Before Mr. Justice O'Kinealy and Mr. Justice Macpherson.

NUNDO LALL BHUTTACHARJEE AND OTHERS (PLAINTIFFS) *v.* BIDHOO MOOKHY DEBEE (DEFENDANT.)*

1886 *March* 9.

Res-judicata—Landlord and tenant—Suit in ejectment—Issue previously heard and determined—Estoppel—Civil Procedure Code, s. 13.

In a suit by a landlord against his tenant for ejectment, the defences were (1) no notice to quit had been served, and (2) the tenure was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant, the defences were: (1) the tenure was permanent; and (2) the plaintiff was estopped by the conduct of his predecessor in title from asserting as against the defendant that the tenure was not a permanent one. The lower Appellate Court found the question of estoppel in favour of the defendant, and dismissed the suit.

On appeal to the High Court—

Held, that the decision was right, and must be affirmed.

Semble, that where a former suit between the same parties in respect of the same subject matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant.

Semble, that the case of *Niamut Khan* v. *Phadu Buldia* (1) has been impliedly overruled by the case of *Run Bahadoor Singh* v. *Lucho Koer* (2).

THIS was a suit for possession of certain land. The plaint stated that the land in question was the auction-purchased paternal *jama* lands of the plaintiffs; that the defendant's predecessors in title had held the land under the plaintiffs as tenants-at-will; that the defendant's predecessors in title had sold their interest therein to the defendant wrongly describing it as a *mourasi mokurari* right; that the plaintiffs had duly served the defendants with a notice to quit and deliver up possession of the land; and that in a former suit between the plaintiffs and the defendant it

* Appeal from Appellate Decree No. 1398 of 1885, against the decree of Baboo Saroda Prosad Chatterji, Officiating Third Subordinate Judge of Hooghly, dated the 9th of April 1885, reversing the decree of Baboo Tara Prosunno Banerji, First Munsiff of Howrah, dated the 31st of January 1884.

(1) I. L. R., 6 Calc., 319.

(2) L. R., 12 I. A., 23; I. L. R., 11 Calc., 301.

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had been decided by a competent Court that the defendant had no permanent interest in the land. The plaintiffs prayed "that the Court will be pleased to remove the houses, &c., belonging to the defendant which are on the disputed land, and to decree that direct possession be delivered to the plaintiffs," and for further relief.

The defence was that the defendant's tenure was a permanent tenure; that no notice to quit had been served by the plaintiffs; and that, whether the tenure was permanent or not, the plaintiffs' father and predecessor in title, Lall Mohun Bhuttacharjee, had induced the defendant to buy the tenure from the defendant's predecessor in title on the representation that the tenure was a permanent one.

As to the previous suit relied on by the plaintiffs, it appeared that in 1879 the plaintiffs had brought a previous suit for ejectment from the same land. In the first Appellate Court that suit was dismissed, on the ground that service of the notice to quit had not been proved; but the Court held at the same time that the tenure was not a permanent one. The defendant appealed to the High Court against this finding of the first Appellate Court, but the appeal was dismissed, on the ground that the only decree passed by the first Appellate Court was a decree dismissing the suit; that the finding appealed against formed no part of that decree, but was only to be found in the judgment of the first Appellate Court, from which judgment no appeal lay under the Civil Procedure Code.

In the present suit the Court of first instance found in favour of the plaintiffs, but this decision was reversed on appeal, the lower Appellate Court finding in favour of the defendant on the question of estoppel. The plaintiffs appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee* for the appellants, contended that the former decision was *res-judicata*—*Niamut Khan* v. *Phadu Byldia* (1), and that the facts relied on by the Judge did not constitute an estoppel.

Baboo *Bash Behary Ghose* for the respondent.

(1) I. L. R., 6 Calc., 319.

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

It appears that, previous to the present suit, there was a suit between the same parties in which the plaintiffs sought to eject the defendant.

That suit was dismissed, but in the course of the trial, the Court came to a decision upon the nature of the defendant's holding.

In the present suit, the plaintiffs seek, anew, to recover possession of the land after notice to quit, and the lower Court has held that the decision arrived at by the Court in the previous suit is binding between the parties ; but that as in the previous suit no issue regarding the question of estoppel by conduct was raised, the defendant is not precluded from raising it in the present suit; and on that ground judgment has been given in favour of the defendant.

The plaintiffs have appealed, and they urge that the previous decision is, as has been held by the Court below, *res-judicata*, and being *res-judicata* that Court was precluded from going behind the previous decision and taking notice of the question of estoppel. They further contend that the inducement was too remote to affect the conduct of the defendant, and that the Subordinate Judge was wrong in holding that there was an estoppel by conduct.

This last is a question of fact with which we are not competent to deal. The Judge has declared that "it is clear that Lall Mohan by his words and conduct induced the appellant to believe that Panchcowri's interest in the property was of a permanent character and to part with a large sum of her money in consequence of that belief for purchase of the land."

In regard to the first question raised by the appellant, namely, whether the decision arrived at in the previous case is *res-judicata* and binding between the parties, we have come to the conclusion that it is not.

No doubt it has been held by a Full Bench of this Court that even where the defendant does not get the issue decided against him inserted in the decree, it is binding between the parties in a subsequent litigation. But this procedure was not followed in

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the case of *Run Bahadoor Singh* v. *Lucho Koer* (1), and in regard to that their Lordships state as follows:—

"The widow has not appealed against the decree, nor could she, because it is in her favour. But she has appealed against the finding that the brothers were joint in estate. It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her. This could not be so inasmuch as the decree was not based upon it, but was made in spite of it."

Here, in the former suit between the present parties, the decree dismissing the suit was not based on the finding adverse to the defendant in that case, but in spite of it. We think, therefore, after looking at the decision of their Lordships in the Privy Council, that the previous decision is not binding between the parties in this suit.

Further, we are of opinion that, even if we come to an opposite conclusion, the respondent is correct in saying that the issue then decided was not an issue regarding any estoppel by conduct.

What was decided there was, what was the right to the property, not whether the plaintiffs are estopped by their conduct from asserting their right, if it existed.

From this point of view also we think the decision of the lower Court was correct.

The appeal is therefore dismissed with costs.

P. O'K. *Appeal dismissed.*

(1) L. R., 12 I. A., 23; I. L. R., 11 Cal., 301.