

FULL BENCH

Before S. S. Sandhawalia, C.J., R. N. Mittal and G. C. Mital, JJ.

AJMER SINGH,—Appellant.

versus

Shamsher Singh and others,—Respondents.

Regular Second Appeal No. 2354 of 1982.

June 1, 1983.

Code of Civil Procedure (V of 1908)—Section 100 and Order 1 Rule 10—Suit for possession against trespasser—Such suit filed by one co-sharer without impleading the other co-sharers—Such suit—Whether maintainable—Decree in such suit—Whether to be qua only the share of the plaintiff.

Held, that a co-sharer can institute and maintain a suit for possession against a trespasser in respect of the entire property without impleading the other co-sharers and secure a decree for the entire property and not only the share of such co-sharer therein.

(Para 9)

Smt. Daya Kaur vs. Jaswant Kaur, 1971 Currl. L.J. 1001.

OVERRULED.

Regular Second Appeal from the decree of the Court of the Additional District Judge, Faridkot, dated the 18th day of October, 1982, modifying on appeal filed by the plaintiff that of the Senior Sub Judge, Faridkot, dated the 15th day of January, 1980 (decreeing the suit in favour of the plaintiffs and against defendant No. 1 for possession of 1/2 share of suit land and dismissing the suit for recovery of mesne profits and leaving the parties to bear their own costs) to the extent of decreeing the suit with regard to the entire land and further ordering that defendant shall pay the costs of the plaintiffs.

The other appeal filed by the defendant was dismissed with costs

Case referred by Hon'ble Mr. Justice Rajendra Nath Mittal,—vide orders dated the 18th March, 1983, to Full Bench for decision of an important question of law involved in the case. The Full Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice R. N. Mittal, and Hon'ble Mr. Justice G. C. Mital, finally decided the case on June 1, 1983.

H. S. Wasu, Sr. Advocate with Lakhbir Singh Wasu, Mr. Manmohan Singh, Advocates, *for appellants.*

S. M. Lal Arora, Advocate, *for respondents.*

JUDGMENT

S. S. Sandhwalia, C.J.—

(1) The significant question necessitating the admission of this appeal for hearing by a Full Bench is whether one co-sharer can institute and maintain a suit for possession against a trespasser in respect of the entire property (irrespective of his own share therein) without impleading the other co-sharers. Equally on the anvil is the correctness of the ratio of the Division Bench in *Smt. Daya Kaur v. Jaswant Kaur* (1) holding that in such a suit the co-sharer is entitled to a decree in respect of his share only.

2. Since the aforesaid issue is admittedly the only one pressed in this Regular Second Appeal, it is unnecessary to advert to the facts in any great detail. Suffice it to mention that the plaintiff-respondents has brought the suit for possession of land measuring 98 Kanals 5 Marlas which originally belonged to one Gurmukh Singh who had died issueless. The stand of the plaintiffs was that they and Balbir Singh defendant No. 2, being the nearest agnates of Gurmukh Singh, were co-heirs and were, therefore, entitled to recover possession from defendant No. 1, Ajmer Singh, who was a mere trespasser thereon. The suit was contested only by defendant No. 1 Ajmer Singh; whilst Balbir Singh defendant No. 2 filed a separate written statement in which he admitted the claim of the plaintiffs. The trial Court decreed the suit to the extent of half share to the property holding that the plaintiffs could bring the suit regarding their share only. The plaintiff-respondents and defendant-appellant Ajmer Singh appealed against the said judgment. The appellate court dismissed the appeal of Ajmer Singh defendant No. 1 and allowing the appeal of the plaintiff-respondents held that they could bring the suit for the whole of the property and consequently decreed the suit accordingly.

3. The present appeal came up for admission before my learned brother R. N. Mittal, J. The only contention raised on behalf of the appellants was that the suit could be decreed *qua* the half share of

(1) 1971 Curr. L.J. 1001.

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the plaintiffs alone. In support of this contention, reliance was placed on *Smt. Daya Kaur's case* (supra). Noticing that the mainstream of precedent was wholly contrary to *Smt. Daya Kaur's case* (supra) the appeal was admitted for hearing by a Full Bench.

4. As before the Single Bench so before us Mr. H. S. Wasu, the learned counsel for the appellant forcefully reiterated the contention that the suit of the plaintiffs could be decreed only as regards their half share in the suit property alone and not in its entirety and buttressed the same on the ratio of *Smt. Daya Kaur's case* (supra).

5. It appears to me that the issue herein is so substantially covered by the precedent that it would be perhaps wasteful to examine it on principle. There is a consistent line of authority now more than half century old not only within this jurisdiction but equally in other High Courts taking a view diametrically opposite from what is sought to be canvassed on behalf of the appellant. The true rationale underlying this view cannot perhaps be better epitomised than in the following words of C.J. Misra, speaking for the Full Bench in *Ram Niranjana Das and another v. Loknath Mandal and others*, (2):—

“.....A co-sharer, having an interest in a property, jointly with others, is apparently a person with a better title than a trespasser. Following this principle there is no reason why his suit should not be decreed. It is relevant also to consider in this connection that it is a well settled principle of law that one of the various co-owners of a property, if in possession, will be deemed to be in possession on behalf of all the co-owners and it is for this reason that his possession in law, therefore, is not regarded as adverse to other co-owners unless there is distinct proof of ouster. In that view of the matter also, the interest of an undivided co-owner or co-sharer must be taken to cover every inch of land which may be the subject matter of dispute as belonging to the co-owners, and hence it is clear that there is no support for Mr. Kalash Rai's contention either in principle or in authority as to why a co-sharer's suit cannot be held to be maintainable without impleading other co-sharers, and why it should not be decreed, in respect of the entire interest of the co-owners which of

course, however, will not affect the rights of other co-owners *vis-a-vis* successful plaintiff in a suit against a trespasser."

I am entirely in agreement with the aforesaid ratiocination and it calls for pointed notice that the Full Bench has impliedly overruled the earlier Division Bench, *Abdul Kabir v. Mt. Jamila Khatoon*, (3) wherein a somewhat contrary view had been expressed on this point. Equally, it calls for mention that the Full Bench had noticed a catena of cases in the other High Courts uniformly subscribing to the same view to which it is not necessary to refer individually. Suffice it to mention that an identical conclusion has been arrived at in *Ram Charan v. Bansidhar*, (4), *Sundarammal v. Sadasiva Reddiar and others* (5), and *Kishori Jena and another v. Rupa Jena and others*, (6).

6. Within this jurisdiction, even wayback in *Ganga Ram and others v. Relu* (7) the matter was considered axiomatic and briefly disposed of in the following words:—

".....The case, however, seems to me analogous to that of one of several joint owners suing to eject a trespasser and all the joint owners are not necessary parties to such a suit. I, therefore, overrule the preliminary objection."

The aforesaid view was then followed in *Vinod Sagar v. Vishnubhai Shanker Kakobhai and others*, (8), by the Division Bench whilst according relief to the plaintiff-co-owner by decreeing his suit with regard to the entire property, (Para 62 of the report). In *Gopal Singh v. Mehnga Singh* (9), D. K. Mahajan, J. sitting singly categorically observed that the rule was firmly settled that a trespasser can be evicted by one of the co-owners. Again in *Kirpa and another v. Raghbir Singh and another*, (10) R. N. Mittal, J. whilst following the aforesaid authority has reiterated the rule that a suit for

(3) A.I.R. 1951 Patna 315.

(4) A.I.R. 1942 All. 358.

(5) A.I.R. 1959 Madras 349.

(6) A.I.R. 1953 Orissa 285.

(7) A.I.R. 1933 Lahore 999.

(8) A.I.R. (34) 1947 Lahore 388.

(9) 1968 P.L.R. 515.

(10) 1982 P.L.J. 76.

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possession against a trespasser can be filed by one of the co-sharers alone and can be decreed with regard to the entire property irrespective of the plaintiff-co-owner's share. Lastly, (though not directly on the point), by way of analogy, the seal of approval on this line of reasoning has been put in the recent Full Bench decision of this Court in (*Biru etc. v. Suraj Bhan*), (11) (Para 7 to 12 of the report).

7. It remains to advert to the solitary discordant note struck in by the Division Bench in *Smt. Daya Kaur's case* (supra). I was a party thereto and can well recall what would otherwise be plain from the recorded judgment that the issue was not even remotely and adequately canvassed before the Bench. The long line of unbroken authority beginning from the binding precedent of the predecessor High Court of Lahore, as also of other High Courts was not at all brought to the notice of the Bench. The question seems to have been treated as one of first impression. Neither principle nor authority was cited therefor barring a bare reference to the unreported Single Bench judgment in *Smt. Dropti v. Chinta* (12). A perusal of the said judgment would indicate that therein also the point was not at all raised. In fact, the defendants in that case were not held to be trespassers, but the successors-in-interest of co-heirs and the *inter se* relationship of the parties was put in serious factual dispute. The observations in *Smt. Dropti's case* (supra), therefore, lend no support what-so-ever to the proposition enunciated. It must, therefore, be held that the somewhat categoric observation in *Daya Kaur's case* (supra), that only the share of the co-owner should be decreed in a suit for possession against a trespasser and not that of the other co-owners as well, is in headlong conflict with the consistent line of unbroken precedent and does not lay down the law correctly and, therefore, has to be necessarily overruled.

8. Before parting with this judgment, one must in fairness also notice what appears to me as the last argument of desperation by the learned counsel for the appellant in his reliance on *Kanakarathanammal vs. V. S. Loganatha Mudaliar and another*, (13). This, however, need not detain one for long. A bare perusal of the judgment would show that the point herein was not even remotely raised before their Lordships. The basic issue which was adverted to and adjudicated upon was whether the claimed property

(11) R.S.A. 190 of 1971 decided on 1-2-1983.

(12) R.S.A. 361 of 1961 decided on 1-4-1971.

(13) A.I.R. 1965 S.C. 271.

fell under Section 10(2)(b) or Sec. 10(2)(d) of the Mysore Hindu Law Women's Rights Act, 1933. It would appear that their Lordships, after hearing arguments, had allowed time for an amicable settlement between the parties whereafter an application was moved on behalf of the appellant to amend for plaint by adding her brothers as parties at that late stage. This application was rejected by their Lordships and it is plain that the observations made in that context have little or no relevance to the question before us. This judgment is thus plainly distinguishable.

9. To conclude, the answer to the question posed at the out-set is rendered in the affirmative and it is held that a co-sharer can institute and maintain a suit for possession against a trespasser in respect of the entire property without impleading the other co-sharers and secure a decree for the same irrespective of his own share therein.

10. Mr. H. S. Wasu, the learned counsel for the appellant has candidly stated that no other question arises in this Regular Second Appeal and the aforesaid issue having been held against the appellant, this appeal must fail and is hereby dismissed. The parties are however, left to bear their own costs.

Rajendra Nath Mittal J.—I agree.

G. C. Mittal J.—I also agree.

N.K.S.