

(1897) 05 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1001 of 1896

Kazem Sheik and others

APPELLANT

Vs

Danesh Sheik

RESPONDENT

Date of Decision : 03-05-1897

Acts Referred:

Citation : (1897) 05 CAL CK 0005

Judgement

Rampini, J.—In this suit the Plaintiffs sued for possession of a plot of land and to prove his title thereto. The Court of first instance gave the Plaintiffs a decree, The Lower Appellate Court has reversed the decree of the Munsif, and has dismissed the Plaintiffs' suit, because the learned Subordinate Judge says, that the Plaintiffs have not given in their plaint sufficient particulars by which the land in dispute can be identified, and that, therefore, the decree of the Munsif, as given to them, is incapable of execution. The learned Subordinate Judge has dismissed the Plaintiff's suit entirely upon this ground, and has not gone into the merits of the case at all.

2. Now, the Plaintiffs appeal to this Court and in their behalf it is argued (1) that the learned Subordinate Judge in his judgment admits that, at least a portion of the land claimed by the Plaintiff can be ascertained; therefore on his own showing the Plaintiff was entitled to a decree to this portion of the land, and the suit should not have been entirely dismissed, (2) that there is no provision of the law providing for the dismissal of a suit if the land cannot be identified, and that, if this was the case, it was proper for the Lower Appellate Court to remand the case to the Court of first instance to have steps taken to enable the disputed property to be identified, and (3) that the point on which the learned Subordinate Judge has dismissed the suit was not raised in the Court of first instance or taken in the grounds of appeal in the Lower Appellate Court,

3. I think, on the whole, that the learned Subordinate Judge has dealt very hardly with the plaintiffs. He himself says that " from the map prepared by the Commissioner and the report made by him, the site of a part of the land claimed

by the Plaintiffs may be ascertained." So that, that being so, there can be no case for the dismissal of the Plaintiffs' entire suit, and secondly, I am not aware of there being any provision in the CPC authorizing the dismissal of a suit on this ground. The plaint under sees. 53 and 54 of the Code, may be returned for amendment or rejected under certain circumstances. The Court of first instance took no action in this direction and there seems no reasons why the Lower Appellate Court should have proceeded in the manner it did. Nor do I see that the land could not be identified, seeing that a map was prepared by the Commissioner, and though the map seems not to be one prepared in a very scientific manner, it is quite sufficient for identification of the land as far as may be necessary for the execution of a decree. Moreover the Plaintiffs would have taken the decree at their own risk, and if it could not have been executed, they would be themselves to blame. However, if the learned Subordinate Judge really thought it necessary to have a proper map of the land drawn up, so as to enable the subject of dispute in the suit to be identified with accuracy, he might have taken steps to have that done. Finally, the last contention of the Appellant appears to be correct, that is, that the plea that the land was not capable of identification was not taken in the Court below or in the grounds of appeal to the Lower Appellate Court; and under the circumstances, I must find that the learned Subordinate Judge was not justified in dismissing the suit. In these circumstances, I set aside the finding of the learned Subordinate Judge and remand the case to him for disposal upon the merits, and if he finds, after further consideration, that it is desirable he can have a proper map of the disputed property drawn up, and if the judgment of the Court of first instance is affirmed", then the map can be made part of the decree. Cost will abide the result.