

**Court No. - 19**

**Case :-** SECOND APPEAL No. - 253 of 1986

**Appellant :-** Munshi Raza

**Respondent :-** Rahem Ali And Ors.

**Counsel for Appellant :-** Mohd. Husain, Mohammad Aslam Khan, Mohd. Arif Khan

**Counsel for Respondent :-** Abid Ali, Mohd. Kashif Rafi, Mohd. Mustafizul Haq, S.M. Nasir, S.M. Parvez

**Hon'ble Jaspreet Singh, J.**

Heard Sri Mohd. Arif Khan, learned Senior Counsel along with Sri Mohd. Aslam Khan, learned counsel for the appellant as well as Sri M.M. Haque, learned counsel along with Sri Kashif Rafi, learned counsel for the respondents.

This is the defendant's second appeal assailing the judgment and decree dated 30.04.1982 passed in Regular Suit No. 282 of 1979 whereby the suit of the plaintiff-respondent was dismissed, however, the plaintiff carried the matter in appeal bearing No. 124 of 1982 which has been allowed by the Lower Appellate Court by means of judgment and decree dated 05.02.1986, consequently, the suit which was dismissed by the Trial Court has been allowed by the Lower Appellate Court.

The instant appeal was admitted by this Court on 15.04.1986, however, the substantial question of law was not framed. Later, this Court by means of order dated 21.07.2023 had framed the substantial question of law which reads as under:-

*"Whether the suit for joint possession and seeking demolition of construction at the behest of the plaintiffs-respondents was maintainable and could have been decreed once the possession as well as construction over the disputed land was taken to be joint and old construction without seeking a decree of partition?"*

The submission of learned counsel for the appellant is that the suit filed by the plaintiff-respondents seeking a decree of joint possession was not maintainable apart from the fact that the decree seeking demolition of certain constructions and structures also could not have been granted.

It is urged that the relations between the plaintiff and the defendant was that of co-shares. This being the admitted position, the plaintiff could not have sought a relief of joint possession nor could have sought the demolition of certain

structures erected on the disputed land in question.

It is urged that since the land was jointly owned then each person would be deemed to be in possession thereof. If at all, the plaintiff had any grievance, he ought to have filed a suit for partition and get his share demarcated. In case if the structures were found to be on the land which fell in the share of the plaintiffs after the partition only then the same could have been removed and that too after adjusting the equities between the parties at the time of the execution of the final decree proceedings. Without determining the shares of the respective parties and passing a decree directing the removal of constructions/structures was apparently not correct.

The Trial Court had dismissed the suit and this aspect was not considered by the Lower Appellate Court, accordingly, the appeal deserves to be allowed.

Sri M.M. Haque, learned counsel for the plaintiff-respondents on the other hand submits that the land in question was joint. The defendant had ousted the plaintiff and thus the plaintiff was entitled to get back his possession in terms of Section 5 of the Specific Relief Act, 1963 and thus the suit for joint possession was maintainable.

It is further urged that once the land was joint it was not open for the defendant to have raised or placed any structure over the joint land without first getting the land partitioned and demarcated, thus, in the instant case, the Lower Appellate Court had found that the defendant had raised certain structures over the joint land and had granted the relief to the plaintiff-respondents which is based on material available on record, consequently, the judgment in appeal does not require any interference and as such the appeal deserves to be dismissed.

The Court has heard the learned counsel for the parties and also perused the material on record.

As far as the issue involved in the instant appeal is concerned, it is not in dispute between the parties that the land in question was joint. It is also to be noticed that Rahim Ali, Ahmad Ali, Mohd. Ibrahim and Buddhu were the co-sharers along with Munshi Raza, Jaan Mohammad and Mohal Ali.

During the pendency of the proceedings, the plaintiff no. 3 and 4 namely Mohd. Ibrahim and Buddhu have sold some part of the property to Sri Jaan Mohammad. Sri Jaan Mohammad being aggrieved from the dismissal of the suit had also preferred a separate appeal under Section 96 C.P.C. which was bearing No.

132 of 1982 which also was heard and decided together and the appeal filed by the original plaintiff bearing No. 124 of 1982.

The controversy involved in between the parties is in a narrow compass, inasmuch as, both the parties agreed that the land was joint. Once the land was found to be joint, the plaintiff stated that the defendant had ousted the plaintiff over some part of the land and had also raised certain structures and this gave cause of action to the plaintiff-respondents to file a suit seeking a decree of mandatory injunction requiring the defendant to remove his structures and the plaintiff be put in possession thereof.

The aforesaid stand was denied by the defendants in their written statement and apart from raising other pleas also stated that the land in question was jointly held by the parties and the plaintiff was not entitled to any specific portion and the decree as prayed was not required to be passed.

The Trial Court after considering the oral as well as the documentary evidence by means of judgment and decree dated 30.04.1982 dismissed the suit.

Being aggrieved, the plaintiff preferred a Civil Appeal No. 124 of 1982 whereas the purchaser of the plaintiff namely Jaan Mohammad preferred Appeal No. 132 of 1982. Both the appeals were heard and decided together by the judgment and decree dated 05.02.1986. In the aforesaid backdrop, this Court finds that the land in question was an open piece of land over some part of which a grove was also there.

The property which is joint, the possession of each co-owner is also deemed to be joint over each and every part thereof. In the instant case, it is not the situation where each set of the parties were in specific demarcated portion of the property and by resorting to unfair means one party has ousted the other.

It is also not the case of the plaintiff that he was never in possession, though, he had a right in the property as a joint owner. Once, the parties had their respective rights over the property in question which was joint, it was most appropriate to get the property partitioned. Without partitioning the property, it cannot be said that any one co-owner was in exclusive possession to the detriment of the other co-sharer. Neither the plaintiff led any evidence nor was his pleadings that he was in possession of any specific portion of the property in question. The plaintiffs also does not claim to seek possession in some particular portion of the property in suit.

Even assuming if the defendant had raised any structures, the same cannot be ordered to be demolished unless and until it is first ascertained that what is the respective shares of the parties concerned.

It is only thereafter, it can be seen whether the constructions or structures on the given piece of land is in excess or deficient to the share of the party concerned.

It is in view thereof, this Court finds that the Lower Appellate Court misdirected itself and failed to consider this aspect of the matter.

In light of the above, this Court has no hesitation to hold that the judgment and decree passed by the Lower Appellate Court dated 05.02.1986 cannot be sustained and the judgment and decree passed by the Trial Court dated 30.04.1982 passed in Regular Suit No. 282 of 1979 is affirmed. It is made clear that there is no limitation for a suit of partition, accordingly, it shall be open for the parties to seek their appropriate remedy before the appropriate Court if the law so permits.

The appeal is accordingly ***allowed*** and the judgment and decree passed by the Lower Appellate Court dated 05.02.1986 in Appeal No. 124 of 1982 and 132 of 1982 is set aside. The judgment and decree of the Trial Court dated 30.04.1982 in Regular Suit No. 282 of 1979 is affirmed. In the facts and circumstances, there shall be no order as to costs. The records of the court below be returned forthwith.

**Order Date :- 28.11.2023**

Asheesh