APPELLATE CIVIL.

Before Suhrawardy and Jack JJ.

MUKTAKESHI DASI

v.

MANILAL JANA*.

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April 16.

Res Judicata—*Rent suit, when operates as* res judicata *in title suit—Tenant setting up title in himself and in third party, distinction between the two—Code of Civil Procedure (Act V of 1908), s. 11—Indian Limitation Act (IX of 1908), Art. 144.*

The decision in a rent suit relating to the relationship of landlord and tenant operates as *res judicata* in a subsequent suit either for title or for rent.

Mane Mahammad Nasya v. *Dhani Mahammad* (1) referred to and explained.

There is a distinction between cases in which the defendant in the rent suit sets up his own title and cases in which the defendant pleads *jus tertii*. In the first class of cases the decision in the rent suit should operate as *res judicata*, as it was a decision between parties laying conflicting claims to the property under similar title. In the second class of cases the decision in the rent suit should not operate as *res judicata*.

Where the tenant fails to prove settlement from a third party and the landlord succeeds in proving that the disputed plot is included in his lands, the dismissal of the previous rent suit does not operate as *res judicata*.

Dwarkanath Roy v. *Ram Chand Aich* (2) referred to.

Nauji Koer v. *Umatul Batul* (3) distinguished.

When the tenant does not claim title in himself, but sets up a third party as landlord and does not claim any higher right than that of a tenant, it should be assumed that he was encroaching upon the land of his landlord when the land in suit is found to belong to the landlord and in such a case Article 144 of the Indian Limitation Act, 1908, applies.

Mrigendra Nath Saha v. *Krishna Chandra Saha* (4) referred to.

SECOND APPEAL by the defendants, Muktakeshi Dasi and another.

The appeal arose out of a suit for declaration of title to and *khas* possession of a plot of land described as plot No. 5. The plaintiff subsequently gave up his claim for *khas* possession and asked the court to

*Appeal from Appellate Decree, No. 996 of 1927, against the decree of L. B. Chatterjee, Additional District Judge of 24-Parganas, dated Feb. 28, 1927, reversing the decree of Harendra Krishna Mukherji, Munsif of Basirhat, dated May 30, 1925.

(1) (1912) 17 C. W. N. 76.
(2) (1899) I. L. R. 26 Cal. 428.
(3) (1911) 15 C. L. J. 653.
(4) (1920) 33 C. L. J. 334.

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fix a fair and equitable rent under section 157 of the Bengal Tenancy Act. In 1916, the plaintiff had brought a suit for enhancement of rent against the defendants in respect of some lands including the plot No. 5 in the present suit. The main defence in the rent suit was that there was no relationship of landlord and tenant between the plaintiff and the defendants in respect of plot No. 5, inasmuch as it did not appertain to the plaintiffs' holding, but was held by the defendants as part of another *jama* under the Satkhira *zemindars* and the contention of the defendants with regard to the disputed plot was given effect to by the appellate court in 1918. The plaintiffs then brought the present title suit in 1923. The defendants pleaded *inter alia* that the suit was barred by *res judicata* by the decision in the rent suit of 1916 and that it was also barred by limitation. The Munsif accepted the contention of the defendants and dismissed the suit with costs. On appeal, the Additional District Judge set aside the judgment and decree of the trial court and decreed the plaintiff's title to the disputed land and his right to recover a fair rent from the defendants, which was fixed by the court.

The defendants, thereupon, appealed to the High Court.

Mr. Sharatchandra Ray Chaudhuri and *Mr. Shantikumar Ray Chaudhuri*, for the appellants.

Syed Nasim Ali, for the respondent.

SUHRAWARDY J. The facts leading to this litigation are that the plaintiff brought a suit against the defendants in 1916 for rent in respect of several plots, including plot No. 5, which is involved in the present suit. The defendants in that suit admitted their liability for rent, but averred that they held plot No. 5 not under the plaintiff but under a third party, the Satkhira Babus. That suit for rent was decreed. But the defendants' plea that plot No. 5 did not form part of the holding under the plaintiff prevailed. That judgment was pronounced in 1918. In 1923,

the present suit was brought by the plaintiff for declaration of his title to and recovery of possession of the land, which was plot No. 5 in the rent suit. Subsequently, the plaintiff gave up his claim for *khas* possession, but asked the court, under section 157, Bengal Tenancy Act, to settle fair and equitable rent in respect of it. The trial court dismissed the plaintiff's suit on the question of title, holding that the plaintiff had failed to prove that plot No. 5 was included within his tenure. Upon appeal, the learned Additional District Judge held, on an examination of the evidence, that the plaintiff had succeeded in proving that the land in suit was included within his tenure. Against that decision this appeal is preferred by the defendants and two questions of law are urged before us. It is conceded that the finding that the land in suit was included within the plaintiff's tenure cannot be assailed in Second Appeal, being a finding of fact. The two questions on which we have been addressed are with reference to the pleas of *res judicata* and limitation. Both these grounds were decided against the defendants by both the courts below.

The objection on the ground of *res judicata* arises in this way. In the previous rent suit, the court found that the plaintiff had failed to prove that plot No. 5 appertained to the disputed holding of the defendants. It was also remarked that the evidence adduced by the plaintiff to identify the land as included in his *kabala* was neither sufficient nor reliable. The issue which was framed by the learned Subordinate Judge in the appellate court in the rent suit was in these terms : " Is plot No. 5 of the plaint " included in the disputed holding." It is argued on the authority of a number of cases that the decision in the rent suit that the plaintiff had no title to the land in dispute is *res judicata* in the present suit, as the finding in that suit was the ground-work for the decision arrived at, namely, that the plaintiff was not entitled to rent in respect of that plot. This argument is met on behalf of the plaintiff respondent on two

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grounds. First, that the finding in the previous suit that the plaintiff had failed to prove his title to plot No. 5 was incidentally arrived at in the course of determination of the principal issue in the suit, namely, whether the plaintiff was entitled to recover rent in respect of that plot. Secondly, it is submitted that a decision in a rent suit with reference to title is not *res judicata* in a subsequent declaratory and possessory suit. With regard to the first point, the best authority is the decision of their Lordships of the Judicial Committee in *Run Bahadur Singh* v. *Lucho Koer* (1). In that case, a suit for rent was brought by the widow of a deceased Hindu. The brother of the widow's husband intervened and challenged the right of the widow to sue alone for rent on the ground that he had joint interest and ownership in the land with his deceased brother. That suit was decided in favour of the widow. Subsequently, the brother brought a suit against the widow for a declaration that he was joint with the widow's husband. It was argued that the decision in the previous rent suit was *res judicata* on this question. Their Lordships of the Judicial Committee after disposing of the plea on several other grounds observed: "Having regard, "however, to the subject matter of the suit, to the "form of the issue" (which was set out), "and to "some expressions of the learned Judge, their Lord- "ships are further of opinion that the question of "title was no more than incidental and subsidiary to "the main question, namely, whether any and what "rent was due from the tenant and that on this ground "the judgment was not conclusive." But this case has been strenuously argued before us on the ground that the decision in the previous rent suit is *res judicata* in the present suit. In my judgment, this point seems to be covered by the Full Bench decision of this Court in the case of *Dwarkanath Roy* v. *Ram Chand Aich* (2). A distinction was attempted to be made on the ground that, in that case, the third party

(1) (1884) I. L. R. 11 Calc. 301; L. R. 12 I. A. 23.

(2) (1899) I. L. R. 26 Calc. 428.

under whom the defendants claimed to have held the land was made a party and, therefore, the question decided in the rent suit was not *res judicata* in the title suit. In the present suit, it is true that the Satkhira Babus had not been impleaded. In order to understand what that case really decided it may be useful to refer to the case which led to the reference to the Full Bench. In *Gopal Das* v. *Gopinath Sircar* (1), a suit for rent in which the defendants denied the plaintiff's title alleging that some other persons along with the plaintiff were his landlords having been dismissed on the ground that the plaintiff had failed to prove his title, another suit was brought by the plaintiff for recovery of possession against the tenant and the other persons alleged to be the plaintiff's co-sharers. It was held that the suit was barred by section 13 of the old Code of Civil Procedure. The learned referring Judges in *Dwarkanath's case* dissented from this view on the ground that the only question that arose for determination in the previous suit was as to the relationship of landlord and tenant between the parties to the suit during the period for which rent was then claimed. The judgment of the learned Chief Justice in the Full Bench case is based not, however, on the fact that the third party was a party to the second suit, but on the general principle which he ennunciated thus: "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 occured 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 defen-"dants' 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

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

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"land in dispute belongs to the plaintiff . . . . . It "is impossible to say that the plaintiff is barred in this "suit from establishing his title to the land both as "against the alleged tenant and also against the "persons whose title as landlord the tenant defendant "had set up in the rent suit." The other learned Judges were of the same opinion and a very cogent reason was given by some of them for holding that the decision in the rent suit should not be treated as *res judicata* in a subsequent title suit; the basis of their decision was that the cause of action of the title suit arose from the successful termination in favour of the defendant of the rent suit. The observation I have quoted of the learned Chief Justice did not confine itself to the case as between the plaintiff and the third party set up by the tenant. In fact the presence of the third party does not affect the question of *res judicata* as between the plaintiff and the tenant defendant. Of course the decision cannot be treated as *res judicata* between the plaintiff and the third party, but whether the third party is or is not a party to the suit, the plea of *res judicata* as founded upon the decision of the rent suit would be available to the tenant defendant in every case in which a suit for recovery of possession on declaration of title is brought against him. There is no reason why the decision in the rent suit should operate as *res judicata* in favour of the defendant, if he is sued alone and would not operate as *res judicata* in his favour if a third party is joined. This point seems to be conclusively covered by the Full Bench decision quoted above. But as reference has been made to various cases I will just shortly refer to some of them and try to find out what I understand to be the present law. The view taken in the Full Bench case was adopted in *Nitya Nunda Sarkar* v. *Ram Narain Das* (1). In *Sahadeb Dhali* v. *Ram Rudra Haldar* (2), a distinction was attempted to be made between cases in which the defendant in the rent suit set up his own title and cases in which the defendant pleaded *jus tertii*. It was held, in the first class

(1) (1901) 6 C. W. N. 66. (2) (1906) 10 C. W. N. 820.

of cases, that the decision in the rent suit should operate as *res judicata*, as it was a decision between parties laying conflicting claims to the property under similar title. In the second class of cases, it was held that the decision in the rent suit should not operate as *res judicata*. This distinction was kept in view in *Panchu Mandal* v. *Chandra Kant Saha* (1).

In *Nauji Koer* v. *Umatul Batul* (2), the landlord brought a suit against the tenant for rent. The tenant pleaded that he was holding the land as tenant of third persons. The tenant's defence was investigated and overruled and the suit was decreed in favour of the landlord. The tenant then brought a suit for declaration that the third party and not the plaintiff in the rent suit was his landlord. It was held that the suit was barred by *res judicata*. The question which was decided in the previous rent suit was whether there was relationship of landlord and tenant between the plaintiff and the defendant and it was held that such relationship existed. In the subsequent suit brought by the tenant for declaration that this relationship did not exist, the decision in the previous suit was conclusive, for the only issue finally decided in a rent suit was whether relationship of landlord and tenant existed between the parties to the suit for the period for which rent was claimed. This case is of no help to us in the present controversy.

In *Mane Mahammad Nasya* v. *Dhani Mahammad* (3), the facts were that in the previous suit for rent the plaintiff alleged that the defendant held along with some plots a plot which was abandoned by another tenant of the plaintiff and taken possession of by the defendant, at the rental of Rs. 30. It was decided in that suit on an objection taken by the defendant that the *jama* was only Rs. 16 and that the defendants' tenancy included the plot of land which the plaintiff alleged had been abandoned by a tenant. The plaintiff landlord subsequently brought a suit against the defendant for establishment of his title

(1) (1909) 14 C. L. J. 220. (2) (1911) 15 C. L. J. 653.
(3) (1912) 17 C. W. N. 76.

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to the plot and for rent in the alternative. It was held that the decision in the rent suit was *res judicata* in the title suit and this view is supported by the accepted view that a decision in a rent suit relating to the relationship of landlord and tenant operates as *res judicata* in a subsequent suit either for title or for rent. In the previous rent suit it was held that the relationship of landlord and tenant existed between the plaintiff and the defendant in respect of the plot said to have been abandoned. The same question the plaintiff wanted to reopen in the subsequent title suit and it was held that he could not do so on the principle of *res judicata*. The decision is correct and does not in any way modify or qualify the Full Bench decision in *Dwarkanath's case* (1).

In the *Midnapur Zemindari Co., Ld.* v. *Jogendra Kumar Bhaumik* (2), both the suits were suits for rent and it was held that the decision in the previous rent suit although it went to the very root of the matter was *res judicata* in the subsequent suit. It will be useful here to refer to another case in the same volume decided by the same Judges. In *Mrigendra Nath Saha* v. *Krishna Chandra Saha* (3), the previous suit for rent was dismissed on the ground that the plaintiff had failed to prove the relationship of landlord and tenant. Subsequently, the plaintiff instituted a suit in ejectment and it was held that the judgment in the previous suit was conclusive between the parties upon one and one point only, namely that there was no relationship of landlord and tenant between the parties during the period for which rent was claimed in that litigation, but it was open to the plaintiff to establish in a subsequent suit that he had a subsisting title and that the defendants were liable to be ejected because they were not tenants as they had themselves pleaded in the rent suit. The view taken in the last case is in agreement with that taken in the Full Bench *case of Dwarkanath Roy* and is supported by the decision in *Goher Sheikh* v. *Alifuddin Sheikh* (4).

(1) (1899) I. L. R. 26 Calc. 428.
(2) (1920) 33 C. L. J. 186.
(3) (1920) 33 C. L. J. 334.
(4) (1919) 24 C. W. N. 717.

The findings of fact arrived at by the lower appellate court are that the defendants have failed to prove settlement from Satkhira Babus and that the plaintiffs have succeeded in proving that the plot of land in dispute is included within their purchase. On these findings, the lower appellate court is justified in passing a decree in favour of the plaintiffs.

The second question raised on behalf of the appellants is that the suit is barred by limitation. It is argued that the present suit was brought by the plaintiffs treating the defendants as trespassers. It was found in the previous suit that the tenants did not hold this land under the plaintiffs, so that the defendants must have been for more than 12 years in adverse possession to the plaintiffs. This objection should also fail. The findings in this case are that the defendants held the land as tenants. They never claimed title in themselves. Instead of saying that they were the plaintiffs' tenants they set up a third party. But they never claimed any higher right than that of a tenant. If the defendants did not occupy this land as included within their holding, it should be assumed that they were encroaching upon the land of their landlord when the land in suit is found to be the plaintiffs' and not of the Satkhira Babus as alleged by the defendants. In a case like this, Article 144 of the Limitation Act applies. Apart from this the learned Subordinate Judge observes: "The plaintiffs were all along treating the defendants as tenants in respect of this land. The defendants were holding this land but they never asserted any adverse title until the decision of the rent suit; and since then the defendants' possession must be taken to be adverse to the plaintiffs." In the case of *Mrigendra Nath Saha* v. *Krishna Chandra Saha* (1), a similar objection was taken and it was held that on the finding that the land belonged to the plaintiffs and was in the possession of the defendants as tenants it must be held that so long as the defendants did not successfully deny the tenancy under the plaintiffs the plaintiffs were in possession of this land

(1) (1920) 33 C. L. J. 334.

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through the tenant defendants. Both the courts have concurred in finding that, though the defendants were in possession of the land for more than 12 years before suit, no case has been made out by them to show that their possession was adverse to the plaintiffs and that the first occasion on which adverse possession was asserted was in the course of the rent suit in 1916. In *Gopal Krishna Jana* v. *Lakhiram Sardar* (1), it was held that when a tenant encroaches upon the land of his landlord, he does so as a tenant and the landlord's right to recover possession of the land encroached upon may be lost by the tenant having adversely to the landlord asserted his title as tenant to the land for more than 12 years. By such assertion, the tenant gets a limited interest in the land encroached upon to the extent to which he asserts adverse possession. On the findings of this case, it cannot be successfully pleaded that the plaintiffs' suit for recovery of rent is barred by limitation.

The appeal, accordingly, fails and is dismissed with costs.

JACK J. I agree.

Appeal dismissed.

A. A.

(1) (1912) 16 C. W. N. 634.