

(1916) 06 CAL CK 0012
In the Calcutta High Court

Hriday Nath Parai and Another

APPELLANT

Vs

Akshay Lal Chaudhuri and Others

RESPONDENT

Date of Decision : 30-06-1916

Acts Referred:

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

Citation : 39 Ind. Cas. 963

Hon'ble Judges : Cuming, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. We are invited in this Rule to set aside an order of a peculiar character, made ostensibly under Rule 1 of Order XXIII of the Code of Civil Procedure. The plaintiffs instituted a suit for recovery Of possession of land on establishment of title. The Court of First Instance dismissed the suit on the ground that the evidence adduced by them was not sufficient to prove their claim. Upon appeal, the plaintiffs made an application for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action; this was taken up for consideration at the time of the hearing of the appeal. The Subordinate Judge came to the conclusion that the plaintiffs had not produced important items of evidence and that, in the absence of such evidence (which was admittedly with the plaintiffs), it would be difficult to come to any satisfactory finding on the question of title, although the documents already proved on their behalf raised a presumption in their favour. The Subordinate Judge also held that the defendants had not produced on their side all the evidence necessary to prove their allegations. In these circumstances, he considered that in the interests of justice, the prayer for withdrawal should be granted and proceeded to record an order to the effect that the appeal should be dismissed, but that the suit should be allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action, if not otherwise barred, and subject to payment by the plaintiffs to the defendants their costs in his Court and in the Trial Court. This order is manifestly self-contradictory; the Subordinate fudge has overlooked that if the appeal was dismissed, the suit could not very well be allowed to be withdrawn, as the decree

of dismissal would operate as res judicata between the parties in respect of all questions in controversy in the suit. It is also plain that the reason assigned by the Subordinate Judge does not justify an order for withdrawal under Rule 1 of Order XXIII, Civil Procedure Code. The decisions in *Khorda Company Ltd. v. Durga Charan Chandra* 5 Ind. Cas. 187 ; 11 C.L.J. 45 *Mabulla Rardar v. Hemangini Debi* 6 Ind. Cas. 629 ; 11 C.L.J. 512 and *Kali Prasanna Sil v. Panchanan Nandi* 33 Ind. Cas. 670 ; 23 C.L.J. 489 ; 20 C.W.N. 1000, 44 C. 367 show that an order under Rule (1) of Order XXIII cannot properly be made on the ground that the plaintiffs had failed to produce evidence in support of their claim. Clause (b) of Rule 1 must be read in conjunction with Clause (a), and, when they are so read, the intention of the Legislature becomes patent that the grounds included in Clause (b) must be of the same nature as the ground specified in Clause (a). It is not suggested in the case before us that the suit was liable to fail by reason of some formal defect. Consequently, the reason assigned by the Subordinate Judge in support of his conclusion is erroneous.,

2. The result is that this Rule is made absolute and the order of the Subordinate Judge discharged. The case will be remitted to him in order that the appeal may be re-heard on the materials on the record. It will be open to the Subordinate Judge to proceed under Rule 27 of Order XLI of the Code, if he is Satisfied that the conditions which justify the production of additional evidence in a Court of Appeal have been fulfilled in this case; and in this connection his attention may be drawn to the observations of the Judicial Committee in *Kessowji Issur v. Great Indian Penin-sula Railway Company* 84 I.A. 115 ; 9 Bom. L.R, 671 ; 11 C.W.N. 721 ; 6 C.L.J. 5 ; 4 A.L.J. 461 ; 31 B. 881 ; 17 M.L.J. 347 (P.C.). The petitioners are entitled to their costs in this Court as also the costs of the hearing before the Subordinate Judge on the 22nd January 1916. "We assess the hearing fee in this Court at one gold mohur.