APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, and Mr. Justice A. G. P. Pullan.

SHEORAJ AND OTHERS, (DEFENDANTS-APPELLANTS) *v.* AJUDHIYA AND OTHERS, PLAINTIFFS, AND OTHERS (DEFENDANTS-RESPONDENTS).* 1929 *January* 8,

Adverse possession between co-tenants—Possession of one co-tenant, when can be adverse against another co-tenant—Limitation Act (IX of 1908), article 44.—Joint Hindu family—Sale-deed by manager of joint Hindu family of ancestral property without legal necessity—Suit by a member of joint family for recovery of possession of property, limitation applicable to.

A co-tenant out of possession starts with the presumption in his favour that the possession of the other co-tenants is not adverse but lawful and nothing short of ouster or something equivalent to ouster must be proved by the co-tenant in possession in order to succeed on a plea of adverse possession.

Where one brother brought a suit for possession of his share against the transferees of his brother who as manager of a joint Hindu family had executed a sale-deed of ancestral property without any legal necessity and which was as such void from its inception and the transferees who were themselves co-sharers in the mahal in suit from before the sale-deed, resisted the claim on the ground that as the sale-deed in their favour was invalid their possession must be held to be adverse to the plaintiffs, *held*, that as co-sharers the defendants were entitled to possession of the property and failing definite evidence that they asserted a different title than that of co-sharers after the execution of their sale-deed it cannot be held that their possession became adverse against the other co-sharers.

Article 44 of the Limitation Act has no application because the suit did not relate to a transaction entered into by the guardian of the plantiff but by his elder brother in his capacity as the manager of the joint Hindu family and the plaintiff was not required to challenge the sale-deed on which the

*Second Civil Appeal No. 335 of 1928, against the decree of Saiyed Asghar Hasan, District Judge of Gonda, dated the 11th of August, 1928, reversing the decree of Saiyed Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 3rd of January, 1928, dismissing the plaintiff's claim.

1929

SHEORAJ v. AJODHIYA.

defendants relied because it was a sale-deed by the manager of a joint Hindu family of an ancestral property without any legal necessity and as such was void from its inception. *Indarpal Singh* v. *Thakur Din Singh* (1), *Corea* v. *Appuhamy* (2), *Muttunayagam* v. *Brito* (3), *N. Varada Pillai* v. *Jeewarathnammal* (4) *Jogendra Nath Rai* v. *Baldeo Das* (5), *Ram Narain* v. *Nand Kumar* (6), *and Annada Mohan Roy* v. *Gour Mohan Mullick*, (7), relied on. *Ram Narain* v. *Mannu Lal* (8), distinguished. *Hardit Singh* v. *Gurmukh Singh* (9), *Thomas* v. *Thomas* (10), *Kennedy* v. *De Trafford* (11), *Hardoon* v. *Belilios* (12), *Griffith* v. *Owen* (13). In re *Bliss* (14), referred to.

Messrs. *M. Wasim and Khaliquzzaman*, for the appellants.

Messrs. *Bisheshwar Nath Srivastava* and *Bishambhar Nath Srivastava*, for the respondents.

HASAN, A. C. J. and PULLAN J. :—This second appeal arises out of a suit brought by one Ajudhia and his transferees for possession of a share in two mahals in the village of Baharwa, which were originally in possession of Dharamraj, who was the father of Ajudhia. In the plaint it was alleged that the cause of action had arisen when the defendants-appellants raised an objection in the Revenue Court to the application made by the transferees of Ajudhia for entry of their names in respect of this share. It was also stated that Ajudhia brought the suit within three years of attaining his majority, and this allegation gave rise to a contest on the question of fact whether Ajudhia was less or more than twenty-four years of age when the suit was filed. The first court found this issue against him and clearly deemed that it was the most important issue in the suit, but it also found that the suit was barred by limitation on the ground that

(1) (1922) I. 27 O. C., 78.
(2) (1912) A. C., 230.
(3) (1918) A. C., 895.
(4) (1919) 24 C. W. N., 346; L.R., 46 I. A., 285.
(5) (1908) I. L. R., 35 Calc., 961.
(6) (1922) 25 O. C., 164.
(7) (1923) 50 I. A., 239.
(8) (1928) 5 O. W. N., 85.
(9) (1918) 28 C. L. J., 437.
(10) 2 K. & J., 79, 83.
(11) (1897) A. C., 180.
(12) (1901) A. C., 118.
(13) (1907) 1 Ch. Dn., 195
(14) (1903) 2 Ch. Dn., 40.

1929

SHEORAJ v. AJUDHIYA.

Hasan, A. C. J. and Pullan, J.

the appellants before us had attained a title by adverse possession. The District Judge found that article 34 of the Limitation Act had no application because this suit did not relate to a transaction entered into by the guardian of the plaintiff, but by his elder brother in his capacity as manager of a joint Hindu family. This view is, in our opinion, correct; and in any case the plaintiff was not required to challenge the sale-deed on which the contesting appellants rely, because it was a sale-deed by the manager of a joint Hindu family of ancestral property without any legal necessity and as such was void from its inception. See *Ram Narain* v. *Nand Kumar* (1), read with *Annada Mohan Roy* v. *Gour Mohan Mullick* (2).

Although this was the principal point raised in the court of first instance and the appellants never specifically pleaded title by adverse possession, they raised that point in argument in both the courts below and this is the main plea which has been argued before us. The appellants are transferees by virtue of a sale-deed executed by Pateshar, the elder brother of Ajudhia, in the year 1907. They did not apply for mutation of names in respect of this property until they made their objection to the application brought by the transferees of Ajudhia. They plead, however, that their possession must be held to date from the year 1907, and as the sale-deed by which they obtained possession is an invalid document their possession must, therefore, be held to be adverse to Ajudhia and his brother Biddam deceased, whose share is now claimed by Ajudhia. The lower appellate court has pointed out that the appellants or their predecessor-in-title in whose name the sale-deed was executed were themselves co-sharers in the mahals in suit in their own right even before the sale-deed was executed. As co-sharers they were entitled to possession of the property and failing definite evidence that they asserted a different title than that of co-sharers

(1) (1922) 25 O. C., 164. (2) (1923) L. R., 50 I. A., 239.

1929

SHEORAJ v. AJUDHIYA.

Hasan, A. C. J. and Pullan, J

after the execution of their sale-deed, we are not prepared to find that their possession became adverse against the other co-sharers. The same question came up for decision before one of us when Additional Judicial Commissioner of Oudh in a case : *Indarpal Singh* v. *Thakur Din Singh* (1) and that judgment expresses the views which this Bench now holds. After finding that the plaintiffs and the defendants were co-owners in the property in suit the judgment proceeds as follows :—

> "This is a cardinal point in subordination to which the decision of the question of adverse possession should be approached. As Lord BUKMASTER observed in the case of *Hardit Singh* v. *Gurmukh Singh* (2) 'Possession may be either lawful or unlawful and in the absence of evidence it must be assumed to be the former.' And possession is lawful when it is in virtue of a legal title. In the case of *Thomas* v. *Thomas* (3), WOOD, Vice-Chancellor, said :—'Possession is never considered adverse if it can be referred to a lawful title.' This dictum was quoted with approval by Lord MACNAGHTEN in the case of *Corea* v. *Appuhamy* (4). In the case before me it is admitted that the defendants and before them their ancestor, Ochcha Singh, have all along been in possession of the whole of the property in suit and in enjoyment of the profits thereof. In the circumstances the question to be asked is 'Has one tenant in common legal title to the whole' If he has, then the defendants' possession is lawful and therefore not adverse. It is well established that one tenant in common is not the

(1) (1922) 27 O. C., 78.
(2) (1918) 28 C. L. J., 437.
(3) 2 K. & J., 79, 83.
(4) (1912) A. C., 230.

1929

SHEORAJ v. AJUDHIYA.

Hasan, A. C. J. and Pullan, J.

agent of the other nor is there any fiduciary relation between them. *Kennedy* v. *De Trafford* (1). In a clash of self-interest and duty to others the law will compel a person to do his duty. *Hardoon* v. *Beliolis* (2); in re *Bliss* (3) and *Griffith* v. *Owen* (4). But one tenant owes no duty to the other tenant is common in respect of the interest of the latter in the common property though he has a duty to share the advantages acquired in his character as such with the other tenant—White and Tudor's Leading Cases, volume II; *Keech* v. *Sandford* and the notes thereunder; also see section 90 of the Indian Trust Act (II of 1882). The presumption that the possession of one cotenant of the entire common property is lawful seems to be founded on the principle that between two tenants in common each has a title to the whole and also to his undivided moiety and each is said to be seized *per my et per tout*, that is, each cotenant has 'the entire possession as well of every parcel as of the whole.' In the case of *Kennedy* v. *De Trafford* (1) Lord HERSCHELL, in speaking of a coowner called Dodson, said :—'Dodson was an owner of this property—the owner of an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner.' I must therefore hold that *prima facie* the possession of the defendants of the common property in its entirety was not adverse to the plaintiffs.

(1) (1897) A. C., 180.
(2) (1901) A. C., 118.
(3) (1903) 2 Ch. Dn., 40.
(4) (1907) 1 Ch. Dn., 195.

1929

SHEORAJ v. AJUDHIYA.

Hasan, A. C. J. and Pullan, J.

The defendants had to prove that the possession which was and is not *prima facie* adverse had or has become so in reality. This is a heavy onus which the defendants have to discharge. It is clear on the authorities that the fact that the plaintiffs have not been in the enjoyment of the rents and profits of the property in suit does not establish a title by adverse possession in the co-tenants, that is, the defendants who have enjoyed such profits, the reason of the view being that it is consistent with the legal title in the co-tenant in possession. It may be doubted whether the old rule of English law afterwards abrogated by the Statute 3 and 4, William IV. Chapter 27, section 12, that the possession of one of several co-parceners, joint tenants or tenants in common is the possession of the others so as to prevent the statute of limitation from affecting them is applicable in India to 'shares in an unpartitioned agricultural village.' See the decision of Viscount CAVE in the case of *N. Varada Pillai* v. *Jeewarathnammal* (1). But one thing is perfectly clear that the co-tenant out of possession starts with the presumption in his favour that the possession of the other co-tenants is not adverse but lawful. This is well established by a series of decisions of their Lordships of the Privy Council and further it is equally well established that nothing short of ouster or something equivalent to ouster must be proved by the

(1) (1919) 24 C. W. N., 346: : 46 I. A., 285.

co-tenant in possession in order to bring about the success of the plea of adverse possession *Corea* v. *Appuhamy* (1), *Hardit Singh* v. *Gurmukh Singh* (2); *Muttunayagam* v. *Brito* (3) and the last decision of Viscount CAVE in *N. Varada Pillai* v. *Jeewarthnammal* (4) already mentioned. In the case of *Jogendra Nath Rai* v. *Baldeo Das* (5) decided by the High Court of Calcutta a series of cases are noticed in support of the opinion expressed above. From the same principle, it would seem to follow that such overt acts on the part of the tenant in possession as would ordinarily prove the adverse character of the possession as against a stranger will afford no evidence of such character as against the co-tenant, the reason being that those acts will be found to be consistent with the lawful title of the co-tenant in occupation."

In the present case we cannot find that there has been anything equivalent to ouster of the plaintiff. The appellants did nothing to assert their title and mere possession was not inconsistent with their position as co-sharers in the mahals. We have been referred to a decision of a Bench of this Court reported in *Ram Narain* v. *Mannu Lal* (6) in which it is alleged that a different view was taken. As will be seen from a perusal of that judgment the point on which it turned was that the co-sharers had successfully asserted their rights to the sole enjoyment of the property, and that there

(1) (1912) A. C., 230.
(2) (1918) 28 C. L. J., 437 (P. C.)
(3) (1918) A. C., 895.
(4) (1919) 24 C. W. N., 346; 46 I. A., 285.
(5) (1908) I. L. R., 35 Calc., 961.
(6) (1928) 5 O. W. N., 85.

1929

SHEORAJ v. AJUDHIYA.

had been an ouster. In the present case we find no assertion and no ouster. We find, therefore, that the possession of the defendants-appellants was not adverse and the suit was not barred by limitation. The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and Mr. Justice Gokaran Nath Misra.

1929

January 16,

G. Mc KENZIE AND CO., LIMITED (PLAINTIFFS-APPELLANTS) *v.* MUHAMMAD ALI HAIDER KHAN (DEFENDANT-RESPONDENT).*

Hire-purchase contract—Contract for hire of a car with option to purchase—Ownership of car when passes to the hirer—Default in the terms of a hire-purchase agreement, remedy open to the owner—Interpretation of hire-purchase contracts, rules of.

Where in a deed of hire purchase the plaintiffs were described as the "owners" and the defendant as the "hirer" and the terms of the deed were "the owners agree to let on hire to the hirer and the hirer agrees to take from the owners a motor-car on payment to the owners a certain sum of money for the option of purchase and if the hirer shall exercise such option credit will be given to the hirer for that sum and if he does not, then that sum shall belong absolutely to the owners; and the hirer was to pay to the owners certain monthly instalments and when the hirer has paid the owners a certain sum of money by monthly instalments the motor-car shall become the absolute property of the hirer and this agreement shall terminate; but until the hirer had paid that sum by monthly instalments the motor-car shall remain the absolute property of the owners . . and if the hirer shall make default in punctually paying any hire instalments or . . . . . shall fail to observe and perform any of the agreements and the conditions

*Second Civil Appeal No. 306 of 1928, against the decree of Rai Bahadur Jotindra Mohan Basu, District Judge of Lucknow, dated the 22nd of May, 1928, setting aside the decree of Pandit Sheo Narain Tewari, First Additional Subordinate Judge of Lucknow, dated the 21st of March, 1927.