

Allahabad High Court

Hing Raj Singh vs Raja Bhagwati Bux Singh on 14 December, 1949

Equivalent citations: AIR 1952 All 427

Author: Chandiramani

Bench: Chandiramani

JUDGMENT Chandiramani, J.

1. This is the defendant's appeal against the appellate decree of Mr. B. N. Zutshi, Civil Judge, Rae Bareli, dated 25-5-1945.

2. The plaintiff alleged that he was zamindar of the land in suit and the defendant was a rank trespasser. He prayed for fixation of rent and also for a decree for arrears of rent for 1348 to 1351F. The defendant denied being a trespasser and on the contrary asserted that he was either an under proprietor or a proprietor. He also pleaded that the predecessor of the plaintiff had filed an earlier suit against him in 1933 for the same relief but that suit was dismissed in plaintiff's default under Order 9, Rule 8, Civil P. C. and accordingly the present suit was barred under Order 9, Rule 9 Civil P. C. The issue on the question of title was referred to the civil Court and the finding was that the defendant is neither an under proprietor nor a proprietor. It was also held that the previous suit did not bar the present suit. The rent was assessed at Rs. 8-3-0 per year. A decree for 8 years' rent, that is Rs. 24-9-0 was granted. On appeal the decree of the lower Court has been confirmed.

3. In this appeal it is first urged that the previous suit of 1933 barred the present suit. There is no force in the contention. It certainly appears that the previous suit was also for fixation of rent and recovery of arrears of rent on the ground that the defendant was a trespasser. The suit was certainly dismissed under Order 9, Rule 8 Civil P. C. because the plaintiff was absent while the defendant was present. However the mere fact that the previous suit was dismissed will not bar the subsequent suit unless it can be shown that the cause of action in both the suits is the same. Here the plaintiff had alleged that the defendant is a trespasser and in the case of a trespasser the rightful owner has recurring cause of action. Obviously therefore the Second suit, that is the present suit was not based on the same cause of action as the earlier suit. The learned counsel for the appellant has not been able to show a single authority where it has been held that in the case of trespass an earlier suit filed for ejectment will bar subsequent suit if the earlier suit has been dismissed under Order 9 Rule 8, Civil P. C. Learned counsel referred to *Mundar Bibi v. Baij Nath Prasad* 42 ALL 193 This was a case in which the plaintiff had first filed a suit against the defendants who had borrowed money from him on the promissory note and when the suit was dismissed under Order 9, Rule 8, he filed a subsequent suit for the recovery of money borrowed on the actual borrowing. It was held in that case that cause of action was one and the same. This, therefore, does not help the appellant in the present case. I am satisfied that the present suit was not barred because the earlier suit and the present suit were based on different causes of action.

4. It was also argued for the appellant that Ex. D 9, a compromise of 5-6-1868 conferred the rights of an under-proprietor on his ancestor, Kundan Singh. The lower appellate Court has found it as a fact that the defendant has failed to prove that Kandan Singh was his ancestor. This is a finding of fact which cannot be challenged in second appeal. In these circumstances the defendant could not be

held to be an under-

proprietor even if Kundan Singh had been an under-proprietor.

5. No other point has been urged in appeal. The appeal fails and is hereby dismissed with costs.