

(1948) 11 AHC CK 0009
In the Allahabad High Court

Bhagwan Sahai and Others	Vs	APPELLANT
Ch. Mukand Lal and Others		RESPONDENT

Date of Decision : 29-11-1948

Acts Referred:

Citation : AIR 1949 All 562

Hon'ble Judges : Malik, C.J

Bench : Division Bench

Judgement

Malik, C.J.—This is a defendants, appeal, The plaintiffs and the defendants are co-sharers. The plaintiffs came into Court on the allegation that a plot No. 884 was pasture land of the co-sharers of the village and the defendants had wrongfully, without the consent of the other co-sharers, brought a portion of the land under their cultivation and had thus ousted the other co-sharers. The plaintiffs, therefore, claimed joint, possession of the plot. The defence was that plot. No. 884 was not pasture land set apart for grazing of cattle but was banjar land lying useless and the defendants had at considerable expense brought it under cultivation. The lower appellate Court held that the defendants were not able to prove that they had spent Rs. 300, in making the land, which was ban jar land, fit for cultivation, but the defendants had brought it under cultivation. The trial Court had passed a decree in plaintiffs" favour but had protected the cultivatory possession of the defendants, and the decree was in these terms:

Plaintifia" claim for joint possession of the land in dispute with the defendants amounting to the former"s declaration of title of joint ownership without a right to oust the latter till partition, which contingency may or may not arise, is decreed.

The lower Court modified this decree and the decree passed by the lower appellate Court was as follows:

The decree of the learned lower Court is modified to this extent that the suit of the plaintiffs for joint possession of the disputed land along with the defendants

is decreed. The defendants will have no right to assert exclusive possession on the disputed land.

This decree was affirmed by a learned single Judge of this Court. We may at the outset mention that a decree for joint possession does not entitle the decree-holder to take actual physical possession of the property. So, in spite of the decree passed by the lower appellate Court the defendants were entitled to remain in actual physical possession of the property, the plaintiffs being only given formal possession which entitled them to claim a share of the profits at the time of accounting.

2. The point for decision in the case is very simple though it often arises for decision by the Courts. The land in suit has been found by the lower Court to be ban jar land, which means waste land not in the actual possession of any co-sharer and lying useless except for such fugitive use as a co-sharer or cattle may make of it. Banjar land being an open piece of land, usually cattle stray there and graze such blades of grass as may be growing there, but it is not in the exclusive possession of any particular co-sharer, nor is any use made of it. When there is land which is not being brought in use by any body, a co-sharer has the right to bring it under cultivation provided by doing so he does not in any way affect or damage the rights of the other Co- sharers. This point was settled by their Lord-ships of the Judicial Committee in Watson's case as far back as the year 1890 (see Watson & Company v. Ramchand Butt 18 Cal. 10. The finding being that it was ban jar land, it must be held that the plaintiffs were not making any use of this land nor were they in exclusive possession of it. Since the defendants have brought it under cultivation this would be khudkasht land in their possession and at the time of accounting between the co. sharers they will have the account for the excess land in their possession. So, instead of doing any damage to the plaintiffs it would increase the share of the income of the plaintiffs. We "consider, therefore, that the principle of the decision in Watson's case 18 Cal. 10 is applicable to this case.

3. It is not necessary to set aside the decree passed by the lower appellate Court as the plaintiffs being co-sharers of the property were [entitled to a declaration of title and a declaration that they were in joint possession as owners so that the defendants may not be able to assert any title by adverse possession. The defendants' right to remain in cultivatory possession of the I property till partition in the village must, however, be protected. We, therefore, modify the decree of the lower appellate Court and in place of the decree passed by that Court pass the following decree : That the suit of the plaintiffs for a declaration of title and joint possession as owners is decreed, but the defendants shall remain in cultivatory possession of the land so long as the rights of the parties are not adjusted by partition. The plaintiffs' suit for injunction is dismissed.

4. The defendants were given their costs by the first Court. The lower appellate Court and this Court did not give any party any cost. We consider that the defendants are entitled to half of their costs of this Court and the lower appellate

Court. The decree for costs passed by the trial Court will stand.