

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

PANCHANAN BANERJI AND ANOTHER (PLAINTIFFS) v.
ANANT PRASAD AND OTHERS (DEFENDANTS).*

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March, 4.

*Agra Tenancy Act (Local Act III of 1926), section 266—
Co-sharers in zamindari land—Land let to tenant by one
co-sharer without the consent of the others—Such tenant's
possession unlawful and he may be ejected by the co-sharers.*

A tenant let into possession by one of several co-sharers, without the authority or consent of the other co-sharers, acquires no rights and, being in unlawful possession, may be ejected. He can not support his possession as being lawful to the extent of the undivided share of the co-sharer who let the land to him. And such co-sharer may also join with the other co-sharers in a suit to eject him, he being a person in possession without any rights.

Mr. S. N. Gupta, for the appellants.

Mr. A. P. Pandey, for the respondents.

PULLAN and NIAMAT-ULLAH, JJ. :—This is an appeal by plaintiffs Nos. 1 and 2 and arises out of a suit for recovery of possession of a number of plots specified in lists A and B annexed to the plaint and for damages, on the allegation that the principal defendant Anant Prasad has no right to them and that he entered into possession without any lawful title. It is common ground that the land in dispute is part of the zamindari of the plaintiffs Nos. 1 and 2 and Ishwar Dayal and formed the occupancy holding of one Ram Kishun, who died three years before the institution of the suit. Ishwar Dayal was originally impleaded as defendant second party, but was subsequently transferred to the array of plaintiffs as plaintiff No. 3. It was alleged by the plaintiffs Nos. 1 and 2 that Ram Kishun left no heirs and that in consequence his occupancy rights lapsed. They instituted a suit for ejection of the sub-tenants Baldeo and Bholet

*Second Appeal No. 918 of 1930, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 25th of February, 1930, modifying a decree of Zamiruddin, Munsif of Ghazipur, dated the 20th of November, 1929.

Bhar. Anant Prasad, the present contesting defendant, intervened, claiming to be the lawful heir of Ram Kishun. The plaintiffs' suit was decreed on the finding that Ram Kishun left no heir entitled to succeed to his occupancy tenure. Delivery of possession was taken by the plaintiffs. In spite of delivery of possession by the court which passed the decree in the suit already referred to, they failed to obtain actual possession which remained with Anant Prasad, who claimed title as heir to Ram Kishun and also put forward his right as a tenant put into possession by Ishwar Dayal, defendant second party (now plaintiff No. 3). Accordingly, plaintiffs Nos. 1 and 2 brought the present suit in the civil court for recovery of possession and damages, impleading Ishwar Dayal as defendant second party, on whose behalf Anant Prasad, the principal defendant, claimed to be a tenant. The suit was resisted by Anant Prasad on the ground that he was the heir of Ram Kishun and a tenant under a lease granted on behalf of Ishwar Dayal after the decision in the previous suit. He claimed to be a tenant in respect of the lands of all the co-sharers including plaintiffs Nos. 1 and 2 and Ishwar Dayal. The issue thus raised, being one whether the relationship of landlord and tenant existed between the parties, was referred to the revenue court, which negatived Anant Prasad's right as an heir of Ram Kishun but upheld his plea that he had been admitted into tenancy after the decision of the previous suit. The court of first instance dismissed the plaintiffs' suit on that finding. The lower appellate court found, on appeal, that the lands in dispute were let to Anant Prasad by one Balkaran Singh, who was a karinda on behalf of Ishwar Dayal, but that he had no authority to act on behalf of plaintiffs Nos. 1 and 2. Accordingly, it held that Anant Prasad is not a tenant of plaintiffs Nos. 1 and 2 but that he cannot be deemed to be a trespasser. The decree of

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the court of first instance was so far modified that joint possession was decreed to plaintiffs Nos. 1 and 2. The latter have filed the present second appeal.

It has not been argued before us that Anant Prasad is entitled to possession of the lands in dispute as heir of Ram Kishun, the deceased occupancy tenant. His defence rests solely on the plea that the lands in dispute were let to him after the decree in the previous suit. The finding of the lower appellate court, so far as it held that Balkaran Singh, the karinda of Ishwar Dayal, let the land in dispute to Anant Prasad and had authority to do so on his behalf, must be accepted in second appeal. It is likewise conclusive that Balkaran Singh had no authority to let it on behalf of plaintiffs Nos. 1 and 2. The position then is that the land belonging to the three co-sharers was let by only one of them. The question is whether the tenant in whose favour the tenancy was created by one of the three co-sharers is entitled to retain possession in spite of the dissent of the other two. We are of opinion that section 266 of the Agra Tenancy Act (Act III of 1926) governs the case and that the defendant Anant Prasad cannot be considered to be a tenant in respect of the lands in dispute. That section declares that "Where there are two or more co-sharers in any right, title or interest, all things required or permitted to be done by the possessor of the same shall be done by them conjointly, unless they have appointed an agent to act on behalf of them all". It is only the possessor of proprietary right who can let land. The section is, therefore, clearly applicable and the tenancy could be created by all the co-sharers conjointly and any attempt by only one of them to create a tenancy must be declared to be ineffectual. The defendant Anant Prasad, not having been admitted to tenancy by all the three, did not acquire the rights of a statutory tenant. This being so, he is not entitled to retain possession as such. His learned advocate argues that he is entitled to retain possession

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of the undivided share of Ishwar Dayal at whose instance he was placed in possession. This position is, however, untenable, inasmuch as Ishwar Dayal merely admitted Anant Prasad as a tenant and cannot be deemed to have assigned his proprietary or possessory right in the lands. The only ground on which Anant Prasad has defended the suit and the only right which he has claimed and could have claimed is that he is a tenant of the land in virtue of the lease granted by Balkaran Singh on behalf of Ishwar Dayal. If this defence cannot be sustained he must be considered to be in unlawful possession.

Another argument which has been put forward on behalf of the defendant Anant Prasad is that Ishwar Dayal who is now in the array of plaintiffs cannot succeed and obtain possession jointly with plaintiffs Nos. 1 and 2, he having himself created a tenancy in favour of the defendant Anant Prasad. We are of opinion that this contention must be rejected. The lease in favour of Anant Prasad having been found to be one granted by an unauthorised person, it confers no right upon the defendant Anant Prasad. There is nothing to prevent Ishwar Dayal from joining the other co-sharers to eject one who is found to possess no right in respect of the land in dispute.

A learned single Judge of this Court has taken the same view as regards a tenant let into possession by one of several co-sharers. In *Kunwar Singh v. Abdul Ali Khan* (1) it was held that where one of the co-sharers granted a permanent lease of the joint holding without the consent of the other co-sharers, such co-sharers are entitled to treat the lease as a nullity and to eject the lessee. The view is based on the terms of section 194 of the old Tenancy Act (Act II of 1901) which is almost identical with the present section 266. The lower appellate court has referred to the case of *Bhola Nath v. Buskin* (2), and *Amin-Ullah v. Hajira* (3). We

(1) A.I.R., 1928 All., 525.

(2) Weekly Notes 1894, p. 127.

(3) (1906) 3 A.L.J., 767.

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have considered these cases and are clearly of opinion that the question arising before us did not arise and was not decided in them. The lower appellate court has also referred to a decision of the Board of Revenue in *Ram Bahadur v. Ram Niranjan Pathak* (1). That decision is also not in point. Besides, we find that in two other cases, *Pirthi Singh v. Beda* (2), and *Maula Khan v. Mamnoon* (3), the Board of Revenue took a contrary view which is in accord with our own.

The result is that this appeal succeeds and it is accordingly allowed.

Before Mr. Justice Banerji and Mr. Justice King.

HALIMA BEGAM (PLAINTIFF) v. MUHAMMAD
MOHITULLAH AND ANOTHER (DEFENDANTS).*

1932
March, 2.

Land Revenue Act (Local Act III of 1901), section 233(k)—Civil Procedure Code, section 11—Res judicata as between co-plaintiffs or co-defendants—Partition of mahal into pattis—No question of title raised as between the co-sharers of one of these pattis—Subsequent suit by one of these co-sharers against the others, claiming a larger share than that recorded in her name at the partition.

A mahal was partitioned into four pattis. One of the pattis was allotted to A, B and C jointly and the share of each in the patti was recorded in accordance with the entries in the khewat. The partition was effected on the application of two other co-sharers of the mahal, who asked for separation of their shares; also, probably A, B and C, who were members of the same family, applied for having the share belonging to the family formed into a separate patti. At the partition no question was raised by C about the correctness of the share in the patti recorded in her name. Subsequently C brought a suit against A and B, claiming a larger share in the patti than that recorded in her name. *Held* that the suit was not

*First Appeal No. 512 of 1927, from a decree of P. C. Mogha, Subordinate Judge of Aligarh, dated the 6th of July, 1927.

(1) (1921) 3 L.R., All., (Rev.) 165. (2) (1919) 3 U.D., 355.

(3) (1920) 4 U.D., 697.