

Rabindra Kumar Shaw and ors. Vs. Tanusree Chatterjee

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Court : Kolkata

Decided On : Jan-20-2006

Reported in : 2006(4)CHN82

Judge : Bhaskar Bhattacharya and ;Pravendu Narayan Sinha, JJ.

Acts : City Civil Court Act; ;West Bengal Premises Tenancy Act; ;Kolkata Municipal Corporation Act; ;Code of Civil Procedure (CPC) - Order 21, Rules 97 and 101 - Order 41, Rules 11, 24 and 103

Appeal No. : S.M.A.T. No. 163 of 2006

Appellant : Rabindra Kumar Shaw and ors.

Respondent : Tanusree Chatterjee

Advocate for Def. : Asit Kumar Bhattacharyya, Adv.

Advocate for Pet/Ap. : Barun Roychowdhury and ;Binod Kumar Gupta, Advs.

Disposition : Appeal dismissed

Judgement :

Bhaskar Bhattacharya and P.N. Sinha, JJ.

1. The learned Advocate for the appellants is permitted to strike out the additional signatures appearing in the vokalatnama.

2. This second miscellaneous appeal is at the instance of third parties in proceeding under Order 21 Rule 97 read with Rule 101 of the Code of Civil Procedure and this appeal is preferred against a judgment of affirmance.

3. The decree holder instituted a suit being Ejectment Suit No. 189 of 1972 in the City Civil Court at Calcutta against his tenant one Dalsingar Singh. Such suit ended in a decree in favour of the plaintiff-landlord. On an appeal preferred by the tenants such decree was affirmed up to this Court. Subsequently, the landlord instituted execution case for getting possession of the property from the tenants thereby giving rise to Ejectment Execution Case No. 160 of 1989 in the City Civil Court at Calcutta which was renumbered as Ejectment Execution Case No. 130 of 2002 after transfer of the said proceedings to the Presidency Small Causes Court, Calcutta by virtue of amendment of the City Civil Court Act and the West Bengal Premises Tenancy Act.

4. In the said execution case, the present appellants came forward with an application under Order 21 Rule 97 read with Rule 101 of the Code of Civil Procedure thereby giving rise to Misc. Case No. 142 of 2005 apprehending dispossession by virtue of such execution case.

5. The specific case made out by the present appellants was that they occupied the vacant land in the year 1991-92 and made construction over the property by constructing a kutcha hut. It is further asserted that from the year 1991-92 they are all along in possession of the property openly and by virtue of such open, uninterrupted possession, title of the landlord has extinguished by adverse possession. They, therefore, claimed that the decree for eviction passed against the tenants was not binding upon them.

6. The aforesaid allegations of the appellants were disputed by the landlord by filing written objection and according to the landlord, the appellants are set up by the tenants. The learned Trial Judge on consideration of the materials-on-record disbelieved the case of adverse possession put forward by the appellants, and, thus, passed an order for eviction by due process of law, namely, execution of the decree.

7. Being dissatisfied, the appellants preferred an first appeal before the learned Court of Appeal below and by the order impugned herein the said Court has affirmed that passed by the learned Executing Court.

8. Being dissatisfied, the appellants have come up with the present second miscellaneous appeal.

9. Mr. Roychowdhury, the learned Advocate for the appellants strenuously contended before us that both the Executing Court and the Appellate Court misapplied the principle of adverse possession in arriving at the conclusion that his clients did not acquire title by adverse possession. Mr. Roychowdhury points out that both the Courts below erroneously came to the conclusion that in order to acquire title by adverse possession it is necessary that acquisition of possession must be brought to the notice of the owner of the property and according to him on such misconception of law the learned Courts below have dismissed the claim of his clients.

10. After hearing Mr. Roychowdhury, learned Advocate for the appellants and after going through the materials-on-record, we find that although there is such finding recorded by the learned Courts below which we do not approve, yet in the fact of the present case, it is apparent that the appellants could not acquire title to the property by adverse possession against the owner of the property.

11. We find that undisputedly the owner of the property filed a suit for eviction in the year 1972 against tenants and after a long battle succeeded and put the decree into execution. The present appellants claimed to have acquired possession only in the year 1991-92 after passing of the decree, but during the pendency of the execution case.

12. It is now settled law that if a property is in actual occupation of a tenant, so long such tenancy does not come to an end and consequently, the owner is in position to resist the possession of any third party, the third party's illegal possession does not become adverse to the owner of the property though the same may be adverse to the tenant in actual occupation. Therefore, in the present case, the landlord having failed to obtain possession from the tenants through due

process of law and the tenants ail along having resisted such endeavour, even if the appellants entered into possession, such possession did not become adverse to the owner of the property.

13. Apart from the aforesaid fact, the property being undisputedly within Kolkata over which Kolkata Municipal Corporation Act has application, in our view, in order to assert possession as adverse to the owner of the property, the occupier must describe himself openly as occupier by approaching the municipal authority for insertion of his name in the municipal records thereby taking responsibility of payment of tax for the service rendered by the municipality to the occupier of the property.

14. It is not the case of the appellants that they have mutated their names in the municipality and/or paying taxes on the basis of their own possession. Since the property is still in the name of the owner of the property and he is paying taxes, illegal possession of the appellants have not ripened into adverse possession so as to extinguish the title of the original owner.

15. We, therefore, although do not approve the reasons assigned by the learned Courts below, we maintain the ultimate conclusion of the learned Courts below that the appellants did not acquire title to the property by adverse possession on the basis of materials-on-record by exercising our power under Order 41 Rule 24 read with Rule 103 of the Code of Civil Procedure.

16. We, thus, find that no substantial question of law is involved in this second miscellaneous appeal and the same is accordingly dismissed under Order 41 Rule 11 of the Code of Civil Procedure.

17. After this order is passed, Mr. Roychowdhury prays for time to vacate the property.

18. Since the suit was filed in the year 1972, 34 years ago, and the present appellants are claiming title in respect of indefinite portion of the property, in our view, stay of decree will create unnecessary complications and in the fact of the present case, we are not inclined to assist a rank trespasser.

19. The prayer is thus refused.

20. In views of dismissal of the appeal, the connected application for stay being C.A.N. No. 411 of 2006 has become in fructuous and the same is accordingly disposed of.

21. Let xerox certified copy of this order be given to the parties by Tuesday next, if applied for.

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