

(1926) 05 AHC CK 0032

Allahabad High Court

Case No: None

Ishwari Prasad

APPELLANT

Vs

Sheotahal Rai

RESPONDENT

Date of Decision: May 26, 1926**Citation:** AIR 1926 All 669 : (1926) ILR (All) 684**Final Decision:** Dismissed

Judgement

1. A preliminary objection has been taken that no Letters Patent appeal lies. It would be necessary to state the facts of the case in order to find whether an appeal lies or not.

2. The parties are co-sharers in a village which is subject to the alluvial action of a river. A certain piece of land was thrown up and the finding is that the defendant took possession of the same and was in possession till the date of suit instituted by the plaintiff. The plaintiff claimed that he was in possession and that his possession had been disturbed. He said that the land was his khudkasht. On these allegations he brought the suit out of which this appeal has arisen for a declaration of his title and, in the alternative, for recovery of possession. The lower appellate Court found that the possession was with the defendant. There being no question of title at issue (the plaintiff's title was never denied) the suit was dismissed.

3. When the appeal came before this Court a learned Judge of this Court held that although the plaintiff's suit was for possession, and possession alone, it should not have been dismissed; but if the plaintiff's title was proved, and if the land was found to be a joint property, a decree for joint possession might be awarded. Being of this opinion, the learned Judge set aside the decree of the appellate Court and remanded the appeal for re-trial.

4. It is admitted on behalf of the respondent that up till now the practice has been in this Court to entertain an appeal from a judgment like the one complained of. The case of Sevak Jeranchod Bhogilal v. Dakore Temple Committee AIR 1929 PC 155 has

been quoted on behalf of the respondent as laying down a rule that no Letters Patent appeal would lie where the judgment does not amount to a decree. The case went from Bombay and evidently what their Lordships of the Privy Council had in their mind was the Letters Patent of that High Court. The Letters Patent of this High Court (Section 10) speaks of orders and exclusion of certain orders as being not appealable. In the circumstances, we think that an appeal does lie. At any rate, nothing has been shown to us which ought to induce us to differ from the existing practice.

5. On the merits, it would appear that the plaintiff-respondent had no cause for any complaint. The land was admittedly the property of the parties. The plaintiff's allegation that he had taken possession of the land has been found to be inaccurate. It has been found that the defendant has been in peaceful possession of the land and as a co-sharer he has not denied the plaintiff's title. Under the circumstances to grant the decree for joint possession to the plaintiff would mean a criminal case and nothing else. The plaintiff, on foot of the decree for joint possession, would try to take physical possession with the result of heads being broken. He has not shown that he was in possession and has been ousted from possession. All that he claims before us through his counsel is a title to share in the profits by a regularly framed suit in the revenue Court. That title of his still exists and has not been denied. Under the circumstances we think the suit of the plaintiff was rightly dismissed by the Court Below.

6. We set aside the decree of this Court and restore the decree of the lower appellate Court. The respondent must pay the costs of the appeals in this Court (at both the hearings), the costs including counsel's fees on the higher scale.