

Googlee Sahoo Vs. Premlall Sahoo and anr.

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Court : Kolkata

Decided On : Apr-21-1881

Reported in : (1881)ILR7Cal148

Judge : Cunningham and ;Prinsep, JJ.

Appellant : Googlee Sahoo

Respondent : Premlall Sahoo and anr.

Judgement :

Cunningham, J.

1. The plaintiff sues Raghoonath, his tenant, for the rent due on a 5-anna 2-pie share amounting to 4 rupees 5 annas. The defendant denied that the plaintiff was the proprietor of the whole of this share, and stated that the plaintiff's brother, was a co-sharer, and he asked that the brother might be made a defendant.

2. The Munsif, instead of making the brother a defendant, added him as a co-plaintiff, notwithstanding the protest of the original plaintiff. He has dealt with the matter in dispute between the two brothers in a very summary way, and has refused to determine the issues which would necessarily arise between them if they complained an antagonism; but he has, nevertheless, given two brothers, plaintiffs, a decree.

3. The Subordinate Judge has affirmed this decision.

4. A preliminary objection is raised to the hearing of this special appeal. It is urged that the matter for our decision is really an appeal against an order passed under Section 32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party whether as Plaintiff or as defendant, improperly joined, be struck out and therefore cannot be brought before this Court on second appeal.

5. The present case however, is one provided for by Section 591, Except as provided in this chapter, no appeal shall lie from any order passed by any Court on the exercise of its original or appellate jurisdiction ; but if any decree be appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal and can be dealt with in special appeal against the decree passed. The objection, therefore is disallowed.

6. As regards the particular order complained of, we think that the Court in acting under Section 32 of the Code of Civil Procedure, is bound to exercise its discretion in a reasonable manner ; and that, in a case like the present, where the original plaintiff disputes the right of any one to be joined with him in the suit, any party intervening should, if made a party at all, be more properly joined as a defendant.

7. The effect of the brother being joined with the original plaintiff is that the issues as between them cannot properly be tried, and must be made the subject of a separate suit. The first Court, it is true, has drawn an issue which would determine the dispute between these two brothers, supposing them to be plaintiff and defendant; and if the Courts had proceeded to decide this issue on the evidence offered, we should probably not feel inclined to interfere, because, then the error would be an error in form rather than in substance; but when we find that both the lower Courts have not tried the issue as between the two brothers, we have no course left open to us but to set aside the judgment of the Court below, and to remand the case in order that it may be properly tried in the manner stated above. The brother Prem Lall must be removed from the record as a plaintiff and be made a defendant, and the case must then be tried, both as between them, and between

the plaintiff and the ryot-defendant.

8. The case must, therefore, be remanded to the lower Appellate Court, either to try the case itself on the evidence on the record, or otherwise to deal with it in accordance with law.

9. Costs will follow the result.

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