

(1907) 12 AHC CK 0002
In the Allahabad High Court

Ahmad Husain

APPELLANT

Vs

Ismdar Khan and Others and Harib-Ullah Khan and Others

RESPONDENT

Date of Decision : 21-12-1907

Acts Referred:

Citation : (1908) ILR (All) 119

Hon'ble Judges : Banerji, J;Aikman, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Banerji and Aikman, JJ.—This appeal and the connected appeal No. 997 arise out of a suit brought by the plaintiff Ahmad Husain for possession of 9 bighas and odd biswas of land, being three-fifths of 15 bighas and odd, and for mesne profits. The said land forms part of a larger quantity of land, which was the holding at fixed rates of one Rashida Bibi and was mortgaged by her under two mortgages, one executed in favour of Bahadur Ali and Saadat Beg and the other in favour of Aiyam-ud-din Khan. The mortgages were usufructuary and the mortgagees were put in possession. Rashida Bibi died, leaving as her heirs her daughters Najman Bibi and Rabuan Bibi, who sold their equity of redemption to the plaintiff Ahmad Husain and to the first defendant Ismdar Khan on the 21st of June 1877. The former was the purchaser of a three-fifths share and the latter of the remainder. Other transactions relating to the property took place subsequently, to which it is not necessary to refer for the purposes of these appeals. The plaintiff claimed possession of his three-fifths share in the land in question on the allegation that the defendant Ismdar Khan had wrongfully dispossessed the mortgagees and taken possession, not only of his own share, but also of the share of the plaintiff. The suit was resisted on various grounds, the main plea being that the claim was barred by limitation. The court of first instance overruled this plea and made a decree in the plaintiff's favour for possession, but dismissed the claim for mesne profits. This decree having been affirmed by the lower appellate Court these two appeals have been preferred,

one by the plaintiff and the other by the defendants. The plaintiff appeal against the portion of the decree which dismisses his claim for mesne profits. The defendants' appeal relates to the remainder of the claim.

2. The contentions urged on behalf of the defendants are that they have held possession for more than twelve years adversely to the plaintiff and the claim is therefore time-barred, and that in any case the plaintiff cannot obtain possession without redeeming the defendants.

3. Upon issues being referred by us to the Court below, that Court has found that the mortgagees were dispossessed by Ismdar Khan defendant in June 1878, but that he never denied the plaintiff's title, but on the contrary admitted it in a written statement and in a deposition. We have examined the written statement and the deposition referred to and are of opinion that they do not contain any admission of title. We must, however, accept the findings that the defendants dispossessed the mortgagees in June 1878 and that they never specifically denied the plaintiff's title.

4. As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly adverse to the mortgagees, and as this adverse possession has continued for a longer period than twelve years, the right of the mortgagees has u/s 28 of the Limitation Act become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of a limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgages would also be adverse possession against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespass is coupled with a denial of the title of the mortgagor. But, as held in *Muhammad Husain v. Mul Chand* ILR (1904) All. 395 following *Chinto v. Janki* ILR(1892) I. 18 Bom. 61, possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the mortgagor?, and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession, the defendants cannot be held to have been in possession adversely to the plaintiff. As observed by Mr. Justice Markby in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* ILR (1878) Calc., 327, by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. We are therefore unable to accept the defendants' contention that their possession is adverse to the plaintiff and

that the claim is time-barred.

5. We are, however, of opinion that the plaintiff is not entitled to recover possession without redeeming the mortgages to which his share is subject. As we have already pointed out, the defendants by virtue of their adverse possession against the mortgagees, acquired the rights of the mortgagees, and, as held in *Vithoba v. Gangaram* (1875) 12 Bom. H.C. Rep. 180, succeeded only to such estate as the mortgagees possessed. The plaintiff, therefore, can only redeem the defendants, his equity of redemption being unaffected by the possession of the defendants. The ouster of the mortgagees by the defendants did not entitle the plaintiff to re-enter into possession. A similar view was held by Fulton, J. in *Chinto v. Janhi* ILR (1892) . 18 Bom. 61 . It is true the position of the defendants is that of co-mortgagors, but that circumstance does not, in our opinion, make any difference so far as the interests of the plaintiffs are concerned, it being an admitted fact that the mortgages have not been "discharged. The claim for possession was not therefore maintainable. As the plaintiff did not seek to redeem the mortgages, the suit as brought ought to have been dismissed. This will not preclude the plaintiff from bringing a properly framed suit for redemption. We accordingly allow this appeal, and, setting aside the decree of the Court below, dismiss the plaintiff's suit. Having regard to the circumstances of the case and the conduct of the parties we direct that they abide their own cost in all Courts.