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SooperKanoon Citation : sooperkanoon.com/458781

Court : Allahabad

Decided On : Jan-10-1973

Reported in : AIR1973All328

Judge : Jagmohan Lal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rules 4 and 11 - Order 41, Rule 4; Specific Relief Act, 1877 - Sections 9; Muhammedan Law; Limitation Act, 1908 - Schedule - Articles 142 and 144

Appeal No. : Second Appeal No. 478 of 1966

Appellant : Jamal UddIn and anr.

Respondent : Mosque at Mashakganj and ors.

Advocate for Def. : Habibullah and ;Badre Habib, Advs.

Advocate for Pet/Ap. : K.B. Sinha, Adv.

Disposition : Appeal allowed

Judgement :

Jagmohan Lal, J.

1. This appeal arises out of a suit filed on behalf of the mosque of Mashakganj, Lucknow and its Mutawalli Abdul Haq, who are respondents Nos. 1 and 2 before

us, in the Court of Musif North Lucknow on 24-4-1950 for possession over a piece of land situate in Mohalla Mashakganj of Lucknow City which was half part of Plot No. 292 of First Settlement, The suit was originally filed against Jamaluddin defendant-appellant No. 1 and his nephew Qamaruddin. Qamaruddin died during the pendency of the suit and his legal representatives who were his widow Smt. Nanhi and his brother Shamshuddin (defendant-appellant No. 2) were substituted for him.

2. The suit had a chequered career. It was originally dismissed by the trial Court on 16-8-1960 on the finding that the plaintiffs had not been in possession of the property in suit within twelve years and the suit was barred by limitation under Article 142 of the Limitation Act. The plaintiffs filed an appeal. The Appellate Court allowed certain amendments to be made in the pleadings and without reversing that finding of fact allowed the appeal and remanded the suit for retrial after considering the new pleas taken through amendment of the pleadings. After remand the plaintiffs impleaded Zawar Husain (Respondent No. 3) also as a pro forma defendant in the suit. This time the suit was decreed by the trial court on 20-5-1963. An appeal filed against that decision was dismissed by the Civil Judge Mohanlalganj at Lucknow on 28-7-1966.

3. Jamaluddin and Shamshuddin defendants then filed this second appeal before this Court impleading the plaintiffs as respondents Nos. 1 and 2, the pro forma defendant Zawar Husain as respondent No. 3 and Smt. Nanhi (one of the legal representatives of the decreed defendant Qamaruddin) as respondent No. 4. During the pendency of this appeal Smt. Nanhi died and her legal representatives were not brought on record. Hence an order dated 23-9-1968 was passed by this Court that the name of Smt. Nanhi shall be struck off from the array of respondents and the appeal shall stand dismissed against her for want of prosecution.

4. The plaintiffs' case as set out in its final shape after repeated amendments of the pleadings was that Mehar Ali and Qasim Ali who are real brothers were owners of a house, an Ahata and Plot No. 292 which they had inherited from their ancestors. On 29-3-1881 Qasim Ali and Mehar Ali made a usufructuary mortgage

of this property in favour of one Wazir Khan for a sum of Rs. 50/- by means of a registered document. The period for redemption stipulated in the mortgage deed was two years and within this period the mortgage was redeemed by making payment to Wazir Khan of the mortgage money. Qasim Ali then executed a registered sale deed dated 12-6-1883 in favour of Bulaqi, predecessor of the defendant-appellants, transferring the house and the Ahata to him for a sum of Rs. 18/- Plot No. 292 was not, however, included in this sale deed and it remained in possession of Qasim Ali and Mehar Ali.

Qasim Ali died issueless and his interest in the property was inherited by his brother Mehar Ali. After Mehar Ali's death, his son Azam Husain succeeded to that property. When Azam Husain died, he left a widow Smt. Sanwli Begum, a daughter, Smt. Sayada Begum. and a son Nazir Husain as his heirs. According to the plaintiffs there was a custom in this family excluding the daughter from inheritance. So it was alleged that Nazir Husain alone became the owner of Plot No. 292 as the ultimate successor of Mehar Ali. Adjacent to Plot No. 292 was a mosque which figured as plaintiff No. 1 in the suit and of which Abdul Haq plaintiff No. 2 was alleged to be the Mutawalli. Nasir Husain made an oral wakf in respect of half of Plot No. 292 in favour of this mosque some time before 1940 and after wakf the mosque was extended over this portion.

The remaining half portion of this plot which is the land in dispute, was lying as vacant land and it was in possession of Nasir Husain who made an oral wakf thereof in the year 1943 for the construction of a school attached to the mosque. Since then the mosque was in possession of this land through its Mutawalli till April 1958 when the defendants Jamaluddin and Qamaruddin dispossessed the plaintiffs from the land in dispute and started digging foundations for constructions of a building. The oral wakf made by Nasir Husain in the year 1943 was subsequently confirmed by him through a registered document dated 31-3-1958. The plaintiffs then filed the suit on 24-4-1958 for possession over the land in dispute.

5. The suit was originally contested by Jamaluddin and Qamaruddin who filed a joint written statement. They denied the plaintiffs' title to the land in dispute the

factum of the alleged oral wakf made by Nasir Husain and the custom set up by the plaintiffs for exclusion of the daughters from inheritance in the family of Mchar Ali. It was further pleaded that neither Nasir Husain had any interest in the land in dispute nor he could dispose of the same through an oral wakf nor any valid wakf was actually made by him. These defendants contended that the usufructuary mortgage of 1881 was also never redeemed by the mortgagors Qasim Ali and Mehar Ali or their successors and in any case the contesting defendants and their predecessors had been in possession over the land in dispute for more than seventy five years and they had thereby acquired title to it by adverse possession.

6. The trial court found that the mortgage of 1881 was redeemed by the mortgagors before executing the sale deed dated 12-6-1883 in favour of the defendants' predecessor Bulaqi and that Plot No. 292 was free from mortgage and the same had also not been transferred to the defendants' predecessor through the said sale deed. Nasir Husain alone become the owner of this land by inheritance from Mehar Ali and his sister Smt. Sayda Begum whose son was the pro forma defendant Zawar Husain, was excluded from inheritance on account of the family custom prevailing in this family. Nazir Husain had made an oral wakf of half of this plot in favour of the mosque on the previous occasion and on that land the mosque was extended in the year 1940.

In respect of the remaining half Nasru Husain made an oral wakf in favour of the mosque for constructing a school thereon in the year 1943. It was further, held that the contesting defendants had failed to prove their adverse possession over the land in dispute for more than twelve years and on the basis of their title the plaintiffs shall be deemed to be in constructive possession thereof till they were dispossessed by the defendants shortly before the filing of the suit. On these findings a decree for possession in respect of the entire land in suit was passed in favour of the plaintiffs.

7. The lower appellate court reversed the finding of the trial court on the point that there was a custom in the family of Mehar Ali excluding daughters from inheritance. Consequently it was held that at the time of the alleged oral wakf made by Nasir Husain he was not the exclusive owner of the land in dispute as both his

mother and sister were alive at that time. But since the plea of jus tertii was not available to the contesting defendants, the plaintiffs were entitled to claim a decree for possession in respect of the entire land on the basis of the oral wakf made in their favour by Nasir Husain. On other points the lower Appellate Court confirmed the findings of the trial Court.

8. In this appeal preliminary objection was raised by the learned counsel for the plaintiff-respondents that in view of the appeal having abated against Smt. Nanhi whose legal representatives were not brought on record and the order dated 23-9-1968 being passed by this Court to this effect, the appeal was not maintainable against the plaintiff-respondents also. In support of this contention the learned counsel relied on two decisions of the Supreme Court *Rameshwar Prasad v. Shambhari Lal* : [1964]3SCR549 and *Sri Chand v. Jagdish Pershad*, AIR 1966 SC 1427. It was held by the Supreme Court in these cases that an appellate court has no power to proceed with an appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under Order 41 Rule 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned.

In my opinion, these decisions have no application to the present case where the deceased was not an appellant but a respondent and that too a pro forma respondent. Smt Nanhi, after she was impleaded as one of the legal representatives of Qamaruddin defendant who had filed a joint written statement with Jamaluddin, did not put in any appearance or defence in suit. It was only the other legal representative Shamshuddin who joined hands with Jamaluddin in defending the suit. According to the contention made on behalf of the defendant appellants she remarried after the death of Qamaruddin and had no possession over the land in suit. After the plaintiffs suit was decreed against all those persons, Smt. Nanhi did not appeal against that decree either by filing a separate appeal or joining hands with the appellants Jamaluddin and Shamshuddin in the first appeal filed before the District Judge or in the present second appeal before this Court. She was simply impleaded in this appeal as a pro forma respondent and no relief was claimed by the appellants against her.

9. Both Rule 3 (2) and Rule 4 (2) read with Rule 11 or Order 22 of the Code of Civil Procedure provide for partial abatement of the appeal as regards the deceased appellant or as against the deceased respondent where there are several appellants or respondents. If the deceased himself was one of the appellants the decree becomes final against his legal representatives after the abatement of his appeal under Rule 3 (2). In such a case it is not permissible for the appellate court to grant any relief to the legal representatives of the deceased appellant under Order 41, Rule 4 even though the decree proceeds on a ground common to the deceased and the surviving appellants as held by the Supreme Court in : [1964]3SCR549 (Supra) and AIR 1966 SC 1427 (Supra).

10. If the deceased is one of the several respondents in whose favour the decree has been passed, the abatement of the appellants appeal as against him will have the effect of making the decree final so far as he is concerned, and if at all the appeal is allowed, it will be allowed only against the surviving respondents without disturbing the decree in favour of the deceased,

11. The position will, however, be different where the deceased respondent is only a pro forma respondent against whom no relief has been claimed by the appellants. There will be no abatement of the appeal for failure to bring on record the legal representatives of the deceased pro forma respondent. Reference may be made to Sham Rathi v. Dharam Deo : AIR1951 All428 ; Teg Singh v. Govind Ballabh, 1960 All LJ 116; Sabitri Bai v. Jugal Kishore : AIR1938 Cal639 and Velappan Pillai v. Parappan Panickcr : AIR1969 Mad309 . The Supreme Court also held in Mangal Singh v. Ratno, AIR 1967 SC 1786 that the death of an unnecessary party respondent during the pendency of the appeal does not result in abatement of the appeal. The death of such party and the failure to bring on record his legal representatives within the prescribed time will have the effect as if that party had not been impleaded at all in the appeal.

It was held by this Court in Thakur Prasad v. Ram Khelawan : AIR1944 All240 that it is not obligatory for a defendant to implead his co-defendants as pro forma respondents in an appeal unless the case is of such nature e.g., a suit for accounts or a suit on the basis of a mortgage, that in the absence of the co-

defendant the dispute between the defendant appellants and the plaintiff respondents cannot be effectively decided.

12. So in every case of partial abatement of an appeal under Rule 4 (3) read with Rule 11 of Order 22 as also in a case of failure to implead a co-defendant as a pro-forma respondent in an appeal filed by other defendants, the question that calls for decision by the court is whether the appeal can proceed at all in the absence of the legal representative of the deceased co-defendant or the co-defendant who has not been impleaded. If the appeal becomes improperly constituted, considering the nature of the relief claimed by the appellant, by reason of the fact that the legal representatives of the deceased are not parties to it, it cannot proceed any further and the appeal has to be dismissed as improperly constituted. The proper order to pass in such case is to dismiss the suit or appeal as improperly constituted and not to abate the whole appeal.

In this connection reference may be made to : AIR1951 All428 . If, however, the appeal can proceed to a final adjudication in the absence of the legal representative of the deceased respondent the partial abatement Will not affect the rest of the appeal. See Dr. K.A. Dhairyawan v. J.R. Thakur : [1959]1SCR799 ; Mohomedally Tyebally v. Safiabal and Raghunath Keshav v. Ganesh Balakrishna : [1964]3SCR520 .

13. In State of Punjab v. Nathu Ram : [1962]2SCR636 a test was laid down by the Supreme Court for determination whether the appeal after its abatement against some of the respondents can proceed against the other respondents. It was held that when Order 22, Rule 4, Civil Procedure Code does not provide for the abatement of appeals against the co-respondents of the deceased respondent there can be no question of abatement of appeals against them. The only question is whether the appeal can proceed against them. The provisions of Order 1, Rule 9 also show that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it. The question

whether a court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible.

It, may, however, be stated that ordinarily the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed.

None of these considerations apply to the present appeal being decided between the appellants on the one hand and the plaintiff-respondents Nos. 1 and 2 on the other. So far as Smt. Nanhi was concerned, if she had no possession over the property as represented on behalf of the appellants, the decree against her, even if allowed to stand in favour of the plaintiff-respondents, would hardly be of any practical use to them unless under this decree they can eject the defendant-appellants from the land in dispute. On the other hand, if Smt. Nanhi also deemed to be in constructive possession over the land in dispute along with the appellants, being one of the legal representatives of the deceased Qamaruddin, this court can reverse the decree even against her (or her legal representatives) under Order 41, Rule 4, Civil Procedure Code, if the appeal of the defendants succeeds on merits.

14. The benefit of Order 41, Rule 4 cannot of course be extended to the legal representatives of a deceased defendant who himself had preferred an appeal along

with his co-defendants against a decree proceeding on a ground common to all of them. But, there can be no bar to the application of Order 41, Rule 4 in favour of a co-defendant who had not appealed at all against such a decree or who was only impleaded as a pro forma respondent in the appeal filed by his co-defendants but after his death his legal representatives were not brought on record. This distinction in the two cases was noted by a Full Bench of this Court in *Baij Nath v. Ram Bharose* : AIR1953 All565 (FB) when it observed, while considering the application of Order 41, Rule 4, Civil Procedure Code at p. 567 as follows:--

'This rule would seem to be similar in principle to Order 1, Rule 8. It strikes us, however, that it cannot be said that the defendant who appeals and after the preferment of the appeal dies and against whom on the failure of his co-appellants or of his heirs or legal representatives to apply within the time allowed for substitution, an order of abatement has been passed, can by any fiction of law be treated on a par with the defendant who has not appealed at all,'

15. The preliminary objection is therefore rejected.

16. Coming to the merits of the case, the first point that has been argued on behalf of the appellants is that after the lower appellate Court had found that there was no custom in the family of Nasir Husain for exclusion of the daughters from inheritance, that court ought to have determined the share of Nasir Husain at the time of the alleged oral wakf, and Nasir Husain could have disposing power only with respect to that share. As such, the plaintiffs suit for possession could be decreed only in respect of that share, if all other pleas raised on behalf of the defendants were rejected and, in any case, a decree for possession over the entire land could not be passed. It is contended that the courts below committed a legal error in not going into the question on the ground that the plea of *jus tertii* was not available to the defendant-appellants. This contention of the learned counsel appears well founded.

The courts below relied on a decision of the Madras High Court in *B. Ganmayaya v. Satyanarayana*, ATR 1925 Mad 1021 and of Patna High Court in *Chaturbhuj Singh v. Sarda Charan*, AIR 1933 Pat 6 in both these cases it was held that a plea of *jus tertii* is no defence, unless the defendants can show that the act complained

of was done by the authority of the owner. The lower courts, however, do not appear to have taken any notice of a Bench decision of this Court in *Musammatt Prem Lata v. Musammatt Janka*, ILR (1951) 2 All 328. In this case the Bench consisting of Kidwai, J., and Desai, L, (as he then was) after an exhaustive review of the case law on the subject held that a person in possession cannot be evicted except by a person having a better title to possess and the person in possession may always plead *jus tertii*. In fact, this plea of *jus tertii* is only another way of setting up the plea that the defendant does not admit the plaintiffs title and he put him to proof of his title.

It is an elementary principle of law that unless the plaintiff proves his title, he is not entitled to a decree for possession in a suit based on title. If, however, he is successful in proving that he has a title to a share in the property in suit but not to the entire property, a further question arises whether he can get a decree for possession against the trespasser in respect of the entire property or only to the extent of his share. Kidwai, J., after an exhaustive review of the relevant case law on the subject enunciated the following principle at pages 357-358 of the report;

'In the case of co-owners, one of them may sue either for the vindication of his own rights in the property or for the vindication of the rights of all his co-sharers. If his interests cannot be separated from those of his co-sharers, e.g., where a trespasser is causing irreparable damage to his land by building upon it or digging a tank or in some way altering its nature, then the vindication of his own rights will carry with it a vindication of the rights of his co-sharers since the two are inseparable. In other cases in which one co-owner sues to vindicate his own rights, he will be granted a decree for those rights to the extent of his share and will, if necessary, be put in joint possession of the land with the defendant. There will be no difficulty in granting this relief because in the case of co-owners, as distinguished from coparceners, there is already an ideal partition and the interests of each are definite and ascertained with reference to shares. If one co-sharer, however, seeks to vindicate the rights of his other co-sharers, he can only be permitted to do so if he represents these co-sharers since a person in possession cannot be evicted except by a person having title to possession and may always plead *jus tertii*. In the case of co-owners the share of non-suing co-owners is also

definite and ascertained and the defendant cannot be evicted from that share except by some person having title to it. The plaintiff, therefore, in order to succeed in such a suit must be either the agent or attorney of the co-owner whose share is sought to be recovered or must be clothed with some other legal authority to act for the other co-owner e.g. as his guardian or next friend, or as the lambardar of the mahal. If he does not possess any of these capacities, he may never the less act on behalf of his co-sharers if he complies with the requirements of Order 1, Rule 8, Civil Procedure Code, on the ground that his interest are the same as those of the other co-sharers, that is to recover possession of the property from trespasser.' If he is neither the agent nor attorney nor, in any other manner, the representative in law of the other co-sharer, and he does not frame his suit in accordance with Order I, Rule 8, Civil Procedure Code, he cannot get the relief claimed.'

Desai, J., also reviewed the previous case law on the subject and made the following observations:

'If the tenants-in-common are dispossessed from the whole property or a fractional share of it, each of them has a distinct and separate remedy against the trespasser. This Would apply to a relief of a quantitative nature such as that for possession, mesne profits, declaration of title, etc., but not a relief of a qualitative nature such as that for injunction, accounting, damages, etc.

The position is different when a specific area out of the property jointly held by tenants-in-common is to be considered. Tenants-in-common have separate titles with unity of possession; they are joint owners of the whole of the property. They do not possess their respective shares in any specific area out of the property; as regards the specific area they are in the position of joint tenants. A joint tenant can be given a decree against a trespasser in respect of the whole property. So a tenant-in-common can be given a decree against a trespasser for the whole of specific area.

The right of one tenant-in-common to recover possession of the whole property from a trespasser does not depend upon whether the trespasser was a rank-trespasser or a trespasser with some colourable title. Nor does it depend upon

whether he claims to be suing on behalf of all or not in denial of the title of the others. A plaintiff can succeed only on the strength of his own title and the fact that he sues for possession on behalf of himself and the other tenants-in-common does not form an exception to the rule.

Sections 90 and 95 of the Trusts Act simply state the legal effect of a decree for possession granted to a joint owner on behalf of himself and others; they do not lay down the circumstances in which a decree can be granted to him.'

17. The learned counsel relied besides the decisions referred to in the judgment of the trial Court, on the following decisions Ram Kali v. Pahilwan Singh : AIR1953 All331 ; Ram Adhar v. Gayadin, 1955 All LJ 458 and R. N. Das v. Loknath Mandal : AIR1970 Pat1 .

18. The case of : AIR1953 All331 (Supra) was a case of joint tenants who had inherited the property as daughters from their father. The suit for possession against the trespassers was originally filed by both of them, Subsequently one of the daughters made a statement in court that she did not want a decree in her favour. It was treated as a surrender of her interest in favour of the other plaintiff and so she was allowed a decree in respect of (he whole property and not only with regard to her half share. It was also casually observed that one co-sharer alone can sue a trespasser, without taking note of the Division Bench decision in ILR (1951) 2 All 328 (Supra).

19. In 1955 All LJ 458 (Supra) the plaintiff claimed possession over the entire property by alleging that the other co-tenants had relinquished their rights in his favour. Though the alleged relinquishment could not be proved, the plaintiff was granted a decree for the entire property against the defendant who was a trespasser without prejudice to the rights of the other co-tenants who were not impleaded in that suit even as pro forma respondents. In this case also, no notice was taken of the Bench decision in ILR (1951) 2 All 328 (supra). Since the other co-tenants were not impleaded in that suit, they could claim their interest in the land from the plaintiff who was to hold it as a trustee for them in case he was successful in obtaining a decree against the trespasser.

20. In : AIR1970 Pat1 (Supra) It was noticed by Patna High Court that there was a conflict of decisions of various High Courts in the matter whether or not a co-sharer can sue a trespasser for possession in respect of the entire joint land. The Full Bench affirming the view taken by that court in some earlier cases and overruling the discordant view taken by that court in Abdul Kabir v. Jamila Kbaton : AIR1951 Pat315 held that a co-owner alone can institute a suit for recovery of possession of land held by him along with other persons against a trespasser who dispossessed all the co-owners, and that he can obtain a decree for recovery of possession of the entire area, but the judgment would not affect the rights of other co-sharers which would remain intact In that case also, the other co-sharers were neither impleaded as pro forma defendants nor their co-ownership was specifically denied by the plaintiffs.

The judgment appears to have proceeded on the theory of implied representation by the plaintiffs of the rights of the other co-sharers also. The Full Bench also referred to a decision of this Court in Ram Charan v. Bansidhar, AIR 1942 All 358. This decision was noticed by the subsequent Bench in ILR (1951) 2 All 328 (Supra) and the same was distinguished on facts. In that case AIR 1942 All 358 a Hindu widow who succeeded to the property of her husband had filed a suit under Order 1, Rule 63 of the Code of Civil Procedure for a declaration that property inherited by her from her husband was not liable to be sold in execution of a decree obtained by one Balkishan (predecessor of defendants Nos. 1 to 7 in that case) against one Genda Lal. The suit was dismissed by the trial Court. The widow filed an appeal before this Court and during the pendency of the appeal she died. One Ram Charan applied for substitution in her place as the next reversioner of her husband. His application was allowed by this Court and he was permitted to continue the appeal as legal representative of the deceased widow. The appeal was allowed and a decree was passed in his favour.

In the meantime the property had been sold in execution of the decree and purchased by Balkishan decree-holder himself who was delivered possession over that property as an auction-purchaser. Ram Charan then filed a suit for possession and recovery of mesne profits against Balkishan. On a plea raised by Balkishan (who died during the pendency of the case and was substituted by Bansi Dhar and

others) that besides Ram Charan there were two other persons who would succeed as next reversioner after the death of the widow. Those two persons were also impleaded as defendants with the allegation that they had relinquished their interest in succession and that is why in the earlier appeal Ram Charan alone was substituted and allowed to proceed with the appeal after the death of the widow. On these facts the trial Court decreed the suit for possession over the entire property in favour of Ram Charan but allowed his claim for mesne profits only to the extent of his share.

The case of relinquishment of their interest by the pro forma defendants does not appear to have been pressed further. The defendants submitted to that decree but the plaintiff filed an appeal in this court in so far as his claim for mesne profits was not fully decreed. This court held that on these facts there was no reason for not decreeing the full claim for mesne profits also which will be without prejudice to the rights, if any of the other co-sharers. The basis of that decision seems to be that when an appellant dies after filing an appeal and by the order of the court one of his heirs is brought upon record as legal representative of the deceased and allowed to continue the appeal, that heir represents the entire inheritance which came into being on the death of the appellant. In the subsequent suit also which was virtually based on a claim of restitution after the earlier appeal had been allowed, that very legal representative was granted a decree for possession and mesne profits in respect of the entire property on the same theory of implied representation by one co-sharer of the interest of other co-sharers.

21. From a perusal of these decisions it appears that there has been some conflict of opinion in various High Courts on the question whether or not some of the co-owners can eject a trespasser from the entire property with or without impleading the other co-owners as pro forma defendants to the suit. If all the co-owners of the property join in the suit as plaintiffs, there can be no question of a plea of *jus tertii* by the trespasser against whom the suit is filed. If some of the co-owners do not join as plaintiffs and they are impleaded in the suit as pro forma defendants and the plaintiffs specifically pray for a decree for possession in favour of themselves as well as pro forma defendants against the trespasser, the plea of *jus tertii* will not again be available to them unless they claim through the pro forma defendants

and they support their claim.

22. A third case may be where only some of the co-owners file the suit for possession against the trespasser but they specifically admit in their plaint that there are other co-sharers also and they have filed the suit for the common benefit of themselves as well as those co-sharers who had not joined as plaintiffs or been impleaded as pro forma defendants. In such a case, unless the plaintiffs can show that they have some legal authority to act for those co-owners also who hold the property with the plaintiffs as tenants in common and who are not parties to the suit or that they have complied with the requirements of Order 1, Rule 8, Civil Procedure Code, they are not entitled to get a decree for possession in respect of more than their own share, in a simple suit for possession of the entire joint property as was held by the Bench in the case of ILR (1951) 2 All 328 (supra).

23. In a case where the plaintiffs implead the other co-owner as a pro forma defendant but still maintain that he has no interest in the property and the plaintiffs alone are the exclusive owners of the property, they can, by no stretch of imagination, be said to have filed the suit on behalf of that co-owner also so as to be entitled to a decree for possession in respect of the entire property. Ali Raza Khan v. Nawazish Ali Khan, ILR 14 Luck 666 = (AIR 1939 Oudh 229) it was held by a learned Single Judge of the erstwhile Chief Court of Oudh in an original suit that co-owners who denied the title of the other co-owners could not get a decree for possession of the shares of those co-owners. This view was upheld by the Bench which decided the appeal filed against that decision of the learned Single Judge, in Ali Raza Khan v. Nawazish Ali Khan, ILR 19 Luck 109 = (AIR 1943 Oudh 243). The case was then taken to Privy Council in second appeal and the same view was affirmed in Nawazish Ali Khan v. Ali Raza Khan. Their Lordships of the Judicial Committee made the following observations in that case at p. 141 of the report.

'With regard to Juliana estate the respondent claimed the whole estate for himself, relying on a custom which he failed to prove. Their Lordships agree with the Courts in India that it would be wrong to grant to the respondent an order for possession on behalf of himself and his co-heirs. The suit was neither framed nor

fought as a representative suit.'

In the present case the plaintiffs did not originally implead the other co-owner of the property, namely, Zawar Husain, and wrongly asserted that Nasir Husain was the exclusive owner of this property because under a custom the mother of Zawar Husain was excluded from inheritance. Even after Zawar Husain was impleaded as a pro forma defendant in the suit, it was not alleged by the plaintiffs that if he is also held to be co-owner of the property, a decree for possession may be passed jointly in favour of the plaintiffs and this pro forma defendant. They persisted in their denial of the right of the co-owner. On these facts, the aforesaid decision of the Privy Council as well as of this Court in ILR (1951) 2 All 328 would apply with full force to support the contention that the plaintiffs could not get a decree for possession in respect of more than the share of Nasir Husain which he had at the time of the alleged wakf made in the year 1943, if the plaintiffs' claim is otherwise established.

24. The mere fact that the pro forma defendant Zawar Husain admitted the claim of the plaintiffs and did not claim any interest in the land in dispute for himself would not be sufficient to confer title on the plaintiffs for the entire land if the facts otherwise proved the plaintiffs can claim only a fractional share in this land as we shall shortly see. Obviously Zawar Husain had a motive to make this admission which in any case cannot bind the contesting defendants against whom the plaintiffs have to prove their title independently of this admission.

25. It is an admitted fact that at the time of Azam Husain's death he left his son Nasir Husain, his daughter Sayeda Begum and his widow Smt. Sanwli Begum as his heirs. Under the Mahomedan Law their respective shares in the property of Azam Husain would be $\frac{14}{24}$, $\frac{7}{24}$ and $\frac{3}{24}$. It is also an admitted fact that Smt. Sanwli Begum died in 1948 and Smt. Sayeda Begum in the year 1955 or 1956 (the trial Court has wrongly mentioned the year of her death as 1943). Thus all these heirs were alive when the alleged oral wakf was made by Nasir Husain in the year 1940 or 1943 (the defendant has no consistent case on this point as we shall shortly see). According to the plaintiffs' version Nasir Husain had already made a wakf in respect of half the Plot No. 292. So in the remaining half of this

plot Nasir Husain could at best claim 1/6th share and the remaining 5/6 share would belong to his mother and his sister. Nasir Husain had therefore no disposing power over the land in dispute in excess of his own share which would work out to be 1/6 in the land in dispute.

26. The next point urged on behalf of the appellants is that Nasir Husain could not make a valid wakf even in respect of his own share as the same would be hit by the principle of Mushaa. This plea is not well-founded. According to the plaintiff's version the alleged wakf was made by Nasir Husain not for the construction of any mosque but for the construction of a school attached to this mosque. As such, the principle of Mushaa would not be applicable to this wakf.

27. The trial Court has however fallen in a legal error in holding by relying on the Full Bench decision of this Court in Mohd. Yasin v. Rahmat Ilahi, 1947 All LI 85 = (AIR 1947 All 201) (FB), that in this case it was not necessary for the wakif to deliver possession to the mutawalli at the time of making the alleged oral wakf. That decision applied only to the wakf made by a Hanafi Muslim. In the present case Nasir Husain was admittedly a Shia. In the case of wakf made by a Shia Muslim delivery of possession is necessary as laid down in Section 186 of the Mulla's Mahomedan Law, Sixteenth Edition at page 180. The Privy Council also held in Ali Zamin v. Akbar Ali Khan that under Shia Law actual delivery of possession by or by direction of the wakif is a condition precedent to the wakf having validity and effect.

Again, in Abadi Begum v. Bibi Kama Zainab the Privy Council held that for the creation of a valid wakf under Muhammadan Law, at any rate among the Shias, it is necessary that there must be delivery of possession of the thing dedicated. If the wakif constitutes himself as the first Mutawalli he must change the nature of his possession. In a case like the present one, where there is no document executed by the wakif at the time of making of the alleged wakf it is necessary that cogent evidence should be produced that he had delivered possession to the Mutawalli. An obvious method of doing so is to get the property in dispute recorded in the name of the wakf in the records maintained by the municipal board. It is an admitted fact that in the present case the land in dispute was not got

recorded in the name of the mosque in the records maintained by the Municipal Board.

28. The learned counsel for the appellants further argued that the words which are alleged to have been uttered by Nasir Husain at the time of the alleged wakf do not show an unequivocal intention of the dedicating the property for the alleged object. It is pointed out that one of the witnesses named Maqbool Ahmad P. W. 3 who was alleged to be present at the time of this wakf, Stated that Nasir Husain had only said to the persons who approached him in connection with this wakf that they could take as much land as they liked for the school. No particular words are prescribed by Mahommedan Law for completing a wakf. If it can be established that Nasir Husain had an intention to dedicate this property for the construction of the school and he actually gave the same to the Mutawalli of the mosque for this purpose, not much value can be attached to the words which he might have uttered, at that time. But in my opinion, even this finding of fact that such an oral wakf was made by Nasir Husain in the year 1943 recorded by the Courts below, is based on a misreading of the evidence.

It may be pointed out that a few days before the filing of the sruit Nasir Hussain also executed a rendered wakf deed to con-firm the alleged oral wakf. that wakf deed is dated 31-3-1958 of which a copy is on the record. But neither the plaintiffs have based their claim on this document nor the courts below have found that any valid wakf was created through it. They have relied only on the alleged oral wakf. Now according to the recitals contained in this wakf deed dated 31-3-1958 the wakf of the land in suit was made 18 years before this document was executed i.e., in the year 1940, and the wakf of the other half of the land on which the mosque was extended was made some time earlier. In conformity with this recital contained in this document Nasir Husain P. W. 1 in his statement recorded in April 1960 deposed that the first wakf in respect of the half of the land was made by him 23 years before and the second wakf relating to the land in dispute was made by him about two years after that. This would also show that the alleged wakf was made in 1939 or 1940.

But the plaintiffs came with the theory that the allied wakf was made in the year 1943 and the courts below without noting this discrepancy in the evidence accepted the plaintiffs version. The alleged wakf was made for the construction of a school on it and admittedly no construction was made till this suit was filed in 1958. This suggests that the story about the creation of an oral wakf by Nasir Hussain in the year 1943 is not true. As we shall shortly see, this land had been in possession of the contesting defendants for quite a long period and it appears that both Nasir Husain and Zawar Hussain were diffident to file a suit on their behalf to recover possession over this land and so a suit was filed on behalf of the mosque after executing a registered document dated 31-3-1953, in its favour.

29. The next point that was urged by the counsel for the appellants was that the courts below committed a legal error in applying Article 144 of the Limitation Act, 1908, to the suit and placing the burden on the defendants to prove their adverse possession for more than twelve years, while the suit on the allegations contained in the plaint clearly fell within the ambit of Article 142 and the burden was on the plaintiffs to prove their possession within twelve years. This contention also is quite correct. It was clearly alleged by the plaintiffs that they had been dispossessed by the contesting defendants before the filing of the suit As such, the suit would be governed by Article 142 and the residuary Article 144 will have no application. The courts below have unnecessarily imported into their discussion the requirements of adverse possession and wrongly placed the burden on the defendant to prove those requirements. Now the trial Court has approached the evidence produced by the parties would be evident from the following observation contained in its judgment.

'The onus of proving adverse possession over the disputed land lies heavily upon the defendants and their possession has to be proved beyond doubt to be notorious, ex-clusive, openly hostile and to the knowledge of the true owner as laid down in AIR 1938 Mad 454.'

After a consideration of the documentary and oral evidence produced by the defendants to prove their possession the trial Court has opined that the document on record do not prove the title and possession of the defendants to the hilt in

respect of the disputed land. So far as the plaintiffs' evidence is concerned it was disposed of by the trial Court with the following observations:

'..... No doubt, the oral evidence of the plaintiffs about the use of the land for saying the prayers of 'Janaze Ki namaz' and about the letting out of the land in suit for purposes of 'D or Sootana' is equally shaky and inconsistent. But as already pointed out above the plaintiffs have succeeded in proving their title over the disputed land and as such possession would go with the ownership of the land. The defendants cannot be allowed to take advantage of the plaintiffs faulty evidence and it was for them to prove beyond any shadow of doubt that they were actually in possession over the disputed land as owners and that they exercised this right openly hostile to the plaintiffs with the latter's knowledge. Judged in this context, the evidence of the defendant falls short of this requirement.'

30. The learned Civil Judge being conscious of the fact that the issue relating to limitation was the crucial point on which the decision of the suit depended and that this issue had on the previous occasion been decided by the trial Court against the plaintiffs while on the second occasion after remand it was decided in their favour, also fell in the same error by placing the burden on wrong shoulders and approaching the evidence from that angle. Both the lower courts relied on the presumption that an open piece of land shall be presumed to be in possession of the owner unless it is proved by the trespasser that he had done some substantial acts of possession over the land which may excite the attention of the owner that he has been dispossessed. This presumption may be applied to jungle land situate in a village as held by the Privy Council in Jagadindra Nath Roy v. Hemanta Kumari Debi. (1911) 8 All LJ 1176 (PC) but it cannot be applied to a land situate in a crowded locality of a city like Lucknow. At one stage in the year 1936-37 when this land was lying uncared for the Municipal Board started escheat proceedings by issuing a public notice as to why this land should not be treated as Nazul property. At that time, it was the defendants' predecessor Badruddin who set up a claim to this land and got these proceedings dropped while Nasir Husain and his co-sharers kept quiet.

31. The learned Civil Judge has noted in his judgment that this land was enclosed by walls which were occasionally washed away during rains but were rebuilt though it was not clear from the Commissioner's report as to when the existing walls had been constructed. It has also been found that the defendant-appellants and their predecessors had set up a barber's stall on this land by placing wooden Takhat on it on which they used to shave their customers and sleep thereon in the night But they were of the opinion that these acts did not amount to dispossession of the plaintiffs. It was not noticed by them that it is an admitted fact that some windows of the mosque opened towards this land and so any activity of the defendant-appellants or their predecessors on this land could escape the notice of plaintiff No. 2 or his predecessor. According to the plaintiffs' allegations the defendants had simply started digging foundation on this land when they treated this act of theirs as amounting to their dispossession and filed their suit out of which this appeal has arisen. It is therefore clear that if the evidence had been appraised from a correct angle that the burden under Article 142 is on the plaintiffs, a finding could not be recorded in favour of the plaintiffs. On the other hand, from the facts and circumstances of the case, it was evident that the plaintiffs or their predecessors-in-interest had no possession over the land within twelve years prior to the suit The suit was therefore barred by limitation under Article 142.

32. As a result of the above findings, the appeal succeeds. The judgments and the decrees passed by the courts below are set aside. The plaintiffs' suit shall stand dismissed with costs to the defendant-appellants throughout.

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