

(Firm) Ram Sahai Ram Ratan Vs. Imami

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Court : Allahabad

Decided On : Mar-06-1935

Reported in : AIR1935All586; 157Ind.Cas.526

Appellant : (Firm) Ram Sahai Ram Ratan

Respondent : imami

Judgement :

Bennet, J.

1. This is a second appeal by a plaintiff against, a decree of the appellate Court dismissing the suit of the plaintiff. The plaintiff brought a fuit setting out that the plaintiff was thekadar of an enclosure No. 66 known as Mandi Qaziganj together with a house in the enclosure, that Imam defendant was occupying a Kothri in the said enclosure on a rent of Re. 1-4-0 per mensem, that there was a quarrel between the parties and on 5th June 1929. the plaintiff sent a notice by registered post, to defendant to vacate the Kothri by the end of June 1929 and to pay the rent which was due from March 1929, that, in reply to the notice defendant, wrote stating that he was not a tenant of the said Kothri but that he was a tenant of the land and the owner of the Kothri and that the rent was due year by year for the land. The plaintiff asked for possession of the Kothri and Rs. 5 arrears of rent and Rs. 5 damages. The written statement set out that plaintiff was not the owner of the house, that contesting defendant was the owner of the house, and that the predecessors of the plaintiff were the owners of the site only and plaintiff had only got a right to realise the rent of the site which the contesting defendant had never refused, that the house had been constructed by some predecessors-in-title of the defendant and that the proprietors of the Mandi had no concern with, the construction of the house and that the predecessors-in-title of the defendant had been for a long time in occupation of the house.

2. The first issue framed was whether the plaintiff was the owner of the Kothri in suit, and the second was whether the defendant was the tenant of the disputed Kothri. The Munsif held that the plaintiff was the owner of the land and that a sale by one Alopi to Bhawani, uncle of the present defendant, was a sale of the materials of the house, only and not of the house. The Munsif granted a decree to the plaintiff for possession of the Kothri allowing the defendant, to remove the materials. The defendant appealed and the lower appellate Court set out that the point for determination was whether the defendant purchased only building materials or also the right of residence, and whether the suit was barred by estoppel. The Court found that although the sale deed was missing the statement of the plaintiff's witness Nathu Teli proved that this witness admitted that formerly Alopi lived In that room and then Bhawani came some 30 or 35 years ago, and for the purpose of the present discussion

the possession of Bhawani over the house is proved for over 30 years, that, the Munsif had decided that the payment of rent was ground rent and no objection had been taken to that finding, that under a deed of gift of 3rd November 1890 by Bechu in favour of Bisheswar, predecessors of the defendant, there was a gift of the house and not of the land on which it stood, that the right to reside in the house was the subject of the gift so long as the donee paid the ground rent. Then follows a sentence to which objection has been taken:

There is no doubt that there is no registered lease but the fact that the house has been allowed to stand on the land for such a long time shows the permanency of the tenancy, also the fact that so long the rent has not been, increased.

3. Learned Counsel has assumed in grounds Nos. 1 and 2 of the second appeal that this is a finding that there was a perpetual lease and objection is taken that a perpetual lease, was not pleaded or put in issue and should have been created by a registered instrument under the Transfer of Property Act of 1882 and the Registration Act. I do not consider that the finding is intended to be that there was a perpetual lease. The words used are 'the permanency of the tenancy' as opposed to a tenancy for a short period of month to month or year to year. What the Court has found is contained in the last sentence of the judgment before the order which is:

The plaintiff's case that he was the owner of the shop and land has been proved to be false and in my opinion he is only entitled to realize the ground rent so long as the house stands and the present defendant has a right of residence in it.

4. This is not a finding that there was a perpetual lease because in the case of a perpetual lease the lessee would have a right to remain in possession even though the house had ceased to stand; but the finding is that defendant is entitled to remain in possession 'so long as the house stands.' In other words the lower Court has found that the defendant owns a house and a right to retain the site as long as it stands. This is the usual term which the Courts hold applies to the rights between the owners of sites and the owners of houses in a city, such as in the present case the city of Allahabad. Objection has been taken by learned Counsel that the Transfer of Property Act and the Registration Act would apply. I may note that this objection is only taken in the memorandum of second appeal to the existence of a perpetual lease and it is not taken to the existence of the tenure which has been found by the lower Court as a, tenure to occupy the site so long as the house stands. Even if we extend the argument in grounds Nos. 1 and 2 of the memorandum of second appeal to cover the actual tenure found, there are certain difficulties in the way of the appellant. These difficulties are that in the plaint the appellant did not set out that the house had been built subsequent to the Transfer of Property Act of 1832 and the first Registration Act. Learned Counsel argued that it would be for the defendant to plead that the house had come into existence prior to those Acts. I consider that the allegation that the house had been built subsequent to those Acts should be made in the plaint. Secondly there was no plea in the plaint that there should have been a registered agreement for the creation of the tenure in question. Thirdly by accepting rent, for the site from the defendant for so many years and by agreeing to the transfer from Alopi to Bhawani many years ago, the plaintiff and his predecessors are in my opinion estopped from raising the question now that the original transfer was not made in a legal form. This question of estoppel forms the subject of the third ground of appeal.

5. The fourth ground is that the Court below misconstrued the evidence of defendant

which was that Alopi sold the 'amla' and that the word 'amla' could only mean the materials of the house. The finding of fact is that the house was owned by the defendant and his predecessors and that only the site was owned by the plaintiff and his predecessors. When Alopi made a sale-deed he would naturally transfer all the right which he possessed. The sale-deed is not before us and there is only an oral account by a witness for the plaintiff, Nathu Teli, of what was sold. The deed of gift has been produced and it shows that the house was transferred. In regard to the use of the word 'amla' there is a difficulty experienced by Indian witnesses in distinguishing between a house and the site on 'which the house stands and they frequently use the word 'amla', which no doubt literally means materials, to indicate the house as it stands as contrasted with the site. The lower appellate Court was entitled to construe the evidence before it to mean that the house as it stood with the right of occupation was, transferred by Alopi to Bhawani. This is a finding of fact and I do not, consider that the matter can be raised in second appeal. It was a question of fact as to what was meant by the witnesses by the use of this particular word 'amla' and it is not for a Court, of second appeal to reverse the finding on the meaning of this word of the lower appellate Court. For these reasons I consider that no case has been made out for second appeal and I therefore dismiss this second appeal with costs. As points of law have been raised I grant permission for a Letters Patent appeal.

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