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IMPERIAL TOBACCO COMPANY, LD., v. ALBERT BONNAN.

no such barrier as the company desire can, in the circumstances, be imposed on the importation of genuine Wills & Co.'s Gold Flake cigarettes into India.

I agree that the suit was rightly dismissed and that this appeal fails.

Attorneys for the appellants: *Kesteven, Gooding & Co.*

Attorneys for the respondents: *Orr, Dignam & Co.*

A. P. B.

APPELLATE CIVIL.

Before Rankin and Buckland JJ.

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March 23.

KRISHNA KUMARI BASU

v.

NAGENDRA PROSAD BASU.*

Landlord and Tenant—Bengal Tenancy Act (VIII of 1885) s. 148—Claim for rent joined with claim for money had and received—Summary trial —Jurisdiction.

Where the plaintiffs instituted a suit for rent against the tenant and included in it an alternative claim for money had and received, against the co-sharer landlords, and the whole case was tried under the summary procedure prescribed by s. 148, Bengal Tenancy Act, without the settlement of any issues:—

Held, that the procedure adopted did not affect the jurisdiction of the Court and the case was covered by s. 99 of the Civil Procedure Code.

SECOND APPEALS by Tincowri Basu and on his death his legal representative Srimati Krishna Kumari Basu and others, the defendants.

* Appeals from Appellate Decrees, Nos. 163, 164 and 165 of 1921, against the decrees of Banwari Lal Banerjee, Subordinate Judge of Howrah, dated Sep. 29, 1920, affirming the decrees of Jitendra Nath Sen, Munsif of Howrah, dated Sep. 22, 1919.

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These three appeals arose out of three suits which were tried together by consent of parties; the plaintiffs claimed 2 annas share of rent from the defendant No. 1, the tenant, and in case of his payment to co-sharer landlords, the *pro formâ* defendants, prayed in the alternative for relief against them for money had and received. The defendant No. 1 in each case denied the relationship of landlord and tenant as between him and the plaintiffs and set up the *pro formâ* defendants as the landlords. The primary Court decreed the suit adopting in the trial the procedure laid down under section 148, Bengal Tenancy Act, and directed the *pro formâ* defendants who had realised the money from the defendants to pay it back to the plaintiffs; the defendants appealed before the Subordinate Judge but the appeals were dismissed, the *pro formâ* defendants then preferred these second appeals to the High Court.

Babu Nagendra Nath Ghose, for the appellants. Intricate questions of title should not have been tried without framing specific issues; the claim as against the present appellants was not a claim for rent and should not have been treated as governed by the provisions of section 148(*c*), Bengal Tenancy Act; the Court acted without jurisdiction in adopting the summary procedure.

Dr. Jadunath Kanjilal, for the respondents. The appellants knew the case they were to meet, they were not prejudiced in any way because the issues were not framed, if there was any defect of procedure it was mere irregularity; section 99, Civil Procedure Code, cures such defects; it cannot be treated as a matter affecting jurisdiction: *Iswar Dalin* v. *Girindra Kumar Nag* (1).

(1) (1918) 48 I. C. 726.

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RANKIN J.

RANKIN J. This is an appeal by certain co-sharer defendants who were impleaded together with the tenants in a rent suit. The plaintiffs claim to have a two annas share in the landlord's interest. The appellants contended that the whole interest belonged to them. A claim was made against the tenants for a two annas share of certain rent in arrear and an alternative claim was made against the present defendant-appellants that the plaintiff's share of certain rent which had been received by the appellants from the tenants should be paid over to the plaintiff. A decree has been given both against the tenant and against the defendant-appellants.

On this appeal it has been contended that a serious question of title was raised as between the plaintiffs on the one hand and the appellants on the other and treating the case as a rent suit the trial Judge did not formally settle issues that would determine the question of title but proceeded in the manner prescribed in section 148 of the Bengal Tenancy Act. A further question has arisen in the course of the argument. The claim against the present appellants was not a claim for rent at all. It was a claim for money had and received to the plaintiff's use. The question arises if such a claim as that may be joined with a claim for rent and can be tried properly by the procedure prescribed in section 148 of the Bengal Tenancy Act.

Taking the first point first, I am of opinion that there is no rigid rule of law to the effect that in a rent suit properly so called and filed under the provisions of section 148, a question of title may not be determined if it arises. In the present case although formal issues were not framed, the judgment of the learned Judge is an extremely lucid and careful judgment; and I am quite satisfied that so far as regards the claim for rent upon which claim the

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present appellants may be called *pro formâ* defendants, there has been nothing in the way of miscarriage of justice. It was suggested as a possibility, though I am satisfied that it is a possibility entirely in the air, that if issues had been framed the appellants might have had a better chance of producing evidence. I see no reason to think that the appellants had in fact any evidence that they did not adduce and they had ample opportunity in many stages of the case for taking that point if there was anything in it.

So far as this is a suit for a share of rent, I see no substance in this appeal. The suit, however, as I have said, was not merely a suit for rent, but there was coupled with it a claim in the alternative upon which the present appellants were not *pro formâ* defendants but were contesting defendants, a claim that they should disgorge to the plaintiffs their share of the rent which had been paid to these defendants in full. Now a question arises when a claim which is not for rent is included in a suit which is tried under section 148 whether there is any lack of jurisdiction on the part of the trial Judge to deal with the claim. An analogy has been suggested in argument of the case where the Judge has purported under the Small Cause Jurisdiction to try a case which apart from that jurisdiction he might have been quite competent to try. In my judgment, there is this distinction, between provisions as regards the Small Cause Courts and the provisions of section 148 regarding rent suits. In the former case this Court has always regarded the matter as one of jurisdiction, special jurisdiction which is given by the provisions of the Small Cause Courts Act. In the case of section 148 of the Bengal Tenancy Act, the view which has been consistently adopted by this Court is that the prescribed procedure is not a special jurisdiction

but a summary procedure. If I could find that as regards the cause of action for money had and received, there was any indication that the present appellants had been prejudiced by the fact that issues were not formally framed in advance it would, I think, become my duty not to allow the decree made against the present appellants to stand; but I think that this case is amply covered by section 99 of the Civil Pocedure Code. I cannot find that in the present case anything has been done that is not in conformity with the provisions of the Civil Procedure Code except that, the present appellants are able to show that issues were not formally framed. Having considered carefully the manner in which the case was tried by the trial Court, I am of opinion that no prejudice has been shown or can be presumed in the circumstances of the present case by reason of that fact.

For these reasons it appears to me that this appeal must be dismissed with costs. This judgment will govern the other two appeals (S. A. 164 and 165 of 1921).

BUCKLAND J. Before we part with this case I desire to say something about *Iswar Dalin* v. *Girindra Kumar Nag* (1) which was cited in argument by the learned vakil for the respondent whose contention it may superficially appear to support. In that case the question considered was one of misjoinder. The point which has been argued here seems to have arisen but was treated as one of jurisdiction for I observe from the report that it was contended that the plaintiffs could not get a decree for recovery of their share of the rent against co-sharer landlords in a suit framed under section 148 of the Bengal Tenancy Act. The judgment, however, proceeded upon the former question

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for the learned Judges observed as follows; "It is "contended that the prayer for this relief could not be "joined to the prayer for the recovery of rent against "the principal defendants; but in our opinion, Order "I, rule 3, of the Civil Procedure Code provides for the "joinder of such claims; and it is well established "practice to join such claims". The point to which my learned brother has addressed himself was not argued or considered; and though possibly it might have been taken in that case, it by no means follows that it would have affected the result. It seems to me, therefore, that that case is distinguishable and is not an authority for the proposition advanced by the learned vakil for the respondent. I agree with the judgment delivered by my learned brother for the reasons stated by him.

A. S. M. A. *Appeals dismissed.*