

Samiulla Vs. Nil Mamud

Samiulla Vs. Nil Mamud

SooperKanoon Citation : sooperkanoon.com/851726

Court : Kolkata

Decided On : Mar-18-1926

Reported in : AIR1927Cal13,97Ind.Cas.564

Appellant : Samiulla

Respondent : Nil Mamud

Judgement :

B.B. Ghose, J.

1. Two points have been raised in this appeal on behalf of the defendant-appellant. The plaintiff sued the defendant for arrears of rent at a certain rate with regard to a piece of land in the possession of the defendant. In the alternative, he claimed that, if the tenancy was not proved, he might be allowed damages against the defendant for use and occupation of the land. The defendant denied the relationship of landlord and tenant and his case was that the land never belonged to the plaintiff, but was his own land. The plaintiff claimed title by virtue of an auction-purchase in execution of a decree on a mortgage alleged to have been executed by the defendant's father. The plaintiff's case was that after the auction-purchase he had been in possession of the land and that the defendant came into occupation in the year 1325 B.S. by virtue of a contract of lease. The defendant's plea was that the piece of land had never been mortgaged by his father, that assuming that it was mortgaged and sold, in execution' of the decree, the

defendant or his father never gave up possession of the land but remained on it all along and that, if the plaintiff had derived any title by virtue of the auction-purchase, that title was barred by limitation. The defendant further said that, as the plaintiff had no subsisting title, he was not entitled to the property. The defendant also denied the contract of tenancy and pleaded that the plaintiff's suit was liable to be dismissed.

2. Two issues were raised in the trial Court : first, as to whether there was a relationship of landlord and tenant between the parties; and, secondly, whether the plaintiff had the right to get any damages for use and occupation of the land. The trial Court found both the issues against the plaintiff and dismissed the suit. The plaintiff appealed and only those two points were raised for decision before the learned Subordinate Judge. The Subordinate Judge held that the plaintiff had a subsisting title to the property; but he accepted the finding of the Munsif that the contract of tenancy set up by the plaintiff had not been proved, and, therefore, he held that the plaintiff was not entitled to recover rent on the basis of the alleged settlement but that he was entitled to damages for use and occupation; and upon that view, he calculated the amount of damages and awarded a decree in favour of the plaintiff. Against that decision, the defendant has preferred this appeal.

3. A preliminary objection was taken on behalf of the plaintiff-respondent that the appeal was not maintainable under the provisions of Section 153 of the Bengal Tenancy Act as no question relating to title to land as between parties having conflicting claims thereto had been decided. It appears, however, that there was a question of conflicting title between the plaintiff and the defendant as the defendant claimed the property to be his on the ground that it was never conveyed by way of mortgage by his father, and that even if it was, any title acquired by the plaintiff was barred by the statute of limitation. This second appeal, therefore, is maintainable.

4. The learned advocate on behalf of the defendant-appellant has assailed the judgment of the Subordinate Judge on both the points, that is to say, with regard to the question of title as well as with regard to the plaintiff's right to recover damages for use and occupation. With regard to the question of title the argument

addressed is that the Subordinate Judge has wrongly placed the onus upon the defendant to prove that the plaintiff's title had been extinguished by adverse possession. It does not appear to me that that would be a proper reading of the judgment. The plaintiff alleged that the defendant came to live in the land in the year 1325 B.S. The defendant said that he and his father had all along been living on the land and that the plaintiff or his predecessor, the auction-purchaser, never took possession of the disputed land by virtue of the auction-purchase. Upon this state of the pleadings the Subordinate Judge found that the plaintiff's predecessor had actually taken possession of the land after the auction-purchase. Then he dealt with the question whether the plaintiff's story of the defendant coming into possession was true or not. In dealing with the evidence he observed that the plaintiff's story that the defendant came in. 1325 B.S. to live on the land was more probable. Then he considered the defendant's story and recorded this finding that the evidence on the record was too flimsy to show that the plaintiff or his lessors right had been extinguished by any adverse possession.

5. The learned advocate for the appellant relies upon this passage of the judgment and contends that the previous statement is not a finding of the learned Judge, but his real finding is contained in the passage last cited. That does not seem to be the proper construction of his finding. He deals with the two stories piecemeal. Taking the plaintiff's story first, he finds it more probable, and again taking the defendant's story he says that the evidence is too flimsy to show that the plaintiff or his lessor's right has been extinguished by adverse possession. This ground, therefore, fails.

6. The next point is with regard to the question of damages for use and occupation. The contention is that in order to claim damages for use and occupation, the Court must find that the defendant came into occupation under such circumstances that an implied promise to pay for that occupation may be inferred. There was an alternative claim made by the plaintiff for damages for use and occupation, and, following the cases of this Court, the learned Judge held that it could not be said that because the plaintiff had failed to prove the contract on which he alleged the defendant came upon the land, he was precluded from urging his alternative claim for damages for use and occupation. The learned advocate for the appellant cites the case of *Nityanund Ghose v. Kissin Kishore*

[1864] W.R. Act, Rule 82 which it may be said was the leading case on the subject, before the subsequent Pull Bench case, referred to by the Subordinate Judge, that is, the case of Lukhee Kant Dass Chowdhury v. Sumeerooddi Tustar 13 B.L.R. 243 and contends that, in that case, it was found that the circumstances showed that there was an implied contract between the plaintiff and the defendant creating relationship of landlord and tenant. There the learned Judges distinguished the position of the tenants in this country and in England. In that case, the plaintiff sued the defendant for rent. The defendant denied the plaintiff's right and claimed that he had held the land adversely to the plaintiff and that no relationship of landlord and tenant was existing. Even in such a case as that, it was held that the landlord was entitled to damages for use and occupation.

7. I may also cite the case of Surnomoyec v. Deenunath Gir Sunnyasee [1883] 9 Cal. 908 where Garth, C.J., and Mr. Justice Macpherson held that, although the lands were in the possession of two persons as trespassers, if the plaintiff had elected to waive the trespass, all the defendants might, on the authority of the cases in this Court, be treated as tenants and a decree for use and occupation might be given to them. Reference may also be made to the provisions of Section 157 of the Bengal Tenancy Act which says that when a plaintiff institutes a suit for ejectment against a trespasser, he may claim an alternative relief that the defendant be declared liable to pay for the land in his possession a fair and equitable rent to be determined by the Court and the Court may grant such relief accordingly. It seems to me that the rule implied here is that the circumstances need not be such as to imply a contract by a trespasser coming upon the land of a rightful owner to pay rent in order to enable the rightful owner to recover damages for use and occupation. The plaintiff may waive the trespass and elect to treat the trespasser as a tenant. If the trespasser does not like that position, he may vacate the land. There is no hardship in this procedure and I do not think that the Subordinate Judge has committed any error of law in allowing a decree to the plaintiff for use and occupation. In this view, the appeal fails and is dismissed with costs.

Graham, J.

8. I agree.

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