APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

1933
April, 25

MUHAMMAD ABDUL JALIL KHAN AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD ABDUS SALAM KHAN (PLAINTIFF)*

Co-owners—Joint property in exclusive possession of some co-owners—Ouster—Suit by others for compensation for use and occupation—Whether maintainable without partition—Suit for share of profits of part only of joint property—Whether maintainable.

A co-owner who is ousted and excluded from the enjoyment of his share in the property held by him and others as tenants-in-common is entitled to maintain a suit for compensation for use and occupation of his share from which he has been excluded by other co-owners. Also, one co-owner can sue another for his share of the profits which the latter has realised from some of the items of the joint property, and his only remedy is not a suit for partition. So *held* in a suit by one of three Muhammadan brothers, who jointly owned five houses besides other property, for compensation for use and occupation of two houses from which the plaintiff had been ousted and for his share of the rents realised by the defendants from the three other houses. The case, however, of co-sharers holding various parcels in joint zamindari, held by them as tenants-in-common, for the sake of convenience would stand on a different footing.

Where different co-sharers have, without force or fraud, been in peaceful and exclusive possession of different portions of joint properties for a time sufficient to raise the inference that their separate possessions originated in some mutual understanding, that arrangement cannot be disturbed either by a suit for joint possession or one for compensation for use and occupation; in such a case the only remedy left would be a suit for partition.

Dr. *K. N. Katju* and Mr. *N. A. Sherwani*, for the appellants.

Messrs. *A. M. Khwaja* and *C. B. Agarwal*, for the respondent.

*First Appeal No. 457 of 1929, from a decree of Syed Nawab Hasan, Additional Subordinate Judge of Aligarh, dated the 30th of May, 1929.

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SULAIMAN, C. J., and RACHHPAL SINGH, J. :—This is a defendants' appeal arising out of a suit instituted by the plaintiff which has been partially decreed by the court below.

The plaintiff respondent and the defendants appellants are three brothers; they are joint owners of the five properties, situate in Aligarh, detailed in the plaint. Each of the three brothers owned one-third share in them. Property No. 1 is a pucca residential house, while properties Nos. 2 to 5 are kachha buildings known as *ahatas*.

The plaintiff, in his plaint, stated that during the period of three years from 1st of June, 1925, to 31st of May, 1928, the plaint property had been in use and occupation of the defendants, that properties Nos. 1 and 2 could be let at about Rs.300 per mensem, and that therefore he was entitled to recover from the defendants a sum of Rs.100 monthly as compensation for the use and occupation of his one-third share of these two properties. As regards properties Nos. 3 to 5 the plaintiff alleged that the defendants had been letting them out and had realised rents therefor, and he, therefore, claimed to recover his one-third share in the same.

The defendants contended that the plaintiff was not entitled to get compensation in respect of properties Nos. 1 and 2. The properties Nos. 3 to 5 had been in wretched and ruinous condition and had been mostly unoccupied, that though some portions thereof had been let on rent on some occasions yet the income had been hardly sufficient to meet the cost of repairs. It was also pleaded that the parties owned several properties jointly, and therefore a suit in respect of profits of some of them only was not maintainable.

The plaintiff had claimed a sum of Rs.5,047-14-0. The learned Subordinate Judge has made a decree for Rs.2,913-8-0. The defendants have preferred this appeal.

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Before proceeding any further we may point out here that the learned counsel for the appellants, on the authority of the ruling in *Swan Tee* v. *Ma Ngwe* (1), contended before us that one co-sharer could not sue another for use and occupation of property held by them as tenants-in-common. We find that the two learned Judges of the Burma Chief Court in the above mentioned case held that "a suit for use and occupation by a co-owner against another co-owner will not lie." We find ourselves unable to agree with this view when so broadly stated. We see no valid ground for holding that a co-owner cannot sue another co-owner for use and occupation when the former has been ousted and has been excluded from the enjoyment of his share in the property held by them as tenants-in-common. It is the right of each and every co-owner to enjoy the property in common with other co-owners and as soon as that right is denied or a co-owner is prevented from enjoying the property like other co-owners, he has a cause of action for recovering compensation for use and occupation of his share from which he was excluded. Another ruling cited by the learned counsel for the appellants is *Jagar Nath Singh* v. *Jai Nath Singh* (2). The learned counsel for the appellants relies on the following observation in the judgment of STANLEY, C. J., at page 90: "It appears to me that if co-sharers desire to sue a co-sharer who is in occupation of joint property and who has not obtained possession illegally, the only course open to them is to apply for and obtain partition." It was argued by the learned counsel for the appellants that so long as there is no partition, a co-owner cannot sue another for the use and occupation of the joint property. In our opinion, the rule cited above lays down no such proposition, because after the above quoted sentence we find the following: "It is true that the co-sharer in possession must account to the other co-sharers for the profits of

(1) (1916) 32 Indian Cases, 630. (2) (1904) I. L. R., 27 All., 88.

the land of which he is in exclusive physical possession." So long as the partition does not take place, we think the co-sharer in exclusive possession is liable to account for profits to the other co-sharers. The facts of the case in the above quoted ruling of the Allahabad High Court were different. There, on the death of a tenant of a 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 sued to recover physical possession. The court held that the only relief which the plaintiffs could get was a declaration that they were joint owners and entitled to ask the co-sharer in possession to account for profits. The Court found that it was not a case in which one co-sharer has taken "illegally" the possession of some land to the exclusion of the other. In the case before us, however, the facts are different. If the plaintiff could establish that he was prevented from the use of his one-third share by the defendants, then his ouster would be an "illegal" act on the part of the defendants which would entitle him to claim compensation. Another case on which reliance was placed on behalf of the appellant is *Basanta Kumari Dasya* v. *Mohesh Chandra Shaha* (1). That case, in our opinion, does not help the appellants. It was held that "Sole occupation of different parcels of land by different co-sharers according to their convenience does not constitute ouster of the others and that 'ouster' must mean dispossession of one co-sharer by another where a hostile title is set up by the latter, and where the occupation of the latter is not consistent with joint ownership." It is clear that this ruling would not apply to a case where a co-sharer could show that he has been ousted from the enjoyment of a house by another co-sharer. In such a case the occupation of a co-sharer in possession would not be "consistent with joint ownership". After a consideration of the

(1) (1913) 21 Indian Cases, 621.

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rulings cited above by the learned counsel for the appellants we are of opinion that the contention that a co-owner cannot sue another co-owner for compensation for use and occupation of property held by them as tenants-in-common even if he is excluded from the enjoyment of his share is not correct and cannot be accepted. We hold that a co-sharer who is ousted and excluded from the enjoyment of his share in the property held by him and others as tenants-in-common is entitled to maintain a suit for use and occupation of his share from which he has been excluded by other co-sharers. Nor do we agree with the argument that one co-sharer cannot sue another for his share of the profits in the property which one of them might have realised and that his only remedy is to sue for a partition. If two co-sharers own a house and one of them realise its entire rent, there does not seem to be any reason as to why the one realising the entire rent should not be compelled to pay the share of the other. We would like to add, however, that the case of co-sharers holding various parcels in joint zamindari held by them as tenants-in-common for the sake of convenience would stand on a different footing.

Where different co-sharers have without force or fraud been in peaceful and exclusive possession of different portions of joint properties for a time sufficient to raise the inference that their separate possessions originated in some mutual understanding, that arrangement cannot be disturbed either by a suit for joint possession or one for compensation for use and occupation. In such a case the only remedy left would be a suit for partition.

It is a common ground between the parties that properties Nos. 1 and 2 have never been let on rent.

The first question which we have to determine is whether the plaintiff can claim any compensation from the defendants in respect of properties Nos. 1 and 2. The plaintiff, in paragraph 2 of the plaint, states that

"owing to partnership, the parties are in legal possession of the said property, which is however in use and occupation of the defendants." The plaint is not happily worded, but its perusal goes to show that the plaintiff claimed compensation for use and occupation of the properties Nos. 1 and 2 because he had been excluded from the enjoyment of his own share in them. The plaintiff went into the witness-box and stated on oath that he asked the defendant No. 1 to let him live in property No. 1 but the defendant No. 1 did not accede to this request and said that he would not allow the plaintiff to put up in the kothi because there was litigation going on between them. * * * * * In our opinion the plaintiff has made out a case of ouster and, therefore, he is entitled to compensation in respect of properties Nos. 1 and 2.

About properties Nos. 3 to 5 the plaintiff in paragraph 4 of his plaint stated: "As regards properties Nos. 3, 4 and 5, the defendants are responsible to pay the rent for the last three years, to the extent of one-third share as profits of his share. As far as the plaintiff has learnt from enquiry defendant No. 1 has received the entire amount." * * * * Now, it will be clear from the pleadings that the question for consideration was what amount the defendants had realised as rent of properties Nos. 3 to 5. The learned Subordinate Judge has brushed aside this question and has held the defendants liable for the rents which they might have realised, because they did not look after the buildings properly. It is enough to say that no such case was set up by the plaintiff in the plaint and so the court below was altogether wrong in holding the defendants liable simply on the ground that they did not keep the properties in good repair. It was as much the duty of the plaintiff as that of the defendants to keep the premises in good repair. A suit for the recovery of the plaintiff's share in the rents realised has been converted by the learned Subordinate Judge into a suit to recover damages

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because the buildings were not kept in good repair. The question for our consideration is whether the evidence produced in the case goes to show what rents properties Nos. 3 to 5 fetched during the three years in suit. [After referring to the evidence the judgment proceeded.] Under these circumstances we are justified in accepting the statement of the plaintiff that the properties Nos. 3 to 5 must have fetched at least Rs.54 monthly.

In respect of properties Nos. 1 and 2 the learned Subordinate Judge has fixed the rent at the rate of Rs.150 monthly for the purpose of determining the amount which the plaintiff should get as his one-third share. About properties Nos. 3 to 5, we are of opinion that the plaintiff's statement that they could fetch at least Rs.54 monthly should be accepted. With reference to these rates the amount which the plaintiff should get on account of his one-third share comes to Rs.2,457. The learned Subordinate Judge has allowed the plaintiff interest on the amount due at the rate of Rs.12 per cent. per annum. We do not, however, think that any interest should be awarded to the plaintiff. To this extent the appeal must succeed.

The appellants urged that as they and the plaintiff owned several properties as tenants-in-common, so the latter could not institute a suit to recover rents or compensation in respect of only some of them. We can see no force in this plea. The plaintiff was ousted in respect of two of them and he had a right to recover compensation in respect of those properties. As regards properties Nos. 3 to 5 the defendants' own evidence shows that they alone realised rents and there can be no doubt that the plaintiff could ask them to give his share in the rent realised. It was, of course, open to the defendants to show by their evidence that the entire income of properties Nos. 3 to 5 had gone towards the

repairs of other buildings owned by them as tenants-in-common and so nothing was due. But the defendants never attempted to prove a case of this kind.

For the reasons given above, we allow the appeal in part, modify the decree of the court below by dismissing the plaintiff's claim for interest claimed by him. The decree in favour of the plaintiff for a sum of Rs.2,457 stands. He will get future interest on the amount at Rs.6 per cent. per annum from the date of the suit till satisfaction. The parties will receive and pay costs in both the courts in proportion to their success and failure.

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

MANGAT RAI AND OTHERS (PLAINTIFFS) *v.* DULI CHAND AND OTHERS (DEFENDANTS)* 1933 APRIL, 25

Election—Choice of two remedies which are not co-existent but alternative—Adoption of one bars the other—Estoppel—Decree-holder accepting payment of decree money is barred from pressing appeal against order which had set aside the sale—Civil Procedure Code, section 11, *explanation IV—Constructive* res judicata *arising out of execution proceedings—Transfer of Property Act (IV of* 1882), *section* 52—*—Affected by doctrine of election.*

Mortgaged property was sold in execution of a decree for sale and was purchased by the mortgagee decree-holder. On an application by the judgment-debtor the sale was set aside, and two days later he sold the property by private sale. The decree-holder filed an appeal against the order setting aside the sale; to that appeal the vendee was not a party. A few days later the vendee deposited in the execution court money for discharging the decretal amount. Before the appeal came up for hearing, the decree-holder withdrew the money from the execution court, but he did not mention this fact at the

*First Appeal No. 67 of 1930, from a decree of Muhammad Aqib Nomani, Additional Subordinate Judge of Meerut, dated the 14th of December 1929.