
(1909) 06 CAL CK 0001

Calcutta High Court

Case No: None

Hossein Mahomed

APPELLANT

Vs

Fakir Mahomed

RESPONDENT

Date of Decision: June 16, 1909

Judgement

1. The plaintiff has brought this suit to recover possession of certain land from defendant No. 1 on the theory that defendant No. 1 is a trespasser, and, by his plaint he seeks exclusive possession of the land. A decree was passed in his favour by the first Court but on appeal the lower appellate Court modified the decree of the first Court by disallowing khas possession of the land in question to the plaintiff in respect of 8 annas 5 pies share of it, and the decree for khas possession of the plaintiff jointly with defendant No. 1 in respect of the remaining 7 annas 7 pies share was affirmed. The plaintiff was dissatisfied with this decree for joint possession. He never sought it, and when it was given to him it did not answer the purpose for which the suit was brought, and so he appealed to this Court putting forward as the first ground of appeal that the orders of the Subordinate Judge directing the plaintiff to have khas possession of 7 annas 7 pies with defendant No. 1 being inconsistent with the previous part of his judgment ought to be set aside.

2. On the hearing of the appeal by Mr. Justice Lal Mohan Doss, the decree of the Subordinate Judge was modified and the suit for khas possession of the entire holding was decreed. The cross-appeal which had been preferred by the defendant was dismissed with costs. From this judgment of Mr. Justice Lal Mohan Doss this present appeal is preferred.

3. The case can only be determined on the basis of the findings of the lower appellate Court, and in particular of the finding by the learned Judge of that Court in which he says: "I feel no hesitation in saying that the co-sharer landlords who attested the transfer as witnesses did so, giving their unreserved consent to the sale transaction evidenced by it." The meaning of that is that defendant No. 1 claimed as transferee from defendant No. 2, and in the view of the Subordinate Judge there was an assent to that transfer by certain of the landlords. The learned Judge goes on to say that the shares of those who had so

assented amounted in all to 6 annas 8 pies only. But he adds to the same the share of defendant No. 31, who through his agent accepted rent from the defendant No. 1 admitting his tenancy under him. In the face of that finding, it is impossible to treat defendant No. 1, as the plaintiff seeks to do, as a mere trespasser, and it is further impossible to award to the plaintiff a decree for exclusive possession. On the other hand, it would not be right for us at this stage, and having regard to the attitude throughout assumed by the plaintiff, to award joint possession. And, the only result is that we must dismiss the present suit for ejectment with costs throughout. If the plaintiff considers that he has any right other than that of ejectment, then he must, if he can, assert it in another suit.