

(1923) 04 AHC CK 0048
In the Allahabad High Court

Muhammad Maqbul Husain	Vs	APPELLANT
Abdullah Khan and Musammat Shafiqa and Others		RESPONDENT

Date of Decision : 24-04-1923

Acts Referred:

Citation : (1923) ILR (All) 565

Hon'ble Judges : Walsh, J;Piggott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Piggott and Walsh, JJ.—In the suit out of which this appeal arises the plaintiff came into court claiming to be the owner of a residential house, fully described in the plaint, and sued for recovery of possession and damages against certain defendants alleged to be in possession as trespassers. , The plaintiff asserted that the defendants were the heirs and representatives of two persons whom he had let into possession of the premises in the month of April, 1917, on a three years" lease. He pleaded that in a subsequent suit, brought to enforce the terms of the alleged covenant of lease, the defendants had denied his title. He, therefore, sued for ejectment of the defendants as trespassers and for a sum of Rs. 46 by way of damages on account of their use and occupation of the house. The defendants put the plaintiff to proof of his title and pleaded further that they and their predecessors had held possession of the house in suit adversely to the plaintiff for a period of 40 years. The trial court fixed two issues: one on the question of title and one on the question of possession, but decided the two issues together in a somewhat confused judgment which we can only interpret as being a finding in favour of the defendants on the question of adverse possession only.. The suit having been dismissed on this ground, the plaintiff appealed. The lower appellate court has definitely found in favour of the plaintiff on the question of title and on the question of possession. There having been no finding by the trial court on the question of damages, the learned Subordinate Judge, instead of going into the question himself or remitting an issue to the trial court,

has exercised his powers under Order XLI, Rule 23, of the CPC to remand the whole case to the court of first instance. The appeal before us is by one of the defendants. In substance two points are taken. The first; of these is that the finding of the lower appellate court on the question of possession is based in part upon inadmissible evidence, namely upon a certain rent agreement of the 15th of April, 1917, which was inadmissible in evidence by reason of the provisions of Section 49 of the Indian Registration Act No. XVI of 1908. We do not, find that this objection was taken in the trial court. The document was denounced by the defendants as a forgery and there was much controversy in both the courts below as to whether or not its execution was proved. But there is not a word in the judgment of the trial court as to the admissibility of the document in evidence. We doubt, under the circumstances, whether the learned Subordinate Judge should have allowed the point to be taken; in any case, we are not prepared to dissent from his view, which is that he has not received the document in evidence of any contract of lease, or other transaction affecting the immovable property in suit, but has merely treated it as an item of evidence bearing on the question of the date on which certain persons, the predecessors in title of the defendants, entered into possession of certain premises. The other point urged in appeal is that the lower appellate court has abused its powers of remand under Order X.LI, Rule 23, of the Code of Civil. Procedure. We certainly consider that the order in question was an improper one and unfair to the parties, who were clearly entitled to a final decision from the court of first appeal and to be spared the necessity of further proceedings in he trial court and the possibility of another first appeal from any decree winch that court might finally pass. It Would be obviously competent for us to substitute for the order under appeal an order remitting an issue under Order XLI, Rule 25, of the Code of Civil Procedure; but in view more particularly of the fact that the plaintiff respondent is not represented a? the hearing of this appeal, we think the most suitable course for us to adopt is to pass an order disposing of the suit finally at this stage. The lower appellate court might undoubtedly have taken upon itself the determination of the question of the amount of damages, on the evidence available upon the record, without remitting any issue at all, and we have the same power under Rule 33 of Order XLI of the Code of Civil Procedure. So far as we are able to ascertain from the record, the plaintiff failed to produce admissible evidence on which the court could come to any satisfactory finding as to the amount of damages to which he was entitled. If we are right in this view, then the lower appellate court should not, by remanding the whole case, have virtually offered the plaintiff an opportunity of producing further evidence on this point. The result is that we substitute for the order under appeal the decree which, in our opinion, the lower appellate court ought to have passed. That is, We set aside the order and decree of the first court and in lieu thereof we give the plaintiff a decree for recovery of possession and dismiss his claim for damages. The plaintiff is entitled to 2/3rds of his costs throughout, as against all the defendants. The defendant who has appealed to this Court may recover 1/3rd of his costs in all three courts from the plaintiff.