APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

RASH DHARY GOPE (DEFENDANT) *v.* KHAKON SINGH (PLAINTIFF).* 1897 *February* 18.

Decree—Form of decree—Suit for arrears of rent—Failure of plaintiff to prove alleged rate of rent—Ascertainment of proper rate—Duty of Court.

In a suit for arrears of rent at certain alleged rates in which the plaintiff fails to prove the rates alleged by him, it is not the duty of the Court to ascertain what were the fair rates unless it is asked to do so.

The case of *Punnoo Singh* v. *Nirghin Singh* (1) does not lay down a contrary rule.

THE fact and pleadings in this case sufficiently appear from the judgment of the High Court.

Moulvie *Mahomed Yusuf* and Moulvie *Mahomed Hubibulla* for the appellant.

Babu *Saligram Singh* and Babu *Mahabir Sahoy* for the respondent.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

The plaintiff alleges that he holds a *thika* of *mohuzah* Makbulpore Denga from 1294 to 1300 F. The defendant was a former *thikadar* of this village, and it is admitted that he still occupies lands in it.

In 1889 the plaintiff sued the defendant for rent for the years 1294, 1295 and a part of 1296 F, on the allegation that he held 8 bighas 14 cottahs odd at a money rent of Rs. 41-7-9 per annum (including cesses), and some 50 or 60 bighas of other land at a corn rent, the total claim being for Rs. 2,016. The defendant, on the other hand, alleged that he held 118 bighas odd, and that he held it all at a money rent of Rs. 131-14.

The Courts found that the plaintiff had failed to prove his allegations, and they accordingly gave him a decree for the amount of

* Appeal from Appellate Decree No. 1372 of 1895, against the decree of H. Holmwood, Esq., District Judge of Gya, dated the 18th of May 1895, modifying the decree of Babu Tej Chunder Mookerjee, Munsif of Gya, dated the 4th of December 1894.

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rent admitted by the defendant. It was expressly stated in that case that the question as to the nature and rental of the defendant's tenure was left open.

In June 1894 the plaintiff brought the present suit upon the same allegations for the rent of the years 1298, 1299 and 1300 F., the total claim being laid at Rs. 1,633 odd.

The defence was also the same as in the former suit, and it was pleaded in addition that the decision in the former suit operated as *res judicata*. The Munsif held that the plea of *res judicata* could not be maintained ; but on the merits after an exhaustive review of the evidence he came to the conclusion that neither party had succeeded in proving his case, and he therefore gave the plaintiff a decree at the rental admitted by the defendant.

The plaintiff appealed. The judgment of the District Judge is so involved that it is difficult to distinguish between what is intended to be his own findings and what was merely the argument addressed to him, but at the end of his judgment he says that he finds certain propositions clearly established, which for our present purpose may be summarised as follows: (1) That the plaintiff had not succeeded in proving that any portion of the land paid a corn rent, and therefore it must all be taken to be *nakdi* land. (2) That the plaintiff not having proved his case as to the area the defendant's allegation of the holding 118 bighas odd must be accepted. (3) That the average rate of *nakdi* lands in the village is not less than Rs. 3-8 per bigha. And he accordingly gave the plaintiff a decree for *nakdi* rent on 118 bighas odd at Rs. 3-8 a bigha, with damages and costs.

In second appeal to this Court the defendant presses his contention that the decision in the former suit operates as *res judicata*, and he also objects that the suit not having been brought for that purpose it was not open to the District Judge to assess a rent at rates not alleged by either party and of which there was no legal evidence.

We entirely agree with the Courts below that the decision in the former suit determined nothing whatever as to the nature or rent of the defendant's holding, those questions being expressly left open between the parties. As regards the contention that the Court was not asked to assess a rent of the defendant's holding, the respondent relies on the case of *Punnoo Singh* v. *Nirghi*

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Singh (1), in which Garth, C. J., is supposed to have laid down (as stated in the headnote to the report) that "in a suit for arrears of rent where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord and not to give a decree merely for the rent admitted by the tenant."

We are of opinion that this broad proposition is scarcely borne out by the language of the judgment referred to. The report does not show what were the pleadings in the cases that came before this Court, but we have referred to the paper books of those cases, and it is clear that the issue which had to be tried was, what was the proper rent payable to the plaintiff for the land admittedly held by the defendant. That we think would be a proper issue in a suit brought to have the rate of rent determined where the parties are not agreed as to what would be a fair and reasonable rate. We can hardly suppose that the learned Chief Justice intended to lay down that in *every* suit brought for arrears of rent in which the plaintiff failed to prove that the defendant held at the rate alleged, it was the duty of the Court to ascertain what was a fair rate, even though it was not asked to do so. It is a general principle of law that suits must be decided with reference to the pleadings of the parties, and unless the Court is specially asked to determine a particular question as between the parties, we think that it is not only not bound to do so, but it would not be justified in so doing.

In the present case the effect of the decision of the lower Appellate Court is that the defendant is found to hold under the plaintiff a tenancy wholly different, in its nature, its area and its rental, from that alleged by the plaintiff, and in one important respect from that alleged by the defendant. The defendant, it is true, alleged that he held 118 bighas odd at a *nakdi* rent, but he further pleaded that that *nakdi* rent was a consolidated sum of Rs. 131-14. It was scarcely fair to him to take a part of his allegation as an admission wholly irrespective of the other part.

The judgment, moreover, apparently leaves it wholly undetermined where the defendant's holding is situated. From section 148 (*b*) of the Bengal Tenancy Act it would seem to be necessary that in a suit for the recovery of rent the land in respect

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of which that rent is payable should be clearly defined. Now, the learned District Judge does not distinctly find that the defendant holds the lands specified by him in his written statement, but if that is the meaning and intention of his judgment, it is clear that as these lands do not agree with those specified in the schedules to the plaint, he has given the plaintiffs a decree for the rent of lands that were not the subject-matter of the suit.

A further objection is pressed upon us that the learned District Judge in fixing Rs. 3-8 a bigha as the rate of rent has acted upon what is not legal evidence in the cause. The Judge says: "The average rate of *nakdi* rent throughout the village is Rs. 3-8 from the roadcess paper." This paper appears to be a roadcess return for the years 1281 and 1282 alleged to have been filed in the Collector's office by the defendant at the time when he held a *thika* of the village. The Munsif says that the defendant denied on oath that he ever filed it; and there is apparently no evidence on the record that he did so. Moreover, only a copy has been filed, and the Munsif says that no one was called to prove that the original had been destroyed. The learned Judge remarks that "it was exhibited as secondary evidence, and must be given its full weight." But if no foundation was laid for the admission of secondary evidence, the copy was clearly inadmissible.

For all these reasons we are of opinion that the decree of the lower Appellate Court cannot stand, and we accordingly set it aside. The case must go back to the District Judge in order that he may try the appeal according to law. What he has to consider in the case is whether the plaintiff has upon the evidence on the record proved the allegations made in his plaint, that is to say, that the defendant holds the land specified in the two schedules annexed to the plaint; that those lands are *nakdi* and *bhaoli*, respectively, as alleged, and that the defendant contracted expressly or impliedly to hold them at the rates claimed. If, as the first Court found, the plaintiff has failed to prove these allegations, the Judge will then consider whether, there being no cross appeal to his Court, the appeal should not be dismissed and the decree of the first Court affirmed. The costs of this appeal will abide the result.

S. C. C. *Appeal allowed. Case remanded.*