

1903

BALDEO
SINGH
v.
DHARAM
KUNWAR

Judge on other grounds are, as he himself points out, mere *obiter dicta* which cannot be treated as *res judicatae*. In this connection we would refer to the remarks of Sir George Jessel, in the case of *Kewan v. Crawford* (1). Section 204 of the Code of Civil Procedure is also in point. For the above reasons we direct that the findings upon the two issues numbered 2 and 3 by the learned Subordinate Judge be struck out of the decree. The costs incurred by Balwant Singh in this matter must be borne by Rani Dharam Kunwar.

Appeal dismissed.

1903
December 17.

Before Mr. Justice Blair and Mr. Justice Banerji.

JAI GOPAL MUKERJI (PLAINTIFF). v. LALIT MOHAN (DEFENDANT).
Act No. I of 1877 (Specific Relief Act), sections 9 and 39—Suit on basis of former possession apart from title—Concurrent suit for cancellation of deed of gift under which defendant claimed—Cause of action.

Where a plaintiff filed a suit for recovery of possession of immovable property under section 9 of the Specific Relief Act, 1877, and while such suit was pending filed a second suit asking for cancellation of a deed of gift under which the defendant claimed title, it was *held* that this was not a splitting up of a cause of action and that the second suit was unobjectionable in point of law.

THE facts of this case are as follows :—

The plaintiff brought a suit against the defendant under section 9 of the Specific Relief Act, 1877. In that suit he alleged that he had been in possession of the property claimed and that the defendant had ousted him otherwise than in due course of law, and he claimed a decree for possession on the basis merely of his former possession in fact without raising any question of title. While this suit was pending the plaintiff brought the suit out of which this appeal arises against the same defendant under section 39 of the Specific Relief Act. In the present suit the plaintiff claimed a decree for cancellation of a certain deed of gift under which the defendant was claiming title to the property in suit in the former case.

The Court of first instance (Munsif of Muttra) held that the suit was bad for splitting up cases of action, and dismissed

* Second Appeal No. 666 of 1902, from a decree of H. D. Griffin, Esq., Judge of Agra, dated the 30th June, 1902, confirming the decree of Munshi Maharaj Singh, Munsif of Muttra, District Agra, dated the 1st May, 1902.

(1) (1877) L. R., 6 Ch. D., 29; at pp. 41 and 42.

it, and the lower appellate Court (District Judge of Agra), agreeing with this view of the law, dismissed the plaintiff's appeal.

The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*), and Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Jogindro Nath Chaulhri* (for whom Babu *Sital Prasad Ghosh*), for the respondent.

BLAIR and BANERJI, JJ.—A suit was brought by the present plaintiff under section 9 of the Specific Relief Act. Under that section the plaintiff came into Court upon the allegation that he was in actual possession, and that that possession was disturbed by the defendant otherwise than in due course of law. Upon the basis of such possession, without any allegation of title, he claimed to be entitled to a decree for possession. Having brought such suit, which is now pending, he commences another suit under section 39 of the same Act. He is perfectly aware that the person whom he alleges to be a trespasser claims a title under a certain deed of gift. In his suit under section 39 he claims that it may be declared that that deed of gift is null and void against him on the ground that, if left outstanding, it may cause him serious injury. The Courts below have dismissed this latter suit on the ground that the plaintiff by the proceedings he has taken is splitting up his cause of action. Mr. *Sital Prasad* in support of these decrees suggests that the suit under section 39 is a veiled form of asking for a declaration of title, that is to say, it is in substance and effect a suit contemplated by section 42 of the Specific Relief Act. That section permits a suit for a declaration of title only in those cases in which the plaintiff can seek no other relief, that is to say, no such suit can be maintained if he is out of possession. In other words, he cannot sue for possession in one suit and then for a declaration of title only in another. It appears to us that in this case that is not the position of things at all. The suit under section 9 is a suit which alleges not what is ordinarily called title but a right against a mere trespasser. That is a right which might be seriously threatened by the existence of a document such as the deed set up here, and for

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the maintenance of a suit under section 39 it is not necessary that the injury should be an injury to the title in any other sense. It appears therefore to us that this suit is unobjectionable in point of law, and that the Courts below were both in error. The case having thus been wrongly decided upon the preliminary point, we allow this appeal, and setting aside the decrees of both the Courts below, remand the case under section 562 of the Code of Civil Procedure in the Court of first instance for trial upon the merits. The appellant will have his costs of this appeal: other costs will follow the event.

Appeal decreed and cause remanded.

P. C.
1904
February
12, 25.

PRIVY COUNCIL.

JAI PAL KUNWAR AND ANOTHER (DEFENDANTS) v. INDAR BAHADUR SINGH (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Declaratory decree, suit for—Cause of action to reversionary heir—Execution of will by Hindu widow as taluqdar—Act No. I of 1869 (Oudh Estates Act) section 22, clause (7)—Adverse title set up as defence to suit for declaratory decree—Discretion of Court.

The execution of a will by a limited owner, such as a Hindu widow, affords, as a general rule, no sufficient reason for granting a declaratory decree. But where such a decree had been granted by the lower Courts in a suit the defence to which made it clear that the defendants relied upon an alleged title in the widow inconsistent with any present or future rights of the plaintiff or any other reversionary heir, and the defendants had besides no legitimate interest in the appeal except in respect of costs which had been incurred only by the course taken by them throughout the case, the Judicial Committee, always slow to reverse the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by law, declined to interfere with the decree on appeal.

APPEAL from a judgment and decree (31st July 1899) of the Court of the Judicial Commissioner of Oudh which affirmed a decree (12th October 1898) of the Subordinate Judge of Bahraich by which the respondent's suit was decreed.

The suit related to the taluqa of Mustafabad in the district of Bahraich in Oudh of which the second summary settlement,

Present:—Lord DAVEY, Lord ROBERTSON and Sir ARTHUR WILSON.