

Shanu Sheikh Vs. Dhani Sarkar

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Court : Kolkata

Decided On : Jul-23-1917

Reported in : 41Ind.Cas.934

Judge : William Chitty and ;Beachoroft, JJ.

Appellant : Shanu Sheikh

Respondent : Dhani Sarkar

Judgement :

1. This is a Rule taken out at the instance of the defendant calling upon the plaintiff opposite-party to show cause why the order of the lower Appellate Court permitting him to withdraw the appeal and the original suit with liberty to file a fresh suit on the same cause of action should not be set aside. The case was tried before the Munsif at considerable length. A number of issues were raised and the Munsif decided that the suit was barred by limitation and also held that the plaintiff had no title. When the case went up on appeal, the learned Subordinate Judge, passed an order permitting the plaintiff-appellant to withdraw the appeal and the original suit. He said: As there were some defects in the plaint, the plaintiff is permitted to bring a fresh suit on the same cause of action.' In his petition for leave to withdraw the plaintiff does not appear to have stated what the defects were. In his petition he said: through the mistake of the writer who drew the plaint some important Hams were left out. After correcting those errors it is necessary that a new plaint should be drawn and the case be conducted on a new line'. That clearly does not bring the matter within the provisions of Order XXIII, Rule 1, Code of Civil.

Procedure. It has been objected on behalf of the opposite party that this Court has no jurisdiction to interfere; and the case of Bansi Singh v. Kishun Lall Thakur 26 Ind. Cas. 203 : 41 C. 632 has been cited. The facts, however, of that case were entirely different to the facts of the present case. There, although there had been some hearing in the first Court, the decision had not been delivered. It was not a case of the suit being withdrawn in the lower Appellate Court. It may also be noted that, though Mr. Justice Coxe expressed a doubt as to whether this Court had jurisdiction to interfere, Mr. Justice Digambar Chatterjee did not accede to that but agreed in discharging the Rule on other grounds. There are a number of cases in this Court which show that we have jurisdiction and that that jurisdiction has been exercised. We need only refer to Kharda Co. Ltd. v. Durga Charan Chandra 5 Ind. Cas. 187 : 11 C.L.J 45; Mabulla Sardar v. Hemangini Debi 6 Ind. Cas. 629 : 11 C. L. J. 512; Hira Lal Mitra v. Uday Chandra Dey 14 Ind. Cas. 33 : 16 C. L. J. 103 : 16 C.W.N 1027 and Hriday Nath Parai v. Ahthay Lal (5). In all these cases the order of the lower Appellate Court has been dealt with by this Court. In this case we think that the order now under review should not have been passed. There were no formal defects or other sufficient cause for allowing the plaintiff to withdraw both his appeal and the original suit. The order is accordingly set aside and the case is remanded to the lower Appellate Court to be taken up from the point at which it stood when the order now complained of was made. The defendant is entitled to his costs of this Rule. We assess the hearing-fee at one gold mohur.