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Court : Kolkata

Decided On : May-22-1929

Reported in : AIR1929Cal830

Appellant : Ramjoy Modak and ors.

Respondent : Durga Charan Nath and anr.

Judgement :

Mitter, J.

1. This is an appeal by the plaintiffs and arises out of a suit brought by them on the allegation that the lands were originally held by one Dina Nath at a jama of Rs. 8-3-0 and that Dina Nath made a gift of the entire holding on 5th March 1327 B. S. to defendant 1 and that defendant 1 took possession of the jote on 13th November 1923 and that consequently there has been an abandonment by the old tenant of this holding which entitles the plaintiffs to re-enter, The defence of defendant 1 in substance was that the entire jote of Dina Nath was not transferred to him by the deed of gift and there has not been an abandonment of the jote by the heirs of the old tenant, Dina Nath having died since the execution of the deed of gift. The Court of first instance found that there has been a gift of the entire holding of Dina Nath and basing its decision on this finding decreed the plaintiffs' suit and declared the plaintiffs' maliki right to the lands in suit and directed that they do get khas possession therein after ejecting the defendants. Against this decision an appeal

was taken to the Court of the second Subordinate Judge of Sylhet. The Subordinate Judge came to the conclusion that there has not been a transfer by way of gift of the entire holding, that out of 27 keyars which is the area of the holding the deed of gift covers only 15 keyars and there has not been any abandonment as after the deed of gift the widow of Dina Nath, the original tenant, used to be in possession of the lands reserved by Dina Nath through bhagidar tenants. On this view the lower appellate Court reversed the decision of the Court of first instance and dismissed the plaintiffs' suit. The plaintiffs have consequently brought this second appeal and the main contention before us on behalf of the plaintiffs appellants has been that there has not been a proper finding on the question of abandonment by the lower appellate Court and the case should be remitted to him in order that he may re-hear the appeal on the question of abandonment

2. The finding of the lower appellate Court that the widow of Dina Nath possessed a portion of the holding even after the deed of gift cannot be questioned in second appeal. Dina Nath died in 1329 B.S. and his widow Bisakha who succeeded him died in 1330 B.S. i.e. sometime in 1923. According to the finding of the lower appellate Court the widow was in possession till 1923 and the present suit was commenced on 12th June 1924. It has been argued by the learned advocate for the appellants that as no rent has been paid by Dina Nath's daughter who succeeded to Dina Nath's holding after the death of Bisakha the lower appellate Court should have inferred that there has been an abandonment of the holding. It has also been stated that in the written statement which had been filed by Dina Nath's daughter in Court in this case she has disclaimed any interest in this tenancy and it is said that that is sufficient to entitle the landlord to re-enter. With reference to the written statement it is enough to state that no cause of action could be founded on any allegation made in the pleadings. The cause of action must be antecedent to the suit. In order to entitle the landlord to reenter, it must be shown that there has been transfer by way of gift either of the whole or part of the holding and repudiation or relinquishment or abandonment of the tenancy with reference to the remainder by either the original tenant or the heirs of the said tenant. The written statement which is filed in the course of the suit does not show that there has been a repudiation of the tenancy prior to the institution of the suit. It

could not give rise to the cause of action for this suit. Neither do we think that the mere fact that for a very short period rent had not been paid by the heirs of Dina Nath can justify the landlord to consider that the holding has been abandoned by the old tenant. It would not be right having regard to the shortness of the period intervening between the cessation of the payment of the rent and the date when the suit was instituted to infer abandonment by the original tenant even assuming that the question of abandonment is a question to be inferred from the facts found. It has been pointed out in the Full Bench case of Dayamayi v. Ananda Mohan Roy [1914] 42 Cal. 172 that the question as to whether there has been an abandonment depends on the circumstances of each case. We are not satisfied that the facts on which reliance has been placed by the learned advocate for the appellants constitute an abandonment.

3. The result is that the appeal fails and must be dismissed with costs.

Graham, J.

4. I agree.

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