(1869) 01 CAL CK 0030

Calcutta High Court

Case No: Regular Appeal No. 345 of 1867

Shib Kisto Daw		APPELLANT
	Vs	
Sheikh Abdul Sabhan Chowdhry		RESPONDENT

Date of Decision: Jan. 25, 1869

Judgement

Hobhouse, J.
This was a suit to obtain possession of 1019 bigas of mal and lakhiraj lands, by the enforcement of a bynaputra, of date the 31st December 1862. The suit was instituted on the 19th April 1864, and was carried for the first time to this Court in Regular Appeal, No 100 of 1865.

2. The defendant in the first instance denied the bynaputra altogether, but this Court found against him on that point, and remanded the case to the lower Court, with these remarks, viz., that the plaintiff was "entitled to specific performance of his contract, and to obtain possession of the disputed estate on paying down the correct amount of consideration-money unless the co-defendant can show a better title" and lower down in ids judgment, the Court directed that the case should be remanded, in order that the lower Court might, after proper enquiry, fix the amount of consideration-money due from the plaintiff under the terms of his deed, and award him possession, that is, possession of the disputed estate, on payment of that sum.

3. Accordingly, on remand in its decision of date the 13th August 1866, the lower Court directed that, in modification of the claim, the plaintiff should obtain possession of 836 bigas odd, on payment of a certain sum of money specified in the decree. But this decision was reviewed by the lower Court on the 26th August 1867; and in the judgment on review the lower Court directed that the plaintiff should obtain possession of 1,015 bigas odd of land, and it found that, so far from there being any thing due from the plaintiff to the defendant, there was a surplus due from the defendant to the plaintiff; and the Court, accordingly, decreed that the defendant should pay that surplus to the plaintiff.

4. Against this decision on review, the defendant appeals to this Court, and there is also a cross-appeal on the part of the plaintiff, which will be noticed in the course of the judgment. The first objection, taken by the defendant, is that the decision of the Court below, on the 13th August 1866, was a final decision which that Court had no authority in law to disturb on review, and the argument turns upon the following facts:--It has been stated that the plaintiff sued to recover possession of a total area of 1,019 bigas of land, and it has been shown that, in the decision of the 13th August 1866, the lower Court gave the plaintiff a decree for possession of some 836 bigas; and it is contended, here that that decree for a lesser area of land was given rightly on an admission, made on behalf of the plaintiff by his vakeel; that this admission was binding on the plaintiff; and that the lower Court was wrong in admitting the review and in ultimately giving a decree to the plaintiff for a larger area than 836 bigas, on the ground that the admission of the plaintiff''s vakeel was not binding on him.

5. We are of opinion that the admission of the plaintiff''s vakeel was not a binding admission, and that the lower Court was justified in admitting the review in question, and in virtually setting that admission aside.

6. The vakeel for the appellant has quoted a decision of a Bench of this Court, Ram Kumar Roy v. The Collector of Beerbhoom 5 W.R. 80. This decision, as we read it, simply goes to this extent, viz., that, under the authority. given by the vakalatnama in that case, the pleader, for the party in question, had authority to withdraw the case, with liberty to bring a fresh suit.

7. We need hardly remark that there is an immense difference between the authority, simply to withdraw a case, with liberty to sue again, based upon and found to be conveyed by a particular vakalatnama, and the authority by which a vakeel actually gives up a part of the claim, which he is instructed under his vakalatnama to prosecute, having, as it is admitted, upon the evidence received no instruction to abandon that part. But even if we could hold that under the vakalatnama filed in this case, the vakeel had authority to abandon a part of the property sued for, we think he could not have done it at that stage of the case in which it appears that he did do it.

8. In the decision given by this Court on the 23rd June 1865, it was a part of the decree given that the plaintiff shall" obtain possession of the disputed estate," and the only questions left for the determination of the lower Court were these two, viz., what that disputed estate was, and what was the correct amount of the consideration money which the plaintiff was to pay before he obtained possession of it; and it is clear from the statement made by the vakeel on the 13th August 1866, that he did not state that the particular portion of the land in question was not a part of the disputed estate, but that he simply stated, on behalf of his client, that, although the property was within the bynaputra, that is, that it was a part of the disputed estate, yet that he did not claim it.

9. This Court had held, in its order of remand, that the plaintiff was entitled to possession of the "disputed property," that is, to possession of the property claimed in the suit; and it is admitted that the property relinquished by the vakeel was a part of the property so claimed. Therefore the lower Court had only to give possession of that property, and had not jurisdiction to determine that the plaintiff should be debarred from possession of it, by reason of an admission made by his vakeel on a point not before the Court for determination.