

(1926) 08 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 750 of 1925

Barjorji Shapurji

APPELLANT

Vs

Shripatprasadji Viharilalji Acharya

RESPONDENT

Date of Decision : 02-08-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1927 Bom 145 : (1927) 29 BOMLR 215

Hon'ble Judges : Shah, J;Fawcett, J

Bench : Division Bench

Judgement

Shah, J.—The plaintiff in this case gave notice to the defendant to vacate the lands in suit in November 1920. According to that notice, he was required to give up the lands on March 31, 1921. The plaintiff claimed to be a mortgagee from the original Inamdars. The defendant was on the land as a tenant of the mortgagors. The defendant pleaded that ho was a permanent tenant; that the mortgagors were necessary parties; and that the plaintiff was neither entitled to possession nor to enhance the rent. The first issue raised was whether the plea that the defendant was a permanent tenant was res judicata in consequence of the finding in the previous litigation between the same parties in Suit No. 48 of 1915.

2. The trial Court came to the conclusion that the plea of permanent tenancy was not now open to the defendant as that question was hoard and finally decided in the previous suit between the same parties. The further question raised in the issues was whether it was not open to the mortgagee, contrary to the wishes of the mortgagor, to determine the tenancy of the defendant. That issue also was decided against the defendant. In the result a decree was passed against the defendant directing him to deliver possession of the plaint lands to the plaintiff, and to pay Rs. 306-9-0 for mesne profits prior to the date of the suit. This sum was arrived at on the basis of the annual profits having been determined at Rs. 225, out of which the defendant had already paid Us. 121-14-0 a year as rent to

the plaintiff! The sum represented the difference between the full rent payable for three years and the amount paid at the old rate. There was also a decree for future mesne profits from the date of suit until delivery of possession, to be determined under Order XX, Rule 12, Civil Procedure Code.

3. The defendant appealed to the District Court, and the same points were raised before the learned District Judge, who, on a consideration of the pleadings and the findings in the previous suit, came to the conclusion that the plea of permanent tenancy was not open to the defendant, as that question was heard and finally decided in the previous suit between the same parties. On the other points also he affirmed the view taken by the trial Court, with the result that the appeal was dismissed and the decree was confirmed.

4. The defendant has preferred this second appeal, and the principal point argued in support of this appeal is that the lower Courts are wrong in their view that the plea of permanent tenancy is not open to him in this suit.

5. In order to test this point, it is necessary to refer to the previous suit between the same parties. In that suit (No. 48 of 1915) the plaintiff-mortgagee sued the present defendant and also joined the original mortgagor as a party to the suit. The claim was for possession of the land, and also to recover a certain amount as damages from the defendant for having cut certain Babul trees on the land. The plaintiff's case was that the trees belonged to him and not to the tenant, and he asked for an injunction restraining the defendant No. 1, that is the tenant, from cutting or dealing in any way with the trees situated on the land. The defendant's answer, so far as it is material to the present point, was that he was a permanent tenant, and secondly, that he was the owner of the trees. Though it is not stated in terms in the written statement in that form, the issue framed shows that at least one of the grounds upon which he claimed the ownership of the trees was that he was a permanent tenant. Accordingly, issue No. 8 was framed in this way:

Is the defendant in possession of the lands as a permanent tenant? Has he any right to the trees in the lands?

6. The learned Judge dealt with this issue at considerable length in a companion suit in which the same points had arisen and which was filed on the same basis against another tenant. He came to the conclusion that defendant No. 1 was not a permanent tenant, and he also found that he was not the owner of the trees. It may be mentioned that in the judgment in dealing with issues Nos. 7 and 8 the learned Judge, who decided the suit, observed as follows:-

The defendants resist the claim by asserting their own title to the trees. They say that they are permanent tenants of the lands and as such entitled to the trees growing therein.

7. In the end, on a consideration of the evidence in the case, he found that the defendant did not hold the lands as a permanent tenant and had no right to the

trees in the land. When defendant No. 1 appealed to the District Court, no doubt, he made a point in his memorandum of appeal that the question of permanent tenancy should not have been gone into at all, and that, even apart from his being a permanent tenant, he was owner of the trees. But when the matter came before the learned District Judge, that position does not seem to have been adhered to or maintained; and again the following issues were raised:-Issue No. 3-" Whether defendant is a permanent tenant ?" Issue No. 4-" Is he entitled to the Babul trees in the land? "The learned District Judge observes in his judgment that" Closely connected with the question of permanent tenancy is the right of the tenants to the Babul trees." He agreed with the findings of the trial Court on both these issues and confirmed the decree of the trial Court. I may add here that the decree passed by the trial Court on the findings was that the claim for possession was disallowed, but a decree for the price of the Babul trees found to have been cut by the defendant was passed, and also an injunction restraining the defendant from interfering with the trees was granted against the defendant. The defendant preferred a second appeal, and in second appeal the principal point argued appears to have been whether he was a permanent tenant or not. In the judgment of this Court in S.A. No. 459 of 1919, it was held that defendant No. 1 failed to prove that he was a permanent tenant. The question whether a mortgagee had a right to evict the tenants of the mortgagor was left open in view of the fact that there was no decree for possession passed by the lower Court, and in other respects the decree already passed against the defendant was confirmed and the appeal was dismissed with costs.

8. This was the result of the previous litigation between the parties. It is urged on behalf of the appellant now that the view taken by all the three Courts with regard to his plea as to permanent tenancy is not *res judicata*, because, though the question was heard, it could not be said to have been finally decided within the meaning of Section 11, Civil Procedure Code, as there was no decree for possession against him, and as the plaintiff's claim in that suit for possession was disallowed. Though the finding was recorded against the defendant, it cannot be said to have been finally decided. In support of this contention reliance has been placed upon *Midnapur Zamindari Company v. Naresh Narayan Roy* (1920) L.R. 48 IndAp 49; *Daudbhai Allibhai v. Daya Rama* ILR (1918) 43 Bom. 508; and *Ramasami Reddi v. Marudai Reddi*. ILR (1923) Mad. 453 It may be mentioned here that the claim for possession was disallowed in the suit on the ground that, u/s 84 of the Bombay Land Revenue Code, a notice to determine the annual tenancy of the defendant was necessary. The position is plain that if the decision as to the plea of permanent tenancy was on any ground unnecessary in the previous suit, even though a finding be recorded, it could not be said to have been finally decided. But the pleadings in the previous litigation, so far as the present case is concerned, are perfectly clear, and leave no doubt that the finding was necessary. There was undoubtedly the plaintiff's claim with regard to the trees which were said to have been cut by the defendant, and the defendant pleaded that he was the owner of the trees because he was a

permanent tenant, though, as I have said, he did not say so in the written statement. But that is the view which I take of the grounds as disclosed in the judgment upon which he really proceeded in that litigation. Though I recognize that he based his claim to the trees on grounds other than that of permanent tenancy, it is clear that he also claimed to be the owner of the trees on the ground that he was a permanent tenant. It is clear, according to the decisions in *Harbans Lal v. The Maharaja of Benares* ILR (1900) All. 126 and *Sitabai v. Sambhu Sonu* ILR (1914) 38 Bom. 716 that a permanent tenant is the owner of the trees growing on the land. It seems to have been so understood, as both the Courts observed that closely connected with the question of the ownership of the trees was the question of the permanent tenancy of the defendant. Therefore, in the present case, it cannot be said that the finding as to permanent tenancy was unnecessary. Further, the present case is distinguishable from the other decisions which have been relied upon by the learned counsel for the appellant. In the present case there was a decree passed against the defendant from which it was possible for him to prefer an appeal and to raise the question of permanent tenancy, which was negatived by the trial Court, if he was minded to do so, and in fact he did so. It was not a case where, after the finding was recorded against the defendant, the suit was dismissed as against him, with the result that he could not appeal from the decree and could not question the correctness of the finding against him. Therefore, it seems to me that, on the facts of this case, the cases relied upon by the learned counsel are quite distinguishable, and do not help him in any way.

9. It is not necessary for the purposes of this case to examine further the position whether, if the plaintiff's suit had been dismissed, and if it was merely a case where relief by way of possession was claimed, and if it had been definitely found that in consequence of the defendant not being a permanent tenant but an annual tenant, a notice, as required by Section 84 of the Bombay Land Revenue Code, was necessary, the finding that he was an annual tenant, as distinguished from a permanent tenant, could be said to be necessary for the decision of the suit or not. That point does not arise in the present case.

10. Thus, I am satisfied that both the lower Courts are right in holding that the plea of permanent tenancy is not open to the defendant in the present suit, as that question has been heard and finally decided between the parties in the previous suit.

11. As regards the second question that a mortgagee cannot determine the tenancy of an annual tenant in respect of land which forms part of the mortgaged property without the consent of the mortgagor, no authority has been cited. On principle the contention seems to be untenable. A mortgagee in possession has his own right of managing the lands; and he is not in any sense dependent upon the consent of the mortgagor in determining as to what rent he should reasonably seek from an annual tenant in respect of a particular land and what tenant he should keep. Though that question was left open in the previous

litigation, it seems to me that that contention of the defendant must be disallowed.

12. As regards the question of mesne profits for three years prior to the date of the suit, the position is that in the previous litigation the plaintiff's claim for possession was disallowed, and the second appeal to this Court was decided on July 15, 1920. Thereafter in November 1920, he gave a notice calling upon him to pay Rs. 300 as enhanced rent. It seems to us, under the circumstances, that, up to March 31, 1921, possession of the defendant cannot be said to be wrongful in any way. The previous notice, such as it was, was not considered good notice, according to the provisions of the Bombay Land Revenue Code, and under the circumstances the plaintiff is not entitled to anything by way of mesne profits prior to the date of this notice, that is, prior to the date on which, if he was not prepared to comply with the notice, he would be expected to vacate, that is, before March 31, 1921. The suit was filed in August 1921. Therefore, the plaintiff is really entitled to the extra profits as found by the lower Courts at the rate of Rs. 225 a year from April 1, 1921, and deducting therefrom the amount which the defendant has admittedly paid, namely, Rs. 121-14-0 a year, he would be entitled to about Rs. 104 for one year. We think that, having regard to the short period between that date and the date of the suit, we would roughly fix the mesne profits at Rs. 40, having regard to the amount which would be due for one whole year.

13. Accordingly, we vary the decree under appeal by substituting Rs. 40 for the sum of Rs. 306-9-0 in the decree of the trial Court. In other respects we confirm the decree of the lower appellate Court with costs.

Fawcett, J.

14. I agree on all the three points discussed in the judgment just delivered by my learned brother. As to the point of *res judicata*, the case is certainly different from that of *Daudbhai Allibhai v. Daya Rama*. ILR (1918) 43 Bom. 568 In Pratt J.'s judgment in that case, he puts his conclusion mainly on the view that the contention about the plaintiff's right to enhancement of rent was consistent with the defendant in that suit being a permanent tenant. The same cannot be said here, because the finding that the defendant was a permanent tenant would certainly not be consistent with that part of the decree which allows the plaintiff damages for cutting Babul trees. The decision of this Court in *Sitabai v. Sambhu Sonu* ILR (1914) 38 Bom. 716 that a permanent tenant has rights of ownership over trees on land, of which he is a permanent tenant, shows that, if the defendant was a permanent tenant, he would have rights over the trees such as he asserted. That was a decision in 1914, prior to Suit No. 48 of 1915, and obviously, therefore, the claim of the defendant to ownership over the trees could not be disposed of without a finding whether he was or was not a permanent tenant. The same distinction applies to the remarks of Heaton J. in *Daudbhai Allibhai v. Daya Rama*(1) that the decree passed "is precisely the decree which would follow if the Court had held that the tenant was a permanent

tenant and not a yearly tenant," etc. Here the same decree would not have been passed, if the defendant had been held to be a permanent tenant.

15. Then, in regard to the Privy Council decision in Midnapur Zamindari Company, Ltd. v. Naresh Narayan Roy,⁽²⁾ and the Madras decision in Ramasami Reddi v. Marudai Reddi⁽³⁾ the test there laid down is whether it is necessary or not to come to a finding such as this one whether the defendant is or is not a permanent tenant. In those two cases it was not necessary to come to a finding upon that question. In the present case, as my learned brother has clearly shown, it was necessary to have such a finding.

16. As regards the question of mesne profits, those can only be recovered from the time that the defendant was "in wrongful possession" of the land. I do not think it can fairly be said that he was in wrongful possession, until he was given notice to quit according to Section 84 of the Bombay Land Revenue Code.