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July, 18.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

NANDAN SINGH (PLAINTIFF) v. GANGA PRASAD (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 34*—Defendant in possession of land without consent of owner—Ejectment of defendant through Revenue Court—Subsequent suit for rent—Cause of action—Misjoinder of causes of action—Civil Procedure Code* (1908), *order II, rule* 2.

On a partition of certain revenue paying property some land which fell to the plaintiff's share remained in possession of the defendant, who refused to vacate it. The plaintiff sued the defendant for ejectment in the Revenue Court. The defendant pleaded that he was an ex-proprietary tenant, but the Court held him to be a non-occupancy tenant and ejected him. The plaintiff then brought the present suit under section 34 of the Agra Tenancy Act, 1901, for rent of the land held by the defendant during the period prior to his ejectment as land occupied by the defendant without the plaintiff's consent.

Held, that the defendant, being in occupation of the land without the consent of the plaintiff, was liable to pay rent therefor, under section 34 of the Agra Tenancy Act, and further that the claim could be maintained notwithstanding that the defendant was not in possession at the date of the suit. *Sheo Gopal Pande* v. *Thakur Baldeo Singh* (1) distinguished.

Held further, that the suit was not barred by reason of the plaintiff having in his previous suit for ejectment treated the defendant as a tenant.

Held also, that the plaintiff's cause of action under section 34 of the Agra Tenancy Act was no part of his cause of action to recover possession of the property, and could not be joined in the previous suit, and the present suit was, therefore, not barred by the provisions of the Code of Civil Procedure, order II, rule 2.

THE facts of this case were as follows :—

The plaintiff and the defendant were co-sharers in a village. Disputes arose between them which were referred to arbitration. An award followed, in terms of which the property was divided. The property in suit fell to the share of the plaintiff, and it was decided that one co-sharer would have no right in the share of the other. The award was made a rule of court and a decree was passed in accordance therewith. The defendant continued in possession of the property in suit contrary to the terms of the decree. The plaintiff then brought a suit for the ejectment of the defendant in the Revenue Court under sections 58 and 63 of the

* Second Appeal No. 602 of 1912 from a decree of J. L. Johnston, Second Additional Judge of Aligarh, dated the 14th of February, 1912, reversing a decree of Saghir Husain, Assistant Collector, First Class, of Aligarh, dated the 26th of April, 1911.

(1) (1911) 8 A. L. J., 1067.

Agra Tenancy Act. The Revenue Court decreed that suit. In that suit the defendant pleaded that he was an ex-proprietary tenant, but the court held him to be a non-occupancy tenant. The present suit was then brought by the plaintiff under section 34 of the Agra Tenancy Act, 1901, for recovery of arrears of rent for the period during which the defendant was in possession prior to ejectment. The court of first instance decreed the suit, but the lower appellate court dismissed it on the ground that the plaintiff, having ejected the defendant as a tenant, could not now turn round and sue him as a person in occupation of the land without his consent. The plaintiff appealed.

Munshi *Parshotam Das Tandan* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant, submitted that the defendant, having held the land of the plaintiff, was bound to pay rent therefor. He was, no doubt, a trespasser, but he could not be ejected as a non-occupancy tenant; *Balli* v. *Naubat Singh* (1). This was a suit under section 34 of the Agra Tenancy Act. Under that section "rent" could be recovered from a person who remained in possession against the consent of the landlord. Rent is only paid by a tenant. It follows, therefore, that a person who remains in possession against the consent of the landlord is his tenant. The defendant remained in possession of the plaintiff's land and must pay compensation for use and occupation.

Mr. *M. L. Agarwala* (with him Munshi *Girdhari Lal Agarwala*), for the respondent, submitted that the defendant was not a tenant, and the Revenue Court could not pass a decree for rent against him. He was only a trespasser, and a suit for his ejectment and for mesne profits should have been brought in the civil court. If a decree for rent was passed against him it would be holding a trespasser to be a tenant. Where no rent is fixed before ejectment it cannot be fixed after ejectment; *Kamta Prasad* v. *Panna Lal* (2), *Sheo Gopal Pande* v. *Thakur Baldeo Singh* (3). In the first suit the plaintiff sued the defendant as his tenant, and the present suit under section 34 is not maintainable. That section applies where a suit for compensation is brought against a person who is in possession at the date of the suit. Then again, the plaintiff

(1) (1912) 9 A. L. J., 771. (2) (1912) I. L. R., 35 All., 123.

(3) (1911) 8 A. L. J., 1087.

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should have claimed rent in the previous suit, and having failed to claim it the present is barred by the provisions of the Code of Civil Procedure, 1908, order II, rule 2, which apply to Revenue Courts also (See section 193, Agra Tenancy Act). The present claim arises out of the same cause of action as the previous suit. The omission to sue for rent in the previous suit is fatal to this suit; *Mewa Kuar* v. *Banarsi Prasad* (1), *Lalji Mal* v. *Hulasi* (2), *Debi Dial Singh* v. *Ajaib Singh* (3), *Venkoba* v. *Subbanna* (4), *Maksud Ali* v. *Nargis Dye*, (5).

RICHARDS, C. J., and BANERJI and TUDBALL, J.J:—This appeal arises out of a suit instituted in the Revenue Court to recover a sum of money claimed to be payable as arrears of rent under section 34 of the Agra Tenancy Act. The facts have been very clearly ascertained and are as follows. The plaintiff and the defendant or their predecessors in title were co-sharers. Disputes arose between them, which resulted in an arbitration award and a decree in accordance therewith. Under that decree the plaintiff became entitled to the property in respect of which the present claim is made, notwithstanding that the defendant had previously been in possession and occupation of this particular land. Under the arbitration award and the decree following it the defendant had to give it up to the plaintiff. He did not do so. A suit for his ejectment was then instituted in the Revenue Court. In this suit the defendant was described as a cultivator, but in the body of the plaint the actual facts were set out as stated above. The arbitration proceedings were referred to, the decree which followed on the award was mentioned, as also the fact that the defendant had insisted upon remaining in possession though many times asked by the plaintiff to give up possession. The defence was not that the defendant was a proprietor, but that he was the ex-proprietary tenant and not liable to be ejected. He based his claim to be ex-proprietary tenant on the allegation that the land in dispute had been his *sir* before the arbitration proceedings. The award had already decided that the land was not his *sir* nor his *khudkasht*, and the Revenue Court gave a decree to eject the defendant, holding that he was a non-occupancy tenant.

(1) (1895) I.L.R., 17 All., 533. (3) (1881) I. L. R., 3 All., 543.
(2) (1881) I.L.R., 3 All., 660. (4) (1887) I. L. R., 11 Mad., 150.
(5) (1892) I. L. R., 20 Calc., 338.

The present suit has now been instituted under section 34 of the Tenancy Act. The court of first instance acertained the amount which it thought fair and equitable to be paid by the defendant under the circumstances. The lower appellate court reversed the decree of the court of first instance and dismissed the plaintiff's suit. Hence the present appeal.

Section 34 is as follows :—

"A person occupying land, without the consent of the land-holder, shall be liable for the rent of that land at the rate payable in the previous year, or, if rent was not payable in the previous year, at such rate as the court may determine to be fair and equitable, but he shall not be deemed to hold the land within the meaning of section 11 until he begins to pay rent therefor."

The appellant contends that there is no doubt that the defendant was a person occupying his land without his consent and that, therefore, he was bound to pay compensation at a fair and equitable rate which has been ascertained by the court of first instance. The respondent urges, on the other hand, that the plaintiff having sued the defendant in the Revenue Court as a tenant, cannot now recover rent from him under section 34 as a person occupying the land "without his consent." He further contends that the plaintiff, in the previous suit to recover possession, was bound to make the claim for rent under the provisions of order II, rule 2, of the Code of Civil Procedure, and lastly, that compensation or rent under section 34 can only be recovered against the person who is still in occupation of the land at the time of the institution of the suit.

The wording of section 34 is certainly somewhat peculiar. In England there is a well known form of action, viz., the action for use and occupation. In such a case where no rent has been fixed and the land is occupied *with the permission* of the owner, an action for use and occupation lies, and where the ownership of the plaintiff is proved as well as the occupation by the defendant, *prima facie* it will be assumed that there was a contract by the defendant to pay reasonable compensation for the occupation. Section 34, however, provides that a person who occupies the land *without permission* shall be liable to pay rent therefor. We are bound to construe the section according to the plain words used.

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We now come to the question whether the proceedings in the Revenue Court, which ended in the ejectment of the defendant, can be said to bar the present claim. We have already pointed out that in bringing these proceedings the plaintiff clearly and distinctly stated the real facts of the case and that the defendant was in possession against his consent. There can be little doubt that on the facts of the present case, as now ascertained, the most appropriate remedy for the plaintiff to have taken would have been a suit in the civil court for recovery of possession, coupled with a claim for mesne profits. It is quite unnecessary for the purposes of the present appeal to decide whether or not, under the circumstances of the present case, the Revenue Court had power to eject the defendant. It is quite clear that unless the relationship of landlord and tenant exists, the Revenue Court has no power to eject. It is, therefore, quite possible that the decree of the Revenue Court was erroneous, but this is not a matter which we have to decide in this appeal. In our opinion, the proceedings which the plaintiff did take cannot be said to bar the present suit on the ground that he was treating the defendant as his tenant. He set out the actual facts as already mentioned and in his plaint as well as his evidence stated the fact that the defendant was holding in spite of him and against his will. Under the circumstances, the rulings which have been cited during the course of the arguments have no application.

We now come to the third point, viz., whether it was incumbent upon the plaintiff to join in his previous suit the present claim. Order II, rule 2, is as follows:—

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, &c."

It is urged that part of the plaintiff's cause of action was his present claim under section 34 and that, therefore, he should have included it in his claim.

In our opinion, the plaintiff's cause of action under section 34 was no part of his cause of action to recover possession of the property, assuming the claim to be regarded as a claim for arrears of rent. The very words of rule 4 of the same order show that a claim for rent is not on the same cause of action as the claim for possession. Rule 4 is as follows:—"No cause of action

shall, unless with the leave of the court, be joined with a suit for the recovery of immovable property, except (*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof (*b*) claims for damages for breach of any contract under which the property or any part thereof is held, and (*c*) claims in which the relief sought is based on the same cause of action." This rule shows that, but for these exceptions, claims for mesne profits and for arrears of rent could not be joined with a suit to recover possession of immovable property except with the leave of the court. It further shows that claims for mesne profits and arrears of rent are regarded as different causes of action. The inconvenience of holding that claims for rent under section 34 are based on the same cause of action as claims for ejectment is illustrated by the fact that under the Tenancy Act the court which hears an ejectment suit would, in some cases, and would not in others, be the same as the court which hears a suit for arrears of rent. The court of appeal also in one case is not the same as in the other. We may also observe that this point was not raised either in the court of first instance or in the grounds of appeal to the lower appellate court.

As to the last point, we think it is quite clear that a claim can be made, notwithstanding that the person has ceased to be in occupation. The case of *Sheo Gopal Pande* v. *Thakur Baldeo Singh* (1) has no bearing on the present case. In our opinion, the plaintiff was entitled to make a claim under section 34. As no rent had been paid in the previous year, the court was bound to determine what sum would be fair and equitable. We find that the court of first instance fixed the sum at Rs. 240 a year. It based its decision upon a decree for profits of the very same land, between the parties on a former occasion. The lower appellate court did not decide the question. We do not think that the rent to be paid by the defendant could have been fixed upon any more equitable basis than that adopted by the court of first instance. We, therefore, allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance. The appellant will have his costs in all courts.

Appeal allowed.

(1) (1911) 8 A. L. J., 1087.