
(1927) 03 AHC CK 0008

Allahabad High Court

Case No: None

Mohammad Shakur

APPELLANT

Vs

Mt. Husani Bibi and Another

RESPONDENT

Date of Decision: March 11, 1927

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: AIR 1927 All 772 : 101 Ind. Cas. 816

Hon'ble Judges: Iqbal Ahmad, J

Bench: Division Bench

Judgement

Iqbal Ahmad, J.

This is a defendant's appeal and arises out of a suit for recovery of Rs. 544 on account of mesne profits.

2. On the 25th October 1920, a suit for partition of certain house properties was brought by the plaintiffs-respondents against Karim Bakhsh their brother. Karim Bakhsh died during the pendency of that suit leaving as his legal representatives his two sons Mohammad Shakur defendant-appellant and one Chhedi, who were brought upon the record in place of Karim Bakhsh. Chhedi admitted the plaintiff's claim, but Mohammad Shakur appellant contested the suit inter alia on the ground that the plaintiffs were not the daughters of Ilahi Bakhsh, father of Karim Bakhsh, and as such were not entitled to a share in the houses in dispute which belonged to Ilahi Bakhsh, and further that Mohammad Shakur and his father Karim Bakhsh had been in adverse possession of the houses in dispute for a period of more than 12 years and as such the suit was time barred. The trial Court held that the plaintiffs-respondents were the daughters of Ilahi Bakhsh but gave effect to the plea of adverse possession raised by Mohammad Shakur and dismissed the suit. On appeal by plaintiffs-respondents the decree of the trial Court was reversed, and their suit was decreed by the lower appellate Court, and the decree of the lower appellate Court was affirmed on second appeal by this Court on the 23rd January 1923. A final

decree for partition was prepared on the 31st October 1923, and formal delivery of possession was made over to the plaintiffs-respondents of the houses or shares in the houses allotted to them on the 7th March 1924.

3. By the suit, giving rise to the present appeal, the plaintiffs claimed mesne profits at the rate of Rs. 15 a month from the 25th October 1920, viz., the date of the institution of the partition suit, to the 7th March 1924, the date on which delivery of possession was made over to them.

4. Chhedi did not contest the suit, and the trial Court being of opinion that, as Chhedi never contested the rights of the plaintiffs-respondents to a share in the houses in dispute, he was not liable to answer the claim for mesne profits, exempted him.

5. Mohammad Shakur appellant resisted the suit on various grounds but all the pleas raised by him were overruled by the trial Court and a decree for Rs. 468 was passed in the plaintiff's favour.

6. On appeal by Mohammad Shakur the decree of the trial Court has been affirmed by the lower appellate Court.

7. The decree of the lower appellate Court has been assailed by the learned Counsel for the appellant on two grounds, viz., (1) that the plaintiffs-respondents having asserted in the previous suit for partition that they were in joint possession of the houses in dispute in that suit, were not entitled to assert in the present case that they were; out of possession and as such entitled to mesne profits; (2) that the present suit was barred by Section 11 and Order 2, Rule 2, Civil P.C.

8. In my judgment there is no substance in either of the points urged by the learned Counsel. It is true that in the previous partition suit the plaintiffs alleged themselves to be in joint possession. But by his written statement in that suit Mohammad Shakur distinctly denied the right of the plaintiffs to a share in the houses in dispute and maintained that he was in adverse possession of the same from a long time. It is clear from the judgments in the former suit that the plaintiffs-respondents and Mohammad Shakur were co-owners of the houses in dispute, and that Mohammad Shakur was in actual possession of those houses. In short there was an ouster of the plaintiffs from the houses in dispute, but this ouster was not accompanied by a denial of the plaintiffs' title by Mohammad Shakur or his father before the institution of the partition suit, and as such their possession could not be held to be adverse till the date of the institution of that suit, but when the plea of adverse possession was embodied by Mohammad Shakur in the written statement filed by him in the partition suit, there was an open denial of the plaintiffs' title by Mohammad Shakur and from that moment onwards there was both the ouster of and the denial of the plaintiffs' title by Mohammad Shakur. From that moment onwards Mohammad Shakur's possession qua the share of the plaintiffs was in the capacity of a trespasser and Mohammad Shakur has been rightly held by the Courts

below liable to answer the plaintiffs' claim for mesne profits.

9. Neither Section 11 nor Order 2, Rule 2, Civil P.C., have any application to the present case. The matter that is now in issue between the parties was never a matter directly and substantially in issue in that former suit and as such Section 11 cannot be a bar to the suit. The cause of action for the present suit is distinct from the cause of action for the former suit and accordingly Order 2, Rule 2, Civil P.C., does not apply. The view that I take is in consonance with the view taken in the case of Mohammad Ishaq Khan v. Muhammed Rustum Ali Khan [1918] 40 All. 292. The learned Counsel for the appellant has placed reliance on the case of Mewa Kuer v. Banarsi Prasad [1895] 17 All. 533. In that case it was held that a suit with respect to mesne profits from the date on which the plaintiffs became entitled to possession of certain property to the date of the institution of the suit for recovery of possession of that property, was barred by Section 43, old Civil P.C., corresponding to Order 2, Rule 2, present Code. In the present case the claim for mesne profits is for a period subsequent to the date of the institution of the former suit and not for any period antecedent to the date of that suit. Thus the case relied on by the learned Counsel does not help him.

10. I dismiss the appeal with costs.