
(1872) 06 CAL CK 0007

Calcutta High Court

Case No: Special Appeal, No. 1380 of 1871

Kasinath Shaha

APPELLANT

Vs

Dwarkanath Sirkar and
Another

RESPONDENT

Date of Decision: June 26, 1872

Judgement

Mitter, J.

We are of opinion that this case falls within the purview of the case of Ishan Chandra Ghose v. Haris Chandra Banerjee ⁽¹⁾. The suit was for possession of a place of land which the plaintiff claimed by virtue of an alleged jotedari right (His Lordship, after briefly stating the facts, and reading the portion of the Subordinate Judge's judgment, from the words "Under these circumstances the Court below was not justified, & c.," to "within the knowledge of the party who refuses to give evidence," proceeded.)--In this case there is no dispute whatever that the defendants were duly ordered by the Court to appear and give their evidence, and consequently the first portion of the Judge's remark does not appear to be of much importance. With reference to the other portion of it, it seems clear that there is nothing in the Code of Civil Procedure, or in any other law that we are aware of, which says that the provisions of s. 170 apply to those cases only in which the party summoning his opponent is not in a position to prove his case otherwise than by the evidence of that opponent, nor is there any law that it is in those cases only where the fact to be proved is solely and exclusively within the knowledge of the Party summoned to appear, that the Court can apply the provisions of the section above referred to This reasoning of the Subordinate Judge appears to be quite erroneous.

2. We wish further to observe that we are by no means satisfied with the mode in which the Subordinate Judge has dealt with the evidence adduced by the plaintiff. The Subordinate Judge says, with reference to one of the plaintiff's witnesses, that his evidence cannot be relied upon, inasmuch as the defendants had previously mentioned in their written statement that they and the witness were not on good terms. Such reasoning appears to me to be manifestly erroneous: otherwise a party may get rid of all his opponent's witnesses, by simply saying beforehand that they are not on good terms with

him. The Subordinate Judge seems to have Wholly overlooked the defendants" persistent and contumacious refusal to give evidence upon the merits of the case and taking all the circumstances into consideration, we think that the judgment of the lower Appellate Court ought to be reversed, and that of the first Court restored, with all costs.

(1) Before Mr. Justice Macpherson and Mr. Justice Glover.

ISHAN CHANDRA GHOSH and OTHERS (PLAINTIFF) V. HARIS CHANDRA BANERJEE AND ANOTHER (DEFENDANTS)."

The 1st September 1869.

Baboo Taraknath Dutt For the appellants.

Baboo Bama Charan Banerjee for the respondents.

Macpherson, J.--In this case the defendant, having been ordered to attend and give evidence, without lawful cause, failed to comply with that order; and in consequence, the Court of first instance passed judgment against him. The first Court decided in favor of the plain-tiff upon other grounds also. In appeal the lower Appellate Court reversed this order, not being satisfied with the evidence of the plaintiff, and saying that the Munsif ought not to have decided against the defendant, because he failed to appear and give evidence.

It appears to me that the judgments passed by the Court of first instance against the defendant, was a judgment which that Court had fall power to pass and which that Court properly passed-And I think that the lower Appellate Court was wrong in interfering With that judgment. We have sent for the (sic) and it appears clearly from it that the defendant was announced specially under as, 162 and 163 of the Code of Civil Procedure; and that, when he showed cause against being called upon to attend, the Court was not satisfied with the cause shows. Under these circumstances and there being evidence which supported the plaintiff's case, the Munsif was quite right to decide against the defendant under s. 170. The judgment of the lower Appellate Court ought to be reversed, and the judgment of the Court of first instance restored with, costs.

GLOVER, J.--I am of the same opinion it is quite clear that the order of the Munsif was based substantially on the default of the defendant to come in and give evidence, and it appears, moreover, that the defendant was summoned after enquiry on the part of the Munsif that his evidence was necessary for the elucidation of the case.