(1914) 08 CAL CK 0022

Calcutta High Court

Case No: None

Kali Kumar Chuckerbutty	APPELLANT
Vs	
Aslam and Others	RESPONDENT

Date of Decision: Aug. 3, 1914

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: 33 Ind. Cas. 139

Hon'ble Judges: Holmwood, J; Chapman, J

Bench: Division Bench

Judgement

1. This appeal arises out of a suit for the possession of a holding which the plaintiff had purchased at a sale in execution of a rent-decree in January 1906. He obtained formal delivery of possession in September 1906. The holding consisted of a homestead and the arable land attached thereto. In April 1907, the plaintiff sued for khas possession of that portion of the holding only which included the homestead. His allegation was that the defendants had dispossessed him of the homestead. That it was dismissed for want of prosecution in November 1907. An application to restore was also dismissed in February 1908. The plaintiff had also brought a criminal case charging the defendants with criminal trespass on the arable portion of the holding. The criminal case ended in acquittal in June 1908.

2. The first Court held that the plaintiff''s suit was barred so far as the homestead was concerned, his previous suit for the homestead having been dismissed. The Court, however, decreed the suit for the arable land. The Court of first appeal has reversed this decision holding that by reason of the dismissal of the previous suit, the suit for the arable portion of the land was also barred under Order II, Rule 2, Code of Civil Procedure.

3. The plaintiff appeals. The contention in appeal is that the provisions of Order II, Rule 2, do not apply to the case. The material portion of the rule referred to is to the

following effect: "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.. "Where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted." The previous suit was for a portion of the holding only. The plaintiff in that suit omitted to sue for the arable land. The present suit for the arable land has thus been held to be barred. The argument on appeal, however, is that the cause of action in the previous suit was a re-entry into the homestead only. The cause of action alleged in the present suit was a dispossession from the arable land on a subsequent date and on an entirely independent occasion, namely, after the application for review in the previous suit was dismissed. The argument is that the acts of dispossession being different the causes of action were different and the rule does not apply. The Court of first appeal has, however, found that in fact there were not two separate acts of dispossession; and that the plaintiff never obtained anything more than formal delivery of possession of any portion of the land and that, therefore, the causes of action were not different: they were in fact the same and the allegations in the plaint in this respect were untrue. It is, however, contended that the learned District Judge fell into error in so dealing with the question and that he should not have gone outside the four corners of the plaints in the two cases. In support of this contention the case of Jibunti Nath Khan v. Shib Nath Chuckerbutty 8 C. 819 : 10 C.L.R. 537 is relied upon, in which it is said that the cause of action must be sought for between the four corners of the plaint. The facts of that case were, however, entirely different. In that case the previous suit had been one for confirmation of possession and had been dismissed upon the ground that the plaintiff had never been in possession. The suit which was before the learned Judges was for recovery of possession and it had been held in the suit before them that the plaintiff had in fact been dispossessed. The learned Judges with reference to the facts of the case said that the findings in the previous suit must not be considered in determining whether the cause of action was the same. In the present case, however, we are not concerned with any finding in the previous suit. It is not the finding in the previous suit, it is the finding in the present suit now before us, with which we have to deal and that finding was that the causes of action in the two suits were the same. In Jibunti Nath Khan v. Shib Nath Chuckerbutty 8 C. 819 : 10 C. L R 537 the finding in the suit before the Court was that the causes of action in the two suits were different. That is the distinction between the present case and the case cited and it goes to the root of the matter. The findings in the present case are (1) that the title is the same, (2) that the parties are the same, (3) that the plaintiff was never in possession and that, therefore, the cause of action was the same. We are of opinion that the learned District Judge fell into no error in so dealing with the case.

4. We have been referred in course of the argument to the case of Pittapur Raja v. Suriya Row 12 I.A. 116 : 8 M. 520 : 9 Ind. Jur. 274 : 4 Sur. P.C.J. 638. That case, if it has any bearing on the question which is now before us, is against the contention of the

appellant. It was a case where the plaintiff had sued to obtain his share of an estate in land under a Will in consequence of having been wrongfully dispossessed by the defendant. He afterwards brought a suit for his share of the personal property under the Will. It was held that the subsequent suit was not barred by reason of the omission to claim the personal property in the previous suit, the decision of the case being based on the fact that the dispossession of the plaintiff from his land was an entirely different cause of action from that which formed the basis of his claim to the personal property. The cause of action was different both upon the pleadings and in fact.

5. It has finally been argued that the learned District Judge was not justified in coming to the findings of fact above referred to. It appears that subsequently to the plaintiff''s purchase, the holding was sold in execution of a decree for arrears of rent obtained against the plaintiff. The present defendants deposited the amount due and obtained an annulment of the sale. The then auction-purchaser, Janki Nath Choudhuri, obtained a Rule in this Court against the Munsif''s order allowing the deposit to be made. In the course of the judgment of this Court disposing of this Rule, it was said "Kali Kumar (the present plaintiff) purchased the holding in execution of a rent decree obtained by the landlords against Hamid Ali and obtained possession of the lands of the holding except the homestead portion, which inspite of the sale Hamid Ali retained in his possession." It is argued that in view of this expression of opinion the learned, District Judge ought not to have held that the plaintiff never obtained possession of any portion of the land. It is clear, however, that there was no estoppel.

6. The statement in the judgment of this Court was nothing more than an introductory recital of the facts. Moreover, the present plaintiff was merely a formal party to the proceeding. The real contest was between the then auction-purchaser Janki Nath and the present defendants. Further, the result of the Rule would have been the same if the facts had been stated to be that Kali Kumar had never obtained possession of any portion of the land. For the purpose of the Rule it was quite immaterial whether the present defendants were in possession of the whole land or only of a portion. In either case they were entitled to make the deposit. It is clear there was no estoppel. To what extent there was any admission in that case we are unable to determine. The Rule was obtained on the application of Janki Nath, not of the defendants. We do not know what statement, if any, the defendants made in the case. It has further been argued that as there was admittedly formal delivery of possession to the plaintiff by the Court, the District Judge ought not to have held that actual possession was not obtained. There is no substance in this contention. The fact that there was formal delivery of possession is not relevant to the question whether the causes of action in the two suits were the same or not. The formal delivery of possession was the common fact in both suits. If that was all that took place, the causes of action were identical. It is finally argued that the dispossession of the arable land must, in any case, have been by a different act from the re- entry

in the homestead. The plaintiff''s specific allegation, however, that he was dispossessed in March 1908 was not believed. We should have to have recourse to surmise if we were to say that the finding that there was not more than one act of dispossession was wrong.

7. We are of opinion that the findings of fact cannot be successfully assailed on any ground of law.

8. Those findings are that the cause of action in the previous suit was the same as the cause of action in the present suit. In the previous suit the plaintiff omitted to sue for a portion of his claim, namely, for the arable lands. He cannot under Order II, Rule 2, of the CPC be permitted to sue for them now.

9. The appeal is dismissed with costs.