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the zamindar's books, and thereby to relieve the former tenant from liability, is a matter which is not before us, and which we have no right to determine. What we have before us is simply this question: does or does not this suit lie against the old tenant, and we think we are bound to hold that it does, and that the rights of the zamindar, as stated in the judgment of this Court, to which we have referred, are not affected by the existence of the remedy provided by section 7, and that there is no defence to the suit.

We must therefore dismiss the appeal with costs.

Appeal dismissed.

A. F. M. A. R.

Before Mr. Justice Pigot and Mr. Justice Rampini.

PEARY MOHUN MUKERJI (PLAINTIFF) *v.* ALI SHEIKH AND OTHERS (DEFENDANTS).*

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Res judicata—Civil Procedure Code (Act XIV of 1882), *s.* 13—*Bengal Tenancy Act (Act VIII of* 1885), *s.* 158—*Incidents of tenancy, Application to determine—Dispute as to tenancy—Landlord and tenant.*

The object of section 158 of the Bengal Tenancy Act is merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in clauses (*a*), (*c*) and (*d*) of the section. Though clause (*b*) does authorize the Court to determine the name and description of the tenant, this was not intended to and does not authorize the Court to decide conclusively disputes as to the right to possession of the land. An issue, therefore, regarding a dispute as to the existence of the relation of landlord and tenant between the parties in a proceeding under section 158 can only be decided collaterally, and does not arise between the parties in such a manner as to make the decision upon it *res judicata* between them in a subsequent regular suit.

Bhopendro Narayan Dutt v. *Nemye Chand Mondul* (1) and *Debendro Kumar Bundopadhya* v. *Bhupendro Narain Dutt* (2) referred to.

THE plaintiff Raja Peary Mohun Mukerji sued to eject Ali Sheikh, the defendant No. 1, from and recover possession of a certain plot of land.

* Appeal from Appellate Decree No. 1097 of 1891, against the decree of F. F. Handley, Esq., Judge of Nadia, dated the 10th of June 1891, affirming the decree of Babu Bepin Chunder Roy, Munsif of Ranaghat, dated the 11th of October 1890.

(1) I. L. R., 15 Calc., 627. (2) I. L. R., 19 Calc., 182.

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The plaintiff alleged that he was in khas possession of the land in question, that the defendant No. 1, contrary to his order, and in collusion with Promodanandan Gossami, the defendant No. 2, took possession of the land, alleging that he had obtained an *amalnama* from the latter; that the plaintiff as the landlord cancelled the said *amalnama* and settled the land with Motilal Mandal, the defendant No. 3, that thereupon the defendant No. 1 made an application under section 158 of the Bengal Tenancy Act to have it declared that he was the plaintiff's tenant in respect of the disputed land and obtained a decision in his favour; that against this decision an appeal was preferred, but it was dismissed for default. The plaintiff prayed that the *amalnama* granted by the defendant No. 2 might be declared invalid, and that the decree passed in favour of the defendant No. 1, under section 158 of the Bengal Tenancy Act, might be set aside.

The main defence of the defendant No. 1 was that the suit was barred as being *res judicata* by reason of the decision in his favour under section 158 of the Bengal Tenancy Act.

The defendant No. 2 alleged that he as the agent of the plaintiff had settled the land with the defendant No. 1.

The Munsiff dismissed the suit, holding that the contention of the defendant No. 1 was right, and that the suit was barred under section 13 of the Civil Procedure Code, and his decision was upheld by the District Judge.

From this decision the plaintiff appealed to the High Court on the grounds (*a*) that section 158 of the Bengal Tenancy Act was applicable only to cases of an admitted tenancy, and not to cases where the existence of the tenancy itself was disputed by either party; and that the plaintiff having all along disputed the defendant's tenancy, the decision under section 158 was *ultrà vires*, and could not therefore operate as *res judicata*; and (*b*) that the plaintiff having come into Court on the allegation of collusion between two of the defendants, the matter was one which could not be inquired into under section 158 of the Bengal Tenancy Act, but should be tried in a regular suit.

Baboo *Pran Nath Pundit* for the appellant.

Baboo *Saroda Prasanna Roy* for the respondents.

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The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows :—

The plaintiff in this suit seeks to eject the defendant No. 1, Ali Sheikh, from a certain plot of land, and to obtain khas possession of the land himself. He also prays that a lease of the land granted by the defendant No. 2 to the defendant No. 1 may be declared invalid, and that a former decree passed on an application by the defendant No. 1 under section 158 of the Bengal Tenancy Act, in which it was declared that the defendant No. 1 was his (*i.e.*, the present plaintiff's) tenant in respect of the land in dispute, may be set aside. It is alleged that the defendant No. 2 was formerly the plaintiff's *gumastha*, and that when he let the land to the defendant No. 1, he exceeded his powers, and that the plaintiff subsequently let it to the defendant No. 3, who according to the plaintiff ought now to be in occupation of it, but who has been kept out of it by the defendant No. 1.

Both the lower Courts have held that the suit is barred by the rule of *res judicata* ; inasmuch as it has been already decided in the application under section 158 of the Bengal Tenancy Act that the defendant No. 1 is the plaintiff's tenant in respect of the land. They have therefore dismissed the suit.

In appeal the plaintiff contends that the present suit is not barred by *res judicata*, that the Courts which decided the application under section 158 of the Bengal Tenancy Act were not Courts of competent jurisdiction, inasmuch as they were not entitled in such a proceeding to decide between the plaintiff and the defendant whether there existed the relation of landlord and tenant between them: in other words, it is said this matter was not directly and substantially in issue between the parties in the previous proceeding; as it is only in cases in which the relation of landlord and tenant is admitted to exist between parties that a Court can entertain an application under section 158 of the Bengal Tenancy Act.

The question appears to be a somewhat difficult one. On the one hand, in favour of the appellant there appear to be the following considerations: (1) that the words in the section "on the application of *the* landlord or *the* tenant of the land (not on the application of a person alleging himself to be the landlord or the tenant of the land") seem to point to the conclusion that the Court

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is meant to deal under section 158 with the case of an admitted tenancy; (2) the section while enumerating the points to be determined by a Court does not say that it is to determine the question of the existence of the relation of landlord and tenant. It therefore does not seem to contemplate the existence of a dispute on this point, and (3) that the court-fee payable on the application under section 158 is either 1 anna or 8 annas according as the value of the subject-matter of the suit is below or above Rs. 50. It can hardly have been intended by the Legislature that an important question, such as that of the relation of landlord and tenant, should be adjudicated on on payment of such an insignificant court-fee duty. Then in the case of *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1) it has been said that "if the appellants had altogether denied the respondent's tenancy, they must have brought an action of ejectment, but by acknowledging him as their tenant, they seem to bring themselves within the provisions of the section." This passage certainly favours the view that it is only in case of an admitted tenancy that Courts have jurisdiction under section 158. Again, in the Full Bench case of *Debendra Kumar Bundopadhya* v. *Bhupendro Narain Dutt* (2) it is said:—"It is, we think, clear that the petitioners assert that no tenancy in fact existed between themselves and the opposite party at or before the date of the petition, and the admission of a tenancy, we think, merely amounts to an expression of willingness on their part, that a tenancy should now be treated as existing in order to give jurisdiction under section 158, and so to enable them to remove the opposite party from the land. This admission does not in our opinion bring the case within the meaning of the section, the object of which is to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and his tenant, and not to enable the Court to make a new contract between the parties between whom no contract was in existence at and before the date of the application." This extract, too, is in favour of the view that a Court has jurisdiction under section 158, Bengal Tenancy Act, only when a tenancy is admitted, and that it should not under that section proceed to decide a dispute as to the existence of the relation of landlord and tenant between the parties to the application.

(1) I. L. R., 15 Calc., 627. (2) I. L. R., 19 Calc., 182.

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On the other hand, it may, no doubt, be said that when the section gives the Court power to determine "the name and description of the tenant (if any)" it gives it authority to decide such a dispute; for, if there be such a dispute, the name and description of the tenant cannot be decided without enquiring into and deciding the dispute. But we are of opinion that such an issue can only be decided collaterally, and that it does not arise between the parties in a proceeding under section 158, in such a manner as to make the decision upon it *res judicata* between the parties in a subsequent regular suit. In our opinion the object of section 158 is merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in clauses (*a*) (*c*) and (*d*) of the section. Though clause (*b*) does authorize the Court to determine the name and description of the tenant, this, we think, was not intended to and does not authorize the Court to decide conclusively disputes as to who is the tenant or as to who is entitled to the occupation of the land. The section in other words does not empower the Court to decide disputes as to the right to possession of the land. It could not in a proceeding under section 158 of the Act pass a decree for possession; so that if it were to decide such questions it might declare one person entitled to possession, while another might ostensibly hold, and might continue to hold, actual and direct possession of the land. Further, the section does not empower the Court to bring all persons claiming to have rights on the land before it. It might therefore be, if the respondent's contention as to the meaning of the section be correct, that the Court would decide questions of the right to possession without having all the persons having conflicting claims to the land before it. This seems to have been the case in the previous suit between the present plaintiff and the defendant No. 1; for the defendant No. 1, the applicant in that proceeding, did not make the defendant No. 3, who the plaintiff alleges is the tenant of the land, a party to his application under section 158. Under these circumstances we decree the appeal and remand the suit to the Court of first instance to be decided on its merits. Costs to abide the result.

Appeal decreed and case remanded.

A. F. M. A. R.