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Court : Kolkata

Decided On : Jul-24-1911

Reported in : 13Ind.Cas.455

Judge : Mookerjee and ;Carnduff, JJ.

Appellant : Narak Lal

Respondent : Thagoo Lal

Judgement :

1. This is an appeal on behalf of the first defendant in an action commenced by the plaintiff-respondent under Section 283 of the Code of Civil Procedure, 1882. It appears that in 1907 the first defendant in execution of a decree held by him against the second defendant sought to attach the property now in dispute. The plaintiff preferred a claim under Section 278 of the Code of Civil Procedure of 1882 on the allegation that the second defendant had neither any title to, nor possession over, the disputed property and that the land was his private land and was not liable to be sold in execution of the decree held by the first defendant. The execution Court adjudicated upon the claim and disallowed it. On the 4th April 1903, the plaintiff commenced this action for declaration that the order of the 25th May 1907 was erroneous, that he was the proprietor of the land and that the first defendant had no right in execution of his decree against the second defendant to bring the property to sale. The suit was resisted at first by both the defendants but it appears that at a later stage of the proceedings, the debtor defendant did not

appear.

2. The Court of first instance found that the plaintiff had failed to establish that the land was his private land and that consequently the suit must fail. On appeal the District Judge has held, upon the authority of the decisions of this Court in the cases of Narsingh Narian Singh v. Dharam Thakur 9 C.W.N. 144 and Baraik Kamal Sahai v. Lilhu Christian 8 C.L.J. 170 that the burden is upon the second defendant to establish the tenancy right alleged by him. The District Judge has in fact treated the case as if it was an action in ejectment by the landlord proprietor against the second defendant, and his judgment does not contain any reference to the position of the execution creditor, the first defendant, who was the person really sought to be affected by this litigation. No doubt, in the latter portion of the judgment the District Judge has considered the evidence of the plaintiff, but it is manifest from the judgment taken as a whole that the District Judge has thrown the burden of proof upon the second defendant and has made a decree in favour of the plaintiff because that burden has not been satisfactorily discharged. On behalf of the first defendant this decision has been assailed on the ground that the District Judge has not appreciated the true question in controversy between the parties and that he has considered the case from an erroneous point of view. The learned Vakil for the plaintiff-respondent has strenuously contended that the case is concluded by the findings embodied in the judgment of the District Judge and he hap placed reliance upon the facts which, he contends, have been found by the lower Appellate Court in his favour. In our opinion, there is no room for serious controversy that the appeal has not been properly tried by the District Judge, because he failed to realize the true question in controversy between the parties.

3. As we have already explained, the suit is one commenced by the plaintiff under Section 283 of the Code of 1882. The grievance of the plaintiff is that the adverse decision in the claim case was erroneous and unjust. It is well settled that, in a suit of this description, the burden of proof is upon the unsuccessful inteivenor in the claim case. It is sufficient in support of this proposition to refer to the cases of Mohima Chandra Koondoo v. Noorooddin 11 W.R. 422; Sri Narain Chuckerburty v. A.B. Miller 15 W.R. (O.C.) 7 and Ram Nath v. Bindraban 18 A. 369. The same view is also supported by the observations of their Lordships of the Judicial

Committee in the case of Mitchell v. Mathura Das 12 I.A. 150 : 8 A. 6. If the District Judge had realized the true nature of the suit he would have placed the burden pf proof upon the plaintiff to establish the specific title alleged by him. On the other hand, the two cases mentioned by the District Judge have no application to suits of this description. Those cases merely show that when the admitted proprietor sues to eject a person on the ground that he is a trespasser and the latter sets up a tenancy, the burden is upon him to establish the tenancy alleged because, if the tenancy is not proved, the plaintiff is entitled to recover possession on the strength of his proprietary title, unless, indeed, that title has been barred by limitation. There is also no question that the District Judge has not appreciated the true bearing of the fundamental question in the case; for instance, he makes an adverse comment upon the case of the defendants because the second defendant had riot produced any rent receipt in support of the tenancy alleged by the first defendant. Now, if the contest was between the plaintiff and the second defendant, this circumstance might have carried considerable weight; but when the contest is between the plaintiff and the first defendant who seeks to sell the property which, he alleges, belongs to the second defendant, the latter cannot very well be expected to assist his execution-creditor. Again, the District Judge relies upon the circumstance that, in the partition proceedings of 1894, the land is described as the private land of the proprietor; but he overlooks that the primary question to be decided in the case is whether, at the time of the attachment of the land by the first defendant, the second defendant had a tenancy right therein. Now, as this attachment proceeding took place in 1907, it is conceivable that although the land might have been in the possession of the proprietor as his private land in 1894, in the course of the thirteen years which subsequently elapsed the second defendant might have acquired a tenancy right in the disputed land. The District Judge also does not attach any weight to the entry in the record of rights. Here, again, he has clearly misconceived the law. The burden of proof lies upon the plaintiff, not merely in view of the fact that he was unsuccessful in the claim case but also in view of the circumstance that the entry in the record of rights tends to support the case of the defendant. The District Judge has also attached considerable weight to the release alleged to have been executed by the second defendant in favour of the plaintiff on the 11th April 1907. Apart from the circumstance that the release in

question was executed on the date on which the first defendant applied for execution of his decree against the second defendant, the position is unassailable that the release did not operate as a conveyance. It could at most be taken as an admission by the second defendant that he had no interest in disputed land. Jadunath v. Roop Lal 33 C. 967 at p. 984 : 4 C.L.J. 22 : 10 C.W.N. 650. Consequently, if it is found that the second defendant was a tenant in respect of this land the release is of no assistance to the plaintiff; and whether the admission by the second defendant is of any avail must necessarily depend upon the surrounding circumstances of the case. We have said enough to show that the District Judge has not truly appreciated the questions in controversy before him. The result, therefore, is that this appeal is allowed, the decree of the lower Appellate Court set aside and the case remanded to that Court in order that the appeal may be re-heard. The costs of this appeal will abide the result.