

Abdul Aziz Molla Vs. Ebrahim Molla

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Court : Kolkata

Decided On : Jun-09-1904

Reported in : (1904)ILR31Cal965

Judge : Geidt and; Mokerjee, JJ.

Appellant : Abdul Aziz Molla

Respondent : Ebrahim Molla

Judgement :

Geidt and Mokerjee, JJ.

1. This is an appeal by some of the defendants in a suit to have the plaintiff's right by inheritance declared in respect of a share of certain land. The Subordinate Judge on appeal has decreed the suit with respect to the southern portion of the land in dispute.

2. Two objections are taken in this appeal.

3. The first objection is founded on the fact that the plaintiffs had brought previous suit with respect to the same plot of land against these defendants. That suit was withdrawn, and permission was given to the plaintiffs to bring a fresh suit on payment of the defendant's costs. At the time when the present suit was instituted these costs had not been paid; but it appears that they were paid to the

defendant's pleader before the suit came on for trial.

4. The objection, therefore, taken by the learned pleader for the appellant is that as the plaintiffs had not complied with the order passed in the former suit that they were to pay the defendant's costs, the suit was bad ab initio, and ought to have been dismissed on that ground.

5. The provisions of law dealing with the consequences of withdrawal of a suit are to be found in Section 373 of the Code of Civil Procedure. If that section were not in existence there is no other provision of law by which a plaintiff after withdrawing a suit would be precluded from bringing a fresh suit, in respect of the same cause of action. Now, what is the effect of Section 873-as regards the bringing of fresh suits The second paragraph lays down (I only quote the words that are necessary for the discussion of this point) that, if the plaintiff withdraws from the suit without the permission of the Court, he shall be precluded from bringing a fresh suit for the same matter. Therefore, the only persons who are prima facie precluded from bringing a fresh suit are those who withdraw from the former suit without permission to bring a fresh suit on the same cause of action. Now, in the present case the plaintiffs had received such permission and the second paragraph of Section 373 does not therefore stand in their way.

6. But it is said that there was an express order that the plaintiffs should pay the defendant's costs. We have not the order on the record. We may take it that the payment of costs was meant by the order to be a condition precedent to the bringing of a fresh suit.

7. But then the question arises, does that necessarily make the suit void ab initio, and will not the subsequent payment of the defendants' costs cure the undoubted irregularity

8. There is no express provision by the Indian Legislature as to the consequences of such a course of conduct. But we have, referred to the rules of the Supreme Court, 1883. Order 26, Rule 4, runs as follows: 'If any subsequent action shall be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action, the Court or a Judge may, if they or he

think fit, order a stay of such subsequent action, until such costs shall have been paid'

9. We think that the rule there laid down would be a fair rule for the Courts in this country to follow in the absence of any statutory enactment in the matter, and that though a Court would be warranted in refusing to proceed with a suit like this when the facts are brought to its notice that the plaintiff had not complied with the order requiring payment of costs, yet there is nothing in the law to show that a suit instituted under such circumstances is bad ab initio and must ipso facto be dismissed, if the payment ordered is made after its institution.

10. The next point taken in this appeal is that the learned Subordinate Judge has admitted in evidence a statement in a plaint filed in another suit instituted 20 years or more previously.

11. One of the questions that the learned Subordinate Judge had to try in this case was whether the land in dispute had belonged to Maniruddi.

12. Now, the former suit was one in which the landlord of the property now in dispute had instituted a suit regarding the property lying immediately to the south of that with which we are dealing in the present case. In the statement of the boundaries of that suit, Maniruddi was given as the name of the tenant holding the land immediately to the north of the land in dispute in 1877, and the Subordinate Judge has used that statement as showing that the land was then in occupation of Maniruddi and as disproving the allegation made by the defendants that the land had been let to somebody else.

13. It is urged by the learned pleader for the appellant that this statement is not admissible in evidence. The landlord who instituted the suit of 1877 is now dead, but it is said that the statement as to the present holding of the land on the northern boundary does not come within any of the clauses of Section 32 of the Evidence Act.

14. It appears to us, however, that when the plaintiff in that suit who was admittedly the landlord of the land now in suit, made a statement that her land had

been let to Maniruddi, she did make a statement contrary to her proprietary interest. She admitted thereby that she had parted with some at least of her entire proprietary rights in the land, namely, the right to possession, and though it did not affect her proprietary interest, whether Maniruddi or some one else was a tenant, still the statement must be taken as a whole, and the statement as a whole being in derogation of the proprietary interest, we are of opinion that any part of that statement is admissible under Clause 3, Section 32 of the Evidence Act. We are supported in this view by the judgment of Sir Richard Couch C.J. reported in *Raja Leelanund Singh v. Mussammat Lukhputtee Thakoorain* (1874) 22 W.R. 231. The statement there made in evidence was a statement by the landlord that the rent of a settlement ghatwal had been increased from Rs. 74 to Rs. 101. Now prima facie that particular statement was a statement not against his pecuniary interest, but rather in his favour; but Sir Richard Couch ruled that the statement must be taken as a whole, and taken as a whole, it disclosed that there was a ghatwal on the land, and that therefore the landlord did not enjoy the whole of the proprietary rights, which he would otherwise enjoy. That case seems to us similar to the one with which we are now dealing. The statement that there was a tenant on the land, namely, Maniruddi, was a statement against the landlord's proprietary rights, and therefore admissible under Clause 3, Section 32 of the Evidence Act.

15. The objections therefore fail, and the appeal is dismissed without costs, as there is no appearance on behalf of the respondents.