

## APPELLATE CIVIL.

*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.*

KHEDU RAI (PLAINTIFF) v. SHEO PARSON RAI AND OTHERS (DEFENDANTS).\*

1917  
March, 16.

*Mortgage—Suit for redemption—Adverse possession—Mortgagee in proprietary possession under an agreement unregistered but acted upon for a very long period.*

The parties to a mortgage by conditional sale, executed in 1869, entered into an agreement in 1876 whereby the mortgagor gave up all his equity of redemption in the property mortgaged. The agreement was not registered, but both the parties consented to the complete transfer of the equity of redemption and both parties acted on the agreement for very nearly forty years.

*Held* on a suit being brought in 1912 for redemption of the mortgage of 1869, that the mortgagees or their predecessors in title had been in adverse possession since the year 1876, and the suit was barred by limitation. *Mahomed Musa v. Aghore Kumar Ganguli* (1) and *Usman Khan v. N. Dasanna* (2) referred to.

THE facts of this case were as follows :—

In the year 1869 one Zalim Rai, ancestor of the plaintiff, mortgaged the property in suit to the predecessors in title of the present defendants, first party. In the year 1876, a dispute arose between the mortgagor and the mortgagees and a case arose in the Revenue Courts in respect to the entry of names in the record of rights. It is alleged that a grove had actually been sold by the mortgagees to the predecessors in title of the defendants, second party. The dispute in the Revenue Court resulted in a compromise in which Zalim Rai gave up all his equity of redemption in the property. The mortgagees agreed to certain property being held by Zalim Rai and his wife as long as either of them should live, it, on their death, reverting to the mortgagees. The compromise was not registered. Entries were made in the Government record accordingly, and from that date the mortgagees were recorded as the full owners of the property. The mortgage was one by conditional sale. From that time onwards the mortgagees have always been recorded as owners of

\* Second Appeal No. 1072 of 1915, from a decree of Durga Dat Joshi, District Judge of Azamgarh, dated the 1st of May, 1915, confirming a decree of Raja Ram, First Additional Munsif of Azamgarh, dated the 18th of February, 1915.

(1) (1914) I. L. R., 42 Calc., 801. (2) (1912) I. L. R., 87 Mad., 545.

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the property and they dealt with it as such. In the year 1900 and again in 1904, the defendants, first party, transferred various portions of the property to the defendants, second party. In the year 1908, a co-sharer in the village named Mahabir Rai applied for partition of his own share in the mahal. The defendants, first party, on the 26th of January, 1909, applied for partition of part of the property which is now in dispute and the defendants, second party, applied for partition of the rest of the property which is now in dispute. On the 19th of August, 1909, the present plaintiff Khedu Rai, who is the heir of Zalim Rai, applied for partition of his own share in the village, and in his application laid no claim whatsoever to the property now in dispute, as a mortgagor. The partition was completed on the 20th of October, 1910, and came into force on the 1st of July, 1911. In 1912, the plaintiff brought the present suit for redemption of the mortgage.

Both the courts below dismissed the suit. The plaintiff appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, and Dr. *Surendro Nath Sen*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—This is a second appeal preferred by the plaintiff in a suit brought for redemption of certain property. The plaintiff Khedu Rai is the heir of one Zalim Rai. In the year 1869, Zalim Rai, ancestor of the plaintiff, mortgaged the property in suit to the predecessors in title of the present defendants, first party. In the year 1876, a dispute arose between the mortgagor and the mortgagees, and a case arose in the Revenue Courts in respect to the entry of names in the record of rights. We are informed that a grove had actually been sold by the mortgagees to the predecessors in title of the defendants, second party. The dispute in the Revenue Court resulted in a compromise in which Zalim Rai gave up all his equity of redemption in the property. The mortgagees agreed to certain property being held by Zalim Rai and his wife as long as either of them should live, it, on their death, reverting to the mortgagees. The compromise was not registered. Entries were made in the

Government record accordingly, and from that date the mortgagees were recorded as the full owners of the property. The mortgage was one by conditional sale. From that time onwards the mortgagees have always been recorded as owners of the property and they dealt with it as such. In the year 1900 and again in 1904, the defendants, first party, transferred various portions of the property to the defendants, second party. In the year 1908, a co-sharer in the village named Mahabir Rai applied for partition of his own share in the mahal. The defendants, first party, on the 26th of January, 1909, applied for partition of part of the property which is now in dispute, and the defendants, second party, applied for partition of the rest of the property which is now in dispute. On the 19th of August, 1909, the present plaintiff Khedu Rai, who is the heir of Zalim Rai, applied for partition of his own share in the village, and in his application *laid no claim whatsoever to the property now in dispute* as a mortgagor. The partition was completed on the 20th of October, 1910, and came into force on the 1st of July, 1911. In 1912 the plaintiff brought the present suit for redemption of the mortgage. The courts below have dismissed the suit. The plaintiff appeals. The first point urged on his behalf before us, was that the compromise of 1876 being unregistered, conveyed no title, and under section 49 of the Registration Act, No. VIII of 1871, it could not be taken as evidence of any transfer of property. It is urged that there was no transfer of the equity of redemption; that the mortgagees cannot, by asserting adverse possession, change the nature of their possession, and therefore the plaintiff is entitled to redeem. On behalf of the respondents, however, it is pointed out that, though the document was not registered, the parties had acted upon the transaction from the year 1876 up to the date of the present suit; that the nature of the mortgagee's possession has been changed with effect from the date of the compromise; that the defendants, first party, have transferred portions of the property, and that the defendants' possession has really been adverse to that of the plaintiff or his predecessor in title. Reliance is placed upon the decision of their Lordships of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (1), and our

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attention has also been called to the decision in *Usman Khan v. N. Dasanna* (1). It will be noted that the transaction of 1876, took place at a period prior to the coming into force of the Transfer of Property Act of 1882. It is true that the Registration Act was then in force, but it seems to us that this was not a case of the mortgagee merely setting up adverse possession without any act on the part of the mortgagor in the matter. In other words, that the present case is not one of mere unilateral action by the mortgagee. Both parties consented to the complete transfer of the equity of redemption to the mortgagee, and both parties have acted upon it for very nearly forty years. This case is very similar indeed to the case of *Usman Khan v. N. Dasanna* (1). We think the principle of that decision and also of the decision in *Mahomed Musa v. Aghore Kumar Gunguli* (2) is applicable to the present case, and we hold that the defendants have held possession of this property since the year 1876, as owners adversely to the mortgagor and his heirs. We do not think it necessary to go into the other point which has been raised in the appeal. The appeal fails and is therefore dismissed with costs.

*Appeal dismissed.*

1917  
March, 23.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

MAULADAD KHAN AND OTHERS (PLAINTIFFS) v. ABDUL SATTAR  
AND OTHERS (DEFENDANTS).\*

*Act No. 1 of 1872 (Indian Evidence Act), section 32(5)—Evidence of relationship—Statement made in a plaint filed by a member of the family since deceased—Second appeal—Finding of fact.*

In a suit to recover possession of property which had belonged in her life-time to one Musammât Fiddo, one of the material issues was whether the plaintiffs were, or were not, the sons of one Munir Khan, paternal uncle of Musammât Fiddo. In support of their statement that they were the sons of Munir Khan the plaintiffs tendered in evidence the plaint in a suit, filed some years *ante litem motam*, in which Musammât Fiddo as plaintiff had impleaded them as defendants, describing them as the sons of Munir Khan.

*Held* that this plaint was not only admissible evidence on the subject of the plaintiffs' relationship to Munir Khan, but was evidence to which considerable weight might be attached. The High Court, however, in second

\* Appeal No. 46 of 1916, under section 10 of the Letters Patent.

(1) (1912) I. L. R., 37 Mad., 545. (2) (1914) I. L. R., 42 Cal., 801.