

(1914) 04 CAL CK 0032

Calcutta High Court

Case No: None

Brij Nandan Singh

APPELLANT

Vs

Kailash Tewary

RESPONDENT

Date of Decision: April 17, 1914

Citation: AIR 1914 Cal 674 : 24 Ind. Cas. 17

Hon'ble Judges: Mullick, J; D. Chatterjee, J

Bench: Division Bench

Judgement

D. Chatterjee, J.

The facts giving rise to this appeal are shortly these The mother of the plaintiffs purchased the disputed property in execution of a mortgage-decree in the name of defendant No. 1. Defendant No. 1 who himself had a larger share in the purchase applied for the registration -of- his name, but his application was disallowed on the 17th of February 1903. Defendant No. 1 then brought a regular suit for declaration of title, with an alternative prayer for possession if ho was hold to be out of possession. He did not proceed with this suit and on the 27th of November 1907 the order of the Court was, the plaintiff applies to say he would not proceed with the suit : the defendants" Pleader is without instructions, ordered suit be dismissed, each party to bear its own costs".

2. It is contended by the learned Vakil for the appellant that this order operates as res judicata and he relies upon the cases of Gopal Lal v. Bernard Prasad Chowdhry 31 C. 428., Mahomed Ibrahim Hossain Khan v. Ambika Per-shad Singh 14 Ind. Cas. 496 : 39 C. 527 : 15 C.L.J. 411 : is C.W.N. 505 : 11 M.L.T. 265 (1912) M.W.N. 367 : 9 A.L.J. 332 : 22 M.L.J. 668 : 14 Bom.L.R. 280. and Gajadhar Teli v. Bhagwanta 16 Ind. Cas. 8 34 A. 599 : 10 A.L.J. 244. I do not think that any of these oases help the appellant. They decide that a party, who has an opportunity of making a defence which he ought to make and omits to make it, -will be debarred from making that defence in a future suit.

3. Here the suit did not proceed to trial, neither party wanted to proceed and the suit was dismissed for default. The case is very similar to that of Doma Ram v. Raghu Nath Pandit 10 C.W.N. 40., where Mitra and Caspersz, JJ., decided that when the suit of the plaintiff was dismissed against defendant for want of proof against defendant and in the absence of the defendant, the decree was not res judicata.

4. The next point that is urged is that no title passed to the plaintiffs as there was no kobala by the benamdar.

5. I think there was no need for a kobala. The plaintiffs were the real purchasers and they did not require to have a conveyance of title from their benamdar. They might have got a release, but that .is another matter.

6. The last ground is that the suit is barred by limitation. It has been found that the plaintiffs are in possession and their cause of action arose in 1316 when the benamdar refused to give them a deed by way of admission of title.

7. All the .grounds, therefore, fail and this appeal is dismissed with costs.

Mullick, J.

8. I agree.