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expressed in the cases of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1), *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3). The appeal is dismissed with costs.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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NIL MADHUB SARKAR (DEFENDANT) v. BROJO NATH SINGHA (PLAINTIFF).*

Res judicata—Rent suit—Decree as to amount of land—Rent payable for former years—Rate of rent payable.

The plaintiff sued the defendant for rent of certain lands. The defendant contended that he was not liable for the entire rent, as part of the land was in the plaintiff's possession. The defendant failed to prove his contention, and a decree was given for the full amount claimed. Subsequently the plaintiff again sued the defendant in regard to the same property for arrears of rent for subsequent years at the rate claimed in the former suit. The defendant had the land measured, adduced evidence, and endeavoured to raise the same defence as he had in the previous suit. No allegation was made to the effect that the rent had been altered in consequence of anything that had happened since the previous decision. The Lower Courts, without considering the evidence adduced by the defendant, held that the defendant could not again raise the same contention, as the question had already been considered and determined in the previous suit, and was *res judicata* between the parties.

Held, that the previous decision did not operate as *res judicata*, and that the Lower Courts ought to have determined on the evidence adduced what the amount of rent in question was.

THE facts in this case were as follows:—

The plaintiff was the owner in *patni* and *sepatni* rights of an eight-anna share in certain property and made separate collections.

* Appeal from Appellate Decree No. 1003 of 1891, against the decree of J. Whitmore, Esq., District Judge of Birbhum, dated the 10th of April 1891, modifying the decree of Babu Debendra Nath Roy, Munsif of Dubrajpur, dated the 27th of September 1890.

(1) 15 W. R., 87. (2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.

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In that property the defendant held a *jote* which consisted of 15 bighas and 16 cottahs of land, and bore a rental of Rs. 29-13. The plaintiff realized his share of rent from the defendant from 1291 to Pous kist 1294 (1884 to December 1885) by bringing a suit, No. 286 of 1888, in the Munsif's Court at Dubrajpur. The defendant contended in that suit that he was not liable for the entire rent claimed, as a portion of the land comprised in the tenure was in the possession of the plaintiff himself. The Court decided against the defendant on the ground that he had failed to prove his contention. The defendant appealed, and his appeal was dismissed by the District Judge of Birbhum, who took the same view as the Munsif, and held that the burden of proof was on the defendant and that he had failed to discharge it. The result was that the plaintiff obtained a decree for the rent of the years then in question at the rate of Rs. 29-13 per annum.

The plaintiff not having been able to recover any rent for the years 1294 to 1296 (1887 to 1889), brought the present suit to recover his share of the rent of the same tenure for those years. The plaintiff's allegations as to the area of the land and the amount of the rent were the same as in the previous suit. And the defendant's contention was substantially the same. Both the Lower Courts held that the question of the amount of annual rent payable by the defendant was *res judicata*, and the plaintiff's claim was decreed in full.

From this decision the defendant appealed to the High Court.

Babu *Dwarka Nath Chuckerbutty* for the appellant.

Babu *Karuna Sindhu Mukerjee* for the respondent.

Babu *Dwarka Nath Chuckerbutty*:—The decisions of the Lower Courts are wrong, for whatever may have been the decision in the former suit, it should not have treated as a bar to this suit. In the former suit the plaintiff claimed more than he was entitled to: the *onus* was put on the defendant, and he failing to prove his contention, the plaintiff obtained a decree for the full amount claimed. In the former suit there was no finding as to what the area of the land was, and if no area was determined, no rent could have been fixed. That was simply a decision as to how much money was due to the plaintiff from the defendant for the years

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claimed. It is still open to the defendant to prove by measurement that he is entitled to a reduction of rent under section 52 of the Tenancy Act; if so, it cannot be said that the rent of this land has been determined. The only question both in the former and in the present suit is, what is the area of the land? the amount of rent has never been disputed. In the present suit the cause of action is quite distinct: it is for rent accruing from year to year, and each year creates a different cause of action. Had it been a question of what was the yearly rental, and a decision had been given on that point, then it would have been a bar to the present suit, and the defendant would have been bound by the numerous authorities on that point. But in this case the question is, what is the area of the land? On that point the case of *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (1) supports the appellant's case. In that case the ryots alleged that the amount of rent and the extent of land had been overstated, but the Court decided that the ryots were bound by a *jummabundi* signed by them. Nevertheless the High Court held that the question could still be raised by the ryots in a subsequent suit.

Babu *Karuna Sindhu Mukerjee* for the respondent:—If the decision in the previous suit was "what is the annual rent of the land" for the years for which rent was sought, it is clearly under the authorities, *Jeo Lal Sing* v. *Surfun* (2), *Mon Mohinee Debee* v. *Binode Behares Shaha* (3), *Nobo Doorga Dossee* v. *Foyzbux Chowdhry* (4), *Bussun Lall Shookul* v. *Chundee Dass* (5), and *Hurry Behari Bhagat* v. *Pargun Ahir* (6), a bar to the amount being disputed in the present suit.

The decision in the former suit is a distinct finding as to the amount of land and the rate per annum for such land, and is therefore a finding as to what is the amount of rent for the land in question. The authorities show that the decision as to the amount of the rent cannot be questioned in a subsequent suit in respect of the same cause of action, nor can it be questioned in the present suit, and this appeal should be dismissed with costs.

(1) I. L. R., 7 Calc., 214.
(2) 11 C. L. R., 483.
(3) 25 W. R., 10.
(4) I. L. R., 1 Calc., 202.
(5) I. L. R., 4 Calc., 686.
(6) I. L. R., 19 Calc., 656.

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

The facts are shortly these. In 1888 the plaintiff sued the defendant for his share of the rent of a tenure for the years 1291 (1884) to 1293 (1886) and part of 1294 (1887), alleging that the tenure contained 15 bighas 16 cottahs of land, and that the annual rent payable was Rs. 29-13. The defendant contended that he was not liable for the entire rent claimed, as a portion of the land comprised in the tenure was in the possession of the plaintiff himself. It does not appear that any issues were framed, or that there was any measurement of the land, but the first Court, after considering the evidence which the defendant adduced, rejected his contention on the general ground that he had failed to prove it. The defendant appealed, and his appeal was dismissed by the District Judge, who took the same view as the Munsif, and held that the burden of proof was on the defendant, and that he had failed to discharge it. The result was that the plaintiff obtained a decree for the rent of the years then in question at the rate of Rs. 29-13 per annum.

The present suit is for the plaintiff's share of the rent of the same tenure for the years 1294 to 1296 (1887 to 1889), the plaintiff's allegations as to the area of the land and the amount of the annual rent being the same as in the previous suit. The defendant's contention is also substantially the same, *viz.*, that he obtained possession of only 8 bighas 12 cottahs of land, the annual rent of which would be Rs. 13-0-6. He further contended that the land was misdescribed, and that some of the plots mentioned in the plaint did not exist. He does not, however, say that the rent has been altered in consequence of anything which has happened after the decision in the suit of 1888.

Both the Courts have held that the question of the amount of the annual rent payable by the defendant is *res judicata*, and the claim has been decreed in full without any consideration of the evidence which the defendant adduced in support of his contention or of the proceedings of the amin who was deputed to measure the land.

It is urged, and we think successfully, that the decisions are wrong, and that the Court ought to have determined on the

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evidence now adduced what the annual rent for the years in question is.

The decision in the suit of 1888 went no farther than this, that the defendant, upon whom the burden of proof lay, had failed to make good the plea he advanced, and the necessary consequence was that he failed to get the relief asked for, that is to say, a reduction of the rent for the years for which the rent was then claimed. But the cause of action is in this case different, each year's rent being in itself a separate and entire cause of action, and the mere failure of the defendant to prove what he tried to prove in the previous suit would not, we think, prevent him from proving it in this. The case might have been different if the Court had in the previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable for the same. It might then be said that the determination was general, and not limited to the particular years for which rent was claimed, and that the defendant could only succeed in the present suit by proving that the area and rent had since altered. The determination was not, however, of that character, and there is nothing in the judgment to indicate that the Court intended to decide anything more than it was strictly necessary to decide for the purpose of the suit, *viz.*, the amount of money which the plaintiff was to recover for the years then in question.

The cases of *Bussun Lall Shookul* v. *Chundee Dass* (1) and *Nobo Doorga Dossee* v. *Foyzbux Chowdhry* (2) cited for the respondent are, we think, distinguishable. In the first of these the question raised as to the area of the tenure had been put in issue and definitely decided in a previous suit for the rent of the tenure. In the second, which was a suit for abatement of rent, it was held that the exact amount of abatement to which the plaintiff was entitled had been raised and determined in a suit previously brought against her for the rent of the tenure, and that the determination was not merely for the year in respect of which the rent was claimed, but for all future years.

We cannot say that the questions which the defendant raises in this suit were heard and finally determined in the suit of 1888.

(1) I. L. R., 4 Calc., 686. (2) I. L. R., 1 Calc., 202.

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It is still, we think, open to the defendant to prove by measurement that he is entitled to a reduction of rent under section 52 (B) of the Tenancy Act, and if that question is open, it cannot be said that the area of his holding or tenure has been determined.

The case of *Roghoonath Mundul* v. *Juggut Bundhoo Bose* (1) seems to us to be more in point than the cases cited on the other side and referred to above.

We would also notice that the decree leaves it undecided whether certain of the plots for which rent is now claimed are correctly described in the plaint and are the same as those for which rent was claimed in the suit of 1888. The defendant is clearly entitled to have this point decided in the present case.

We set aside the decrees of both the Courts. The case must go back to the Court of first instance in order that all the other questions which arise may be disposed of.

The appellant will get his cost in this Court. The costs incurred in the Lower Courts will abide the result.

Appeal allowed and case remanded.

C. S.

REFERENCE UNDER STAMP ACT.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris, and Mr. Justice Pigot.

IN THE MATTER OF KO SHWAY AUNG AND OTHERS, *v.* STRANG STEEL AND CO.

1893 *July* 20.

Stamp Act I of 1879, *Schedule I, Arts.* 29 *and* 44 (*b*)—*Mortgage advance payable on demand—Power of sale in default of repayment of advance.*

In consideration of an advance of Rs 1,450, on interest, repayable on demand, certain boat-owners assigned to S. and Co. their paddy boats, the boat-owners retaining, working, and being responsible for the safety of, the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to S. and Co., and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S. and Co. On failure to make repayment on demand, S. and Co. were empowered to take

* Stamp reference No. 2 of 1892, made by W. F. Noyce, Esquire, Secretary to the Financial Commissioner, Burma, dated the 11th October 1892.

(1) I. L. R., 7 Calc., 214.