

(1912) 05 CAL CK 0035**Calcutta High Court****Case No:** None

Nabadwipendra Mookerjee

APPELLANT

Vs

Madhu Sudan Mandal and
Others

RESPONDENT

Date of Decision: May 9, 1912**Citation:** 16 Ind. Cas. 741**Hon'ble Judges:** Beachcroft, J; Ashutosh Mookerjee, J**Bench:** Division Bench**Judgement**

1. This is an appeal on behalf of the plaintiff in a suit for declaration of title to Immovable property and for recovery of possession thereof. The plaintiff alleges title by purchase at a sale in execution of a mortgage-decree. He further states that when he took delivery of possession through Court, he was opposed by the defendants, which led to a proceeding u/s 335 of the CPC of 1882. The plaintiff interprets the decision in this proceeding as adverse to him and asserts that he lost possession thereby; he, therefore, claims to recover possession from the defendants. The defendants resist the claim on the merits, put the plaintiff to the proof of his title, and allege that their possession was sustained by virtue of the proceedings u/s 335 mentioned in the plaint. The defendants also take the stereotyped objection, usually wholly frivolous, that there was no cause of action as against them. The Court of first instance proceeded to dismiss the suit without trial on the merits, because in its opinion, the effect of the order u/s 335, Code of Civil Procedure, was not to dispossess the plaintiff. Upon appeal, the District Judge has affirmed that order of dismissal. The statement of the history of the case will illustrate how grave injustice may be done to a litigant when the Courts are astute to favour frivolous objections on the part of the defence.

2. The parties are agreed that the effect of the order in the proceeding u/s 335, Civil Procedure Code, is to deprive the plaintiff of possession of the disputed property and to secure possession to the defendants. The question, therefore, whether the

order had that effect, does not require examination. But even if it be assumed that the order u/s 335 had not the effect attributed to it by the plaintiff, it is clear that the suit cannot be dismissed on that ground. The suit is for declaration of title and for recovery of possession of Immovable property. It is wholly immaterial in what precise manner or on what exact date, the dispossession took place. No doubt, as stated by Lord Westbury in Eshen chunder Singh v. Shama churn Bhutto 11 M.I.A. 7 at p. 20 : 6 W.R.(P.C.) 57 : 2 Ind. Jur.(N.S.) 87 the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby. It does not follow, however, that every variance between pleading and proof is material and justifies a dismissal of the claim. Such an extreme view was not tolerated in England, even when rules of pleading were in the highest degree technical and artificial Purcell v. Mac Namara (1807) 9 East 157 : 9 R.R. 578 : Wickes v. Gordon (1819) 2 B. & Aid. 335 : I Chit 60. The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer so that he may properly make his defence and may not be taken by surprise; and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Tested in the light of these principles, the objection of the defendants proves wholly unsubstantial. The particular mode in which the ouster of the plaintiff took place, or the specific point of time when it happened, is really not material. The plaintiff has to prove his title first; if he does so, he has further to prove his possession within twelve years prior to the suit, on what precise date, within this twelve years, he lost possession, is not a matter of consequence; at any rate, it cannot take the defendant by surprise, because he at any rate, knows when he dispossessed the plaintiff. From every possible point of view, the objection of the defendants thus proves groundless and cannot be sustained.

3. The result is that the appeal is allowed, the decrees of the Courts below discharged, and the case remanded to the Court of first instance in order that the suit may be tried on the merits. The plaintiff is entitled to costs in this Court and the Court of Appeal below, as also hearing fees in the Court of first instance. As the objection was of a manifestly frivolous character, we assess the hearing fee in this Court at five gold mohurs.