

**AfajaddIn Vs. Jahed and ors.**

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**Court :** Kolkata

**Decided On :** Jan-14-1930

**Reported in :** AIR1930Cal346

**Appellant :** Afajaddin

**Respondent :** Jahed and ors.

**Judgement :**

**S.K. Ghose, J.**

1. The plaintiff sues to recover khas possession of the disputed land on the allegation that defendants 1 to 4 have forcibly taken possession of tire suit lands by erecting tin huts thereon, The suit is contested by defendants 1 to 4 who are brothers. Their case is that they have been residing on the land from the time of their father who had taken settlement of those lands, from the plaintiff's father. The trial Court dismissed the suit. An appeal was preferred by the plaintiff. It appears that on 27th August; 1926 service on the absent defendant respondents 4 and 5 was not proved and the appeal was dismissed as against these defendants without costs. Thereafter the appeal continued as against the remaining respondents and on 2ist January 1927 it was dismissed for default. On the following day there was an application for restoration of the appeal and in that application all the defendants respondents including respondents 4 and 5 were mentioned as opposite parties, and notices were issued on all these defendants.

On 26th March 1927 the appeal was ordered to be restored. When the appeal was heard the learned Subordinate Judge took the view that as on 27th August 1926 the appeal as against the absent respondent 4 had been dismissed the whole appeal must stand dismissed because respondent 4 was a necessary party. It is contended in the first place that since the appeal was restored on 26th March 1927 it must be taken that the appeal had been restored as against respondents 4 and 5 as well. Stress is laid on the fact that these respondents were mentioned as opposite parties in the application for restoration and in the order of restoration costs were ordered to be paid to all the members of the opposite party including respondents 4 and 5. It is pointed out on the other side that there had been no appeal as against the order of 27th August 1926 dismissing the appeal as against the absent respondents and that the time for moving against that order had already expired when the application for restoration was filed. The application for restoration, moreover, was directed as against the order of dismissal for default which was made on 21st January 1927, at which time the appeal was pending as against only defendants 1 to 3, and simply by making respondents 4 and 5 opposite parties in the application for restoration, the appellant could not get round the order of dismissal that was passed on 27th August 1926. I think that this argument is sound and it must prevail. Clearly the order of dismissal dated 27th August 1926 stood and when the appeal was restored, it was restored as against defendants 1 to 3 only and not as against defendants 4 and 5.

2. Then the next point is whether the learned Subordinate Judge is correct in holding that respondent 4 was a necessary party. It is contended that the appeal could proceed only as against defendants 1 to 3, because defendants 1 to 4 are brothers who came as heirs of their father, and each of them has a definite share, so that they are not joint tenants. On the other hand what the plaintiff seeks for is khas possession as against all the defendants, and it is not alleged that they are in possession of specific parcels of land. The trial Court has already made a decree with regard to all the defendants and in that Court the question with regard to those defendants were taken up jointly, there being no distinction as amongst the different defendants. The learned Subordinate Judge has followed the case of *Kali Dayal v. Nogendra Nath* [1920] 24 C.W.N. 44. In that case it is pointed out that from the nature of the suit, the result may follow that an appeal may be imperfectly

constituted when one of the parties is left out, and that the Court cannot be called upon to make two contradictory decrees in the same litigation. In that case various other cases were considered. The learned advocate for the appellant has referred me to the case of Sant Singh v. Gulab Singh A.I.R. 1928, Lahore p. 572 (F.B.) where the decision was to some extent based on a Calcutta case which is reported in A.I.R. 1923 Cal. 289 (Sarat Kamini Dasi, and on her death her legal representatives her sons Jamini Mohan Sarkar v. Chaitanya Chandra Prohoraj). In that case, however, it is pointed out that if the Court comes to the conclusion that the defendants are in possession of specific plots of land, in which the deceased defendant had no share, it will proceed to try the case as against other defendants. This only serves to distinguish the present case in which there is no allegation that the defendants are in possession of specific plots. I consider that the learned Subordinate Judge has taken the correct view and rightly dismissed the appeal.

3. This appeal is dismissed with costs.

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