

(1922) 06 CAL CK 0022
In the Calcutta High Court

Sashi Mukhi Dasi and Others

APPELLANT

Vs

Abinash Chandra Halder and Others

RESPONDENT

Date of Decision : 01-06-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 27, Order 41 Rule 28

Citation : AIR 1922 Cal 279 : 80 Ind. Cas. 172

Hon'ble Judges : Walmsley, J; Ghose, J

Bench : Division Bench

Judgement

Ghose, J.—This is an appeal from an order of remand. A preliminary objection has been taken on behalf of the respondents that no appeal lies as the order has not been made under Order XLI, Rule 23 Civil Procedure Code, the Trial Court not having disposed of the suit on a preliminary point. It appears to us that this order was not made under the inherent powers of the Court to order a remand which can be made only where the justice of the case requires it. To say that there is no appeal where the Court acts in contravention of Rule 23 of Order XLI, CPC and reverses the judgment of the Trial Court and remands the case would be to refuse an appeal in every case where the order of remand is erroneous. We are, therefore, of opinion that in this case, the appeal is competent.

2. Then with regard to the order complained of, it appears that the learned Subordinate Judge has sent back the case for trial of the second question mentioned in his judgment, namely, whether the plaintiff's alleged right was extinguished by an user for more than twelve years before the suit. This question was tried by the first Court under the first and the fifth issues and decided against the plaintiffs. The Subordinate Judge was of opinion that the mode in which this question was decided by the Trial Court was erroneous and he accordingly remanded the case for retrial of the question having regard to the observations made by him in his judgment. It seems to us that the learned Subordinate Judge ought to have decided the question himself and, if he thought that further evidence was necessary, he might have acted according to the

provisions of Rule 27 and 28 of Order XLI, CPC and come to a decision on the question himself. We, therefore, set aside the order of remand and direct that the Subordinate Judge do rehear the appeal and try all the questions himself.

3. An objection has been taken on behalf of the appellants that the finding of the Subordinate Judge with regard to point No. I stated in his judgment is erroneous and the contention, that the question can be raised in this appeal, is based upon the argument that if the learned Subordinate Judge had found the question in the defendant's favour as the Trial Court has done, there would have been no occasion for deciding the second point or for sending the case back on remand to the Trial Court. As we have heard both the parties on the question, it is not necessary for us to say whether it is competent to the appellants to raise the question at this stage of the case but we should decide it now as both parties desire it. It is contended on behalf of the appellants that the Subordinate Judge was wrong in saying that the plaintiff No. 1 had title to the land in dispute. It is urged that, although he was a co-sharer of the defendants and was the representative of a party to the partition suit, No. 79 of 1884, he was not given any right of passage over this strip of disputed land as he was not given any land by the partition contiguous to the disputed land. But the fact is that this piece of land was included in the partition suit which shows that it belonged to all the co-sharers, and that it was not allotted to any one person as appertaining to his share by the decree in the partition suit. The result is that the plaintiffs remain joint owners of the disputed land with the other co-sharers and, therefore, the decision of the learned Subordinate Judge on this question appears to be right.

4. Then objection is taken with regard to the finding of the Subordinate Judge as regards the right of the plaintiffs Nos. 2 and 3. The Trial Court found that the plaintiffs Nos. 2 and 3 had no right to the disputed land. The Subordinate Judge does not come to any definite finding on the question but simply says " even if the plaintiffs Nos. 2 and 3 had no right to the land, the right of the plaintiff No. 1 could not be questioned. It was necessary for him to find, in order to pass a proper decree whether the plaintiffs Nos. 2 and 3 had any right or not. It is stated on behalf of the defendants that the plaintiffs Nos. 2 and 3 are the representatives in interest of some of the parties to the previous partition suit. The Subordinate Judge will, therefore, decide the question as regards the title of these plaintiffs.

5. The order of the lower Appellate Court is accordingly set aside and the case sent back to that Court for being dealt with having regard to the observations made above. We make no order as to costs.

Walmsley, J.

6. I agree.