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be her heir within the meaning of section 48. It is admitted that neither Sukhai nor Jodha shared in the cultivation of the holding with Musammat Kanchana at the time of her death, consequently none of them can be considered to be her heirs within the meaning of section 48(2) of the Oudh Rent Act.

Misra, J.

In view of my findings already given it is undisputably clear that Musammat Kanchana died heirless within the meaning of section 48(2) of the Oudh Rent Act, and this being the case, the Nanpara estate had full right to lease the land to the plaintiff, and his lease cannot on any ground be held to be invalid.

I, therefore, hold that the judgment of the learned Subordinate Judge is correct and, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

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August, 9.

SHAH WAJIH-UD-DIN ASHRAF (PLAINTIFF-APPELLANT) *v.* SHAH AHMAD ASHRAF AND OTHERS (DEFENDANTS-RESPONDENTS).*

Mortgage—Co-mortgagor redeeming entire mortgage, becomes merely charge-holder and not mortgagee of other co-sharer's share—Other co-sharer's right to receive possession by paying his share of charge—Limitation Act (IX of 1908), Articles 148 and 144—Limitation for co-mortgagor's suit to recover possession from the redeeming co-mortgagor—Adverse possession of co-mortgagor, starting of—Mutation in favour of redeeming co-mortgagor, whether gives start to adverse possession.

A co-mortgagor redeeming the whole mortgage does not become a mortgagee of a portion redeemed belonging to the

* Second Civil Appeal No. 111 of 1927, against the decree of Ahmad Kareem, Additional Subordinate Judge of Fyzabad, dated the 22nd of December, 1926, reversing the decree, dated the 22nd of April, 1926, of Syed Hasan Irshad, dismissing the plaintiff's suit.

other co-owners, but becomes merely a charge-holder and, therefore, a suit by one of the co-owners to recover his share of the property on payment of his share of the charge cannot be considered to be governed by Article 148 and that in such a case Article 144 must be held to be applicable. The position of such a co-mortgagor is that he has held the property of his co-mortgagor subject to a lien and has to hand over his co-mortgagor's share on payment by him of the lien, and therefore he cannot be considered to be in adverse possession of the property. [*Ashfaq Ahmad* v. *Wazir Ali* (1), *Khiali Ram* v. *Talik Ram* (2), *Wazir Ali v. Ali Islam* (3), and *Surat Singh* v. *Umrao Singh* (4), followed. *Makhdum Khan* v. *Musammat Jadi* (5), *Sheo Ganga Bakhsh Singh* v. *Ranjit Singh* (6), *Vithal* v. *Dinkar Rao* (7), and *Vasudeo* v. *Balaji* (8), distinguished. *Puranchandra Pal* v. *Barada Prosanna Bhattacharjya* (9), *Munia Goundan* v. *Ramsami Chetty* (10), *Ram Narayan Rai* v. *Ram Deni Rai* (11), and *Basanta* v. *Shanna Singh* (12), followed. *Ram Chandra Yashvan Sirpotdar* v. *Sadashiv Abaji Sirpotdar* (13), *Moidin* v. *Oothumanganni* (14), *Faki Abbas* v. *Faki Nur-ud-din* (15), *Tarubai* v. *Venkat Rao* (16), and *Shah Nawaz* v. *Sheikh Ahmad* (17), distinguished. *Mohammad Taqi* v. *Muhammad Baqar* (18), relied upon.]

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

Mr. *H. K. Ghosh* (holding brief of Mr. *A. P. Sen*), for the respondents.

MISRA, J. :—This is an appeal in a suit for possession brought by a co-sharer against another co-sharer, the latter of whom has redeemed the entire mortgaged property. The facts of the case are that one Murtaza Ashraf mortgaged with possession certain land situate in *patti* Murtaza Ashraf, together with a shop situate in that very *patti*. The *patti* lies in village Rasulpur, district Fyzabad. The mortgage

(1) (1889) I.L.R., 14 All., 1 (F.B).
(2) (1916) I.L.R., 38 All., 540.
(3) (1918) I.L.R., 40 All., 683.
(4) (1922) 20 A.L.J., 611.
(5) (1906) 9 O.C., 91.
(6) (1919) 6 O.L.J., 361.
(7) (1901) 3 Bom. L.R., 685.
(8) (1902) I.L.R., 26 Bom., 500.
(9) (1918) I.L.R., 46 Calc., 111(116).
(10) (1918) I.L.R., 41 Mad., 653(657).
(11) (1921) 63 I.C., 282.
(12) (1920) 55 I.C., 450.
(13) (1886) I.L.R., 11 Bom., 423.
(14) (1887) I.L.R., 11 Mad., 416.
(15) (1891) I.L.R., 16 Bom., 191.
(16) (1902) I.L.R., 27 Bom., 43.
(17) (1920) I.L.R., 1 Lah., 549.
(18) (1913) 16 O.C., 163.

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was made by him in favour of two persons, named Zakir Ali and Farzand Ali for Rs. 150 on the 2nd of May, 1899. A deed of further charge was also executed by the same mortgagor in favour of the same mortgagees for Rs. 200 on the 16th of June, 1900. On the 13th of May, 1902, Murtaza Ashraf sold his entire *patti* to Shah Ahmad Ashraf, defendant-respondent No. 1. Two suits for pre-emption were then filed against the vendee, one by Shah Saiyid Husain, father of the plaintiff-appellant, Shah Wajih-ud-din Ashraf, and the other by one Zakir Husain. Shah Saiyid Husain died during the pendency of the pre-emption suit and the plaintiff-appellant, and Shah Khalil Ashraf and Musammat Zaib-un-nisa were brought on the record of that suit in place of the deceased, Shah Saiyid Husain. On the 12th of July, 1906, a compromise was arrived at between the parties when the case was pending in appeal in the late Court of the Judicial Commissioner of Oudh. According to that compromise half the property was to go to each of the rival pre-emptors on the payment of half the price. It was further stipulated in the said compromise that inasmuch as the property was in the possession of the mortgagees the mortgage-money was also to be paid by the rival pre-emptors half and half. Both the pre-emptors were authorized in that compromise to redeem the property jointly, failing that it was provided that each one of them could redeem the whole and whenever the other co-sharer paid his half share of the mortgage-money and costs, he would be entitled to get possession of his half share. On the 5th of September, 1906, a decree was passed by the appellate court in accordance with the terms of the compromise.

Two days after the said decree, i.e., on the 7th of September, 1906, Shah Ahmad Ashraf purchased the half share of Zakir Husain. On the 30th of September, 1909, Shah Ahmad Ashraf redeemed the entire property on payment of Rs. 350, and got his name entered in the *khewat* (vide exhibits A4 and A5). This was in accordance with the order of the revenue court passed on the 23rd of April, 1910. In June, 1925, the plaintiff deposited half the amount, viz. Rs. 175 in court, but defendant No. 1 refused to take the money and to allow redemption of half share of the property mortgaged. This was on the 5th of September, 1925. The present suit has been brought by the plaintiff on the 22nd of October, 1925, for redemption of half the share belonging to Shah Saiyid Husain. Besides impleading Shah Ahmad Ashraf, who is now in possession of the entire property mortgaged, he impleaded also Shah Khalil Ashraf and Musammat Zaib-un-nisa, the two other representatives of Shah Ahmad Husain who along with himself had been brought on the record as representatives of Shah Saiyid Ahmad Husain.

The suit was mainly contested by defendant No. 1, who, as stated above, was in possession of the entire property mortgaged. His contention was that the plaintiff's right under the pre-emption decree could not be considered to be subsisting since no execution had been taken out by him. It was also urged that the plaintiff's suit having been brought more than twelve years from the date of redemption was time-barred, and that he could not now recover his half share in the property mortgaged on the ground that defendant No. 1 had been in adverse possession of the said half share since April, 1910, when the mutation of names had been effected by the revenue court exclusively in his favour.

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The learned Munsif, who tried the case, held that the pre-empted property being admittedly in the possession of the mortgagees at the time of the passing of the pre-emption decree, it was not necessary for the plaintiff to take the possession from the Civil Court, since no such possession could possibly be taken. He, therefore, held that the plaintiff's right in the property still subsisted. On the question of limitation and adverse possession the learned Munsif held that the suit for possession was within time and that the defendant had failed to establish his adverse possession. On these findings he decreed the plaintiff's suit.

The learned Subordinate Judge took a different view of the case in appeal. He held that the possession of the defendant No. 1 had become adverse since the date he obtained mutation exclusively in his favour in 1910 and in that view of the case he accepted the defendants' appeal and dismissed the plaintiff's suit.

In second appeal it is contended on behalf of the plaintiff-appellant that the view of the law taken by the learned Subordinate Judge in appeal is erroneous. He has urged that the suit is in time and that the defendant-respondent has failed to establish his adverse possession and under these circumstances a decree for possession of half the share in the property mortgaged should be passed in favour of the plaintiff on condition of the payment of half the mortgage money, i.e., Rs. 175.

In order to determine whether the plaintiff's suit is within limitation the first point, which I have to decide, is what article of Limitation Act would apply to a suit like the present.

The Allahabad High Court has consistently held that to a suit like the present, Article 148 of the

Limitation Act would apply [vide *Ashfaq Ahmad* v. *Wazir Ali* (1), *Khiali Ram* v. *Taik Ram* (2), *Wazir Ali* v. *Ali Islam* (3), and *Surat Singh* v. *Umrao Singh* (4).] But the other High Courts in India, including the late Court of the Judicial Commissioner of Oudh, have taken the opposite view. In Oudh this view was taken in *Makhdum Khan* v. *Musammat Jadi* (5), and *Sheo Ganga Bakhsh Singh* v. *Ranjit Singh* (6). In Bombay this view has been taken in *Vithal* v. *Dinkar Rao* (7); and *Vasudeo* v. *Balaji* (8.)

In Calcutta the same view has been taken in *Purnachandra Pal* v. *Barada Prosanna Bhattacharjya* (9). In Madras also the same view has been taken in *Munia Gounden* v. *Ramsami Chetty* (10). In Patna and Lahore also the same view has prevailed [vide *Ram Narayan Rai* v. *Ram Deni Rai* (11); and *Basanta* v. *Shanna Singh* (12)].

In all these cases it has been held that Article 148 refers only to a suit against a *mortgagee* and has no application to a suit against a charge-holder. It is said in those cases that a co-mortgagor redeeming the whole mortgage does not become a mortgagee of a portion redeemed belonging to the other co-owners, but becomes merely a charge-holder and, therefore, a suit by one of the co-owners to recover his share of the property on payment of his share of the charge cannot be considered to be governed by Article 148 and that in such a case Article 144 must be applicable. I, therefore, hold that the plaintiff-appellant's suit being one for recovery of possession

(1) (1889) I.L.R., 14 All., 1 (F.B).
(2) (1916) I.L.R., 38 All., 540.
(3) (1918) I.L.R., 40 All., 683.
(4) (1922) 20 A.L.J., 611.
(5) (1906) 9 O.C., 91.
(6) (1919) 6 O.L.J., 364.
(7) (1901) 3 Bom. L.R., 685.
(8) (1902) I.L.R., 26 Bom., 500.
(9) (1918) I.L.R., 46 Calc., 111(116).
(10) (1918) I.L.R., 41 Mad., 650(657).
(11) (1921) 63 I.C., 282.
(12) (1920) 55 I.C., 450.

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of half the share of the property mortgaged on payment of half the mortgage-money brought against the defendant-respondent, who has redeemed the entire mortgage, cannot be considered to be governed by Article 148, but must be deemed to be governed by Article 144.

Misra, J.

This, however, does not give a complete answer to the question, which I have to decide. Under Article 144 a period of twelve years is given to the plaintiff from the date, when the possession of the defendant becomes adverse to him.

I have now, therefore, to decide when the possession of the defendant No. 1 became adverse. The learned Counsel for the defendant contended that the possession of the defendant-respondent No. 1 became adverse from the 30th of September, 1909, the date, when his client redeemed, and got possession of the entire property. His further argument was that it became adverse, in any case, from the date when the mutation of the entire property was effected by the revenue court in his favour on the 23rd of April, 1910. The suit having been brought in October, 1925, it was brought more than twelve years from either of these dates, and is, therefore, barred by limitation.

I now proceed to give my findings regarding each of these points.

As to the first point I am distinctly of opinion that the defendant-respondent's possession cannot be considered to have become adverse from the date of his having redeemed the entire property, i.e., from the 30th of September, 1909. A co-mortgagor, when he redeems the entire property, does not admittedly hold the property exclusively for himself. The presumption is that he retains the property for his own benefit as well as for the benefit of his co-sharers.

The moment his co-sharer pays him up the share of the money due from him, he is in duty bound to return to the co-sharer so paying up his share of the property. It would be absurd to say that the property is his own exclusive property since no person can have a lien in respect of his own property. It is obvious that a person can only be considered to have a lien in respect of another person's property. If, therefore, the position of such a co-mortgagor is that he has held the property of his co-mortgagor subject to a lien and has to hand over his co-mortgagor's share on payment by him of the lien, he cannot be considered to be in adverse possession of the property. In *Ram Chandra Yashvan Sirpotdar* v. *Sadashiv Abaji Sirpotdar* (1), WEST, J., observed as follows :—

> "The property in question was mortgaged by three co-sharers, Dhondo, Abaji and Ramchandra and was afterwards redeemed by one of the three, Ramchandra. Ramchandra then held the property, as regards his co-sharers' interests in it, as a lienor. They had a right to regain their shares and their enjoyment of the undivided property on recouping to Ramchandra their proportion of the mortgage-money paid by him. His holding, however, as a lienor did not in any way, contradict the ulterior proprietary right of his co-sharers. On the contrary, it implied and preserved their right, since it would be impossible for a man to hold a lien on his own property. But, then, as long as a possession can be referred to a right consistent with the subsistance of an ownership in being at its

(1) (1886) I.L.R., 11 Bom., 423.

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commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership. As the right to possession exists, the owner is not called upon to take any steps towards putting an end to it, and hence no presumption arises against him from his quiescence, nor does the possession become adverse to him."

The learned Judge further observed that:

"In the case of a co-sharer holding after redemption, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title and submission to the right thus set up, in analogy to the provision which bars an excluded co-sharer generally by lapse of twelve years from the time when he becomes aware of his exclusion."

In *Moidin* v. *Oothumanganni* (1), one of the two brothers had redeemed the property and when heirs of the other brother sued to recover their share, he pleaded that the suit was barred by limitation, since it had been brought for more than twelve years after the date of the redemption. It was held that in the absence of proof that the land was held with an assertion of an adverse title, the plaintiff was entitled to a decree. The same view was held by the Bombay High Court in two other cases reported in *Faki Abbas* v. *Faki Nur-ud-din* (2) and *Tarubai* v. *Venkat Rao* (3), In the former of these cases it was held by SARGENT, C. J., that possession would not become adverse without something more pronounced than mere holding after redemption (vide page 196). In the latter case

(1) (1887) I.L.R., 11 Mad., 416. (2) (1891) I.L.R., 16 Bom., 191.
(3) (1902) I.L.R., 27 Bom., 43.

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BATTY and ASTON, JJ., held that the possession of the defendants could not be deemed to be adverse to the plaintiffs inasmuch as there was no notice or knowledge or circumstance, that could have given notice or knowledge to the plaintiffs that defendants' possession was in displacement of their rights and that they had no reason to know that their rights were invaded and until they had such reasons there could be no necessity for them to take action.

The same view was held by DAS, J., in *Ram Narayan Rai* v. *Ram Deni Ray* (1), quoted above.

On these authorities it appears to be amply clear that the defendant-respondent's possession could not be deemed to be adverse from the date when he redeemed the entire property mortgaged on the 30th of September, 1909. Indeed, it would be futile to hold otherwise in view of the compromise arrived at between the parties in the pre-emption suit, which expressly authorized one of them to redeem the entire mortgaged property and to hold it until the other co-sharer paid his quota of the mortgage-money and costs and asked for the possession of his share.

A great deal of reliance was placed by the learned Counsel for the respondent on the case *Puranchandra Pal* v. *Barada Prosanna Bhattacharjya* (2), already quoted above. I have gone through the facts of the case carefully and it appears to me that there was evidence of express acts on the part of the redeeming co-mortgagor showing his setting up of the exclusive title and of his having remained in possession thereafter for a period of over twelve years. This case can, therefore, afford no help to the defendant-respondent in support of the contention raised by his Counsel on his behalf.

(1) (1921) 62 I.C., 282. (2) (1918) I.L.R., 46 Calc., 111(116).

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I am, therefore, of opinion that no adverse possession of the defendant-respondent can be maintained on that ground.

As to the second point that possession must be deemed to have become adverse from the date when the defendant-respondent obtained mutation exclusively in his favour I have to see how the facts stand. It appears from the evidence on the record that after redemption an application was put in for mutation of names by Shah Ahmad Ashraf against Shah Murtaza Ashraf. A proclamation was issued in the usual course from the revenue court, and nobody seems to have filed any petition on the date fixed for hearing. The tahsildar then took evidence about possession and Shah Ahmad Ashraf, who had redeemed the entire property, was admittedly found to be in possession of the entire property mortgaged and the tahsildar thereupon treated the matter as an undisputed case under section 35 of the United Provinces Land Revenue Act (III of 1901) and ordered mutation in favour of defendant-respondent No. 1.

These facts would appear from exhibit A4. It also appears from exhibit A5, the *khewat* of the village, that his name has remained so entered up to this time. It is on the basis of these two documents that the learned Subordinate Judge has held that the exclusive possession of the defendant-respondent No. 1 has been made out. I regret I cannot agree with that conclusion of the learned Subordinate Judge. In a case like the one which I have before me, the mere fact that the name of defendant No. 1 is alone entered in the *khewat* would be no proof of the fact that it was so recorded by virtue of the defendant having set up an exclusive title to himself to the knowledge of the other co-sharers. If a co-mortgagor after redeeming the entire property gets the mutation of names in his

favour on the basis of his possession, he cannot be subsequently allowed to say that merely by virtue of the said act he set up an exclusive title to himself and denied the title of the other co-sharers. It was recently held by their Lordships of the Punjab High Court that a mere entry in the *khewat* could not alone be deemed to be sufficient proof of adverse possession [vide *Shah Nawaz* v. *Sheikh Ahmad* (1)]. The learned Subordinate Judge has relied in support of his finding on *Mohammad Taqi* v. *Muhammad Baqar* (2), decided by LINDSAY, J. C. The facts of that case are clearly distinguishable from those which exist in the present case. In that case one of the several co-sharers redeemed the entire property and after obtaining possession of the property applied to revenue court for correction of the *khewat* by removal of the names of his co-sharers and in those proceedings he asserted his exclusive right to the property and denied the rights of others, who claimed to be his-co-sharers. The petition was, however, rejected by the revenue court, but it was held that since the co-sharer, who had obtained mutation exclusively in his favour, had clearly denied the title of his other co-sharers and after such denial had remained in possession for more than twelve years, he must be deemed to have perfected his title by adverse possession.

It was observed by the learned Judge that the fact that the mutation application had been rejected by the revenue court was quite immaterial for the purposes of determining whether adverse possession had been made out. It was held in that case that if a person who had a title to the immovable property allowed another to retain possession under avowed claim that it was held in his own right and failed for a

(1) (1920) I.L.R., 1 Lah., 549. (2) (1913) 16 O.C., 163.

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period of twelve years to vindicate his title by recovering possession, his right to the property became extinguished and that the opinion of the revenue court and their refusal to alter the *khewat* did not effect the question of adverse possession. It has not been shown in the present case by any evidence on the record that when Shah Muhammad Ashraf applied to the revenue court for mutation in his favour he denied the title of his other co-sharers. Indeed such a thing would be impossible to presume in the face of the compromise arrived at in the pre-emption case. In my opinion unless the defendant-respondent proved that in the mutation proceedings he denied the title of his other co-sharers to their knowledge and remained thereafter in exclusive possession of the property for twelve years his adverse possession cannot be considered to have been made out. As observed in *Munia Gounden* v. *Ramsami Chetty* (1), a mortgagee or a co-sharer or a tenant, who first obtains possession *as such*, cannot without notice to the mortgagor or to the other co-sharers or to the landlord (as the case may be) claim to hold adversely, i.e., by mere unilateral declaration of intention. He cannot convert his original possession into adverse possession. It is clear that Shah Muhammad Ashraf after the compromise and the decree in his favour, which gave him express right to redeem the property alone, took possession of the property after redeeming it as a co-sharer entitled to keep possession over the whole of the property as a lienor until he was paid off. He could not at his own will be allowed to his possession *as such* into a possession exclusively on his own behalf which might enable him to claim the property as his own on the ground of adverse possession.

In my opinion no title has been made out by defendant-respondent on the score of adverse possession. His possession, as remarked by the learned

(1) (1918) I.L.R., 41 Mad., 650(658).

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Munsif, must be deemed in the capacity of a trustee and on payment of half the money he must deliver half the property mortgaged to the plaintiff.

No other point was urged before me.

I am, therefore, of opinion that the plaintiff's suit for possession of half share in the property mortgaged was rightly decreed by the learned Munsif. I, therefore, accept the appeal, set aside the decree of the learned Subordinate Judge and restore the decree of the Munsif with costs in this and all the courts.

Appeal allowed.

APPELLATE CRIMINAL

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

RAM PRASAD AND OTHERS *v.* KING-EMPEROR.*

1927 *August*, 22.

Evidence of accomplices, admissibility of—Accomplices' uncorroborated evidence, how far to be acted upon—Identification evidence, admissibility of—Weight to be attached to a man's identification in jail if he fails to repeat that identification in court.

Held, that the evidence of accomplices is always admissible and is always relevant but under a very old practice of the courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. [*The King* v. *Baskerville* (1), *Rex* v. *Atwood* (2), *Reg* v. *Stubbs* (3), *In re*: *Meunier* (4), *Reg* v. *Mullins* (5), *Rex* v. *Noakes* (6), and *Rex* v. *Wilkes* (7), referred to.]

* Criminal Appeals Nos. 189, 186, 187, 231, 261, 272, 273, 288, 289, 290, 291, 292, 315, 316 and 317 of 1927 against the order of A. Hamilton, Special Sessions Judge of Lucknow, dated the 6th of April, 1927.

(1) (1916) 2 K.B., 658.
(2) (1787) 1 Leach, 464.
(3) Dears 555.
(4) (1894) 2 Q.B., 415.
(5) 3 Cox. C.C., 526.
(6) (1832) 5 C. and P., 326.
(7) 7 C. and P., 272.