

Solicitors for appellant: *Barrow, Rogers and Neville.*

1928

AMJAD KHAN

9.
ASHRAF
KHAN.

Solicitors for respondents: *Watkins and Hunter.*

(1) Reason 11. "Because even if the deed of gift was bad in law, Musammat Waziran had a quarter share by inheritance from her husband the donor, and the appellant is entitled to the same.

P. C.

APPELLATE CIVIL.

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

ALI SHER AND OTHERS (DEFENDANTS-APPELLANTS) v.
WAJID ALI AND ANOTHER (PLAINTIFFS-RESPONDENTS.)*

1928

November,
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Adverse possession—Co-sharers—Possession of one co-sharer when adverse against another co-sharer.

One *R* held a 3 annas share in certain *bhaiyachara* property. The share was mortgaged with the defendants. *R* obtained a decree for redemption in 1888, but apparently never obtained possession of it. *R* disappeared sometimes between 1890 and 1900 and in 1926 defendants obtained mutation of the share in their favour on the allegation that they were the heirs of *R*. In a suit for recovery of possession by the rightful heirs of *R*, held, that the defendants being also co-sharers in the village with *R* and there being no evidence that *R* died on a particular date it must be taken that *R* was a co-sharer with the defendants until the mutation of 1926 and that the defendants as co-sharers were cultivating his land in his absence on his behalf and there being no ouster and no assertion of adverse possession there was no bar to the plaintiffs setting up their title as a co-tenant out of possession starts with a presumption in his favour that the possession of the

*Second Civil Appeal No. 244 of 1928, against the decree of Mahmud Hasan Khan, Subordinate Judge of Sitapur, dated the 26th of March, 1928, upholding the decree of S. Abulkasim Zaidi, Munsif of Biswan (Sitapur), dated the 4th of June, 1927, decreeing the plaintiff's suit.

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other co-tenant is not adverse but lawful. *Indarpal Singh v. Thakur Din Singh* (1), referred to.

Mr. A. Rauf, for the appellants.

Mr. *Mohammad Ayub*, for the respondent.

HASAN, A. C. J. and PULLAN, J.:—The dispute from which this litigation arose relates to the property of one Rahim Bakhsh who admittedly disappeared sometime between the year 1890 and the year 1900. On the 4th of January, 1926, mutation of his 3 annas share was obtained by the present defendants on the allegation that they were his heirs. The present suit has been brought by two persons Wajid Ali and Abid Ali, who state that they are the heirs of Rahim Bakhsh and entitled to his share. The plaintiffs have won their case in the lower courts and the defendants have come before us in second appeal. They have rightly not pressed the first ground of appeal which is that the lower courts were not justified in finding the relationship of the plaintiffs to Rahim Bakhsh proved. This is a question of fact and it must be taken that the plaintiffs, and not the defendants, are the heirs of Rahim Bakhsh, who is now presumed to be dead. The defendants' alternative case is that they have been in possession of this land since the year 1877 and that, therefore, they have obtained title by adverse possession. It is admitted that this property is part of the 6 annas share which belong to the mother of Rahim Bakhsh, was mortgaged by her to defendant No. 4 and the father of defendants Nos. 1 to 3 in the year 1875 and that Rahim Bakhsh got a decree for redemption of the whole 6 annas share on the 24th of October, 1888. Thereafter he sold one 3 annas share to the same defendant No. 4 and the father of defendants Nos. 1 to 3 and his name has been entered subsequently in the khewat as the owner of the remaining 3 annas

share, which he redeemed. It does not, however, appear that he ever obtained possession. On the 11th of July, 1890, he executed a sale-deed of the remaining 3 annas share to one Sajjad Mirza, but it appears that this sale-deed never took effect. We are asked in appeal to reconsider the view taken by the lower courts as to this sale, but we are unable to see how it affects the appellants' case. All that can be said is that there was such a sale-deed, but it was never acted upon, for Sajjad Mirza, who has been examined as a witness, denies all knowledge of it, and there was certainly no entry made in the revenue papers in his favour. We take it, therefore, that this sale-deed was without effect and we are left with the position that the defendants-appellants have always remained in possession of the 3 annas share. It is true that they were formerly in possession as mortgagees, but their right as mortgagees came to an end with the redemption of the mortgage in the year 1888. We have to consider what is the nature of their possession since they ceased to be mortgagees: They themselves claimed mutation in the year 1926 on the ground that they were the heirs of Rahim Bakhsh and it is only now that they have failed to make good that claim that they have come forward with a plea that they should be held to have been in adverse possession. Had they been merely mortgagees holding on to the land after the mortgage was redeemed they could be held no doubt to be persons holding without title, and they could thus have acquired ownership by adverse possession as against Rahim Bakhsh himself as well as against his heirs. But this is not the case. This property is *bhaiyachara* property in which Rahim Bakhsh held a share amounting to 3 annas. The defendants themselves are also co-sharers in the village and have always been co-sharers along with Rahim Bakhsh. One of them also is the *lambardar*. There is no presumption that Rahim Bakhsh

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died on any particular date. He is dead now, since mutation proceedings of 1926 have established the fact, but until then he was a co-sharer and the defendants who were also co-sharers were cultivating his land in his absence. It was held by one of us in *Indarpal Singh v. Thakur Din Singh* (1) that a co-tenant out of possession starts with a presumption in his favour that the possession of the other co-tenant is not adverse but lawful. It is a principle of English law that possession is never considered adverse if it can be referred to a lawful title. [Appeal Cases (1912) 230] and in our opinion we should hold in the present case that the defendants-appellants have all along been in possession of this property on behalf of their co-sharer Rahim Bakhsh. There has been no ouster and no assertion of adverse possession. Even when the defendants-appellants themselves applied for mutation they applied as the heirs of Rahim Bakhsh. There is, therefore, no bar to the plaintiffs setting up their title to this property. They could not sue until Rahim Bakhsh was found to be dead and their cause of action arose, as they themselves state, when the defendants-appellants applied for mutation. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1924) 27 O. C., 77.