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Court : Kolkata

Decided On : Jul-18-1922

Reported in : 71Ind.Cas.976

Judge : Asutosh Mookerjee and ;Chotzner, JJ.

Appellant : Jamini Mohan Sarkar and ors.

Respondent : Debendra Narayan Singh

Judgement :

1. This is an appeal by the plaintiffs in a suit for recovery of possession of land on establishment of title. The plaintiffs are the representatives-in-interest of the reversionary heir to the husband of a Hindu widow, Rani Nilkumari Debi, who was at one time in possession of the estate. On the 26th October 1869, she granted a permanent lease at a fixed rent to the predecessor-in-interest of the defendant. The plaintiffs contend that this lease was granted in excess of her authority as a Hindu widow in possession of the estate of her husband, and that they are consequently entitled to recover possession by ejectment of the defendant. The defendant resisted the claim on a twofold ground, namely, first, that the lease granted on the 26th October 1869 was a fair transaction binding upon the estate in the hands of the reversioners after the death of the lady; and, secondly, that if the lease ceased to be operative upon the death of the lady, he was entitled to fall back upon another lease which was in existence when the grant of the 26th October 1869 was made. The Court of first instance found upon both the points

against the defendant. The result was that the suit was decreed. Upon appeal the District Judge has held that the Court of first instance had rightly decided the first question in favour of the plaintiffs; but he has held upon the second question that the prior lease was not surrendered. In this view, the decree of the Court of first instance has been modified, and, although the title of the plaintiffs has been declared, no decree for ejectment has been made in their favour. On the present appeal, the plaintiffs have contended that there was no prior lease in operation which would protect the defendant from ejectment. The defendant, on the other hand, has, by way of cross-objection, argued that the grant of 1869 was not beyond the scope of the authority of a Hindu widow and protected him from eviction.

2. We may state at the outset that the cross-objection cannot possibly succeed. The Courts below have concurrently found that the permanent lease at a fixed rent granted by Rani Nilkumari on the 6th October 1869 was in excess of her authority as a limited owner in possession of the estate of her husband and does not bind the estate in the hands of the reversioners. It has been argued before us that this conclusion may be impeached in second appeal, as the various aspects of the case which arise on the facts found were not considered by the Courts below. We are unable to give effect to this contention, and the only question which requires consideration is as to the effect of the lease of the 26th October 1869 upon the prior lease.

3. It has been found by the Courts below that at the time when the grant of 1869 was made, the predecessor of the defendant was in possession as a tenure-holder. The tenure was heritable and transferable, though held at a variable rent. The tenure had been created by a predecessor-in-interest of Rani Nilkumari who was full owner and was competent to create such an interest in favour of the defendant. The question, consequently, arises whether the acceptance of the lease of the 26th October 1869 by the predecessor of the defendant must be taken to be equivalent to an implied surrender of the prior lease. The Courts below have, in our opinion, correctly answered this question in the negative. Section 113 of the Transfer of Property Act provides in Clause (f) that a lease of immoveable property determines by implied, surrender. The illustration to the clause is to the following

effect: 'A lessee accepts from his lessor a new lease, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.' In the present case the grant of the 26th October 1869 was not intended to be, and did not operate as, a new lease. The object of the parties was to alter one of the most important incidents of the tenancy, namely, to fix the rent in perpetuity. This did not effect a new grant; Upendra Krishna Mandal v. Ismail Khan Mahomad 32 C. 42 : 31 I.A. 144 : 8 C.W.N. 889 (P.C.), Nilratan Mandal v. Ismail Khan Mahomed 32 C. 51 : 31 I.A. 149 : 8 C.W.N. 895 (P.C.) and Naba Kumari Dabi v. Behari Lal Sen 34 C. 902 : 34 I.A. 160 : 6 C.L.J. 122 : 11 C.W.N. 865 : 4 A.L.J. 570 : 9 Bom. L.R. 846 : 17 M.L.T. 397 : 2 M.L.T. 433 (P.C.). In the case last mentioned, Sir Arthur Wilson pointed out that the view taken in the two earlier decisions was in accordance with the law as laid down in Ram Chunder Dutt v. Jugesh Chunder Dutt 12 B.L.R. 229 at p. 238 : 19 W.R. 353 (P.C.). This grant of the 26th October 1869 has, however, not achieved its purpose. The object of the grantor and the grantee was to effect an alteration in the tenancy which would be operative against the estate in the hands of the reversioners. But the grant was made under circumstances which could not make it operative against the reversioners. What then is the effect in law?

4. It is well settled that an implied condition of surrender by operation of law is that the new lease should be a valid one. Accordingly, a lease which is void or voidable or which does not pass interest according to the contract of the parties does not operate as a surrender. In this connection reference may be made to the judgment of Farwell, L.J., in Zick v. London United Tramways (1908) 2 K.B. 126 : 77 L.J.K.B. 942 : 98 L.T. 841 : 72 J.P. 257 : 24 T.L.R. 577 where he quotes with approval the following passage from the judgment of Coleridge, J., in Doe d. Egremont v. Courtenay (1848) 11 Q.B. 702 at p. 712 : 75 R.R. 600 : 17 L.J.Q.B. 151 : 12 Jur. 454 : 116 E.R. 636: 'Where the new, lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease; in the case of surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void: and in case of an express surrender so expressed as to show the intention the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in

order to effectuate the intention of the parties, would make that surrender also conditional, to be void in case the grant should be made void.' To the same effect is the decision in *Canterbury Corporation v. Cooper* (1909) 100 L.T. 597 : 73 J.P. 225 : 7 L.G.R. 908 : 53 S.J. 301. We hold accordingly that when it was established that the defendant could not rely upon the grant of the 26th October 1869 as an answer to the claim of the plaintiffs he was competent to fall back upon the prior lease; that lease unquestionably furnishes a complete answer to the claim.

5. The result is, that the decree of the District Judge is affirmed and this appeal dismissed. But there will be no order for costs, as the appeal and the cross-objection have both failed.

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