

within limitation. In this view it is not necessary to consider the application under section 5 of the Indian Limitation Act made in the court below.

The result is that the appeal succeeds and is allowed with costs. As the appeal in the lower appellate court was thrown out on the point of limitation, we order that this case will go back to that court for decision on merits.

As regards costs in the lower courts we order that they will be in the discretion of the lower appellate court.

Appeal allowed.

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APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice Radha Krishna Srivastava.

MOHAMMAD NAZIRUDDIN HASAN, DR. (PLAINTIFF-APPELLANT) v. WAJID ALI AND OTHERS (DEFENDANTS-RESPONDENTS)*

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December, 21

Co-sharer—Joint land—One co-sharer in possession of certain joint land—Other co-sharers cannot eject him except by partition—Disputed plot held by tenant—Plaintiff realizing rent by direction of lambardar—Possession, whether can be regarded as exclusive.

Where a co-sharer has been in possession of a piece of joint land *without let or hindrance* by other co-sharers, the latter have no right to eject him or his transferee otherwise than by seeking partition. *Jalaluddin Khan v. Rampal and another* (1), and *Adit Singh v. Rai Bindayal Sahu and others* (2), relied on.

Where the plaintiff used to realize rent from the tenant by virtue of the direction given by the lambardar to the tenant, he cannot be said to be in exclusive possession, for possession to be exclusive must be possession in assertion of the right of a co-sharer.

Mr. *Mohammad Ayub*, for the appellant.

Mr. *Ghulam Hasan*, for the respondents.

THOMAS, C.J., and RADHA KRISHNA, J.:—This is an appeal by the plaintiff under section 12(2) of the Oudh

*Appeal under section 12(2), Oudh Courts Act, No. 20 of 1937, against the order of Hon'ble Mr. Justice W. Y. Madeley, I.C.S., Judge, Chief Court of Oudh, dated the 31st August, 1937.

(1) (1927) I.L.R., 2 Luck., 740.

(2) (1936) A.I.R., All., 456.

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Courts Act against the decree of a single Judge of this Court allowing the defendants' appeal and dismissing the suit.

It is necessary to mention the following facts:

In 1899 there was a partition of village Salempur at which two mahals, one mahal Nizamuddin and the other mahal Baqia Rahim-un-nissa were formed. Although plot No. 342 of the third settlement fell in mahal Nizamuddin, yet the heirs of Mir Khurshed Ali, who were co-sharers in mahal Baqia Rahim-un-nissa, i.e. respondents Nos. 2 to 4 and father of respondents Nos. 5 and 6 remained in possession of it.

In 1901 Nizamuddin, who was a co-sharer in mahal Nizamuddin, filed a suit for the recovery of that plot against the heirs of the said Khurshed Ali. Two deeds of exchange were executed, one by each party and the suit was compromised, the result of which was that the heirs of Khurshed Ali were allowed to retain possession of plot no. 342 and Nizamuddin got plot No. 140 of mahal Baqia Rahim-un-nissa in exchange.

In 1923 Nawab Ali and his sisters executed a sale deed in respect of a certain share in mahal Baqia Rahim-un-nissa in favour of Wajid Ali, respondent No. 1. Thus Wajid Ali became a co-sharer in mahal Baqia Rahim-un-nissa to the extent of the share purchased by him. Nawab Ali was the lambardar of mahal Baqia Rahim-un-nissa till 1933 when the respondent No. 1, became the lambardar. He filed a suit for arrears of rent against one Tilak, who had been occupying plot No. 140 for a long time as a tenant and this claim was decreed whereupon the plaintiff filed a suit which has given rise to this appeal. The relief claimed in the plaint was to the following effect:

"A declaratory decree to the effect that the plaintiff is the owner and in possession of plot no. 140 having an area of 18 biswas out of 1 bigha 15 biswas and that the defendant no. 1, had no right of proprietorship in it."

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The plaintiff's case was that his transferors were the exclusive owners of the plot in dispute and that the plaintiff was in exclusive possession of it. It was further claimed that the plaintiff had become owner of the plot in suit by adverse possession for more than 12 years. On the question of adverse possession the first two courts decided against the plaintiff and so did the single Judge of this Court, who heard the second appeal, and that point no longer survives for discussion. On the question of title it was held that the transferors of the plaintiff were not the sole owners in the plot in dispute. On the question of the exclusive possession of the plaintiff the trial court held that the plaintiff was not in possession of the plot in the right of a co-sharer, and that Nawab Ali, the lambardar, had directed the tenant (i.e. Tilak) to pay rent of the plot to the plaintiff during the period he was lambardar. In the eye of the trial court such possession of the plaintiff by realization of rent from Tilak was not an exclusive possession in the capacity of a co-sharer. In the result, the trial court dismissed the suit.

The first appellate court assumed without discussion that the possession of the plaintiff was exclusive by virtue of the deed of exchange in 1910 in his favour. Applying the principle laid down in *Jalaluddin Khan v. Rampal and another* (1), it allowed the appeal and decreed the plaintiff's suit. Here it may be noticed that on the finding given by the first appellate court that the plaintiff was not the sole owner of the plot, the decree in terms of the relief was not justified.

In second appeal the learned Judge of this Court held that the transfer by some of the co-sharers only of the specific plot of land belonging to the undivided mahal is not allowed by law and, therefore, the plaintiff did not become a co-sharer in it by virtue of the deed of exchange. He quoted a case of the Allahabad High Court in *Adit Singh v. Rai Bindayal Sahu and others* (2),

(1) (1927) I.L.R., 2 Luck., 740.

(2) (1936) A.I.R., All. 456.

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the purport of which is that a co-sharer in an undivided mahal cannot alienate property even though he may have been in exclusive possession of the same by an agreement amongst the various co-sharers. Such an alienation is subject to the right of other co-sharers to enforce a partition. The learned Judge took this case to mean that the transfer could not be allowed to stand even up to the time of the partition and in this view did not express any opinion on the question of exclusive possession set up by the plaintiff. He allowed the appeal and dismissed the suit.

The only point urged in appeal before us is that the plaintiff acquired the interest of his transferors in the plot in dispute by virtue of the deed of exchange and having been in exclusive possession thereof since then he is entitled to his possession being respected until a partition takes place in the village. In support of the above, reliance has been placed upon *Jalaluddin Khan v. Rampal and another* (1).

We have heard the learned counsel for the parties at great length. In view of the fact that the first appellate court and the single Judge of this Court in second appeal did not consider the question of exclusive possession of the plaintiff, we went through the entire evidence on the record and we may say at once that on the evidence of Umrao Ali (P. W. 1), Nawab Ali (P. W. 2) and Tilak (P. W. 3) we have no hesitation in agreeing with the finding of the trial court that the plot in dispute was not in the possession of the plaintiff in the capacity of a co-sharer and he used to realize rent from the tenant by virtue of the direction given by Nawab Ali, the lambardar, to the tenant.

In *Jalaluddin Khan v. Rampal and another* (1) Sir LOUIS STUART, KT., C.J., and the late Mr. Justice RAZA held as follows:

“The rule is that one co-sharer has no right to appropriate to himself a specific portion of the common land,

(1) (1927) I.L.R., 2 Luck., 740.

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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We may observe here that there is no conflict between the above decision and the decision of the Allahabad High Court reported in *Adit Singh v. Rai Bindayal Sahu and others* (1). Both these decisions lay down the same proposition, that is where a co-sharer has been in possession of a piece of joint land *without let or hindrance by other co-sharers*, the latter have no right to eject him or his transferee otherwise than by seeking partition.

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But the nature of exclusive possession contemplated by the above cases is certainly the possession in assertion of a right of a co-sharer and not the sort of possession as the plaintiff has succeeded in proving in the present case. In the present case the disputed plot was held by a tenant. Nawab Ali in the capacity of a lambardar was the only person entitled to realize rent from him. The payment of rent by the tenant, at the direction of Nawab Ali, to the plaintiff does not establish his possession *without any let or hindrance* by the other co-sharers. On this finding it is clear that the case in *Jalaluddin Khan v. Rampal and another* (2) has no application, and the plaintiff was not protected in the enjoyment of the rent which he had been realizing.

The question whether a transfer by one or some co-sharers only of a specific plot in a joint mahal is void or conveys the interest of the transferring co-sharers in that specific plot, is a question which does not arise for decision in the present case, because, as we have said above, even assuming that the interest of the plaintiff's transferors in plot No. 140 did pass to him, the possession by realization of the rent by the plaintiff of the said

(1) (1936) A.I.R., All., 456.

(2) (1927) I.L.R., 2 Luck., 740.

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plot is not, in the circumstances of the case, such a possession as would preclude the other co-sharers from interfering with it.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge, and Mr. Justice Radha Krishna Srivastava

1939
 December, 21

RAM PHERON AND OTHERS (DEFENDANTS-APPELLANTS) v. SRI RAM ALIAS SRI NATH AND OTHERS (PLAINTIFFS-OPPOSITE-PARTY)*

Limitation Act (IX of 1908), section 5—Civil Procedure Code (Act V of 1908), Order XLIV, rule 1—Pauper appeal—Section 5, Limitation Act, whether applies to application for leave to appeal as pauper.

Section 5 of the Limitation Act has no application to an application for leave to appeal as pauper under Order XLIV, rule 1, Civil Procedure Code.

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

THOMAS, C.J. and RADHA KRISHNA, J.:—The decree sought to be appealed from is dated the 12th August, 1939. On the 15th November, 1939, the applicants presented a memorandum of appeal as well as an application (Civil Miscellaneous Application No. 913 of 1939) for leave to appeal as a pauper under Order XLIV, rule 1 of the Code of Civil Procedure. They also filed an application (Civil Miscellaneous Application No. 914 of 1939) under section 5 of the Limitation Act supported by an affidavit explaining the delay in making the application for leave to appeal and praying that the application although beyond time be admitted.

Section 5 of the Indian Limitation Act applies to any appeal or application for a review of judgment or for

*Civil Miscellaneous applications Nos. 913 and 914 of 1939, on an application, dated the 15th November, 1939, under Order XLIV, rule 1, Civil Procedure Code, for leave to appeal as a pauper.