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Mithai and ors. Vs. Hasan Ali and ors.

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Court : Allahabad

Decided On : Jun-13-1930

Reported in : AIR1930All863; 128Ind.Cas.827

Judge : Mukerji and ;Banerji, JJ.

Appellant : Mithai and ors.

Respondent : Hasan Ali and ors.

Judgement :

1. This is an appeal against an order of remand passed by the learned Subordinate Judge under the following circumstances: The respondents who are faqirs sued seven defendants for several reliefs. One of the reliefs was that the defendants should be called upon to remove the materials of their buildings, the second was that they should be asked to pay damages and the third relief was as regards perpetual injunction. The defendants raised various pleas. They denied that the plaintiffs had a right to maintain the suit. They also alleged that the suit was bad for mis-joinder of parties and causes of action and they alleged that the buildings had stood on the land for many years and that the new constructions were on old foundations.

2. The Munsif framed eight issues and he decided all of them. He found that the plaintiffs had no right to maintain the suit. He found that the suit was bad for multifariousness and he found that most of the buildings on the site were more

than 12 years old. He also found that the plaintiffs were not entitled to any damages. In the result the learned Munsif dismissed the suit. It is to be noted that in the order dismissing the suit he does not give multifariousness as one of the reasons for the order that he was passing.

3. On appeal by the plaintiffs the learned Subordinate Judge started by saying that the Munsif decided the case on two preliminary points. Later on he did say that the Munsif decided the case on the merits also. But the learned Judge disregarded the decision on the merits and found that the plaintiffs' title had not been properly investigated and the suit was bad for mis-joinder of parties and causes of action. On behalf of the respondents the learned Judge was asked to ignore the defect of mis-joinder of causes of action and parties because the suit had been tried on the merits, but this suggestion was not acceptable to the learned Subordinate Judge.

4. The plaintiffs having found that the learned Judge was of opinion that the suit was bad for mis-joinder of parties and causes of action made an application to withdraw the suit as against six of the defendants and to be allowed to maintain it as against defendant Mathura alone. The learned Subordinate Judge passed an order acceding to this request and remanded the suit to the Court of first instance directing it to amend the plaint and to proceed with the suit according to the directions contained in the judgment as against Mathura alone.

5. Mathura and three of the defendants have appealed. We find that in respect of the appellants other than Mathura there is no right of appeal. The order allowing the plaintiffs to withdraw their suit as against certain of the defendants was an order which was not appealable, but, in the circumstances, we think that we should take up the appeals of Mithai, Parokwa and Bholwa in revision and pass the necessary orders. As regards the defendants Kandhai, Bhurwa and Jokhwa they have not appealed and they have accepted the order of the Court below. In the circumstances we can do nothing for them.

6. It appears to us that a preliminary point must be decided as a preliminary point and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case. Where, therefore, all the points involved in the merits of the case have been decided, to

call upon the plaintiffs to make their selection means that the case under trial should be thrown away and the defendants should be exposed to the harassment of a second and subsequent suit. In our opinion the learned Subordinate Judge ought to have acceded to the request of the respondents' Counsel that he should ignore the plea of multifariousness raised by the defendants themselves and ought to have tried the case on the merits. It is not suggested that either of the parties have suffered on the merits by the trial.

7. As regards the first question, namely, whether the plaintiffs had a light to maintain the suit, it was a matter to be decided on the evidence that had been placed on the record by the parties. We do not quite see what the learned Judge meant that a further enquiry ought to have been made on the point by the Munsif. The clear issue was there: 'Were the plaintiffs not entitled to maintain the suit?' The parties had adduced the evidence and if the learned Judge was not satisfied with the decision, he himself was there to come to some decision.

8. The reason, therefore, for remanding the case entirely disappears. We take up the cases of Mithai, Parokwa and Bhulwa in revision, and we take the case of Mathura as his appeal, and set aside the order of remand so far as the aforesaid four persons are concerned. The case will go back to the learned Subordinate Judge who will decide the appeal on merits. The question of multifariousness need not be gone into. The costs in this Court and in the lower Courts will abide the result.

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