

Bande Ali Vs Gokul Misir and Others

Court: Allahabad High Court

Date of Decision: Nov. 25, 1911

Citation: (1912) ILR (All) 172

Hon'ble Judges: H.G. Richards, C.J.; Banerji, J

Bench: Division Bench

Final Decision: Allowed

Judgement

H.G. Richards, C.J., and Banerji, J.

This appeal arises out of a suit "in which the plaintiff claimed joint possession of a certain share in a

grove. The defence was that the suit was barred by Section 43 of Act XIV of 1882, having regard to previous litigation between the parties. The

previous litigation consisted of a suit in which the plaintiff sued the defendants for a permanent injunction restraining them from interfering with his

possession and appropriating the fruits of the grove. There was also a claim for damages. This last mentioned suit was dismissed on the ground that

the plaintiff was not in possession, and that neither injunction nor damages could, therefore, be claimed. The court of first instance dismissed the

present suit. The court of first appeal reversed the court of first instance and held that the suit was not barred by Section 43. The learned Judge of

this Court in a very careful and elaborate Judgment reversed the court of first appeal and restored the decree of the court of first instance, The

plaintiff comes now in appeal under the Letters Patent.

2. Section 43 of Act XIV of 1882 is as follows: --"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of

the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. If a plaintiff

omits to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or

relinquished.

3. If we had to decide the question in the absence of authority, we might have some difficulty in dissenting from the view taken by our learned

brother. "We think, however, that the authorities show that for a long time it has been accepted in this Court and in other High Courts that the

dismissal of suits of this nature on the ground that the plaintiff is not or has not proved that he is in possession, is no bar to a subsequent suit for

possession. As early as the year 1879, a Full Bench of this-Court in the case of Darbo v. Kesho Rai ILR (1879) All. 356 decided that the

dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession, was no bar to a subsequent suit for possession. It is

true that the decision in that case was u/s 7 of Act VIII of 1859, and it is also true that the Judgment in that case is a very short one. The same

question arose in Sarsuti v. Kunj Behari Lal ILR (1883) All. 345. In that case the majority of a court consisting of Mr. Justice Straight, Mr. Justice

Oldfield, Mr. Justice Brodhurst and Mr. Justice Tybrell, decided the same way, namely, that the suit was not barred. That also was a decision u/s

7 of Act VIII of 1859. In this case Sir Robert Stuart, C.J., who was a party to the previous decision in Darbo v. Kesho Rai dissented. Again in the

case of Mohan Lall v. Bilaso ILR (1892) All. 512 a Bench of this Court consisting of Edge, C.J., and Blair, J., decided that the dismissal of a suit

for a declaration of title on the ground that the plaintiff was not in possession was no bar to a subsequent suit for possession. The learned Judges

followed Jibunti Nath Khan v. Shib Nath Chukerbutty ILR (1882) Cal 819. The decision of this Court in Darbo v. Kesho Rai ILR (1879) All 356

does not appear to have been cited to the Court in that case. These cases clearly show that it has been the well-established practice of this Court

not to dismiss a suit for possession merely on the ground that a previous suit had been brought for a declaration of title and dismissed on the

ground of the plaintiff not being in possession. In the present case the previous suit was a suit for an injunction, and it was dismissed on the ground

that the plaintiff was not in possession. In our opinion no distinction in principle can be drawn between the dismissal of a suit for a declaration of

title on the ground that the plaintiff was not in possession, and the dismissal of a suit for an injunction on the same ground. Following the rulings and

established practice of this Court we think that the appeal ought to be allowed. We accordingly allow the appeal, set aside the decree of this

Court, and restore the decree of the lower appellate court with costs.