

(1878) 01 CAL CK 0014

Calcutta High Court

Case No: None

Parbutty Dossee

APPELLANT

Vs

Poran Sookh Chunder
and Others

RESPONDENT

Date of Decision: Jan. 11, 1878

Acts Referred:

- Specific Relief Act, 1877 - Section 42

Citation: (1878) ILR (Cal) 612

Hon'ble Judges: L.S. Jackson, J; Kennedy, J

Bench: Division Bench

Judgement

L.S. Jackson, J.

It appears to us that the objection taken during the argument of this special appeal, although it was not taken in the memorandum of appeal, is a valid objection to the decision. The facts of this case are shortly these: (The learned Judge stated the facts of the case as set out above, and having remarked that the particular question before the Court might not have been discussed by the defendants in the Court of first instance continued).--The defendants appeal specially to this Court, and of course we are not only entitled, but bound to consider an objection which raises the question whether the plaintiff was entitled to maintain the suit and to obtain the decree which she asked for. It has been constantly ruled in this Court and in the other High Courts, and the law is stated in the case noticed by Mr. Broughton in his edition of Act VIII of 1859--Padagalingam Pillay v. Skanrmigham Pillay 2 Mad. H.C.R. 333--that a suit ought not to be maintained where "the plaintiff who merely seeks for a declaration of title is in possession." In the present case the plaintiff was and is in possession of the land to which she says she is entitled. But she says, "inasmuch as the defendants claim to be entitled to take rent from me in respect of these lands, and inasmuch as I claim to hold the land lakheraj, free from payment of any rent, by that claim of the defendants, and by the fact that under such a claim they

recovered a decree against me in the Small Cause Court, a cloud has been thrown on my title." And she alleges that, as a justification for this suit. There are no doubt cases--I am speaking now of the state of the law before the Specific Relief Act was passed--in which a plaintiff has been allowed to say: "The defendant sets up a title, a mortgage or any other title, embodied in a certain document. I have accordingly brought the document into Court, and I call upon the Court to look into that document, the alleged mortgage, or whatever it might be, and to determine whether that is a valid mortgage." And if the Court held that the mortgage, was not valid, then the more invalidation of the document relied upon by the defendant has been considered such relief as the plaintiff might properly ask for. ¹ In the present instance the claim which the defendants have set up is no longer in the condition of a mere assertion or a claim for right; it has passed into a decree. Consequently the plaintiff could not bring this suit for the purpose of setting aside the judgment of the Small Cause Court, and therefore no relief could be had in respect of that. It appears to me, therefore, that under the law as it stood before the Specific Relief Act was passed, the plaintiff could not maintain the present suit. It was suggested that in such circumstances, unless such a suit as the present is allowed to be maintained, the plaintiff will be without a remedy. That, in the first place, is not a reason for allowing a suit to be maintained which the law does not allow. But in the next place, it does not seem that the plaintiff is without a remedy, for it is quite conceivable that if a further suit for rent be brought, she might immediately file a suit in the Munsif's Court and apply for an injunction to prevent the other party from proceeding so long as her own suit is not disposed of and an absolute relief given her. It may also be, although I do not wish to express any positive opinion on the point, that the plaintiff" before us may, if a fresh suit for rent be brought, again raise the same question, because the Small Cause Court has no power to determine finally a question of right. But it is unnecessary to decide that point. All that I say is that the present suit is not maintainable. I have the satisfaction of seeing that in addition to this ground there were other good grounds of defence which the defendants had in the present suit and which the Munsif found in their favour, so that if possibly the suit might come before us for trial on the merits, we might be inclined to reverse the judgment of the lower Appellate Court also on other grounds. In both these appeals, therefore, the decrees of the lower Appellate Court will be reversed and the decrees of the Court of first instance dismissing the suit will be restored with costs. Kennedy, J.

2. I entirely concur. As a rule, this Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum; but where a decree comes before it which upon its very face is illegal,--a decree which goes beyond the power of the Court which passed it under circumstances of this sort,--I take it that this Court is bound to take up the point itself and rectify the mistake, and not allow itself to become an instrument to the commission of further mistakes.

1. See *Fakir Chand v. Thakur Singh* 7 B.L.R. 614; *Prasanna Kumar Sandyal v. Mathuranath Banerjee* 8 B.L.R. App. 26. The words in Section 15 of Act VIII of 1859 are to be interpreted as giving a right to obtain a declaration of title only in those case in which the court could have granted relief, if had been prayed for♦*Nilmony Singh Deo. v. Kalee Churn Bhattacharjee* 14 B.L.R. 382; see also *Strimathoo Natchiar v. Dorasinga Tevar* 15 B.L.R. 83. The power of the Court to prass declaratory decrees is now to be found in Section 42 of the Specific Relief Act (I of 187).