

**(1911) 11 AHC CK 0015****Allahabad High Court****Case No:** None

Bande Ali

APPELLANT

Vs

Gokul Misir and Others

RESPONDENT

**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 ease 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 bean 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.