SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Digendra Chandra Pal Vs. Radha Ballav Pal

Digendra Chandra Pal Vs. Radha Ballav Pal

SooperKanoon Citation : sooperkanoon.com/130021

Court : Guwahati

Decided On : Sep-04-1952

Judge : Ram Labhaya, Ag. C.J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 41, Rule 17; Tenancy Law; Sylhet Non-agricultural Urban Areas Tenancy Act, 1947 - Sections 4

Appeal No. : Second Appeal No. 9 of 1951

Appellant : Digendra Chandra Pal

Respondent : Radha Ballav Pal

Advocate for Def. : G.K. Deb, Adv.

Advocate for Pet/Ap. : P. Chaudhuri, Adv.

Disposition : Appeal dismissed

Judgement :

Ram Labhaya, Ag. C.J.

1. This appeal arises out of an ejectment suit. Plaintiff's claim for ejectment was decreed. Defendant's appeal was dismissed. He has appealed to this Court.

2. The decree is challenged only on the ground that the appellant was not liable to ejectment as he had acquired occupancy rights in the property in suit. The findings

arrived at against the appellant on other points are not challenged.

3. When the appeal of the defendant was heard by the learned Additional District Judge, the appellant and his counsel were not present. The appeal was not dismissed in default; it was disposed of on the merits despite the absence of the appellant and his counsel. Under Order 41, Rule 17, C. P. C., the Court could dismiss the appeal by reason of the absence of the appellant, though it was not obligatory on it to dismiss it. The only other course open to it was to adjourn the appeal. It had no power to proceed to decide the appeal on the merits in the absence of the appellant or his counsel. Clause (2) of the Rule supports this interpretation of the Rule. It provides that where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte. No provision is made for the disposal of the appeal ex parte when the appellant does not appear. The Court, in these circumstances, could dismiss the appeal on the ground of absence of the appellant or to adjourn it. It had no power to decide the case on the merits. The High Courts of Allahabad--'Nasir Khan v. Itwari', AIR 1924 All 144 (A); Calcutta,--'Taher Sheikh v. Otaruddi Howladar', AIR 1929 Cal 475 (B); Madras,--'Muhammad v. Manavikrama', AIR 1923 Mad 13 (C); and Rangoon,--'Basudev v. Bideshi,' AIR 1929 Rang 11(2) (D), have held that a Court is not bound to dismiss an appeal for default; the Rule (Rule 17) does not enable it to dismiss an appeal on the merits; it can only adjourn the appeal to another date. In--'Daulat Singh v. Kesho Prasad Singh', AIR 1921 Pat 325 (E), a different view was taken. Sultan Ahmad J. held that an appellate Court has jurisdiction to decide an appeal on merits in the absence of the appellant. With great respect to the learned Judge, I find it difficult to follow this view. In my opinion, the learned Addl. District Judge was not justified in dismissing the appeal on the merits in the absence of the appellant.

4. The learned counsel for the appellant has not challenged the findings arrived at by the learned Judge. He has only contended that defendant-appellant had acquired occupancy rights, under Section 4, Sylhet Non-agricultural Urban Areas Tenancy Act by twelve years' continuous possession of the property before suit. The Courts below have given no finding on this point, though the status of an occupancy tenant was claimed by the defendant in his written statement. The point

was covered by issue No. 3 in the case. It seems that the plea was not pressed in the trial Court. The point was expressly raised in the Memo of Appeal, but the lower appellate Court also has not recorded any finding on it. The question, therefore, has to be decided. It is a simple question of fact, and a remand for its decision to the lower appellate Court is not necessary. The evidence bearing on the point is extremely meagre. The defendant alone appeared in the, witness-box to support his, claim. No other evidence, oral or documentary, was adduced in support of the claim. (After stating the evidence of the defendant the judgment proceeds :)

5. The version of the defendant that he was in occupation of the house for over 12 years before the suit receives no support from any independent testimony. Under Section 4, Sylhet Non-agricultural Urban Areas Tenancy Act, 1947, he could be deemed to have acquired permanent, heritable and transferable right of use and occupation in the land if he could show that he had possessed the land as a tenant continuously for a period of 12 years before suit. It is admitted now that, one Annada-prasad was in possession of the eastern portion of the property in dispute till 1942. He delivered possession to the owner, and it was from him that the defendant got it. Possession, so far as this portion is concerned, admittedly commenced in 1942. The claim to occupancy rights in this part is obviously untenable. So far as the western portion is concerned, the statement in the deed of lease is inconclusive. Though it does not seem to exclude the possibility of the defendant having been in possession of the western portion before the execution of the document, he cannot succeed on the basis of this possibility. He has to prove his possession for 12 years before the suit. He can only rely on his own statement in which he began by claiming possession of the whole house since 1929 but was forced to admit, presumably in view of the contents of the lease deed, that at least so far as the eastern portion was concerned, his possession commenced from 1942. This statement, by itself, does not suffice to discharge the burden that was on him even as regards the western part. If there was any truth in his claim, he could have adduced available independent evidence in support of it. He did not make any such attempt. From his conduct it appears that he did not press this aspect of the case in the trial Court. Besides, this part of the property in which occupancy rights are claimed is not defined by areas or otherwise. The

contention, in these circumstances, cannot prevail.

6. The appeal is dismissed. I make no

order as to costs in this Court.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com