

LETTERS PATENT APPEAL.

Before Mr. Justice Shadi Lal, Chief Justice and Mr. Justice
Leslie-Jones.

MANJI AND OTHERS (DEFENDANTS)—Appellants,

1920

versus

Nov. 22

<p>GHULAM MUHAMMAD AND OTHERS —(PLAINTIFFS) —</p> <p>DULA RAM AND OTHERS—(DEFEN- DANTS)—</p>	}	Respondents.
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Letters Patent Appeal No. 59 of 1919.

Common land—abadi—occupied by some of the proprietors asserting their exclusive title and denying that of the other proprietors—whether a suit by other proprietors for joint possession is competent—partition of abadi land.

Where a plot of *abadi* land was taken exclusive possession of by the defendants, two of the proprietors of the village, who asserted their exclusive title and denied the title of the other proprietors.

Held, that a suit for joint possession by other proprietors was competent.

Watson and Co. v. Ramchand Dutt (1), and *Majju v. Teja Singh* (2), distinguished.

A Civil Court, but not a Revenue Officer or Revenue Court, has jurisdiction to partition the *abadi* land, but the *onus* of proving that there was *shamilat* in the *abadi* which could be partitioned and that partition thereof was feasible rests upon the person claiming partition.

Ishwar Singh v. Atma Singh (3), followed.

Appeal from the judgment of Mr. Justice Abdul Raof, dated the 19th day of November 1919.

TEK CHAND, for Appellants.

N. C. PANDIT, for Respondents.

The facts are fully given in the judgment of Mr. Justice Abdul Raof reported in I. L. R. 1 Lahore, page 249.

(1) (1890) I. L. R. 18 Cal. 10 (P.C.)

(2) 29 P. R. 1918.

(3) 117 P. R. 1894.

The judgment of the Court was delivered by—

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SHADI LAL, C. J.—The dispute between the parties relates to a plot of the *abadi* land situated in *pana Opra* of Tosham in the district of Hissar. This *pana* is owned by two sets of proprietors ; the plaintiffs and certain other persons, on whose behalf the present action was brought, are co-sharers to the extent of nine shares out of sixteen shares, the remaining shares belonging to certain persons who are butchers by profession. The defendants Nos. 1 and 2, Manji and Dulla, along with certain other persons, are joint owners of these seven shares, but the defendants have occupied the land on their own behalf and asserted their exclusive title to it.

The question for determination is whether the defendants are entitled to retain possession of the land in dispute to the exclusion of the other co-sharers. Mr. Tek Chand on their behalf contends that they being co-sharers are entitled to remain in occupation of the land until partition and places his reliance, *inter alia*, upon the judgment of the Privy Council in *Watson and Co. v. Ram Chand Dutt* (1) and a single Bench judgment of the Punjab Chief Court, *Majju v. Teja Singh* (2). In the case which came up before the Privy Council one co-sharer was in actual occupation of a portion of the common land, cultivating it as if it had been his separate property, and the other co-sharer attempted to enter upon the same land in order to carry on operations thereon inconsistent with the work already being carried on by the former who resisted and prevented this attempted entry. Their Lordships held that the resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land in good husbandry and not in denial of the other's title, such resistance was no ground for proceedings on the part of the other to obtain a decree for joint possession or for damages : nor would granting an injunction be the proper remedy. It is sufficient to say that the co-sharer in occupation of the land dealt with by the Privy Council did not deny the other co-sharer's

(1) (1890) I. L. B. 18 Cal. 10 (P.C.)

(2) 29 P.R. 1918.

title, while in the case before us it is beyond dispute that the defendants had before the institution of the suit denied the title of the other co-sharers and asserted their own exclusive title to the land.

The judgment in *Majju v. Teja Singh* (1) related to a portion of the *abadi* land which belonged to all the proprietors of a *patti*, and the passage to which our attention has been invited by Mr. Tek Chand is in the following terms :—

“The appellants had a perfectly simple and obvious remedy at their disposal, namely, they could move the revenue authorities to partition the common land. Instead of doing this they attempted to have the mortgage set aside as stated above. Having failed in this up to this Court, they have now attempted to gain their object in this round-about manner. They have entirely failed to show that any appreciable injury has been occasioned to them by the erection of this walled enclosure, and certainly no injury has been shown which could not be remedied on a partition of the joint land.”

Now, we wish to make two observations in connection with the passage quoted above ; one, with respect to the jurisdiction of the revenue authorities to partition the common land ; and the other, relating to the general proposition which is often invoked for the purpose of resisting a suit of the co-sharers for joint possession. There can be no doubt that the revenue authorities have jurisdiction to effect a partition of the agricultural land but they have no such jurisdiction with respect to the *abadi* land. The *dictum* contained in the above passage is apparently based upon a misapprehension. It is true that a Civil Court has jurisdiction to partition the *abadi* land, but the *onus* of proving that there was *shamilat* in the *abadi* which could be partitioned, and that partition thereof was feasible rests upon the person claiming partition, *vide Ishwar Singh v. Atma Singh* (2). Such jurisdiction, therefore, is seldom invoked or exercised, and a Civil Court would seldom be able to accomplish a task, the satisfactory completion of which demands agreement on the part of all, or at least the great majority, of those concerned. It appears to us that

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when one co-sharer occupies a portion of the vacant land, which in many villages has already been reduced to a comparatively small area hardly sufficient for the common purposes of the inhabitants of the village, it is hardly fair to the other co-sharers to say to them that their action for the joint possession of the common land so occupied cannot be sustained, because they have a remedy by partition, and that the co-sharer occupying the land must, until partition, remain in exclusive possession of the land occupied by him.

An action for the partition of the entire *abadi* is seldom brought; and, any such attempt is bound to lead to a confusion among the inhabitants of the village. The result of the dismissal of a suit for joint possession on the grounds stated above would be that no co-sharer, who encroaches upon the common land, can be made to restore it to the proprietary body as long as he does not assert his exclusive title thereto, and his example would lead other co-sharers to make similar encroachments upon the common property. It is, therefore, a matter for serious consideration whether the doctrine that a co-sharer occupying a portion of the joint land, who has not denied the joint character of the property, should be allowed to retain it until partition is applicable to the peculiar circumstances of the *abadi* land, more especially when the vacant land has already been reduced to a small area barely sufficient for the common purposes of the village.

We are, however, unable to express any final opinion on the subject, because in the case before us the defendants undoubtedly denied the title of the other co-sharers, and even the doctrine relied upon by them cannot, therefore, be invoked for the purpose of defeating the claim of the other co-sharers. But it is contended that the plaintiffs too did not describe the property as belonging to all the co-sharers in the *pana*; on the other hand, they claimed it as the property of only certain co-sharers who owned nine shares out of sixteen shares in the *pana*. Now, it is true that the main allegation contained in the plaint lends support to this contention, but the learned Judge in Chambers, against whose judgment the present

appeal is preferred, was of the opinion that the plaint taken as a whole shows that the plaintiffs did not base their claim upon that ground alone, but set up, as their cause of action, the wrongful exclusive possession of the plot by the defendants under colour of their own title.

It is clear, however, that a slight amendment of the plaint would get over the technical objection raised by the appellants, and there can be no doubt that the present Code of Civil Procedure confers a plenary jurisdiction upon the Court to order an amendment of the plaint even in the highest Court of appeal. It is to be observed that the decree passed in favour of the plaintiffs is not for the ejection of the defendants, but only for joint possession ; and upon the facts found by the Court that decree was fully justified. We consider that the Court was entitled to say that as the plaintiffs had not succeeded in establishing the exclusive title of the co-sharers who were proprietors in the *patti* to the extent of nine shares, they could not get a decree for ejection, but that there was nothing to prevent them from obtaining a decree for joint possession of the land which was proved to be the property of all the co-sharers including the plaintiffs and the defendants. The dismissal of the suit upon the technical ground urged on behalf of the appellants would only lead to a prolongation of the litigation and would do no good to either party.

We accordingly hold that the conclusion reached by the learned Judge in Chambers is correct, and that this appeal must be dismissed with costs.

Appeal dismissed.

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