

## APPELLATE CIVIL.

1896  
May 5.

Before Mr. Justice Banerji.

MUHAMMAD ALI JAN (PLAINTIFF) v. FAIZ BAKHSH AND OTHERS  
(DEFENDANTS.)\**Joint property—Trespass.—Suit by one co-parcener for possession of a building erected by a stranger on the joint property and purchased by the other co-parceners.*

Where a stranger to the property built upon certain land jointly held by several co-parceners and some of the co-parceners purchased from the stranger the building so erected, it was held that the purchasers were, *quoad* the building in suit, trespassers, and that a suit might be maintained by the remaining co-parcener to be put into joint possession of the land covered by the building; and this though it was not shown that any special damage had been suffered by the plaintiff by reason of the building. *Paras Ram v. Sherjit* (1) and *Najju Khan v. Embiaz-ud-din* (2) referred to.

THE facts of this case sufficiently appear from the judgment of Banerji J.

Messrs. *T. Conlan* and *G. P. Boys*, for the appellant.

Mr. *J. Simeon*, for the respondents.

BANERJI, J.—The suit in which this appeal has arisen was brought by the appellant for possession of a small room erected on 15 yards of land, for closing certain doors and for opening one. He offered to pay to the defendants the cost of the building of the room. The land on which the room in question stands is a part of a larger piece of land purchased in 1881 by the plaintiff and the defendants Nos. 2, 3 and 4 under a single sale-deed. The plaintiff alleged that the land purchased by him and the defendants mentioned above contained a building, and that the first defendant, who was the father of the defendants Nos. 2 and 3, had pulled down that building and with the materials had built the room in question. The first defendant sold the room to the defendants Nos. 2 and 3, under a sale-deed executed in February 1886, and it is by virtue of that sale-deed that the defendants Nos. 2 and 3 are in possession

\* Second Appeal No. 370 of 1895 from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 7th January 1895, confirming a decree of Munshi Anant Prasad, Munsif of Amroha, dated the 25th June 1894.

(1) I. L. R., 9 All., 661.

(2) I. L. R., 18 All., 115.

1896

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MUHAMMAD  
ALI JAN  
vs.  
FAIZ  
BAKSH.

of the room. The plaintiff's case was that the first defendant had no right to build on land which belonged to him and to the other defendants, and that the encroachment on that land by the first defendant was an act of trespass.

The defendants stated that the room had been built on that portion of the land purchased jointly by the plaintiff and the defendants Nos. 2, 3 and 4, which had fallen into the share of the defendants by partition, and they contended that the plaintiff had consequently no right to the land on which the room in question stood.

The Court of first instance found in favour of the defendants, and holding the land in suit to be the exclusive property of the defendants Nos. 2, 3 and 4 dismissed the claim. Upon appeal by the plaintiff the lower appellate Court came to the conclusion that the land in question belonged jointly to the plaintiff and the defendants Nos. 2, 3 and 4. It also found that by reason of the construction placed on the land the plaintiff had not sustained any injury, and it held that, according to the ruling in *Paras Ram v. Sherjit* (1), the plaintiff's suit was not maintainable, his remedy being a claim for partition of the joint land. It was upon that ground only that the lower appellate Court maintained the decree of the court of first instance dismissing the plaintiff's suit.

The finding of the lower appellate Court as to the land being joint must be accepted as conclusive between the parties, but upon that finding the Court was not justified in dismissing the claim. The land, which has been found to belong jointly to the plaintiff and the defendants Nos. 2, 3 and 4 was not, according to the plaintiff, encroached upon by those defendants, but by the first defendant alone, who was a stranger to the land. The encroachment therefore which the plaintiff complained of was an encroachment by a stranger upon property in which the plaintiff had a joint interest along with others. There can be no question that, if a stranger trespasses upon joint property, one of the several persons jointly interested in the property is entitled to

restrain that stranger from committing the act of trespass. In this case it was a stranger, who, according to the plaintiff, trespassed on his land, and therefore the plaintiff was competent to restrain him from continuing the trespass. The defendants Nos. 2 and 3 purchased from the trespasser the building which he had erected by encroaching on property which did not belong to him. They therefore stand in the shoes of the trespasser, and it is not in their character as joint co-owners that they are in possession of the room, the building of which constituted the act of trespass. In this view the ruling in the case of *Paras Ram v. Sherjit* (1) did not apply, and the decree made by the lower appellate Court cannot be sustained. This case is not outside the principle of the ruling in *Najju Khan v. Imtiaz-ud-din* (2). Upon the facts found by the lower appellate Court, I am of opinion that the suit was maintainable.

There were other contentions raised by the defendants, one of which was that the room had been built with the acquiescence of the plaintiff. It might also be a question in the case whether the plaintiff could claim possession exclusively to himself of the land on which the room stands and also of the room. These questions have not been tried by the lower appellate Court. In the view which the Court of first instance took of the case it was not necessary for that Court to determine these questions; but upon the finding of the lower appellate Court they will have to be determined before the case can be finally disposed of. As, however, the lower appellate Court dismissed the suit upon a preliminary point and the decree upon that point is erroneous, I allow this appeal, and, setting aside the decree of the Court below, remand the case under section 562 of the Code of Civil Procedure to that Court, with directions to readmit it under its original number in the register and to determine it on the merits.

*Appeal decreed and cause remanded.*

1896

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 MUHAMMAD  
ALI JAN

 FAIZ  
BAKSH.

(1) I. L. R., 9 All., 661.

(2) I. L. R., 19 All., 115.