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APPELLATE CIVIL.

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

BISHESHAR SINGH (PLAINTIFF) *v.* HANUMAN SINGH (DEFENDANT) \*.  
*Civil Procedure Code (1908), order XXI, rule 35 (2)—Joint property—Ouster  
of one co-sharer by another—Suit for recovery of joint possession—Form  
of decree.*

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A person who is entitled to the possession of immovable property jointly with others may be granted a decree for joint possession—whether he was originally in possession and was subsequently dispossessed, or whether he had never been in possession. He is not merely entitled to a decree declaring his rights in the land. *Dhanraji Pandain v. Sheo Raj Pands* (1, distinguished. *Bhairon Rai v. Saran Rai* (2), *Watson & Co. v. Ranchund Dubt* (3), *Phani Singh v. Nawab Singh* (4), *Ram Charan Rai v. Kauleshar Rai* (5) and *Jagannath Ojha v. Ram Phal* (6) referred to.

THE facts of this case are set forth in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

*Babu Piari Lal Banerji*, for the respondent.

LINDSAY and KANHAIYA LAL, J.J. :—The dispute in this appeal relates to certain plots of land, situate in *shamilat patti Pami* in mauza Kura Kanik. The plaintiff is one of the co-sharers of that village. So is the defendant.

The land was originally a part of the *shamilat* land of that village, yielding grass, to the benefit of which, according to the plaintiff, both the parties were entitled.

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\* Second Appeal No. 843 of 1919, from a decree of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 7th of April, 1919, confirming a decree of Ganga Prasad Varma, Munsif of Fatehpur, dated the 10th of December, 1918.

(1) Weekly Notes, 1906, p. 194. (4) (1905) I. L. R., 28 All., 161.  
(2) (1904) I. L. R., 26 All., 588. (5) (1904) I. L. R., 27 All., 153.  
(3) (1890) I. L. R., 18 Cal., 10. (6) (1911) I. L. R., 34 All., 150.

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The allegation of the plaintiff was that up to 1323 Fasli the plaintiff used to take the grass of the southern half of the land and the defendant used to take the grass of the northern half of the land. There was a further allegation that in the year 1324 Fasli the land became fertile owing to the deposit of silt from the river Jumna and that the parties cultivated their respective half shares and appropriated the profits of their shares of the land that year. There was also an allegation that in 1325 Fasli the defendant ousted the plaintiff and took up wrongful cultivation of the entire land, thereby depriving the plaintiff of his right.

The defendant pleaded that the land in question was his separate property ; that he had been in separate possession of the same, and that the plaintiff had never been in possession of any portion thereof, at any rate within 12 years prior to the suit. The courts below dismissed the claim for joint possession and passed a decree for a declaration that the plaintiff and the defendant were entitled to the land in dispute as co-sharers along with the other co-sharers of patti Pami. The court of first instance took the view that in 1324 Fasli, the plaintiff and the defendant had jointly cultivated the land after the river had receded, leaving a deposit of silt on the land. The lower appellate court, however, expressed no opinion on that point. It relied on the decision in the case of *Dhanraji Pandain v. Sheo Raj Pande* (1) in support of the proposition that the plaintiff was not entitled to a decree for joint possession.

We do not consider, however, that that decision is applicable. The plaintiff there claimed exclusive possession of certain land, on which the defendant had constructed a shed and planted certain trees, and the finding was that the former was not entitled to exclusive possession. In *Bhairon Rai v. Saran Rai* (2) it was held by a Full Bench that if a plaintiff was in joint possession of certain property and was illegally ousted from joint possession of any portion thereof by a co-owner, he was entitled to be restored to such joint possession. As a general rule no co-sharer has a right to appropriate a specific portion of the common land to his exclusive use and thereby to exclude his co-sharers from

(1) Weekly Notes, 1906, p. 194. (2) (1904) 1, L. R., 26 All., 688.

all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, or where he has been so in possession jointly with some other co-sharers, he is entitled to continue in possession till a partition is effected. His possession must, however, be either physical or constructive through his own tenants, and not under a right to hold, common to or exercised by all the co-sharers.

The governing principle applicable to such cases has been laid down in *Watson and Co. v. Ramchund Dutt* (1) where Sir BARNES PEACOCK, who delivered the judgment of the Judicial Committee, observed :—

“ It seems to their Lordships that if there be two or more tenants in common and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation, as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protesting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession.” His Lordship then went on to explain :—

“ In India a large proportion of the lands, including many very large estates, are held in undivided shares, and if one share-holder 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 share-holders 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 deteriorate in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according

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to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one co-sharer 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 share-holder to appropriate to himself the fruits of the other's labour or capital."

In *Phani Singh v. Nawab Singh* (1) one of the co-sharers had taken possession of certain land on the death of a common tenant, who had been cultivating the same, and the decree passed by this Court was that the plaintiffs and the defendant, as co-sharers of the village, were entitled to joint possession of the land in suit, and that neither was entitled to possession to the exclusion of the other. An injunction to restrain 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, was refused. In *Ram Charan Rai v. Kawleshwar Rai* (2) the plaintiff was found to have been in joint possession of the disputed land prior to his dispossession and was held entitled to be restored to his former possession.

The same matter was again considered in the case of *Jagarnath Ojha v. Ram Phal* (3) and the view taken by this Court was that the plaintiff, who was entitled to possession jointly with other persons, could 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. That principle has now been recognized by order 21, rule 35, of the Code of Civil Procedure, which prescribed the manner in which a decree for joint possession can be executed.

The lower appellate court here held that neither party was in possession of the disputed land till it was brought under cultivation in 1324 Fasli, but it omitted to decide by whom the said land was cultivated in that year after it had become culturable by the deposit of silt from the river Jumna. The khasra for 1324, which the trial court accepted, however, proves that

(1) (1905) I. L. R., 28 All., 161. (2) (1904) I. L. R., 27 All., 153.

(3) (1911) I. L. R., 34 All., 150.

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. Ramchund 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.