

Gunga Pershad and anr. Vs. Bilbassee Koonwaree Mothee and anr.

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Court : Kolkata

Decided On : Mar-31-1879

Reported in : (1880)ILR5Cal278

Judge : Richard Garth, C.J. and ;Prinsep, J.

Appellant : Gunga Pershad and anr.

Respondent : Bilbassee Koonwaree Mothee and anr.

Judgement :

Richard Garth, C.J.

1. We think that this is a very clear case, and that the Court below was quite wrong in not trying the questions of title which the defendants wished to raise, and which in fact were raised by the issues.

2. The defendants had brought a previous suit against their father for the purpose of having the property in question partitioned, and they obtained a decree for that purpose. The present plaintiffs desired to intervene in that suit, with a view to showing that this property, which had been mortgaged to them by a zurpeshgi lease, was not subject to partition.

3. The Judge, however, would not allow them to intervene, and, therefore, as soon as the defendants had obtained their decree and were proceeding to deal with the property under the partition, the plaintiffs came in under Section 230 of Act VIII of

1859, and claimed to hold the property as against the defendants by virtue of their zurpeshgi deed. The lower Court allowed them to come in, and under that section registered their application as a suit between them and the present defendants, the decree-holders, and framed certain issues which raised the questions of title between them and the defendants.

4. The Court below, however, when the case came on for trial, considered that for the purposes of this suit, it was sufficient for the plaintiffs to prove that they were actually in possession, and having found this, the Subordinate Judge refused to allow the defendants, under the issues raised, to go into the question of title, and to show that, although the plaintiffs had possession under their zurpeshgi lease, the defendant's father had no right to grant them that lease.

5. We think that in this the Subordinate Judge was quite wrong, and that he has entirely misunderstood the meaning of the Full Bench case of Radha Pyari Chowdhrain and others v. Nabin Chandra Chowdhry (5 B.L.R., 708).

6. It was there held that where a claim is made under Section 230 for property as against a decree-holder, and the party making that claim is allowed to bring a suit under that section to try his right, it is sufficient for him, in the first instance, if he pleases, to prove his possession, and that he need not go into his proof of title, even though he has one. The proof of possession would be prima facie evidence of title.

7. But if he takes this course, and proves only his possession, then the Full Bench case clearly decides that the defendant would have a right to show; that although possession may be in the plaintiff, he has no good title to the property; and that he (the defendant) has a better title which would defeat the plaintiff's claim.

8. That very point has occurred in the present case. The plaintiffs have chosen to rely on their possession only under the zurpeshgi, but the defendants contend that they are entitled, notwithstanding the plaintiffs' possession, to have the partition carried out upon the ground that the zurpeshgi is not binding as against their shares.

9. The issues are calculated to raise that question, and Subordinate Judge was quite wrong in not trying them.

10. The case must, therefore, go back to the lower Court under Section 354 of Act VIII of 1859, and the Subordinate Judge will try the issues, and return his finding to this Court.

11. Costs will abide the result.

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