

that the object of the prohibition in the last clause of s. 258 is to compel the *judgment-debtor* to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree if he desire that such payment should be recognised by the execution Court as against the decree-holder executing the decree. That prohibition does not, in my opinion, apply to a case like the present. For these reasons I am of opinion that the decree-holders ought to have been allowed to prove payment. There was on that point a distinct issue before the lower Court, as the decree-holders had asserted and the judgment-debtor had denied the payments. That issue ought to have been tried and decided. I remand the following issue under s. 566 to the lower appellate Court, *viz.* :—

Did the judgment-debtor pay all or any, and if so which, of the first eight instalments due on the decree, dated the 10th September 1885 ?

The lower Court will allow the parties to produce evidence on this point. After receipt of the finding ten days will be allowed for objections.

*Issue referred under s. 566 of the Code of Civil Procedure.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*

HAIIDRI BEGAM (PLAINTIFF) v. NATHU (DEFENDANT) \*

*Act No. IV of 1882 (Transfer of Property Act), s. 106—Landlord and tenant—Suit in ejectment—Notice to quit—Denial of landlord's title by defendant before suit.*

In a suit by a landlord for ejectment of a tenant, no notice of determination of tenancy, under s. 106 of Act No. IV of 1882, is necessary where the defendant has, prior to the suit being brought, denied the plaintiff's title as landlord and that there was any contract of tenancy between them. *Unhanna Deri v. Vaikunta Hegde* (1) and *Dodhu v. Madhavrao Narayan Gadre* (2) referred to.

• THE facts of this case are as follows :—

The plaintiff sued for the ejectment of the defendant from a house and for rent, alleging that the defendant had taken the house

\* Second Appeal No. 417 of 1894, from a decree of Maulvi Jabar Husain, Subordinate Judge of Bareilly, dated the 19th February 1891, confirming a decree of Maulvi Ahmed Ali, Munsif of Bareilly, dated the 25th January 1892.

(1) I. L. R., 17 Mad., 218.

(2) I. L. R., 18 Bom., 110.

1894

KISHAN  
SINGH

AMAN SINGH.

1894

August 11.

1894

HAIDRI  
BEGAM

NATHU.

on rent executing a lease on the 12th of July 1874, but, since the 12th of July 1889, had declined to pay the rent. The plaintiff had therefore sued the defendant for rent in the Small Cause Court, but the defendant denied that he was a tenant of the plaintiff, and, as the suit involved a question of ownership, it was dismissed by the Small Cause Court.

The defendant pleaded that the lease was inadmissible in evidence, not having been registered, and that, having been held to be concocted, the question of its genuineness could not be re-opened. He also pleaded that the claim for rent was *res judicata*, and that the house belonged to the defendant's brother; and lastly that the suit was unmaintainable, inasmuch as no notice, as required by s. 106 of Act No. IV of 1882, had been served upon him.

The Court of first instance (Munsif of Bareilly) dismissed the claim for ejectment, holding that the service of notice under s. 106 of the Transfer of Property Act, 1882, was essential, but decreed the claim for such portion of the rent as had not been the subject of the previous suit in the Court of Small Causes.

The plaintiff appealed; and the lower appellate Court (Subordinate Judge of Bareilly) dismissed the appeal upon grounds similar to those upon which the Munsif's judgment was based.

The plaintiff then appealed to the High Court.

Mr. *Abdul Raoof* and *Maulvi Ghulam Mujtaba*, for the appellant.

*Munshi Madho Prasad*, for the respondent.

EDGE, C. J., and BANERJI, J.—The suit, out of which this appeal arose, was one for ejectment and also for arrears of rent. As to the claim for arrears of rent, that was barred under s. 13 of Act No. XIV of 1882 by the decision in a prior suit brought in a Court of Small Causes. It was contended here that as a Court of Small Causes could not have tried the suit for ejectment, its decision did not operate as *res judicata quæ* the claim for rent. That is a mistaken contention. A Court of Small Causes is competent to

try this suit so far as it relates to the cause of action with reference to the rent, and the fact that the Court of Small Causes is not competent to try this suit so far as it is a suit for ejectment, does not make s. 13 of the Act inapplicable on the question of the rent. The suit, so far as the claim for rent was concerned, was rightly dismissed, and we dismiss this appeal, so far as it relates to the claim for rent, with proportionate costs.

The suit for possession of the house by ejectment of the defendant was dismissed on the ground that no notice determining the tenancy as required by s. 106 of Act No. IV of 1882 had been given. A notice was not necessary in this case, as, in the prior suit to which we have referred, this defendant had denied the plaintiff's title and denied that there was any contract of tenancy between them. The question as to whether in such a case a notice is necessary has been considered in several cases in this Court: but we think that the law is now well settled, and we cannot better express it than by quoting the judgment of Muttusami Ayyar and Best, JJ., in *Unhamma Devi v. Varkunta Hegde* (1). What those learned Judges said was:—"Nor is there any doubt that the tenant forfeits this right to notice by denying the landlord's title prior to suit. It is also settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action; and subsequent denial of title, even if false, does not release the landlord from proving his case or amount to a waiver by the defendant of his right to notice." The same subject is referred to in the judgment in *Dodhu v. Madhavrao Narayan Gadre* (2). We set aside so much of the decisions of both the lower Courts as dismissed the plaintiff's suit for possession of the house, and we remand this case under s. 562 of Act No. XIV of 1882, to the Court of first instance for trial of the suit, so far as it relates to the house, on the merits. Costs of this appeal and in the Court below are allowed to the parties in proportion to their success.

*Cause remanded.*

(1) I. L. R., 17 Mad., 218.

(2) I. L. R., 18 Bom., 110.