APPELLATE CIVIL.

Before Addison and Currie JJ.

NARSINGH DAS (DEFENDANT) Appellant

versus

GOKAL CHAND AND ANOTHER (PLAINTIFFS) Respondents.

1930

May 1.

Civil Appeal No. 1937 of 1924.

Adverse possession—between Co-owners—proof of—non-participation in profits and use — not sufficient.

Held, that in the case of co-owners, in the absence of an *open* assertion of a hostile title by one, to the knowledge of the others, there can be no ouster; and that *non*-participation in the profits by one and exclusive occupation by the other do not establish adverse possession.

Corea v. *Appuhamy* (1), *Thomas* v. *Thomas* (2), *Hardit Singh* v. *Gurmukh Singh* (3), *Kailash Chandra Mitra* v. *Brojendra Kishore* (4), *Lachmeshwar Singh* v. *Manowar Hossein* (5), *Muhammad Bakhsh* v. *Fateh Muhammad* (6), *Mussammat Jano* v. *Narsingh Das* (7), *Kumarappa Chettiar* v. *Saminatha Chettiar* (8), *Balaram Guria* v. *Syama Charan* (9), *Jagannath Marwari* v. *Chandni Bibi* (10), *Shahchuni* v. *Basir* (11), *Biswanath Chakravarti* v. *Rabija Khatun* (12), and *Jam Budha* v. *Dasu Ram* (13), followed.

First appeal from the decree of Thakar *Lalit Chand, Assistant Collector, 1st Grade, sitting as Civil Court, Lahore, dated the 14th April 1924, granting the plaintiffs a declaration as prayed for.*

JAGAN NATH AGGARWAL, TIRATH RAM, RUP RAM, for MOOL CHAND, for Appellant.

G. C. NARANG and FEROZE-UD-DIN, for Respondents.

(1) 1912 L. R. A. C. 230.
(2) (1855) 2 Kay & J. 79, 83.
(3) 64 P. R. 1918 (P. C.).
(4) (1925) 29 Cal. W. N. 1000.
(5) (1892) I.L.R. 19 Cal. 253 (P.C.).
(6) (1929) I. L. R. 10 Lah. 849.
(7) (1930) I. L. R. 11 Lah. 29.
(8) (1919) I. L. R. 42 Mad. 431.
(9) (1921) 60 I. C. 298.
(10) (1922) 67 I. C. 31.
(11) (1921) 64 I. C. 613.
(12) (1929) I. L. R. 56 Cal. 616.
(13) (1927) 106 I. C. 488.

1930

NARSINGH DAS v. GOKAL CHAND.

ADDISON J.

ADDISON J.—The defendant *Rai Bahadur Lala* Narsingh Dass applied to the Revenue authorities for partition of field No. 454, situated in *Qila* Gujar Singh, Lahore City, which is entered in the revenue papers as belonging half to him and half to the plaintiffs, *Lala* Gokal Chand and his brother. The Assistant Collector, 1st Grade, rejected the application and directed the defendant to bring a regular civil suit to establish his title to a half share in the land. On appeal the Collector set aside this order and directed that partition should be allowed unless the plaintiffs were able to establish their exclusive title by means of a civil suit. As a result they instituted the suit now under appeal for a declaration that the land in suit, comprising field No. 454, in area 2 *kanals*, 2 *malas* and 14 square feet, was exclusively owned and possessed by them and that it was not liable to partition at the instance of the defendant, who had no right or concern with it. It was claimed that the plaintiffs' father purchased the land on the 5th April 1893, and that it was owing to some mistake that the defendant was shown in the revenue papers as the owner of the half share. It was further claimed that, even if the plaintiffs failed to establish their title in the whole area of 2 *kanals* 2 *marlas* and 14 square feet, the defendant had relinquished possession and had been out of possession for more than 12 years, while the plaintiffs had been in adverse possession for more than 12 years. The Assistant Collector, 1st Grade, under the provisions of section 117 (1) of the Land Revenue Act, elected to try the suit himself, as though he were a civil Court.

The defendant denied that the plaintiffs' father purchased more than a half share in the plot and

pleaded that he had purchased the other half share on the 16th March 1907. It was denied that the plaintiffs' possession had been adverse for more than 12 years or that the defendant was out of possession. The Assistant Collector, 1st Grade, acting as a civil Court, held that the parties were owners of the land in equal half shares but that plaintiffs had been in adverse possession for more than the statutory period. He accordingly decreed the claim and the defendant has appealed.

The Assistant Collector recognised that with regard to co-owners of joint property the law was that there should be an ouster and adverse possession after ouster for more than twelve years before one co-owner could succeed against another. He then went on to hold that the plaintiffs alone had used and repaired the well on the plot in question and that the tenants of the plaintiffs' house, which adjoins the plot, used the well for irrigating the garden round the house and also used the land attached to the well apparently as part of the compound of the house, *i.e.*, for sitting out and for such like purposes. The Assistant Collector further held that the defendant had not succeeded in rebutting the plaintiffs' evidence regarding exclusive use and that the plaintiffs had been in exclusive possession for more than 12 years. He admitted that there was no direct proof of an overt ouster but he thought that ouster could be inferred from the circumstances of the case, namely, because defendant knew of the user of the well on the plot by the plaintiffs' tenants of the adjoining house and yet made no attempt to get into possession.

Such is the judgment and though the Assistant Collector directed himself correctly as to ouster being necessary, he in the end accepted the doctrine that

1930

NARSINGH DAS v. GOKAL CHAND.

ADDISON J.

common have unity of possession just as much as joint tenants and a tenant in common is entitled to possession of every part of the estate [see *Kailash Chandra Mitra* v. *Brojendra Kishore* (1)]. In *Lachmeshwar Singh* v. *Manowar Hossein* (2) the defendant incurred certain expenditure on joint property so as to produce more profit to himself, but their Lordships of the Privy Council held that the question of any exclusive right in him did not arise; for, the parties being co-owners, the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession.

The same view was taken in *Muhammad Bakhsh* v. *Fateh Muhammad* (3) and *Mussammat Jano* v. *Narsingh Das* (4), where much of the case law was discussed. I shall refer briefly to certain decisions, not noticed in these two authorities. In *Kumarappa Chettiar* v. *Saminatha Chettiar* (5), it was held that though a member of a joint Hindu family was divided in status, that is, was a tenant in common with the others, he was not in law excluded or ousted from those portions of the property which were enjoyed by the others, however long their enjoyment had been. In *Balaram Guria* v. *Syama Charan* (6), the Calcutta High Court held that as the possession of one co-owner did not imply hostility and was rightful there was no presumption that such possession was adverse to the other co-owners; for, ordinarily, the possession of the one was for the benefit of all. In *Jagannath Marwari* v. *Chandni Bibi* (7), the same Court held that to establish adverse possession as between co-

(1) (1925) 29 Cal. W. N. 1000.
(2) (1892) I.L.R. 19 Cal. 253 (P.C.).
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(5) (1919) I. L. R. 42 Mad. 431.
(6) (1921) 60 I. C. 298.
(7) (1922) 67 I. C. 31.

sharers there must be evidence of an open assertion of a hostile title by one to the knowledge of the others and that mere non-participation in the profit by one party and exclusive occupation by the other are not conclusive. See also *Shahchuni* v. *Basir* (1), *Biswanath Chakravarti* v. *Rabija Khatun* (2), and *Jam Budha* v. *Dasu Ram* (3).

The plaintiffs purchased a half share in the plot in dispute at the same time as they purchased the adjoining house. At that time there were two Persian wheels on the well on the plot and plaintiffs and their tenants have continued to use one of these wheels for irrigating the garden of the adjoining house as they had a perfect right to do. It makes no difference that the other wheel fell into disrepair and was not used by the defendant, who did not require it for any particular purpose then, or that the plaintiffs alone kept the wheel they were using in repair at their own expense. Defendant was never asked to contribute to the cost, and plaintiffs never set up any title adverse to the defendant. The plot in dispute, though it lies alongside the compound of the house, is separated from it by a line of trees. This is admitted by Dr. Mirza Yakub Beg, the plaintiffs' witness. On the authorities, therefore, the plaintiffs' possession must be referred to their lawful title and they cannot be allowed to assert that they have acquired title by prescription on the ground that the defendant has not been in possession for some 15 years before suit and that they had a secret intention to exclude him completely from possession. I would accept the appeal and dismiss the suit with costs throughout.

CURRIE J.—I agree. CURRIE J.

N. F. E.

Appeal accepted.

(1) (1921) 64 I. C. 613. (2) (1929) I. L. R. 56 Cal. 616.
(3) (1927) 106 I. C. 488.