

For these reasons we think that our learned brother was wrong in reversing the decrees of the lower courts. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

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NASIR-UL-
HAQ
v.
FAIYAZ-UL-
RAHMAN,

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

JAGDIP NARAIN SINGH (PLAINTIFF) v. BILAR SINGH AND OTHERS
(DEFENDANTS).*

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Limitation—Adverse possession—Purchaser of a decree on a mortgage allowing a puisne mortgagee to pay him off—Such position inconsistent with a claim to be in adverse possession of the mortgaged property.

Hold that when the purchaser of a decree for sale on a mortgage accepted from a puisne mortgagee the amount due under the decree which he had purchased, he by so doing admitted the validity of the puisne mortgage, and his position was not consistent with a claim to be in adverse possession of the mortgaged property. *Ramcharan v. Sadasiv* (1) referred to.

THIS was a suit for a declaration that the plaintiff had acquired a title by adverse possession to certain property. The claim had first been asserted in a similar suit in 1894, but that suit had been dismissed. The immediate cause of the bringing of the present suit was that one of the defendants had executed a mortgage of the property in favour of other defendants, who had obtained a decree thereon and were about to bring the property to sale. The court of first instance, Subordinate Judge of Gorakhpur, decreed the claim in part. On appeal the District Judge dismissed the suit *in toto* for reasons which will be found set forth at length in the judgement of the High Court. The plaintiff appealed to the High Court.

Mr. B. E. O'Conor (with him Babu Durga Charan Banerji), for the appellants.

Mr. W. Wallash (with him the Hon'ble Pandit Sundar Lal), for the respondents.

STANLEY, C. J., and GRIFFIN, J.—This appeal arises out of a suit for a declaration that the plaintiff had acquired a title by

* Second Appeal No. 676 of 1910 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 26th of May, 1910, reversing a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 9th of August, 1909.

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adverse possession to shares in four villages specified in the plaint, and that the defendants, second party, were not entitled to bring that property to sale in execution of a mortgage decree against the defendants, first party.

The defendants, first party, were recorded in the revenue papers as owners of a three-fourths share in the property in suit, but according to the plaintiff they never were in possession and he alone was in exclusive enjoyment of the property for over 12 years. Defendant No. 1, one of the recorded co-sharers, executed a mortgage of the property on the 12th April, 1899, in favour of the defendants, second party. The latter sued on this mortgage and obtained a decree for sale on the 14th of December, 1905. The present suit was instituted on the 3rd July 1906.

Prior to this, namely, on the 16th of February, 1894, the plaintiff had instituted a suit praying for maintenance of possession and establishment of his title by adverse possession over the property. This suit was dismissed on the 18th December, 1894, upon the finding that the plaintiff had failed to prove adverse possession for a period of twelve years. This decision was upheld on appeal by the High Court. The present suit, it will be noted, was filed more than twelve years after the institution of the former suit. It was dismissed by both the courts below upon the ground that the suit was barred by the rule of *res judicata* by reason of the decision in the former suit. This decision was reversed by this Court on appeal, the Court holding that the plaintiffs might have acquired a title by adverse possession since the 16th February, 1894, and that the doctrine of *res judicata* did not bar it. This Court in its order of remand framed two issues for determination, namely :—

- (1) Whether the plaintiff has been in possession of the land since the 16th of February, 1894, and, if so, for what period ?
- (2) If the plaintiff has been in possession for any time, what was the nature of that possession ?

The court of first instance found that the plaintiff had been in possession of the property in suit for a period of over twelve years since the 16th of February, 1894, before the institution of the present suit, and (2) that his possession during that period

over three out of the four villages in suit was adverse to the defendants.

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On these findings the learned Subordinate Judge decreed the plaintiff's suit in respect of three villages, and dismissed it with regard to the fourth village.

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The defendants appealed against the order decreeing the plaintiff's claim, while the plaintiff appealed against the dismissal of his suit with regard to the fourth village.

The learned District Judge has allowed the defendants' appeal and has dismissed the plaintiff's suit *in toto*. The ground upon which he dismissed the suit appears to be, that there was no evidence of an assertion by the plaintiffs of possession adverse to the defendants, first party, subsequent in date to the 16th of February, 1894. The learned District Judge observes:—"It is obvious that any assertion of plaintiff, earlier than the 16th of February, 1894, is nothing, since it is *res judicata* that he was not then in possession. It is equally clear that the plaint is nothing, since it relates to the date of institution and no later, and the *res judicata* relates to the same period as the plaint."

The learned Judge appears to labour under some misconception as to what was decided in the former suit. The decision in that suit was not that the plaintiff was not in possession, but that he had failed to establish the acquisition by him of a title by adverse possession. It appears to us that the assertion of adverse title contained in the plaint of the 16th of February, 1894, cannot be ignored in the manner the court below has ignored it. If the plaintiff had succeeded in proving that for a period of twelve years or upwards prior to the institution of this suit he has held uninterrupted possession over the property in suit adverse to the defendants, then he would be entitled to a declaration of his title as against them.

But there is another ground upon which the lower appellate court dismissed the plaintiff's suit. The defendant, Ganesh Prasad, in conjunction with two other persons, mortgaged his share in the villages in dispute to the Gorakhpur Bank, and on the 29th of November, 1901, the Bank obtained a decree on foot of this mortgage, and on the 16th of January, 1903, sold that decree to a *benamidar* for the plaintiff in this suit who has

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been found to have been the real purchaser. At this date the possession of the plaintiff had not ripened so as to give him a title by prescription. The defendants, second party, as puisne mortgagees, paid to the plaintiff the amount of the decree so transferred to him and thus stepped into the shoes of the prior mortgagee. The learned District Judge held that by his conduct in taking the amount of the decree from the defendants, second party, the plaintiff admitted the validity of the mortgage held by these defendants, and did not hold out his own possession as adverse to the defendant, first party, and he also held that there was no evidence of any adverse possession later than the 16th February, 1894. Adverse possession is a question of fact to be determined upon evidence, and we think that the lower appellate court was justified under the circumstances in holding that adverse possession could not be set up as existing at the date of the redemption by the defendant, second party, of the debt of the Bank. The plaintiff not merely paid off the debt of the Bank, but also on the strength of the security of the Bank and of the transfer to him of the Bank's decree induced the defendants, second party, to pay to him the debt so transferred. In doing so he must be taken to have acknowledged that the Bank had a subsisting claim to the share of the defendant, Ganesh Prasad, and also the right of the defendants, second party, to redeem the earlier security by virtue of their rights as puisne mortgagees. It was in evidence that the plaintiff did not at this time assert adverse possession of Ganesh Prasad's share. He held himself out, to the puisne mortgagees, as owners of the Bank's interest in that share, and his possession, so far as the respondent's interest in the property is concerned, might properly be deemed to have been referable to his title by virtue of the assignment of the Bank's decree. A man cannot hold a mortgage on his own property, and in taking payment from the puisne mortgagees the plaintiff ought, we think, to be deemed to have acknowledged the title of Ganesh Prasad to the equity of redemption in his share of the property. "As long as possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that

right rather than to a right which contradicts the ownership." *Ram Chandra v. Sadashiv* (1). In the case of a co-sharer holding mortgaged property after redemption by him of the mortgage, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title. At the date of the transactions to which we have referred, we do not think it can be rightly held that the plaintiff asserted an exclusive title. This being so, whether the possession of the plaintiff was adverse or not prior to the redemption of the mortgage of the Bank by the defendants, second party, is immaterial. By the transactions above referred to the prior possession, if adverse, was interrupted, and limitation could only be deemed to run as from their date.

For these reasons we think that the learned District Judge came to a right conclusion, and we dismiss this appeal with costs.

Appeal dismissed.

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Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

SUKHDEI (OPPOSITE PARTY) v. KIEDAR NATH (APPLICANT).*

Act No. V of 1882 (*Indian Easements Act*), section 12—*Easement of necessity—Definition.*

An easement of necessity is an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. *Wheeldon v. Burrows* (2) followed. *Union Lighterage Company v. London Graving Dock Company* (3) and *Ray v. Hazeldine* (4) referred to.

THE facts of this case were as follows:—

On the 19th of December, 1908, a decree was passed for partition of movable and immovable property, which, among other things, provided that the plaintiff should have a two-thirds share in the immovable property and ordered "that the plaintiff should get possession of the house marked yellow and green in the map which is incorporated in the decree." This house was only 25 feet wide, was surrounded by other houses on three sides, and had a road to the north on which a door situate in the yellow portion opened. Upon the plaintiff applying for execution of the decree in her favour, the

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* First Appeal No. 409 of 1909, from a decree of Bishu Chandra Basu, Subordinate Judge of Allahabad, dated the 11th of September, 1909.

(1) (1886) I. L. R., 11 Bom., 422.

(2) (1879) L. R., 12 Ch. D., 31.

(3) (1902) 2 Ch. D., 557.

(4) (1904) 2 Ch. D., 17.