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Court : Allahabad

Decided On : Jan-21-1935

Reported in : 155Ind.Cas.602

Judge : Niamat-Ullah, J.

Appellant : Badloo and anr.

Respondent : Nanu and ors.

Judgement :

Niamat-Ullah, J.

1. This is a plaintiffs' appeal and arises from a suit for recovery of possession of a plot of land and for demolition of certain constructions admittedly made by the defendants thereon. The plaintiffs case was that the defendants had encroached upon the plaintiffs' land in 1927 and that they had no right to built on it. The defence was that the land was the property of the defendants and that the constructions complained of by the plaintiffs had been made 30 years before the suit. The plaintiffs' suit was decreed by the trial Court. The defendants, eight in number, preferred an appeal to the lower Appellate Court. The appellant has filed an affidavit which shows that during the pendency of the appeal before the lower Appellate Court one of the defendants namely, Amar Singh, died and his legal representatives were not brought on the record. Apparently this fact was not brought to the notice of the lower Court when the appeal was heard. The learned

Judge accepted the appeal and dismissed 'the plaintiffs' suit in toto.' One of the grounds taken in second appeal is that the legal representatives of one of the defendants not having been brought on the records the entire appeal should be deemed to have abated, and that in any case the decree of the trial Court should not have been reversed so far as it affects the deceased Amar Singh. I am unable to give effect to this contention. The appellants in the lower Appellate Court were the defendants. It cannot be disputed that any one of them could have resisted the plaintiffs' claim to possession and to demolition of the constructions made by the defendants. If Amar Singh had not originally joined in the appeal, the remaining seven or, for the matter of that, anyone of them could have appealed from the decree of the trial Court, impugning it in its entirety. The fact that Amar Singh died can only lead to the conclusion that the appeal in the lower Appellate Court abated so far as he was concerned; but the appeal could not abate so far as the surviving appellants were concerned. As anyone of them could have impugned the entire decree and the lower Appellate Court did set aside the entire decree at their instance and dismissed the plaintiffs' suit in toto no fault can be found with the procedure of that Court. In my opinion the decree of the lower Appellate Court dismissing the plaintiffs' suit is not open to challenge.

2. The only other question argued before me is whether the conclusion arrived at by the lower Appellate Court on the main question on which his decree proceeds is correct. That conclusion is that the defendants constructed the 'gher' in question not in 1927, as alleged by the plaintiffs, but 30 years before the institution of the suit. It is the plaintiffs' own case that in constructing the 'gher' the defendants were guilty of an act of trespass. This being so, the trespass complained of by the plaintiffs took place 30 years before the institution of this suit. The logical result of this finding is that the defendants were in adverse possession for more than 12 years before the institution of this suit. The learned Advocate for the appellants argues that the defendants did not take the plea of adverse possession in so many words in the written statement. This is true; but I think it is clearly implied in the defendants' allegation that they constructed the 'gher' 30 years before the suit. There was no other object in making an allegation of this kind. It was understood in that sense by the Courts below; and since a finding has been arrived at, effect must be given to it. The only manner in which effect can be given to such a finding

is that the plaintiffs' suit should be held to be barred by limitation. This appeal has no force and is dismissed under Order XLI, Rule 11, Civil Procedure Code.

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