

Before Mr. Justice Gokaran Nath Misra.

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November,  
23.

MAHADEO PRASAD, LALA AND OTHERS (PLAINTIFFS)  
GOPAL DAS (DEFENDANT-APPELLANT) v. RAM PHAL  
AND ANOTHER (DEFENDANTS-RESPONDENTS).\*

*Co-owners, possession of—Possession of one co-owner, ouster of—Repairs of whole building by one co-sharer, whether amounts to denial of title of other.*

*Held*, that in the case of co-owners the possession of one co-owner is in law the possession of the other co-owners as well, and that it is not possible for one co-owner to put an end to that possession by any secret intention in the mind. Nothing short of ouster can bring about that result.

*Held further*, that a co-sharer has a right to repair the whole house and if he does so his act cannot be considered to be an act of such a hostile character that it may be considered as equivalent to a denial on his part of the title of the other co-owner or co-owners.

Mr. *Naimullah*, for the appellants.

Mr. *M. Wasim*, for the respondents.

MISRA, J.:—This is a second appeal arising out of a suit brought by the plaintiffs-appellants for possession by partition of a half share in a house situated in mohalla Rakabganj, Fyzabad. The plaintiffs alleged that Sheo Ghulam, their predecessor-in-interest, purchased the half share in the house in dispute at an auction sale in the year 1904, that they had obtained possession through court and had been in possession of their half share since then. They now wanted their share to be partitioned. The defendants admitted the purchase made by Sheo Ghulam but pleaded that he never obtained possession over the share purchased by him and that they had throughout remained in possession of the said half share and thus had acquired title to it by adverse

\* Second Civil Appeal No. 331 of 1924, against the decree of Mahmud Hasan Khan, Subordinate Judge of Fyzabad, dated the 30th of April, 1924, setting aside the decree of Manmatha Nath Upadhya, Munsif of Fyzabad, dated the 9th of October, 1923.

possession. They also pleaded that they had spent Rs. 575 in rebuilding the house and in case the plaintiffs be held entitled to a decree for possession of their share they should be made liable to pay half of this amount.

The trial court, the Munsif of Fyzabad, found that Sheo Ghulam had obtained possession of the share purchased by him through court and had also succeeded in obtaining actual possession thereof. He, however, found that it was not established that the plaintiffs had remained in continuous possession of their share, but that could not affect their title inasmuch as the possession of the defendants was that of co-owners and as such could not be considered to be adverse to the plaintiffs. He, therefore, overruled the plea of adverse possession and gave the plaintiffs a decree for possession by partition of their half share in the house. He, however, decreed possession subject to the payment of Rs. 194-0-7½ on account of their half share out of Rs. 388-1-3 which sum be held as proved to have been spent by the defendants on repairs and the new construction of the house in dispute.

On appeal the learned Subordinate Judge of Fyzabad came to a different conclusion. He held that the plaintiffs were never in actual possession of the share purchased by their predecessor-in-title Sheo Ghulam and that thus the defendants had obtained title to their half share by adverse possession. He consequently allowed the appeal and dismissed the suit of the plaintiffs.

In second appeal it is contended before me that the decision of the learned Subordinate Judge on the question of adverse possession is wrong. It is contended on behalf of the plaintiffs that it having been established that Sheo Ghulam took possession of the

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property through court and that he had remained for some time in actual possession over half the share purchased by him the finding as to adverse possession could not be sustained. In support of this contention the learned Counsel for the appellants relied on *Charles Edward Victor Seneviratne Corea v. Mahatantirigey Iseris Appuhamy and another* (1), *Ahmad Raza Khan v. Ram Lal and another* (2) and *Nadir Singh and others v. Musammatt Anpurna Kunwar* (3).

On behalf of the respondents it is contended that under the circumstances established in the case adverse possession of the defendants over the half share purchased by Sheo Ghulam, the predecessor-in-interest of the plaintiffs-appellants, has been established, and reliance is placed on a decision of the Calcutta High Court in *Lokenath Singh v. Dhakeshwar Prasad Narayan Singh* (4).

I have taken time to consider my judgement. After considering the rulings cited on both sides I have come to the conclusion that this appeal must succeed and the plaintiffs-appellants should be given a decree for possession of the half share in the house in dispute claimed by them. It is now well settled by numerous authorities that in the case of co-owners the possession of one co-owner is in law the possession of the other co-owners as well, and that it is not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about that result. It was urged on behalf of the respondents that the circumstances in this case establish adverse possession and in this connexion reference was made to the judgement of MOOKERJEE, J., in the Calcutta case quoted above. In order to understand

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

(3) 7 O.L.J., 232.

(2) 13 A.L.J., 204.

(4) 21 C.L.J., 253.

what the case actually decides I will quote the following passage from the said judgement (pages 257 and 258):—

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“ Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they, on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant, and is in law the possession of all the co-tenants, and not adverse to any of them. It cannot be questioned, however, that one co-tenant may oust the others and set up an exclusive right of ownership in himself; and an open, notorious, and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although as a general rule, the possession of one co-tenant, is not deemed adverse to the other co-tenants, the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse. In order to render the possession of one co-tenant adverse to the other, not only

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must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious exclusive and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants."

I have, therefore, to decide in this case as to whether the possession of the defendants-respondents over the half share purchased by the predecessor-in-title of the appellants has been of such an open notorious, exclusive and hostile character as to amount to an ouster of the plaintiffs. The only facts which have been established in this case are that the defendants have been in actual possession of the house, that they have been alone making repairs in it and that a short time before the institution of the suit when certain portions of the house fell down they built them afresh. In my opinion the facts enumerated above do not constitute acts of adverse possession on the part of the defendants of a nature and for a period so as to extinguish the rights of the plaintiffs-appellants. If the defendants merely remained in occupation of the whole house and went on repairing it, that cannot

be considered to be an action on their part which may be considered as tantamount to a denial of the title of the plaintiffs-appellants. A co-sharer has a right to repair the whole of the house and if he does so his act cannot be considered to be an act of such a hostile character that it may be considered as equivalent to a denial on his part of the title of the other co-owner or owners. As to the new construction it is alleged that it was made only a short time before the institution of the suit. I am, therefore, of opinion, that according to the rule of law laid down in the abovenoted Calcutta case relied upon by the respondents adverse possession on their behalf has not been established.

The learned Counsel for the plaintiffs-appellants has not denied his clients' liability to pay the amount decreed by the trial court as payable by them to the defendants in respect of their half share in the money spent by them on account of repairs and fresh construction.

I accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and restore that of the learned Munsif with costs in this and the lower courts.

*Appeal allowed.*

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