

Fakire Vs. Tajuddin

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Court : Allahabad

Decided On : Jan-28-1927

Reported in : AIR1927All490; 101Ind.Cas.821

Appellant : Fakire

Respondent : Tajuddin

Judgement :

Iqbal Ahmad, J.

1. The dispute in this case centers round a parti plot of land in a village in which the plaintiff is admittedly one of the co-sharers. Defendant No. 2 and the wife of Defendant No. 3 transferred the plot in dispute along with their house to Defendant No. 1. The plaintiff's case was that he was in exclusive possession of the plot in dispute and being the zemindar was entitled to a decree for possession of the same as against Defendant No. 1 who had no title to retrain possession of that plot.

2. The defence of Defendant No. 1 was that the plot in dispute was the sahan of the house transferred to him. This defence has been overruled by both the Courts below and I am no longer concerned with it in second appeal.

3. The defendant also contested the plaintiff's right to the relief prayed for by him on the ground that he 'the defendant) himself was a zemindar in the village though

his share is recorded for certain reasons in the name of his son. On the question whether or not the contesting defendant was one of the co-sharers in the village no issue was framed by the trial Court, with the result that there is no express finding by the Court on that point. The lower appellate Court has observed in the course of its judgment that 'the vendee cannot resist the claim on the ground that he or his sons are zemindars in the village,' That Court has also not recorded any finding on the question whether the defendant is or is not one of the co-sharers.

4. Both the Courts below have held that the plaintiff's contention that he was in exclusive possession of the plot in dispute prior to the institution of the suit has not been proved. The plea of the contesting defendant that the plot in dispute was situate in the sahan of the house of his vendor having also been overruled, it must be taken that neither the plaintiff nor the contesting defendant was in exclusive possession of that plot. That being so, if the contesting defendant is also one of the 'zemindars, the plaintiff only can get a decree for joint possession against the defendant, and can, in no case, be entitled to a decree for exclusive possession that has been granted to him by the lower appellate Court.

5. It is argued by Mr. Damodar Das that if the defendant is a co-sharer in the village the plaintiff's suit must be dismissed in its entirety, and in support of his contention he has placed reliance on the case of *Shib Narain Lal v. Maulvi Muhammad Abdul Rafi Khan* [1906] 3 A.L.J. 669 and on the case of *Bishambhar Nath v. Bholia* [1912] 34 All. 98. The last mentioned case has absolutely no bearing on the present case. In the case of *Shib Narain Lal v. Maulvi Muhammad Abdul Rafi Khan* [1906] 3 A.L.J. 669 it was held that where one of the co-sharers, claiming under a zer-i-peshgi lease executed by an occupancy tenant, was in peaceful possession of the holding of that tenant, he could not be ousted by the lambardar inasmuch as he, as a co-sharer, was entitled to possession of the holding. It was pointed out in that case that the proper remedy of the lambardar was to have a settlement of accounts in a suit for profits and not by an action for ejectment. It would be noticed that, the holding in dispute in that case was a cultivatory holding and not a parti land. A parti land can never be taken into account in a suit for profits filed in the revenue Court. Every co-sharer is entitled in conjunction with other Co-sharers to joint possession of the parti land in the

village, unless and until some co-sharer is in a position to establish his exclusive and peaceful possession over that parti land for an appreciable length of time. As observed above, if the defendant is a co-sharer, the decree of the lower appellate Court will have to be modified by granting to the plaintiff only a decree for joint possession along with the defendant. On the other hand, if the defendant is not a co-sharer in the village, the decree of the lower appellate Court will have to be affirmed.

6. Before finally deciding this appeal, I must have a finding from the Court below on the following point:

7. Was Defendant No. 1 a co-sharer in the mahal in which the plot in dispute is situate at the time of the institution of the suit and is he still a co-sharer in the same

8. Parties will be entitled to adduce further evidence. On receipt of the finding the usual ten days will be allowed for filing objections.

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