
(1892) 07 CAL CK 0005
In the Calcutta High Court

Maksud Ali

APPELLANT

Vs

Nargis Dye

RESPONDENT

Date of Decision : 19-07-1892

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 43

Citation : (1893) ILR (Cal) 322

Hon'ble Judges : Rampini, J; Pigot, J

Bench : Division Bench

Judgement

Pigot and Rampini, JJ.—The plaintiff is proprietor of mouzah Dariapur in the district of Patna; the defendant is his tenant. In 1889 plaintiff brought a suit against the defendant, the effect of which upon the relief claimed in the present suit is the subject-matter of this appeal. In that suit the plaintiff alleged that in his property there was a long existing lane, which he described, and which he said existed for the use of the public, the pasis, and others, and that in that lane there were four palm-trees which were in his possession. He alleged that the defendant had no right to the land forming this lane; that she had wrongfully included it in her homestead; and that she had no right to the four palm-trees, of which he had all along enjoyed sole or exclusive use and possession. He said the defendant had enclosed the lane by two walls, one to the east with a door in it, and one to the west, and thereby enclosed within her compound two of the juice-producing palm-trees, and thereby caused great inconvenience to the public, the pasis, and others in their coming and going. He said that the defendant's tenant had wrongfully prevented the pasis from going to the palm-trees to tap them; and that for this he would bring a separate suit. The prayer was first (or a declaration that the plaintiff was sole proprietor of the land in dispute, and also of the defendant's homestead, and that the defendant had no right to raise the wall and fix the door which had entirely stopped the passage for the pasis and the public. Secondly, for a mandatory injunction for the removal of the walls, and for an award of restoration of possession of the land to the plaintiff.

2. The Munsif dismissed the suit as to the plaintiff's alleged right to the land in dispute, holding that the land was within the defendant's tenure; and that she had a right, therefore, to build the walls in question. He did not decide whether or not the trees were included in the defendant's tenure, holding that upon that question he was not asked to adjudicate. This decision was affirmed in appeal.

3. In the present suit the plaintiff again denies the defendant's right to build the walls. He states that in the previous suit the defendant claimed the trees as belonging to her; that she does not allow the pasis to approach the trees, and asserts that they belong to her, and he brings this suit, laying it at Rs. 100, being the value of the two palm-trees at Rs. 50 each, He asks, first, for a declaration that the palm-trees belong do him; second, for possession of them; and third, for an injunction restraining the defendant from disturbing his possession of them.

4. Both the Courts below have held that the suit is barred by Section 43 of the Civil Procedure Code.

5. We took time to consider whether such a construction could properly be given to the plaintiff's claim in this suit, as to render it possible to hold that it arose out of a cause of action other than that on which the former suit was brought.

6. We think it must be held that the plaintiff's present claim arose, and now arises, out of the same cause of action as that in the former suit. He claims the right in the trees and, by implication at least, a right-of-way to them for the pasis to enable them to draw the juice. We think that his cause of action in respect of this arose out of the matters, the subject of the former suit. As a matter of fact the defendant did then claim the trees, both expressly and also by the building of the wall so as to bar the access to them at her pleasure; the plaintiff applied for that reason to have the right to the trees determined in that suit, but this was refused, as he had not asked for relief in respect to them in the suit. It is plain that the matter was then in controversy between the parties, and that the controversy had arisen because the defendant's then assertion of right involved an interference with that which the plaintiff now claims.

7. In other words, part of the cause of action which he then had was the interference by the defendant both with the plaintiff's possession of the trees and with the access to them.

8. He did not then include this claim in his suit; he did not obtain the leave of the Court to omit it: and he is therefore barred by Section 43 of the Civil Procedure Code.

9. The appeal is therefore dismissed with costs.