APPELLATE CIVIL.

Before B. B. Ghose and Cammiade JJ.

MUJIBAR RAHMAN

v.

ISUB SURATI.*

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Feb. 23.

Landlord and Tenant—Tenant, if can contest landlord's title—Tenancy, expiration of—Estoppel—Indian Evidence Act (I of 1872), s. 116, if exhaustive—Admission of additional evidence on appeal—Civil Procedure Code (V of 1908), O. XLI, r. 27—Remand order, when improper—Procedure.

Section 116 of the Indian Evidence Act is not exhaustive as containing the whole law of estoppel.

In an action in ejectment by a landlord who put the tenant into possession, the tenant is estopped from denying the landlord's title at the point of time of the demise and further cannot put forward in defence any adverse title to a portion of the demised premises acquired by him during the tenancy. The estoppel operates in the case of a tenant who remains in possession even after the termination of the tenancy by notice to quit.

Bhaiganta Bewa v. *Himmat Badyakar* (1) referred to.

An Appellate Court cannot remand an issue for retrial by setting aside the finding of the trial Court thereon but should itself decide that issue either upon the evidence already on the record or (if necessary) by taking additional evidence for that purpose under O. XLI, r. 27 of the Code of Civil Procedure.

SECOND APPEAL by M. Mujibar Rahman, the defendant.

The plaintiff alleged that he was the 16 annas owner by purchase of the premises No. 256, Panchanan Tolla Road, Howrah, that in 1920 he granted a lease of the said premises to the defendant as a monthly tenant and, as such, put him in possession of the same. The defendant having made default in paying rent, the plaintiff filed this suit for ejectment and for recovery of arrears of rent after serving the defendant

* Appeal from Appellate Decree, No. 1391 of 1925, against the decree of Lal Behari Chatterjee, Additional District Judge of Howrah, dated June 4, 1925, modifying the decree of Basanta Kumar Roy, Munsif of Howrah dated June 23, 1924.

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with the proper notice to quit. The defence, mainly, was denial of the plaintiff's right to the entire premises in suit (the defendant having alleged to have acquired a fractional share in the said premises from a co-sharer previous to the institution of this suit) and denial of service of notice to quit.

The Munsif found that proper notice to quit was served upon the defendant, that the plaintiff (though a co-sharer) having inducted the defendant on to the premises as a tenant, the defendant was estopped from denying the plaintiff's title to the premises and that there was no evidence that any arrears of rent were due and unpaid. Upon the aforesaid findings the Munsif passed a decree for ejectment in favour of the plaintiff and dismissed his claim for arrears of rent.

The plaintiff appealed to the District Judge against the aforesaid order of dismissal of his claim for arrears of rent, and the defendant also appealed against the aforesaid decree for ejectment made against him.

The Additional District Judge, who heard both the appeals, affirmed the decree for ejectment but remanded the question of the plaintiff's claim for arrears of rent for fresh trial.

The defendant appealed to the High Court.

Mr. Sarat Chandra Bose (with him *Babu Probodh Chandra Kar*), for the appellant. No ejectment can be granted against a tenant who had acquired a title that existed before the inception of the tenancy and the tenant is not estopped from setting up this defence.

Mr. Rishindra Nath Sarkar (with him *Babu Kali Sankar Sarkar*), for *Babu Aboni Nath Bose*, for the respondent. Referred to s. 116 of the Indian Evidence Act. A tenant is estopped from denying his landlord's title. Referred to *Bhaiganta Bewa* v. *Himmat Badyakar* (1) and *Bilas Kunwar* v. *Desraj Ranjit Singh* (2).

Mr. Sarat Chandra Bose, in reply.

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(2) (1915) I. L. R. 37 All. 557; L. R. 42 I. A. 202.

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GHOSE J. This is an appeal by the defendant against the judgment and decree of the Additional District Judge of Hooghly at Howrah. The facts are these:—It has been found that the plaintiff let out the premises in suit to the defendant at a certain rate of rent. He afterwards served a notice terminating the tenancy and then sued to recover possession of the property in question and also rent for the period the defendant was in possession as tenant. The plea of the defendant shortly stated was denial of the plaintiff's right to the entire share of the property. He stated that a certain share belonged to the sisters of the plaintiff and the letting out of the property was not by the plaintiff alone. He denied service of notice and he also alleged that the plaintiff was not entitled to any rent as the defendant had spent a large sum of money for repairing the premises on the basis of a contract by which the owners had agreed that no rent should be demanded until the house was thoroughly repaired. The trial Court found that the plaintiff was the sole person who demised the premises to the defendant and inducted him into the land. He also found that proper notice to quit had been served on the defendant. With regard to the question of title to the property the trial Court held that the plaintiff was only a co-sharer, but the defendant was estopped from disputing the title of the plaintiff who had demised the premises to him. Upon that view that Court made a decree for ejectment. With regard to the question of arrears of rent which was put in issue No. 7 the Munsif held that there was no evidence in the suit that the arrears claimed were due and unpaid, and upon that ground he dismissed the claim for rent. There were two appeals before the lower appellate Court, one by the plaintiff for arrears of rent and the other by the defendant as against the decree for ejectment. The learned Additional District Judge who heard both the appeals affirmed the decree of the Munsif for ejectment on the ground that the defendant was estopped from disputing the title of the plaintiff, but he remanded the case on the

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question of arrears of rent to the Munsif in the appeal preferred by the plaintiff, that is No. 252 of 1924, for a fresh trial on the question regarding the claim for rent.

From this decree of the lower appellate Court the defendant appeals and the principal question that is urged on his behalf is that the defendant is entitled to show that the title of the plaintiff has ceased to exist with regard to the share belonging to the sisters of the plaintiff which the defendant has purchased shortly before the suit was instituted. The Additional District Judge did not allow the plea to be raised on the ground of estoppel as well as on the ground that the decision of this question would involve enquiries of a more complicated nature than an enquiry in a simple suit for ejectment.

The question of fact that it was the plaintiff who put the defendant into possession of the house cannot be questioned. The sole question for decision in this appeal, therefore, is whether the defendant is estopped from raising the plea that the plaintiff was not the sole owner of the property when he was let into possession by the plaintiff, and substantiating his plea that he had purchased the share from the sisters of the plaintiff and therefore entitled to resist the plaintiff's claim for ejectment. Section 116 of the Evidence Act lays down that "no tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property". It is contended on behalf of the appellant that the tenancy does not continue now as it was terminated by a proper notice to quit. Therefore section 116 of the Evidence Act has no application to this case. That is quite true, but it has been established by a long series of decisions that section 116 of the Evidence Act does not contain the whole law of estoppel. It has been held in this Court that the tenant's estoppel operates even after the termination of the tenancy. That was held in the

case of *Bhaiganta Bewa* v. *Himmat Badyakar* (1) relying upon the observation of Chief Justice Tindal in *Doe dem Joseph Manton* v. *Austin* (2). This argument therefore that the defendant is not estopped from denying the plaintiff's title because the tenancy is not continuing must fail.

With regard to the general principle of law there cannot be any dispute. Now it has been settled that a tenant may show in an action in ejectment brought by the landlord who put the tenant into possession of the demised premises, that the title of the landlord has determined. But no plea can be set up of which the necessary effect is to dispute the title of the person who gave possession at the point of time of the demise. It is open to the tenant, as I have already said, to show that the title of the person who delivered possession to him has ceased to exist subsequent to the demise. But he cannot say that the interest of the landlord was less in quality than what he must have in order to put the tenant in possession of the entire property. In other words in an action in ejectment by the landlord who put the tenant into possession the tenant cannot plead that the landlord had no title to grant the lease when possession was given, nor can he defend the suit on the ground that he had acquired an outstanding title adverse to the landlord. It is sought to support the argument on behalf of the appellant on the basis of the analogy of dispossession by a title paramount. It is argued that if a third person having a higher right than that of the plaintiff had dispossessed the defendant, not physically but in case of such dispossession as would amount to legal ouster, the tenant would be in a position to show that the person who put him into possession had no title. Similarly in this case it is said that the co-sharers of the plaintiff had asserted their title and the defendant was obliged to purchase that interest in order to save himself from being sued by those co-sharers. The facts of the case are said to be parallel to the case when there is ouster by title

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paramount and where the landlord's title has ceased subsequent to the demise. But the present is not such a case as that. Here the defendant asserts that the plaintiff who put him into possession had no title to the entire interest at the time when he put him into possession. This is a position which he is not entitled to take. He must give up possession and if he has acquired any right adverse to that of the landlord he may assert it in some future litigation if he is so advised. But he cannot resist the landlord's claim on that ground.

The appeal so far as the question of ejectment is concerned must be dismissed.

Next with regard to the question of the order of the Additional District Judge sending back the case to the Munsif for fresh trial, we are of opinion that this order is wrong in form. What the Judge ought to have done was to decide the issue himself. The Munsif framed the issue and decided it against the plaintiff. If the learned Judge on appeal thought that it was not properly decided he might reverse that decision if he chose, but he had no right to set aside the judgment of the trial Judge and remand that issue for retrial. The learned Judge must himself decide the issue upon the evidence on the record and if he thinks that it is necessary for him to take any additional evidence under Order XLI, rule 27, if there is any good ground for such evidence being admitted, he may follow that procedure; but in any case he had no right to send the matter back for trial to the court of first instance.

With this modification we dismiss the appeal. The respondent is entitled to his costs in this appeal.

CAMMIADE J. I agree.

A. K. D. *Appeal dismissed.*