

(1926) 11 AHC CK 0002
In the Allahabad High Court

Mohendra Dube and Another

APPELLANT

Vs

Ram Bhajan and Others

RESPONDENT

Date of Decision : 18-11-1926

Acts Referred:

Citation : AIR 1927 All 822

Hon'ble Judges : Iqbal Ahmad, J

Bench : Division Bench

Judgement

Iqbal Ahmad, J.—"This is a defendants" appeal and arises out of a suit for possession of a one-third share in certain occupancy holding and for damages.

2. The plaintiffs"s case was that they were entitled to a one-third share in the holding and that the remaining two-thirds share belonged to defendants 1 to 7. One of the defendants to the suit was Ram Das Dube and he alleged in his written statement that he along with the plaintiffs was entitled to one-third share claimed by the plaintiffs; in other words, he maintained that he had a one-ninth share in the holding in dispute and that the decree in the plaintiffs" favour should be passed "subject to the reservation of his right and share."

3. The contesting defendants, who are the appellants before me, resisted the suit on the ground, that the plaintiffs had no share in the holding in dispute and further the plaintiffs not having been in possession within 12 years prior to the institution of the suit, the suit was time barred. The trial Court dismissed the plaintiffs" suit. On appeal by the plaintiffs, the learned District Judge remitted certain issues to the trial Court for findings thereon. On return of those findings the lower appellate Court has held that the plaintiffs" allegation that they were the owners of a one-third share in the holding, and had a subsisting right to the same, has been proved and on that finding it has passed a decree in the plaintiffs" favour for a one-third share of the holding in dispute.

4. The only point that has been argued before me on behalf of the defendants-appellants in this appeal is that the plaintiffs" share was only to the extent of

two-ninths in the holding and the remaining one-ninth share with respect to which a decree has been passed in the plaintiffs' favour belongs to Ram Das Dube, and as such the decree in the plaintiffs' favour should have been only with respect to the two-ninths share in the holding. In support of this contention reliance has been placed on the case reported as Rohan Singh v. Ahsani Begam [1912] 10 A.L.J. 518. It was held in that case that when the plaintiffs have a definite share in the property in dispute, the decree in their favour should be limited to the specific share to which they are entitled. In my opinion, that case is distinguishable from the present case. In the case of Rohan Singh v. Ahsani Begam [1912] 10 A.L.J. 518 only one of several heirs of a deceased Mahomedan was the plaintiff, and her remaining co-heirs were not parties to the suit, and, as a matter of fact, their whereabouts were not known. In the present case Ram Das Dube who was entitled to a one-ninth share was a party to the suit, and he himself prayed that the decree in the plaintiffs' favour as prayed for by the plaintiffs should be passed "subject to the reservation of his right and share."

5. Moreover, the point now raised in appeal before me was nowhere taken in the written statement and this by itself was a justification for the lower appellate Court to overrule the point now urged before me.

6. The learned Counsel for the respondent has no objection to a modification of the decree of the lower appellate Court to this extent that instead of decreeing the plaintiffs' claim as decreed by that Court, I should pass a decree for one-third share jointly in the plaintiffs' favour and Ram Das Dube. All the parties are before me and I think that I must pass a decree that will protect the rights of all the persons having an interest in the holding in suit.

7. The result is that I modify the decree of the lower appellate Court by passing a decree for possession of a one-third share in the holding in dispute jointly in favour of the plaintiffs and Ram Das Dube, defendant 8. As the appeal substantially fails, the appellants must pay the costs of the plaintiffs-respondents in all Courts, including in this Court fees on the higher scale.