

(1918) 01 PAT CK 0007
In the Patna High Court

Bisheswar Ahir and Others

APPELLANT

Vs

Brijra Misser and Others

RESPONDENT

Date of Decision : 31-01-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1

Citation : AIR 1918 Patna 485 : 44 Ind. Cas. 406

Hon'ble Judges : Roe, J;Jwala Prasad, J

Bench : Division Bench

Judgement

1. The facts of this case are that the opposite party before us were plaintiffs in an action framed so as to include relief sought against mortgagees from whom redemption was claimed by the plaintiffs and also against tenants who, it was alleged, had been inducted on to the lands by the mortgagees. The Court of first instance found that the tenant defendants were in fact ancient cultivators who did not derive their tenancies from the mortgagees. He dismissed the suit against the tenant defendants and made a decree as against the mortgagees giving a right to redeem on certain terms; he also awarded costs against the mortgagees.

2. From this decree the opposite party appealed to the District Court. The mortgagee defendants put in a cross-objection to the costs allowed in the Court below. The tenant defendants put in a cross-appeal on the ground that the whole action should have been dismissed for misjoinder of causes. Upon this the opposite party filed an application to withdraw his suit on the ground that there were "some formal defects." We must admit that we gather generally from the petition for leave to withdraw from the suit that it was made rather on the ground that there had been an omission to put upon the record in the Court of first instance certain important documents which were in his possession than on the ground that the suit must fail by reason of a formal defect" in the plaint. Leave was given to withdraw with permission to bring a fresh suit upon the same cause of action "subject to payment of the full costs of the suit and of the appeal

to the tenant defendants before the institution of the fresh suit.

3. By the opposite party before us it is contended that we have no power to revise the order made, on the ground that leave given to withdraw the suit is not a case within the meaning of that section. A solitary decision *Bansi Singh v. Kishun Lall Thakur* 26 Ind. Cas. 203 : 41 C. 632 is quoted in support of this contention. With great respect to the learned Judges who decided that case we are of opinion that it is not in accordance with the established practice of every Court in India including the Calcutta High Court itself. There are innumerable cases in which the High Court has interfered in cases precisely similar to the one before us. It is sufficient to quote in this connection *Khorda Co. Ltd. v. Durga Charan Chandra* 5 Ind. Cas. 187 : 11 C.L.J. 45 and the cases referred to therein.

4. On the merits, however, we are of opinion that the application has failed. It is not for us to say whether the Court below did really give leave to withdraw because the case had not been proved in the lower Court, or whether at the back of its mind there was a feeling that there had been a formal defect in the suit. From the moment that the defendants Nos. 2 and 3 alleged in their cross-appeal that the suit must fail in appeal owing to a formal defect in the pleadings, the Court had jurisdiction to pass any order it pleased under Order XXIII, Rule 1. We, therefore, dismiss this application with costs, hearing fee two gold mohurs.