
AIR 1929 Cal 449 : 122 Ind. Cas. 547

Calcutta High Court

Case No: None

Murad Biswas

APPELLANT

Vs

Basti Mandal

RESPONDENT

Date of Decision: March 18, 1929

Citation: AIR 1929 Cal 449 : 122 Ind. Cas. 547

Judgement

1. This appeal has arisen out of a suit which was instituted by the plaintiff for ejecting the defendant from a plot of land on the allegation that the defendant was holding the same as under-raiyat and that notice had been served on the defendant determining his tenancy. The prayers in the plaint were for declaration of the plaintiff's raiyati and for recovery of khas possession. The defendant besides contending that no notice was served upon him asserted that he was a cosharer with the plaintiff in respect of the suit land. The suit has been decreed by both the Courts below. The defendant has then preferred the present appeal.

2. The contention that has been urged in the appeal relates to the question of res judicata. Both the Courts below have held that the question as to whether the defendant is a cosharer of the plaintiff or an under-raiyat under him is barred by res judicata by reason of a previous decision between the parties. The contention that has been urged in connation with this matter is that inasmuch as the previous suit which was a suit instituted by the plaintiff against the defendant for recovery of possession on declaration of title and in which the same question was raised was dismissed on the ground that notice had not been served on the defendant, the finding at which the Courts had arrived in that suit as regards the status of the defendant is not to be treated as res judicata in the present suit. Now on reference to the record it seems that the previous suit was one in which the plaintiff has asked for declaration of his title to the land and for khas possession thereof, and the defence of the defendant in that suit was that he was not a tenant holding under the plaintiff but was a cosharer of his. This defence was gone into and ultimately it was found that the plaintiff's title to the land was made out, but notice had not been served on the defendant and upon that the suit was not dismissed but a decree was made in the

plaintiff's favour in the following terms:

Ordered that the plaintiff's alleged title to the land in suit be declared, he cannot recover khas possession of the land but he may sue for settlement of fair rent and recovery of nazar if he likes.

3. From this decision the plaintiff preferred an appeal and the defendant a cross-objection, and the appellate Court, to which the said appeal and the cross-objection was preferred, "upheld the decree which the trial Court had passed. The facts therefore are not that the suit was dismissed on a preliminary point making it unnecessary for the Court to go into the other questions that arose in the suit but that the questions were decided and made the foundation of a decree declaring the plaintiff's title, and one of the prayers in the suit, namely, that for khas possession was refused on the ground that notice had not been served on the defendant. Under circumstances such as these the case to which the learned advocate for the appellant has referred, namely, that of *Nundo Lal v. Bidhoomukhey Dehee* [1886] 13 Cal. 17 has in our opinion no application. The real reason on which this doctrine of *res judicata* is founded in so far as a case of the present description is concerned has been given by the Judicial Committee in the case of the *Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy* AIR 1922 P.C. 241 at p. 467 (of 48 Cal.) where their Lordships say that they do not consider that a decision will found an actual plea of *res judicata* where the defendants having succeeded on the other plea, had no occasion to go further as to the finding against them. This cannot be said of the present case in view of the fact that the plaintiff's title was declared and it is only one of his prayers, namely, that for khas possession was refused on the ground that no notice was served. We are of opinion that the Courts below were right in the view that they took on the question of *res judicata*.

4. The appeal therefore fails and must be dismissed with costs.