

Before Mr. Justice Richards and Mr. Justice Karamat Husain.

LAL SINGH AND OTHERS (DEFENDANTS) v. KHALIQ SINGH AND OTHERS
(PLAINTIFFS). *

1909.
February 17

Act (local) No. II of 1901 (Agra Tenancy Act), section 199—Suit for arrears of rent—Tenant not pleading proprietary title—Subsequent suit for declaration of title—Res judicata.

In a suit for arrears of rent under Act No. II of 1901 the plaintiff did not set up his proprietary title to the land in suit. Held that a subsequent suit in the civil court for establishment of his proprietary right was barred by the principle of *res judicata*.—*Behari v. Sheobalak* (1) followed.

THE facts of this case are as follows :—

The plaintiffs brought the present suit for a declaration that they were the proprietors of certain plots of land and also prayed that a decree for arrears of rent passed against them on 20th January 1906, be set aside. In the Revenue papers the plots are recorded as in the cultivation of the plaintiffs. The plaintiffs twice applied for correction of the Revenue papers but the Revenue Courts disallowed the application deciding that the entry was correct. The defendants then brought a suit for enhancement of rent of all the plots and that suit was decreed on 11th March 1904 and on the basis of the decree for enhancement a suit for arrears was brought by the defendants and decreed on 20th January 1906. In the suit for arrears Khaliq Singh plaintiff had alone appeared, but in his defence he did not allege that he was proprietor of any of the plots. The lower courts decreed the plaintiffs' claim. The defendants appealed to the High Court.

Mr. *Abdul Raoof*, for the appellants, contended that in the suit for arrears the present plaintiffs could have raised the question of proprietary title and that not having raised it they were barred by the principle of *res judicata* from raising it now. He relied on *Behari v. Sheobalak* (1).

Babu *Surendra Nath Sen*, for the respondents, contended that under section 193 of the Tenancy Act the provisions of the Civil Procedure Code were to apply only if they were not inconsistent with the Act. If the plea of title had been decided by the Revenue Court, the decision would have been *res judicata*.

* Second Appeal No. 1334 of 1907, from a decree of L. Marshall, District Judge of Mainpuri, dated the 22nd July 1907, confirming a decree of Ishri Prasad, Subordinate Judge of Mainpuri, dated the 23rd June 1906.

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Section 199 of the Tenancy Act enacted that if the tenant pleaded proprietary title, the Revenue Court was to adopt one of the two courses mentioned therein. It was only when the plea was raised that the Revenue Court could decide the question.

RICHARDS AND KARAMAT HUSAIN, JJ.—This was a suit brought by the plaintiffs for a declaration that they were proprietors of certain plots of land which are specified in a list at the end of the plaint. They also asked to have a certain decree for rent granted by the revenue court set aside. It appears that as far back as the year 1872, the defendants or their representatives were recorded as proprietors and the plaintiffs in the present suit were recorded as cultivators in respect of the holdings the subject-matter of the present suit. In the year 1902, the plaintiffs made an application to correct the entry in the revenue papers. This application was refused. In 1903, a similar application was made with a like result. The defendants in the present suit then applied in the revenue court to have the rent payable by the plaintiffs enhanced and the application was allowed in March 1904. In the year 1906 the defendants sued the plaintiffs in the revenue court for arrears of enhanced rent. Only one of the plaintiffs in this suit, namely Khaliq Singh, appeared, but a decree was given for enhanced rent and this is the decree which it is now sought to set aside. The plaintiffs by their present suit seek to go behind all the proceedings in the revenue court and to have it declared that they are proprietors of the holding of which they have been recorded as cultivatory tenants ever since the year 1872. If the law permitted this to be done it would be very unfortunate. It would mean that the time of the revenue court in considering the question of the enhancement of rent, and also in deciding the issues between the parties in the suit for arrears of rent, would have been completely wasted, and it would tend to bring the civil and revenue courts into conflict. It does not appear that the plaintiffs ever set up their proprietary title until they instituted the present suit. When they were sued for arrears of rent it is quite clear that they did not plead the proprietary title. We have had the judgment of the revenue court in that case read to us. It has been ingeniously argued by Mr. Surendra Nath Sen

that the revenue court has only jurisdiction to decide a question of proprietary right or to order the defendant to bring a suit in a civil court under the provisions of section 199 of the Tenancy Act, in a case in which the defendant has expressly pleaded his proprietary title and he argues that inasmuch as the plaintiffs in the present case did not plead proprietary title when sued in the revenue court the question never was capable of being decided by a revenue court. We think that such construction of the Tenancy Act is quite contrary to the entire policy of the law. We think that when the plaintiffs were sued in the revenue court they were bound under the provisions of section 199 of the Tenancy Act read with section 13 of the Code of Civil Procedure (Act No. XIV of 1882) to put forward as a defence to the suit their plea of proprietary title, and that having failed to do so the matter is *res judicata*, and it is not open to them to raise the question afresh in the present suit. We find that a similar view was taken by a Judge of this Court in the case of *Bihari v. Sheobalak* (1). The learned Judge in that case points out the alteration that has been made in the law by section 199 of the Tenancy Act and distinguishes cases arising since the passing of that Act from cases coming under the provisions of Act No. XII of 1881. We allow the appeal, set aside the decrees of the courts below, and dismiss the plaintiffs' suit with costs in all courts including in this court fees on the higher scale.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

JHUNKU SINGH (DEFENDANT) *v.* CHHOTKAN SINGH AND OTHERS
(PLAINTIFFS).*

1909
February 21

Usufructuary mortgage—Mortgagee not in possession of a portion of the mortgaged property—Acquiescence of mortgagee in part performance—Stipulation for interest—Redemption without payment of interest.

Where a mortgage-deed provides for payment of interest if "there is any defect (*nugs*) in the mortgaged property and any manner of defect arise in the mortgagee's possession," held that the defect referred to is a defect in the title of the mortgagor whereby the mortgagee should fail to get possession or having got possession should lose it.

* Second Appeal No. 1389 of 1907 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 7th September 1907, confirming a decree of Achal Behari, Subordinate Judge of Gorakhpur, dated the 30th July 1906.