(1876) 05 AHC CK 0005

Allahabad High Court

Case No: None

Jiwan Singh and Others		APPELLANT
	Vs	
Ratan Kuar and Others		RESPONDENT

Date of Decision: May 22, 1876

Citation: (1875) ILR (All) 194

Hon'ble Judges: Robert Stuart, C.J; Turner, J; Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

Robert Stuart, C.J. and Oldfield, J.
On the first ground of appeal we are of opinion that there is not such a clear adverse possession by the defendants, appellants, for 12 years, as will bar this claim.

2. Though the defendants assert their purchase to have been made in 1842, yet there is no very clear evidence of their possession under it till Tej Singh''s death, for up to that time he continued to be recorded in the revenue records as proprietor, and there is no evidence of any acts of proprietorship on the part of defendants betokening possession. They have produced some dakhilas, or receipts for revenue, in their names for 1841, but these are prior to the alleged sale, and made by them as lessees, and there is no other material evidence, except some entries in certain papers, one copy of a khewat of 1268 Fasli or 1856 (No. 103 exhibit), where it is entered that Kirat Singh is in possession as purchaser, and similar entries in certain nikasis: these may be of use to support the sale, but not sufficient to support the averment of a possession under tire sale adverse to the plaintiffs. We then come to the time of Tej Singh''s death, 5th September 1869, and find that, on the 21st October, the defendants, through their agent, Parshadi Lal, applied For imitation of names in their favour, and set up their title under sale and mortgage as now claimed, hut the plaintiffs'' ancestors at once disputed their title. The Deputy Collector found the plaintiff''s were entitled to have their names recorded, but the Collector reversed this order, and entered the names of the defendants'' ancestors in the column of manager, or lambardar, and this order was affirmed on appeal to the Commissioner.

Since the last order was passed the plaintiffs appear to have taken no steps against the defendants till the suit was brought, and from that time the possession held by defendants may properly be considered adverse to the plaintiffs, but not so from the time during which their title was in dispute in litigation, and 12 years have not run so as to bar this claim.

3. It has also been contended that the three years'' limitation will apply to this suit, but this is not so, as there was no such award by the revenue authorities in 1860 as is contemplated in the Limitation Act. We now take the last plea in appeal, as to the burden of proof. It is of the utmost importance in this case, as the evidence on both sides is so unsatisfactory, and the cases of both parties so full of inconsistencies, that the case will be determined mainly by the determination of this point.

4. There is no dispute that Tej Singh, through whom plaintiffs claim, was originally owner, and, prima facie, the burden of proof to show the present proprietary or mortgage possession of defendants will be on them; but this burden can be shifted if the defendants show that they have ostensibly for a length of time been in possession under the titles they now set up, and we think that is the case here, and that the Subordinate Judge has wrongly put the onus on them.

5. It is shown that on Tej Singh''s death in 1860 they set up the very same titles to the estates that they do now, and that they were held by the higher revenue authorities to be in possession under such titles (see the Collector''s order) and their possession has ever since continued, that is, for very nearly 12 years. Under such circumstances, the plaintiffs can now only succeed by proving their averments that the defendants bold under a mortgage of the entire estates for Rs. 2,500 executed in 1842. (The learned Judges, holding that the plaintiffs failed to prove these averments, dismissed the suit.)

6. The plaintiffs applied for a review of judgment on the ground that, as to the 10-biswa share in each village of which the defendants admitted they were mortgagees, no proof of their title was necessary, and, as to the remaining shares, that the burden of proving the sale alleged by the defendants lay on them. The application was admitted by Stuart, C.J., Oldfield, J., dissenting.

Robert Stuart, C.J.

7. I have repeatedly and anxiously considered this case since the argument in review of our first judgment was addressed to us, and I have also had the advantage of perusing the opinion of my colleague, Mr. Justice Oldfield, but I cannot concur in his conclusion. The plaintiffs'' ancestral and hereditary right is undoubted, it is admitted, while the defendants'' story is, to my mind, very doubtful, if not suspicious, and on this broad view of the case I bold the burden of proof is on the defendants. The facts are not the same as those in the Privy Council case referred to Valoji Kristnan Gopalar v. Nayana Chetti 10 Moo I.A 151. Their clear actual possession for forty-four years was satisfactorily shown

on the part of the defendants, and on the simple intelligible statement that they had held such possession as purchasers under a deed of sale to one of their ancestors; the plaintiffs, on the other hand, alleging that the defendants'' possession had been that of usufructuary mortgagees. But whatever the origin of the possession, the fact of it for forty-four years was undoubted, and the burden of proof was therefore justly put on the party who alleged an hereditary title against the defendants.

8. Here the circumstances are not quite the same. The defendants show, indeed, or rather suggest, their ostensible possession since 18452, but I think we must take it as a fact that their possession from that year till 1860, when Tej Singh died, was the possession of mortgagees, and therefore was not adverse to the plaintiffs. But it was not till the 19th April, 1H(S1, that their possession was recorded, so that the defendants can barely show 12 years of absolute or clearly adverse possession; in fact, the 12 years had not expired when the present suit was instituted. Then the defendants'' plea of possession, such as it is, is accompanied by statements of a very doubtful, and even, as I have said, of a suspicious nature; and their suggestion respecting the sale to their ancestors of a 10-biswa share for Rs. 1,250 is scarcely credible, and is certainly inconsistent with their other statement that the other 10-biswa share had been mortgaged to them for Rs. 14,000. Generally, I agree with the Subordinate Judge in his view of the facts so far as we know them, and I consider the plaintiffs'' statement the more reasonable of the two, and their hereditary title is undisputed. On the other hand, the defendants'' account of the origin of their possession is so doubtful and even improbable, as respects both its character and duration, that it ought not, in my opinion, to he allowed to shift the burden of proof from their shoulders to those of the plaintiff''s.

9. Therefore, holding that the burden of proof is on the defendants, I would affirm the judgment of the Subordinate Judge, in which I substantially concur, and dismiss the appeal with costs.

Oldfield, J.

10. (Who, after stating the facts, continued): The plea of limitation in bar by adverse possession urged by the defendants has no weight, for the plaintiffs'' suit is to redeem a mortgage, and they can sue any time within 60 years. Long ostensible possession on the part of the defendants as owners would throw the burden of proving the mortgage on the plaintiffs; but it would not he adverse so as to bar the institution of the suit for redemption; and the plea of three years'' limitation also fails, as there has been no award by the revenue authorities in I860, such as is contemplated in the Limitation Act. But in my opinion the lower Court has wrongly placed the burden of proof on the defendants. The plaintiffs'' ancestors are admittedly the original owners of the estate, but it is very clear that the defendants'' ancestors have held possession at least since 1842 up to the present time; the plaintiffs admit so much, ascribing it to the mortgage. This possession the defendants ascribe to sale of half the estate and mortgage of the remainder, but however this may be, possession on their part from 1842 is clear, and since I860, if not

before, this possession by them has been openly held under the titles they now set up. Tej Singh died on 5th September, 1860, and defendants, through their agent, Parshadi Lal, applied for mutation of names in their favour, averring they had purchased half the estates, and become mortgagees of half in the same way as they contend in this suit; the. plaintiffs" ancestors disputed their titles, but the Collector, on 19th April, 1861, recorded the defendants" names as being the parties in possession, and since then the plaintiffs have not taken any steps against defendants till this suit was instituted.

11. It appears to me that, in the face of this lengthened possession of the estates by defendants, the plaintiffs can only succeed by proving the mortgage which they sue to redeem, and the ruling of the Privy Council in Valoji, Kristnan Gopalar v. Nayana Chetti 10 Moore"s Intl. App. 151 I think supports this view.

12. The defendants appealed to the Full Court against the judgment of Stuart, C.J., under Clause 10 of the Letters Patent, on the ground that the burden of proof should have been thrown on the plaintiffs; and that the plaintiffs failed to prove the mortgage under which they claimed.

13. Babu Oprokash Chandar (with him the Junior Government Pleader, Babu Dwarka Nath Baverji, and Pandit Ajudhia Nath), for the Appellants.--It is admitted that the defendants are in possession of the property in suit and have been so for upwards of 30 years. Since 1860, at the least, they have been in possession under the titles now set up. As to the moiety of the property therefore which they say was sold to them, the burden of proving their qualified ownership lies on the plaintiff"s--Section 110, Act I of 1872; Sheoruttun Ciir v. Doorga I.C.R. N.W.P. 1874 p. 36. In view of their long enjoyment of possession the plaintiffs cannot succeed in their suit unless they prove the mortgage which they sue to redeem--Valoji Kristnan Gopalar v. Nayana Chetti 10 Moore"s Ind. App. 151. This they have failed to do.

14. Mr. Howard (with him Pandit Bishambar Nath), for the Respondents.--The cases cited and the present case are distinguishable. In the present case there was no ostensible possession by the defendants as owners of the moiety of which they allege the sale. They were recorded as managers only. There has been no adverse possession of the moiety for 12 years. They admit their possession as mortgagees of half the property. The plaintiffs are entitled to relief in respect of this portion, and the amount of the mortgage-debt should lie determined.

Pearson, J.

15. As regards the 10-biswa> share which is said to have been sold by Tej Singh to Kirat Singh more than 30 years ago, and which is undeniably in the possession of the defendants, it appears to me that Section 110* of the Law of Evidence (Act I of 1872), entirely supports the first ground of the appeal before us. It is, therefore, scarcely necessary to refer to the doctrine laid down by the Privy Council in the case to be found

at p. 151, vol. 10 Moore''s Ind. App. Valoji Kristnan Gopalar v. Nayana Chetti. The law declares that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." The plaintiff''s are then clearly bound by the law to prove that the defendants are not the owners of the 10-biswa share in their possession, and we have to consider whether they have discharged the burden thus imposed upon them. I hold that they have not done so, being of opinion that the evidence adduced by the defendants in proof of the sale alleged by them is more weighty and trustworthy than that which the plaintiffs have brought forward to substantiate their assertion of a mortgage having been made of the three entire mahals in 1842 for Rs. 2,500. I am further of opinion that, although the suit as brought in respect of this portion of the claimed property is not barred by the law of limitation, the plaintiffs are nevertheless precluded from recovering possession of it by the fact that the defendants have held adverse possession of it for more than 12 years. For it appeal''s in evidence that, on the 21st October, 1860, the defendants publicly assorted their title by purchase to a moiety of each of the mahals by applying to the Revenue Department for the recognition and registration of their title and possession, and in my judgment their possession must not be reckoned as adverse only from the 19th April, 1861, the date of the order passed on their application by the Collector in appeal, but at least from the date on which their title as purchasers was openly set up in the face of Tej Singh''s heirs. From this point of view their possession had certainly become adverse to the latter more than 12 years before the date of the institution of the present suit.

16. It remains to deal with the remaining portion of the claim, in respect of the 5-hiswa share of each of the three mahals admitted by the defendants to be held in mortgage by them in lieu of Rs. 14,000, and to be redeemable on payment of that amount. The allegation on which the suit was brought, that the entire mahals were, mortgaged for Rs. 2,500, an allegation quite inconsistent with that made by the plaintiffs, or those whom they represent, in 1860, has broken down; and it appears to me that we should not be warranted by the evidence on the record in ruling that the 5-biswa share now in question was redeemable whenever Rs. 625--a fourth part of Rs. 2,500--had been recovered with interest from the usufruct, and has been accordingly redeemed. The plaintiffs must establish their right to re-entry, but they have failed to prove that they are entitled to re-entry, on any other terms than those stated by the defendants. I would therefore restore and affirm the decision of the Bench, dated the 16th June, 1874, and decree this appeal with costs.

Turner, J.

17. That the appellant and her predecessors in title have held possession of the property in suit for upwards of 12 years is virtually admitted by the respondents and is abundantly proved. It is shown that in 1860 they opposed the entry of the names of Tej Singh''s heirs in the revenue registers, on the ground that they were in possession, and in April, 1861, the Collector allowed their objection and ordered their names to be entered. Although

they did not ascribe the same date to the origin of their title, they virtually asserted the same title as that on which she now relies. She now claims one moiety of the property under a sale effected by Tej Singh in favour of Kirat Singh in 1842, and she alleges that, legal proceedings having been instituted to contest the right of Tej Singh to sell the property, debts were incurred by Tej Singh to Kirat Singh, and that the other moiety of the estate was in consideration of these debts "made over in possession" to Kirat Singh. The phrase used respecting this last transaction is somewhat ambiguous both in the written statement filed by the appellant and in other proceedings, but the case was argued on the hypothesis that the alienation of the second moiety of the property was of the nature of a mortgage and not an absolute sale. In their petition tiled in the Revenue Office on the 26th December, 1860, the heirs of Kirat Singh alleged they were in possession by virtue of sale and mortgage effected by Tej Singh in their favour. In their appeal to the Collector they alleged that in 1839 the estate was mortgaged and sold by Tej Singh to Kirat Singh and Moti Singh, their ancestors. This appeal''s from the Collector''s decision, dated the 20th February, 1861. Moreover, the witnesses they have produced in this suit were called to speak to a sale of one moiety of the property and to a mortgage of the other moiety. I see no sufficient ground for the suggestion, that, although the property was nominally mortgaged, it was not intended it should he redeemed.

18. The appellant asserts that whatever documents of title she possessed were lost when Kirat Singh''s house was plundered in the mutiny, and the kanungo who appears to he impartial confirms her statement that the residence was destroyed in the manner stated by her. Now, inasmuch as possession of Kirat Singh and his heirs for so long a period has been proved, the presumption that they were in possession as proprietors must be rebutted. In respect of one moiety it is rebutted by the admission and proof that their possession was that of mortgagees. But in respect of the other moiety which they claimed to hold as purchasers the respondents must adduce evidence to rebut the presumption arising out of possession or must fail. The circumstance that one moiety of the property is admittedly held under mortgage might lend corroboration to evidence, if there was any, that Kirat Singh''s heirs held entire property as mortgagees, but by itself it will not relieve the respondents from the burden of rebutting the presumption arising from the possession of Kirat Singh''s heirs. No reliable evidence has been produced by them. The witnesses called by either party to speak to the contents of deeds executed so many years ago would in this respect be untrustworthy, even if it were proved that they were at the time made acquainted with the contents of the deeds which from the position in life of some of them is hardly probable. They may, or rather some of them may, have been present when the deeds were executed, and if they were present they may be able to recall the fact of the execution of the deeds, but it would be unsafe to accept their testimony beyond this point.

19. Putting aside the parol evidence, there remains the circumstance that Tej Singh''s name was retained in the revenue registers as proprietor up to the time of his death. The appellant seeks to explain this by asserting that Tej Singh''s title to the estate was

disputed by one Daulat Singh, in the name of whose ancestor Tej Singh had purchased in ismfurzi, and that, in consequence of proceedings taken by Daulat Singh, the entry of Kirat Singh''s name in respect of the 10 biswas purchased by him was postponed. That Tej Singh''s title was in fact disputed by Daulat Singh is shown by the petition of Jiwan Singh, Himmat Singh and Mussannnat Eadha, when as the heirs of Tej Singh they applied in 1860 to have their names recorded in the registers. But to whatever cause the retention of Tej Singh''s name may have been due, this circumstance would not by itself warrant the conclusion that the possession of Kirat Singh''s heirs was merely that of mortgagees. The claim then for one moiety of the property must be dismissed. The question arises whether the respondents, although they have failed to prove that the whole estate was mortgaged, should be allowed any relief in this suit? The circumstances are peculiar; the appellant admits that she holds one moiety of the property claimed by way of mortgage; ordinarily a deed would have been executed creating such an interest. Now she does not produce any mortgage-deed. She avers that large sums were expended in defending the sale of one moiety of the property and that other sums were advanced to the original proprietor, and that in consideration of these expenses and advances, which altogether are said to amount to a sum wholly disproportionate to the sum alleged to have been paid for one moiety of the property, the other moiety of the property was made over to Kirat Singh. That it was transferred to Kirat Singh by absolute sale is not asserted, and, as has been pointed out, in 1860 it was admitted that the title to a portion of the property was in virtue of mortgage, and, on the hypothesis that the mortgage was admitted, the case was argued at the bar.

20. The appellants do not state at what date this assignment was made. The sale of the one moiety is ascribed to the year 1842, the date assigned by the respondents to the mortgage of the entire village. If the assignment of the other moiety was made for the consideration alleged by the appellant, it must have taken place some years after the sale. In 1860 the dates ascribed to the sale and mortgage were the year 1839. There is some slight evidence in the revenue proceedings to show that Kirat Singh held a mortgage of the estate before 1842, and it is apparent from the circumstance that in i860 the appellant alleged her title originated in 1839, that she is uncertain of the date on which the assignment of the second moiety was made. It is possible that a mortgage subsisted prior to 1842; that in 1842 that mortgage was paid off, and one moiety of the property sold to Kirat Singh; and it is not improbable that subsequently the second moiety was mortgaged; and assuming that the title to the second moiety is admittedly founded on a mortgage, I can see no good reason to debar the respondents from having an account taken in this suit of what may be due on the mortgage of the moiety of the estate and of obtaining such relief as they may be found entitled to on the taking of the account. It is impossible to ascribe any date to this mortgage save that it occurred after the sale in 1842 and before 1860. If the respondents are not allowed to obtain relief in this suit, they may hereafter be met with the plea that they ought to have obtained relief in this suit. There are cases in which this Court has allowed mortgagors to recover a portion of the property claimed by them; there are cases in which a mortgagor has asserted the debt to

be less than the mortgagee has proved it to be; and nevertheless the mortgagor has been allowed to proceed with his suit, and accounts have been taken and such relief granted as on taking the accounts he was shown to be entitled to. A claim for the whole surely includes a claim for a part, and if the plaintiff fails to prove his whole claim, he may nevertheless obtain such relief as falls fairly within the purview of his claim. Seeing that the parties to this suit are not the persons who were parties to the original transactions, and that whatever documentary evidence existed of those transactions is not now forthcoming, it appears inequitable to require the same correspondence of proofs and allegations which might have been required from persons who were themselves parties to the original transactions. If the respondents are entitled, as in my judgment they should he held to be, to obtain partial relief in this suit, I am of opinion that, in respect of the moiety of the property which is admittedly under mortgage, the burden of proof lay on the appellant. The respondents alleged the mortgage-debt was Rs. 2,500, and that it had been discharged from the usufruct. The appellant alleged the debt was Rs. 14,000, and that a large balance was still owing. She may yet have in her possession accounts to prove the sums advanced, and she must have accounts of the profits of the estate. In my judgment the suit should not be wholly dismissed, but issues should be remitted to ascertain the amount of the mortgage-debt on the moiety held in the mortgage, and to ascertain the amount of profits received by the mortgagee.

Robert Stuart, C.J.

21. I think there is considerable force in the latter part of Mr. Justice Turner"s judgment, and pro tanto I concur in the account and remand he suggests. But I consider that such account and remand might justly be extended to the whole property in suit; and generally, after giving the case the most careful consideration, and hearing all that has been urged before the Full Bench, I am not satisfied that my first judgment was wrong. The question before us is simply on which of the parties the burden of proof is laid, and I remain of the opinion that it is on the defendants. Anything like adverse possession by them cannot, I think, be considered to have commenced till the 19th April, 1861, and 12 years had not elapsed from that date when the present suit was instituted. The presumptions therefore are all in favour of the plaintiff"s, and the defendants must make out their case. I would affirm the judgment of the Division Bench.

Spankie, J.

22. I am of opinion that the burden of proof in this case was on the plaintiffs. It is true that the ancestor of plaintiffs is admitted to have been the original owner of the property. But the defendants and their ancestors have held possession, as shown by Mr. Justice Oldfield, since 1842 up to the present time. This plaintiffs allow, but say that they hold as mortgagees. On the other hand, the defendants have held possession since 1860, and have set up a proprietary title to half the estate since 1860, and contend that they are mortgagees of the other half. Their title was disputed in 1861. But the Collector recorded their names as being in possession. Plaintiffs took no steps to establish their own title

until this suit was instituted, in which they claim to have their right declared and full proprietary possession of 15 biswas by redemption of mortgage, asserting that the mortgage had been liquidated from the income of the property. They were bound to establish the mortgage, but they could not produce the deed said to have been executed so far back as 1812, and the parol evidence in support of it is suspicious and unreliable. On the other hand, though the defendants cannot produce a sale-deed, the fact of the sale is supported by the kanungo and by entries in the village papers and statement of proprietary charges for 1263 Fasli. The patwari, too, supports their statement. The witnesses generally are not better than those of plaintiffs. But it is for the former to establish their case, and a weak defence cannot set up a weak claim. I think that the circumstance that on Tej Singh''s death, when application was made for mutation of names in favour of the predecessor of plaintiffs, any mortgage was denied, tells against the case of the plaintiffs; and if their statements now are correct the mortgage in 1812 was but for a small term, and mutation of names was not considered necessary, as it was thought that the mortgage would be redeemed from the income in two or three years. Even no attempt has been made to get back the property until this suit was entered.

23. I think that the appeal must be admitted, and that the suit as brought was, in the first instance, properly dismissed on appeal. Whether, on the admission of defendants that they held as mortgagees of a portion of the property under a mortgage on which a large sum is still due to them, the plaintiffs can claim to redeem that portion after getting an account is another question. I do not think that they are entitled to ask for it in this suit, in which their claim as brought had not been established.

Oldfield, J.

24. I adhere to the view of this case which I have expressed at length in the previous judgments, and I would restore the judgment and decree of this Court, dated the 16th June 1874, and dismiss the suit with costs in all Courts.

----------Foot Note----------

*[Section 110:--When the question is whether any person is owner of anythi
is shown to be in possession, the bu
Burden of proof as to. is not the owner is on the person w
ownership owner.]