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ordinary and not occupancy tenants. They cannot, therefore, resist the claim of the plaintiff who has acquired the title of those to whom the Khandekars attorned as tenants.

The result is that the decree of the lower appellate Court is affirmed and the appeal dismissed with costs in both cases.

Decrees confirmed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Pratt.

1918. *November* 20.

DAUDBHAI ALLIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* DAYA RAMA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res Judicata—*Civil Procedure Code (Act V of 1908), section 11—Finding recorded on an issue which is not necessary in the first suit—Finding does not become* res judicata—"*Finally decided,*" *meaning of.*

In 1903, the plaintiff sued the defendant to recover possession of land and arrears of assessment at an enhanced rate, alleging that the defendant was a tenant-at-will and not a permanent tenant. The Court held in that suit that the defendant was a yearly tenant ; and though it decreed the claim to recover arrears of assessment at the enhanced rate, it dismissed the claim to recover possession on the ground that notice to quit had not been given by the plaintiff. Ten years later, the plaintiff gave to the defendant a legal notice to quit, and brought a second suit to recover possession of the land, alleging that the defendant was a tenant-at-will and that he was prevented from contending otherwise by *res judicata.*

Held, by *Heaton J.*, that though the issue as to the nature of the tenancy was undoubtedly directly and substantially in issue, it could not be said that it was finally decided, in the earlier case.

Held, by *Pratt J.*, that the dismissal of the claim for possession prevented the finding that the defendant was not a permanent tenant from operating as *res judicata* ; and that the issue as to the character of the tenure was a matter collateral to the liability to pay enhanced assessment.

* Second Appeal No. 559 of 1917.

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DAUDBHAI ALLIBHAI *v.* DAYA RAMA.

SECOND appeal from the decision of G. R. Datar, Joint First Class Subordinate Judge, A. P., at Surat, confirming the decree passed by K. K. Sunavala, Second Class Subordinate Judge at Surat.

Suit to recover possession of land.

In 1903, the plaintiff, who was an Inamdar, sued the defendant to recover possession of the land and to recover arrears of assessment at an enhanced rate. The Court held in that suit that the defendant was not a permanent tenant, nor was he a tenant at will, but he was a tenant from year to year; that the plaintiff had a right to recover possession but he could not do so as he had not given a legal notice to quit; and that the plaintiff was entitled to recover enhanced assessment. Accordingly, the plaintiff's claim to recover arrears was decreed, and his claim to recover possession was dismissed.

The plaintiff gave a legal notice to the defendant to quit and brought the present suit in 1913 to recover possession of the land. He alleged in that suit that it was not open to the defendant to contend that he was a permanent tenant, because the question was concluded as *res judicata* in virtue of an express finding in the earlier suit.

The lower Court held that the decision in the earlier suit did not operate as *res judicata* on the point of annual or permanent tenancy; and dismissed the suit on the merits.

The plaintiff appealed to the High Court.

Coyajee with *B. G. Rao*, for the appellant:—The finding in the earlier suit operates as *res judicata*, for though that suit was dismissed on the ground of want of notice, the question arose only after it was determined there that the respondent was an annual tenant. The respondent could have appealed against that finding:

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see *Krishna Behari Roy* v. *Brojeswari Chowdranee*[1]; *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya*[2]; *Mota Holiappa* v. *Vithal Gopal*[3] and *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer*[4].

[PRATT J. referred to *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*[5] and *Shib Charan Lal* v. *Raghu Nath*[6].]

H. V. Divatia, for the respondent, was not called upon.

PRATT, J.:—This question raises a point of *res judicata*.

The plaintiff sued in 1903 alleging that the defendant was liable to pay assessment as enhanced by the Survey Settlement, but had failed to do so; that he was a tenant-at-will and not a permanent tenant; that the plaintiff had given him notice to quit and that he had not given up possession. Plaintiff, therefore, prayed for two reliefs: (1) to recover possession of the land, and (2) to recover arrears of assessment at the enhanced rate.

Defendant in his written statement replied that he was not liable to pay enhanced assessment; that he was a permanent tenant; and that the plaintiff was not entitled to recover possession.

The following issues were raised :—

(1) Whether it is proved that the defendant is a permanent tenant of the land in dispute or he is a tenant thereof at the pleasure of the plaintiff (*i.e.*, as long as the plaintiff chooses to keep him as such)?

(2) Has the plaintiff a right to take the land in dispute from the defendant (possession of the land in dispute)?

(3) Is the assessment of the land in dispute enhanced on a resurvey thereof? and should the defendant be

(1) (1875) L. R. 2 I. A. 283.
(2) (1897) 24 Cal. 900.
(3) (1916) 40 Bom. 662.
(4) (1884) L. R. 12 I. A. 23.
(5) (1886) 13 Cal. 17.
(6) (1895) 17 All. 174.

given a notice thereof under the Land Revenue Code? and has such a notice been given to the defendant? If not, is not the defendant bound to pay the enhanced assessment under the Land Revenue Code? and

(5) Has the plaintiff given to the defendant a notice requiring him to deliver up possession of the land in dispute and intimating to him that he is no longer willing to retain him as his tenant?

The Court decided on the first issue that the defendant was a tenant from year to year, and not a permanent tenant; on the 5th issue that a legal notice to quit had not been given; and therefore on the 2nd issue plaintiff was not entitled to recover possession; and on the 3rd issue the plaintiff was entitled to recover arrears of assessment at the enhanced rate. The suit for possession was, therefore, dismissed and a decree was made for arrears of assessment at the enhanced rate.

Plaintiff has now given notice to quit and files this suit for possession. He claims that the nature of defendant's tenure is *res judicata*.

The question for decision is whether the defendant is bound by the finding in the first suit that he is not the permanent tenant. The solution of that question depends upon whether that issue was substantially in issue in the former suit and whether it was heard and finally decided.

The question whether an issue was substantially raised and decided is a matter of fact to be decided upon the circumstances of each particular case: see *Girdhar Manordas* v. *Dayabhai Kalabhai*[1]. And although no rule of general application can be laid down, this proposition is well-established that when a decree of the Court is not based upon a finding but was made in spite of it, that finding cannot be *res judicata*: *Rajah Run*

[1] (1882) 8 Bom. 174 at p. 180.

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Bahadoor Singh v. *Mussumut Lachoo Koer*[1]; *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*[2]; *Thakur Magundeo* v. *Thakur Mahadeo Singh*[3]; *Ghela Ichharam* v. *Sankalchand Jetha*[4]; and *Parbati Debi* v. *Mathuranath Banerjee*[5]. The dismissal of the claim for possession, therefore, prevents the finding that defendant was not a permanent tenant from operating as *res judicata*.

But it is claimed that the decree for enhanced assessment is based on this finding and gives it the effect of *res judicata*. I think it clear, however, that the issue as to the character of the tenure was a matter collateral to the liability to pay enhanced assessment. The frame of issue No. 3 shows that the liability was attributed not to the tenure, but to the fact of the Survey Settlement. The finding is indeed consistent with the defendant being a permanent tenant, and therefore the decree for enhanced assessment was in no sense based upon the finding that defendant was not the permanent tenant.

Mr. Coyaji relied upon the two cases, *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya*[6] and *Krishna Behari Roy* v. *Brojeswari Chowdranee*[7]. In the first case the former suit was dismissed on the grounds of want of notice and of non-liability of defendants. In the second suit filed after notice the question of liability was held to be *res judicata* against the plaintiff. Here after the decision of the first issue, the second issue was not necessary for the disposal of the suit. But as both had been heard and determined against the plaintiff, he was held to be bound by both. The decision is in conflict with certain observations in the case of *Shib Charan Lal* v. *Raghu Nath*[8]. But

(1) (1884) L. R. 12 I. A. 23.
(2) (1886) 13 Cal. 17.
(3) (1891) 18 Cal. 647.
(4) (1893) 18 Bom. 597.
(5) (1912) 40 Cal. 29.
(6) (1897) 24 Cal. 900.
(7) (1875) L. R. 2 I. A. 283.
(8) (1895) 17 All. 174.

however that may be, it has no bearing on the present case. For the decree was based on both findings, whilst here it is made in spite of one finding and the other finding on which it is based was a collateral one. In *Krishna Behari Roy* v. *Brojeswari Chowdranee*[1] an adopted son sued a Putneedar for a declaration that the lease granted to him by his adoptive mother was in excess of her authority. The reversioner intervened disputing the validity of the adoption and the right of the plaintiff to sue. The first Court found that the adoption was valid but dismissed the suit as the Putnee lease could not be set aside. The reversioner appealed, and the Court of appeal affirmed the decision of the lower Court. The validity of the adoption was held by the Privy Council to be *res judicata* in a subsequent suit by the reversioner to set aside the adoption. Mr. Coyajee contends that the finding of the adoption was as much involved in the main purpose of the suit, the setting aside of the Putnee lease, as here the finding as to the nature of the tenancy is to the claim for enhanced assessment. The answer, I think, is that the reversioner intervened not to support the suit to set aside the Putnee lease, but to dispute the title of the adopted son. In his appeal he raised the issue of the adoption which was decided against him. As regards the reversioner the validity of the adoption was the substantial issue.

The two cases quoted by Mr. Coyajee do not, therefore, affect the conclusion I have come to on the authority of *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer*[2], and the Indian cases that follow it in regard to the first issue and in regard to the third issue that the finding as to the nature of the tenancy was only collateral to the decree for enhanced assessment.

[1] (1875) L. R. 2 I. A. 283.

[2] (1884) L. R. 12 I. A. 23.

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The case of *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*[1] is a case on facts which are almost identical and the issue was there held not to be *res judicata*.

I would, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

HEATON, J. :—I agree in the order proposed. I need not restate the facts of the case. The law as to *res judicata* is contained in section 11 of the Civil Procedure Code. I always find myself in troubled waters when I am asked to deal with decided cases on this point which do not proceed on the precise words of the section. To my understanding the section itself gives us a solution in this particular case. The issue as to the nature of the tenancy was, I think, undoubtedly, directly and substantially in issue in the earlier case. For it was as to the nature of the tenancy that the parties were disputing and it was to get that dispute settled that they went to Court, though they also went about the amount of rent or assessment. But I do not think that it can be said that the issue as to tenancy was finally decided in the earlier suit. It is perfectly true it was decided, that is to say, the Court expressed a perfectly definite opinion about it. But the operative part of the decree was that the tenant should not be ejected, though he had to pay a certain amount of rent. That is precisely the decree which would follow if the Court had held that the tenant was a permanent tenant and not a yearly tenant, though in fact it held that he was a yearly tenant. I cannot think that the Legislature intended the words 'finally decided' to apply to a finding not followed by anything peculiarly appropriate to itself. Where a finding is followed, as in that case, by a result which would equally follow from something

[1] (1886) 13 Cal. 17.

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essentially different, then, I think, it cannot be supposed that the finding is a final decision. It seems to me to be merely an expression of opinion and nothing more.

Therefore I think that this appeal should be dismissed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Pratt.

1918.

December 3.

SHAHASAHEB MARD SABDARALLI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3), APPELLANTS *v.* SADASHIV SUPDU (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 1—Mortgage suit—All persons interested in the mortgage to be parties to the suit—Some only of the heirs of mortgagor joined as parties—Suit not bad for non-joinder of parties.

The plaintiff, a mortgagee, sued to recover the mortgage debt by sale of mortgaged properties. The original mortgagor, who was a Mahomedan, having died before the suit, only his widow and daughters were made defendants. It was contended that the suit was bad for non-joinder of other heirs of the mortgagor, viz., his brother and sister's children :—

Held, that the non-joinder of parties was not fatal to the suit, inasmuch as the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded.

SECOND appeal from the decision of C. C. Dutt, Assistant Judge of Khandesh, confirming the decree passed by M. M. Bhatt, Subordinate Judge at Erandol.

One Sabdaralli, a Mahomedan, executed two mortgages in 1896 in favour of the plaintiff. After Sabdaralli's death, the plaintiff brought a suit on the 11th January

* Second Appeal No. 654 of 1916.