Before Mr. Justice Brett and Mr. Justice Mookerjee.

1904
July 6.

UJALBI BIBI

v.

UMAKANTA KARMOKAR.*

Limitation—Adverse possession—Co sharer—Joint property.

Possession or occupation of joint property by one co-sharer does not constitute adverse possession against any other co-sharer, until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former.

Baroda Sundari Deby v. *Amoda Sundari Deby*(1) and *Ittappan* v. *Manavikrama*(2) followed.

SECOND APPEAL by the plaintiff No. 1, Ujalbi Bibi.

One Ataulla, owner of the *jote* in dispute, died in 1259 B.S., leaving behind him his widow Bhendar Bibi and two daughters, Amirannessa and Ujalbi, the plaintiff No. 1. Amirannessa was married to one Amirulla, and died in 1284 B.S., leaving two daughters, Rahimannessa and Karimannessa, the plaintiffs Nos. 2 and 3. Amirulla subsequently died and Bhendar Bibi died in 1302 B.S.

Uma Kanta Karmokar, the defendant No. 1, took a mortgage of the disputed property from Amirulla and Enayutulla, the defendant No. 3 and husband of the plaintiff No. 2, and in execution of a decree obtained on his mortgage, purchased it on the 7th September 1888.

The plaintiffs sued to recover from the defendant No. 1 possession of 14¼ annas share of the disputed *jote* as heirs at law of Ataulla and his widow Bhendar Bibi. The defendant No. 1 contended that Ataulla was never the owner of the *jote*, that it was

* Appeal from Appellate Decree No. 282 of 1902, against the decree of Aswini Kumar Guha, Subordinate Judge of Rungpore, dated Sept. 20, 1901, modifying the decree of Annada Prosad Bagchi, Munsif of Rungpore, dated Feb. 25, 1901.

(1) (1898) 3 C. W. N. 774. (2) (1897) I. L. R. 21 Mad. 153, 166.

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the absolute property of Amirulla, that the plaintiffs' claim was barred by limitation, and that at any rate they were not entitled to the share claimed.

The Munsif found that the *jote* belonged to Ataulla, that the defendant No. 1 acquired nothing by his purchase, that the suit was not barred by limitation, and accordingly decreed the suit in respect of $\frac{2}{3}\frac{2}{3}\frac{3}{4}$ths share of the disputed *jote*, which he found was the share, to which the plaintiffs were entitled.

On appeal by the defendant No. 1, the Subordinate Judge held that the claim of the plaintiff No. 1, in so far as it related to the share she had inherited from her father, was barred by limitation, inasmuch as she had no possession of the property in dispute within 12 years before her mother's death in 1302B.S., and as Amirulla, who lived in Ataulla's homestead and used to look after the property on behalf of his mother-in-law and his wife, held it adversely to the said plaintiff for over 12 years. With regard to the other shares claimed, he held that the suit was not barred by limitation, and passed a modified decree accordingly.

Babu Nalini Ranjan Chatterjee, for the appellant, contended that the mere fact that Amirulla held possession of the property on behalf of his wife and mother-in-law for over 12 years would not make such possession adverse to the appellant, unless any adverse right was set up to her knowledge. The Munsif found that the appellant, after the death of her first husband, lived in her father's homestead with her mother until her death, which homestead stood within the disputed *jote*. The appellant was a co-owner with her mother and sister in the property left by her father, and in the circumstances the possession could not be adverse to her. The question as to whether possession is adverse or not is a mixed question of law and fact: *Lachmeswar Singh* v. *Manowar Hossein*(1). See also *Hari* v. *Maruti*(2) and *Baroda Sundari Deby* v. *Annoda Sundari Deby*(3). [MOOKERJEE J. The case of *Ittappan* v. *Manavikrama*(4) supports your contention.]

Babu Mohini Mohan Chakravarti, for the respondents, contended that the question of adverse possession was concluded by the

(1) (1891) I. L. R. 19 Calc. 253.
(2) (1882) I. L. R. 6 Bom. 741.
(3) (1898) 3 C. W. N. 774.
(4) (1897) I. L. R. 21 Mad. 153, 166.

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findings of fact of the Lower Appellate Court. At any rate, there should be a remand for a finding on the question whether the appellant had any knowledge of the exclusion.

BRETT AND MOOKERJEE JJ. A certain *jote* belonged to one Ataulla, and the plaintiff No. 1, who is his daughter, and the plaintiffs Nos. 2 and 3, who are his granddaughters through a daughter, brought the suit for a declaration of their title to 14 annas 5 gundas share of the *jote* and to recover possession from the defendant No. 1, who claimed the property as mortgagee-purchaser from Amirulla, the husband of the sister of plaintiff No. 1, (who is also the mother of the plaintiffs Nos. 2 and 3), and who denied that the *jote* in question ever belonged to Ataulla.

Both the Courts below have found that the *jote* belonged to Ataulla, and not to Amirulla, and this finding is not contested in this appeal.

It has, however, been pleaded on behalf of the defendants that the suit was barred by limitation.

The first Court has held that the suit is not barred so far as the shares of all three plaintiffs are concerned.

The Lower Appellate Court has held that the suit is not barred so far as the shares of plaintiffs Nos. 2 and 3 are concerned, and so far as the share of the plaintiff No. 1 inherited from her mother is concerned, but that the claim of plaintiff No. 1 so far as it is based on the share derived from her father is barred.

The Court of first instance decreed the suit in favour of the plaintiffs in the following manner. It found that the share to which the plaintiff No. 1 is entitled was $\frac{4}{9}\frac{7}{3}\frac{7}{6}$, and the share to which the plaintiffs Nos. 2 and 3 were entitled was $\frac{1}{9}\frac{9}{3}\frac{2}{6}$. The Lower Appellate Court has modified the decree of the Court of first instance by reducing the share of the plaintiff No. 1 to $\frac{3}{9}\frac{6}{3}\frac{1}{6}$.

The plaintiff No. 1 has appealed. The only ground on which the Lower Appellate Court appears to have held that the plaintiff No. 1's right to the share inherited from her father was barred by limitation was that, after the death of Ataulla, Amirulla had been in possession of the *jote* as manager of the widow of Ataulla and for his own wife, that in consequence he had held the property on

behalf of the widow and his wife adversely to the plaintiff for more than 12 years, and so her claim was barred by limitation. It has, however, been pointed out on behalf of the appellant that, after the death of Ataulla, the plaintiff was living in the house of her mother, the widow of Ataulla, and her sister, the wife of Amirulla, and it is contended under these circumstances that it cannot be held that, while she was living in the house on the *jote* and was being supported out of the profits of the property, the possession of Amirulla, even though he was managing the property on behalf of his wife and her mother, was adverse to plaintiff No. 1. On the death of her father there can be no doubt that the plaintiff No. 1 succeeded with her mother and her sister as co-sharers to his property. There is also no doubt that the possession or occupation of the property by one co-sharer does not constitute adverse possession against the other co-sharer: see *Baroda Sundari Deby* v. *Annoda Sundari Deby*(1). The same rule has been laid down by the Madras High Court in the case of *Ittappan* v. *Manavikrama*(2). The rule is there stated to be this:—"Consequently sole occupation by one tenant in common is *primâ facie* not inconsistent with the right of any other tenant in common. And in such cases there is no ouster or adverse possession, until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances."

In this case it has not been suggested that there had been any assertion of any hostile title by Amirulla, and the mere fact that he was managing the property on behalf of two of the co-owners would not constitute adverse possession against the other co-sharer.

We think therefore that the Lower Appellate Court has erred in holding that the plaintiff's claim to the share inherited from her father was barred by limitation. We accordingly set aside the findings of the Lower Appellate Court as regards the share which the plaintiff No. 1 inherited from her father, and restore the findings of the Court of first instance.

It has, however, been pointed out to us that there has been a small error in the calculation by which $\frac{4}{320}$ too much has been

(1) (1898) 3 C. W. N. 774. (2) (1897) I. L. R. 21 Mad. 153, 166.

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allowed to the plaintiff on account of her mother's share. The learned vakil for the appellant admits that this error has been committed, and the decree of the Court of first instance will therefore be restored with this modification that the share to which the plaintiff No. 1 is entitled will be declared to be $\frac{473}{936}$ instead of $\frac{477}{936}$.

We therefore decree the appeal with this slight modification with costs.

Appeal allowed.

M. N. R.