

the privies, that proceedings appear to have been taken against the owner of the land, though he had no interest or property in the huts, receives no rent therefrom, and could not pull them down. The argument based on inconvenience may be a matter for executive consideration. We do not think it is insuperable, for the Commissioner may erect public privies under section 252. Any how we cannot take it into consideration in interpreting the precise words of section 248. The same reasoning which would seek to make the fazendárs liable under this section might be applied with equal effect to Government, where it has let State lands on long leases to private persons for building purposes. Such an application could never have been in contemplation in enacting these regulations for promoting the sanitary efficiency of private houses.

For the reasons stated above, I am of opinion that the questions referred to this Court must be answered in the negative.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

NÁ'NÁ' BIN BHÍKA'PPA' RAHA'TE (ORIGINAL DEFENDANT No. 1),
APPELLANT, v. APPA' BIN BA'BA'JI RAHA'TE (ORIGINAL PLAINTIFF),
RESPONDENT.*

1895.

July 23.

*Possession—Joint property—Suit by co-owner for exclusive possession—
Practice—Procedure.*

The plaintiff sued for possession of certain land. The lower Court held that the land was the joint property of the plaintiff and defendant, but finding that the plaintiff had been in exclusive possession allowed his claim and gave him a decree. On second appeal,

Held, that exclusive possession could not be awarded unless exclusive title was proved. On plaintiff's application, which was not opposed by the defendant, the decree of the lower Court was varied, and the plaintiff was awarded joint possession of the property in suit.

SECOND appeal from the decision of Ráo Bahádur Chintáman Náráyan Bhat, Joint First Class Subordinate Judge of Sátará, with appellate powers. Suit for possession of land. The plaintiff alleged that he had purchased it in the year 1889 and had

* Second Appeal, No. 878 of 1893.

1895,

NA'NA'

v.
APPA'.

leased it to one Bhagái, whom the defendants had wrongfully dispossessed on the 16th August, 1890. The plaintiff had previously brought a possessory suit against the defendants, but his claim had been rejected.

The first defendant alleged that the land was the joint property of himself and the plaintiff, and he contended that the plaintiff's only right was to partition, and that he could not sue for possession.

Defendants Nos. 2 and 3 did not contest the plaintiff's claim.

The Subordinate Judge found that the land was the joint property of the plaintiff and defendant No. 1 and he dismissed the suit, holding that the plaintiff's proper remedy was a suit for partition.

On appeal by the plaintiff the Judge found that the property was joint, but that the plaintiff had enjoyed it separately since the time of its acquisition. He held that the first defendant had no right to take it out of the plaintiff's possession, and he, therefore, reversed the decree and allowed the plaintiff's claim.

Defendant No. 1 appealed to the High Court.

Báláji A. Bhágnat, for the appellant (defendant No. 1):—The plaintiff sought to recover possession on the ground that he was the sole owner of the land. The Judge found that the land was joint property, and the plaintiff, therefore, has no right to exclusive possession. The plaintiff must sue for partition—*Parashráam v. Miráji*⁽¹⁾.

Mahádeo V. Bhat, for the respondent (plaintiff):—The plaintiff has been in possession since the land was purchased. He leased it to Bhágnái, from whom defendant No. 1 took wrongful possession. The defendant is a trespasser and ought not to be allowed to retain possession which he has wrongfully taken. The question is whether a co-parcener who is not in possession can dispossess a tenant of a co-parcener who is in possession. We submit that he cannot. He may sue to set aside the alienation of a co-parcener, so far as his interest is concerned, or he may sue for a general partition. If the plaintiff cannot retain exclusive possession he should be given

(1) *Ante* p. 569.

joint possession with the defendant—*Báláji Anant v. Ganesh Janárdan*⁽¹⁾; *Krishnaráv v. Govind Trimbak*⁽²⁾; *Mahábalaya v. Timayá*⁽³⁾; *Wahid Alam v. Safat Alam*⁽⁴⁾; and *Kállápá v. Venkatesh*⁽⁵⁾.

1895.

NA'NA'
v
APPA'

PARSONS, J.:—Plaintiff having failed in a possessory suit brought this action to obtain possession of a certain piece of land of which he alleged he was the owner by purchase in October, 1889. The defendant No. 1's contention was that the land was the joint property of himself and the plaintiff, but he asserted his own sole right to retain possession, and said that plaintiff's remedy was to bring a suit for partition. The other defendants were tenants only of the land.

The first Court found that the land was joint, and dismissed the suit. The Subordinate Judge remarks:—"As the defendant No. 1 has a right to retain the possession of the property in dispute as a tenant-in-common, the plaintiff is not entitled to maintain this suit. His proper remedy, if so advised, is a suit for partition." The Appellate Court, though it agreed that the land was joint, awarded the plaintiff exclusive possession. The Judge says: "Although the land was bought out of the joint funds, still the plaintiff has been enjoying it separately from the date of its acquisition, and defendant No. 1 cannot take it collusively or forcibly out of the hands of plaintiff's tenant. Defendant No. 1 can claim a share in the land and other undivided property, if any, in a properly constituted partition suit." He refused, however, to give either mesne profits or costs.

In our opinion, the decree of the lower Appellate Court is wrong and cannot be maintained. Unless exclusive title is proved, exclusive possession cannot be awarded in a suit of this nature (see the ruling of this Court in *Parashráam v. Miráji*⁽⁶⁾). The plaintiff failed to prove his exclusive title, and, therefore, the decree of the first Court dismissing his suit is strictly right. Upon the state of facts, however, that after a full inquiry the lower Courts found to exist, it was open to either of them to have given the plaintiff a decree for joint possession, that being the only relief to which on those facts he was

(1) I. L. R., 5 Bom., 499.

(2) 12 Bom. H. C. Rep., 85.

(3) 12 Bom. H. C. Rep., 138.

(4) I. L. R., 12 All., 556.

(5) I. L. R., 2 Bom., 676.

(6) P. J. for 1895, p. 161; ante p. 569.

1895.

NA'NA'
v.
APPA'

entitled. Apparently no such request was made to those Courts, each of the parties being anxious only to establish his own right to exclusive possession and so to throw on the other the *onus* of bringing a partition suit.

In this Court the plaintiff has asked us to give him this relief, and his right to obtain it is not seriously disputed by the other side. Amending, therefore, the decree of the lower Appellate Court, we award the plaintiff joint possession of the property in suit. Had the defendant No. 1 not contended for his own right to exclusive possession, we should have given him his costs, but as it is, we think that plaintiff should bear his own, and pay a moiety of the costs of the defendant No. 1 throughout.

Decree amended.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1895.

July 26.

RA'MRA'O TA'TYA'JI PA'TIL (ORIGINAL PLAINTIFF), APPLICANT, v.
BA'BA'JI DHONDJI BIBVE (ORIGINAL DEFENDANT), OPPONENT.*

Mamlatdars Act (Bombay Act III of 1876)—Jurisdiction of Mamlatdar—Irregular decree of Mamlatdar made by consent of parties—Subsequent refusal by Mamlatdar to order execution of decree—Extraordinary jurisdiction of High Court—Questions of fact—Practice—Procedure.

The applicant brought two possessory suits against the opponent in the Mamlatdar's Court for the recovery of certain pieces of land. By consent, decrees were passed in these suits, that unless the opponent paid a certain sum of money to the applicant within two months, the latter should get possession. After the expiration of two months the applicant, alleging that the money had not been paid as agreed, applied for execution of the decrees. The Mamlatdar found that the money had been tendered to the applicant, but had been wrongfully refused by him. He ordered execution to issue as to costs, but declined to make any order as to possession. The applicant thereupon applied to the High Court in its extraordinary jurisdiction and alleged that the money had not been duly tendered.

Held, that the decrees were such as the Mamlatdar could not legally make under the provisions of the Mamlatdars' Act (Bombay Act III of 1876), and the consent of parties could not give him power to do so.

* Applications Nos. 104 and 105 of 1895 under the extraordinary jurisdiction.