APPELLATE CIVIL.

Before Richardson and Suhrawardy JJ.

NABA KISHORE TILAKDAS

v.

PARO BEWA.*

1922

May 2.

Trespasser—Title suit by real owner dismissed—Subsequent dispossession of trespasser—Title of real owner set up as a jus tertii—Res judicata.

Where a title suit by the real owner against the present plaintiff was dismissed but he was subsequently dispossessed by the present defendants who set up the title of the real owner as a *jus tertii* :—

Held, that the judgment in the previous suit made the question of title *res judicata* in favour of the plaintiff and that the defendants were mere trespassers having no title.

Nisa Chand Gaita v. *Kanchiram* (1) distinguished.

Shyama Charan Roy v. *Surya Kanta Acharya* (2), and *Adhar Chandra Pal* v. *Dibakar Bhuian* (3) referred to.

SECOND APPEAL by Naba Kishore Tilakdas, the plaintiff.

One Fatiram Tilakdas owned an occupancy holding, he died leaving a widow and four daughters; the widow executed a usufructuary mortgage of the holding, making over possession to the mortgagee for a period of nine years ending in 1319 B.S.; the widow died and on the expiry of the term of nine years, the mortgagee refused to surrender possession; Paro and Bhuban, two of the daughters, thereupon,

* Appeal from Appellate Decree, No. 567 of 1920, against the decree of Bamandas Mukerjee, Subordinate Judge of Mymensingh, dated Nov. 29, 1919, reversing the decree of B. K. Dutta, Munsif of that place, dated Feb. 1, 1919.

(1) (1899) I. L. R. 26 Calc. 579. (2) (1910) 15 C. W. N. 163.
(3) (1913) I. L. R. 41 Calc. 394.

1922

NABA KISHORE TILAKDAS v. PARO BEWA.

sought to recover possession by a suit, each claiming a moiety. The suit was dismissed but on appeal Paro's claim only was decreed and she obtained possession of her half share through Court. Later on Paro and some of her relations dispossessed the mortgagee from the other half share also, the mortgagee therefore instituted the present suit, the trial Court gave a decree but the lower Appellate Court dismissed the suit, the plaintiff preferred this second appeal before the High Court.

Babu Jatindra Mohan Chowdhury (for *Babu Profulla Chandra Nag*), for the appellant. The defendants are mere trespassers, they are seeking shelter under the title of Bhuban, who failed to recover possession from the plaintiff, in a suit instituted against him; the judgment passed in that suit is binding upon the defendants and they cannot question the plaintiff's title: a mere trespasser cannot set up the plea of *jus tertii* against a person who had prior possession: *Shyama Charan Roy* v. *Surya Kanta Acharya* (1), *Narayana Row* v. *Dharmachar* (2). The case of *Nisa Chand Gaita* v. *Kanchiram* (3) is not applicable, in that case there was merely prior possession but in this case prior possession is coupled with some kind of title also; moreover, the admitted landlord has settled the land with the plaintiff and has recognised him as tenant.

Babu Annada Charan Karkoon, for the respondent. The defendants were not parties to the previous suit and therefore the judgment passed in it is not binding upon them. The plaintiff acted improperly in taking settlement from the landlord during the continuance of the usufructuary mortgage

(1) (1915) 15 C. W. N. 163. (2) (1902) I. L. R. 26 Mad. 514.
(3) (1899) I. L. R. 26 Calc 579.

and should not be allowed to take advantage of his own wrong.

The suit being instituted more than six months after the date of dispossession, the plaintiff cannot succeed on the mere ground of prior possession: *Nisa Chand Gaita* v. *Kanchiram* (1).

Babu Jatindra Mohan Chowdhury, in reply.

Cur. adv. vult.

RICHARDSON J. The disputed land originally formed part of the occupancy holding of Fatiram Tilakdas. After his death his widow, Pratima, mortgaged the holding to the plaintiff. Under the terms of the mortgage instrument the plaintiff was to have possession as usufructuary mortgagee, or ijaradar, for a period of nine years ending with Baisakh 1319 B.S. Tilakdas left four daughters but it appears that since the death of his widow, two of the daughters Paro and Bhuban have been treated as his heirs and the case has been argued before us on both sides on the assumption that they were his sole heirs.

On the expiry of the term of his mortgage the plaintiff did not surrender possession of the holding or the agricultural land therein comprised. In 1912 therefore Paro and Bhuban sued him in ejectment claiming title as their father's heirs. In that suit Paro succeeded in appeal to the extent of a moiety of the holding while Bhuban's claim to the other moiety was dismissed. It is not very easy to follow the reasoning of the Appellate Court. The plaintiff's case (he was then defendant) was that on the death of Pratima, the landlord took khas possession of the holding and settled it with him with the knowledge and consent of the two ladies. The trial Court had

(1) (1899) I. L. R. 26 Calc. 579.

1922

NABA KISHORE TILAKDAS v. PARO BEWA.

RICHARDSON J.

accepted that plea and had dismissed the suit in its entirety. In the appeal the learned Subordinate Judge found in his own words that "the evidence is not satisfactory to show that the malik dispossessed the plaintiffs (*i.e.*, the two ladies) and took the lands into his khas possession." Nevertheless he seems to have dismissed Bhuban's claim on the ground that she and the plaintiff (then defendant) had come to some amicable settlement with the landlord which did not bind Paro. It is not easy to conceive of an amicable arrangement between the plaintiff and Bhuban which would deprive the latter of the whole of her share. Moreover, the claim of a person who has obtained possession of land as mortgagee to retain possession after the termination of the mortgage should always be jealously scrutinized. Nevertheless it must be accepted that the previous suit makes the question of the title to Bhuban's original moiety *res judicata* in the plaintiff's favour as between him and Bhuban.

In the present suit, the plaintiff seeks to recover possession of that moiety. The defendants are No. 1 Paro, No. 2 Paro's son, No. 3 Bhuban's husband and No. 4 Bhuban's son-in-law. Defendant No. 4 is a mortgagee from Paro of her moiety and apparently he makes no claim to the disputed moiety. Defendants Nos. 1, 2 and 3 have no title of their own to the latter and must be treated in respect thereof as mere trespassers.

In the state of things so disclosed the learned Munsif in the trial Court found in the plaintiff's favour and decreed his suit. In the lower Appellate Court the learned Subordinate Judge took a different view and made a decree of dismissal from which the plaintiff has appealed.

It is contended on the plaintiff's behalf that the learned Subordinate Judge has erred in law in so far

as he holds that the findings of the Appellate Court in the previous suit are not admissible in evidence against the defendants or the contesting defendants "who were not parties to that suit and who do not claim to be in possession of the disputed eight annas share of the land either through Paro or through Bhuban."

On that footing the view of the case taken by the learned Subordinate Judge is briefly this, that on the merits (apart from the previous litigation) the plaintiff has not succeeded in establishing his title to the moiety and that inasmuch as he was dispossessed in 1323 (1916) and this suit was instituted more than six months later in August 1918, he cannot succeed on the mere ground of prior possession.

If his premises were granted, the conclusion of the learned Subordinate Judge could not in such a case as the present be disputed in this High Court. There is really no controversy as to the principle that prior peaceable possession furnishes a good title as against a mere trespasser. The result arrived at by this High Court in *Nisa Chand Gaita* v. *Kanchiram* (1) is based on the construction and effect of section 9 of the Specific Relief Act. Other High Courts may have taken a different view of the legal operation of that section but at any rate there is this to be said that if a true title may be defeated by twelve years' adverse possession by a trespasser, there is nothing shocking to the sense of justice in a legislative rule that the period of limitation for a suit by mere trespasser or squatter to recover possession should be six months from the date of his dispossession. If that be the true effect of section 9 of the Specific Relief Act, the learned Subordinate Judge is so far right, nor do the observations of Sir Lawrence Jenkins, C.J., in *Shyama Charan Roy* v. *Surya Kanta Acharya* (2) and *Adhar*

(1) (1899) I. L. R. 26 Calc. 579. (2) (1910) 15 C. W. N. 163.

1922

NABA KISHORE TILAKDAS v. PARO BEWA.

RICHARDSON J.

Chandra Pal v. *Dibakar Bhuian* (1) amount to a dissent from the rule laid down in *Nisa Chand's* case (2). The *ratio decidendi* in both those cases was that the rule had no application to the facts. It was held in both cases that the plaintiff had not only been in possession but had a title to possession.

So in the present case, though I should have no compunction in following the Subordinate Judge if I could see my way to so doing, in my opinion, he has applied the rule in *Nisa Chad's* case (2) in circumstances to which it has no proper application.

Here it is common ground that the true title was originally in Bhuban. The contesting defendants though they do not in terms claim a title through or under Bhuban are in effect setting up Bhuban's title as a *jus tertii*. That being so they must take Bhuban's title as it stands. The plaintiff claims a title from Bhuban which in view of the previous litigation Bhuban could not be heard to contest and that title therefore is in the circumstances a good title as against the contesting defendants.

In my opinion the appeal should be allowed. The judgment and decree of the Subordinate Judge should be set aside and the judgment and decree of the Munsif should be restored. The plaintiff is entitled to recover his costs of this appeal and his costs in the lower Appellate Court from the defendants Nos. 1, 2 and 3 as the contesting defendants.

SUHRAWARDY J. I concur in the order my learned brother proposes to pass in this case. I only wish to add that if the question whether a plaintiff can succeed in a suit for recovery of property as against a person having no title to it, only on the strength of his (plaintiff's) previous possession had not been

(1) (1913) I. L. R. 41 Calc. 394. (2) (1899) I. L. R. 26 Calc. 579.

settled in this Court by a series of decision followed in a large number of cases, I would have deemed the proposition worth reconsideration in view of the reasonings of other High Courts which have taken a different view and some pronouncements of the Judicial Committee.

A.S.M.A. *Appeal allowed.*

ADMIRALTY JURISDICTION.

Before C. C. Ghose J.

J. R. B. MORRIER

v.

LALA RAGHUMULL AND ANOTHER.*

1922

May 15.

Mariner's Wages—Master of a ship, liability of—Jurisdiction.

In a suit by the Master of a ship, for recovery of his wages and messing charges together with the wages and messing charges of the Chief Engineer and other mariners :—

Held, that the Master could recover the same.

Held, further, that a mariner had a three-fold remedy for his wages, (*i*) against the ship, (*ii*) against the Master, (*iii*) against the owner of the ship.

The Jack Park (1), *The Salacia* (2), *Baily* v. *Grant* (3), *Armstrong* v. *Smith* (4) referred to.

THIS suit was instituted by one J. R. B. Morrier, who was Master of the steamship *Singaporean*, against the owners of the ship, Rai Bahadur Damodar Dass and Lala Raghumull, for recovery of Rs. 6,744-4-11, being the total sum due on account of his own wages and messing charges, the wages and messing charges of the Chief Engineer and the wages of other seamen under him. At the hearing the suit was withdrawn

* Original Civil Suit No. 1 of 1921. (Admiralty Jurisdiction).

(1) (1802) 4 Robinson 308.
(2) (1862) 7 L. T. N. S. 440.
(3) (1700) 1 Ld. Raym. 632.
(4) (1805) 1 N. R. 299.