

CALCUTTA HIGH COURT

Dwarkanath Roy

Vs

Ram Chand Aich

(F W Maclean, C.J .K Prinsep and O'Kinealy, JJ. Banerjee and Hill , JJ.)

31.01.1899

JUDGMENT

Maclean, C.J.

1. The question submitted to us ought to be answered in the negative. The issue determined in the previous suit (a rent-suit) was, whether the relation of landlord and tenant existed at the time when that suit was instituted between the present plaintiff and the then defendant, and whether the then defendant was liable for the amount then claimed as rent for a certain period. That issue was decided against the present plaintiff, and as it is conceded that nothing has occurred in the interval to change the position of the parties, that question must be treated as res judicata as against the plaintiff, and in the defendants' favour. But the relief sought in the present suit is absolutely different from the relief sought in the previous suit. The present issue is, whether the land in dispute belongs to the plaintiff, and, if so, whether the plaintiff is entitled to compensation from the tenant defendant for the use of the land. That is put clearly in the reference, and I agree with the view expressed by the referring Judges, that, having regard to the nature of the relief sought in the previous suit, and the relief sought in the present suit, it is impossible to say that the plaintiff is barred in this suit from establishing his title to the land both against the alleged tenant and also against the person whose title as landlord the tenant defendant had set up in the rent-suit.

2. I do not propose to refer to the case of *Gopal Das v. Gopi Nath Sircar*¹ because it has not been relied on by the learned Vakil who argued the respondents' case.

3. The appeal must be allowed, and the case remanded to the Lower Appellate Court for trial on the merits, and the costs both of the hearing before the Division Bench and of this reference must abide the result.

Prinsep, J.

4. The question referred for our decision is, whether the proceedings in the former suit are a bar

to the present suit by reason of Section 13 of the Code of Civil Procedure.

5. In the former suit, the present plaintiff sued the tenant defendant for arrears of rent, claiming that the defendant was his tenant. The defendant pleaded that he was not the plaintiff's tenant, but the tenant of a third party who was entitled to the land. That suit was dismissed. The plaintiff has now again sued the defendant tenant, joining with him the person who was in the former suit set up as the defendant's landlord, and he has asked for a decree declaring his title to the land with consequential relief in somewhat complicated terms. First of all, he has asked for consequential relief by ejectment of the defendant tenant who disputed his title in the former suit, and he has also asked for alternative relief in the shape of rent from the defendant. In the course of the suit it would seem that his legal advisers, on his behalf, withdrew the claim for ejectment, and, therefore, by his suit, as it is now presented to us, the plaintiff is seeking for a declaration of his title to the land and for the recovery of rent from the defendant tenant who had successfully disputed his right to receive rent from him in the former suit.

6. At first sight, it would seem that this claim is barred, inasmuch as it was made the subject of the previous suit and was adjudicated upon, for it is not stated that at any time since the decision in the former suit fresh relations of landlord and tenant have been created between the parties so as to prevent; the findings in that suit being applied to them now. But the suit, so far as the adjudication of the plaintiff's title is concerned, cannot, as I understand the law, be considered as *res judicata* in the present proceedings, inasmuch as the parties are not the same, the plaintiff having, in this case, joined with the tenant defendant who disputed his title, the person under whom that tenant professed to hold, and his object in bringing this suit is to remove the cloud which was cast upon his title by the former proceedings, and he could not effectually do so except by making, as his adversary in this suit, the person who professes to hold the title as against him. Ordinarily, he would not be entitled to consequential relief in the form of a decree for rent, because it had already been decided in the former suit between him and the tenant that he was not entitled to such rent. We have, however, to apply the terms of Section 157 of the Bengal Tenancy Act, and, under that section, the plaintiff can, in my opinion, obtain a decree in the form which he seeks. Section 157 enables the plaintiff in a suit for the ejectment of a trespasser, such as the present suit, to ask instead of his ejectment, that the trespasser or the person whom he seeks to eject may be declared liable to pay, for the land in his possession, a fair and equitable rent to be determined by the Court, and that, as I understand, is the form which the suit now before us has assumed.

7. It seems to me, therefore, that the present suit is not barred, and that the plaintiff, if he establishes his right, can obtain a decree in this form.

O'Kinealy, J.

8. I agree with the opinion expressed by the learned Chief Justice. In 1885, the plaintiff brought a suit for rent against the defendant No. 1, and in that suit, it was decided on issue raised, by a

Court of competent jurisdiction, that the relation of landlord and tenant did not exist. That, I think, was *res judicata* that the relationship of landlord and tenant did not exist between these parties in 1885, but I agree in considering that would not dispose of the matter, for on the day after that decree, the plaintiff could have brought an action in ejectment and have succeeded if he could have made out his title to the property and that the cause of action was not barred. He can do the same now, and if the pleadings be read as constituting an action in ejectment, the suit is good, and not barred by *res judicata*. It has been pointed out, that if the plaintiff is entitled to maintain the action, he may, under Section 157 of the Bengal Tenancy Act, claim in the alternative a fair and equitable rent to be determined by the Court. I think, therefore, that the case must be disposed of on these lines.

9. It seems to me that there has been a misconception in regard to the case of *Gopal Das v. Gopi Nath Sircar*² In that suit Gopi Nath Sircar brought a suit against the tenant, and lost; he then brought a second suit against the same tenant and another person, who, in the first suit, was said to be the landlord, but he was made only a pro forma defendant and no relief was asked for as against him. We held, and held rightly, that when the title of the plaintiff to rent is in issue in both suits that would be *res judicata*, and the effect of the decision is not got rid of by the plaintiff putting on the record as a party a person who is not really one.

Banerjee, J.

10. I agree with the learned Chief Justice. I have nothing to add to what he has said in his judgment and to what I have said in the order of preference, except this, that a right to claim rent may arise under Section 157 of the Bengal Tenancy Act upon the establishment of the plaintiff's right to the land in dispute, notwithstanding that his right to receive rent from the first defendant was found to be not established in the previous suit for arrears of rent; and that the judgment in the previous rent-suit cannot therefore operate as *res judicata*, not only as against the claim for establishment of title and recovery of possession, but also as against the claim for rent under present circumstances.

Hill, J.

11. I also agree with the learned Chief Justice. It appears to me that so far from its being sought in the present suit to re-open an issue already tried and determined by a competent Court, the former finding has been assumed by the plaintiff in this suit to be correct, and has been made the foundation of the relief which he now seeks.

Cases Referred.

1(1882) 12 C.L.R., 38

2(1882) 12 C.L.R., 38