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Court : Allahabad

Decided On : Sep-04-1939

Reported in : AIR1939All728

Appellant : Mohammad Umar

Respondent : Abdul Ghani and anr.

Judgement :

Allsop, J.

1. This second appeal arises out of a suit for possession over a house upon the allegation that defendant 1, Mohammad Umar, was the tenant of the plaintiff Abdul Ghani and of defendant 2, Jagat Ram. The fact that Abdul Ghani and Mohammad Umar are related is not denied. Mohammad Umar is the grandson of Pir Bux and Abdul Ghani is the grandson of Nathwa. These two men Pir Bux and Nathwa were brothers. Nathwa had three sons Mohammad Ismail, Jangoo and Makhdum Bux. Abdul Ghani, the plaintiff, is the son of Mohammad Ismail. According to the Judge of the lower Appellate Court both parties were agreed that the house in suit and three other houses had belonged originally to the father of Nathwa and Pir Bux and that there was a partition by which the houses went to various members of the family. Abdul Ghani maintains that the house in suit went to Nathwa's branch and Mohammad Umar says that it went to the branch of Pir Bux. According to Abdul Ghani Mohammad Ismail, Jangoo and Makhdum Bux at one time had equal

shares in the house, but the share of Makhdum Bux was transferred at a sale to Jagat Ram and the share of Jangoo passed first to Radhey Lal and then from Radhey Lal to Abdul Ghani himself so that the share of the plaintiff is two-thirds, and the share of the second defendant one-third. The plaintiff alleged that there had been a contract of tenancy between him and Mohammad Umar about seven or eight years before the suit was instituted, but the Courts below have both found that the evidence is unsatisfactory and that no tenancy is proved. This finding would have been sufficient in the first Court to entitle the learned-Munsif to dismiss the suit but he went into the further question whether the plaintiff' had established his title and whether the defendant had established a claim to the house by prescriptive right if not otherwise. The learned Munsif came to the conclusion that the evidence of partition was unsatisfactory and that Abdul Ghani had failed to prove that he was the proprietor of this house. He also found that Mohammad Umar had been in possession of the house for over 20 years and that he had established his title by adverse possession if he had no other claim.

2. The learned Judge of the lower Appellate Court has agreed that there is no sufficient evidence of tenancy and that the defendant has been in possession of the house for over 20 years. He came to the conclusion however that the plaintiff had sufficiently established his title by the circumstances of the case supported by the decision in certain proceedings in the year 1925. In that year it appears that one Brij Behari had a decree against Mohammad Umar in execution of which he attached the house. Abdul Ghani, the plaintiff, then raised an objection that the house could not be attached because he and not Mohammad Umar was the owner of it. It was decided in that case that the attachment must be set aside on the ground that Abdul Ghani was the owner. The learned Judge of the lower Appellate Court has come to the conclusion that this decision is absolutely binding as between Abdul Ghani and Mohammad Umar and that for this reason the fact that Abdul Ghani is the owner of the house must be accepted. He has certainly given other reasons for thinking that the house must have passed to Abdul Ghani but they are not very strong and it certainly appears that he was very greatly influenced by this decision in the proceedings under Order 21, Rule 58, Civil P.C., in the execution case. In my judgment this decision s not binding at all as between Abdul Ghani and Mohammad Umar. In the first place there is nothing to show that

Mohammad Umar had any notice of the objection taken by Abdul Ghani or that he ever raised any issue or took any part in the proceedings in the execution Court. There may be cases where it is to the interest of the judgment-debtor to oppose a claim that the property attached is not his property and, if he does oppose the claim and the matter is decided, the decision may be binding as between him and the claimant, but there are many cases where judgment-debtors have very little property against which decree, holders can proceed and are interested merely to save properties attached because, if those are safe, there is no other method by which the decree, holders can proceed against them. In such cases there may be collusion between them and the claimants. In the case before me it does not appear that Mohammad Umar had any reason to question the decision of the execution Court by way of instituting a suit under Order 21, Rule 63, Civil P.C. The attachment upon his property had been removed and his object had probably been attained. I consider that the learned Judge was not right in his view of the law and consequently his finding that the plaintiff had established his title to the property is vitiated. He relied upon the circumstances that Mohammad Umar admittedly had owned another house and that it was not probable that he would have obtained in a partition the house in suit as well. He has pointed out quite rightly that the alleged partition took place very many years ago and that the Court would have to be guided very largely by circumstances, but he has not mentioned the circumstance that Mohammad Umar had been in actual possession of the house for a period of 20 years before the institution of the suit and had paid no rent for it. I do not think that the finding of fact of the learned Judge can in these circum stances be binding on this Court.

3. It might have been advisable to remand the case for another finding upon this issue of proprietary title, but I think there is another reason why the appeal ought to be allowed. The learned Judge has found that Mohammad Umar has been in possession of this house for 20 years and has also found that there was no contract of tenancy between the parties as was alleged in the plaint. One would have thought in these circumstances that he would have held that the suit was at least barred by limitation. He has however said that Mohammad Umar has adduced no evidence whatsoever to prove that his possession over the house was adverse. The learned Judge considers that it is plain that he was permitted to live

in the house by the appellant or Mohammad Ismail and the sons of Jangoo because of their relation, ship with him. He proceeded to hold that Mohammad Umar resided in the house as a licensee and the suit was not barred by time. It must be said at once that no plea was ever raised in the trial Court that there was any license or that any permission was given to Mohammad Umar by anybody to live in the house apart from the permission given under the alleged lease. The learned Judge has referred to no evidence whatsoever upon which he bases the finding that such permission was given. He has deduced the existence of permission from the circumstance of relationship and from the fact that Mohammad Umar did not adduce any evidence to prove that his possession over the house was adverse. It is not clear to me what kind of evidence the learned Judge expected Mohammad Umar to give. This is not a case of possession by one of a number of tenants in common. Mohammad Umar must have been in possession of the house either adversely or under some lease or license or permission of some kind. The only permission that was alleged by the plaintiff was the lease which is held not to have been proved. If there was no permission then the possession must have been adverse.

4. I have already pointed out that the plaintiff's suit might have been dismissed on the ground alone that he had failed to prove the contract upon which it was based, but it was doubtless open to the Courts below, if they thought that the facts found justified a relief, to grant that relief to the plaintiff. On the other hand the plaintiff should not be placed in any better position than that in which he would have been placed if he had alleged the true facts in his plaint. If we take it that the facts as found by the learned Judge of the Court below are true then the plaintiff would have had to allege that the defendant had been in possession of the house for a period of 20 years under a license and that in recent times he had repudiated the license and set up an adverse title. The plaintiff would have been bound to prove the facts which ho alleged and which would justify the Court in granting him a decree. One of those facts would be the existence of the license. It follows therefore that the plaintiff, if he had alleged the license in the plaint, would have had to prove it and he cannot be placed in a more advantageous position by failing to state the true facts. It follows therefore that the burden of proving that there was a license was upon him. He might of course have based his claim upon the ground

that ha was the owner of the property and that the defendant who had no title to it was a trespasser, but if he had done that and the defendant had set up a title by adverse possession it would obviously have been sufficient for the defendant to prove possession alone because according to the plaintiff's plea in those circumstances the defendant would have admittedly been a trespasser and not a person in permissive possession. I do not think that the learned Judge of the lower Appellate Court was justified in holding that there was a license merely because Mohammad Umar had failed to disprove it. I also think that he was not justified in drawing from the circumstance of relationship a conclusion which was not the only conclusion consistent with that circumstance. It may be that the plaintiff or some of his relations or predecessors-in-interest may have given Mohammad Umar permission to live in the house, but on the other hand it is equally likely that they may have been careless of their rights or it is even possible that the permission to reside was something more and was intended to be permanent or in other words a gift. The relationship is not necessarily inconsistent with a trespass. I cannot uphold the finding of the learned Judge that there was necessarily a license given to Mohammad Umar and that for this reason his possession can not be held to have been adverse.

5. It has been suggested by learned Counsel for the respondent that I might remit issues to the Court below, but I do not see why in the year 1939 I should remit issues to enable the respondent to make out a case which he did not plead when he instituted his suit in the year 1936. There may be oases where justice demands on the facts proved that relief should be granted although the facts proved are not those pleaded, but generally speaking it appears to me to be in the interests of justice that a plaintiff should come into Court with true allegations and that he should prove them before he obtains a decree. The result is that I allow this appeal, set aside the decree of the learned Judge of the lower Appellate Court and dismiss the suit with costs throughout. Leave to appeal under the Letters Patent is granted.

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