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Court : Allahabad

Decided On : Jul-31-1933

Reported in : AIR1933All829

Appellant : Har Bilas

Respondent : Dalla and anr.

Judgement :

Bajpai, J.

1. This is a plaintiff's appeal against an order of remand passed by the lower appellate Court. It appears that the plaintiff as the zamindar of Nagla Patram Mahal Netram khewat No. 1 brought a suit for possession of the land mentioned in the plaint alleging that that land had been encroached upon by the defendants, who had dug certain holes for planting trees and had planted certain trees in other places in the said land. The plots in dispute as given in the plaint are numbered as 1308, 1311 and 1323. The defendants are admittedly ex-proprietary tenants in that mahal but their ex-proprietary tenancy is over a plot other than the three plots mentioned above. These three plots lie very near the ex-proprietary tenancy of the defendants. The defendants pleaded that the trees in dispute lie on the ridges of their ex-proprietary holding and they further pleaded that even if the trees and plants did not stand on the ridges of the ex-proprietary holding then they have from of old ancestral rights regarding planting, cutting and selling the trees without the

interference of any one. They did not, it may be mentioned, plead that they were the tenants of the plots Nos. 1308, 1311 and 1323.

2. The Court of first instance appointed a Commissioner who went to the spot and who reported that the three plots were banjar plots and all the mango plants in dispute were on those plots. He also reported that these mango plants were of recent growth and there were only three nim-trees about five years old on plot No. 1311. Upon this report the Court of first instance passed a decree in favour of the plaintiff to the effect that the khondas and plants be removed and that possession be delivered to the plaintiff over the specific patches of land over which the khondas and plants stand. It also passed a decree for the recovery of Rupees 3-8-0 as damages. On appeal the learned Subordinate Judge came to the conclusion that the plaint and the written statement were inartistically drafted but one could spell out in the written statement a plea to the effect that the defendants were the tenants of the three plots in dispute and he was therefore of the opinion that the proper course for the Court of first instance was to frame an issue whether the land in suit formed part and parcel of or was appurtenant to the defendants' holding and to remit that issue to the Revenue Court for decision under Section 273, Agra Tenancy Act.

3. In appeal it is contended before me that the lower appellate Court has made a new case for the defendant, that, as a matter of fact, there was no plea by the defendants to the effect that they were the tenants of the plots in dispute I am inclined to agree with the contention put forward on behalf of the appellant and I do not see any plea of tenancy in the whole of the written statement. The report of the Commissioner is undoubtedly against the defendants and from that report it appears that these plots are banjar plots over which the zamindar as of right has proprietary possession. It was not open under those circumstances to the lower appellate Court to direct the Court of first instance to remand an issue to the Revenue Court. I have examined the evidence in the case and I am in entire agreement with the finding of the Court of first instance. All the trees lie on the ban-jar plots and have no connection whatsoever with the ex-proprietary holding of the defendant. The mango plants are of very recent growth, the three nim-trees are also five years old, and the defendant cannot claim any right either in the

mango or in the nim-trees. The result therefore is that the decree of the Court of first instance is correct. This decision, of course, does not in any way, affect any trees that might lie on the ridges of the ex-proprietary holding.

4. I therefore allow this appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance. Costs of the Court of first instance will be paid as directed by that Court. Costs of the lower appellate Court and of this appeal are allowed to the plaintiff. The defendants must pay their own costs of these two Courts.

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