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NISSA
v.
SHABAN ALI
KHAAN.

case, whether the defendant is, or is not, the legitimate son of Nawab Ali. This being an ejectment action, the plaintiff must succeed on the strength of her own title, and as she has failed to prove her title the suit was properly dismissed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent: Messrs. *Watkins and Lempriere.*

J. V. W.

1904
April 8.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Burkitt and Mr. Justice Banerji.

BHAIROUN RAI AND OTHERS (DEPENDANTS) v. SARAN RAI (PLAINTIFF).*

Joint owners—Illegal ouster of joint owner—Suit for recovery of joint possession—Form of decree.

Held that if a plaintiff has been in joint possession of property and has been illegally ousted from joint possession of any portion of that property by a co-owner, he is entitled to be restored to such joint possession. *Rahman Chaudhri v. Salamat Chaudhri* (1) distinguished.

THE plaintiff in the suit out of which this appeal arose owned jointly with his brother Sangam Rai certain zamindari in mauza Mallap. Sangam Rai sold a portion of his share to Bhairon Rai and others. The purchasers, according to the plaintiff, took forcible possession of some 10 bighas odd of the joint sîr land, and accordingly the plaintiff, after an unsuccessful application to the Revenue Court, filed his suit in the Civil Court asking for joint possession of the sîr from which he had been ousted. He also claimed profits of the sîr land for 1308 Fashî. The Court of first instance (Munsif of Rasra) decreed the plaintiff's suit, and that decision was upheld in appeal by the District Judge. The defendants purchasers appealed to the High Court. Their appeal came before Aikman, J., sitting in single bench, and was dismissed by the following order:—"In

*Appeal No. 59 of 1902 under section 10 of the Letters Patent.

(1) Weekly Notes, 1901, p. 48.

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my opinion this appeal is without force. If a plaintiff has been in joint possession of certain property and has been illegally ousted from joint possession of a portion thereof, he is entitled to be restored to joint possession. I dismiss the appeal." The defendants purchasers appealed under section 10 of the Letters Patent of the Court, and this appeal coming on for hearing before a Division Bench, was referred to a Full Bench in view of the ruling in *Rahman Chaudhri v. Salamat Chaudhri* (1).

Munshi *Haribans Sahai*, for the appellants:—I submit that the defendants, who are co-sharers in the village in which the land in dispute is situate, being in cultivatory possession of the land, no decree could be passed for joint possession—*Rahman Chaudhri v. Salamat Chaudhri* (1). The plaintiff is entitled only to a declaratory decree, as a decree for joint possession would be unmeaning and incapable of execution. *Bholanath v. Burkin* (2), *Watson & Co. v. Ramchund Dutt* (3) and *Rahman Chaudhri v. Salamat Chaudhri* (1). The *ratio decidendi* is that when one co-sharer is in possession he cannot be ejected by another, his sole remedy being by an application for partition, *Madan Mohan Shaha v. Rajab Ali* (4). The plaintiff according to us is in separate possession of 24 bighas, which is more than the proportionate share of the *sir* he is entitled to hold. I further submit that the plaintiff is not entitled to any damages, his remedy being by a suit for profits or settlement of accounts in the Revenue Court.

Maulvi *Muhammad Ishaq*, for the respondent was not called upon.

STANLEY, C. J.—I have no doubt in my mind as to the propriety of the judgment of the learned Judge of this Court from whose decision this appeal has been preferred, affirming, as it does, the decree of the Court of first instance and also the decree of the lower appellate Court. The suit out of which this appeal has arisen was brought by the plaintiff Saran Rai to recover joint possession with the defendants first party of a moiety of *sir* lands consisting of about 20 bighas and also for compensation on account of the produce of this *sir* land for the

(1) Weekly Notes, 1901, p. 48.

(3) (1893) I. L. R., 18 Calc., 22

(2) Weekly Notes, 1894, p. 127.

(4) (1900) I. L. R., 28 Calc., 223!

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year 1303 Fasli. It appears that the plaintiff and Sangam Rai, the defendant No. 2, are brothers and joint owners of the village called Mallap. Sangam Rai sold one-third of the village to the defendants appellants, and they thereupon had mutation of names effected, and, as has been found by the Courts below, took forcible possession of 10 bighas odd of sir land, the subject-matter of the present appeal. In consequence of this act of the defendants the suit was instituted, and the only questions for our determination in this appeal are (1) whether the Court was justified under the circumstances in passing a decree restoring the plaintiff to joint possession of the sir land, and (2) whether or not the plaintiff was entitled to damages in respect of the produce of the sir land for the year 1303 Fasli by reason of the wrongful ouster. It appears to me that the learned Judge of this Court, as also the District Judge, are perfectly right in the decision at which they arrived, namely, that if a plaintiff has been in joint possession of property and has been illegally ousted from joint possession of any portion of that property by a co-owner, he is entitled to be restored to such joint possession. That is what was held in this case. It is not necessary for us to determine how the decree of the Court is to be carried out. It may be, if the parties do not come to an amicable arrangement and divide the sir land in question between them, or make an exchange, that it will be necessary to go to the Revenue Court and have the joint property partitioned. Be that as it may, however, it seems to me that no fault can be found with the decree which has been passed in this case, which merely declares that the plaintiff, who has been illegally ousted from joint possession of certain land, is entitled to be restored to such possession. Accordingly, being of this opinion, I would dismiss the appeal so far as this point is concerned. As regards the claim for damages, it appears to me that the Court having found that the defendants first party illegally ousted the plaintiff from joint possession, they are responsible to him for the damages which resulted from that wrongful act. For these reasons in my opinion the appeal fails and ought to be dismissed with costs.

BANERJI, J.—I am of the same opinion. Where a party who was in joint possession of property with another has been

wrongfully excluded from such joint possession, he is entitled to a decree to be put back into the possession which he enjoyed before he was evicted. That is the decree which has been granted to the respondent in this case, and I can find no fault with it. The learned vakil for the appellant mainly relied upon the ruling in *Rahman Chaudhri v. Salamat Chaudhri* (1). I must confess that with some of the observations contained in that judgment I am not prepared to agree, but, as the learned Judge of the lower appellate Court points out, that case is distinguishable from the present, and it cannot be regarded as an authority in support of the appellant's contention. I would dismiss the appeal.

BURKITT, J.—On the finding by the learned District Judge that the plaintiff had been illegally ousted from joint possession of certain sir land, I concur with the learned Judge of this High Court that he is entitled to be restored to that possession. He is entitled to be restored to that from which he was illegally ousted. During the argument the case of *Rahman Chaudhri v. Salamat Chaudhri* (1) was cited. The facts in that case, however, differ wholly from the facts in the case we are now considering, and it does not appear to be in any way in point. I concur in the observations of the learned Chief Justice on the question of the damages, and I would dismiss this appeal.

Appeal dismissed.

APPELLATE CIVIL.

1904
May 3.

Before Mr. Justice Blair and Mr. Justice Banerji.

BINDESHRI RAI (DEPENDANT) v. SADHO CHARAN RAI AND OTHERS
(PLAINTIFFS).*

Civil and Revenue Courts—Jurisdiction—Suit by usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him.

Held that a suit brought by the usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him was rightly

* Second Appeal No. 738 of 1902, from a decree of L. Marshall, Esq., officiating District Judge of Ghazipur, dated the 8th of August 1902, reversing a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 30th of January 1902.

(1) Weekly Notes, 1901, p.48.