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In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such possession is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

The learned advocate for the respondent has drawn our attention to the clause in the deed of dedication authorizing Chittaranjan to see to the proper carrying on of the worship. That conferred on him a right of intervention but it in no way amounted to a vesting of the trust property in him nor did it constitute him a trustee. There was therefore no bar to his exercising adverse possession or acquiring title by adverse possession over this property.

We accordingly allow this appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

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BACHCHI LAL AND OTHERS (DEFENDANTS) *v.* DEBI DIN AND OTHERS (DEFENDANTS) AND BENI PRASAD AND OTHERS (PLAINTIFFS).*

Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4(1) and 20—"Co-sharer"—Indefeasible interest—Full proprietary title necessary—Estoppel—Invalid transfer together with estoppel does not confer proprietary title.

For a person to become a co-sharer within the meaning of section 4(1) of the Agra Pre-emption Act it is necessary that he should be entitled as proprietor to a share in the mahal. A right short of proprietary title will not do; nor can a person in adverse possession without actual title be said to be entitled

* First Appeal No. 157 of 1926, from a decree of Jamuna Narain Dikshit, Additional Subordinate Judge of Banda, dated the 22nd of February, 1926.

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as proprietor to the property in his possession so long as his title has not matured by prescription. The expression "indefeasible interest" in section 20 of the Agra Pre-emption Act also refers to full proprietary title which is not liable to be defeated.

An oral gift of immovable property by a Hindu widow, followed by the donee's possession, even if supplemented by circumstances creating an estoppel against the reversioners' challenging the validity of the gift, will not, unless the possession has been for twelve years, vest any proprietary title in the donee.

Fateh Singh v. *Thakur Rukmini Ramanji Maharaj* (1), distinguished.

Babu *Piary Lal Banerji* and Munshi *Ambika Prasad*, for the appellants.

Mr. *Mahmud-ullah* and Munshi *Sarkar Bahadur Johari*, for the respondents.

SULAIMAN and KENDALL, JJ. :—First Appeals Nos. 157 and 158 of 1926 are connected and are defendants' appeals arising out of two suits for pre-emption. Under a sale-deed, dated the 9th of August, 1924, shares in two khatas Nos. 2 and 7 in mahal Mustaqil and mahal Ihtmali of village Tirmau were sold to the defendants. Two suits were separately instituted. The plaintiff alleged that the defendants vendees were strangers and their names were wrongly recorded in the revenue papers. The defence raised by the defendants was that they were co-sharers on the same footing as the plaintiff. The defendants claimed title through one Jagannath. Before the trial commenced, the plaintiff's counsel made it clear that he was not admitting the title of Jagannath at all.

The court below has found in favour of the plaintiff and has decreed the claim except as regards mahal Ihtmali in which the defendants had become co-sharers by virtue of a deed of gift, dated the 15th of November, 1920.

(1) (1923) I. L. R., 45 All., 339.

Sewak was a proprietor in this village, and he died some time ago and was succeeded by his widow Musammat Jasodia. She also died some time about 1918. After her death the patwari reported that the names of Sewak's collaterals, Ramadhin and another, should be entered in the column of proprietors. An objection was made on behalf of Jagannath, who claimed that Musammat Jasodia had made a gift of the property in his favour and he was in possession as a donee. Apparently there was no registered deed and Jagannath was relying on an oral gift. On the 7th of May, 1919, an application was filed on behalf of Ramadhin purporting to act for himself and as *sarbarahkar* (or guardian) of Tissu and Gopi, in which the gift in favour of Jagannath was admitted, and there was a statement that the petitioners refused to take back the property and agreed to the mutation of names in favour of Jagannath. The court accordingly ordered that the name of Jagannath should be entered in place of the deceased Musammat Jasodia.

The plaintiff led no evidence in the court below to show that any one other than Ramadhin and Gopi were the collaterals entitled to succeed on the death of Musammat Jasodia. Nor was it made clear before the court who Tissu was, as whose guardian Ramadhin had acted. In the absence of such evidence the court below has assumed that Ramadhin and Gopi were the next reversioners of Musammat Jasodia's husband, and that therefore there was a consent on the part of the persons in whom the property had become vested on her death. The learned Judge has also assumed in favour of the defendants that this consent of the reversioners will estop them from ousting Jagannath and from taking possession from his vendees, the present defendants, but has held that consent cannot confer perfect title on Jagannath and his vendees so long as the full period of 12 years has not expired.

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In appeal before us it is contended that inasmuch as the reversioners who became entitled to the estate are estopped from recovering possession of the property from Jagannath and his transferees, and the heirs who would come after them would have to claim through them, the defendants had acquired an indefeasible title which is by no means liable to be defeated, and that inasmuch as they are in possession in the capacity of proprietors they can defeat the claim of the plaintiff. Great reliance is placed on the Full Bench case of *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (1).

In the case before the Full Bench there was a registered deed of transfer by the widow in her life-time, but the consent had been given by the reversioners before they had become entitled to the estate. In the present case the consent was given after such title had accrued, but there had never been any deed of gift by the lady at all. Without deciding that the consent of Ramadhin and Gopi would operate as an estoppel against them and their representatives, we may for the purposes of this appeal assume that it would so operate. In this view it is unnecessary for us to examine whether this consent was for consideration or not. But it is clear to us that no interest in immoveable property can validly pass from one person to another in the eye of the law without there being a registered document of transfer. Under section 123 of the Transfer of Property Act a gift can only be effected by means of a document duly registered. In the absence of such document, the proprietary interest in the property could not have passed from Musammat Jasodia to Jagannath or from Ramadhin and Gopi to Jagannath. Even if Ramadhin and Gopi or their heirs be estopped from claiming the possession of the property it is impossible to hold that proprietary title has actually become vested in Jagannath or his transferee.

(1) (1923) I. L. R., 45 All., 339.

For a person to become a co-sharer under the Agra Pre-emption Act it is necessary under section 4, sub-clause (1) that he should be entitled as proprietor to a share in the mahal. A right, short of a proprietary title, e.g., that of a lessee or mortgagee, will not do. A person in adverse possession without actual title cannot be said to be entitled as proprietor to the property in his possession so long as his title has not matured by prescription. We think that the expression "indefeasible interest" in section 20 also refers to full proprietary title which is not liable to be defeated. So long as proprietary title has not been acquired the defendant cannot successfully resist a claim by a co-sharer for pre-emption. Estoppel against the heirs is one thing and acquisition of title as proprietor is another. And of course the word interest can not include an interest less than a proprietary interest.

The court below has held that the agreement for mutation of names in favour of Jagannath in the revenue court was not in the nature of a family arrangement which would confer title on Jagannath. The application itself does not indicate that there had previously been any such family settlement. Nor is it clear that there was any *bona fide* dispute, nor could Jagannath, the son-in-law of Musammat Jasodia, be treated as a member of the family of Ramadhin and Gopi. The plea of a family settlement also was not raised in the written statement. We are therefore unable to hold that there was any such family settlement as, even in the absence of a registered document, could confer title on Jagannath. The result therefore is that the defendants cannot resist the plaintiff's claim on the basis of the alleged oral gift made to their vendor Jagannath.

Under the gift of the 15th of November, 1920, the defendants have acquired a share in patti No. 10 in mahal Mustaqil only. The shares sold are situated in khewats Nos. 2 and 7 which are in patti Sheo Din and patti Kalu

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respectively. According to the khewat, mahal Mustaqil is divided into several bahris, each bahri being subdivided into pattis and each patti into several khewats. Khewat No. 1 is in patti Sukhnandan. Khewats Nos. 2 and 3 are in patti Sheo Din. The areas of the two pattis are totalled separately and then the two are added together to make up bahri Gur Bakhsh Singh. The same process is followed as regards other bahris. It is clear to us therefore that bahri is a sub-division of the mahal very much like a thok, which is found in eastern districts. The plaintiff is undoubtedly a co-sharer in bahri Gur Bakhsh in which khewat No. 1 is situated. The defendants are not co-sharers in this bahri. The plaintiff accordingly has preference under section 12, sub-clause (3).

As regards khewat No. 7 which is situated in patti Kalu, we find that it is a part of another bahri called bahri Sheo Shankar and khewat No.10 in which the defendants had become co-sharers is situated in the same bahri. As regards this khewat therefore the plaintiff cannot have preference as against the defendants. The learned Subordinate Judge has accordingly dismissed the claim with regard to this last-mentioned khewat.

In our opinion the view taken by the court below was correct and the decrees are right. Both the appeals are accordingly dismissed with costs.

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

1929 January, 29.

AWADH BIHARI AND ANOTHER (DECREE-HOLDERS) *v.* FAHIMAN AND OTHERS (JUDGEMENT-DEBTORS).*

Civil Procedure Code, order IX, rule 13 *and order XXXIV, rule* 3—*Final decree for foreclosure passed* ex parte—*Setting aside* ex parte *decree—Jurisdiction.*

Although order XXXIV, rule 3, of the Civil Procedure Code does not require notice to be given to the defendant

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*Civil Revision No. 320 of 1928.