APPELLATE CIVIL.

Before Chatterjea and Cuming JJ.

1923

Aug. 10.

KALI RANJAN CHOWDHURY

v.

RAJESWAR ROY CHOWDHURY.*

Accretion—Deara lands—Howla tenure—Rent, separate suit for—Settlement Khewat—New tenures—Regulation XI of 1825, s. 4 (1).

It is difficult to affirm a general proposition that in no case can a separate suit for rent be maintained for accreted lands.

Golam Ali v. *Kali Krishna Thakur* (1), *Assanullah Bahadur* v. *Mohini Mohan Das* (2), *Muktakesi Dasi* v. *Srinath Das* (3), *Pria Nath Das* v. *Ramtaran Chatterjee* (4) referred to.

Where (as in the present case) the accreted lands were formed subsequent to the creation of the parent (*howla*) tenure and were not only constituted a separate estate between the Government and the proprietor, but the *deara* lands were separated and formed into new tenancies recorded in the settlement *khewats*, and the plaintiff had previously sued for and obtained a decree for rent in respect of the parent *howla* tenure separately, and the parties had treated the accreted lands as separate tenures,

Held, that a separate suit for rent for the accreted lands was maintainable.

SECOND APPEAL by Kali Ranjan Chowdhury and others, the defendants.

One Bisweswar Roy Chowdhury, a cosharer landlord of the lands in suit, sued the defendants, Kali Ranjan Chowdhury and others for recovery of three years' arrears of the newly assessed rent of a portion

*Appeal from Appellate Decree, No. 2536 of 1921, against the decree of Sris Chandra Banerjee, Subordinate Judge of Bakarganj, dated June 14, 1921, reversing the decree of Abinash Chandra Ghosh Hazra, Munsif of Patuakhali, dated March 6, 1920.

(1) (1881) I. L. R. 7 Calc. 479.
(2) (1889) I. L. R. 26 Calc. 739.
(3) (1914) 19 C. L. J. 614.
(4) (1903) I. L. R. 30 Calc. 811.

of a recorded *howla* named Krishnaram Das, alleging that the said portion formed *deara* lands and the Government had made a new assessment for the same. The defendants denied the authenticity of the *deara* proceedings and contended that the plaintiff's suit for the said alleged arrears was not maintainable as he had already obtained a decree for rent of his entire tenancies for the period in suit, and the present suit was with regard to a portion of these very tenancies. The trial Court dismissed the suit but on appeal the plaintiff was successful, whereupon the defendants preferred this second appeal to the High Court.

Babu Sarat Kumar Mitra, for the appellant, (after meeting a preliminary objection that there was no appeal in the present matter under the provisions of section 153, Bengal Tenancy Act). Our case (*i.e.*, the defendants') was that the plaintiff had actually realised rent for the entire tenure including the *deara*, for the same period in a previous suit, and cannot now realise rent again for the *deara*. The trial Court found in our favour but the lower Appellate Court has apparently come to a different conclusion. But, though its finding is assailable, I shall not press further as I have a stronger point. If the plaintiff, as alleged by him, omitted to include the *deara* lands in the earlier suit, can he now bring a separate suit for it? It is well established that *deara* is an accretion to the parent estate and is a part of it. The case of *Assanullah Bahadur* v. *Mohini Mohan Das* (1) is on all fours with the present appeal. Then again, under rule 2 of Order II of the Code of Civil Procedure, the plaintiff is debarred from bringing a separate suit: *Vide*, *Upendra Narain Roy* v. *Janaki*

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Nath Roy (1), *Khardah Company, Ltd.*, v. *Durga Charan Chandra* (2), *Abdul Hakim* v. *Karan Singh and Rahim Ali Khan and Others* (3). Thus the plaintiff can relinquish a portion of the claim and bring a subsequent suit for the omitted portion only when the relinquishment was to bring the suit within the jurisdiction of the Court or with leave of Court or by inadvertence. It is clear from the conduct of the plaintiff that it was not by inadvertence. The plaintiff has proved nothing, as he must do, to bring the matter within the other two saving clauses. This is not an equitable claim and the parties to the suit are bound by the above provision of the Code. My next contention is that we are not bound by the *deara* proceedings to which we were not parties, and even if we are so bound, the fact that Government assessed further and separate rent cannot affect a pre-existing contract between us and the plaintiff: *Assanullah Bahadur* v. *Mohini Mohan Das* (4) and *Muktakeshi Dasi* v. *Srinath Das* (5). Lastly there are no materials for finding out the rent of *deara*.

Babu Mohini Mohan Chakravarti (with him *Babu Trailokya Nath Ghose*), for the respondent. The *deara* is a separate tenure: *Vide, Golam Ali* v. *Kali Krishna Thakur* (6). A consideration of the question whether the *deara* is a separate tenure or not is not at all material here, as there is nothing in law to prevent me from bringing a separate suit for rent for the *deara*. The concluding portion of clause 1 of section 4 of the Regulation XI of 1825 "nor if annexed "to a subordinate tenure, etc.", to the end of the clause, has been repealed by section 52 of the Bengal Tenancy Act. That shows that a separate suit can be brought.

(1) (1917) I. L. R. 45 Calc. 305.
(2) (1919) I. L. R. 46 Calc. 640.
(3) (1915) I. L. R. 37 All. 646.
(4) (1889) I. L. R. 26 Calc. 739.
(5) (1914) 19 C. L. J. 614.
(6) (1881) I. L. R. 7 Calc. 479.

The case relied on by my friend is against him. That was a suit for the rent of the *deara* only. There was a remand.

[CUMING J. That was a remand for assessment only. No one disputes that assessment can be directed.]

What then where the *asli* land is a rent-free tenure? See *Rajendra Nath Roy* v. *Nanda Lal Guha Sarkar* (1) and Act XXXI of 1885, section 2. In the present case the assessment was complete.

Babu Sarat Kumar Mitra, in reply.

CHATTERJEA AND CUMING JJ. This appeal arises out of a suit for rent. The lands in respect of which the rent was claimed were accretions to a *howla* tenure held by the defendants under the plaintiff. The accreted lands were constituted a separate estate by the *deara* authorities, and also recorded as separate tenures of the defendants in the settlement *khewats*.

The defence *inter alia* was that no suit for rent was maintainable in respect of the accreted lands separately from that of the *howla* tenure. The Court of appeal below has held that it can be maintained and the defendants have appealed to this Court.

The appellants relied upon the cases of *Golam Ali* v. *Kali Krishna Thakur* (2), and *Assanullah Bahadur* v. *Mohini Mohan Das* (3). But in the first case all that was held was that the accreted land should be governed by the terms and the conditions applicable to the parent tenure, and that the same rent was payable for it as the land included in the *kabuliat*. The Government had not assessed the revenue of the accreted land in that case and there was no question whether the accreted lands formed a separate tenure. In the second case however the question was raised

(1) (1914) 19 C. L. J. 595. (2) (1881) I. L. R. 7 Calc. 479.
(3) (1889) I. L. R. 26 Calc. 739.

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and it was held that the rent of the additional lands cannot be recovered separately from the original part of the tenure.

Now section 4, cl. (*1*) of the Regulation XI of 1825 provides that in the case of a gradual accretion it shall be considered as an increment to the tenure of the person to whose land it is accreted but shall not exempt such person from the payment of any increase of rent to which he may be justly liable. Land accreted to a rent free tenure is therefore liable to payment of rent though the tenure to which it is accreted may be rent free. The rate of rent of land accreted to a rent paying tenure may not be the same as that of the original tenure having regard to the quality of land. Then again, where the proprietor of an estate declines to take settlement from the Government, the accreted portion must be settled with some other person, and such other person must necessarily bring a separate suit for rent for the accreted land held by the tenant. Again when the proprietor takes a settlement from the Government of the accreted portion as a separate estate, which he is entitled to do under section 2 of Act XXXI of 1858, and such estate is sold away to a third person such person would certainly be entitled to maintain a separate suit for rent for the accreted portion. These considerations are sufficient to show the difficulty of affirming a general proposition that in no case can a separate suit for rent be maintained for the accreted lands.

In the case of *Muktakeshi Dasi* v. *Srinath Das* (1), certain lands formed by gradual accretion by recession of a river was resumed by the Government and settled with the plaintiff. The land was held by the defendant under a lease granted to him by the plaintiff, who, was a co-sharer to the extent of two-thirds share, and

(1) (1914) 19 C. L. J. 614.

her co-sharers. It was held that in respect of the two-thirds share, the plaintiff was bound by the terms of the contract, that is, she was entitled to realize rent at the rate mentioned in the lease, and in respect of the remaining one-third she was in the position of a stranger and was entitled to realize rent at the rate assessed by the settlement authorities as payable by the under-tenure holder of the original estate. The cases of *Assanullah* v. *Mohini Mohan Das* (1) and *Pria Nath Das* v. *Ramtaran Chatterjee* (2), were distinguished on the ground that in these cases the settlement was with the original proprietors. A contention was raised that the co-sharers of the plaintiff were necessary parties to the litigation. But the learned Judges overruled it on the ground that the land in respect of which settlement was made by the Government *formed a separate tenure.*

In all the cases cited above, the accreted land already formed part of the tenure held by the tenant under the landlord. In the present case the accreted lands were formed subsequent to the creation of the parent *howla* tenure. They were not only constituted a separate estate between the Government and the proprietor, but the Court of appeal below finds that the *diara* lands were separated and formed into new tenancies' recorded in the settlement *khewats.* The plaintiff had previously sued for and obtained a decree for rent in respect of the parent *howla* tenure separately. The parties therefore treated the accreted lands as separate tenures. In these circumstances we think that the Court below was right in holding that a separate suit for rent for the accreted lands is maintainable.

The appeal is accordingly dismissed with costs.

G. S. *Appeal dismissed.*

(1) (1889) I. L. R. 26 Calc. 739. (2) (1903) I. L. R. 30 Calc. 811.