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evidence of the Raja himself in so far as it is admissible is of very little value. He did not even remember if the land was *parti* or a grove and although he attempted to help the defendants by writing a letter to the Court of Wards after the plaintiffs' lease was granted, and he ventured also to say that the land appeared to be *chiari*, he could only say that he had been told that the *ijazatnama* had been lost, and he was unable to state on what ground he held the land to be *chiari*. In my opinion the court of first instance was right and the lower appellate court was entirely wrong.

I allow this appeal set aside the order of the lower court and restore that of the court of first instance with costs throughout.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice A. G. P. Pullan.

* 1929 *August*, 23.

SAT NARAIN MISIR AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* DEPUTY COMMISSIONER, MANAGER, COURT OF WARDS, AJODHYA ESTATE (DEFENDANT-RESPONDENT.)*

Adverse possession—Tenant's possession, if can be adverse—Tanks—Fishing in tank, right of—Underproprietary rights—Exclusive right of fishing in tank, whether gives under-proprietary rights in the land of the tank—Pre-emption decree—Possession obtained under a pre-emption decree, if adverse—'Hostile possession' meaning of.

The possession of a tenant cannot amount to adverse possession and the mere fact that he was formerly village zamindar does not give him any title.

An exclusive right of fishing in a particular tank does not amount to a right in the land below the water and the

*Second Civil Appeal No. 102 of 1929, against the decree of Pandit Krishna Nand Pande, Subordinate Judge of Sultanpur, dated the 17th of December 1928, upholding the decree of Pandit Shiam Manohar Tewari, Munsif of Musafirkhana at Sultanpur, dated the 28th of July, 1928, dismissing the Plaintiffs' claim.

holder of such a right is not entitled to be considered an under-proprietor of that land.

Where the plaintiff's predecessors-in-interest went on transfering the grove in suit by mortgage and sale and the plaintiff finally got a decree for pre-emption and obtained *lakhal dehani* and continued in possession for over 12 years there can be no question that the plaintiff who obtained possession or recovered possession by the pre-emption decree obtained actual, physical and exclusive possession and that his possession became adverse possession. For possession to be adverse it must also be 'hostile' but the word hostile cannot be considered to mean that there must have been litigation on the subject between the taluqdar and the plaintiffs. It is sufficient if it is proved that the title is entirely opposed to the interests of the taluqdar, and that the latter, who must have been aware of the title so set up, "stood by and did nothing while the plaintiffs continued in possession in direct contravention of his alleged rights."

Barjor Singh v. *Sidh Nath* (1), and *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal* (2), relied on.

Mr. *Naimullah*, for the appellants.

The Assistant Government Advocate (Mr. *H. K. Ghose*), for the respondent.

PULLAN, J. :—This is a plaintiffs' appeal in a suit for underproprietary or other possession of certain plots against the taluqdar. The plaintiffs were ejected from some numbers by the Revenue Court and they then brought this suit in respect of these numbers and certain others. The suit was entirely dismissed by the courts below. The numbers may be divided into three groups; the old numbers 624 and 476 are tanks, No. 452 is a grove and the other numbers are agricultural land. As to the latter, the plaintiffs have no claim. They can only set up at best adverse possession, but such adverse possession is only that of a tenant, and the mere fact that they were formerly village zamindars does not give them any title.

As to the tanks it was never denied by the defendant that the plaintiffs had an exclusive right of fishing in

(1) (1926) 29 O. C., 395. (2) (1919) L. R., 46 I. A., 204 : 17 A. L. J., 1097.

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these tanks. This is the only right which was conceded to the predecessor-in-title of the plaintiffs by the settlement decree of 1872. An exclusive right of fishing does not amount to a right in the land below the water, and in my opinion, the plaintiffs are not entitled to be considered under-proprietors of that land, although had their claim to an exclusive right to fishing in the water been contested they would no doubt have been able to obtain a declaration in their favour in accordance with the settlement decree. But as their right was not denied, I agree with the courts below that they were not entitled to any decree of this nature.

There remains No. 452, now No. 484. At the time of the settlement decree of 1872 the plaintiffs' predecessor Bhawani Prasad obtained an entry in his favour as to three out of four groves, one of which was No. 452, but later the decree was amended in the year 1877 when it was ordered that the number not granted to Bhawani Prasad was No. 452 which was entered as belonging to one Bhandan Pande. Who Bhandan Pande was is not known, but he was described as a stranger and, therefore, he could not have been a member of the plaintiffs' family. The plaintiffs, therefore, were unable to prove that No. 452 belonged to them from the time of the settlement decree and they had to fall back on the second plea, which was raised in the plaint in respect of all the numbers, namely a plea of adverse possession. The lower courts have not done justice to the evidence on this subject. It is proved that at the time of the new settlement in 1893 this grove was described as being in the possession of a mortgagee from the mortgagor Bhawani Prasad. Consequently, in spite of the settlement decree of 1877, it appears that Bhawani Prasad, who was the plaintiffs' predecessor-in-title, was able to re-assert the claim in this grove which he had made in the year 1872. In 1897 Bhondu, who is the nephew of Bhawani Prasad, together with Pothi Ram, who was his own nephew,

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sold the grove No. 452 to one Mahabir. Mahabir in his turn sold the grove to a stranger in the year 1912 and Bindeshri Misir, who is the father of one of the plaintiffs and the nephew of Bhondu Misir, brought a suit for pre-emption and obtained a decree and *dakhal dihani*. This order of possession was given in the year 1914 and the plaintiffs have been in possession ever since.

It has been stated in argument that these facts are insufficient to establish a title by adverse possession in view of a ruling of this court reported in *Barjor Singh* v. *Sidh Nath* (1). In that ruling it was laid down that such possession had to be "actual, physical, exclusive, hostile and continued from the time necessary to create a bar under the statute of limitation." In this case there is in my opinion no question that the plaintiffs, who obtained possession or who recovered possession by a pre-emption decree, obtained actual, physical, exclusive and continued possession. The word hostile cannot be considered to mean that there must have been litigation on the subject between the taluqdar and the plaintiffs. It is sufficient if it is proved that the title is entirely opposed to the interests of the taluqdar, and that the latter, who must have been aware of the title so set up, "stood by and did nothing while the plaintiffs continued in possession in direct contravention of his alleged rights." These are the words used by their Lordships of the Privy Council in defining adverse possession in the case of *Arunachellam Chetty* v. *Venkatachlapathi Gurusvamigal* (2).

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The plaintiffs, therefore, have in my opinion established a title to the grove No. 452, and the title must be that which the vendor purported to sell in 1912 by means of the sale-deed for which they obtained a decree of pre-emption, seeing that the taluqdar has never attempted to contest that sale. I have read the sale-deed

(1) (1926) 29 O.C., 395. (2) (1919) 17 A.L.J., 1097-L.R., 46 I.A., 204.

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and it appears that the title was one equivalent to under-proprietary rights and has been described correctly by the plaintiffs as *dehdari*. The plaintiffs, therefore, are entitled in my opinion to a decree for *dehdari* rights in respect of grove No. 452, now No. 484 only, but their suit has been rightly dismissed in respect of the other numbers subject, as I have said, to their fishing rights in Nos. 624 and 476.

The appeal is thus partially dismissed and partially allowed, and proportionate costs will be allowed throughout.

Appeal partly allowed.

APPELLATE CIVIL.

August, 23.

Before Mr. Justice Bisheshwar Nath Srivastava.

ABDUL RAHMAN (OBJECTOR-APPELLANT) *v.* GAYA PRASAD (DECREE-HOLDER) AND ANOTHER (JUDGMENT-DEBTOR) RESPONDENTS.]*

Civil Procedure Code (Act V of 1908), Schedule III, rule 11 —Execution of decree—Attached property under control of Collector—Gift by judgment-debtor in favour of his sons, whether void or voidable—Muhammadan Law—Gift under Muhammadan law, essentials of.

The use of the word "incompetent" in rule 11 of Schedule III of the Code of Civil Procedure seems to show clearly that whilst the property is under the control of Collector the judgment-debtor is disqualified from entering into any transaction in contravention of the terms of that rule. The disqualification imposed by the rule is absolute in its nature, making transactions entered into by the judgment-debtor contrary to the provisions of rule 11 altogether void, and not merely voidable as against the Collector or persons claiming under him. Therefore rule 11 of schedule III is applicable not only to those cases in which a sale has actually been made by the Collector, but if the decree

*Execution of Decree Appeal No. 18 of 1929, against the order of Pandit Bishambhar Nath Misra, Subordinate Judge of Kheri, dated the 19th of January, 1929, upholding the decree of Babu Pratap Shankar Munsif of Kheri, dated the 5th of November, 1928.