APPELLATE CIVIL.

Before Mr. Justice E. H. Ashworth and Mr. Justice Gokaran Nath Misra.

1926 *January* 12.

SIDDHESHWAR AND OTHERS (DEFENDANTS-APPELLANTS) *v.* GANGA SAGAR (PLAINTIFF), AND OTHERS (DEFENDANTS-RESPONDENTS).*

Misra, J.

Finding of fact, when can be interfered with in second appeal—Adverse possession by a co-sharer against another co-sharer—Joint property, repairs of by one co-sharer, whether amounts to ouster.

Held, that it is a settled rule of law that where a particular property is owned by several co-sharers, the possession of one co-sharer is, in law, the possession of the other co-sharers as well, and that it is not possible for him to put an end to that possession by any secret intention in his mind.

Every co-sharer has a right to keep joint property in repairs, and in doing so he cannot be considered to be doing an act which would in any way indicate an intention on his part to deny the title of other co-sharers and to set up an exclusive title to himself. [*Corea* v. *Appuhamy* (1); *Ram Manorath* v. *Sant* (2); *Ahmad Raza Khan* v. *Ram Lal* (3), and *Lokenath Singh* v. *Dhakeshwar Prasad Narain Singh* (4), relied upon.]

Mr. *H. Husain* holding brief of Mr. *Niamat Ullah*, for the appellants.

Mr. *B. N. Srivastava*, for the respondent No. 1.

MISRA, J. :—This second appeal arises out of a suit brought in the Court of the Subordinate Judge, Hardoi, by the plaintiff-respondent against the defendants (Nos. 1 to 4) appellants and respondents (Nos. 2 to 6) for a declaration to the effect that he is the owner of the property in suit. The property in suit is composed of a tank (No. 33 old and 38 new), measuring 3 bighas 19 biswas, 2 biswansis, a private temple and a small building consisting of one room near the said tank, situate in village Musepur, pargana

* Second Civil Appeal No. 532 of 1924, against the decree of Raghubar Dayal Shukla, 3rd Additional District Judge, Lucknow at Hardoi, dated the 23rd of October, 1924, reversing the decree of Gulab Singh Joshi, Subordinate Judge of Hardoi, dated the 14th of September, 1923.

(1) L.R., A.C., 230 (1912). (2) (1919) 7 O.L.J., 8.
(3) (1914) 13 A.L.J., 204. (4) (1915) 21 C.L.J., 253.

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Mallawan, district Hardoi. The allegations on which the plaintiff came to Court were to the effect that the entire village Musepur was at one time the property of his grandfather, Ganga Prasad, who dug the tank in dispute, called *Bhatain*, as well as planted a grove near it, and erected the temple and the building mentioned above in the said village; that in the summary settlement in the year 1264 Fasli corresponding to 1856 A. D. the said village was settled with the Lambardars of a neighbouring village, called Tejipur; and that subsequently during the course of the settlement of the district, in 1867, the village was decreed to him and other members of his family, his share and that of his cousin, Baram Dat, being 2 biswas, that is, one-tenth of the entire village. The plaintiff stated that the tank as well as the grove and the temple together with the building mentioned above remained continuously in exclusive possession of himself and his ancestors. He alleged that on the 1st of April, 1873 he and his cousin, Baram Dat, sold their share of 2 biswas to one Jai Narain Bajpei, excluding the above-mentioned tank and the properties appurtenant thereto, and that subsequently the said Jai Narain sold the aforesaid share to the fathers of defendants Nos. 1 to 4, he (the plaintiff), however, remaining in possession of the exempted property. The plaintiff also alleged that defendant No. 3 applied for partition of the above-mentioned village Musepur in the revenue court, and that he raised an objection to the effect that the tank in dispute was his exclusive property and should, therefore, be separately recorded in his name, but that Court by its order, dated the 10th of March, 1922, directed him (plaintiff) to get his title to the aforesaid property adjudicated upon in the civil court, and hence the present suit.

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The defendants denied the title of the plaintiff to the property in suit and his exclusive possession over the same. They contended that the tank was the property of all the proprietors of the village, and that since the sale of 1873 the plaintiff had never been in possession of the tank, the temple or the building, and that they had been in adverse possession of them. Other defendants admitted the plaintiff's title to the property in suit.

The main points, therefore, for trial before the Subordinate Judge were the plaintiff's title to the property in dispute and his exclusive possession over them. The trial Court on both of these points decided against the plaintiff and dismissed his suit.

On appeal, the learned Additional District Judge disagreed with the findings of the trial Court and held that the property in suit belonged to the plaintiff and had always been in his possession. He, therefore, allowed the appeal and decreed the plaintiff's suit in regard to the entire property claimed. He, however, did not decide the question of adverse possession raised by the plaintiff.

On second appeal it is, however, contended on behalf of the defendants-appellants that the finding of the learned District Judge regarding the title of the plaintiff should not be accepted by this Court because it is vitiated by errors of law, misreading of the documentary evidence and having been based on inadmissible evidence. For instance, the learned Judge in his judgment states that the plaintiff's title to the tank, the temple and the building did not depend upon his being a co-sharer of the village, and that they would be the property of the person who built them even though he might not be the owner of any land in the village. After hearing the parties and examining the record I am of opinion that this contention is correct. I do not consider that the proposition enunciated by the

learned Judge is accurate. Whatever may be the position with regard to the temple and the building, it is clear that the plaintiff could not acquire title to the tank merely on the ground that he or his ancestors dug it, if he or they were not the owners of the village. I also find that in the old settlement papers names of the plaintiff and other co-sharers, among whom were the defendant's predecessor-in-title, are entered as owning the land of the tank, and this record has been maintained up to date. I have not been able to follow how the learned Judge on the basis of these entries came to the conclusion that the plaintiff is the exclusive owner of the tank land. I also find from the *wajib-ul-arz* of the village (exhibit 3) that the temple in dispute was built by Misra Baji Lal. The plaintiff in his statement as a witness in the case stated on oath that it had been built by his grandfather, Ganga Prasad, 125 years ago, but when asked to state the source of his knowledge he stated that he had heard of this fact from his cousin, Barham Dat, and other people. This statement being purely hearsay cannot be regarded as evidence admissible in law to prove the plaintiff's exclusive title to the temple in dispute. I am, therefore, of opinion that the finding of the lower appellate court should not be accepted as a finding of fact binding on this Court in second appeal. There are only two courses open to us in appeal, either to remand the case for a fresh finding to the lower appellate court or to arrive at a finding ourselves. The whole evidence on the record has been placed before us and it is quite sufficient to enable us to determine the points involved in the appeal. I, therefore, proceed to determine the plaintiff's title in regard to the property in suit.

There are three items of property regarding which the plaintiff seeks a declaration of his title; the

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first is the land of the tank, the second is the temple, and the third is the small building close to the temple.

Regarding the tank land it is clear from exhibit 6 which is the *khasra* of village Musepur, prepared at the old settlement, a document filed by the plaintiff himself, that plot No. 33 described in it as *talab Bhatain* is entered as the property of Rameshar Das, Raghunath Prasad and others in accordance with their shares recorded in the *khewat*, the name of the plaintiff being entered as one of the co-sharers. Referring to exhibit 5 the *khewat* of the said village prepared at the old settlement, a copy of which has been filed by the plaintiff himself, I find that he and his cousin, Baram Dat, are entered as owners of 2 biswas share in it. These two documents prove conclusively that the plaintiff was not the exclusive owner of the tank land in suit, but owner of it only to the extent of one-tenth. The *khasra* of 1310 F. (exhibit A7) and the *khataunis* of 1315 F. (exhibit A5), 1320 F. (exhibit A4) and 1325 F. (exhibit A6) all of the same village, show that the land is entered as the land owned by all the co-sharers of the village. On this evidence the conclusion to which I arrive is that the plaintiff is the owner of the tank land (No. 33 old and 38 new) only to the extent of one-tenth.

Regarding the temple I find from paragraph 7 of the *wajib-ul-arz* of the village Musepur (exhibit 3) that the temple was built by Misra Baji Lal. There is no documentary evidence on the record to prove that it was built by the grandfather of the plaintiff, and whatever oral evidence there is, it is hearsay and therefore inadmissible to prove the plaintiff's allegation. The plaintiff and his cousin, Baram Dat, and the fathers of the defendants-appellants who were originally defendants Nos. 1 and 2 in this case are equally related to Misra Baji Lal, and under those

circumstances the plaintiff would be the owner of not more than one-half in the temple in suit.

Regarding the small building I find it described in the *wajib-ul-arz* as bungalow. It is stated therein that it was built by Ganga Prasad, the grandfather of the plaintiff. It is, therefore, clear that so far as that property goes the plaintiff would be the exclusive owner of it.

Having arrived at a finding as to the title of the plaintiff in regard to all the items of the property in dispute, I now proceed to determine as to whether his exclusive title by adverse possession to the tank land and the temple, items Nos. 1 and 2, of which I find him to be the owner to the extent of one-tenth and one-half respectively, has been established.

As to the tank land, the plaintiff's allegation is that it has been repaired by him exclusively. It being a joint property owned by all the co-sharers, that alone would not suffice to establish his exclusive and adverse possession over it. It is a settled rule of law that where a particular property is owned by several co-sharers, the possession of one co-sharer is, in law, the possession of the other co-sharers as well, and that it is not possible for him 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, vide *Corea* v. *Appuhamy* (1), *Ram Manorath* v. *Sant* (2) and *Ahmad Raza Khan* v. *Ram Lal* (3). In Second Appeal No. 331 of 1924, decided by me only the other day, I have held after referring to these cases and to one other case, namely, *Lokenath Singh* v. *Dhakeshwar Prasad Narain Singh* (4), that the act of repairing a joint property by one co-sharer cannot be considered as tantamount to the

(1) L.R., A.C., 230 (1912).
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ouster of other co-sharers. Every co-sharer has a right to keep joint property in repairs, and in doing so he cannot be considered to be doing an act which would in any way indicate an intention on his part to deny the title of other co-sharers and to set up an exclusive title to himself. The only evidence which the plaintiff has led in the case is to the effect that he has produced his account books (exhibits 13 to 20) to show that he has spent money on effecting such repairs. This, as indicated above, would not be legally sufficient to constitute adverse possession on his part in regard to the property in dispute. The learned Counsel for the respondent relied upon two other pieces of evidence to show that the plaintiff had set up such an exclusive title as would legally be sufficient to constitute his client's adverse possession over the tank land in dispute. The first piece of evidence is the sale-deed executed by the plaintiff and his cousin, Baram Dat, on the 1st of April, 1873, in favour of Jai Narain Bajpei in regard to their share in the village of Musepur. It is pointed out that in that sale-deed the plaintiff and his cousin exempted the tank in dispute, called by the name of *Bhatain*. It is contended in reply on behalf of the appellants that the exemption would operate only in regard to the plaintiff's share in the tank land. If the plaintiff was not the owner of the entire tank land, he could not be deemed to have exempted the whole tank land. Even if there was such an exemption, it was couched in vague and indefinite language and cannot be considered to be any clear evidence of an intention on the part of the plaintiff to appropriate the entire land to himself. Even if he did so, the other co-sharers of the village could not possibly be considered to be aware of the declaration by him of setting up such an exclusive title to himself. In my opinion both these arguments are sound. The words used in

the sale-deed are "*siwae talab Bhatain mae digar mutalaqhae.*" The words when translated would be rendered as equivalent to "except the tank *Bhatain* together with other appurtenants thereto." Moreover, the plaintiff was executing a sale-deed in favour of Jai Narain Bajpei who was not till then a co-sharer in the village, and any recital in that deed executed by him and his cousin, Baram Dat, could not convey to the other co-sharers of the village that their title regarding the tank land in dispute had been denied by him. I am, therefore, of opinion that the assertion contained in the sale-deed does not amount to an assertion sufficient in law to constitute adverse possession to destroy the title of the other co-sharers.

[His Lordship then goes on to discuss the evidence and came to the finding that the plaintiff had failed to prove his exclusive or adverse possession on the tank land or the temple in suit.—EDITOR.]

The result therefore is that the plea of exclusive title by adverse possession fails altogether. My finding is that the plaintiff is entitled to a declaration that he is the exclusive owner of the building which he has described in his plaint as "kamra" situate close to the tank, that he is the owner of the temple to the extent of one-half, and that his share in the tank (old No. 33, recent No. 38) is one-tenth.

I would, therefore, allow the appeal, set aside the decision of the Court below and pass a declaratory decree in favour of the plaintiff to the extent indicated above. The parties will pay and receive costs of all the Courts in proportion to their failure and success in this appeal.

ASHWORTH, J.:—I agree.

BY THE COURT.—Appeal allowed. Costs in proportion to success and failure in this appeal.

Appeal allowed.