

(1929) 11 CAL CK 0001
In the Calcutta High Court

Hara Chandra Mistry and Others

APPELLANT

Vs

Bhagabat Mandal and Others

RESPONDENT

Date of Decision : 28-11-1929

Acts Referred:

Citation : AIR 1930 Cal 690 : 129 Ind. Cas. 574

Hon'ble Judges : S.K. Ghose, J

Bench : Division Bench

Judgement

S.K. Ghose, J.—The plaintiffs sue to eject the defendants alleging that they are under-raiyats and have been served with notice to quit. The defence is that the defendants are not under-raiyats, but that they are occupancy raiyats and that the notices were not sufficient. On these two points the learned Munsif held against the defendants and decreed the suit. On appeal the Additional District Judge agreed with the trial Court on the two points; but he held that the suit was barred by the principle of res judicata. The plaintiffs now come in second appeal.

2. It is pointed out that the question of res judicata, though raised at the trial, was not pressed before that Court. Nevertheless it is a point of law which can be properly urged in appeal; and the learned Additional District Judge was quite right in deciding it on merits. It is next pointed out that this question of res judicata has been decided upon the judgment in a previous suit in 1920 between the parties, but that neither the pleading nor the issues in that suit have been filed. But where the judgment is sufficient to indicate the pleadings and the issues, it affords sufficient materials for the decision of the question of res judicata; and I do not think that in the present case this objection has any force. The question of res judicata arises in this way : In 1920 the plaintiffs brought a suit to eject the defendants, their father having died in 1914. It was alleged by the plaintiffs that the defendants and their father had no tenancy right, that the defendants were trespassers, and that they had wrongfully dispossessed other persons who had been holding the land as tenants under the plaintiffs. It was further alleged by the plaintiffs that in a previous criminal case the defendants

had given out that they were tenants in respect of the land and had filed rent receipts. In their defence, the defendants stated that they were tenants in respect of the lands for a long time past and that they were holding the lands at a rental of Rs. 67 a year the issues as they appear in the judgment are:

(1) Are defendants 1 to 6 tenants or trespassers? and

(2) Can the plaintiffs get has possession and mesne profits?

The finding as recorded in the Judgment is:

In the above circumstances the defendants cannot be trespassers and I believe they are tenants as alleged and I find the issue accordingly.

3. It is no doubt true that the question of status was not expressly decided. Upon this point the learned Additional District Judge remarks as follows:

It was incumbent on the plaintiffs to make their case as they make it now that even if the defendants' father be found to be tenant, the tenancy being under-raiyati-defendants could not inherit and were therefore trespassers and they not having done so it must be taken to be a matter which might and ought to have been raised as a ground of attack and it must be held that it was decided against the plaintiffs by implication when their prayer for khas possession was refused on the finding of the tenancy upon materials which show payment of rent by the father only up to 1320 B.S.

4. In this view the learned Additional District Judge held that the decision in 1920 was res judicata in the present suit. On behalf of the appellants it is contended that, having accepted the decision in the previous suit, the plaintiffs were entitled to treat the defendants as tenants, to give them notice to quit, and to bring thereupon the present suit in ejectment. It is also pointed out that one of the defendants in the previous suit died and his heirs were substituted; and to that extent the plaintiffs had recognized the tenancy. But all this argument begs the question that the point as to status had not been decided in the previous suit. The whole point comes to this : Whether in the previous suit the point whether the defendants were tenants or under-tenants, might and ought to have been raised for decision. If the answer is in the affirmative, then according to the rule of res judicata it must be taken to be a point already decided as against the plaintiffs. Now it has been held in several cases that, whether a particular matter might be and ought to be raised in a previous suit, depends in each case on the circumstances. In the present case the circumstances are as indicated already. Upon the pleadings of the parties on both sides there was a question as to whether the defendants were tenants. In the plaint it was alleged that in a previous criminal case the defendants alleged themselves to be tenants. In their defence the defendants alleged that they were tenants for a long time and in support of this they filed receipts up to 1320 B.S., and granted in the name of their father. Another noteworthy fact is that the Record-of-Rights has already been finally published in 1919 and in that record the present defendants were

recorded as under raiyats. It is contended by the learned advocate for the appellants that it was not open to the plaintiffs to make out an alternative case that the defendants' father's tenancy was an under-tenancy and not heritable, because in that case there would have been contradictory pleadings and different causes of action. But this does not follow. The defendants' father died in 1914 and it was never the plaintiffs' case that they had exercised their option to recognize the defendants as under-tenants in succession to their father. On the contrary, the very suit that they brought indicated that they were all along regarding the defendants as trespassers. It has been held as a rule of res judicata that where the right claimed in both suits is the same, the subsequent suit will be barred as res judicata though the right in the subsequent suit may be sought to be established by a title different from that in the previous suit. For instance I may refer to the case of Fateh Singh v. Jagannath Baksha 52 I.A. p. 100.

5. In the present case I fail to see how it would have been inconsistent with the plaintiffs' claim in ejectment if they had made out a case that the tenancy, as alleged in the defence and also in the previous criminal suit, was merely an under-tenancy of the defendants' father which had not descended to the defendants. On the contrary, that would have been a proper ground of attack which might and ought to have been raised for decision in that suit. Instead of doing that, in spite of the fact that there was a Record-of-Rights showing that the defendants were under-tenants, the plaintiffs at first sought to eject the defendants on the allegation that they were trespassers, and they have now brought another suit for the same relief upon a different ground. In my opinion the learned Subordinate Judge was right in holding that the decision in the previous suit was in effect res judicata in the present suit.

6. The appeal is therefore dismissed with costs.

7. The application is also dismissed.