APPELLATE CIVIL

Before D. S. Tewatia, J.

SUKHMANI,—*Appellant.*

versus

HARI KISHAN,—*Respondent.*

Regular Second Appeal No. 53 of 1967

December 4, 1970.

Limitation Act (XXXVI of 1963)—Article 65—Trespasser not in physical possession of the land trespassed—Such land being cultivated through his tenants—Title of the trespasser—Whether perfected after the lapse of 12 years of his constructive possession—Tenants of the trespasser being owners of the land without knowledge of their title—Possession of the trespasser through such tenants—Whether hostile to the owners, who possess the land as tenants—Owners of the land shown as tenants of the trespasser in the revenue records but not paying rent to him—Such entries in the revenue records continuing for 12 years—Trespasser—Whether entitled to recover possession from such tenants.

Held, that a trespasser need not be in actual physical possession as the possession of the tenants under him or anybody else holding the land with his permission shall be treated as the possession of the trespasser over the land through such persons. A trespasser need not be in physical possession and he can hold the land in question under his possession through tenants or through licensees etc. and 12 years of such constructive possession shall entitle him to perfect his title to the land. (Para 4).

Held, that it does not make the slightest difference to the trespasser's constructive possession over the land whether the tenants under him are the strangers to the land or the tenants are the actual owners who agree to become tenants either through ignorance of the true legal status *qua* the land in question or otherwise. Such a constructive possession of the trespasser shall have precedence over the permissive actual possession of the tenant claiming to be actual owner afterwards when it comes to be decided as to whether the trespasser has been in hostile possession over the land against the true owner. (Para 5).

Held, that the possession of a person, not paying any rent or *batai* to an ostensible owner, though described as tenant, cannot be considered permissive under the ostensible owner, because the non-payment of rent by such a tenant holds out a challenge to the right of the ostensible owner (the trespasser landlord) to exercise the ownership rights over the land in question and that fact changes the colour and context of such a tenant's permissive possession to the one of hostile. In this state of facts, it is the possession of such a tenant that (if he is not the actual owner himself) should be considered hostile to the rights of the actual owner and *qua* the said owner, it is

the tenant with the above-noted hostile posture that should be considered to have assumed the status of a trespasser in the place of the original trespasser and if such entries continue for a period of twelve years, then the ostensible landlord (the original trespasser) shall not be at all able to recover the possession of the land from such a tenant. If such a tenant also happens to be the true owner, then in that case even the semblance of the constructive possession of the ostensible owner over the land in question shall vanish. (Para 6).

Regular Second Appeal from the decree of the Court of Shri Om Parkash Sharma, Additional District Judge, Ambala, dated the 5th day of August, 1966 modifying that of Shri Manmohan Singh, Sub-Judge II Class, Ambala, dated the 31st May, 1966 (granting the plaintiff a decree for possession of the land in suit) to the extent of dismissing the plaintiff's suit for possession of one half share in the land in dispute and maintaining the decree of the trial Court with regard to the remaining one half share of the land in suit and leaving the parties to bear their own costs throughout.

R. N. MITTAL, ADVOCATE, for the appellant.

RAM LAL AGGARWAL, AND BAKHAT SINGH, ADVOCATES, for the respondent.

JUDGMENT.

D. S. TEWATIA J,—(1) This regular second appeal arises out of a suit for possession at the instance of the plaintiff-appellant relating to suit land as detailed in the plaint. The plaintiff-appellant grounded her claim for possession of the suit land on the strength of her title and alternatively she claimed possession on the ground of her having become owner by adverse possession . The defendant controverted the allegations and pleaded that she was neither owner nor was ever in adverse possession against the defendant who is the real owner alongwith his colleterals who claimed to have been in possession of the land all through. The trial court framed the following issues on the basis of the peadings of the parties:—

(1) Whether the plaintiff is the owner of the suit land ?

(2) If issue No. 1 is not proved, whether the plaintiff has matured his title by way of adverse possession ?

(3) Whether Shri Krishan, Mohan Lal, .Khushi Ram and Rainku Ram are necessary parties?

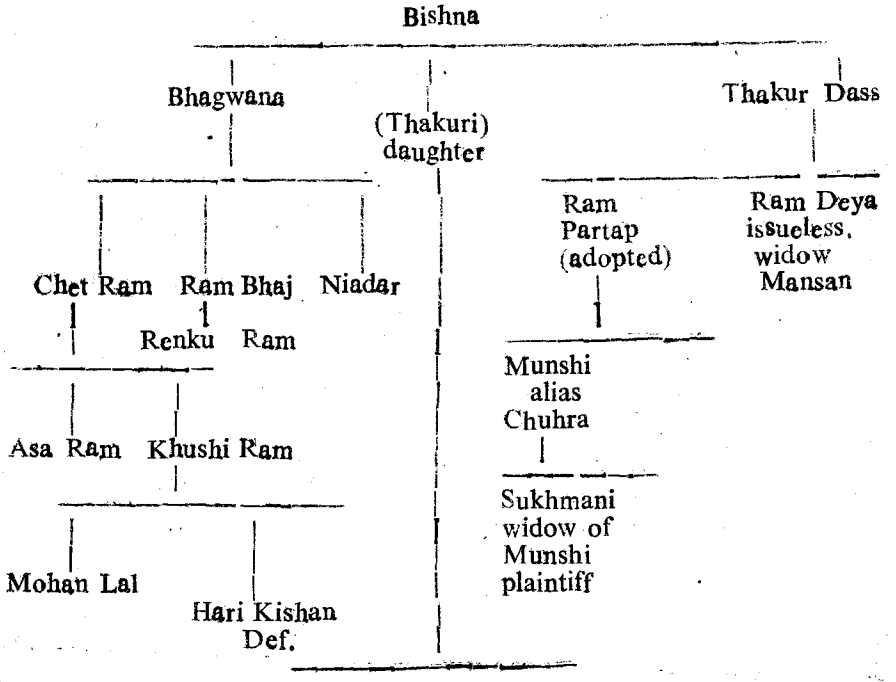
(4) Whether the plaintiff had been in possesion within 12 years of suit?

(4-A) Whether Ram Partap, husband's father of the plaintiff was adopted by Devi Chand, husband of Thakri, sister of Thakar Dass, father of Ram Partap, of village Baknaur, District Ambala? If so, whether the adoption was valid and what is its effect ?

(5) Relief.

The trial court decreed the suit but in appeal the lower appellate court affirmed the decree of the trial court *qua* half of the suit property and regarding the other half it dismissed the suit of the plaintiff. The plaintiff-appellant aggrieved by the judgment and decree of the lower appellate Court has approached this Court in second appeal.

(2) The learned counsel for the appellant has urged (i) that the lower appellate court has misread the evidence of Smt. Sukhmani, plaintiff and (ii) that for its finding 'that defendant had been in continuous possession of the suit land with other claimants from the death of Smt. Mansan widow of Ram Deya', it has not relied upon or made any reference to any evidence on the record. Before adverting to the submission of the learned counsel, I consider it desirable to reproduce the pedigree table which is admitted on both sides to correctly appreciate the controversy between the parties.



At this stage it is also desirable to notice the fact that Thakuri, daughter of Bishna was married to Devi Chand of village Baknaur who adopted Ram Partap grandson of Bishna and nephew of Thakuri, his wife. The said Ram Partap died in the year 1910 and his son Munshi alias Chuhra was survived by his widow Smt. Sukhmani, the plaintiff-appellant. Ram Diya brother of Ram Partap died issueless and was survived by his widow Smt. Mansan.

(3) Now to appreciate the submission of the learned counsel for the appellant, the factual position as emerged from the documentary evidence placed on the record may be considered. The earliest jamabandi Exhibit P-14 placed on the record relates to the year 1917-18. In this jamabandi Smt. Sukhmani and Mansan have been depicted as owner's and one Chhajju son of Phaggu is shown in cultivating possession as tenant of 40 bighas 2 biswas, Renku Ram son of Ram Bhaj and Khushi Ram, son of Chet Ram are shown in cultivating possession of 3 bighas 9 biswas as tenants paying 2/5th of the produce as Batai. Jamabandi Exhibit P-16 relates to the period of 1926-27 wherein Renku Ram son of Ram Bhaj and Khushi Ram son of Chet Ram are shown in cultivating possession of 2 bighas 7 biswas as tenants paying half of the produce as Batai. In Jambandi Exhibit P-15 for the year 1922-23 the entries are the same as in Exhibit P-16 and so is the case with jamabandi Exhibit P-10 relating to the year 1930-31. In jamabandi Exhibit P-9 for the year 1934-35 the entries are the same as in jamabandi Exhibit P-16. On 2nd September, 1935 Mansan widow of Ram Deya died and on December 11, 1935, a mutation of inheritence Exhibit P-8 of the land left by Smt. Mansan was sanctioned in the name of Smt. Sukhmani, plaintiff-appellant. Jamabandi Exhibit P-6 relating to the year 1938-39 reflected a departure from the entries in the previous Jamabandis in as much as in Exhibit P.6, Smt. Sukhmani is shown to be the sole owner and name of Smt. Mansan from the column of ownership is omitted because of her having died as already noticed. Smt. Sukhmani, plaintiff-appellant is shown in possession of 1 Bigha 13 Biswas and the rest of the land measuring 41 Bighas 18 Biswas is shown in cultivating possession of the said Renku Ram and Khushi Ram as tenants and the entry in the column of rent reads *'billa Lagan bawaja vaqja boodbash'* (without rent because of their common boarding and lodging). In Jamabandi Exhibit P. 5, relating to the period of 1943-44 the entries of Jamabandi Exhibit P. 6 are repeated. Jamabandi Exhibit P. 4 relating to the year 1950-51 marks a departure from the previous Jamabandis. In this Jamabandi Smt. Sukhmani is recorded as owner and in the column of cultivation,

the entries 'khud kasht' along with Budhia and Shingara, Halli, the owner is to have 6 shares of the produce and Budhia and Shingara are to share between themselves two shares of the produce equally. Renku Ram and Khushi Ram are not shown in possession of even an inch of the suit land in exhibit P. 4. In Jamabandi Exhibit P. 1 pertaining to the year 1959-60, revenue entries of Jamabandi Exhibit P. 4 are repeated. In Jamabandi Exhibit P. 2 for the year 1962-63 Smt. Sukhmani is recorded as owner of the whole of the suit land and in cultivating possession of only 2 Kanals 1 Marla and of the rest of the land Hari Kishan son of Khushi Ram and one Gharibu son of Buta are recorded in cultivating possession as tenants and in the column of rent entry is *'billa lagan bawaja rishtedari'*. The allegation of the plainitff is that in the year 1961 Hari Kishan defendant, dispossessed her which led her to file the present suit on September 14, 1964.

(4) From the perusal of the Jamabandi entries already noticed, the factual position that emerges is that the possession of the defendant or his predecessors-in-interest over the suit land continued upto 1944 as is evidenced by the Jamabandi of that year. As to at what stage between the year 1944 and the year 1950 (when the possession of the plaintiff appellant has been recorded) defendant's possession came to an end is not clear from the evidence on the record. It is for the paintiff-appellant to prove as to at what time after 1944 the possession of the predecessors-in-interest of the defendants, came to an end and at what time actually the possession from them was regained by her, as it is for her to establish that she remained in continuous hostile possession of the land for a period of 12 years, and since no evidence is forthcoming as to when before the year 1950, she regained the possession, so it she who must fail in her endeavour to show her continuous possession for 12 years, because in the absence of such a proof forthcoming, at best, she will be considered in hostile possession from the year 1950 to the year Rabi 1961, which period falls short of 12 years. But the learned counsel for the appellant has urged that prior to the year 1950-51, she was in possession of the suit land through the tenants. That being the position, so she should be considered in constructive possession of the suit land through her tenants and her constructive possession under a hostile title shall also have to be taken into consideration while deciding as to whether her hostile possessory title for a period of 12 years has or has not matured into ownership of the suit land. From the

above submission of the learned counsel for the appellant, three situations emerge for consideration :—

(1) Whether a trespasser getting the land cultivated through his tenant shall be considered in hostile possession against the true owner;

(2) Where the true owner happens to be tenant/s. whether in such a situation the trespasser's constructive possession through the tenant/s who were the real owners can be considered hostile to the actual possession of the true owner, i.e., the tenant though holding the land in his possession through the permission of the trespasser; and

(3) Where the true owner is in actual cultivating possession as tenant under the trespasser (who is recorded as owner) but not paying any rent to him.

In support of his contention whether the trespasser can be considered to be in constructive possession as to entitle him to perfect his title to the land after 12 years of such possession, learned counsel for the appellant has cited the decision of the Calcutta High Court in *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand Hukum Chand,* (1), which decision was later on affirmed by the Privy Council and is reported as *Hafiz Mohammad Fateh Nasib* v. *Sir Swarup Chand-Hukam Chand* (2). The learned counsel pointedly relied on the following observations of Edgley and Biswas, JJ., which appear at page 23 in para (h) :—

"On this point the learned Subordinate Judge appears to have taken too strict a view with regard to the doctrine of constructive possession. The proper test to be applied in a case of this nature is whether the predecessors of the plaintiffs for a period of twelve years or more exercised such dominion over the property in suit as to justify an inference of fact that they were in possession of the whole. It was not necessary that they should prove affirmatively that their predecessors had actually been in physical possession of every square inch of this land, but it should have been considered whether the acts of possession which had been proved would legitimately show that the predecessors of the plaintiffs had enjoyed

(1) A.I.R. 1942 Cal. 1.
(2) A.I.R. 1948 P.C. 76.

> dominion over this property in the manner in which such dominion is normally exercised. The views expressed by the Privy Council in 61IA78 were to the same effect. In a case such as that with which we are now dealing, which relates to a compact plot of land, part of which had been left out to tenants and part of which was vacant, it would be sufficient for the plaintiffs to show that for a period of ewelve years or more their predecessors held the tenanted land through tenants who had attorned to them or through licensees whom they had permitted to remain on the land and that, in respect of untenanted land, they had asserted their possession from time to time in some suitable manner, for instance, by taking or selling the produce of such land. Mere interference with their possession by the rightful owner would not be sufficient to show that they had been dispossessed unless such Interference had resulted in their being definitely ousted from any portion of the land."

On the strength of above quoted observations, the learned counsel for the appellant has urged that a trespasser need not be in actual physical possession as the possession of the tenants under him or anybody else holding the land with his permission shall be treated as the possession of the trespasser over the land through such persons. Learned counsel for the respondent has not drawn my attention to any authority to the contrary. I am in respectful agreement with the principle enunciated in the ruling cited by the learned conusel for the appellant and I hold that a trespasser need not be in physical possession and he can hold the land in question under his possession through tenants or through licensees, etc., and 12 years of such constructive possession shall entitle him to perfect his title to the land.

(5) As regards the second situation, I am of the opinion that it should not make the slightest difference to the trespasser's constructive possession over the land whether the tenants under him are the strangers to the suit land or the tenants are the actual owners who agree to become tenants either through ignorance of the true legal status *qua* the land in question or otherwise. And the constructive possession of the trespasser shall have precedence over the permissive actual possession of the tenant claiming to be

actual owner afterwards when it comes to be decided as to whether the trespasser has been in hostile possession over the land against the true owner. As observed in the ruling cited by the learned counsel for the appellant that it is the state of mind which is the determining factor of the kind of control a person is exercising over the property. In the present illustration, the trespasser though not owner exercised all the rights of an owner, i.e., he could bring on the land any new tenants, he could mortgage the land, he could sell the land and so on, and the tenants who later on claimed to be the owners of the land by becoming his tenants mentally acquiesced and accepted the exercise of rights by the trespasser in question, over the land in their possession befitting only a true owner.

(6) As regards the third situation, In my opinion, the trespasser shall not be considered in constructive possession of the land. The possession of a person, not paying any rent or *batai* to an ostensible owner, though described as tenant, cannot be considered permissive under the ostensible owner, because the non-payment of rent by such a tenant holds out a challenge to the right of the ostensible owner (the trespasser landlord) to exercise the ownership rights over the land in question and that fact changes the colour and complexion of such a tenant's permissive possession to the one of hostile possession. In this state of facts, it is the possession of such a tenant that (if he is not the actual owner himself) should be considered hostile to the rights of the actual owner and *qua* the said owner, it is the tenant with the above-noted hostile posture that should be considered to have assumed the status of a trespasser in the place of the original trespasser and if such entries continue for a period of twelve years, then the ostensible landlord (the original trespasser) shall not be at all able to recover the possession of the land from such a tenant. If such a tenant also happens to be the true owner, then in that case even the semblance of the constructive possession of the ostensible owner over the land in question shall vanish. For this view I rely on a passage in Salmond on Jurisprudence (10th edition page 304) where the principle is enunciated as under :—

> "As between landlord and tenant, prescription, if it runs at all, will run in favour of the tenant, but at the same time it may run in favour of the landlord as against the true owner of the property.....To put the matter in a general

form, prescription runs in favour of the immediate against the mediate possessor, but in favour of the mediate possessor, as against third persons."

(7) The case in hand presents features which are common to the situation No. 3 just discussed, because here the true owner is in immediate possession as tenant, and by not paying any *lagan* to the trespasser recorded as owner in the revenue record, he challenged entries recording the trespasser as owner and himself as the tenant. The period in question during which the suit land was under the actual possession of the defendant or his predecessors-in-interest, cannot be treated as period of plaintiff's hostile possession, so I hold that in the present case the plaintiff has failed to prove that she acquired ownership right by adverse possession. Learned counsel for the appellant then tried to argue that the entry in the rent column *"billa lagan bawaja yaqja boodobash"* cannot be interpreted to mean that the tenants asserted their hostile posssession as againts the person who was recorded as owner in the column of ownership. The said entry, the learned counsel asserts, should be interpreted to mean that they did not pay the rent to the owner because the owner was residing with them. I do not think that the interpretation of the entry in the column of *lagan* suggested by the learned counsel for the appellant is correct specially when the tenants are in fact, the persons who are actually entitled to inherit the half share in the land left by deceased Smt. Mansan. Since they cultivated the whole of the holdings belonging to Smt. Mansan, deceased as well as Smt. Sukhmani, so even if whatever they incurred for maintaining her is considered to be the amount of the rent that they paid to Smt. Sukhmani, that rent shall have to be related to the land of the share of Smt. Sukhmani and cannot be relatted to other half of the land which they were entitled to inherit. Because of their being in immediate possession of that land, they became co-owners with Smt. Sukhmani to the extent of the share left by Smt. Mansan, deceased. So, in the peculiar facts of this case, the entry in the column of *lagan* cannot be so construed as to mean that the tenants, predecessors-in-interest of th defendants, were tenants of Smt. Sukhmani with regard to half of the suit land representing the share of Smt. Mansan, deceased. The above reasoning will apply with greater force to the facts of the present case, especially when the fact that the plaintiff never claimed the predecessors-in-interest of the defendants to be her tenants is kept in view. So to a case like this the ratio of the

decision of this Court reported as *Sher and others* v. *Phuman Ram and others* (3), as recorded in head-note (i), will be applicable, which reads :—

> "It is well-known that when a person other than the real owner is found to be in possession of the land belonging to any person, the revenue officers frequently enter that person as a tenant-at-will of the owner. Therefore where the plaintiffs do not allege that the defendants are their tenants no presumption of correctness can be attached to the entries in the revenue records showing the defendants as tenants-at-will under the plantiffs."

(8) After going through the evidence minutely myself, I am of the view, as already stated, that Smt. Sukhmani, plaintiff-appellant, has failed to prove her adverse possession for a continuous period of twelve years and so she has no right to seek possession of the land of the share of Smt. Mansan which is now in possession of the rightful heirs of Smt. Mansan. Therefore, I affirm the finding of the lower appellate Court to that extent.

(9) For the reasons recorded above, this appeal fails and is dismissed, but in the circumstances of the case I make no order as to costs.

N. K. S.

APPELLATE CIVIL

Before Prem Chand Pandit and S. S. Sandhawalia, JJ.

STATE OF PUNJAB ETC.,—*Appellants.*

versus

SHAM LAL GUPTA,—*Respondent.*

Regular First Appeal No. 355 of 1960

December 7, 1970

Limitation Act (IX of 1908)—Article 56—Conditions for the applicability of—Stated—Contractor submitting tender in response to the invitation of the

(3) 1940 P.L.R. 497.