

**Narain Das Vs. Sheo Kumar**

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**Court :** Allahabad

**Decided On :** Jun-14-1902

**Reported in :** (1902)ILR24All501

**Judge :** John Stanley, C.J. and ;Banerji, J.

**Appellant :** Narain Das

**Respondent :** Sheo Kumar

**Judgement :**

John Stanley, C.J. and Banerji, J.

1. This appeal arises out of an order of the District Judge of Cawnpore, remanding the case to the Subordinate Judge, under the provisions of Section 562 of the Code of Civil Procedure, for the determination of the suit on the merits. The facts are shortly as follows: One Lachmi Narain was the owner of the property which is now in dispute. He died leaving a widow Mukhta Kunwar, and the plaintiff respondent Narain Das claims to hold the property in dispute under a lease which was granted by Mukhta Kunwar in her lifetime. His name was recorded as lessee on the 17th of April, 1897, and he remained in possession until the 27th November, 1897. 'What the nature and the terms of the letting made by Mukhta Kunwar to Narain Das are have not been determined by either the Court of first instance or the lower appellate Court, and we are in ignorance as to these matters. Mukhta Kunwar having died on the 16th of July 1897, the present defendant, Sheo

Kumar, claiming to be the adopted son of Lachmi Narain, by some means other than by legal process, dispossessed the plaintiff of the property in question. It is obvious that if the plaintiff was not entitled to possession under the lease made by Mukhta Kunwar, the defendant ought to have dispossessed him by regular process of law, and not in the illegal way in which he appears to have done so. Narain Das thereupon instituted a suit for possession of the property under the provisions of Section 9 of the Specific Relief Act, and he obtained a decree, and on the 5th of February, 1899, re-entered into possession. The present suit was instituted by him for recovery of mesne profits during the time he was out of possession, namely, from the 27th of November, 1897, to the 5th of February, 1899. The defence set up to the suit was, amongst others, firstly, that the suit was barred by reason of the provisions of Section 43 of the Code of Civil Procedure; and secondly, that the plaintiff was a lessee under a parol lease, which was for a term of more than one year, and had therefore no title to remain in possession, the lease being invalid, having regard to the provisions of Section 107 of the Transfer of Property Act.

2. The Court of first instance sustained both these defences and dismissed the suit, but upon appeal the lower appellate Court has held that the plaintiff, having got a decree under the Specific Relief Act, had at least a possessory title, and that the Court of first instance ought to have determined the suit on the merits, and accordingly remanded the case for trial upon the merits, suggesting the determination of two issues, namely an issue as to the amount due to the plaintiff during the period of dispossession; and, secondly, as regards the alleged adoption of the defendant Sheo Kumar and the respondent's consequent title to possession as against the appellant during the latter's dispossession.

3. Now, on the first defence, the lower appellate Court held that Section 43 of the Code of Civil Procedure did not bar the claim for mesne profits, and we think that in this finding the Court was perfectly correct. Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The cause of action under the Specific Relief Act is an entirely different cause of action from the cause of action set up in the present suit. Under the Specific Relief Act the plaintiff would be entitled to recover possession

in any event if he had been dispossessed otherwise than in due process of law, and therefore was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. In a suit, however, for mesne profits other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case the Court could not award mesne profits as against the true owner. Therefore we think that the defence under Section 43 of the Code of Civil Procedure fails.

4. As regards the defence set up under the provisions of Section 107 of the Transfer of Property Act, it is impossible to determine the rights of the parties without knowing what were the nature and provisions of the lease which was granted by Mukhta Kunwar. Nor is it possible to determine whether or not the plaintiff is entitled to mesne profits unless it has first been ascertained whether or not the defendant is the true owner of the property. If he be not the true owner, then, even though the plaintiff had only a possessory title, it appears to us that he would be entitled to recover mesne profits against the defendant who had no title whatever. If, on the other hand, it turns out that the defendant is the true owner of the property, different considerations would arise. The plaintiff has already established his possessory title. Therefore it will lie upon the defendant to establish that he is the true owner of the property, and if he establish this, then the onus will be thrown on the plaintiff of showing that he has an interest in the property, under the lease which was granted to him or otherwise, which would entitle him to remain in possession as against the defendant.

5. The order, therefore, of the District Judge in remanding the case is correct, but he has not directed the attention of the Court of first instance to all the issues which it is necessary to determine for the purpose of fully adjudicating upon the rights of the parties as indicated above. We therefore dismiss the appeal, and confirm the order of remand of the District Judge; but in doing so and in confirming the order of remand, we should direct the Court of first instance to have regard in the determination of the suit, to the matters which we have dealt with in our

judgment. The costs of this appeal will abide the event.

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