

# Akbar Khan And Ors. vs Abdul Ghafoor And Ors. on 3 May, 1950

**Equivalent citations: AIR1950ALL690, AIR 1950 ALLAHABAD 690**

## JUDGMENT

Sapru, J.

1. This appeal has been preferred by the plaintiffs and arises out of a suit for joint possession of two plots Nos. 4456 and 4769 in a certain village in Azamgarh. Admittedly, the parties are co-sharers. The case which was put forward by the plaintiffs was that, being joint owners, they were entitled to joint possession of the two plots in question, that what was actually happening was that the defendants had taken exclusive possession of the plots and were not allowing them to interfere with their possession of it. They claimed that, because of this action of the defendants they were entitled to bring a suit for joint possession.
2. The suit was resisted by the defendants on the ground that the plot in dispute was a tal or a low lying land which they claimed they had filled up and made cultivable. In so doing they had spent money and labour and the defence taken by them was that the remedy of the plaintiffs who undoubtedly were joint owners of these plots with them was to bring a suit for a partition or profits in the revenue Court. Another defence which was taken by them was that the tal was filled up by them some six years back and the plaintiffs had consented by their conduct to their doing so.
3. The trial Court did not accept the case set up by the defendants. It thought that the plaintiffs had been able to establish their case and decreed their suit for possession.
4. Aggrieved by the decision of the trial Court the defendants went in appeal to the learned Civil Judge. He reversed the judgment of the trial Court and dismissed the plaintiffs' suit and pointed out that the proper remedy for the plaintiffs was not a decree for joint possession but a suit for profits.
5. The learned Civil Judge has written, what I consider to be, a careful and able judgment. Admittedly, the parties in this case are co-sharers and the land in dispute is a joint land. The point which has been pressed by learned counsel before me, is that in principle it is Wrong to allow any co-sharer to do anything with fallow and tal land and thereafter by doing something for it to allow him to claim it as exclusively his own. There might have been something to be said far this contention had the co-sharers in this case not kept silent for five or six years. According to the report of the Commissioner which the learned Civil Judge accepts as correct, the disputed land was filled up about five or six years back without any objection, as far as one can see, by the appellants. It is, therefore, because of the conduct of the appellants that the learned Judge felt bound to apply the rule of "equity justice and good conscience."

6. It strikes me that, if there be a common piece of land not used by any co-sharer and a co-sharer reclaims that piece of land and converts it into a scarce of income, Courts should be reluctant to disturb his possession by giving a decree for joint possession to a co-sharer, who stands by, while his co-sharer is spending money and labour in reclaiming the land. This principle is in full accord with that which was enunciated by their Lordships, of the Privy Council in the case of Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy, 23 A. L. J. 76 : (A.I.R. (11) 1924 P. C. 144). In delivering the judgment of the Board their Lordships observed that:

"Where lands in India are held in common by co-sharers, each co-sharer is entitled to cultivate in his own interest in a proper and husband-like manner any part of the land which is not being cultivated by any of his co-sharers but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such, an exclusive use of land held in common by a co-sharer is not an ouster of his co-sharers from their proprietary rights as co-sharers in the land. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of land held in common is to obtain a partition of the lands." Another case to which a reference was made is the case of Bal Singh v. Nawab Singh, A. I. R. (34) 1937 ALL. 688 : (171 I. C. 795). In this Case Harries J. made the following observation :

"Where a co-sharer has taken peaceful possession of a piece of land held in common and had been permitted to cultivate it for five or six years the inference is irresistible that he was occupying the land and cultivating it with the consent of the coparcenary body and of the lambardar. Such person is not a person who takes or retains possession over the land in question in contravention of the provisions of Section 44, Agra Tenancy Act. He cannot be treated as a trespasser and ejected though he can, of course, be made to account to his other co-sharers for the rental of such laud."

I have referred to these two cases in order to indicate what exactly was the remedy which was open to the co-sharer in the circumstances which existed in this case.

7. My attention was drawn by learned counsel for the appellants to the Full Bench case of Hanuman Prasad v. Mathura Prasad, 26 A. L. J. 992 : A. I. R. (15) 1923 ALL. 472 (F. B.). He also made a reference to the case of Jagannath v. Ramphal, 34 ALL. 150 : (13 I. C. 79). In both these cases it was laid down that it was competent for a co-sharer to sue another co-sharer for joint possession of their common land. In the Full Bench case referred to above it was, however, observed that, though the Court has jurisdiction to pass a decree for joint possession even where the plaintiff has not been in actual possession, the grant of such a decree is a discretionary matter with the Court and that that discretion will be exercised after a full and fair consideration of the rights and interests of all the parties concerned. It is obvious, therefore, that it is discretionary with the Court to either pass or not pass a decree for joint possession; in the exercise of this discretion the Court will be bound to take into consideration the equities of the case and the conduct of the parties.

8. Having regard to all the facts of the case I am satisfied that the order passed by the learned Civil Judge was a correct one. For the reasons I have indicated above this appeal must fail and the decree of the lower Court must be affirmed. The result is that I dismiss this appeal with costs.