

(1903) 09 CAL CK 0008
In the Calcutta High Court

Krishna Prosad Roy

APPELLANT

Vs

Bipin Behary Roy

RESPONDENT

Date of Decision : 02-09-1903

Acts Referred:

Citation : (1904) ILR (Cal) 228

Hon'ble Judges : Pargiter, J; Brett, J

Bench : Division Bench

Judgement

Brett and Pargiter, JJ.—This appeal arises out of a suit brought by the plaintiff to recover possession of certain lands in which he said he had purchased a taluki right from Adhar Chandra Shaha on 19th Baisakh 1296, and from which he had been dispossessed by defendant No. 4 under a decree obtained u/s 9 of the Specific Relief Act on the 28th June 1899.

2. In 1891, Parmeshwari Chowdhrahi, predecessor in interest of defendants 1 and 2, obtained a decree for arrears of rent in respect of the lands in suit, and attached them in execution of the decree. Thereupon the plaintiff put in a claim u/s 278, Code of Civil Procedure, which, however, was disallowed on the 14th January 1891. The plaintiff then paid up the money due under the decree, and the attachment was withdrawn. Subsequently, however, the lands were again attached for arrears of rent and sold, and they were purchased by the decree-holder, and according to the defence settled with defendant No. 4.

3. The only plea taken in the Court of first instance, which it is necessary to consider for the purposes of this appeal, is that the suit was barred by limitation under Article 11, Schedule II, of the Limitation Act, by reason of the, foot that the-plaintiff had failed to, bring, his suit, within one year from; the 14th January 1891, the date on which his claim preferred u/s 278, Civil Procedure Code, was, disallowed, u/s 281, Civil Procedure Code.

4. The first Court held that the suit was barred. The lower Appellate Court, relying on the decision of The Bombay High Court in the case of Ibrahimhai v.

Kabulabhai I.L.R (1888) . 3 Bom. 72, has held that the suit was not barred. Disagreeing with the finding of the Court of first instance on this point and on another preliminary point as to title, the Sub-Judge set aside the judgment, and decree of the Munsif and remanded the case, u/s 562, Civil Procedure Code, to be tried, on the merits.

5. Defendants 1 and 2 have appealed, and in support of their appeal two points have been taken: (i) That the Sub-Judge's decision on the question of limitation was erroneous; and (ii) that he had no power to remand the case u/s 562, Civil Procedure Code, as the whole of the evidence had been taken in the Munsif's Court, and the Sub-Judge ought therefore to have arrived at findings on the merits on the evidence.

6. In support of the first contention, we have been referred to the decision of this Court in the case of Surnamoyi Dasi v. Ashutosh Goswami ILR (1900) Cal. 714. That case, however, is distinguishable from the present, for in that the land attached was in fact sold after the claim had been disallowed u/s 281, Civil Procedure Code.

7. In our opinion the principle laid down by the Bombay High Court in the case of Ibrahimbai v. Kabulabhai ILR (1888) 13 Bom. 72, which was followed in the case of Gopal Purshotam v. Bai Divali I.L.R (1893) . Bom. 241, applies to the present case. The object of the claim preferred by the plaintiff u/s 278, CPC was to obtain the removal of the attachment, and when that attachment had been removed after payment of the decretal amount, there was no longer an attachment or any proceeding in to execution on which the order could operate to the prejudice of the plaintiff, and therefore there was no necessity to bring a suit to set aside the order. We are unable to accept the view suggested on behalf of the appellants that, in spite of the withdrawal of the attachment, the dismissal of the claim u/s 281, Civil Procedure Code, could, by virtue of the provisions of Section 283, Civil Procedure Code, have the effect of finally determining the question of title between the parties. The first point in support of the appeal therefore fails.

8. As to the second point we think that in this case the remand is not open to objection. The finding of the Munsif does not show what issues were framed other than those in bar, which he has decided, and he has not dealt with the evidence adduced by the parties. We think that in this case the evidence should be duly weighed and considered by the Court of first instance and findings arrived at on the other issues raised in the case. This point also fails, and we dismiss the appeal with costs.