

## APPELLATE CIVIL.

*Before Mookerjee and Wulmsley JJ.*

1919

April 23.

DEBENDRA NARAYAN SINGH

v.

NARENDRA NARAYAN SINGH.\*

*Joint Owners—Their right—Ouster, what amounts to—Cause of action.*

Each joint owner has the right to the possession of all the property held in common, equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property that he had to his sole property except in so far as it is limited by the equal right of his co-sharers. Accordingly, each co-owner may, at all times, reasonably enjoy every part of the common property, that is, he is entitled to such enjoyment as will not interfere with the like rights of the co-owners. It necessarily follows that one co-owner has no right to the exclusive possession and use of any particular portion of the joint property; and if he exercises such rights and excludes his co-sharers from participation in the possession, he must account to his co-sharer for his interest in the part from which he is ousted, even though he takes no more than his just share. But the co-sharer out of possession cannot complain of the mere possession of the co-owner so long as he refrains from setting up any claim to share in that possession. Hence, in order to give rise to a cause of action against the co-sharer, it must be proved that his act amounted to ouster or disseisin. It is not easy to frame a formula to cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to the possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an actual ouster. Such resistance must be clearly and affirmatively shown and is not presumed from equivocal acts which may or may not have been designed to operate as an exclusion.

*Jacobs v. Sevard* (1) referred to.

\* Appeal from Original Decree, No. 303 of 1917, against the decree of Kali Kumar Sarkar, Subordinate Judge of Nadia, dated April 28, 1917.

Appeal by Debendra Narayan Singh, the plaintiff.

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The facts are briefly these. This appeal arises out of a suit for recovery of joint possession of a money-lending business and its branches, and with immovable properties acquired with the income of the same together with damages for the loss occasioned to the plaintiff by the unlawful possession taken by the defendants in excess of a decree passed in favour of defendant No. 1. The plaintiff and defendant No. 1 are brothers, and defendant Nos. 2—5 are their nephews. The *pro forma* defendant was the mother of the plaintiff and defendant No. 1 who died during the pending of this suit. She took a probate of the will of her deceased husband and while she was holding possession of the estate as executrix, the plaintiff instituted an administration suit against her, his brothers and sisters. That suit was compromised while it was pending in appeal in this Court and the term of the compromise was that the plaintiff should get Rs. 15,000 from his mother on account of costs incurred by him in that suit and that he should recover the amount in five years from the aforesaid money-lending business and its branches which would be placed under his management for the purpose, and that thereafter the three brothers would have the properties in three equal shares. The plaintiff accordingly took possession of the business on the 29th of October 1906, but in 1909 the defendant No. 1 instituted a suit against him for establishment of his title to the said *karbar* and for accounts. A preliminary decree was passed in that suit in April 1911, and soon after he executed that decree and in conjunction with defendants Nos. 2—5 took possession of all properties appertaining to the *karbar* on the 21st, 22nd and 23rd April 1911. In executing the decree it is alleged they exceeded

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the order of the Court and dispossessed him from the *karbar*, by breaking and removing his padlocks from the *malghar* and *golabaris* and by putting their own padlocks instead, although the order of the Court was that they would get joint possession of all those properties with the plaintiff. According to the compromise decree in the High Court, the plaintiff was entitled to one-third share of the said *karbar* and of the properties acquired with its income, while the defendants were entitled to the remaining two-thirds share and he was to hold possession of all the shares for five years. In such a circumstance the defendants had no legal rights to take possession of the property including the plaintiff's share therefrom which has resulted in a serious loss to him. The amount of that loss on account of the stoppage of the business has been put down at 25,033-5-4 in the plaintiff's share and Rs. 2,000 has been claimed as damages in his share for the wrongful misappropriation by the defendants of the whole income arising from the landed property acquired with the profits of the money-lending business. The plaintiff, accordingly, prayed for Rs. 27,163-5-4 as damages and for recovery of possession of his own one-third share of the money-lending business and its branches together with the immovable properties appertaining thereto jointly with the defendants. Defendant No. 1 and defendants Nos. 2—5 entered appearance and contested the claim on this, among other grounds; viz., that the plaintiff has no cause of action against them for the suit as framed. The trial Court dismissed the suit with costs. Hence this appeal.

*Babu Jogesh Chandra Roy, Babu Upendra Narayan Baychi and Babu Nagendra Nath Sen, for the appellant.*

*Babu Bipin Behari Ghose, Babu Panchanan Ghose  
and Babu Gopendra Nath Das, for the respondent.*

*Cur. adv. vult.*

MOOKERJEE AND WALMSLEY JJ. This is an appeal by the plaintiff in a suit for recovery of damages and of possession of immovable properties and of a money-lending business. The father of the plaintiff died on the 5th November 1899. He had made a testamentary disposition of his properties (now in suit) on the 4th March 1881. On the 27th April 1901, his widow, the mother of the plaintiff, obtained a probate of the will and took possession of the estate as executrix. Differences arose, however, amongst the members of the family, and in 1903 the plaintiff instituted a suit for construction of the will and for administration of the estate, joining as defendants his brothers and his nephews (the sons of a deceased brother). On the 13th March 1906, a consent decree was made in that litigation, which had been brought up to this Court by way of appeal. Under that decree, the plaintiff became entitled to recover a sum of Rs. 15,000 from the estate and for that purpose to be placed in possession for a period of five years. The decree further directed that, upon the expiry of this period, the estate would be held in equal shares by the plaintiff, his brother, and the sons of his deceased brother. The plaintiff took possession on the 29th October 1906. On the 11th March 1909, the brother of the plaintiff commenced a suit for recovery of possession of his one-third share, on the allegation that the plaintiff had already realised more than his dues under the decree. The suit was decreed on the 12th April 1911. The decree directed that the then plaintiff do take possession within 15 days, and that, on failure to do so, he do forfeit his right to take an

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account of the sums received by his brother. The decree was accordingly forthwith executed on the 21st, 22nd and 23rd April 1911. The writ for delivery, of possession directed that possession be delivered to the decree-holder by removal of any person who though bound by the decree, refused to give up possession. Possession was delivered in the usual manner: bamboos were posted, drum was beaten and the purport of the decree and the writ was proclaimed. It was found that the plaintiff had locked up the granaries, warehouses and store-rooms. The decree-holder and his nephews accordingly put on additional locks. The result was that it became impossible for any of the parties to obtain access to the warehouses or store-rooms by removal of the lock put on by himself; they must act in concert and remove all the locks before any one could enter. Objection to the mode in which possession had been delivered was taken before the execution Court, but was overruled on the 9th May 1911. An appeal was preferred to the High Court, but was ultimately abandoned on the 19th May 1913. Meanwhile, correspondence passed between the legal advisers of the parties with a view to arrange matters amicably, so that the goods and papers locked up might be dealt with in due course. The attempt proved fruitless. The present plaintiff appears to have acted most unreasonably. He would not agree to the appointment of a Common Manager and also had the proceedings stayed by order of this Court. Ultimately, after the dismissal of the appeal to the High Court, the Subordinate Judge directed a Commissioner, on the 15th January 1914, to unlock the doors. This order was carried out, and on the 21st February 1914 the Commissioner submitted a report. He found that many of the granaries were empty and the papers were in disorder. On the 20th

April 1917, the plaintiff commenced this action for damages, on the allegation that the padlocks placed by him had been broken open at the time of delivery of possession and that the defendants had placed their own padlocks, with the result that the plaintiff had been ousted and had suffered heavy damages by the destruction and deterioration of the properties. The Subordinate Judge has held that the story set out by the plaintiff, namely, that the padlock placed by him had been removed was untrue. What happened was that when the defendant and his nephews found that the doors had been locked up by the plaintiff, they placed additional padlocks to make it impossible for the plaintiff to enter without their concurrence. We feel no doubt on the evidence that the Subordinate Judge has correctly found what actually took place. The question now arises, whether the conduct of the defendants was such as to amount in law to ouster of the plaintiff and thus to entitle him to claim damages.

The principles applicable to cases of this character are well settled. Each joint owner has the right to the possession of all the property held in common, equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-sharers. Accordingly, each co-owner may, at all times, reasonably enjoy every part of the common property, that is, he is entitled to such enjoyment as will not interfere with the like rights of the co-owners. It necessarily follows that one co-owner has no right to the exclusive possession and use of any particular portion of the joint property; and if he exercises such rights and excludes his co-sharers from participation in the possession, he must account to his co-sharer for his

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interest in the part from which he is ousted, even though he takes no more than his just share. But the co-sharers out of possession cannot complain of the mere possession of the co-owner, so long as he refrains from setting up any claim to share in that possession. Hence, in order to give rise to a cause of action against the co-sharer, it must be proved that his act has amounted to ouster or disseisin. It is not easy to frame a formula which will cover all cases of ouster, but it may generally be stated that where there is an actual turning out or keeping excluded the party entitled to the possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an actual ouster. Such resistance must be clearly and affirmatively shown and is not presumed from equivocal acts which may or may not have been designed to operate as an exclusion. Thus, it was ruled in *Jacobs v. Seward* (1) that a finding that the gate of the premises was kept locked did not establish an ouster, because it did not show that plaintiff was excluded by the locking or that at some time he applied to have it unlocked and was refused. In the case before us, the defendants placed locks on the doors after the plaintiff had taken a similar measure. It was not their intention to exclude the plaintiff; they only desired to prevent the plaintiff from enjoying exclusive possession and were ready to remove the locks as soon as the plaintiff would do so and allow them to exercise their rights as joint owners. It was the plaintiff who acted unreasonably and in defiance of the rights of the defendants. He persisted in his obstructive attitude even after the title of the defendants had been judicially established and possession had been delivered by the Court. It is impossible to hold that there was ouster of the plaintiff by

(1) (1872) L. R. 5 H. L. 464, 472.

the defendants whose aim throughout has been, not to exclude the plaintiff but to obtain joint possession with him.

The principal ground set out in the plaint in support of the claim is consequently unsustainable.

In this Court, however, strenuous endeavour has been made to support the claim on a somewhat different ground. Our attention has been drawn to portions of the evidence to show that the first defendant has taken possession of some of the granaries and possibly carried off some of the crops stored there. No such allegation was made in the plaint, but even if it be established, the act could not constitute ouster or trespass on joint property. A tenant in common, as was explained in *Mahesh Narain v. Nowbat Pathak* (1), cannot be held liable to his co-tenant for damages for use and occupation of the joint property, unless there has been waste or ouster. Where one tenant in common occupies part of the joint property without assertion of hostile or exclusive title and without claim by his co-tenant to be admitted into possession, he is under no obligation even to account, for he has a right to such occupancy. In the case before us, the embarrassment in which the parties now find themselves is due to the persistent attempt of the plaintiff to frustrate the decree obtained by the defendants against him for the enforcement of their undoubted rights in joint property.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

S. K. B.

*Appeal dismissed.*

(1) (1905) I. L. R. 32 Calc. 837.