APPELLATE CIVIL.

1930

April, 11.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty.

HALIM SHAH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* RAHIM BUX AND OTHERS (DEFENDANTS-RESPONDENTS).*

Adverse possession—Co-owners, co-sharers and tenants-in-common—Possession of one co-owner or co-sharer is to be presumed to be for benefit of all—Adverse possession among co-owners, co-sharers or tenants-in-common, essential elements for proof of—Rule of co-owners and co-tenants, whether applies to transferees of co-owners and co-tenants.

It is a well settled rule in this country that amongst co-owners, co-sharers and tenants-in-common the possession of one will be presumed to be for the benefit of all, and that in order to make such possession adverse there must be an open assertion of hostile title on the part of the person setting up adverse possession and overt acts of dispossession amounting to an ouster of the other co-owner. It does not affect the matter at all whether the parties are members of the same family or are co-heirs or not. The principle rests merely upon their being co-tenants or co-owners and should, therefore, apply to all co-tenants and co-owners irrespective of their being related as members of the family or not. A person who takes a transfer from a co-tenant or co-owner steps into the shoes of his transferor. When he takes the assignment he is clothed with all the rights and becomes subject to all the liabilities of his transferor. In short he becomes as much a co-tenant or co-owner as his transferor was before the transfer. This being the position there is no good reason for the rule applicable to co-owners and co-tenants not being applied to the transferee. *Charles Edward Victor Senaviratne Corea* v.

*Second Civil Appeal No. 195 of 1929, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rae Bareli, dated the 25th of February, 1929, affirming the decree of Kunwar Raghuraj Singh, Munsif, Dalmau, at Rae Bareli, dated the 22nd of November, 1928.

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Mahatantrigey Iseris Appuhamy (1), *Aloysia Muttunayagam* v. *Margaret Brito* (2), *Robert Watson and Co.* v. *Ram Chand Dutt* (3), *Maharajah Sir Luckmeswar Singh Bahadur*, K.C.I.E., v. *Sheikh Manowar Hossein* (4), *Sheoraj* v. *Ajudhiya* (5), *Bashir Ahmad* v. *Parshotam* (6), *Jagendra Nath Mukherjee* v. *Rajendra Nath Bhattacharjee* (7), and *Venkatarama Iyer* v. *Subramania Sastry* (8) relied on *Varatha Pillai* v. *Jeevarathnmal* (9), *Udmi* v. *Maru Ma'l* (10), and *Bhavrao* v. *Rakhmin* (11) distinguished. *Jogendra Nath Rai* v. *Badeo Das* (12), *Abdul Gafur* v. *Ashmath Bibi* (13), *Anwar* v. *Kishen Singh* (14), and *Mahomed Ali Khan* v. *Khajah Abdul Gunny* (15) referred to.

Messrs. *Akhtar Husain* and *Kalbe Abbas*, for the appellants.

Messrs. *Haider Husain* and *Ali Zaheer*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ.:—This is a second appeal by the plaintiffs against the judgment and decree dated the 25th of February, 1929, passed by the Subordinate Judge of Rae Bareli affirming the decision, dated the 22nd of November, 1928, passed by the Munsif of Dalmau in that district. It arises out of a suit for a declaration that the plaintiffs are owners to the extent of two-thirds in the half share of Rajab Ali and to the extent of one-fourth in the remaining half share of Ashraf Ali in village Chak Malehra, pargana Rokha, tahsil Salon, district Rae Bareli. Both parties are agreed that Chak Malehra which has an area of 21 bighas, 8 biswas, was owned by two persons Rajab Ali and Ashraf Ali in equal moieties. The plaintiffs have now abandoned their claim in respect of the one-fourth out of the moiety which was owned by Ashraf Ali. The claim is now confined to two-thirds share in the moiety which

(1) (1912) A.C., 230.
(2) (1918) A.C., 895.
(3) (1890) L.R., 17 I.A., 110.
(4) (1891) L.R., 19 I.A., 48.
(5) (1929) I.L.R., 4 Luck., 503: 6 O.W.N., 213.
(6) (1929) 6 O.W.N., 536.
(7) (1922) 26 C.W.N., 890.
(8) (1923) 78 I.C., 37.
(9) (1918) L.R., 46 I.A., 285.
(10) (1924) 6 L.L.J., 567.
(11) (1898) I.L.R., 23 Bom., 137 (F. B.)
(12) (1907) I.L.R., 35 Cal., 961.
(13) (1919) 54 I. C., 385.
(14) (1922) 71 I. C., 171.
(15) (1883) I.L.R., 9 Cal., 744.

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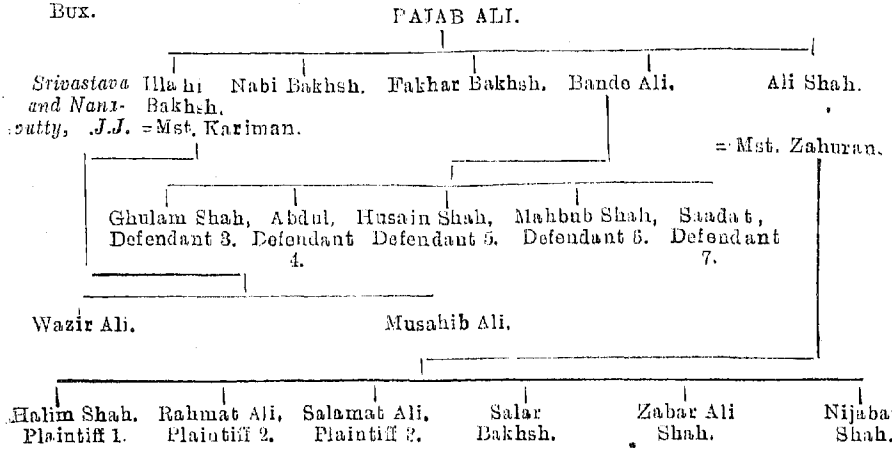
belonged to Rajab Ali. It will be convenient to give a short pedigree so far as it is admitted by both parties.



It will appear from the above that plaintiffs Nos. 1 to 3 are the sons of Ali Shah. The fourth plaintiff Qudrat Ali Shah claimed to be the son of Fakhar Shah, but his parentage was disputed. For the purpose of this appeal it is not necessary to go into details as regards the various steps of succession set up by the plaintiffs. It is enough to say, as stated before, that they claimed, on the pedigree set forth above, that they owned and were in possession of a two-thirds share in the moiety which belonged to Rajab Ali. The claim was resisted by defendants Nos. 1 and 2 who claimed to have acquired by purchase the entire Chak Malehra from the various persons mentioned in the pedigree. They purchased the whole of the moiety share which belonged to Ashraf Ali under two sale deeds, one dated the 29th of June, 1902, and the other dated the 30th of September, 1902. As regards the share of Rajab Ali they relied upon a sale deed, dated the 12th of July, 1902, executed in their favour by Bande Ali Shah (son of Rajab Ali), Salar Bakhsh and Zabar Ali Shah (major sons of Ali Shah), Musammat Zahuran as mother and guardian of her minor sons, Halim Shah, Rahmat Shah and Salamat Shah (plaintiffs Nos. 1 to 3)

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and Najabat Shah (deceased) and Musammat Kariman as mother and guardian of her minor son Musahib Ali. They claimed that they had thus become owners of the entire Chak Malehra under the sale deeds above referred to. They further claimed to have acquired title to the property by adverse possession. Several other defences were also raised, but it is not necessary to mention them. The plaintiffs denied the sale deed, dated the 12th of July, 1902, set up by the defendants and challenged its validity.

The trial court relying on the decision of their Lordships of the Judicial Committee in *Imambandi* v. *Mutsaddi* (1), held that Musammat Zahuran was not the legal guardian and was not competent to transfer the share of her minor sons and the sale deed was therefore not binding upon the plaintiffs. He, however, found that since the execution of sale deed in question, defendants Nos. 1 and 2 had remained in proprietary and adverse possession of the plaintiff's share. He accordingly dismissed the suit. The plaintiffs appealed impugning the finding of the trial court on the question of adverse possession. The learned Subordinate Judge held that as the defendants Nos. 1 and 2 were strangers to the family so their possession must be deemed to be adverse to the plaintiffs. He, therefore, agreed with the trial court in its finding on the question of adverse possession and upheld the Munsif's order dismissing the suit.

The plaintiffs have come here in second appeal. They have challenged the correctness of the finding of the courts below about defendants Nos. 1 and 2 having acquired good title in respect of the plaintiffs' share by adverse possession. Their contention is that the courts below ought to have held that the position of defendants Nos. 1 and 2 in relation to the plaintiffs-appellants was that of tenants-in-common and that they had entirely

(1) (1918) I.L.R., 45 Cal., 878.

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failed to make out any case of ouster, nothing short of which could entitle them to succeed on their plea of adverse possession. Mr. *Hyder Husein*, the learned counsel for the defendants-respondents, met this by contending that the presumption arising in favour of a co-tenant that the possession of the other co-tenant is not adverse had no application in the present case, inasmuch as defendants Nos. 1 and 2 were not the original co-owners but only transferees from a co-owner. He further contended that if the theory of non-adverse possession was held applicable, even then there was sufficient evidence to establish ouster.

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We are of opinion that there is no efficacy in either of the contentions urged on behalf of the respondents and that the appeal must succeed. The rule of the English Common Law was that in case of tenants in common the possession of one of them was deemed to be the possession of them all. It is true that since 1833 this rule has been abolished in England by section 12 of 3 and 4 William IV, c. 27, but this cannot be any reason for restricting the application of the rule in this country. The Legislature here has not thought fit to enact any provision analogous to section 12 of the English Statute, and looking to the conditions obtaining in this country it is not difficult to imagine good reasons for this. Be it as it may, it is a well settled rule in this country that amongst co-owners, co-sharers and tenants-in-common the possession of one will be presumed to be for the benefit of all, and that in order to make out such possession as adverse there must be an open assertion of hostile title on the part of the person setting up adverse possession and overt acts of dispossession amounting to an ouster of the other co-owner. See *Charles Edward Victor Seneviratne Corea* v. *Mahatantrigey Iseris Appuhamy* (1) and *Aloysia Muttunayagam* v. *Margaret Brito* (2).

(1) (1912) A.C., 230. (2) (1918) A.C., 895.

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It does not affect the matter at all whether the parties defendants-respondents that the principle above referred to must be confined in its application to persons who are members of the same family or co-heirs and that it cannot apply to a stranger such as a transferee or an assignee from a co-owner. It is contended that the possession of a transferee must as a rule be considered to be adverse like that of any other stranger. We find ourselves unable to accede to this argument. It may be that in many of the cases in which this question arose for consideration the parties formed members of the same family. But we can see no reason for confining the application of the rule to the case of co-heirs or of members of the same family. It is based upon the principle that *prima facie* there is no hostility between co-owners and the possession of one is not inconsistent with the rights of the others. As remarked by Lord MACNAGHTEN in *Corea* v. *Appuhamy* (1) :—

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> "The principle recognized by WOOD, V. C., in *Thomas* v. *Thomas* (2) holds good: 'Possession is never considered adverse if it can be referred to a lawful title'."

It does not affect the matter at all whether the parties are members of the same family or are co-heirs or not. The principle rests merely upon their being co-tenants or co-owners and should therefore apply to all co-tenants and co-owners irrespective of their being related as members of the same family or not. A person who takes a transfer from a co-tenant or co-owner steps into the shoes of his transferor. When he takes the assignment he is clothed with all the rights and becomes subject to all the liabilities of his transferor. In short he becomes as much a co-tenant or a co-owner as his transferor was before the transfer. This being the position, we fail to see any good reason for the rule applicable to co-owners and co-tenants not being applied to the transferee.

(1) (1912) A.C., 230. (2) (1855) 2 K. & J., 79 (83).

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The learned counsel for the defendants-respondents has relied upon a number of cases in support of his contention. The first case cited is *Varatha Pillai* v. *Jeevarathammal* (1). The facts of this case are quite different from those of the present case, and the principle enunciated by their Lordships of the Privy Council, namely, that where a person has had such possession of land as to amount to an ouster of the two owners, each being owner of a moiety, and before the expiration of the statutory period of limitation, succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety although he has become jointly interested with that other, has no application in this case. But reliance has been placed upon a passage in their Lordships' judgment in which their Lordships referring to the rule that the possession of one of several co-parceners, joint tenants or tenants in common is the possession of the others, observed as follows :—

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> "Whether this rule is applicable to sharers in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purposes of the present case to decide; for upon the facts of the case the rule has no application."

Their Lordships having expressly left the question open we are unable to make any inference from these observations in support of the defendants' contention. In *Udmi* v. *Maru Mall* (2) Mr. Justice MOTI SAGAR observed as follows :—

> "But I fail to understand how a transferee or an assignee can, by the mere fact of transfer or assignment, become a co-sharer if his rights as such are denied by the other co-sharers."

(1) (1918) L.R., 46 I.A., 285. (2) (1924) 6 L.L.J., 567.

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These observations must be read in the light of the facts of the case. The plaintiff in this case claimed possession on the basis of a sale deed executed in his favour by one Lalji. The defendants who were the co-sharers denied that Lalji had any share. The case therefore is quite distinguishable. In *Jogendra Rai* v. *Baldeo Das* (1) their Lordships of the Calcutta High Court remarked that—

> "The fundamental rule is that the entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful and does not imply hostility as would be the possession of a mere stranger."

These remarks do not support the defendants' contention. Reference to a "mere stranger" cannot be read as applying to a transferee from a co-owner.

In *Bhavrao* v. *Rakhmin* (2) it was held that article 127 of schedule II of the Limitation Act (XV of 1877) does not apply except in cases of members of a joint family, and that where an alienee from a co-parcener had been in possession for over twelve years, a claim for partition against such alienee would be barred by limitation under article 144 of the Limitation Act. We can unhesitatingly agree with the opinion of their Lordships of the Bombay High Court to the effect that the possession of the alienees must be regarded as adverse to their alienors. We can also understand the position that in the case of a Hindu co-parcenery the possession of an alienee who is a complete stranger may be treated as

(1) (1907) I.L.R., 35 Cal., 961. (2) (1898) I.L.R., 23 Bom., 137 F. B.

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adverse to the other co-parceners. Then in one place their Lordships remarked as follows :—

> "The inconvenience of a contrary ruling to that which we have expressed is shown by the practice which prevails in the Ratnagiri district from which these appeals come."

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This shows that their Lordships' view was also influenced to some extent by local considerations. Under the circumstances we think that this case also is distinguishable and find ourselves unable to regard it as an authority for treating the possession of a transferee from a tenant-in-common as adverse to the other co-tenants. This case has been followed by a Bench of the Madras High Court in *Abdul Gafur* v. *Ashamath Bibi* (1) and by a single Judge of the Lahore High Court in *Anwar* v. *Kishen Singh* (2). We have been unable to discover in either of these decisions any reasoned arguments justifying the extension of the principle enunciated in *Bhavrao* v. *Rakhmin* (3) to the case of co-tenants.

On the contrary there are numerous decisions to be found in the reports in which a transferee from a co-tenant has been treated on the same footing as the original tenant in the matter of the rules governing relations between tenants-in-common. In *Robert Watson and Co.* v. *Ram Chand Dutt* (4) the rule that one tenant in common cannot be restrained from cultivating a portion of the land not actually used by another, was applied to the transferees. In *Maharajah Sir Luchmeswar Singh Bahadoor, K.C.I.E.*, v. *Sheikh Manowar Hossein* (5) Lord HOBHOUSE in the course of his judgment observed as follows :—

> "The Subordinate Judge quotes a passage from a decision in the case of *Mahomed Ali Khan* v. *Khajah Abdul Gunny* (6), in which Mr. Justice WILSON points out that many

(1) (1919) 54 I.C., 385.
(2) (1922) 71 I.C., 171.
(3) (1898) I.L.R., 23 Bom., 137
(4) (1890) L.R., 17 I.A., 110.
(5) (1891) L.R., 19 I.A., 48.
(6) (1883) I.L.R., 9 Cal., 744.

acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction. Whether the facts found in this case would, as between strangers, raise the inference of adverse possession or of enjoyment of the ferry as an easement and as of right, is a question which need not be discussed, for the parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession."

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This was a case of a purchaser from a co-sharer and the observations of their Lordships quoted above leave no doubt that for the application of these principles a transferee cannot be treated upon a different footing from the transferor. In *Sheoraj* v. *Ajudhya* (1) a Bench of this Court consisting of Mr. Justice HASAN, A. C. J., and Mr. Justice PULLAN remarked as follows :—

"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 after execution of their sale deed, we are not prepared to find that their possession became adverse against the other co-sharers."

This is a case directly in point. The rule that the possession of a co-sharer is presumed to be non-adverse against the other co-sharers was applied to transferees.

(1) (1929) 6 O.W.N., 213.

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Bashir Ahmad v. *Parshotam* (1), is another case of this Court decided by the late Mr. Justice MISRA which affords another instance in support of the same view. We might also refer to two cases, one decided by the Calcutta High Court and the other by the Madras High Court, which support the view taken by us. In *Jogendra Nath Mukerjee* v. *Rajendra Nath Bhattacharjee* (2) it was held that "to prove dispossession of one co-sharer by another it must be shown that there was exclusion or ouster to the knowledge of the former, and this principle is applicable to all cases of co-owners and is not confined to cases where the co-owners were persons who at one time formed members of a family." Similarly in *Venkatarama Iyer* v. *Subramania Sastry* (3) it was decided that "possession by one owner is not ordinarily adverse to the other co-owners. Not only possession by one co-owner, but also exclusion of the others or a denial of their title to their knowledge is essential to render such possession adverse. The same principle is applicable to the case of a transferee from one of several co-owners. Where he prescribes as a co-sharer, he must prove exclusion or denial of title as against the other co-sharers."

Having discussed the law, let us take stock of the facts showing the position of the defendants Nos. 1 and 2. Admittedly Rajab Ali and Ashraf Ali each held an undivided half share in Chak Malehra as tenants-in-common. The defendants Nos. 1 and 2 purchased one half of Ashraf Ali's share on the 29th of June, 1902. They thus became co-sharers to the extent of one-fourth in the whole chak by virtue of this purchase. Subsequently on the 12th of July, 1902 they obtained a sale deed in respect of Rajab Ali's half share. This sale deed was perfectly valid to the extent of the interest of Bande Ali, Salar Bakhsh and Zabar Ali Shah who were of age, but it was invalid *qua* the share of the plaintiffs Nos. 1

(1) (1921) 6 O.W.N., 536. (2) (1922) 26 C.W.N., 890.
(3) (1923) 78 I.C., 37.

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and 3 who were minors. Thus it is clear that before they obtained this sale deed they had already become co-sharers in the chak, and that even under this sale deed they acquired the position of co-sharers to the extent of the share of the vendors who were of age. Under these circumstances the defendants Nos. 1 and 2 cannot in any sense be regarded as strangers. It being no longer disputed that the sale in respect of the share of plaintiffs Nos. 1 to 3 was invalid the position of defendants Nos. 1 and 2 in relation to the said plaintiffs was clearly that of co-owners. The lower courts are therefore wrong in holding that their possession must be deemed to be adverse to the plaintiffs.

Next we have to consider whether the defendants-respondents have succeeded in making out a case of ouster against the plaintiffs. The learned counsel for the defendants-respondents relied upon the fact that mutation in respect of the entire chak was made in their favour on the basis of the sale deeds already referred to, and that the names of defendants Nos. 1 and 2 have all along been recorded as proprietors in the *khewats*. In our opinion it cannot have any effect as against the plaintiffs who were admittedly minors when the mutation was made. If the sale deed is invalid mutation cannot invest the defendants with any better rights. Next, reference was made to exhibits A41 to A45 which show that the defendants obtained decrees for arrears of rent against certain tenants. This is quite consistent with their being co-owners and does not afford any evidence of adverse possession against the plaintiffs. Lastly, emphasis was laid upon the fact that Salar Bakhsh, the brother of the plaintiffs Nos. 1 to 3, was recorded as a tenant of 5 bighas odd land in this chak, that exhibits A73 to A75 are *siahas* showing that the defendants realized rent, and that A35 and A37 are decrees for arrears of rent passed in respect of the said land. When mutation in respect of the entire chak had been

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made in favour of the defendants-respondents it is obvious that any land in the possession of Salar Bakhsh or the plaintiffs could not be recorded as their *sir* or *khudkasht* and they could only be recorded as tenants in respect of them. In any case it is worthy of note that exhibits A73 to A75 are *siahas* for 1333 and 1334 Fasli, and the decrees A35 to A37 are only of the years 1920 and 1921. There is absolutely no evidence to show that the defendants realized any rent in respect of the said land at any time before twelve years of the present suit. The same remarks apply to exhibit A89, the statement of Halim Shah made in a suit for arrears of rent instituted in 1921. Lastly, reference was also made to the oral evidence of three witnesses, D. W. 7, D. W. 10 and D. W. 12. This evidence also does not carry us very far, but even if it did, we are not prepared upon the oral evidence of these three witnesses to hold that a case of ouster has been established. We must therefore repel this contention also.

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The result therefore is that the plaintiffs Nos. 1 to 3, Halim Shah, Rahmat Ali and Salamat Ali, are entitled to the declaration claimed in respect of their share in the moiety which was owned by Rajab Ali. But it is not possible for us to determine the exact share to which the plaintiffs are entitled without deciding issues 1(*a*), (*b*), (*c*) and (*d*) which were left undecided by the trial court. Similarly, before the final disposal of the case it is also necessary to determine the pleas embodied in issues 6(*a*) and (*b*) which were also left undetermined by the trial court. We, therefore, remand the case to the trial court for a finding on issues 1(*a*), (*b*), (*c*) and (*d*) and 6(*a*) and (*b*). The findings on these issues should be sent to this Court within two months. The parties will not be allowed to adduce any additional evidence. Ten days from the date of the findings will be allowed for objections.

Case remanded.