

(1911) 05 CAL CK 0028
In the Calcutta High Court

Giri Narain Chatterji

APPELLANT

Vs

Modhu Sudan Mukerji

RESPONDENT

Date of Decision : 24-05-1911

Acts Referred:

Bengal Tenancy Act, 1885 — Section 157

Citation : 18 Ind. Cas. 751

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. We are invited in this Rule to set aside a decree whereby the Court below has dismissed a suit described as one for mesne profits or damages for use and occupation. The case for the plaintiff is that he purchased the property at a sale execution of a decree for rent but was unable to obtain possession as against the defendant. In 1895, he sued the defendant for declaration of title and recovery of possession. He obtained a decree which was confirmed in appeal in the year following. He executed the decree in 1898, but obtained only symbolical possession. Since then, the defendant has continued in actual occupation of the land and the plaintiff has sued successfully in 1898, 1902, 1904 and 1907 for recovery of damages for use and occupation of the land. The present suit was commenced in 1910 and here again the plaintiff asked for compensation for use and occupation. The Court below has dismissed the suit on the ground that as the plaintiff was not in possession at the date of the institution of the suit, he was not entitled to recover damages for use and occupation on the principle explained by this Court in the case of Lep Singh v. Nimar 21 C.244. In our opinion, the view taken by the Court below is erroneous and cannot be supported. The decision upon which reliance is placed merely shows that if a person has been dispossessed from Immovable property and brings a suit for recovery of mesne profits, the suit is not maintainable, and that the proper remedy open to him is to institute a suit for declaration of title and recovery of possession with mesne profits. This decision is based on the principle that as the title of the plaintiff is denied by the defendant, he ought not to obtain a decree

for mesne profits till his title has been established in a Court of competent jurisdiction. In the case before us, the title of the plaintiff has been established in a Court of competent jurisdiction and that decision is conclusive between the parties for all time to come. The plaintiff has also obtained symbolical possession as against the defendant and such possession, as is well settled, is effective against the judgment-debtor, though it may not be operative as against strangers to the suit. The position, therefore, is that although the title of the plaintiff has been declared and he has obtained symbolical possession, he has allowed the defendant to continue in actual occupation of the land. He has, however, successfully asserted his right to be paid a fair and reasonable amount of damages for use and occupation of the land. In other words, the substance of the matter is, that the plaintiff has been in occupation of the land through the defendant during all these years. Consequently, it is no longer open to the defendant to question the title of the plaintiff, and there is no intelligible reason why the latter should not be allowed to maintain an action for recovery of damages for use and occupation of the land. The principle upon which our decision is based is in fact recognised by the Legislature in Section 157 of the Bengal Tenancy Act, where it is provided that a plaintiff who institutes a suit for the ejectment of a trespasser, may, if he thinks fit, claim as alternative relief that the defendant be declared liable to pay for the land in his possession a fair and equitable rent to be determined by the Court, and the Court has authority to grant such relief accordingly. Here the plaintiff is not competent to determine the fair and equitable rent which would be payable by the defendant. But he has obtained a decree for damages for use and occupation. The defendant cannot be allowed to remain in possession and at the same time to pay nothing in the shape of damages to the plaintiff.

2. The Rule is, therefore, made absolute, the decree of the Small Cause Court Judge set aside and the case remanded to him in order that the amount of damages may be determined upon evidence. As the Rule has not been opposed, there will be no order for costs.