

course of his judgment our brother Banerji expressed his approval of the rulings of the Madras High Court to which we have referred, but this was merely *obiter*. It was not necessary in that case to determine the correctness of those rulings having regard to the language contained in the mortgage deed indicating an intention that the mortgaged property should remain liable for payment of the mortgage debt. It appears to us in the case before us that so far as the document sued on affects the land of the mortgagor, it is a usufructuary mortgage pure and simple, and we are unable to see that the insertion in it of a purely personal covenant on the part of the mortgagor to pay the mortgage debt in any way alters the nature of the mortgage itself. For these reasons we think that the conclusions arrived at by the Courts below were correct, and we dismiss the appeal with costs.

Appeal dismissed.

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

PHANI SINGH (DEFENDANT) *v.* NAWAB SINGH AND OTHERS
(PLAINTIFFS).*

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July 28.

Joint property—Exclusive dealing with joint property by one of the co-owners—Remedy of the other co-owners—Form of decree.

On the death of a tenant of land which belonged to several joint owners one of the co-owners obtained exclusive possession of the tenant's holding and had his name recorded in the mutation department as owner. The other co-owners sued for joint possession to the extent of their interest in the land, and they asked also for interest *pendente lite* and future interest and costs of suit and for no further relief.

Held that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land. But the plaintiffs were not entitled to an injunction restraining the defendant from dealing with the land without the plaintiffs' consent. *Bhola Nath v. Buskin* (1), *Ram Jatan Shukul v. Jaisar Shukul* (2), *Rahman Chaudhri v. Salamat Chaudhri* (3), *Jagar Nath Singh v. Jai Nath Singh* (4), *Ram Sarup v. Gulzar Banu* (5) and *Watson & Co. v. Ramchund Dutt* (6) referred to. *Nanhi Devi v. Daulat Singh* (7) in part overruled.

* Appeal No. 15 of 1905, under section 10 of the Letters Patent.

(1) Weekly Notes, 1894, p. 127. (4) (1904) I. L. R., 27 All., 88.
(2) Weekly Notes, 1894, p. 166. (5) Weekly Notes, 1905, p. 160.
(3) Weekly Notes, 1901, p. 48. (6) (1890) I. L. R., 18 Calc., 10.
(7) Weekly Notes, 1905, p. 119.

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IN this case the plaintiffs came into Court claiming that they were entitled to a two-thirds share of certain zamindari property, and alleging that in respect of 3 bighas 4 biswansis 14 dhurs of land, a portion of that property, the defendant, taking advantage of the death of the tenant of it, had obtained exclusive possession and got his name recorded as owner in the mutation department. The plaintiffs asked for a decree for joint possession of their two-thirds share of the property, for the costs of the suit, for interest *pendente lite* and future interest, but for no further relief. The Court of first instance (Munsif of Ballia) gave the plaintiffs a decree for joint possession. On appeal by the defendant the lower appellate Court (Officiating District Judge of Ghazipur) held that the plaintiffs were not entitled to a decree for joint possession, but were only entitled to a decree declaring their title to the share of the lands of which they are admittedly the owners, *viz.* a two-thirds share of the land in dispute. The learned District Judge found that the defendant "quietly appropriated the land" on the tenant's death and "sought to regularize his position by the mutation application." Against the decree of the lower appellate Court an appeal was preferred to this Court, which was heard by a learned Judge of the Court. He, modifying the decree of the lower appellate Court, passed a decree declaring that the plaintiffs and the defendant as co-sharers in the village were entitled to joint possession of the land in suit, that neither was entitled to possession to the exclusion of the other, and he then gave an injunction, which was not asked for in the plaint, in the following terms, *viz.* "that an injunction do issue restraining the defendant from dealing with the land by cultivating it, letting it to tenants or receiving the rents and profits of it in any way to the exclusion of the plaintiffs without their consent." Against this decree the defendant appealed under section 10 of the Letters Patent of the Court.

Mr. *Abdul Majid*, for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

STANLEY, C.J. and BURKITT, J.—The question raised in this Letters Patent Appeal is one which has been considered by this High Court on a number of occasions. It is as to the

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form which a decree should take in a case in which a co-sharer of property has taken possession of a portion of the joint property to the exclusion of the other co-sharers. The claim of the plaintiffs is that they are entitled to a two-thirds share of certain zamindari property, and that in respect of 3 bighas 4 biswansis 14 dburs of land, a portion of that property, the defendant, taking advantage of the death of the tenant of it, obtained exclusive possession and had his name recorded as owner in the mutation department. The relief sought in the plaint is that the plaintiffs may be put into joint possession of their two-thirds share and for the costs of the suit, interest *pendente lite* and future interest. There is no claim for any other relief than the reliefs which we have stated. The Court of first instance decreed the plaintiffs' claim for joint possession, and on that decree an appeal was preferred. The lower appellate Court, on the authority of the case of *Rahmat Chaudhri v. Salamat Chaudhri* (1) held that the plaintiffs were not entitled to a decree for joint possession, but were only entitled to a decree declaring their title to the share of the lands of which they are admitted to be owners, *viz.* a two-thirds share of the land in dispute. The learned District Judge found that the defendant "quietly appropriated the land" on the tenant's death and "sought to regularize his position by the mutation application." This is a finding of fact behind which this Court cannot go in second appeal. It amounts to this, that on the death of the tenant who was in possession of the land in question the defendant, who was one of the co-sharers, quietly took possession of it and proceeded to cultivate it. Against the decree of the lower appellate Court an appeal was preferred to this Court, which was heard by a learned Judge of the Court. He, modifying the decree of the lower appellate Court, passed a decree declaring that the plaintiffs and the defendant as co-sharers in the village are entitled to joint possession of the land in suit, that neither is entitled to possession to the exclusion of the other, and he then gave an injunction, which was not asked for in the plaint, in the following terms, *viz.* "that an injunction do issue restraining the defendant from dealing with the land

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

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by cultivating it, letting it to tenants or receiving the rents and profits of it in any way to the exclusion of the plaintiffs without their consent." It is against this decree that the present Letters Patent Appeal has been preferred.

On the part of the appellant it has been pointed out that the form of the decree is not consistent with the decrees passed by this Court in several cases under similar circumstances, and that the Court was not justified in granting an injunction. The question before us is one which we have considered and dealt with on several occasions, and which we may hope will not come before us again, having regard to the fact that there are numerous decisions which appear to us to conclude the question. We shall refer to some of those decisions. The earliest to which we think it necessary to refer is that of *Bhola Nath v. Buskin* (1). In that case some co-sharers in a *thok* made a lease and put the lessee into physical possession of the leased land. A co-sharer in the *thok* who was no party to the lease sued the lessee for joint possession and for mesne profits. It was held by a Bench of the Court consisting of Edge, C.J. and Banerji, J., that the only decree which could be given to the plaintiff was a declaration that plaintiff was entitled to an undivided share in the *thok* and for a proportionate share of the rents and profits. The learned Judges referred to the judgment of the Privy Council in *Watson & Co. v. Ramchund Dutt* (2) and held that being bound by it they could not give the plaintiff a decree for joint physical possession, but could only give a decree declaring him to be entitled to an undivided one-fourth share in the *thok* and to his share in the rents and profits in proportion. In a later case of *Ram Jatan Shukul v. Jaisar Shukul*, in the same volume of the Weekly Notes at page 166, the same learned Judges held that if one of two joint owners of immovable property has been forcibly ejected by the other from land of which he was in possession through a tenant, the person so ejected was not entitled to more than a declaration of his title to possession jointly with the defendant. An injunction was in that case issued to the defendant prohibiting him from dealing with the land of which he was in possession to the

(1) Weekly Notes, 1894, p. 127. (2) (1890) I. L. R., 18 Cal., 10.

prejudice of the plaintiff without the plaintiff's consent. The form of the injunction in that case was very much the same as that of the injunction granted in the case which is now before us. In their judgment the learned Chief Justice and our brother Banerji observe—"This not being a suit under section 9 of the Specific Relief Act, 1877, and neither of those parties having any better title than the other, we can only give the plaintiff such decree as will thoroughly protect his interests and the parties will be left to obtain, if they choose, partition by regular process of law." Accordingly they gave plaintiffs a decree declaring them entitled to joint possession. The point was again considered by one of us in the case of *Rahman Chaudhri v. Salamat Chaudhri* (1). In that case it was held that where co-sharers in an undivided mahal come into Court complaining that other co-sharers, having a like interest with themselves, have excluded them from possession of the joint property, the only relief which a Civil Court can give is a decree declaring the plaintiffs to be entitled to possession jointly with the other co-sharers. It was pointed out in that case that a Civil Court can only declare a plaintiff's rights as a co-sharer and the extent of those rights, and that it is only by partition that a co-sharer can obtain physical possession of an area of the mahal equivalent to his fractional share, if he be not already in possession of such an area. In the case of *Jagar Nath Singh v. Jai Nath Singh* (2) the same question was considered by this Bench. The facts in that case appear to us to be on all fours with those of the case now before us and of the case to which we have last referred. In that case upon the death of the tenant of certain land which was the property of four persons jointly, one of the co-sharers took possession of the tenant's holding and commenced to cultivate it himself. The remaining co-sharers brought a suit to recover physical possession of a share of the tenant's holding thus occupied by the defendants. It was held after careful consideration that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendants were joint owners of the land in dispute and that the plaintiffs were, as such joint owners,

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entitled to an account of the profits of the land. The learned vakil for the respondent has admitted that, in view of the authorities, in a case such as the present the Court cannot give a decree for joint physical possession, but his contention is that the decree passed by the learned Judge of this Court is free from objection, and that an injunction was properly granted. Reliance was placed by him upon the decision in the case of *Nanki Devi v. Dawlat Singh* (1). In that case our brother Banerji dealt with this question at considerable length and held that a plaintiff who had been entitled to joint possession of land with the defendants, and who had been unlawfully excluded from possession by the defendants, was entitled to a decree declaring her title to joint possession of the lands, and also to an injunction restraining the defendants from dealing with the lands in suit, substantially in the form of the injunction granted in the decree now under appeal. The learned Judge drew a distinction between the facts of that case and the case of *Bhola Nath v. Bustin* which we are unable to appreciate. A lessee is in no better position than his lessor. His possession is the possession of his lessor, and if an injunction could properly be granted against a lessor, we see no good reason for refusing to grant it against the lessee. The ruling of this Bench in the case of *Ram Sarup v. Gulzar Banu* (2) follows the ruling of this Bench to which we have already referred.

It appears to us that the only relief to which a co-sharer is entitled in a case where another co-sharer takes peaceable possession of joint property and proceeds to cultivate that property, is a declaration from the Court of his title to his share of the property. If he seek to obtain physical possession of any portion of the joint property of which he is not in possession, his only course is to obtain partition by regular process of law. In this case the learned Judge of this Court has not given a decree for joint possession, but merely a declaration of title to joint possession, but he has granted an injunction, which we think is open to grave objection. There is no prayer for an injunction in the plaint, and in any case in view of the language of their Lordships of the Privy Council in the case of *Watson & Co. v.*

(1) Weekly Notes, 1905, p. 119.

(2) Weekly Notes, 1905, p. 160.

Ramchund Dutt (1) an injunction is not a proper relief to be given in such a case. In their Lordships' judgment in that case, at p. 22, we find the following passage:—"In India a large proportion of the land, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital." These words appear to us to be applicable to the case before us. The finding of the lower appellate Court amounts to this, that the defendant appellant finding lands derelict on the death of a tenant "quietly appropriated" the lands and proceeded to cultivate them. This is a finding of fact of the lower appellate Court. There was no physical ejection of the plaintiffs by the defendant, nor was there any improper conduct on the part of the defendant, except it be that he ought not to have applied for mutation of names in his own favour alone in respect of the property. Under such circumstances we do not think that the plaintiffs, if they had asked for it, were entitled to obtain an injunction such as had been decreed, much less when they did not ask for it. For these reasons we allow this appeal and modify the decree of the

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learned Judge of this Court by striking out therefrom the injunction granted by it. The respondents must pay the costs of this appeal.

Decree modified.

1905
August 1.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burkill.*

JAI DAT AND ANOTHER (PLAINTIFFS) v. RAM BADAL (DEFENDANT).*

Pre-emption—Wajib-ul-arz—Construction of document.

The pre-emptive clause of a *wajib-ul-arz* was drawn up in the following terms:—"In case of great necessity each co-sharer is entitled to transfer his property as recorded in the *khawat*, and the near co-sharers and the *pattidars* can claim a pre-emptive right; but out of them the one who is nearer will have a prior right to do so."

Held that the right of pre-emption only arose on a sale to a stranger. If the sale was to a co-sharer, no right of suit accrued to a nearer co-sharer.

IN a mahal consisting of four *thoks* one Mithu Dichhit, who was a co-sharer, sold a small share to Ram Badal and others, co-sharers in a different *thok*. One Jai Dat and his wife, Raghunathi, filed a suit for pre-emption of this sale, claiming the right to pre-empt as being nearer co-sharers, *i.e.* co-sharers in the same *thok* with the vendor. The Court of first instance (Officiating Munsif of Deoria) gave the plaintiff a decree. On appeal, however, by Ram Badal, the District Judge of Gorakhpur, on a construction of the *wajib-ul-arz* reversed the Munsif's decision and dismissed the suit. The material terms of the *wajib-ul-arz* were as follows:—"In case of great necessity each co-sharer is entitled to transfer his property as recorded in the *khawat*, and the near co-sharers and the *pattidars* can claim a pre-emptive right; but out of them the one who is nearer will have a prior right to do so." The lower appellate Court held that the right of pre-emption arose only on a sale to a stranger, but not when the sale was to a co-sharer in the mahal, although the plaintiff might be a nearer co-sharer than the vendee. The plaintiffs appealed to the High Court.

* Second Appeal No. 1082 of 1903, from a decree of W. Tudball, Esq., District Judge of Gorakhpur, dated the 24th of June 1903, reversing a decree of Babu Gokul Prasad, Officiating Munsif of Deoria, District Gorakhpur, dated the 11th of May 1903.