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requires the selection of one person of the nearest degree or by lot where there are several persons of equal degree in relationship to the vendor for the purpose of giving the preferential right to buy. This in the very nature of things implies that the competitors and the vendors are descended from a common stock.

Hasan and
Misra, J.J.

On the above interpretation it must be held that the plaintiff has failed to establish that he is nearer in degree than the vendee to the vendor; and that he has also failed to establish that he is equal in degree with the vendee to the vendor. His claim for pre-emption must, therefore, fail.

We accordingly allow this appeal, set aside the decree of the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and
Mr. Justice Muhammad Raza.*

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JALALUDDIN KHAN (DEFENDENT-APPELLANT) v. RAM-
PAL AND ANOTHER (PLAINTIFFS), AND OTHERS (DEFEND-
ENDENTS-RESPONDENTS).*

Co-sharer—Common land—Right of a co-sharer to appropriate to himself a specific portion of common land—Long possession by a co-sharer of a specific portion of common land—Other co-sharers' right to eject him or his transferee.

Held, that one co-sharer has no right to appropriate to himself a specific portion of the common land, and to exclude his co-sharers from 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, the latter have no

* Second Civil Appeal No. 95 of 1927, against the decree of Gokul Prasad, Subordinate Judge of Partabgarh, dated the 4th of January, 1927, upholding the decree of Hiran Kumar Ghoshal, Munsiff of Partabgarh, dated the 19th of October, 1926, decreeing the plaintiffs' suit.

right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. Such a co-sharer or his transferee is entitled to continue in such possession, so long as such user does not interfere with the use by other co-sharers of what is in their possession. *Midnapur Zamindari Company Limited v. Naresh Narayan Roy* (1), *Babu Ram Bahadur Singh v. Raja Sukhmangal Singh* (2), and *Thakur Singh v. Nanhun Singh* (3), relied upon.

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THE case was originally heard by HASAN, J., who referred it to a Bench. His order of reference is as follows :—

HASAN, J. :—This is an appeal by one of the defendants Jalaluddin Khan from the decree of the Subordinate Judge of Partabgarh, dated the 4th of January, 1927, affirming the decree of the Munsif of the same place, dated the 19th of October, 1926, in a suit for recovery of possession of plot No. 75, situate in village Gularha, pargana and district Partabgarh.

The facts of the case are as follows :—

Karim Khan, defendant No. 3, made a usufructuary mortgage of the plot in suit to Pudan and Sitaram, defendants Nos. 1 and 2, for a sum of Rs. 300 on the 22nd of November, 1909. In the year 1917 the mortgagees Pudan and Sitaram sold their rights to the plaintiff. The appellant Jalaluddin, defendant No. 4, is a co-sharer to the extent of the half in the plot in suit. He resists the relief for exclusive possession but has no objection to a money decree being passed in favour of the plaintiffs, or a decree for possession over the half share of the plaintiffs. It is found that Jalaluddin has recently taken possession of his half share of the plot in suit, and is, to-day, in possession thereof. It is further found that the plaintiff and his predecessor-in-interest maintained uninterrupted and exclusive possession of the plot in suit for a period of fourteen years.

(1) 1924) L.B., 51 I.A., 293.

(2) (1921) 8 O.L.J., 637.

(3) (1921) 8 O.L.J., 231.

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On these facts the courts below have granted to the plaintiffs the relief of exclusive possession of the plot in suit, relying on the authority of a decision of a single Judge of the late Court of the Judicial Commissioner of Oudh in the case of *Ram Piyare Lal v. Nageshwar* (1).

Hasan, J.

On behalf of Jalaluddin it is argued in second appeal that the decision in the case mentioned above is inapplicable to the facts of this case for the reason that that case related to the *abadi* of the village, and not to agricultural lands.

In support of the decree of the court below the following cases were cited on behalf of the respondents. *Lahaso Kuar v. Mahabir Tiwari* (2), *Jagannath Prasad v. Badri Prasad* (3), *Lachmi v. Ganga Din* (4), and *Hardeo Singh v. Chandika Bakhsh Singh* (5).

Having regard to the basic principle on which tenancy in common rests and to the rights of co-tenants *inter se* and further having regard to the latest pronouncement of their Lordships of the Judicial Committee in the case of the *Midnapur Zamindari Company Limited v. Naresh Narayan Roy* (6), I entertain serious doubts as to the correctness of the law laid down in the cases cited on behalf of the respondents as to the rights of a transferee of a co-sharer.

I, therefore, think that this case involves a question of sufficient importance to be decided by a Bench of two Judges. Accordingly under section 14, sub-section (2) of the Oudh Courts Act, 1925, I refer this appeal for decision to a Bench of two Judges.

Mr. Ali Zaheer, for the appellant.

Messrs. Radha Krishna, Kashi Prasad and Ali Raza, for the respondents.

(1) (1918) 21 O.C., 214.

(3) (1912) I.L.R., 34 All., 113.

(5) (1919) 6 O.L.J., 278.

(2) (1915) I.L.R., 37 All., 412.

(4) (1907) 5 A.L.J., 93.

(6) (1924) L.R., 51 I. A., 293.

STUART, C. J., and RAZA, J. :—We are concerned in this appeal with plot No. 75, area 2 bighas, 6 biswas, situated in the village of Gularha. It is admitted that this plot forms portion of an under-proprietary holding, about 42 bighas in area, which was owned in half shares by Karim Khan and Jalaluddin Khan. Karim Khan mortgaged plot No. 75 with possession on the 22nd of November, 1909. His mortgagees obtained possession, and transferred their rights subsequently to the present plaintiffs-respondents. There is a finding of fact that the mortgagees obtained possession in 1909, and held possession continuously over the plot till 1917, when possession was transferred to the plaintiffs-respondents. In 1923 Jalaluddin Khan ejected the plaintiffs-respondents from possession without process of the law. The plaintiffs then sued to regain possession against him as a person who had ejected them without right. He has put forward the plea in both the lower courts and in the present Court that inasmuch as Karim Khan and he owned the whole holding jointly, Karim Khan had no right to execute the mortgage of 1909, and that such being the case he had the right to eject the plaintiffs and that the plaintiffs have no right to recover possession from him. He admits that he did eject them. There are a number of decisions of the old Judicial Commissioner's Court and of the Allahabad High Court laying down the general rule as regards the enjoyment of joint property by co-sharers. The rule is that one co-sharer has no right to appropriate to himself a specific portion of the common land, and to exclude his co-sharers from 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, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition.

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Such a co-sharer or his transferee is entitled to continue in such possession, so long as such user does not interfere with the use by other co-sharers of what is in their possession. Most of these decisions refer to land in the village sites. But two of the decisions of the old Court of the Judicial Commissioner refer to cultivated land. One of these is a decision by Mr. LINDSAY in *Thakur Singh v. Nanhun Singh* (1), and the other is a decision by Mr. DANIELS in *Babu Ram Bahadur Singh v. Raja Sukhmangal Singh* (2). Their Lordships of the Judicial Committee have considered to some extent the rights of co-sharers in *Midnapur Zamindari Company Limited v. Naresh Narayan Roy* (3). That suit was brought by a co-sharer for partition of certain lands in which he and others were co-sharers, the other co-sharers asserting that they had acquired rights of occupancy by long user over certain of these lands. Their Lordships repelled that contention, and made certain observations as to the conduct of co-sharers while remaining joint and the remedy which was open to them in event of their wishing to separate. They say at page 296: "Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands." We read these

(1) (1921) 8 O.L.J., 231.

(2) (1921) 8 O.L.J., 637.

(3) (1924) L.R., 51 I.A., 293.

observations as supporting the general rule of law which we have already stated. We thus have it that although Karim Khan was not entitled to appropriate to himself No. 75 and to exclude Jalaluddin Khan or his predecessor-in-interest from all use and enjoyment of the same without a lawful partition, and in these circumstances was not entitled alone to mortgage No. 75 with possession, inasmuch as he had exercised the right of transfer as far back as 1909 without let or hindrance from Jalaluddin Khan or his predecessor-in-interest, Jalaluddin Khan had no right to eject the mortgagee in possession, and his action in so ejecting him was illegal and unauthorized. The remedy of Jalaluddin Khan was to obtain a partition. He says he has already obtained a partition, but that fact is not admitted and there is nothing to support the statement. The course which Jalaluddin Khan should now adopt is to go into the court and obtain a partition of the whole holding. If he does this, it will be a comparatively simple matter to award the proprietary rights in No. 75 to Karim Khan and the mortgage of 1909 will not then stand as against the interests of Jalaluddin Khan. In the meanwhile the courts have rightly ordered him to restore possession and pay damages to the plaintiffs-respondents. We dismiss this appeal with costs.

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Appeal dismissed.