

(1920) 07 AHC CK 0010
In the Allahabad High Court

Balkaran Kurmi

APPELLANT

Vs

Sheodan Kurmi and Others and Sheobadan Kumaria and
Another

RESPONDENT

Date of Decision : 29-07-1920

Acts Referred:

Citation : (1921) ILR (All) 193

Hon'ble Judges : Walsh, J; Pramada Charan Banerji, J; Piggott, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Pramada Charan Banerji, J.—This appeal arises out of a suit in which the plaintiff claimed joint possession, to the extent of a third share of certain plots of cultivatory land. The plaintiff set forth a pedigree under which he alleged that he had a third share in the holding. He also alleged that the family was joint, that they were in joint possession of the holding until seven years ago when a separation of the family took place but that the lands remained joint. By this, manifestly, he means that the lands were not divided by metes and bounds. He goes on further to allege that the defendants who are the owners of the remaining two-thirds share have excluded him from the profits of his one-third share, and he accordingly claimed joint possession in respect of a third share. The defence was that the plaintiff did not belong to the family at all, that he was not entitled to any portion of the disputed property, and that he had never been in possession. Both the courts below have found that the land in dispute belongs to the plaintiff and the defendants, that each set of parties represents a third branch of the family, and that thus the plaintiff is entitled to a third share. The lower appellate court believed the statement of one of the defendants who deposed that at the end of each year the profits arising from the land used to be divided. The claim accordingly was decreed. Three of the defendants, who represent one branch of the family, have preferred this appeal and Munshi Haribana Sahai on their behalf put forward two pleas in the memorandum of

appeal. The first was that the suit as brought was not maintainable. He has now to concede that a suit for joint possession could be maintained if the plaintiff was in joint possession before his exclusion from possession, and that he was entitled to be restored to the possession which he held before he was interfered with by the defendants. He however, urges that it must be assumed that there has not been a separation of the family, that, therefore, a decree for joint possession of a third share could not be granted. This is his second plea. In my opinion according to the findings of the learned Judge there has been a separation of the family, although not a division by metes and bounds. As I have already stated, the learned Judge has believed the statement of one of the defendants that the produce of the land used to be divided at the end of the year between the different co-sharers. This means that the produce used to be divided in defined shares. Therefore there was a disruption of the joint family, although there was no division by metes and bounds. The parties agreed upon taking defined shares and according to these shares they divided the profits. Furthermore, the objection taken in this appeal seems to me to be wholly groundless inasmuch as according to the pedigree filed by the plaintiff, which has been found by the court below to be correct, the plaintiff has a one-third share and it cannot be alleged that he does not own that share. No question, therefore, for decision by the Full Bench arises in the case and I deem it unnecessary to discuss it. I would dismiss the appeal with costs.

Piggott, J.

2. I concur, but take the liberty of adding a few words regarding the aspect of the case which has led to its reference to a Full Bench, The memorandum of appeal to this Court does raise a question of law which had not been raised in the pleadings or in argument in either of the courts below. It is not clearly "stated in this memorandum of appeal that the claim should have been dismissed because on the facts stated by the plaintiffs themselves they had no cause of action. Such a plea would be, in my opinion, upon the face of it, unsustainable, but I do not think that it was taken. Apart from questions of jurisdiction or of limitation which a court is always bound to consider, it is only a plea which goes to the root of the case, in this sense that if it be well founded the plaint itself discloses no cause of action, that this Court is bound to entertain in second appeal. Over and beyond this the court has a wide discretion. In the present case, as soon as the nature of the point taken had been explained to the court, it would have been obvious that at most even if the plea succeeded, the result would have been a slight modification in the decree. Even such modification would, in my opinion, have had no practical effect, because the finding that the plaintiff was entitled to a one-third share would have remained and would have operated as *res judicata* in any subsequent litigation. This Court, therefore, would have been fully warranted in holding that this was not a plea which should be entertained in second appeal.

Walsh, J.

3. I entirely agree. I am not particularly surprised at the result. In my experience

a point which is deliberately not taken until the eleventh hour, and is then taken in the final Court, is generally a bad one. I had my suspicion that this was the nature of the point on this occasion, but I do not see on what principle courts of appeal should be compelled to listen to long arguments on bad points which have been deliberately kept in reserve for the final Court. For the very reason that such points, although there may be exceptions to the rule, are generally irrelevant, an appellate court ought not to be compelled to listen to them for the first time. In my opinion the real principle which has always been followed, certainly in English Courts and in most High Courts in India, is that the cases in which a point whether it goes to the root of the cause of action or is merely a subsidiary point can be taken after all the evidence has been concluded and one Court of appeal has also determined the suit are very rare indeed, and in my opinion it should only be done by the permission of the court hearing the appeal; i.e., the court hearing the appeal may take the point itself or, if persuaded that for some good cause a vital point has been overlooked in the proceedings of the court below, it may permit the point to be argued. It cannot, however, in my opinion be compelled as a matter of right at the instance of the appellant to listen to a point so raised.

4. The order of the Court is that the appeal is dismissed with costs.