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in my opinion, constitute a clog on the equity of redemption. The contract, therefore, into which the parties entered with their eyes open must be upheld. I, therefore, agree that the appeal should be allowed.

BY THE COURT :—The appeal is allowed, and the suit is dismissed with costs in all courts.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice A. G. P. Pullan.*

1928  
November,  
1.

RAM SEWAK AND OTHERS (DEFENDANTS-APPELLANTS) v.  
LALTA PERSHAD AND ANOTHER (PLAINTIFFS-  
RESPONDENTS).\*

*Co-sharers not allowing the donee of another co-sharer to obtain possession—Donee, remedy of—Donee, whether entitled to obtain joint possession from civil courts—Suit for partition or profits in revenue courts, necessity of.*

Where one of the co-sharers who was in exclusive possession of certain plots and in joint possession of certain other plots gifted his share to another but the donee was not allowed by the other co-sharers to obtain possession of either the exclusive or joint plots, *held*, that the other co-sharers were in the position of persons who had taken wrongful possession and the donee could obtain a decree for joint possession of the gifted plots and of mesne profits or damages from the civil courts and it was not necessary that they should bring a suit for partition or profit or both in the revenue courts. *Babu Ram Bahadur Singh v. Raja Sukhmangal Singh* (1), followed. *Jalaluddin Khan v. Rampal and others* (2), and *Jagarnath Ojha v. Ram Phal* (3), referred to.

\*Second Civil Appeal No. 275 of 1928, against the decree of Jagdamba Saran, Additional Subordinate Judge of Hardoi, dated the 30th of April, 1928, modifying the decree of Syed Abid Raza, Munsif of Bilgram, dated the 27th of September, 1927, decreeing the plaintiffs' suit.

(1) (1921) 8 O.L.J., 637.

(2) (1927) 2 Luck., 740.

(3) (1912) I.L.R., 34 All., 150.

Mr. K. P. Misra, for the appellants.

Mr. Radha Krishna, for the respondents.

PULLAN, J. :—The subject-matter of the suit from which this second appeal arises is the *khudkhasht* land of a certain Bhawani Din. This Bhawani Din owned 16 biswansis share in the village and he executed a deed of gift on the 26th of April, 1920, by which he gave two-thirds of this *khudkhasht* property to his daughter-in-law Musammat Mithni and one-third share to his brother Hira Lal. Bhawani Din died shortly afterwards, and we find that the year 1924, Musammat Mithni was shown to be in exclusive possession of certain plots and in joint possession along with Hira Lal of certain other plots. In 1925, Musammat Mithni herself gifted her two-thirds share to her son-in-law and her daughter. It appears that this gift by Musammat Mithni was objectionable to Hira Lal and his son and other members of the family, who took possession of the plots, which had been in the exclusive possession of Mithni, and refused to allow Mithni's donees to get a footing either in these plots or in the four plots which were recorded jointly in the names of Mithni and Hira Lal. The donees of Mithni brought this suit for possession and damages, accruing from the loss which they had sustained owing to their being unable to obtain the profits of the land. Both the courts below agreed that they could give possession to the plaintiffs of the numbers which had been entered as in the exclusive possession of Musammat Mithni, but the court of first instance was of opinion that the civil court could not award any sum by way of damages, as this was of the nature of profits, and also that it was impossible to grant a decree for joint possession of the remaining four numbers. The lower appellate court disagreed on this point and passed a decree for joint possession of the four numbers which had

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been entered in the papers as being owned jointly by Mithni and Hira Lal, and also passed a decree for damages or mesne profits, the amount of which was to be determined later.

Pullan, J.

It is argued in appeal that this decision is incorrect and that the plaintiffs' only remedy in a case of this kind is by way of a suit for partition or a suit for profits, or both in the revenue court. There is, however, a decision of the late court of the Judicial Commissioner of Oudh which has not been dissented from, but rather accepted as authority by a Bench of this Court in the case of *Jalaluddin Khan v. Rampal and others* (1), which is distinctly in favour of the plaintiffs in the present suit. I refer to the case of *Babu Ram Bahadur Singh v. Raja Sukhmangal Singh* (2). This ruling itself is based upon a decision of the Allahabad High Court, *Jagarnath Ojha v. Ram Phal* (3), which held that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession not only if he was originally in joint possession and has been subsequently ousted, but even if he has never been in possession at all. This case referred to co-sharers in village rights and appears to me to be applicable to the case before me. This is even a stronger case, because it can hardly be said that the present plaintiffs were never in possession, for they inherited the rights of their donor Musammat Mithni who was undoubtedly in undisputed possession of all the four numbers in dispute along with her co-sharer. The lower appellate court finds, I consider rightly, that the appellants are in the position of persons who have taken wrongful possession of property and are virtually trespassers in so far as the share obtained by the plaintiffs from Musammat Mithni is concerned. This is not a case in which the parties should

(1) (1927) I.L.R., 2 Luck., 740; (2) (1921) 8 O.L.J., 637.

4 O.W.N., 871.

(3) (1912) I.L.R., 34 All., 150.

be sent to obtain an order of partition from the revenue court. It might be necessary to do so in their own interests later on, but a decree for joint possession, even if it is not what the plaintiffs specifically ask for in their plaint, can, on the authority of the Judicial Commissioner's court, to which I have referred, be properly granted. Nor is there any difficulty as to granting a decree for mesne profits or damages, whichever it may be considered to be, as this is in no way the same as a suit for profits between co-sharers contemplated in the Oudh Rent Act. In my opinion, therefore, the decision of the court below is correct and I dismiss the appeal with costs.

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Pullan J.

Appeal dismissed.

### APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice  
A. G. P. Pullan.

MUSAMMAT JILAI (OPPOSITE PARTY-APPELLANT) v.  
ABDUL RAHMAN AND OTHERS (OBJECTORS-RESPONDENTS).\*

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*Civil Procedure Code (Act V of 1908), sections 39, 41 and 47—Decree transferred to another court for execution—Decree returned by executing court to the court which transferred the decree with certificate under section 41 that the decree was only partly satisfied—Jurisdiction of court to which decree was transferred to decide objections about things done by that court in the course of execution—Limitation Act (IX of 1908), articles 165 and 181—Decree-holder wrongly obtaining possession of property about which his suit was dismissed—Objection under section 47, limitation applicable to.*

The proper court to which an application for execution should be made is the court to which a decree is transferred

\*Execution of Decree Appeal No. 39 of 1928, against the order of M. Zia-ud-din Ahmad, Subordinate Judge of Gonda, dated the 2nd of May, 1928.