

(1910) 01 AHC CK 0017
In the Allahabad High Court

Babu Nandan Pat Tewari

APPELLANT

Vs

Radha Keshun Kalwar and Others

RESPONDENT

Date of Decision : 28-01-1910

Acts Referred:

Uttar Pradesh Land Revenue Act, 1901 — Section 118

Citation : 5 Ind. Cas. 664

Hon'ble Judges : John Stanley, C.J.; Banerji, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal must prevail. So far as regards the question before the Court the suit was one for possession of land and for the demolition of a thatched cottage situate on that land. It appears from the evidence that the plaintiff and the defendants were co-sharers of the property in dispute and other property prior to the year 1891. On the 19th of February 1891, the plaintiff executed a usufructuary mortgage in favour of the defendants of the property in dispute and other property. That mortgage was redeemed on the 14th of September 1905. Subsequently to this, namely about three years ago, a partition of the joint property of the plaintiff and the defendants was carried out and in that partition the site of the house in question was allotted to the plaintiff. The defendants retained possession of the house and consequently the suit out of which this appeal has arisen was instituted for possession of the site, demolition of the thatched house and other relief to which it is not necessary here to allude. The Court of first instance granted a decree to the plaintiff. The lower appellate Court reversed the decree of the Court of first instance, holding that the defendants had acquired a title by adverse possession to the house and the site of it. An appeal was preferred to this Court which was dismissed by the learned Judge of this Court. This appeal has been preferred to us under the Letters Patent.

2. It appears to us that in view of the fact that a partition was effected of the joint property three years ago, the parties are bound by the provisions contained

in the order of partition. According to that order the site in question was allotted to the plaintiff. Behind this partition the parties cannot go, and it is idle now for the defendants to set up a claim to the house and its site by adverse possession. It is contended by the learned Counsel for the defendants that his clients are at all events entitled to continue in occupation of the house on payment of a reasonable ground rent therefor. He relies for this contention upon the provisions of Section 118 of the Land Revenue Act III of 1901. That section provides that if, in making a partition, it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in the possession of another co-sharer, the latter shall be allowed to retain it with the buildings thereon on condition of his paying for it a reasonable ground-rent to the co-sharer in whose portion it may be included." The section further provides that the "limits of such land and the rent to be paid for it shall be fixed by the Collector." In this case no application was made to the Collector by the defendants for liberty to retain the building in question and no offer was made by him to pay a reasonable rent therefor. The site of the house was, as we have said, allotted to the plaintiff and no reservation was made of any right of residence by the defendant. In view of this it is idle to contend that the defendants have any right whatever to remain in possession of the site of the house. We are informed that the house has been demolished since the decree was passed by the Court of first instance. Be this as it may, we think that the plaintiff is clearly entitled in view of the partition award to a decree for possession of the site. The lower appellate Court considered that possession by the defendant during the period of the usufructuary mortgage amounted to adverse possession but in this it is clearly wrong. The possession under the mortgage is referable to the contract of the parties and cannot be regarded as adverse possession. We, therefore, allow the appeal, set aside the decree of the learned Judge of this Court and also the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.