

Baldeo Pershad Vs. Narain Halwai

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Court : Allahabad

Decided On : Apr-20-1916

Reported in : 34Ind.Cas.123

Judge : P.C. Banerji, J.

Appellant : Baldeo Pershad

Respondent : Narain Halwai

Judgement :

P.C. Banerji, J.

1. The only question in this appeal is whether the plaintiff's claim in respect of the southern section of the house in dispute is barred by the rule of res judicata. The plaintiff's allegation is that a house consisting of two sections belonged to one Paharu; that the northern section had been purchased by him and the southern section had been built by him; that the house passed from Paharu to Musammat Kachani and was occupied by the defendant as tenant upon agreement to pay rent at the rate of Rs. 17 per annum. Musammat Kachani is said to have made a gift of the house in the plaintiff's favour. The plaintiff issued notice to the defendant to vacate the house and he now seeks to eject him from it. It appears that Musammat Kachani made a usufructuary mortgage of the property in favour of one Debi Prasad. Debi Prasad brought a suit for arrears of rent against the present defendant. Musammat Kachani was added as a plaintiff to that suit. The defence

was that the house did not belong to Musammat Kachani; that the defendant was not the tenant but was the owner of the house. The suit was decreed by the Court of first instance, which was the Court of the Munsif. An appeal was preferred to the District Judge. The learned Judge affirmed the decree, but in the course of his judgment he held that the southern section of the house was not included in the purchase by Paharu and did not therefore belong to Musammat Kachani and that agreement to pay rent was in respect to the northern house only. As the rent was in arrears the claim for rent was decreed. In the present suit it is contended that this decision of the learned District Judge which was passed on the 1st of August 1912, operates as res judicata in the present suit and precludes the plaintiff from setting up his title in respect of the southern house.

2. The Court of first instance decreed the northern portion of house, but on the ground of res judicata dismissed the claim in regard to the southern portion without trying it on the merits. This decision was affirmed by the lower Appellate Court. The learned Judge refers to the decisions of Kali Krishna Tagore v. Secretary of State for India 16 C. 173 : 15 I.A. 186 : 12 Ind. Jur. 413 : 5 Sar. P.J. 237 and Magniram v. Mehdi Hossein Khan 31 C. 95 : 8 C.W.N. 30 in support of his view that the matter is res judicata. Both the rulings have, in my opinion, no bearing on the present case. In both these cases the previous suit was a suit relating to title, so that any decision upon the question of title which directly arose in the previous suit would undoubtedly be res judicata in a subsequent suit upon the same question. In the present case the former suit was, as I have said above, a suit for arrears of house rent. It was a suit of the nature cognizable in a Court of Small Causes and would have been instituted in a Small Cause Court had one existed in the District of Mirzapur, where the property in suit is situate. The question which was substantially and directly in issue in the previous suit was the question, whether the defendant was the tenant of Musammat Kachani and was liable to pay rent. Any question of title which had to be considered in the former suit arose only incidentally and not directly. The decision upon the question of title cannot, therefore, have the effect of res judicata. No doubt the Appellate Court did go into the question of title and held that the southern house was not included in the purchase by Paharu, who was the predecessor-in- title of Musammat Kachani. It held that although the defendant was a tenant, he must be deemed to be the

tenant of the northern house only, and as the plaintiff had no title to the southern house, the plaintiff could not claim rent in regard to that house.

3. This decision, as I have said above, was only incidental to the real matter in controversy, namely whether the relationship of landlord and tenant subsisted between the parties. In *Inauat Khan v. Rahmat Bibi* 2 A. 97 it was held that the incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title. The same view was held by a Full Bench of the Calcutta High Court in *Dwarkanath Roy v. Ram Chand* Aich 26 C. 428 : 3 C.W.N. 266. The learned Counsel for the respondent has referred to the ruling of the same High Court in *Sahadeb Dholi v. Ham Rudra Haldar* 10 C.W.N. 820, which appears to have been followed in a subsequent case; but that case, so far as the present question is concerned, is apparently against the respondent. In my opinion the Courts below were wrong in holding that the matter is *res judicata* and that the question of the plaintiff's title to the southern house could not be determined in the present suit. I allow the appeal, discharge the decree of both the Courts below, so far as they relate to the southern section of the house in dispute, and remand the case to the Court of first instance under Order XLI, Rule 23, Civil Procedure Code, with directions to re-admit it under its original number in the register and try it on the merits. Costs here and hitherto will abide the event.