

Helim Ulla Vs. Hakim Ali and ors.

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Court : Kolkata

Decided On : Nov-23-1934

Reported in : AIR1935Cal157a

Appellant : Helim Ulla

Respondent : Hakim Ali and ors.

Judgement :

Mitter, J.

1. This appeal must be dismissed. The plaintiff instituted a suit in the year 1922 for possession being Suit No. 286 of that year for declaration of title alleging that he had been dispossessed from the lands by the defendants in Chait 1326 B.S. While the suit was pending the plaintiff made an application to withdraw the suit on the plea that the matter would be settled out of Court through the intervention of arbitrators. In this application he did not ask the Court to reserve in his favour a right to bring a new suit on the same cause of action in case the settlement out of a Court through arbitration fell through. On 17th February 1923, the Court permitted the plaintiff to withdraw the suit and as no leave to institute a new suit on the same cause of action had been prayed for no order granting leave was passed. Eventually there was a reference to arbitration out of Court but that arbitration failed. The plaintiff now institutes the suit basing his claim on the same title which he pleaded in Suit No. 286 of 1922. He also pleaded that he had been

dispossessed in Chait 1326 as in the earlier suit.

2. In the present suit he however recites the circumstance under which the suit of 1922 was withdrawn, recites the facts of the abortive reference to arbitration and institutes the suit, as I have stated, on the same title and on the, same disturbance of his title. I do not think that simply because it is stated in the present plaint that there was an arbitration and the arbitration failed that alters the cause of action. The cause of action in the present suit is the same, in my judgment, as the cause of action in the suit of 1922 and that is the view that has been taken by both the Courts below and I agree with them. The plaintiff contends further that the bar of Order 23, Rule 1(3) would not apply if the withdrawal without permission to institute a new suit on the same cause of action was made with the consent of the defendant in the hope of the matter being settled out of Court. The withdrawal is a withdrawal within the meaning of Order 23, Rule 1(3), whether the defendant consented to the plaintiffs' prayer for withdrawal or not. To hold that para. 3, Order 23, Rule 1 would have no effect, if the application for withdrawal made by the plaintiff is consented to by the defendant when there is no order of the Court granting leave to institute a fresh suit on the same cause of action, would be to introduce into Order 23, Rule 1, some words which are not there. I would accordingly hold that the Courts below have rightly held that the present suit is barred by reason of the provisions of para. 3, Order 23, Rule 1. Defendant-respondent 9 has preferred cross-objections which relate to the question of costs. But the cross-objections are not pressed. The result is that both the appeal and the cross-objections are dismissed with costs.