

## APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Baijai

AMBIKA PRASAD UPADHIYA (PLAINTIFF) v. SADA SHEO LAL (DEFENDANT) \* 1932  
November, 3.

*Adverse possession—Co-tenants—Auction purchaser of share of one co-tenant—Formal possession and mutation of names obtained by auction purchaser but not actual possession—Suit for possession against the other co-tenant—Limitation—Ouster—Jus tertii.*

*S. S.* and *S. L.* were the co-tenants of a fixed rate holding. The share of *S. L.* was sold in execution of a decree and formal possession was delivered to the auction purchaser in 1907. Failing to obtain actual possession, the auction purchaser sued *S. S.* for partition and possession in 1914; partition was refused and joint possession was decreed, and in execution again a formal delivery of possession was obtained, in 1915. A transferee from the auction purchaser got mutation of names effected in his favour in 1918. In the aforesaid proceedings *S. S.* throughout resisted and denied the title of the auction purchaser as well as his successor in title; and neither of them ever obtained actual possession. In 1928 the transferee brought a suit against *S. S.* for joint possession and mesne profits. The defendant pleaded that he and *S. L.* and *S. L.*'s sons had all along been in possession and that the suit was barred by adverse possession for over 12 years. *Held* that the suit was barred by limitation, time having begun to run from the delivery of formal possession in 1915.

Ordinarily the possession of one co-owner is in the eye of the law the possession of the others, and in order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. In the present case there had been throughout an open denial of title and resistance to possession. So there had been an ouster, and the possession was adverse.

On the contention that the defendant's plea that he and *S. L.* were jointly in possession showed that he did not claim title in himself *qua S. L.*'s share and the setting up of *jus*

\* Second Appeal No. 255 of 1930, from a decree of V. Mehta, Additional Subordinate Judge of Benares, dated the 3rd of December, 1929, reversing a decree of Bind Bansi Prasad, Munsif of Haveli, dated the 28th of February, 1929.

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*tertii* did not amount to adverse possession, it was held that the admission about the possession of *S. L.* could be of no avail to the plaintiff, as the possession of *S. L.* could not be deemed in law to be the possession of the plaintiff or his predecessor in title and was, in fact, adverse throughout.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the appellant.

Mr. *A. Sanyal*, for the respondent.

IQBAL AHMAD and BAJPAL, JJ. :—This is an appeal by an unsuccessful plaintiff whose claim for joint possession along with the defendant respondent over certain fixed rate tenancy plots and for the recovery of Rs.270 as mesne profits has been dismissed by the lower appellate court on the ground that the claim was barred by limitation.

The plots in dispute admittedly belonged to Sada Sheo Lal, the defendant respondent, and his cousin Shankar Lal. His Highness the Maharaja of Benares held a simple money decree against Shankar Lal, and in execution of the same the rights and interests of Shankar Lal in the plots were attached and sold and purchased by the Maharaja on the 21st of August, 1905, and he obtained formal delivery of possession on the 19th of February, 1907. The Maharaja, however, could not obtain actual possession of the plots and he filed a suit in 1914 against Sada Sheo Lal and his sons for partition and for separate possession of his share. The suit was contested by Sada Sheo Lal. The prayer for partition was refused, but the claim of the Maharaja for joint possession was decreed, and in execution of the decree the Maharaja obtained formal delivery of possession on the 1st of September, 1915. On the 15th of August, 1916, the Maharaja sold his rights and interests in the plots to the father of the plaintiff appellant, and he applied for mutation of his name in the revenue papers. The application for mutation of names was also resisted by the defendant respondent and other members of his family. Their objections, however, were overruled and mutation was ordered in

favour of the father of the plaintiff appellant on the 6th of November, 1918. It is clear from the facts stated above that the rights and interests of Shankar Lal in the plots in dispute passed to the father of the plaintiff appellant.

The suit giving rise to the present appeal was brought by the plaintiff appellant on the allegation that after the sale deed dated the 15th of August, 1916, his father remained in possession of the plots in dispute jointly with Sada Sheo Lal, the defendant respondent, and after his father's death in December, 1919, the plaintiff also remained in joint possession of the plots but subsequently was dispossessed by the defendant respondent. It was stated in the plaint that the cause of action for the suit arose in the month of December, 1919, when the plaintiff was wrongfully dispossessed by the defendant respondent.

The defendant respondent denied the allegations of the plaintiff as regards the plaintiff or his father being in possession of the plots in dispute and alleged that all through he and Shankar Lal and Shankar Lal's sons remained in possession of the same, and that neither the Maharaja nor the father of the plaintiff ever succeeded in obtaining possession of the plots. He contended that the suit was barred by 12 years' rule of limitation.

The trial court, after pointing out that the attempts of the Maharaja to attach and sell the share of Shankar Lal and to get possession of the same were always opposed by the defendant respondent and the members of his family and so was the attempt of the father of the plaintiff appellant to obtain mutation of names in his favour, held that though the objections of the defendant and the members of his family were never crowned with success in courts of law, the actual possession of the plots always remained with the defendant and that neither the plaintiff nor his father nor the Maharaja was ever able to obtain joint possession over the plots in dispute. It was of the opinion that fresh start to the period of limitation

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was given by the proceedings for delivery of formal possession dated the 1st of September, 1915, and that though the suit was brought more than 12 years after that date it was not time-barred as "Mere exclusive possession by one co-owner does not amount as the ouster of others and constitute that possession as adverse against other co-owners. There must be a clear and unambiguous repudiation of title of other co-owners by the co-owner in possession", and that in the present case the defendant appellant had failed to prove such repudiation of the title of the plaintiff or of his father or of the Maharaja. It held that as the defendant alleged that he was all along in possession jointly with Shankar Lal and his sons he cannot be said to have set up title in himself *qua* the share of Shankar Lal and that "setting up of *jus tertii* does not amount to adverse possession". In short, it was of the opinion that as the defendant did not claim title in himself *qua* Shankar Lal's share, he could not be said to have acquired title by adverse possession to the same, and in this view overruled the plea of limitation raised by the defendant and passed a decree in the plaintiff's favour.

The lower appellate court agreed with the trial court in holding that neither the plaintiff appellant nor his father nor the Maharaja of Benares were ever in actual possession of the plots in dispute, but held on the authority of the decision in *Sita Ram Dube v. Ram Sundar Prasad* (1) that the suit was time-barred.

In second appeal before us the accuracy of the decision of the lower appellate court on the question of limitation is called into question and it is argued that as it was the defendant's case that he was never in sole possession of the plots in dispute, and that Shankar Lal and his sons also remained in joint possession with him, the defendant's possession could not be adverse as regards the share of Shankar Lal and his sons, and, as such, the

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plaintiff was entitled to a decree. It is further pointed out that the case was between co-tenants and that the possession of one co-tenant is in law the possession of the other and that nothing short of ouster or something equivalent to ouster could put an end to that possession. With this contention we are unable to agree.

It is well established that each joint owner has the right to the possession of all the property held in common, and that he has the same right to the use and enjoyment of the common property as he has to his sole property except in so far as it is limited by the equal right of his co-sharers. Accordingly, each co-owner is entitled to enjoy every part of the common property, but his possession is in the eyes of law the possession of all the co-owners and, unless he openly denies the title of his other co-owner and such denial is accompanied by dispossession of the other co-owner, time does not begin to run against the latter. In other words, in order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster, and the possession subsequent to that must be for the statutory period; *vide Ahmad Raza Khan v. Ram Lal* (1) and *Gobinda Chandra Bhattacharjee v. Upendra Chandra Bhattacharjee* (2). But it appears to us that these propositions have no application to the facts of the present case. In the present case if the controversy had been between Sada Sheo Lal, the defendant respondent, and Shankar Lal's sons it might have been impossible for Sada Sheo Lal to successfully put forward the plea of adverse possession, but in our judgment the plea of limitation raised by Sada Sheo Lal against the claim of the plaintiff appellant was unanswerable and was rightly given effect to by the lower appellate court.

By his auction purchase of the year 1905 His Highness the Maharaja of Benares became a co-tenant with Sada Sheo Lal, but his attempt to obtain actual possession

(1) (1914) I.L.R., 37 All., 203.

(2) (1919) I.L.R., 47 Cal., 274.

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of the plots in dispute always failed. Throughout, Sada Sheo Lal denied his title to the plots. The title of the father of the plaintiff appellant was also denied by Sada Sheo Lal and the members of his family in the course of the mutation proceedings consequent on the execution of the sale deed by the Maharaja in favour of the father of the plaintiff. It is clear, therefore, that there has all along been an open denial by Sada Sheo Lal of the title of the plaintiff and of his predecessors in title. It is further clear from the finding recorded by the lower appellate court, which finding is binding on us in second appeal, that neither the plaintiff nor his predecessors in title ever succeeded in obtaining actual possession of the plots. It follows, therefore, that there has been an ouster of the plaintiff and of his predecessors in title from the year 1905. It is not easy to frame a formula to cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to the possession there is an ouster. The resistance on the part of Sada Sheo Lal and the members of his family had the effect of preventing the plaintiff's predecessors in title from obtaining actual possession and this, coupled as it was by an open denial of their title, amounted in our judgment to their ouster. Therefore time began to run against the Maharaja of Benares from the 1st of September, 1915, the date on which he obtained formal delivery of possession in execution of the decree obtained by him for joint possession over the plots in dispute. This was the view taken by this Court in *Sita Ram Dube v. Ram Sundar Prasad* (1), and in view of that decision we must hold that the present suit was time-barred.

We are unable to agree with the trial court in holding that in the present case the fact of Sada Sheo Lal's "setting up of *jus tertii* does not amount to adverse possession". It is, no doubt, a fact that Sada Sheo Lal admitted that Shankar Lal and his sons have also been in joint

possession with him of the plots in dispute, but the possession of Shankar Lal and his sons cannot be deemed in law to be the possession of the plaintiff or of his predecessors in title. The admission of Sada Sheo Lal about the possession of Shankar Lal's sons can therefore be of no avail to the plaintiff. Shankar Lal, as already stated, was the judgment-debtor in the decree held by the Maharaja. Notwithstanding the sale of his share he and his sons continued in possession of the plots. Their possession was adverse to that of the Maharaja and of his successors in title, and it would be absurd to give to the Maharaja or to his successors in title including the plaintiff the benefit of possession on the part of Shankar Lal and his sons, which was adverse to them from the very outset. If the plaintiff had impleaded Shankar Lal's sons in the present suit and if the latter had pleaded adverse possession there could have been no answer to that plea, and it is impossible to appreciate how by omitting to implead Shankar Lal's sons the plaintiff can insist on the possession of Shankar Lal's sons being deemed to be equivalent to his own possession.

For the reasons given above we hold that the suit was time-barred and we dismiss this appeal with costs.

*Before Sir Lal Gopal Mukerji, Acting Chief Justice, and  
Mr. Justice Rachhpal Singh*

MUHAMMAD SHAFIQ AHMAD AND ANOTHER (JUDGMENT-DEBTORS) v. RAM KATORI AND ANOTHER (DECREE-HOLDERS) \*

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*Civil Procedure Code, order XXXVIII, rule 5—Attachment before judgment—Suit for sale on mortgage—Application for attachment made after the preliminary decree for sale but before the final decree—Application maintainable.*

The language of order XXXVIII, rule 5 of the Civil Procedure Code is very wide and an application for attachment

\* First Appeal No. 176 of 1931, from an order of Pran Nath Acha, Additional Subordinate Judge of Moradabad, dated the 15th of September, 1931.