THE

INDIAN LAW REPORTS

PUNJAB SERIES

Before G. D. Khosla, Gurnam Singh and Tek Chand, JJ

GANDA SINGH AND OTHERS,—*Plaintiff-Appellants*

versus

RAM NARAIN SINGH,—*Defendant-Respondent.*

Regular First Appeal No. 9(P) of 1951.

1957

May, 24th

Adverse possession—Plea as to—Nature of—Facts to be proved in support thereof—Plea of adverse possession not raised specifically in the pleadings nor put in issue—Whether can be raised in appeal on the evidence already on the record—Land in actual possession of the mortgagee—Title to equity of redemption—Whether can be acquired by adverse possession—Possession—Meaning of—Adverse possession—Extent of.

Held, that the plea of adverse possession is not always a legal plea. Indeed, it is always based on facts which must be asserted and proved. A person who claims adverse possession must show on what date he came into possession, what was the nature of his possession, whether the factum of his possession was known to the legal claimants and how long his possession continued. He must also show whether his possession was open and undisturbed. These are all questions of fact and unless they are asserted

and proved, a plea of adverse possession cannot be inferred from them. Therefore, in normal cases an appellate Court will not allow the plea of adverse possession to be raised before it. There are no doubt some cases in which the plea will be allowed because in some form the allegation upon which it can be raised was made at the time and the facts necessary to prove the plea were brought before the Court and proved.

Held, that the law relating to adverse possession has its roots in the reluctance of lawyers to disturb an existing state of things whenever to do so would injure a person in *de facto* possession, in order to benefit another who though possessing a legal claim to the property has been so careless or indifferent that he has not chosen to assert his right although he knew that he had been deprived of it. The law will not, however, help a wrongdoer if he has obtained possession of another's property in a clandestine manner and has concealed the knowledge of his possession from the person who is the rightful owner. Also the law will protect the rightful owner where he has remained ignorant of the trespass upon his rights or where he has exercised whatever vigilance he could in the circumstances. Possession may be corporeal as well as incorporeal, and from this it follows that adverse possession can also be corporeal or incorporeal. Where the possession is corporeal the matter is quite simple. Possession is disturbed when a stranger or a trespasser takes corporeal possession by entering upon it and asserting that he has a right to it. In the case of incorporeal right, however, the matter is not so simple. The mortgagor cannot enter upon actual possession of the land whenever he wants to because he has parted with his possession to the mortagee. He can redeem the land in accordance with the terms of the mortgage. If somebody else to his knowledge exercises this right, then it may be said that his rights have been interfered with by someone else, but if he continues undisturbed in the possession of this right, it cannot be said that a trespasser has come and taken adverse possession of his rights.

Held, that where a stranger asserts that he is the owner to the knowledge of the mortgagor, this assertion is not by itself sufficient to disturb the right of the mortgagor because mere assertion has never been held to amount to

adverse possession. Where an owner is not deprived of any rights which he exercises or can exercise, there is no case of adverse possession. A person will be said to be in adverse possession if he does something which the owner would have done and does not do, or if he does something which adversely affects the rights of the owner and he knows about it. Where, however, the person claiming adverse possession has merely made an assertion or got his name entered in the revenue records without doing anything to the detriment of the owner he cannot claim to have ousted the rightful owner. Mere entry in the revenue records has never been held to amount to adverse possession.

Held, that in the case of a simple mortgage obtaining possession would undoubtedly amount to adverse possession, but in the case of a mortgage with possession the equity of redemption is never capable of prescription by lapse of time for actual possession of the land is not with the mortgagor. Adverse possession must be adverse and it must be possession. There can be no possession of equity of redemption in the case of mortgage with possession and and it is difficult to understand how a stranger can establish adverse possession over it. Equity of redemption is, thus, not capable of adverse possession.

Held, that possession means the enjoyment of whatever right is possible in the circumstances in relation to that right. The owner is said to be in possession of it when he can exclude everyone else from entering upon it, when he can go upon it whenever he likes and use it in whatever manner is permissible by law. If he mortgages the land with possession to somebody else the mortgagee is in actual physical possession. The owner is only left with the equity of redemption. The only manner in which he can exercise this right is to redeem the property or to transfer the equity of redemption. The sum total of his right as the holder of the equity of redemption is his possession in the land.

Held, that a claim based on adverse possession can only extend to that portion of the property claimed over which there has been actual physical possession. This claim cannot be extended by analogy.

Case referred by a Division Bench consisting of Hon'ble Mr. Justice Gurnam Singh, and Hon'ble Mr. Justice Mehar Singh on the 16th August, 1956 to a Full Bench for consideration on the two questions of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice G. D. Khosla, Hon'ble Mr. Justice Gurnam Singh, and Hon'ble Mr. Justice Tek Chand on 24th May, 1957 after considering the law points came to the conclusion that the appeal being meritless should be dismissed. The D. B. consisting of Hon'ble Mr. Justice Gurnam Singh, and Hon'ble Mr. Justice Tek Chand passed the final order accordingly on 24th November, 1958.

Regular First Appeal from the decree of the Court of Shri Haqiqat Singh Gondara, Sub-Judge, Ist Class, Barnala, dated the 28th February, 1951, dismissing the plaintiffs suits and leaving the parties to bear their own costs.

DALIP CHAND, for Appellants.

D. K. MAHAJAN AND D. S. NEHRA, for Respondent.

JUDGMENT

G. D. Khosla, J. G. D. KHOSLA, J.—This reference to the Full Bench by a Division Bench of the erstwhile Pepsu High Court has arisen in the following manner. One Mal Singh died leaving 150 *bighas* of agricultural land. He had inherited this land from his father Gurmukh Singh who had obtained it by means of a gift from his father-in-law, Samund Singh. Some of this area was under mortgage and a small portion was unencumbered. An area, 131 *bighas biswas*, was mortgaged with Ram Narain Singh who is the repondent before us. Another plot of 5 *bighas* was mortgaged in favour of somebody else and the rest was unencumbered. Mal Singh left no male issue and the State began to take stepts for the escheat of the property. There upon the collaterals of the donor, Samund Singh, intervened. They are the plainffs appellants before us. Their case was that the property

after the ending of Mal Singh's line had reverted to them because they represented the line of the donor. Gujjar Singh who was a first cousin of Mal Singh and therefore, his heir raised no objection to the claim made by Samund Singh's collaterals. The escheat proceedings were stopped and the question of entering a mutation of this land was taken up by the revenue authorities. Smt. Khemi, the daughter of Mal Singh, now raised an objection, but the mutation was entered in favour of the appellants. They obtained possession of the unencumbered land and redeemed the 5 *bighas* of land which was mortgaged to persons other than those who are parties to the present litigation. Therefore, the position then was that the appellants who are the collaterals of Samund Singh were in actual possession of about 19 *bighas* of land and they were entered as owners of this area. They were also entered as owners of 131 *bighas* 9 *biswas*, but their rights consisted only of the equity of redemption in this land. The actual possession of the land was with the defendants because the original mortgage was a mortgage with possession. This was the state of affairs in 1983 Bk. The plaintiffs now took steps to recover possession of the remaining land also, i.e., the land which is now in dispute. They brought a suit against the present defendants claiming possession of the land on the ground that Mal Singh, the last male-holder had no right to effect a mortgage. They claimed that the land was ancestral *qua* them. Both these issues were decided against them. It was held that Mal Singh was full owner of the property and the property was not ancestral *qua* the plaintiffs. Their suit was accordingly dismissed. This decision was upheld by the High Court of Pepsu.

Having been failed in their effort to oust the defendants, the plaintiffs had recourse to a subterfuge. They made an ostensible transfer of their

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rights in favour of one Basakha Singh who, on the basis of the entries in the revenue records, applied to the Collector for redemption. This application, however, failed. The application was made in 1999 Bk. Soon afterwards Basakha Singh and the plaintiffs brought a suit for redemption. This was the third attempt to oust the defendants. The plaint in the suit was rejected for non-payment of court-fee. In the meantime Mal Singh's cousin Gujjar Singh sold his rights to the defendants for a sum of Rs. 7,000 in the year 2000 Bk. The result of this sale was that whatever rights Gujjar Singh possessed were transferred to the defendants-mortgagees. Gujjar Singh being the reversioner of Mal Singh claimed to have the equity of redemption and therefore, by this sale the defendants became complete owners of the property mortgaged to them.

The plaintiffs now made a fourth attempt to oust the defendants and brought a suit for redemption. It is out of this suit that the present appeal has arisen. This suit was repelled by the defendants who claimed that Gujjar Singh who held the equity of redemption after the death of Mal Singh had sold his rights to them and they (the defendants) had therefore, become full owners. They also raised the plea of *res judicata* contending that this matter had been considered and disposed of in the previous suit brought by the plaintiffs in 1984 Bk. The suit was dismissed, but when the matter came up in appeal to the High Court the plaintiffs sought to raise the plea of adverse possession. The substance of their contention is that ever since 1983 Bk. when the mutation of Mal Singh's land was effected in their favour they have, to the knowledge of Gujjar Singh and his successors-in-interest, been in possession of this land and since their possession has lasted for a period of

more than 12 years, it has now matured into ownership, whatever be the decision in the previous cases.

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Objection was at once taken on behalf of the respondent that this plea could not be raised at this stage and the proper time to raise it was at the trial. It was further contended that a bare equity of redemption could not be prescribed. Gurnam Singh and Mehar Singh, JJ., who heard the appeal in the first instance felt that this was a case which should be considered by a larger Bench. They accordingly framed the following two questions which were argued before us—

(1) Whether the plea of adverse possession not having been raised specifically in the pleadings or in issue can be raised in appeal on the evidence already on the record?

(2) Whether the title to equity of redemption can be acquired by adverse possession when the land is in actual possession of a mortgagee?

The plea of adverse possession is not always a legal plea. Indeed, it is always based on facts which must be asserted and proved. A person who claims adverse possession must show on what date he came into possession, what was the nature of his possession, whether the factum of his possession was known to the legal claimants and how long his possession continued. He must also show whether his possession was open and undisturbed. These are all questions of fact and unless they are asserted and proved, a plea of adverse possession cannot be inferred from them. Therefore in normal cases an appellate Court will not allow the

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plea of adverse possession to be raised before it. There are no doubt some cases in which the plea will be allowed because in some form the allegation upon which it can be raised was made at the time and the facts necessary to prove the plea were brought before the Court and proved. Such a case is the one of which the decision is reported in *Municipal Board, Etawah* v. *Mt. Ram Sri and another* (1). In that case the plaintiffs based their suit on title extending over a period of thirty years. "The plaintiffs' case was that plaintiff 1 was the owner of the land and she had on that plot four small shops fetching a rent of about Rs. 80 a month. Plaintiff 2 is her lessee. The shops were burnt down in June, 1926 and the land was laid vacant. The plaintiffs made an application to the Municipal Board for permission to build again on the land, but this permission was refused on 27th August, 1926, on the ground that the Municipal Board was the owner of the land and not the plaintiffs." The learned Judges of the Allahabad High Court held that a plea of adverse possession extending over a period of thirty years could be read into this claim and therefore although it was not specifically raised in the plaint it could be raised at a later stage. In other words, what they held was that the plea of adverse possession was included in the plea of title. In coming to this conclusion the learned Judges no doubt took notice of the fact that the plaintiffs had clearly stated that actual physical possession of the property in dispute was with them.

A case of another type in which the plea of adverse possession was not allowed to be raised is *Krishna Churn Baisack and others* v. *Protab Chunder Surma* (2). In that case no plea of adverse possession for a period of twelve years was

(1) A.I.R. 1931 All. 670.
(2) I.L.R. 7 Cal. 560.

made in the plaint, but the plea was raised in the trial Court itself. The District Judge, however, took the view that the plaintiffs ought not be allowed to succeed on the plea of adverse possession because it had not been set out with sufficient distinctness in the plaint. With this view the learned Judges of the Calcutta High Court agreed. They based their decision on the ground that all the facts necessary for proving this plea had not been alleged before the Court. In that case the plaintiffs had not been in continued possession for a period of twelve years and they sought to tack on the previous possession of another. Therefore, it is clear that in disallowing the plea of adverse possession to be raised before them the learned Judges were actuated by the fact that fresh material would have to be brought before the Court in the form of allegations and counter-allegations before the plea of adverse possession could be held to be proved. They remanded that case for fresh decision on another issue.

In *Ram Singh* v. *Deputy Commissioner of Bara Banki* (1), the plea of adverse possession was raised for the first time in appeal before the Privy Council. Their Lordships held that since there was no allegation of adverse possession in the plaint and no issue raised as to it before the Court below they could not entertain the plea.

Lachhmi Sewak Sahu v. *Ram Rup Sahu and others* (2), is another case in which the same principle was laid down. Also see *Somasundarum Chetty* v. *Vadivelu Pillai* (3).

The learned counsel for the respondent has contended that had the plea of adverse possession been raised in the plaint the defendant would have been

(1) I.L.R. 17 Cal. 444.
(2) A.I.R. 1944 P.C. 24.
(3) I.L.R. 31 Mad. 531.

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able to repel it, and one of the pleas which he could have raised is the plea of ignorance because he did not know that Gujjar Singh had remained silent when the plaintiffs obtained a mutation in their favour. It seems to me that this plea, if raised, would certainly have deserved consideration even though the defendant is nothing more than the successor-in-interest of Gujjar Singh. The basis of the plaintiffs' suit in my view in the present case was not continued possession over a long period but their title as holders of the equity of redemption. In the circumstances, it seems to me somewhat difficult to entertain the plea of adverse possession at the appellate stage. The general practice of Courts is not to entertain a plea of this type at a late stage. In some cases the plea was repelled even when it was raised at the trial stage because it was not specifically mentioned in the plaint or in the written-statement as the case happend to be. It is only in extremely rare cases that the plea will be entertained at the appellate stage, and I am not at all sure that the matter before us is one of those cases. The plea is clearly an afterthought and the plaintiffs have made three previous efforts to oust the defendants, adopting a different course each time. On the fourth occasion, too, they did not rely upon adverse possession, and raised the point only in appeal. I am therefore inclined to the view that on the facts of the present case the plea of adverse possession should not be allowed to be raised at this stage. I would, therefore, answer the first question in the negative.

I now come to the second question, namely whether equity of redemption is a right capable of prescription. The law relating to adverse possession has its roots in the reluctance of lawyers to disturb an existing state of things whenever to do so would injure a person in *de facto* possession, in

order to benefit another who though possessing a legal claim to the property has been so careless or indifferent that he has not chosen to assert his right although he knew that he had been deprived of it. The law will not, however, help a wrongdoer if he has obtained possession of another's property in a clandestine manner and has concealed the knowledge of his possession from the person who is the rightful owner. Also the law will protect the rightful owner where he has remained ignorant of the trespass upon his rights or where he has exercised whatever vigilance he could in the circumstances. Possession may be corporeal as well as incorporeal, and from this it follows that adverse possession can also be corporeal or incorporeal. The question for our decision in the present case is whether the equity of redemption which is an incorporeal right can be prescribed by adverse possession. The nature of possession has been defined thus by Salmond in his Jurisprudence in section 108—

> "Possession, whether corporeal or incorporeal, exists only when the *animus possidendi* has succeeded in establishing a continuing practice in conformity to itself."

The author says again—

> "In the case of corporeal possession the *corpus possessionis* consists * * * in nothing more than the continuing exclusion of alien interference, coupled with ability to use the thing oneself at will * * * In the case of incorporeal possession, on the contrary, since there is no such claim of exclusion, actual continuous use and enjoyment is essential, as being the only possible mode of exercise."

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In a footnote on the next page the author quotes from a book by Baudry—Lancantinerie—

> "Possession is nothing else than the exercise or enjoyment, whether by ourselves or through the agency of another, of a real right which we have or claim to have over a thing."

Possession therefore means the enjoyment of whatever right is possible in the circumstances in relation to that right. The owner is said to be in possession of it when he can exclude everyone else from entering upon it, when he can go upon it whenever he likes and use it in whatever manner is permissible by law. If he mortgages the land with possession to somebody else the mortgagee is in actual physical possession. The owner is only left with the equity of redemption. The only manner in which he can exercise this right is to redeem the property or to transfer the equity of redemption. The sum total of his right as the holder of the equity of redemption is his possession in the land.

The question now arises how is the rightful owner's possession disturbed. Where the possession is corporeal the matter is quite simple. Possession is disturbed when a stranger or a trespasser takes corporeal possession by entering upon it and asserting that he has a right to it. In the case of incorporeal right, however, the matter is not so simple. The mortgagor cannot enter upon actual possession of the land whenever he wants to because he has parted with his possession to the mortgagee. He can redeem the land in accordance with the terms of the mortgage. If somebody else to his knowledge exercises this right then it may be said that his rights have been interfered with by someone else, but if he

continues undisturbed in the possession of this right, it cannot be said that a trespasser has come and taken adverse possession of his rights.

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Where a stranger asserts that he is the owner to the knowledge of the mortgagor this assertion is not by itself sufficient to disturb the right of the mortgagor because mere assertion has never been held to amount to adverse possession. I can conceive of cases where a stranger may enter into actual physical possession of mortgaged property and yet his possession may not be deemed to be adverse by the mortgagor, because the mortgagor may think that it is the mortgagee who has transferred possession to the stranger and his equity of redemption has remained unaffected by the transaction. The adverse possession would in that case be to the detriment of the mortgagee but not of the mortgagor. Generally speaking, it seems to me that where an owner is not deprived of any rights which he exercises or can exercise, there is no case of adverse possession. A person will be said to be in adverse possession if he does something which the owner would have done and does not do, or if he does something which adversely affects the rights of the owner and he knows about it. Where, however, the person claiming adverse possession has merely made an assertion or got his name entered in the revenue records without doing anything to the deteriment of the owner he cannot claim to have ousted the rightful owner. In the present case Gujjar Singh was the rightful owner of the land after Mal Singh's death. When mutation proceedings began he raised no objection to the land being mutated in the plaintiffs' name. The plaintiffs could not obtain actual possession of the portion mortgaged to the defendants and so in respect of it Gujjar Singh could not do anything nor could

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the plaintiffs. In 1984 Bk. the plaintiffs tried to obtain possession of the land but failed. There was therefore, no disturbance of Gujjar Singh's rights. In 1999 Bk. Bisakha Singh, the nominee of the plaintiffs, failed to redeem the land and in 2000 Bk. the plaintiffs themselves failed a third time. All that happened during these years was that the plaintiffs' names remained in the revenue records as owners of the equity of redemption. They did not do anything which would have affected adversely the rights of Gujjar Singh. They were unable to deal with the land or obtain possession of it although they tried on several occasions. Therefore there was no overt act committed by them in relation to this land which would give them justification to say that they were in adverse possession of the land. Mere entry in the revenue records has never been held to amount to adverse possession.

In the case of a simple mortgage obtaining possession would undoubtedly amount to adverse possession, but I am extremely doubtful if in the case of a mortgage with possession the equity of redemption is ever capable of prescription by lapse of time for actual possession of the land is not with the mortgagor. Adverse possession in my view must be adverse and it must be possession. There can be no possession of equity of redemption in the case of mortgage with possession and it is difficult to understand how a stranger can establish adverse possession over it.

In *Mst. Durga Devi* v. *Girwar Singh* (1), a stranger in collusion with the mortgagee took possession of some property. It was held that this did not amount to adverse possession.

(1) 70 I.C. 958.

In *Tarubai and others* v. *Venkatrao and others* (1). it was pointed out that under Roman Law possession was not lost in land until the possessor had notice of his physical power to deal with it having been destroyed. To constitute adverse possession there must be some adverse act. The Judges who decided this case quoted from a previous Full Bench decision of their Court in *Bhavrao and others* v. *Rakhmin and others* (2).

"By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, or some person other than the true owner, the true owner having the right to immediate possession." The learned Judges pointed out that if the true owner has no right to immediate possession no adverse possession can begin against him. In the case of a mortgage with possession the mortgagor is not entitled to immediate possession and therefore the mere assertion of a right in equity of redemption by a stranger will not affect his rights and will not constitute possession adverse to him.

An argument raised on behalf of the plaintiffs is that after the death of Mal Singh they did whatever they could, not only to assert their title to the land but to obtain possession of it. They did actually obtain corporeal possession of a small area of unencumbered land. They further redeemed 5 *bighas* of land which was mortgaged to a third party and with regard to the land in dispute they got their names entered in the revenue records. The argument therefore amounts to this. The land left by Mall Singh was a single entity. Part of it was capable of immediate possession and

(1) I.L.R. 27 Bom. 43.
(2) I.L.R. 23 Bom. 137.

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part had to be redeemed. The plaintiffs took immediate possession of the unencumbered portion and redeemed a further portion. The plaintiffs' claim is not based on title. It is based on adverse possession and the person claiming adverse possession cannot say "I have one portion in my actual possession and the remainder therefore must be deemed to be in my possession also". A claim based on adverse possession can only extend to that portion of the property claimed over which there has been actual physical possession. This claim cannot be extended by analogy. The principle applicable was clearly set out in a Madras case *Pattathil Chathu Nayar* v. *Pattathil Aku and others* (1). In that case the equity of redemption in a certain estate on the death of the mortgagor vested in two branches of the family. The rents and profits of the land paid by the mortgagee were enjoyed exclusively by the representative of one branch for 15 years. This representative claimed to have become owner of the equity of redemption by adverse possession. Dealing with his claim the learned Judges observed—

> "Now, what is the title he claims? It is a title to the property. To show that the title of the first three defendants has determined and that he has held possession of an adverse character for more than tweleve years, he points to the receipt of rents from the mortgagee from 1864.
>
> "But he has not had possession of the *property* for more than twelve years. His exclusive receipt of rents is evidence of an exclusive right residing in him to

(1) I.L.R. 7 Mad. 26.

redeem the property. The right to redeem is a right of action, and on the evidence there would be perhaps a foundation for holding that plaintiff had for tweleve years hostilely claimed an exclusive right to redeem. But, notwithstanding this, the right of the first three defendants to sue for possession of the property would not be affected until plaintiff had had possession of the property itself for upwards of twelve years. For the possession of the proprety was all this time with the mortgagee, and as against the mortgagee defendants would have sixty years. "The payment of the rents and profits to plaintiff alone could have no more effect as against the first three defendants than if the rents and profits had not been paid at all but withheld by the mortgagee. In the latter case, plaintiff and defendants, though they might be barred in course of time as to their right to the recovery of the rents, would still retain the right to redeem for sixty years from the date of the mortgage."

I have taken the liberty to give a somewhat extensive quotation from this judgment because the rule laid down by the Madras Judges applies to the case before us in every respect. Here too we have the case of a person getting himself entered as holder of equity of redemption. Even if it is held that this was something more than a mere declaration, all that can be said is that he was entitled to redeem the property, it does not make him the owner. We find, however, that when he did try to redeem the property he failed.

I would therefore answer the second question also in the negative.

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Therefore my conclusion is that the plea of adverse possession cannot be allowed to be raised at this stage in the circumstances of this case and in any event the equity of redemption is not capable of adverse possession because the plaintiffs never exercised any proprietary right over the land nor is there any evidence of any overt act of ownership in respect of the property. The appeal must therefore fail and should be dismissed.

GURNAM SINGH, J.—I agree.

TEK CHAND, J.—I entirely agree both with the conclusions and the reasoning of my learned brother Khosla, J., on both questions referred to the Full Bench. In view of the importance of the matters raised, I desire to state my reasons for agreeing with the conclusions arrived at by my learned brother.

The facts, leading to this reference to the Full Bench, are, that one Mal Singh of village Sherpur, the last male holder, died issueless on 6-3-1979 Bk. Mal Singh had inherited the land in dispute measuring 131 *bighas* and 9 *biswas* along with some other land totalling about 151 *bighas*, from his father Gurmukh Singh, to whom, his father-in-law Samund Singh had given the land by way of gift. On 9-8-1971 Bk: Mal Singh mortgaged 122 *bighas* and 6 *biswas* with Gurmukh Singh and Bagga Singh for Rs. 6,000 as per registered deed of mortgage, dated 9-8-1971 Bk. Later on, some more land was added and the total land thus mortgaged with the same mortgagees was 131 *bighas* and 9 *biswas* and the total mortgage amount was Rs. 6,416.

On Mal Singh's death, escheat proceedings were started. The plaintiffs, who are the fourth degree collaterals of Samund Singh, the donor,

preferred their claim in the escheat proceedings. Shrimati Khemi, as the daughter of Mal Singh, also submitted her claim. Gujar Singh, who was the first cousin of Mal Singh, did not prefer any claim. The revenue officers, on finding, that there were in existence, heirs of Mal Singh, deceased, dropped the escheat proceedings. On 21-2-1983 Bk., a mutation of the entire estate of Mal Singh was effected in favour of the plaintiffs and they have been continuously shown, since then, as mortgagors in the revenue records of the land under mortgage. Shrimati Khemi was unsuccessful in her appeal against the order of mutation and Gujar Singh, who was aware of these proceedings, did not intervene and took no steps for the rectification of the entries in the revenue records in favour of the plaintiffs. After the mutation had been effected in their favour, the plaintiffs took possession of the unencumbered land left by Mal Singh. There was also an area of 5 *bighas* and 11 *biswas* under mortgage with some other persons which was redeemed by the plaintiffs on 16-12-1983 Bk. and taken possession of. As the plaintiffs were out of possession, they instituted a suit for the recovery of possession of the remaining land, i.e., 131 *bighas* and 9 *biswas*, which is now in dispute. In that suit, the plaintiffs claimed, that the land was ancestral *qua* them, and the last maleholder Mal Singh, had no right to effect a mortgage. It was held that Mal Singh was a full owner of the property, which was not ancestral *qua* the plaintiffs, whose suit was dismissed. This decision was upheld by the Pepsu High Court. The plaintiffs then tried to achieve their object by means of a transfer of their rights, i.e., the equity of redemption, in favour of one Basakha Singh, and he, as an assignee, applied to the Collector on 14-11-2000 Bk. for its redemption. This application was dismissed.

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On 1-12-2000 Bk. Gujar Singh who was the first cousin of Mal Singh, sold the equity of redemption for Rs. 7,000 by a registered deed in favour of the mortgagees. The mortgagee-respondents thus perfected their title of full ownership by purchasing the equity of redemption from Gujar Singh, who was the only male heir to Mal Singh deceased.

Another attempt was made when the plaintiffs and Basakha Singh, instituted a suit for redemption under section 12 of the Redemption of Mortgages Act on 13-7-2001 Bk.

The present suit evidences the final attempt on the part of the plaintiffs to obtain possession of the land under mortgage. On 31-2-2004 Bk. the present suit was instituted in the Court of the Subordinate Judge, First Class, Barnala, for redemption of 131 *bighas* and 9 *biswas* of agricultural land, on payment of Rs. 6,416. In this suit the plaintiffs asserted their rights as reversioners of Samund Singh, the donor. They contend, that on the extinction of the line of Mal Singh, the land reverted to the donor Samund Singh and they claim themselves to be his nearest heirs. The defendant admitted the mortgage by Mal Singh, in favour of Gurmukh Singh and Bagga Singh the predecessors-in-interest by a registered deed, dated 9-8-1971 Bk. of 122 *bighas* and 6 *biswas* and later on of additional land totalling 131 *bighas* and 9 *biswas* for Rs. 6,416. The defendant pleaded that the plaintiffs had no *locus standi* to institute the present suit as they were neither the heirs of Mal Singh nor could the land revert to them on the death of Mal Singh. The defendant maintained that Gujar Singh, as the first cousin of Mal Singh, was the rightful heir, who succeeded to Mal Singh, and after the sale of equity of

redemption by him on 1-12-2000 Bk. all the rights of full owner vested in the defendant. It was also pleaded that in view of the dismissal of the plaintiffs' previous suit right up to the High Court, the present suit did not lie. On the pleadings of the parties the following issues were framed:—

(1) Whether the plaintiffs are the heirs of Mal Singh and are entitled to bring the suit for redemption?

(2) Whether the defendant has purchased the land in dispute,—*vide* sale deed, dated 1-12-2000 Bk. from one Gujar Singh, an heir of Mal Singh?

(3) Whether there is a defect of non-joinder of parties in the suit?

(4) Whether the plaintiffs have transferred their right of redemption to Basakha Singh.

The trial Court by its judgment, dated 28th February, 1951, A.D., gave the decision on first issue, against the plaintiffs holding that the land did not revert to the line of the donor. The trial Court was also of the view that the plaintiffs could not challenge the alienation effected by Mal Singh and that they had no *locus standi* to bring the suit which was also barred by the rule of *res judicata*. The second issue was found in favour of the defendant and it was held that the sale of the equity of redemption effected by Gujar Singh, in favour of the defendant Ram Narain Singh was proved. In view of the decision on issues Nos. 1 and 2 it was considered unnecessary to decide issues Nos. 3 and 4. The plaintiffs' suit was dismissed. The plaintiffs presented the present appeal (R.F.A. No. 9 of 1951) to the Pepsu High Court.

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In the High Court the plaintiffs appellants for the first time took up the plea of adverse possession. There, it was conceded that the claim of the plaintiffs resting on other grounds was without foundation. On behalf of the defendant-respondent it was argued, that as the plea of adverse possession had never been specifically raised in the pleadings, it could not be allowed to be urged at the appellate stage, especially when neither any issue had been framed nor any decision given by the trial Court on this question. The plaintiffs' contention was that the plea of adverse possession need not be specifically pleaded and it should be deemed to have been included in the plea of title. Another question that was agitated before the Division Bench of Pepsu High Court was, whether the equity of redemption could be prescribed and adversely possessed. The contention of the defendant-respondent was, that the plaintiffs at no stage had entered into physical possession of the land, and that the mere entries of mutation in the revenue papers, were not sufficient, for commencement of adverse possession. It was pleaded that the mortgagors' right to redeem was incapable of being adversely possessed, where the actual physical possession throughout was with the mortgagees. In view of conflict of judicial opinion noticed by the Division Bench the following two questions were referred to the Full Bench:—

1. Whether a plea of adverse possession not having been raised specifically in the pleadings or in issue can be raised in appeal on the evidence already on the record?

(2) Whether a title to equity of redemption can be acquired by adverse possession

when the land is in actual possession of a mortgagee?

On the first question it is important to remember that the basic rule of law of pleadings is, that a party can only succeed according to what he has alleged and proved, otherwise, on the principle of *secundum allegata et probata*, a party is not allowed to succeed, where he has not set up the case which he wants to substantiate. In the words of Lord Westbury in *Eshan Chunder Singh* v. *Shama Chunder* (1):—

> ".....the determination in a case should be founded upon the case either to be found in the pleadings as involved in or consistent with the case thereby made..... It will introduce the greatest amount of uncertainty into judicial proceedings, if final determination of causes, is to be founded upon inferences, at variance with the case that the plaintiff has pleaded..... and is not taken to prove..... they desire to have the rule observed that the state of fact and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."

This rule that pleadings and proof must correspond, rests upon the principle that no party should be prejudiced by being taken by surprise by varying the case as originally set up. In the words of Mahajan, J., in *Trojan and Co., Ltd.* v. *RM. N. N. Nagappa Chettier* (2). "It is well settled that decision of a case cannot be based on grounds outside the pleadings of the parties and it is a case pleaded that has to be found."

(1) 11 M.I.A. page 7.
(2) 1953 S.C.R. 789 (806).

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It is true that it is not every variance between the pleadings and the proof which offends the rule of "*secundum allegata et probata*". Where there is no element of surprise or where a new claim set up is consistent with the allegations made in the plaint, the plaintiff will not be refused relief as in such a case the defendant is not being prejudiced. Moreover, this rule of pleadings applies to questions of fact and not to pure questions of law, which did not depend for their decision upon substantiation of the facts alleged.

In my opinion, the correct test as to when a plea of adverse possession, when not taken in the plaint, can be raised later on in appeal, was laid down by Calcutta High Court in *Nepen Bala Debi* v. *Siti Kanta Banerji* (1). in the following words:

> "Where no case of acquisition of title by adverse possession is made in the plaint, nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case. On the other hand, as pointed out by this court in the case of *Lilabati Misrain* v. *Bishun Chobey*, when the question reduces itself to one of law, upon facts admitted or proved beyond controversy, it is not only competent to the Court, but expedient in the interest of justice to entertain the plea of adverse possession, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. The true test, therefore, to be applied to determine whether the plea of title by adverse possession should be allowed to be

(1) 8 I.C. 41.

urged though not explicitly raised in the plaint, is, how far the defendant is likely to be prejudiced if the point is permitted to be taken."

Ordinarily, the question of adverse possession is one of fact, resting upon proof of numerous circumstances which go to establish the several elements, indicating adverse character of the possession. In certain cases it may be a question of law, or, a mixed question of law and facts as, where the decision rests upon inferences to be drawn from facts which are admitted or established.

The determination of adverse possession depends upon sifting of facts and circumstances, indicative of adverse possession, and then, upon testing of the evidence in the light of the law applicable. The Appellate Court may allow the setting up of the plea of adverse possession for the first time in appeal provided, the facts on the record are sufficient to support it, and the opposite party is not taken by surprise, but otherwise, a declaration of title by adverse possession will not be given where the claim is not set out distinctly in the pleadings or in issues. In *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1), Markby J., observed at page 242, that where the question of 12 years' possession had not been properly raised either in the plaint or in the issues, and the defendant had no proper notice that such a point was going to be raised, it was not open to the lower appellate Court to declare in plaintiff's favour on the strength of the title which had not been alleged. Plaintiff's suit was dismissed.

(1) I.L.R. 2 Cal. 418.

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The Judicial Committee of the Privy Council declined to entertain the plea of adverse possession which had not been set up in the pleadings and said:—

> "Possession may be adverse or not according to the circumstances; and the question of adverse possession or non-adverse possession is mainly a question of fact. But there has been no allegation of adverse possession in the plaint and no issue raised as to it before the Court below. Their Lordships think that it is impossible now to suggest a case of adverse possession."

See *Ram Singh and another* v. *Deputy Commissioner, Barabanki* (1).

In *Lachhmi Sewak Sahu* v. *Ram Rup Sahu and others* (2), Sir George Rankin stated:—

> "The question whether Bhairon's possession was adverse to the plaintiff is still a question of fact, and it would be manifestly unjust if it were held, in the absence of any issue, any cross-examination, any enquiry upon the point and "without giving the plaintiff an opportunity to meet the allegation, that possession of Bhairon to the appellant had been adverse after 12 years".

In support of the above proposition reference may also be made to the following cases, *Saddik Mohd Shah* v. *Mst. Saran and others,* (3), and *L, Hem Chand* v. *L. Pearey Lal and others* (4),

(1) I.L.R. 17 Cal. 444 at p. 448.
(2) A.I.R. 1944 P.C. 24.
(3) A.I.R. 1930 P.C. 57(1).
(4) A.I.R. 1942 P.C. 64.

In *Krishan Churan Baisak and others*, v *Protab Chunder Surma* (1), the plaintiff had alleged the specific title on the basis of Miras Patta which he failed to establish. He then endeavoured to succeed upon the title by 12 years adverse possession, which was not raised in the Court of first instance, with sufficient clarity, so as to enable the defendant to understand, that he claimed to succeed as well by 12 years' adverse possession, as by a specific title alleged. In these circumstances, the plaintiff was not allowed to succeed on the basis of adverse possession.

Mr. Dalip Chand Gupta, learned counsel for the appellants, has placed reliance upon observations made in a decision of Allahabad High Court in *Municipal Board Etawah* v. *Mst. Ram Sri and another* (2). In that case, the plaintiffs had asked for a declaration, that they were the owners of the land in suit. The High Court after going into evidence led by the parties came to the conclusion that the plaintiffs had substantiated their contention that the land in suit was their private property. The High Court then, observed:—

> ".....and in any case the plaintiff had by completing adverse possession, extending over 30 years, has completed that title in herself as against Municipal Board. The plea of adverse possession need not be specifically pleaded as it is included in the plea of title."

Apart from the fact, that the above observations were in the nature of an *obiter dictum*, on the facts of that case, there was sufficient evidence on the record, from which proof of adverse possession extending over thirty years could be adduced.

(1) I.L.R. 7 Cal. 560.
(2) A.I.R. 1931 All. 670.

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On the facts of this case that authority can throw no light in answering the first question under reference to this Court.

A Privy Council authority, relied upon by the learned counsel for the appellants, also does not lend support to his contention, in view of the particular facts of that case. What was held by Privy Council in *L. Karam Chand and another* v. *Firm Mian Mir Ahmad Aziz Ahmad and another* (1), was that:—

> "The object of pleading is to give fair notice to each party of what his opponent's case is, and all the documents being from the beginning before the Court, there was no question of the defendants being prejudiced by the form of the plaint."

On the basis of the oral and documentary evidence in that case, their Lordships agreed with the conclusion come to by the trial Court. This authority, not even remotely, helps the appellants.

In this case the plaintiffs in their plaint claimed their title on the allegations that they were the heirs of Mal Singh, being collaterals of his maternal grandfather, Samund Singh, and they were entered in the revenue records as mortgagors. There was no averment either express or implied suggesting assertion of title by adverse possession.

In order to succeed on the plea of adverse possession, several facts have to be stated and substantiated by the party basing his title on this plea. Burden of proving all the elements of adverse possession is on the party setting up such a

(1) A.I.R. 1938 P.C. 121.

title. The plaintiffs in this case, in order to succeed, had to allege and establish, that their possession was actual, adverse, exclusive, peaceful, continuous, unbroken, open, notorious, visible, distinct, unequivocal and hostile under a colour of title, or, claim of right. He must further prove the date of commencement, the territorial extent and the length of his adverse possession. After title by adverse possession is *prima facie* substantiated, the defendant is given an opportunity to refute the plaintiff's contention, by showing that some or all the elements which go to support the plea of adverse possession are missing. A defendant may lead evidence to show that the statutory period had not lapsed and the possession was still inchoate, or, that it was not hostile, or, that it was interrupted or, that it was based on fraud or was permissive or clandestine. The defendant could even defeat the plaintiff's contention, by showing, that the possession was not open, hostile, visible, public or notorious or, that he had no actual knowledge. After the parties have led evidence in support of their respective contentions, the Court, then determines the weight and sufficiency of the proof adduced.

An adverse possession, in order to secure title, does not merely consist of mental conclusion or in proving of intention. It must have its basis, in existence of physical facts, as well openly evidence, the purpose to hold dominion over the property, in hostility to the title of the real owner, and as such will be tantamount to giving of notice to the real owner with respect to such a purpose. The party alleging the title by adverse possession, which from its every nature, is commenced in wrong, and is maintained in right, must lead evidence entitling deduction, that the occupant held possession for himself, against all the world, and

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it was exclusive in the sense, that he either successfully turned out or shut out other claimants. It must be shown that the real owner was either evicted or excluded. The intention that is to be manifested is to hold the thing for himself (*Animus sibi habendi*) coupled with the intention to exclude every one else. (*Animus alteri non-habendi*).

An attribute of adverse possession is that it begins with disseisin or ouster of the owner. It is an act of displacement of the owner by the adverse claimant. Disseisin or ouster of the real owner is the foundation of the title by adverse possession. It remains an inchoate title, or a growing title till the expiration of 12 years of its continued, open and hostile assertion and enjoyment. Before title by adverse possession is perfected, all presumptions and intendments are in favour of the real owner. There are a very large number of hurdles before the adverse claimant, which he has successfully to clear. It is only after these obstacles are overcome, that the claimant of title, by adverse possession, receives the protection of law after the expiration of twelve years. Till then the law withholds its support from the wrong-doer.

In this case if plea of adverse possession had been taken in the plaint, and if that plea had been traversed by the defendant and then proper issues framed, a heavy burden would have lain on the plaintiff to lead evidence in support of his hostile claim and a corresponding opportunity of rebuttal would have been given by law to the defendant. In this case it is inconceivable that the question of adverse possession can become the subject-matter of adjudication on this record in the absence of proper plea, issue or proof.

The above discussion leads me to the only conclusion, and that is, that, unless the plea of adverse possession has been specifically raised in the pleadings, put in issue, and then cogent and convincing evidence led on a multitude of points, and an opportunity to refute the case made out by the plaintiff, availed of by the defendant, the plea of adverse possession cannot be allowed to be flung as a surprise, on an unsuspecting defendant, for the first time in appeal.

I find myself in respectful agreement with Khosla J., and in my opinion the first question that has been referred to the Full Bench should be answered in the negative.

.....This brings me to the second question.

It is an uncontested fact in this case, that actual and physical possession had throughout been with the mortgagees, ever since the execution of the deed of mortgage by Mal Singh in the year 1971 Bk. No known or visible right of equity of redemption was exercised by the plaintiffs. It is true that during the course of several years past, the plaintiffs have been asserting their claim to the equity of redemption, on the alleged ground of being successors of the mortgagor Mal Singh deceased, but no litigation launched by them ever bore fruit, their contentions were rejected by the Courts, as often as they were put forward. It is true, that in the year, 1983 Bk., the mutation was entered in their favour and they were, and still continue to be, shown in the revenue records as mortgagors. It is also true that Gujar Singh the nearest heir of Mal Singh kept aloof and did not press his claim when the proceedings were taken for escheat of this land. The plaintiffs and Mst. Khemi alone asserted their respective claims and it was at their instance that authorities dropped

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the proceedings of escheat. But Gujar Singh took no interest and did not participate in those proceedings. On the other hand, the plaintiffs have been making assertions and invoking, though unsuccessfully, the aid of the law Courts. Under these circumstances, can it be said, that the plaintiffs either by unsuccessful assertion of their rights or, by figuring as mortgagors in the revenue records for a period extending over 12 years, should be deemed to have perfected their title to the equity of redemption by plaintiffs? In this case actual possession was throughout with the mortgagees, and in the circumstances of this case, it cannot be said, that the plaintiffs successfully interfered with the possession of the mortgagees.

Adverse possession implies dispossession, or in other words, displacement of dominion of the real owner by the adverse claimant. Record of this case does not suggest any act whereby Gujar Singh, the only rightful heir of Mal Singh the real owner, can be deemed to have been dispossessed of his right to equity of redemption, by the plaintiffs. It admits of no doubt, that repeated assertions without success cannot amount to taking of possession by the wrong-doer, and to the displacement of the title holder. Discontinuance of the right of Gujar Singh cannot be presumed from any act of the plaintiffs. In this case the mortgagors are not shown to have exercised any right of use and enjoyment of the land. Mortgagors' equity of redemption was not capable of use and enjoyment, as in this case, the actual physical possession of the land remained throughout with the mortgagees. Here it cannot be postulated that the equity of redemption could be adversely possessed by the plaintiffs. When actual physical possession under the mortgage, remains with the

mortgagees adverse possession can neither commence nor conclude. In such cases it is impossible to determine either the *terminus a quo* or the *terminus ad quem*.

In the words of Bramwell L.J. in *Leigh* v. *Jack* (1):—

> "to defeat the title by displacement of the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it."

In this case, the nature of the equity of redemption, was such as not to let the mortgagors have enjoyment of possession while the mortgage lasted.

In the particular circumstances, there could conceivably be no act of the adverse claimant which could tantamount to an act of dispossession or ouster. There are no rights of Gujar Singh which can be said to have been encroached upon by the plaintiffs. The very essence of adverse possession is, that it must operate to oust, the other claimant, of his possession or to prevent his entry on his land. For adverse possession to arise, there must be seizure by one and dispossession or exclusion of the other.

In this case there is no indication that the real owner was disseised by the plaintiff and continuously kept out of possession for the legal term. What was the right of Gujar Singh in this case, which was being imperilled by the plaintiff, and which he should have resisted, and on the failure of which, he would be deemed to have submitted

(1) 1879, L.R. 5 Exchequer D. 264 at p. 273.

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to it? Where was the actual entry of one and the expulsion of the other; where was the devestment of the latter and usurpation by the former? In short, can it be said on the facts and in the circumstances of this case, that there was the ouster of the real owner followed by the actual possession of the adverse claimant. During the continuance of the mortgage, Gujjar Singh, the nearest heir of the mortgagor, could neither use nor otherwise enjoy the land under mortgage. Even if, there had been a dispossession of the mortgagees by a stranger, that would not have been treated as equivalent to an adverse possession as against Gujjar Singh who during the pendency of the mortgage,, was merely entitled to a bare equity of redemption. Gujjar Singh, in view of the terms of this mortgage, can well rely upon the maxim "*Contra non valentem agere nulla currit praescriptio*—prescription does not run against a party who is unable to act.

In the particular facts of this case there conceivably were no tangible rights of the mortgagor, which could be overtly invaded by a trespasser.

In *Chinto* v. *Janki and others* (1), the question was, whether, when a mortgage is effected, and the mortgagee is put in possession, a stranger to the mortgage can by 12 years' possession obtain a title against mortgagor. Telang J., was of the opinion, that the question was one not capable of answer in the abstract without reference to the circumstances of each case. In that case he held, that there could be a possession adverse to the interest of a mortgagee, which nevertheless, was not adverse to the interest of the mortgagor. Where the mortgagor puts the mortgagee in possession, he has ordinarily, no right to possession himself until the mortgagee is paid off, and the

(1) I.L.R. 18 Bom. 51.

mere fact of the mortgagee's letting the property go out of his possession, cannot give the mortgagor such a right before payment. In such circumstances it is open to the real mortgagor to say, that the trespasser's possession against the mortgagee, was not adverse to him, as he had no right to possession during the currency of the mortgage.

If a trespasser merely claims to hold the right adversely to the real owner, that is not sufficient because possession means something more than a mere claim to hold. Previous unsuccessful litigation in this case, may be evidence of the fact, that the stranger asserted a claim, but assertion cannot be treated to be at par with possession. What matters is not averment of rights, but their exercise.

In *Tarubai and others* v. *Venkatrao and others* (1), it was observed—

> "By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having the right to immediate possession."

Obviously the real owner in this case did not have the right to "immediate possession".

Ordinarily, in cases of adverse possession, there is forthcoming, proof of knowledge of ouster on the part of the real owner, though it is not absolutely essential in every case. Knowledge will also be presumed where the act of taking possession is open and notorious. The possession of the rightful owner through his agent may be lost where the agent has been dispossessed though

(1) I.L.R. 27 Bom. 43, 51 (F.B.).

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this fact is not within the knowledge of the principal. The principle applicable to such a case was—

> *"Quod servus vel procurator vel colonus tenent, dominus videtur possidere et ideo his dejectis ipse dejici de possessione videtur etiam si ignoreteos dejectos per quos possidebat."*

It means, that the owner is deemed to be dispossessed when his land is held by his slave, agent or a tenant, and therefore, when they are ejected the owner is deemed to be dispossessed even if he is ignorant of the eviction of those, through whom he is dispossessed.

Conversely, the owner in lawful possession cannot be deemed to be ejected from possession, until he has notice of the invasion. This principle is enunciated by the following illustration:—

> *"Nam saltus hibernos et aestivos, quorum possessio retinetur animo, licet nequ servum neque colonum ibi habeamus, quamvis saltus proposito possidendi fuerit alius ingressus, tamdiu priorem possidere dictum est, quamdiu possessionem ab alio occupatam ignoraret,* Dig 41, 2, 44, 2, 45, 46 (When a winter or summer pasture, retained in possession without the instrumentality of slaves or tenants, solely, by the mental relation, is invaded by a stranger who has the intention of taking possession of it, the prior possessor is not regarded as ejected from possession until he has notice of the invasion)."

In this case the plaintiffs under no circumstances could dispossess the mortgagor Gujjar Singh, as he was never himself in possession and

the actual possession of the mortgagees, remained inviolate, never having been encroached upon.

According to the view of Sir Shadi Lal C. J., and Mr. Justice Le Rossignol (*Munna Lal* v. *Hamid Ali and another*) (1), the crucial question in such cases is when was a person dispossessed, i.e., deprived of physical possession of the land? Mere paper dispossession does not amount to dispossession and whether Article 142 or 144 of the Limitation Act be applicable, the *terminus a quo* is the actual physical dispossession. In a case like this, where the possession has been that of the mortgagees throughout, no act of the mortgagor, short of release of the equity of redemption, can be a bar or defence, to a suit for redemption, if otherwise the mortgagor is entitled to redeem. The reason in such cases is, that the mortgagor, who is not entitled to any kind of possession or enjoyment of the mortgaged property during the continuance of the usufructuary mortgage, is not entitled to sue a trespasser in possession. It is the mortgagee alone who can do so, and if the mortgagee does not agree to bring suit for more than 12 years, it is the mortgagee's title alone to the property, which is extinguished. The mortgagor's right to sue for possession accrues, when he proceeds to redeem the property, and is opposed by the trespasser, and the period of 12 years is to be reckoned from the date of redemption. Similarly in the case of a simple mortgage, where the possession is with the mortgagor, an adverse possession against him, is not *per se* adverse against the mortgagee. (*Kharajmal* v. *Daim* (2), *M. Ehtisham Ali* v. *Jamna Prasad* (3), *Shiamlal* v. *Mohammad Ali Asghar Hussain*

(1) 79 I.C. 39.
(2) I.L.R. 32 Cal. 296, 312 (P.C.).
(3) 27 C.W.N. 8 (P.C.).

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(1), *Salig Ram and others* v. *Gauri Shankar* (2), *Praya Sakhi Devi* v. *Manbodh Bibi* (3).

It is true as held in *Raja Jagatjit Singh* v. *Raja Partap Bahadur Singh* (4). that although, adverse possession against a mortgagee is generally ineffectual against the mortgagor, especially when, it begins at a time when the mortgagee is in possession, but when a trespasser takes possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor, after the lapse of the period of 12 years, the title of the trespasser becomes indefeasible not only against the mortgagee in possession but also against the mortgagor. This authority is to be interpreted in the background of its particular facts, as in that case, the trespasser, who took possession of the land in 1891, had changed its character from agricultural land to religious property and had constructed a *dharamsala* upon it. By constructing the *dharamsala,* the trespasser was deemed, not only to have denied the title of the mortgagee, but also, that of the mortgagor, in other words, he was held to be asserting a hostile title to both the mortgagor and the mortgagee. It is well established, that an adverse possession against an existing title must be actual and cannot be constructive.

In the case before us, the plaintiff could not dispossess the mortgagor as he himself was never in possession, and actual possession of the mortgagees, remained inviolate not having been encroached upon. Batty J., in *Tarubai and others* v. *Venkatrao and others* (5), said:—

> "But this bar to equitable relief on the ground of laches and non-claim could

(1) 153 I.C. 73.
(2) A.I.R. 1935 All. 542.
(3) I.L.R. 44 Cal. 425.
(4) A.I.R. 1942 P.C. 47(49).
(5) I.L.R. 27 Bom. 43 at p. 64.

not apply where there was neither knowledge of the assertion of an adverse claim to the equity, nor any act done by another which it was necessary for the claimant to do to preserve his title, and which if not done by him must have been done by and for the benefit of an adverse claimant unless the equity itself were altogether lost. The adverse possession of the equity was therefore due not to the bare claim as mortgagor, but to the exercise of rights and the doing of acts which amounted to a 'public usurpation of the character of the mortgagor', a usurpation of which other persons claiming that character could not, if they professed to retain it, have remained ignorant. That was acquiescence with knowledge."

In the language of Sanderson C. J., in *Priya Sakhi Debi* v. *Manbodh Bibi* (1)—

"In my judgment, the term "adverse possession" implies that the person against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins.

"The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892, and indeed the plaintiff has never yet become so entitled."

To the same effect is the view set out in Madras case reported in *Pattathil Chathu Nayar* v. *Pattathil Aku and others* (2), from which there is a

(1) I.L.R. 44 Cal. 425, 433.
(2) I.L.R. 7 Mad. 26.

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quotation in the judgment of my brother Khosla J., and also in *Kanhoo Lal* v, *Mt. Manki Bibi* (1),

In a case like the present, where possession is with mortgagee, and all that the mortgagor can do is to wait till he is able to redeem the mortgagee, it cannot be said, that his right to the equity of redemption, is capable of being prescribed. In order to set up title by acquisitive prescription, the property must be prescriptible. Equity of redemption in the case of usufructuary mortgage is susceptible of ownership but not of adverse possession. There are cases where, for purposes of adverse possession, property is not prescriptible. For example, property, which has been taken possession of either by violence (vi), or in a clandestine manner (clam), or with the permission of the adversary (*precario ab, adversario*), is not susceptible of prescription, though capable of being possessed.

The next argument of Shri Dalip Chand Gupta, on behalf of the plaintiff is, that the mutation entry in the revenue records showing the plaintiffs to be the mortgagor, should be deemed as proof of his client's adverse possession. The mere fact that the plaintiff's name is entered in the revenue register as a mortgagor is no proof of his possession, actual or constructive. An entry of names in the revenue records has never been treated as a starting point of adverse possession. [See *Shah Niwaz* v. *Sheikh Ahmad* (2), *Sham Lal* v. *Mohd. Ali Asghar Hussain* (3), *Chandersheikhar Singh* v. *Jagjivan Bakhsh Singh* (4)].

It is next contended that the plaintiffs had obtained actual possession of 5 *bighas* of land,

(1) (1902) 6 C.W.N. 601.
(2) I.L.R. 1 Lah, 549, 552.
(3) 158 I.C. 73.
(4) 115 I.C. 179.

which was mortgaged with some other person, and that they had also taken possession of some unencumbered land, left by Mal Singh. From the possession of these lands Shri Dalip Chand argued that adverse possession should also be presumed over the land in suit. This contention is obviously without merit, for plaintiffs can only prescribe to the extent of their possession and no further. In the words of Lord Macmillan in *Nageshwar Bux Roy* v. *Bangal Coal Company, Limited* (1)—

> "Now there is undoubted authority for the proposition that where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed. The maxim *tantum prescriptum quantum possessum* is rigorously applied to him."

I do not, therefore, find any force in the arguments advanced by the learned counsel for the appellant on the second question under reference which in my view should also be answered in the negative. The title to equity of redemption cannot be acquired by adverse possession, when the land is in actual possession of the mortgagee. There is no merit in the appeal which should be dismissed.

B. R. T.

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(1) I.L.R. 10 Pat. 407, 414 (P.C.).