

Tepu Mahammad Vs. Tefayit Mahammad and ors.

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SooperKanoon Citation : sooperkanoon.com/874366

Court : Kolkata

Decided On : Feb-10-1915

Reported in : 29Ind.Cas.216

Judge : Richardson and ;Mullick, JJ.

Appellant : Tepu Mahammad

Respondent : Tefayit Mahammad and ors.

Judgement :

Richardson, J.

1. The suit relates to two plots of land. It has been found, and is not now disputed, that the plaintiff has a gocid title to the land as a lessee under the zemindar, the Maharaja of Cooch Behar. Defendants Nos. 2 to 4 are jotedars and their land adjoins the land in dispute. Defendant No. 1 is admittedly a tenant under defendants Nos. 2 to 4 in respect of the land comprised within their jote. The suit was brought by the plaintiff to eject defendant No. 1 from the disputed plots of which he is in possession. Defendants Nos. 2 to 4 do not contest the plaintiff's claim.

2. It appears that defendant No. 1 is prima-faaie a trespasser and that the plaintiff is entitled to succeed, unless some such defence as adverse possession for the statutory period can be established. The first Court decided the suit upon the

simple consideration that defendant No. 1, not having been in possession for more than five or six years, was a trespasser. The Munsif, therefore, decreed the plaintiff's claim. The learned Subordinate Judge in the Court of Appeal below took a different view. In the first place, he allowed defendant No. 1 to raise a new issue. It is always dangerous to allow a new issue to be raised at the appellate stage, and the learned Subordinate Judge seems in this connection to have been betrayed into error. The new issue runs as follows : Having bona fide held as tenant of persons who were their de facto proprietors, has the defendant acquired any right, occupancy or non-occupancy, in the disputed land ? The issue was apparently framed with reference to the decision of the Full Bench of this Court in the case of *Binad Lal Pakrashi v. Kalu Pramanik* 20 C. 708. Some exception, however, may be taken to the mode in which the issue is worded. The question it was intended to raise was not whether the defendants Nos. 2 to 4 were the de facto landlords of the defendant No. 1, but whether they were the de facto proprietors of the disputed land and in that capacity settled it with that defendant. Where a person has been in possession of a particular estate or a particular portion of an estate as de facto landlord, it may be that raiyats settled by him on the land would have a good answer to a suit for ejectment brought by the true owner, but to carry the principle laid down by the Full Bench to the extent to which it has been carried in this case is to go much too far. There seems, indeed, to have been some confusion in the Subordinate Judge's mind between this principle and another principle on which the Courts have acted. Where a tenant of A encroaches on the adjoining land of B, no doubt as between A and his tenant there is a presumption that the encroachment enures to A's benefit and becomes on accretion to tenant's holding under *A Nuddyarchand Shaha v. Meajan* 10 C. 820. The tenant will ordinarily hold the land upon which he has encroached as tenant of A and in that case A may perhaps be described as his de facto landlord. But that is a very different thing from saying that the land was settled with the tenant by A as de facto proprietor and in such circumstances as those indicated, there would be nothing to prevent B, the true owner of the land encroached upon, from bringing a suit for the purpose of recovering possession from A and his tenant. Similarly in the case before us the learned Subordinate Judge has not found that the disputed land was in fact in the possession of defendants Nos. 2 to 4, nor has he found that the

disputed land was included within the area settled with defendant No. 1 by defendants Nos. 2 to 4. No case is made,, therefore, for the application of the principle of the Full Bench decision. That principle only applies where raiyats are settled upon land by a person in de facto possession as landlord, who is afterwards found to have no title. It is not applicable in every boundary dispute or in every case where a question of parcel or no parcel arises. It is obvious that the learned Subordinate Judge was wrong in allowing a new case to be made in appeal and that he had no clear conception of the limitations of the principle on which he founded his decision.

3. There remains the question of limitation. In the course of his judgment the learned Subordinate Judge says that the defendant No. 1 has been in possession for the last 10 or 15 years. This is an extremely vague finding upon an important question, which should have been the subject of precise decision. It is impossible for us to say upon the judgment, as it stands, whether the learned Subordinate Judge is of opinion that, defendant No. 1 had or had not acquired any title upon the footing of adverse possession. This is the subject of the first two issues framed by the first Court and if the Subordinate Judge had confined himself to those two issues and had come to an express finding upon them, his judgment would probably have been more satisfactory. As the matter stands, in my opinion the judgment and decree appealed from must be set aside and the suit remanded to the lower Appellate Court in order that the appeal thereto may be re-heard upon the issues originally settled.

4. Costs will abide the result.

5. Mullick, J.--I agree.