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Court : Allahabad

Decided On : May-11-1918

Reported in : AIR1918All241; (1918)ILR40All637; 46Ind.Cas.925

Judge : Tudball and ;Abdul Raoof, JJ.

Appellant : Narain Das

Respondent : Het Singh and ors.

Judgement :

Tudball and Abdul Raoof, JJ.

1. This appeal arises out of a Suit brought for possession of property and damages. The plaintiff in paragraph 1 of his plaint stated that Musammat Gulabo, defendant No. 2, was the zamindar and owner of nine bighas and nineteen biswas of land in a certain village, that she and her husband, defendant No. 1, mortgaged the same with possession to the plaintiff for a period of five years under a registered mortgage-deed for Rs. 600 on certain conditions, one of which was that the principal mortgage-money should be deposited in the month of Jeth before the property could, be redeemed. He went on to state that he, the plaintiff, obtained possession of the property and had it cultivated through his sub-tenants. In paragraph 2 of the plaint he stated that on the 1st of September, 1915, the two principal defendants mentioned above ejected his sub-tenants who were made pro formd defendants to the suit and without paying the mortgage-money unlawfully

took possession of the property and that they were still in such possession; that they had refused to deliver possession to the plaintiff or to pay him his mortgage-money or to pay him the damages which he had suffered. He dated his cause of action as the 1st of September, 1915, the date of the trespass. In paragraph 3 of his plaint he merely stated that he had impleaded the sub-tenants as pro formd defendants. In paragraph 4 of the plaint he stated that the suit for the purposes of jurisdiction and paymenb of court fees was valued at Rs. 600, the mortgage-money, plus Rs. 114, the amount of damages, but with regard to the claim being under Section 9 of the Specific Relief Act, the court fee had been paid on half the mortgage-money and the entire amount of damages, that the village was within the local limits of the jurisdiction of the court hence the suit was cognizable by the court. The following reliefs Vera prayed for:

- (1) That the plaintiff's rights may be declared the principal defendants, dispossessed and the plaintiff as mortgagee may be put into possession of the 9 bighas, 19 biswas of lana numbered as below, situate inmauza Bhursaya.
- (2) That Rs. 114 due on account of damages for 1323 Fasli may be awarded to the plaintiff as against the principal defendants,
- (3) The costs of the suit may be awarded.
- (4) That any other relief to which the plaintiff may be entitled may also be granted.

2. It will be noticed that it is only in paragraph 4 of the plaint that the plaintiff mentions Section 9 of the Specific Relief Act, and he only mentions it to show why he paid court fees on half the mortgage-money. In their defence the defendants urged that the claim was one based on title and therefore could not be brought under Section 9 of the Specific Relief Act. They pointed out that the claim for damages along with that for possession could not be maintained under Section 9 of the Specific Relief Act. They then went on to deny the allegations of fact and raised other points in defence. When the case came on for trial the learned vakil for the plaintifi amended the plaint by striking out in the first relief the words ' The plaintiff's right may be declared, ' and retaining the following words ' the principal defendants may be dispossessed and the plaintiff, as a mortgagee, may be put in

possession of the 9 bighas and 19 biswas pukhta of land.' The claim for damages was allowed to remain. The learned Munsif thereupon treated the suit as a suit under Section 9 of the Specific Relief Act, held that the suit was not barred by limitation; held that no claim for damages could be joined with the suit claiming possession under Section 9 of the Specific Relief Act; dismissed the claim as to damages and gave the plaintiff a decree under Section 9 for possession of the property without going into the merits of the other' defences at all. The defendants appealed to the District Judge. Objection was there taken that no appeal could lie in a suit brought under Section 9 of the Specific Relief Act. The Judge treated the suit as a suit based on title. He held it to be of that nature, but instead of remanding it to the court of first instance for decision' on the merits, he held that, in view of the decision of this Court in Nazir Ahmad v. Abid Ali (1) (1011) 8 A. L. J., 910. he was bound to dismiss the suit in toto. He accordingly dismissed it. There are two pleas raised before us in the alternative. The first is that the suit being a suit under Section 9 of the Specific Relief Act, no appeal lay to the court below. The second is that if it was not such a suit, then the first court ought to have remanded it to the court of first instance for decision on the merits. The facts are as stated above. The first question before us is whether or not the suit as it stands is really a suit based on title, or is one under Section 9 of the Specific Relief Act. As pointed out above, the only mention of Section 9 of the Speeific Relief Act is to be found in paragraph 4 of the plaint and it was mentioned more as an excuse or an explanation of the amount of court fees paid on the plaint. Even after the amendment made, that is, after the striking out of the words ' the plaintiff's right may be declared', it seems to us that the suit is clearly a suit based upon title and that in so holding the court below was correct. There remains the point as to whether the lower appellate court was justified by the ruling quoted above in dismissing' the suit in toto. We do not think that that ruling is any authority for the decision at which the lower appellate court has arrived. In that case really what this Court decided was that the suit as brought was a suit based on title in which an appeal did lie to the lower 'appellate court and that the lower appellate court had rightly dismissed the suit on the merits. In the present case, the suit being really a suit based upon title, the Munsif wrongly dealt with it as a suit under Section 9 of the Specific Relief Act. The case ought to have been sent back to that

court to be dealt with as a suit based upon title, to have the proper issue framed and to be decided on the merits. We therefore allow this appeal. We set aside the decree of the court below, and we direct that the record be sent back through the lower appellate court to the court of the learned Munsif, to be restored to its number upon the file and to be heard and decided according to law. The costs of this appeal will be costs in the cause and will abide the result.

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