

(1887) 06 CAL CK 0021
In the Calcutta High Court

Ramanugra Roy and Another

APPELLANT

Vs

Azizuddin Hossein and Others

RESPONDENT

Date of Decision : 03-06-1887

Acts Referred:

Citation : (1887) ILR (Cal) 605

Hon'ble Judges : Tottenham, J; Norris, J

Bench : Division Bench

Judgement

Norris, J.—The point raised before us by Mr. Sandel in second appeal is that no suit such as this will lie, and in support of his contention he has referred to various decisions of this Court, which, if not completely in his favour, are at least very strongly in his favour. On the other hand, there is at least one case—*Ram Ghulam v. Dwarka Rai* 7 A. 170--a Full Bench case, to which the present Chief Justice of this Court, then the Chief Justice of Allahabad, was a party, which distinctly holds that such a suit as this will lie.

2. We were at first disposed to think that we ought to send this case to a Full Bench, because the balance of our judgment was rather to agree with the Allahabad case than with the cases decided by Division Benches of this Court ; but after hearing the learned Vakil for the respondents we are satisfied that there is no necessity for our so referring this case; indeed, not only that there is no necessity, but that we ought not to do it.

3. It has been pointed out by Baboo Abinash Chunder Banerjee that, supposing Mr. Sandel's contention is right, there has been at most an error in the form of the procedure which has been adopted, and that there has been no exercise of jurisdiction by the Munsif which he did not possess, because, if this matter had been, as Mr. Sandel contends it ought to have been, enquired into under the provisions of Section 244 of the CPC in the execution department, it would in the first instance have been enquired into by the Munsif. The Munsif is the person who tried this suit. If the parties had been dissatisfied with the decision of the Munsif the appeal would have been to the Subordinate Judge. It is the

Subordinate Judge who has heard the appeal from the Munsif in this case, and he has set aside his decision. This view of the ease is fortified by an authority referred to by the learned Vakil-Purmessuree Pershad Narain Singh v. Jankee Kooer 19 W.R. 90 ; the head note to the case Section: "Where a question such as is provided for by Act XXIII of 1861, is. 11, instead of being determined by order of the Court executing the decree, was made the subject of a separate suit in that Court, it was held that, though the form of proceeding was wrong, there was not a want of jurisdiction which could be made a ground of objection in appeal." That was a decision of Couch, C.J., and Dwarka Nath Mitter, J., in a regular appeal. Further, in one of the cases which Mr. Sandel quoted, an authority which undoubtedly is in his favour, the learned Judge who gave the judgment of the Court holding that the suit would not lie also intimated that the Court would have been prepared to have considered the plaint as an application for the ascertainment of mesne profits in the execution department, so that upon principle and upon authority we think the contention of Baboo Abinash Chunder Banerjee is correct. We have further to observe that we do not think this point was tailed in the pleadings. We have been referred to paragraph 1 of the delendants" written staiment, but we think that that does not mean that this suit will not lie because the proper method of ascertaining what the plaintiff's are entitled to is by proceedings in the execution department u/s 244 of the Code of Civil Procedure. We think what the defetdants meant to assign in the first paragraph of the written statement was that this suit would not lie at all, because the defendants had been put in possession of the land by a decree of a competed Court, which is a very different question from the question argued before us today. But, whether that is so or not, we think that the point was not raised in either of the lower Courts; and, it being a point which goes exclusively to the jurisdiction of the Court, we do not think that we ought to allow it to be raised here.

4. For these reasons we think that this appeal should be dismissed with costs.