
(1869) 06 CAL CK 0047

Calcutta High Court

Case No: Special Appeal No. 269 of 1869

Sirdar Khan

APPELLANT

Vs

Padma Lochan

RESPONDENT

Date of Decision: June 7, 1869

Judgement

Bayley, J.

We think that this special appeal ought to be decreed with costs, and the judgment of the lower appellate Court reversed. Plaintiff sued for confirmation of ijardari rights, and claimed the lands as rent-paying lands, and sued also for assessment of rents. It is necessary to see whether the lands in dispute were rent paying lands, and whether plaintiff had evidence on the record to show that he collected rents from these lands. The plaintiff's suit for rent was dismissed on the 27th of April 1867. And upon this dismissal the plaintiff instituted this present suit on the allegation that he had been dispossessed. On the 10th of September 1867 he was ordered to produce his witnesses, and the 1st of November was fixed as the date of hearing. But as on that day, which was the fourth day after the reopening of the Court, neither plaintiff nor his pleaders appeared, the case was dismissed agreeably to section 114, Act VIII of 1859. An application was then made u/s 119 of the Act for a new trial, on the ground that section 114 did not strictly apply to the present case. The re-trial was refused, and the case was again dismissed, but the Judge, in appeal, directed a determination to be come to under the provision of section 148. Then, after remand for this purpose, new witnesses and new documents were produced, and the suit of the plaintiff was decreed. From this decree of the first Court, an appeal was preferred to the Judge; and the Judge dismissed the appeal of the defendant and confirmed the decision of the first Court.

2. The grounds taken in special appeal against the decision of the lower appellate Court are:--1st, that with respect to the plea of limitation, the lower appellate Court has erroneously placed the burthen of proof upon the defendants, and 2nd, that the lower appellate Court had not the authority to decide the case upon documents admitted subsequent to the completion of the record, contrary to the provisions of section 148, Act

VIII of 1859. Both these pleas are good. The lower appellate Court's judgment is erroneous, and must therefore be reversed; the case was remanded to be retried under the terms of section 148, Act VIII of 1859, which is as follows:--"If either party to a suit to whom time may have been granted shall fail to produce his proofs or to cause the attendance of his witnesses, or to perform any other act for which time may have been allowed, the Court shall proceed to a decision of the suit on the record, notwithstanding such default."

3. The words of the law are that the Court shall proceed to a decision of the suit on the record, and not that the Court may proceed to a decision of the suit, and consequently the Court was not justified in taking and in determining on any evidence not on the record when the case was remanded, and such evidence must therefore be taken as if it had no existence.

4. It would then ordinarily be necessary to remand the case in order that the Judge might come to a finding on any other evidence legally on record. It is pointed out to us however that there is no evidence, other than that taken after remand, on the record in support of plaintiffs' case. We have ascertained that the fact is so, and it is therefore unnecessary to remand the case; and it remains only to dismiss the plaintiff's suit, and decree this special appeal, with costs of all Courts.