

the parties had been in actual cultivatory possession, and, that being so, we are of opinion that the defendant had no right to oust him, and the plaintiff is entitled to a decree for joint possession without prejudice to the rights of the other co-sharers of the village.

The appeal is, therefore, allowed to this extent that the plaintiff will be granted a decree for joint possession subject to the rights of the other co-sharers of the village.

The parties will bear their own costs in all the courts.

Appeal decreed.

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Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SARABJIT SINGH (PLAINTIFF) v. RAJ KUMAR RAI AND ANOTHER
(DEFENDANTS)*

Civil Procedure Code (1908), order XXI, rule 35—Co-sharers jointly in possession—One co-sharer ousted by another—Suit for possession and profits by way of damages—Decree given for joint possession but not for profits.

The plaintiff and the predecessor in title of the defendants were joint owners of certain *namindari* and at one time were in joint cultivatory possession. They then leased the land to a tenant. Subsequently the tenant surrendered the land to the predecessor in title of the defendants, who then proceeded to exclude the plaintiff.

Held that the plaintiff was entitled in the circumstances to a decree for joint possession, though not to a decree for profits by way of damages. Such profits could be taken into account when the annual accounts of the village income were adjusted. *Watson & Co v. Ramchand Dutt* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

This case was first heard by a single Judge who passed the following referring order :—

STUART, J.:—These are the facts :—Babban Singh, Mahadeo Singh and Sital Singh owned certain property. Sital Singh sold his share. Raj Kumar Rai, in the exercise of a right of pre-emption, purchased his share. Certain land was *khudkashi* of all the three sharers. This was cultivated by Thagai. Thagai relinquished it in favour of Raj Kumar Rai only, who has taken

* Second Appeal No. 904 of 1919, from a decree of Jotindra Mohan Basu, Additional Judge of Gorakhpur, dated the 16th of April, 1919, confirming a decree of Lakshmi Narayan Tandon, Munsif of Deoria, dated the 9th of January, 1919.

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sole possession of it. The plaintiffs, who represent Babban Singh and Mahadeo Singh, sued Raj Kumar Rai for possession of the plot and for damages. The trial court dismissed their suit for possession and damages but granted them a declaration that the land was their joint *kudhkashit*. They appealed against the dismissal of their claim for possession and damages. The lower appellate court dismissed their appeal, relying on the decision in *Jagar Nath Singh v. Jai Nath Singh* (1). In that case one of several co-sharers entered into the possession of a plot on the death of a tenant. The other co-sharers sued him and obtained a decree for joint possession and mesne profits. A Bench of this Court set that decree aside, holding that they were entitled only to a declaration that they were joint owners entitled to receive their share of profits. That decision was passed before the present Code came into force. In *Jagarnath Ojha v. Ram Phal* (2) it was 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." It was there stated, at page 154 — "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 Civil Procedure Code." The same Bench which decided the appeal in *Jagar Nath Singh v. Jai Nath Singh* (1) arrived at a similar conclusion in 1905 in *Phani Singh v. Nawab Singh* (3). The decision in *Jagarnath Ojha v. Ram Phal* (2) differs distinctly from the decision in *Phani Singh v. Nawab Singh*.

With regard to the question of mesne profits, there is a Full Bench ruling in *Bhairon Rai v. Saran Rai* (4) that a relief for mesne profits can be added to a decree for joint possession.

I am unable to see that the alteration in the Code of Civil Procedure is sufficient to reconcile the conflicting decisions in

(1) (1904) 1. L. R., 27 All., 88. (3) (1904) I. L. R., 26 All., 538.

(2) (1911) I. L. R., 34 All., 150. (4) (1905) I. L. R., 23 All., 161.

Jagarnath Ojha v. Ram Phal (1) and *Phani Singh v. Nawab Singh* (2), and as a single Judge I am unable to decide a point upon which two Benches have disagreed. I refer the decision of this appeal to a divisional Bench. It will be for them to consider whether it should be referred to a Full Bench.

Pandit *Lakshmi Narain Tiwari* and Munshi *Haribans Sahai*, for the appellants.

Munshi *Iswar Saran*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in this appeal relates to certain plots of land, situated in the village Nemi Amna, Pargana Sylhet. The plaintiffs are some of the co-sharers of that village. The defendants are also co-sharers in the same village.

In the year 1898, the said village was partitioned by the Government and lots were prepared by virtue of which the plots in dispute were allotted to the mahal to which the predecessors in title of both the parties belonged. The allegation of the plaintiffs was that after the said partition the plots in question had been in the joint *khudkasht* cultivation of the predecessors of the parties, and that the predecessors in title of the plaintiffs and the defendants jointly cultivated the said plots till 1318 Fasli. It was also stated that after the said year a person named Thagai was put in cultivatory possession of the said plots on behalf of the above parties; that he continued in cultivation till 1321 Fasli, and that the plaintiffs thereafter resumed possession. The plaintiffs further said that after Thagai had surrendered his possession, the plaintiffs cultivated the disputed land, and that the defendants wrongfully cut the crops standing thereon. They, therefore, sued for possession of the said plots and damages.

The defendants denied that the disputed plots were the *khudkasht* land of the plaintiffs. They said that the land in question had been in the exclusive possession of the defendants; that Thagai was their tenant and had a right to surrender possession to them and that the plaintiffs were not entitled either to a decree for possession or to damages.

The trial court found that the land in dispute was the joint *khudkasht* of Sital Singh, the predecessor in title of

(1) (1921) I. L. R., 34 All., 150. (2) (1906) I. L. R., 28 All., 161.

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the defendants, and the present plaintiff; that it was under the cultivation of Thagai on behalf of both, and that the plaintiffs were not entitled to possession or damages. The claim for possession and damages was accordingly dismissed. On appeal that decree was upheld. The lower appellate court similarly came to the conclusion that the parties had a right to cultivate the disputed land and that the possession of Thagai was on behalf of the plaintiffs and the predecessors in title of the defendants.

It is urged on behalf of the plaintiffs appellants that they were entitled to a decree for joint possession, inasmuch as, according to the courts below, the disputed land was in the joint cultivation of the predecessors of both the parties till 1318 Fasli, and that Thagai was in possession subsequently on behalf of them. The decisions on which the plaintiffs rely in support of their contention have been considered by us in another case, *Bisheshar Singh v. Hanuman Singh* (1), which was referred to a Bench along with this case, and we are of opinion that on the findings arrived at the plaintiffs are entitled to a decree for joint possession, because they had been in actual physical possession of the plots till 1318 Fasli and Thagai was thereafter cultivating the said *khudkasht* land on behalf of both the parties.

As pointed out by their Lordships in the case of *Watson and Co. v. Ramchund Dutt* (2), no co-sharer, who has been in physical or actual possession of any part of the joint land, is liable to be ejected by any of the other co-sharers in the village except by means of a partition lawfully obtained in a separate proceeding. Every co-sharer has a right to the beneficial enjoyment of the joint land so long as he does not thereby disturb the actual physical possession held by another co-sharer from before; but where another co-sharer is in such possession, he can only get symbolical possession of the nature referred to in order XXI, rule 35, of the Code of Civil Procedure. The plaintiffs and their predecessors in title have been in actual possession of the disputed land jointly with the defendants by holding the same as their *khudkasht* for some years and letting it out to Thagai afterwards. The defendants had no right to oust them from the land when Thagai

(1) (1921) *Supra* p. 1.

(2) (1890) I. L. R., 18 Cal., 10.

surrendered it, and they are entitled to a decree for joint possession in addition to a decree declaring their joint rights which the courts below have granted. The claim to profits by way of damages cannot be entertained, for such profits can be taken into consideration when the annual accounts of the village income are adjusted.

The appeal is, therefore, allowed and the decree of the courts below is modified in so far as we allow a decree for joint possession to the plaintiffs of the disputed land, in addition to the reliefs granted by the courts below. The parties will bear their own costs in this Court.

Decree modified.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

ANANDI PRASAD DUBE (DEPENDANT) v. KRISHNA CHANDRA MUKERJI (PLAINTIFF) AND RAM KUMAR SINGH AND OTHERS (DEPENDANTS.)*

Mortgage—Prior and subsequent mortgages—Purchaser of mortgaged property who has paid off the earlier mortgages, but not the later ones—His position as regards a subsequent mortgagee's suit for sale—Interest.

When a purchaser of mortgaged property who has obtained possession and paid off prior mortgages sets up in defence to the suit of a subsequent mortgagee the prior mortgages which he has discharged, he is entitled to be recouped the amount which he paid for redemption of the prior mortgages as from the date when it was paid; but he is not entitled to get interest thereon after the date of his entering into possession of the property. *Sri Ram v. Kesri Mal* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Mr. B. E. O'Connor and Mr. Shammath Mushran, for the appellants.

Babu Piari Lal Banerji, for the respondent.

TUDBALL and SULAIMAN, JJ. :—This is a defendant's appeal arising out of a mortgage suit. The mortgaged property is a residential house in Allahabad. The original owner, on the 10th of May, 1907, mortgaged it to Dr. Banerji for the sum of Rs. 7,000. On the 1st of February, 1911, he mortgaged it for the sum of Rs. 1,000 to one Badri Prasad. On the 16th of February, 1911, he mortgaged it for the sum of Rs. 6,000 to

*First Appeal No. 64 of 1919, from a decree of Partab Singh, Subordinate Judge of Allahabad, dated the 31st of July, 1918.

(1) (1908) I. L. R. 26 All., 186.

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