APPELLATE CIVIL.

Before S. K. Ghose J.

NAGENBALA DASEE

v.

SRIDAM MAHATO.*

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June 17, 18.

Rent—Wood to be supplied, if is rent—Res judicata, *when to be considered as waived—Agreement to supply wood if contravenes, s. 113 of the Bengal Tenancy Act—Compromise in contravention of s. 29 or s. 113 embodied in a decree, if binding on parties—Bengal Tenancy Act (VIII of 1885), ss. 29, 113.*

Wood to be supplied on account of jungle lands of a tenure in addition to the cash rent is rent, within the meaning of section 3, clause (*5*) of the Bengal Tenancy Act. A suit for the recovery of the same is a suit for rent.

If a party does not put forward a plea of *res judicata*, he must be taken to have waived it and to have intentionally invited the court to decide the case on the merits, and a subsequent compromise decree on the same point is binding on the parties.

Rajani Kumar Mitra v. *Ajmaddin Bhuiya* (1) referred to.

A compromise, by which the tenant agrees to supply a quantity of wood in addition to the rent reserved and by which the status of the tenancy is also raised, does not contravene either section 29 or section 113 of the Bengal Tenancy Act.

Tayefa Khatun Chaudhurani v. *Surendrakumar Sen* (2) and *Rampadarath Singh* v. *Sohrai Koeri* (3) referred to.

A compromise, even in contravention of section 29 or section 113 of the Bengal Tenancy Act, which merges in a decree, operates as an estoppel by judgment.

Ishan Chandra Banikya v. *Moomraj Khan* (4), *Krishna Lal Sadhu* v. *Pramila Bala Dasi* (5) and *Girishchandra Singha* v. *Mahammad Rausan Mian* (6) followed.

Sarjugsharan Lal v. *Dukhit Mahato* (7) not followed.

SECOND APPEAL by Srimati Nagenbala Dasee, plaintiff.

*Appeal from Appellate Decree, No. 2316 of 1929, against the decree of T. B. Jameson, District Judge of Midnapore, dated July 3, 1929, affirming the decree of Nagendranath Basu, Munsif of Jhargram, dated Oct. 31, 1927.

(1) (1928) 48 C. L. J. 577.
(2) (1931) I. L. R. 59 Calc. 26.
(3) (1919) 4 Pat. L. J. 667.
(4) (1926) 30 C. W. N. 940.
(5) (1928) I. L. R. 55 Calc. 1315.
(6) (1930) Appeal from Appellate Decree, No. 52 of 1928, decided by Graham and Mitter JJ. on May 8.
(7) (1913) 17 C. W. N. 496.

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The material facts appear from the judgment.

Panchanan Ghosh and *Durgadas Ray* for the appellant.

Pramathanath Banerji for the respondents.

S. K. Ghose J. This litigation has come to this Court under the following circumstances. There is a tenure held by certain Kalamuris, who gave an *ijârâ* to one Surabâlâ and subsequently to the plaintiff. Under this tenure, there is an under-tenure held by the Mâhâto defendants. The suit lands are in *mouzâ* Barasole, which is included within the under-tenure. In 1907 the record-of-rights was finally published and therein the defendants were recorded as under-tenure holders in respect of the lands of *mouzâ* Barasole, at a rental of Rs. 118-14 as. Surabâlâ, the then *ijârâdâr*, brought a rent suit in 1909 and obtained decree at the rate of Rs. 118-14 as. In 1910, the present defendants brought title suit—T. S. No. 200 of 1910—in order to have the rent decree set aside. In that suit, there was a compromise, by which the parties agreed that the rent for the under-tenure would be Rs. 118-14 as., and that, on account of the jungle lands, the defendants would supply 15 cart loads of *sâl* and other kinds of wood for fuel annually. Thereafter the plaintiff brought Rent Suit No. 2274 of 1922, consolidating the claim for rent in respect of the aforesaid cash amount and of the wood. The court held that the two claims could not be so consolidated and that, in respect of the claim for wood, the plaintiff was to seek for remedy in a regular civil suit. Then the plaintiff brought Money Suit No. 383 of 1925, claiming supply of wood for the jungle lands for 1330 and 1331 B.S. In that suit, there was again a compromise, by which it was settled that, instead of wood being supplied as fixed by the compromise decree in Title Suit No. 200 of 1910, the defendants would supply 8 cart loads of *sâl* and 7 cart loads of other kind of wood. The suit was accordingly decreed in terms of this compromise. Then the plaintiff brought

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the present suit No. 524 of 1926, claiming wood for the years 1332 and 1333 B.S. The defence denied the filing of the *solenâmâ* as aforesaid and also alleged undue influence. But the denial was not seriously pressed and undue influence was also not proved. The further defence was that the contract to supply wood as aforesaid was illegal and wholly void. The Munsif took this view and held that, by this contract, there was an enhancement of rent contrary to section 113 of the Bengal Tenancy Act and it was in the nature of an *âbwâb*. In that view, the Munsif dismissed the suit. An appeal was taken to the District Judge. But he held that the suit was based on a contract and, as the learned Munsif had Small Causes Court powers up to Rs. 250, the appeal was incompetent. Against that judgment, the plaintiff has filed this Second Appeal and also an application under section 115 of the Code of Civil Procedure. Both these matters are before me.

The first question is whether the learned judge in the court of appeal below is right in holding that the suit is not a suit for rent. If the suit was for rent then the decision of the learned judge was wrong and the appeal should have been heard by him on its merits. Now, the present claim is based on the compromise decrees made in the aforesaid suits in 1910 and 1925 respectively. The terms of the first compromise (Exhibit 2) show that the tenants bound themselves to supply to their landlords so much *sâl* and other wood annually from the jungle lands of the *mouzâ*. It cannot be gainsaid that this is rent even in the restricted sense of clause (*5*) of section 3 of the Bengal Tenancy Act of 1885. Obviously it was something deliverable in kind by the tenant to his landlord on account of the use or occupation of the land held by the tenant. As against this, there are some observations in the judgment (Exhibit 4) of the rent appeal arising out of Rent Suit No. 2274 of 1922. There it is remarked as follows: "As to "15 cart loads of fuel, I fully agree with the "conclusion arrived at by the lower court. It is

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"clearly not rent, not being amalgamated with rent "and payable in *kists*. If the plaintiff can at all "recover it, he must seek his remedy in a regular "civil court and not in a rent court." It may be that this only decides that the claim on account of the supply of wood is not rent in respect of the same holding, of which the cash rent of Rs. 118-14 as. is payable. But, even assuming that there was a clear decision that the claim was not one of rent, it can have no effect as *res judicata* against the plaintiff because the parties later on came to another compromise (vide Exhibit 1), dated the 14th September, 1925, and this was embodied in the decree of the 21st October, 1925. By this compromise the tenant bound himself to supply 8 cart loads of *sâl* and 7 cart loads of other kinds of wood annually. It has been held that if a party does not put forward a plea of *res judicata*, he must be taken to have waived it and to have intentionally invited the court to decide the case on the merits. See the case of *Rajani Kumar Mitra* v. *Ajmaddin Bhuiya* (1).

The question that next arises is whether this claim for the supply of wood is lawfully payable or deliverable. The trial court held that it was not. The learned advocate for the appellant has contended that this position is not tenable in view of the fact that the compromise has merged in the decree. I consider that this argument must prevail, because I feel that I ought to follow the decision in the case of *Ishan Chandra Banikya* v. *Moomraj Khan* (2) which dissented from the case of *Sarjugsharan Lal* v. *Dukhit Mahato* (3). The former case has been followed in the case of *Krishnalal Sadhu* v. *Pramila Bala Dasi* (4) and in a still later case, namely, that of *Girishchandra Singha* v. *Mahammad Rausan Mian* (5). In this last case, it was held that, although an enhancement of rent might be in contravention of the

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provisions of section 29 of the Bengal Tenancy Act, still, since the compromise by which the enhancement was effected was embodied in a decree, it operated as an estoppel by judgment. But even apart from this question, it seems to me that it cannot be said that the stipulation as to supply of wood which was effected by the compromise was illegal in view of section 113 of the Bengal Tenancy Act and was in the nature of an *âbwab*. The rent was enhanced by the record-of-rights in 1907 and the compromise took place in the suit of 1910. But the terms of the compromise show that the status of the tenancy was being raised. The tenancy was a temporary one, but by the compromise, it was stated that the rent would not be enhanced nor would the tenant be liable to pay additional rent for any increase of area. The learned Munsif observed that there was really no occasion for enhancement of rent only three years after the previous enhancement of 1907. But that could not prevent the parties from coming to such a compromise in the suit of 1910. The learned Munsif further observed that the revenue officer might settle a higher rent at the time of the next settlement, as the *mouzâ* in question was within Government *khâs mehâl*. But that again could not prevent an arrangement from being binding as between the tenant and his under-tenant. On this point, see the case of *Tayefa Khatun Chaudhurani* v. *Surendrakumar Sen* (1). That, in these circumstances, section 29 or section 113 of the Bengal Tenancy Act has no application derives support from the case of *Rampadarath Singh* v. *Sohrai Koeri* (2), which, I think, applies to the facts of the present case. In any case, as the learned advocate for the appellant has pointed out, the later compromise of 1925 was certainly more than 15 years after the previous settlement of 1907. This compromise was embodied in a decree and it is upon this decree that the present claim is based. On these grounds, I think that it must be held that the present suit is one for recovery

(1) (1931) I. L. R. 59 Calc. 26. (2) (1919) 4 Pat. L. J. 667.

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of rent. Consequently there was an appeal to the District Judge.

I therefore reverse the decision of the lower appellate court and remand the case for hearing on merits. The present appeal is allowed with costs. No order is necessary on the application.

Appeal allowed, case remanded.

A. C. R. C.