

(1922) 10 AHC CK 0013**Allahabad High Court****Case No:** None

Kanhai Lal and Others

APPELLANT

Vs

Jai Lal and Others

RESPONDENT

Date of Decision: Oct. 27, 1922**Citation:** AIR 1923 All 54 : (1923) ILR (All) 164 : 69 Ind. Cas. 840**Hon'ble Judges:** Pramada Charan Banerji, J; Gokul Prasad, J**Bench:** Division Bench**Final Decision:** Disposed Of

Judgement

Pramada Charan Banerji and Gokul Prasad, JJ.

This appeal arises suit of a suit brought by the plaintiffs appellants for a declaration that a certain sale deed of a shop, executed by five members of a joint family, was null and void as against the plaintiffs who were also members of that family. The plaintiffs are all minors, except the plaintiff No. 1, who has just attained majority. The sale took place on the 1st of October, 1915, and the suit was brought on the 27th of November, 1920. One of the pleas taken in defence was that the suit was barred by the provisions of Section 42 of the Specific Belief Act. The first court held that the plaintiffs were ad been in possession of the property and, therefore, no further relief could be asked for and Section 42 of the Specific Belief Act had no application. On appeal, the learned District Judge has come to the conclusion that because of a lease (kabuliat) executed by one of the vendors, on the 30th of September, 1919, in favour of the vendee defendant No. 1, the vendee was in constructive possession of the property and the suit was, therefore, barred by Section 42 of the Specific Belief Act, and has dismissed the suit. The learned Judge refers to a decree passed by him in a suit by the vendee against Ajudhia Prasad the lessee, and says: "This would show that on the date of decree in the suit which has given rise to this appeal, the defendant No. 1 was in constructive possession of the shop. Ajudhia Prasad was occupying it only as his tenant. The lower court relied upon the evidence of the witnesses who said that all the plaintiffs used to sit in the

shop. Put this was natural, considering that the plaintiffs and their father and uncles (defendants 2 to 6) were all joint and all carried on the business in the shop. This fact alone would not show that the plaintiffs alone used to sit in the shop." And then the learned Judge goes on to say: "On these facts I must hold that the appellant (defendant No. 1) is in possession of the shop and, as such, the plaintiffs" suit for a mere declaration was not tenable and is barred by Section 42 of the Specific Belief Act." In taking this view, we think the learned Judge was in error. There was no further relief which the plaintiffs could have asked for. They were in actual physical possession of the shop, and constructive possession, if any, of the defendant would not affect the matter. This was not a case in which the plaintiffs could be regarded as being out of possession. The physical possession of the plaintiffs was admitted and the question was as to the nature of that possession. We asked the learned *vakil* for the respondents to explain to us the nature of the further, relief which the plaintiffs could have asked for and he could not say that it would be a relief for possession. This case is similar to that of *Ram Manorath Singh v. Dilraji Kunwari ILR (1913) All. 126*. In our opinion, in view of the facts of this case, Section 42 of the Specific Belief Act has no application. We, therefore, allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to restore it to its original number and to dispose of the remaining pleas according to law. Costs here and hitherto will, be costs in the cause.