

## APPELLATE CIVIL.

1911  
November, 21.

Before Mr. Justice Banerji and Mr. Justice Tudball.

JAGARNATH OJHA (PLAINTIFF) v. RAM PHAL AND OTHERS (DEFENDANTS).\*

*Civil Procedure Code (1908), order XXI, rule 35— Suit for recovery of joint possession— Form of decree— Practice.*

Held that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession, whether the plaintiff was originally in joint possession and was subsequently dispossessed, or whether he had never been in possession. *Phani Singh v. Nawab Singh* (1) dissented from. *Bhairon Rai v. Saran Rai* (2), *Rahman Chaudhri v. Salamat Chaudhri* (3), *Watson & Co. v. Ram Chand Dutt* (4) and *Bhola Nath v. Buskin* (5) referred to.

THE facts of this case are briefly as follows:—

The plaintiff appellant brought a suit for joint possession of certain zamindari property, and for damages. The court of first instance gave him a declaratory decree in respect of his share. The lower appellate court affirmed this decree, holding that plaintiff had failed to prove that he was ever in physical possession of the lands jointly with his co-sharers. The plaintiff appealed.

The case coming on before a single Judge was referred to a Division Bench by CHAMBER J., under the following order:—

This was a suit by the appellant for joint possession of land with the respondents. The land belonged to one Lachmi Ojha, on whose death it passed to his widow. On the widow's death the property devolved upon the appellant, the respondents and others. The respondents resisted the suit on the ground that the widow had transferred it to them for lawful necessity. They also relied upon a compromise arrived at in a suit. It has been found, and it is now admitted, that the compromise is not binding upon the appellant and that the transfers by the widow were not supported by necessity. The courts below have given the appellant a declaration of his right in the property and have declined to give him a decree for joint possession. The only point taken in second appeal is that the appellant should have been given a decree for joint possession with the respondents.

\* Second Appeal No. 1050 of 1910 from a decree of Sri Lal, District Judge of Ghazipur, dated the 27th of June, 1910, confirming a decree of Ganga Nath, officiating Munsif of Ballia, dated the 24th of February, 1910.

(1) (1906) I. L. R., 28 All., 161. (3) Weekly Notes, 1901, p. 48.  
(2) (1904) I. L. R., 26 All., 588. (4) (1890) I. L. R., 18 Calc., 10.  
(5) Weekly Notes, 1894, p. 127.

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It was contended by counsel for the appellant that although a decree could not be made for joint possession before the passing of the new Civil Procedure Code, V of 1908, order XXI, rule 35, of the first schedule to that Code had made the passing of such a decree possible, and that in cases like this a decree should be made for joint possession. The first part of this argument is plainly untenable. The courts have always recognized a right to joint possession and have passed decrees for joint possession in certain cases. See for example the case of *Bhairon Rai v. Saran Rai* (1), where the plaintiff had been ousted from joint possession by the defendant, and the court restored the plaintiff to possession by giving him a decree for joint possession. In England it has always been recognized that ejectment or its modern equivalent may be maintained by one co-owner against another where there has been an actual ouster (see the cases cited in Carr on Collective Ownership, Chapter VII). TUDBALL, J., in *Sheo Pher Singh v. Bhoti Singh* (2), held that order XXI, rule 35, has made no change in the law but has merely shown how a decree for joint possession may be executed. I entirely agree.

If a decree can be passed to put a plaintiff *back* into joint possession, there is no reason why it should be considered impossible to pass a decree for joint possession in the case of a plaintiff who has never been in possession. Whether such a decree ought in any particular case to be passed is another question—see the remarks of AIKMAN, J., in *Ram Charan Rai v. Kauleshar Rai* (3). Instances of cases in which this Court has held that a decree for joint possession should not be passed will be found in *Phani Singh v. Nawab Singh* (4). The actual decision in that case was that a decree for joint possession should not be passed in favour of one co-sharer against another, where on the death of the tenant of the land the defendant, who was one of the co-sharers “quietly appropriated the land” and applied for mutation of names in his favour alone. One of the reasons given for the decision was that it was only by partition that a co-sharer could obtain physical possession of an area equivalent to his fractional share if he was not already in possession, and a Civil Court

(1) (1904) I. L. R., 25 All., 588.

(2) S. A. No. 1229 of 1910.

(3) (1904) I. L. R., 27 All., 153.

(4) (1905) I. L. R., 28 All., 161.

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could not make a partition of a mahal. It seems to me that this is not a reason for refusing to give a decree for *joint* possession, but if it is a sufficient reason for refusing a decree for joint possession where the plaintiff has never been in possession, it is also a sufficient reason for refusing such a decree where he has been in possession.

Counsel for the appellant has referred me to the recent decision of BANERJI, J., in *Tund Man v. Chedda* (1). In that case two persons, Chatur Das and Jiwan Das, had leased a shop to the defendants. The plaintiffs acquired the rights of Chatur Das and the defendants acquired the rights of Jiwan Das. The defendants declined to give the plaintiffs their share of the rent and denied their title. BANERJI, J., held that the plaintiffs were entitled to a decree for joint possession, saying that it was manifest from the provisions of the present Code of Civil Procedure that a decree for joint possession could be granted. He might, I think, have rested his decision on the ground that there had been an actual ouster of the plaintiffs by the defendants. As I have already said, I do not think that the present Code of Civil Procedure has altered the law as regards the competency of courts to give a decree for joint possession. The judgement of their Lordships of the Privy Council in *Watson & Co. v. Ram Chand Dutt* (2), shows that a decree for joint possession *can* be given, and that the question whether one co-owner is entitled to a decree for joint possession with another co-owner depends on the circumstances. The judgement of their Lordships shows that it is important to ascertain whether what the defendant is doing with the land is done in denial of the plaintiff's title. In the present case the defendants respondents have all along denied the appellant's title and have kept him out of possession, saying that they alone are entitled.

But for the decision of this Court in *Phani Singh v. Nawab Singh* and other like cases, I should have been disposed to give the appellant a decree for joint possession. In doing so I should have the support of the decision of the Calcutta High Court in *Surendra Narain v. Hari Mohan* (3), and of BANERJI, J., in

(1) S. A. No. 948 of 1910. (2) (1890) I. L. R., 18 Cal., 10.  
(3) (1906) I. L. R., 33 Cal., 1201

*Tund Mun v. Chetda.* It has been the practice in Oudh for years to pass decrees for joint possession in such cases as this. In the circumstances the proper course seems to be to refer this appeal to a Bench of two Judges. I refer it accordingly.

On this appeal.

Babu *Surendra Nath Sen*, for the appellant :—

There has been some difference in the past as to a decree for joint possession. I therefore pray for a decree under order XXI, rule 35. I rely on *Watson & Co. v. Ram Chand Dutt* (1) and *Bhola Nath v. M. Buskin* (2).

Mr. *Ahmad Kareem*, for the respondents :—

The law is the same as it was of old. I submit that no change has been made; *Phani Singh v. Nawab Singh and others* (3). There is a distinction between cases in which no physical possession has been obtained and cases in which there has been ouster from such possession. A decree may be granted in the latter case, but not in the former. Reference was also made to *Bhairon Rai v. Suran Rai* (4) and *Jagarnath Singh v. Jainath Singh* (5).

Babu *Surendra Nath Sen* was not heard in reply.

BANERJI and TUDBALL, JJ. :—The only question in this appeal is whether a plaintiff, who had never been in possession but was entitled to possession jointly with other persons, could be granted a decree for joint possession. The facts of the case are fully set forth in the order of our brother CHAMBER, by which he referred this case to a Bench of two Judges. They are briefly these :—The property in suit, which is a share of zamindari, originally belonged to one Lachmi Ojha. It passed on his death to his widow, and on the widow's death to the plaintiff, to the respondents, and to others. As the plaintiff did not obtain possession of the property, he brought the suit out of which this appeal has arisen for possession jointly with the defendants. He also claimed damages, but that part of the claim has not been pressed in this Court. Other reliefs were asked for with which we are not concerned in this appeal. The court of first instance decreed a part of the claim, but refused to grant a decree for joint possession. This decree was affirmed by the lower appellate court. The

(1) (1890) I. L. R., 18 Calc., 10.

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

(3) (1905) I. L. R., 28 All., 161.

(4) (1904) I. L. R., 26 All., 588.

(5) (1904) I. L. R., 27 All., 88.

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contention before us is that a decree for joint possession ought to have been passed in the plaintiff's favour. For the opposite contention reliance is placed upon the decision of a Bench of this Court in *Phani Singh v. Nawab Singh* (1). That case, no doubt, supports the view taken by the courts below, but with great deference we are unable to agree with it. In the Full Bench case of *Bhairon Rai v. Saran Rai* (2) it was held that where the plaintiff had been ousted from joint possession by the defendants, a decree could be made in his favour for restoration to joint possession. We fail to see that on principle there is any distinction between the case of a person who was in joint possession but was subsequently dispossessed, and the case of a person who was entitled to joint possession, but had not obtained such possession. As pointed out by our brother CHAMIER, an action for joint possession is a well-known form of action, both in England and in this country, and before the decision of the case of *Rahman Chaudhri v. Sulamat Chaudhri* (3) decrees were always made for such possession. There may, no doubt, be cases in which the court may not deem it reasonable in the interests of all the parties concerned to make a decree for joint possession. An instance of such a case is that of *Watson & Co. v. Ram Chand Dutt* (4). Another case of the same kind is that of *Bhola Nath v. M. Buskin* (5). That a decree for joint possession can be made has until recently in this Court always been regarded as settled law, but if any doubt existed on the point, it has been removed by the clear provisions of order XXI, rule 35, of the present Code of Civil Procedure. In our opinion the circumstances of the present case are such as to entitle the plaintiff to a decree for joint possession. The courts below were, therefore, wrong in not granting him such a decree. We accordingly allow the appeal, and vary the decree of the courts below by adding to the decree made by those courts a decree in the plaintiff's favour for joint possession of the property decreed. The appellant will have his costs in this Court and in the courts below.

*Appeal allowed.*

(1) (1906) I. L. R., 28 All., 161.

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

(2) (1904) I. L. R., 26 All., 588.

(4) (1890) I. L. R., 18 Calc., 10.

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