1914
December, 16.

Before Mr. Justice Chamier and Mr. Justice Piggott.

AHMAD RAZA KHAN (PLAINTIFF) *v.* RAM LAL AND ANOTHER (DEFENDANTS) *

Possession—Tenants in common—Presumption—Possession of one co-owner the possession of all.

Possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession. Where a co-owner in possession did not deny the title of the other co-owners till shortly before the institution of the suit and never laid claim to more than his share, it was presumed that the co-owner in possession was in possession on his own behalf and as well as on behalf of his co-owner. *Corea* v. *Appuhamy* (1) followed. *Jafar Husain* v. *Mashuq Ali* (2) and *Jogendra Nath Rai* v. *Baladeo Das* (3) referred to.

THE facts of this case were as follows :—

Two brothers, Nihal Singh and Bhawani Singh, were co-owners of a certain enclosure of land in the town of Aligarh. The half share of Nihal Singh was inherited by his grandsons, and in May, 1909, was sold by them to the plaintiff. Although they professed to be the owners of the whole and purported to sell the whole, admittedly only a half share passed to the plaintiff. The half share of Bhawani Singh passed to his son. In execution of a decree against the son his share was sold by auction. The auction purchasers, in August, 1909, sold this half share to the defendants. The plaintiff brought the present suit for possession by partition of his half share, and the defendants pleaded that they and their predecessors in title had been in exclusive and adverse possession of the whole property for more than 12 years. The plaintiff alleged that he had been in possession of his share till March, 1911, when the defendants denied his title. The court of first instance found that the plaintiff or his vendors had not been in possession at any time within 12 years of the suit and dismissed it. The court also found that the defendants had failed to prove adverse possession for 12 years. The lower appellate court maintained the finding that the plaintiff had not been in possession

* Second Appeal No. 1514 of 1913 from a decree of Banke Behari Lal, Second Additional Judge of Aligarh, dated the 11th of June, 1913, confirming a decree of Farid-ud-din Ahmad Khan Additional Munsif of Hawali, dated the 14th of May, 1912.

(1) L. R., (1912) A. C., 230. (2) (1892) I. L. R., 14 All., 193.

(3) (1907) I. L. R., 35 Cal., 961.

1914

AHMAD RAZA KHAN v. RAM LAL.

within 12 years prior to the suit and further held that as the possession of one of two co-owners could not be regarded as the possession of the other the defendants must be deemed to have been in adverse possession.

The plaintiff appealed to the High Court.

Pandit *Shiam Krishna Dar*, for the appellant :—

The question is whether in the case of co-owners it is for the plaintiff to prove that he has been in possession within 12 years, or for the defendant to establish that he has been in adverse possession for over 12 years. The fundamental rule is that the possession of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be on behalf of all. The law will not construe a possession to be tortious unless from necessity. Possession will not be deemed adverse unless the commencement and continuance thereof are proved to have been wrongful. The possession of one co-tenant will not be held to have been adverse unless it is clearly proved that he ousted the others or repudiated their title and that they had notice or information of his assertion of exclusive ownership. Mere possession, however exclusive or long-continued, if silent, cannot give one co-tenant in possession title as against the others ; *Jogendra Nath Rai* v. *Baladeo Das*, (1). Much stronger evidence is required to prove adverse possession held by a tenant in common than by a stranger ; and in the present case there is no satisfactory evidence that the defendants or their predecessors in title ever ousted the plaintiff or his vendor or ever repudiated their title to a half-share of the property. In fact the vendors of the defendants admitted at the time of the sale in August, 1909, that they were owners of only a half-share of the property although, according to the findings, they were in possession of the whole. They did not repudiate the title of the owners of the other half. In a similar case of possession by partition brought by the purchaser of the share of one Hindu co-parcener against the other co-parceners it was held that it was incumbent on the party raising the plea of adverse possession to prove that the plaintiff's vendor was, in denial of his title, ever excluded from the enjoyment of his share of the property; and the article of the Limitation Act held applicable to the suit was article 144 ;

(1) (1907) I. L. R., 35 Calc., 961 (969).

Davvadu Hari Kistna Chowdury v. *Venkata Lakshmi Narayana Pantulu* (1). *Ittappan* v. *Manavikrama* (2), *Harcharan* v. *Bindu* (3). The plaintiff must be deemed to have had constructive possession through the possession of his co-owners.

Babu *Durga Charan Banerji* (with him Munshi) *Lakshmi Narain*), for the respondents :—

The present suit, although brought in the guise of a suit for partition, is really nothing more than a suit for recovery of possession, for, it has been found by the court below that the plaintiff and his predecessors in title have been out of possession for over 12 years. It has been laid down as a general rule that where in a suit for recovery of possession the defendant sets up a plea of adverse possession for more than 12 years it is for the plaintiff to prove a subsisting title by proving possession within 12 years of the suit; *Jafar Husain* v. *Mashuq Ali* (4). There can be no presumption of continuance of co-ownership in the sense that the possession of one is to be deemed the possession of the other in a case like this where the shares of the original co-parceners have passed into the hands of strangers by a succession of devolutions and transfers. *Deba* v. *Rohtagi Mal* (5) is similar in all respects to the present case. It was there held that it was for the plaintiff to prove that he had a subsisting title. Article 142 of the Limitation Act applies to such a case; *Chiranji Mal* v. *Nathia* (6).

Pandit *Shiam Krishna Dar* was heard in reply.

CHAMIER and PIGGOTT, JJ.—This was a suit for possession by partition of a half share in a small property described as *Ihata* Nidhan Singh in the city of Koil, and consisting apparently of some waste land and the sites of a few houses.

The property belonged formerly to two brothers, Nihal Singh and Bhawani Singh. The rights of the former passed to his three grandsons, who in May, 1909, alleging that they were owners of the whole property, sold the whole to the appellant. The appellant admits, however, that by his purchase he acquired only a half share in the property. The rights of Bhawani Singh

(1) (1910) 20 M. L. J., 323.
(2) (1897) I. L. R., 21 Mad., 153 (162, 165).
(3) (1910) I. L. R., 32 All., 89.
(4) (1892) I. L. R., 14 All., 193.
(5) (1906) I. L. R., 28 All., 479.
(6) (1907) 4 A. L. J., 473.

1914

AHMAD RAZA KHAN v. RAM LAL.

in the other half passed to his son Mathura Prasad, and later in execution of a decree against Mathura Prasad, were sold to two persons who in August, 1909, transferred them to the respondents.

The appellant's case is that he was in possession of his half share till March, 1911, when the respondents denied his title. The defence was that the appellant or the persons through whom he claims have not been in possession of the share within 12 years of this suit and that the respondents have been in adverse possession of the same for more than that period.

The Munsif found that, as the appellant had failed to prove possession within twelve years, the suit failed, although the respondents had failed to prove adverse possession by them for more than a very short time. On appeal the Additional District Judge agreed with the Munsif that the appellant had failed to prove possession within limitation, and therefore held that the suit had been rightly dismissed. He went on to hold that as the possession of one of two co-owners could not be regarded as the possession of the other co-owners, the possession of the respondents must be held to have been adverse to the appellant.

In second appeal the learned vakil for the appellant did not dispute the correctness of the rule laid down in *Jafar Husain* v. *Mashuq Ali* (1), that, where a suit for possession of immovable property is resisted by a plea of adverse possession for more than 12 years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance, to give satisfactory *primâ facie* evidence of possession within 12 years of the suit, but he contended that, as the appellant and the respondents are, as their predecessors were, co-owners, or as English lawyers would say tenants in common of the property, the possession of the respondents was in law that of their co-owner, the appellant, and therefore the suit must be held to have been brought within time, as the respondents have not proved ouster or anything equivalent to ouster of the appellant. Many cases were cited in support of this contention, including that of *Jogendra Nath Rai* v. *Baladeo Das* (2), which seems to go the whole length of this contention.

The learned vakil for the respondents referred us to a number of cases, including two decided by single Judges of this

(1) (1892) I. L. R., 14 All., 198. (2) (1907) I. L. R., 35 Calc., 961.

Court, namely, *Deba* v. *Rohtagi Mal* (1) and *Chiranji Mal* v. *Nathia* (2), which are not distinguishable in principle from the case now before us and certainly support the contention advanced on behalf of the respondents.

We are relieved from the necessity of discussing these cases, for it seems to us that the question is covered by the decision of their Lordships of the Privy Council in a Ceylon case to which our attention was drawn after the conclusion of the arguments, namely, that of *Corea* v. *Appuhamy* (3). The plaintiff in the suit had acquired the rights of Balohamy, a daughter of a man named Elias, who died in 1878 leaving as his heirs Balohamy, two other daughters, and a son named Iseris, the principal defendant to the suit. Iseris was in jail when his father died. He came out in December, 1878, and took possession of the whole of the property belonging to himself and his sisters. Balohamy sued for possession in 1908 and Iseris pleaded adverse possession for more than the prescribed period. The plaintiff tried to prove an acknowledgment of her title by Iseris, but failed. Iseris proved only long continued possession on his part of the whole property. The Ceylon courts decided in favour of the defendant, but their decisions were reversed by the Privy Council. It appears to us that the ground upon which their Lordships decided in favour of the plaintiff has no reference to the special terms of the Ceylon Ordinance. It was that the possession of Iseris was in law the possession of his co-owners and that nothing short of ouster or something equivalent to ouster could put an end to that possession. Even the fact that Iseris had for years pretended that he was sole heir of his father and had sworn that the plaintiff was not his sister at all was not considered to justify a presumption of ouster.

The case before the Privy Council was a much stronger case than the one now before us. Here there is nothing to show that the respondents denied the appellant's title till shortly before the suit was brought and there is nothing to show that the respondents' predecessors in title ever laid claim to more than a half share in the property. On the contrary they did not attempt to transfer to

(1) (1906) I. L. R., 28 All., 479. (2) (1907) 4 A. L. J., 478.

(3) L. R., (1912) A.C., 230.

1914

AHMAD RAZA KHAN v. RAM LAL.

the respondents more than a half share. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgement of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no ground whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property, though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by respondents and their predecessors in title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

1915

January, 12.

Before Mr. Justice Chamier and Mr. Justice Piggott.

MATHURA PRASAD (APPLICANT) *v.* RAM CHARAN LAL (OPPOSITE PARTY.)*

Civil Procedure Code (1908), order IX, rule 13—Decree ex parte—Application to set aside decree—Appeal—Decree confirmed in appeal before hearing of application to set it aside.

When the High Court has once confirmed a decree on appeal, it is not open to the court which passed the decree to entertain an application to set the decree aside, and it makes no difference that the application to set the decree aside was filed before the appeal was disposed of.

THIS appeal arose out of a suit for sale upon a mortgage. In that suit a decree was passed against several defendants. One of the defendants, as against whom the decree was *ex parte*, applied to have the decree set aside under order IX, rule 13, of the Code of Civil Procedure. Some time after this application had been filed the defendants who had contested the suit appealed against the

* First Appeal No. 46 of 1914, from an order of Abdul Ali, Additional Subordinate Judge of Cawnpore, dated the 23rd of December, 1913.