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Court : Allahabad

Decided On : Dec-14-1922

Reported in : AIR1923All413; 79Ind.Cas.408

Judge : Gokul Prasad, J.

Appellant : Kabul

Respondent : Kabool Singh and ors.

Judgement :

Gokul Prasad, J.

1. This is an appeal arising out of a suit for possession and removal of certain constructions alleged to have been made by the defendants who are ryots in the abadi on a plot of land which the zemindar alleges is his. The pleas taken in defence were that the plaintiff was not the owner of the plot and that the shop of the defendants was an old one and not liable to removal. The first Court found in favour of the defendants on both the points and dismissed the plaintiff's suit. The plaintiff went up in appeal and the lower Appellate Court issued a commission for the measurement of the plot in dispute and to make an enquiry whether it belonged to the plaintiff or not and also whether the building put up by the defendants was old or new. The learned Judge of the lower Appellate Court, after having considered the report of the Commissioner along with the other evidence on the record, came to the conclusion that the plot in dispute came to the plaintiff's

share in a-partition of the village in the year 1917 and that the building in dispute was new. On these findings of fact he has allowed the appeal and decreed the plaintiff's claim. The defendant Kabul comes here in second appeal and his first ground is that the issue of the commission which amounted to receiving additional evidence was bad as being contrary to the provisions of Order XLI, Ruler 27 of the Code of Civil Procedure. The learned Judge has omitted to record his reasons for the admission of such evidence. He was bound to do it (vide Order XLI, Ruler 27, Clause. (2)). In the absence of any reasons recorded by the lower Appellate Court for the admission of additional evidence, I must hold that its action cannot be defended and its finding cannot be accepted as binding on this Court as it is partly based on inadmissible evidence and partly on admissible evidence. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and send the case back to that Court under the provisions of Order XLI, Ruler 23, Civil Procedure Code, with a direction to restore the case to its original number and to decide it according to law after omitting from consideration the report of the Commissioner and the sketch made by the Commissioner. Costs here and hitherto will abide the event.