

(1909) 03 CAL CK 0051
In the Calcutta High Court

Abdul Hakim Shaha and Others

APPELLANT

Vs

Rajendra Narain Roy and Others

RESPONDENT

Date of Decision : 02-03-1909

Acts Referred:

Citation : (1909) 03 CAL CK 0051

Judgement

1. The Defendants in this case had a jote under the plaintiff and others comprising 200 bighas of land. It appears that on measurement it was found that this area had increased to 320 bighas. The plaintiff brought this suit for his share of compensation for use and occupation of the excess area of 120 bighas, which was described in the second Schedule to the plaint by definite boundaries. The Munsif gave the plaintiff a decree for rent for use and occupation" for this area at the rate of 12 annas per bigha. The defendants appealed to the Subordinate Judge and that appeal was dismissed. They have now preferred this second appeal to this Court.

2. It is argued on behalf of the appellants in the first place that the landlords are not entitled to sue for compensation for use and occupation without suing at the same time either for ejectment or for rent. This contention appears to us to be sound. u/s 157 of the Bengal Tenancy Act, the plaintiff may unite a claim for rent with a suit for ejectment, but no authority has been shown to us for holding that a plaintiff may sue for compensation for use and occupation for a certain time without a prayer for any other relief. Such compensation would be in the nature of mesne profits, a claim for which can, of course, be joined with a suit for recovery of the land. But the plaintiff cannot treat the defendant as a trespasser and yet be allowed, without seeking to put an end to the traipses, to sue him again and again for damages for what is really the same trespass. That he is not entitled to do this is clear from the decider in the case of Khondakar Abdul Hamid v. Mohini Kant Shaha 4 C.W.N. 508. When he has once sued the defendant for compensation for use and occupation he must be regarded as having recognised him as a tenant, and when he has once recognised him as a tenant he cannot after that treat him as a trespasser. In other words, when he has once waived his

right to eject the defendant as a trespasser, he cannot afterwards change his mind. We must regard this, therefore, as a suit for rent, and treating it in that light the questions which have been argued with regard to limitation need not be further considered.

3. The next contention raised on behalf of the appellants is that this being a suit for rent it must be regarded as a suit for additional rent u/s 52 of the Bengal Tenancy Act, and, therefore, as all the landlords have not been joined, it must necessarily fail. To meet this contention the respondents rely on the case we have already cited. In that case the landlords sued for Khas possession of a share in certain lands, or in the alternative for rent. These lands were formed by the drying up of a beel and had been taken possession of by the defendants who were tenants of contiguous lands under the plaintiffs and their co-sharers. It appears to us that there is no real distinction between the present suit and that suit. It was held in that case that the plaintiffs were entitled to treat the excess land as a new holding and not as an addition to the original holding. They were, therefore, entitled to sue independently of Section 52 of the Bengal Tenancy Act and so were not barred by Section 188 of the Act. The learned Judges held that a case of that nature did not come strictly within the terms of Section 52. They observed: The lands in dispute formed no part of the holding as originally let out to the defendant. They have been formed subsequent to the creation of the original holding and they are outside of the boundaries of that holding. We feel some difficulty in understanding how these considerations took the case outside the scope of Section 52. In a suit for additional rent for additional area, the additional area also forms no part of the original holding and is, acquired by subsequent addition to the original holding. The words of Section 52 are very wide. They lay down that every tenant is liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him; and there is nothing in the section itself which suggests that if these now lands are said by the plaintiff to be a new holding, the section has no application to them. We must confess, therefore, with great respect that we follow this decision with some reluctance, but it is no doubt a clear authority for holding that the plaintiff, in a case of this nature, is entitled to treat the excess land as a new holding and is not, therefore, affected by Section 188. Indeed that case is somewhat stronger than the present case inasmuch as the defendants pleaded in that case that the new lands were part of their old holding which is not pleaded in the present case.

4. Reference has been made to the report of the Ameen in this case, in which he says that the plaintiff was unable to point out the boundaries of the excess land. The boundaries, however, are definitely stated in the plaint and in the decree. The question whether or not these boundaries have been accurately stated or can be accurately ascertained is not a question with which we can deal in second appeal.