1927

BALWANT SINGH v. PARTAP SINGH.

not disputed, no question of proprietary title arose for decision by the partition officer. The real dispute was whether this right of holding in severalty should be ignored in the partition by invocation of section 125 of the Land Revenue Act, and that dispute did not raise a question of proprietary title.

We, therefore, hold, but on a different ground, that the District Judge was right in holding that no appeal lay to him, and dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

1927
June, 6.

KAMTA SINGH (DEFENDANT) *v.* BHAGWAN DAS AND ANOTHER (PLAINTIFFS) AND RAJA SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 115; *order XXIII, rule* 1—*Revision—Order permitting withdrawal of suit with liberty to file fresh suit—Reasons not stated—Material irregularity.*

For a court to invoke order XXIII, rule 1, without giving any reason amounts to a material irregularity in exercising jurisdiction given to it by that rule. If the court is of opinion that an application to withdraw a suit with liberty to bring a fresh one should be granted, it must set forth its reasons for holding that it should be granted, clearly stating whether it is by reason of a formal defect or by reason of some other sufficient cause.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the applicant.

Munshi *Haribans Sahai*, for the opposite parties.

ASHWORTH and IQBAL AHMAD, JJ. :—This is an application in revision against an order of the Munsif of

*Civil Revision No. 105 of 1927.

1927

KAMTA SINGH v. BHAGWAN DAS.

Jaunpur allowing the non-applicant to withdraw his suit with liberty to bring a fresh suit. The order of the Munsif is impugned before us on the ground that the Munsif had no jurisdiction to permit the withdrawal of the suit with liberty to bring a fresh suit, unless and until he had decided that there was a formal defect in the suit or some other sufficient ground. The order of the Munsif fails to mention the reason why he granted the plaintiff permission to withdraw the suit with liberty to bring a fresh suit. It is permissible, however, in this circumstance to refer to the application of the non-applicant. In that application two grounds were set out. One was that the success of the suit depended upon proof of a fact which could only be proved by production of a certain cash book, whereas the applicant had only produced a ledger. The second ground was that there were other persons who were necessary parties to the suit. It is unnecessary to decide whether either of these facts would give the lower court jurisdiction. It is sufficient to say that, in our opinion, the permission as a matter of discretion should not have been allowed on the grounds stated. We admit that if the lower court has erred in the exercise of its discretion no application in revision would lie. But as the order of the lower court does not set forth the reasons for giving the permission, it is possible that the lower court considered that permission to withdraw with liberty to bring a fresh suit could be granted without any condition precedent rather than that it abused the discretion imposed on it by law. In any case we should hold that for a court to invoke order XXIII, rule 1, without giving any reason amounts to a material irregularity in exercising jurisdiction given to the court by that rule. In the circumstances, we consider it necessary to set aside the order of the lower court and to direct the lower court to proceed with the case from the point where the plaintiff had put in the application now impugned. The

1927

KEWAL SINGH v. BHAGWAN DAS.

lower court must reconsider that application and pass an order on it. If the court is of the opinion that notwithstanding the opinion expressed above, the application should be granted, it must set forth its reasons for holding that it should be granted, clearly stating whether it is by reason of a formal defect or by reason of some other sufficient cause. If the court rejects the application, it will still be open to the court to allow the plaintiff to add any necessary party and to produce any necessary evidence, provided of course that the court gives reasons for allowing this and awards appropriate costs. This is not to be construed to mean that the court must allow parties to be added or evidence to be produced. We are told that circumstances exist, such as the conclusion of the evidence on both sides and the conclusion of arguments, which would make such an order improper. It will be for the lower court to consider this aspect of the matter.

Various decisions of this court have been cited to us in the course of the hearing. We do not consider it necessary to examine them in detail. They appear to us merely to be authority for the proposition that provided a court finds that the suit must fail by reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit, then in revision the exercise of the discretion of the court cannot be questioned. In a case like the present one, where the lower court has given no reasons, it will always be difficult to decide whether the order of the court is based on an assumption of jurisdiction not vested in it by law, namely, to allow the suit to be withdrawn without satisfying the conditions of order XXIII, rule 1, or whether it is based on the discretion allowed by the rule. In such cases, then, the correct method seems to be to hold that the court has exercised its jurisdiction irregularly in failing to record its reasons for exercising that jurisdiction. At least this is the view which we take in the present case.

1927

KAMTA SINGH v. BHAGWAN DAS.

The order of the lower court will, therefore, be set aside including the order requiring the plaintiff to pay the defendant full costs plus Rs. 15. Those costs, if paid, should be refunded to the plaintiff. The defendant applicant will get the costs of this application.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

1927
June, 6.

NISAR HUSAIN AND ANOTHER (DEFENDANTS) *v.* SUNDAR LAL AND OTHERS (PLAINTIFFS) AND PEARE LAL (DEFENDANT).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 52—*Mortgage—Lease executed by mortgagor after passing of decree for sale—Lease voidable by auction purchaser—"Agricultural holding"—Procedure—No vested interest in procedure.*

Held (1) that a lease of complete specific *khewat* numbers, with areas and Government revenue separately specified, and where the lessee is given power to cultivate the lands himself or to have them cultivated by other tenants, is a lease of an agricultural holding within the meaning of the Agra Tenancy Act, 1901;

(2) that a suit for a declaration that such a lease is invalid is not exclusively confined to a civil court and the revenue court has jurisdiction to declare it invalid;

(3) that where such a lease was executed after a decree for sale had been passed on a mortgage which comprised the property leased, the lease could not enure beyond the time when the mortgaged property was sold in execution of the decree, and could be avoided by the purchaser under section 52 of the Transfer of Property Act;

(4) that enactments dealing with procedure have an immediate effect and must, unless the contrary is expressed, apply to all actions, whether commenced before or after the passing of the Act.

*First Appeal No. 465 of 1924, from a decree of P. C. Mogha, Subordinate Judge of Muzaffarnagar, dated the 31st of May, 1924.