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SooperKanoon Citation : sooperkanoon.com/865715

Court : Kolkata

Decided On : Feb-26-1937

Reported in : AIR1937Cal636,173Ind.Cas.578

Appellant : Keshab Chandra Sarkar and ors.

Respondent : Gopal Chandra Chanda

Judgement :

1. The suit in which this appeal has arisen was instituted by the plaintiff-respondent in this Court for declaration that a Miras Ijara tenancy created in favour of defendant 7 terminated on account of violation of conditions restraining alienation of the same. There were other reliefs claimed in the suit ancillary to the declaration sought for, which related to the action taken by the transferees from defendant 7 by virtue of the unauthorised transfer. The Miras Ijara (Ex. 4 in the case) was in respect of three different plots of land specifically mentioned in the document. The first plot consisted of five cottahs of land of which the rental was four annas only. The incorporation of the property made it possible for the parties concerned to have the document registered in the District of Bakargunj. The other two plots were properties situate in the district of Khulna. The three different plots comprised properties as mentioned in the document itself being scattered (pital gola), boundaries could not be given of the same. The rent fixed for the three plots taken together was Rs. 80, payable in six different kists. It was stipulated in the Miras Ijara that in case of necessity for the sale of the lands comprised in the tenancy, the lessee shall sell the same to the lessor at a proper valuation, barring

that, the lessor shall not gift away, sell, sublet or make transfer of the same in other manner. In case the lessee did so, the properties comprised in the lease will revert to the lessor's khas possession on extinction of the lessee's right. The lands were to be enjoyed by the lessee from generation to generation exercising right of transfer subject to the condition mentioned above.

2. There was a transfer of two of the plots mentioned in the Ijara lease, and the plaintiff wanted to enforce the covenant against transfer in the present litigation. The case of the contesting defendants, defendant 7 and defendants 1 to 4, was that there has been no forfeiture of the tenancy, as only plots 2 and 3 of the lease and not plot 1, were transferred, that there was no contract in the lease for forfeiture in case of transfer of even a part of the leasehold. It may be taken to be well settled that restrictive covenant or a covenant entailing forfeiture of a tenancy in a case of alienation contained in a lease must be strictly construed against the lessor. A covenant against alienation by a lessee must relate to transfer of the entire leasehold; and on transfer of a part only, the lessor's right of re-entry would not accrue: see in this connexion *Sm. Swarnamoyee Debya v. Aferaddi* : AIR1932 Cal787 .

3. In the case before us, the principal question raised on the merits of the case was whether plot 1 mentioned in the Ijara lease existed at the date of the lease or not. There was however a distinct admission of the plaintiff on the subject that three properties were comprised in the lease including the Kamarhati land of five cottahs, which was plot 1 in the Miras Ijara lease, and as mentioned already, the incorporation of which item of property made registration of the document possible at the place where it was registered. The trial Court on the materials before it came to the decision that the property existed at the date of the lease, and that the same is in possession of defendant 7. The learned District Judge in the Court of Appeal below however came to the conclusion that the defendants failed to prove that plot 1 was a part of a permanent tenure. The reason given by the Judge was that plots 2 and 3 only were consistently treated as constituting the permanent grant. According to the Court of Appeal below, the forfeiture clause contained in the lease applied to the unwarranted sale of plots 2 and 3.

4. There was no question of ambiguity in the term of a document in the case before us and there was no case of any mistake by a party to the transaction, and in our judgment there was no justification whatever for the exclusion of plot 1 from the lease, on the lease itself and upon the clear admission of the plaintiff himself. There could be no doubt that one divisible tenure was created by the Miras Ijara (Ex. 4) and plot 1 could not be separated from plots 2 and 3 for the purpose of considering the question whether forfeiture of the tenancy was incurred by an authorized transfer of the same. As a matter of construction of the lease, and as a position from which the plaintiff could not be allowed to resile by virtue of his own admission, the plaintiff could not be heard to say that plot 1 of the Miras Ijara lease did not form part of the tenancy created. There was no alienation or transfer as contemplated by the lease in respect of plot 1; and the covenant relating to forfeiture contained in the lease could not therefore be invoked in favour of the plaintiff. On the decision arrived at by us, no other question arises for consideration in this appeal.

5. In the above view of the case before us, the decision of the Court of Appeal below is set aside, and the decision and decree passed by the Court of first instance dismissing the suit in which this appeal has arisen so far as it relates to prayer (ka) of the plaint is restored. The appeal is allowed in the manner stated above. The appellants to this Court are entitled to get their costs in the litigation throughout, including the costs in this appeal from the plaintiff-respondent.