

APPELLATE CIVIL.

Before Greaves and Mukerji JJ.

ASRAFANNESSA KHATUN

v.

HERAMBA CHANDRA CHOWDHRY.*

1926

May 5.

*Res judicata—Revenue Court, decision of—Civil Court, subsequent suit in—
Bengal Tenancy Act (VIII of 1885), ss. 101 (2) (a), 102 (dd), 106.*

The decision (of a Revenue Court) in a suit under section 106 of the Bengal Tenancy Act does not operate as *res judicata* in a subsequent suit by the aggrieved party in the Civil Courts, notwithstanding the introduction of clause (dd) in section 102 of the Bengal Tenancy Act, as the Revenue Officer has to go primarily upon the question of possession.

Padmalav v. Lukmi Ram (1) followed.

SECOND APPEAL by Asrafannessa Khatun, the defendant No 1.

The facts of the case out of which this appeal arises are briefly as follows. One Syed Abdul Gaffur had 8 gandas odd share in the Taluq bearing Tauzi number 328 of the Mymensingh Collectorate, and during the cadastral survey plaintiff's share in the above Taluq was duly recorded in the settlement papers. The defendant No. 1 then filed an application under section 106 of the Bengal Tenancy Act for correcting the settlement records by substituting defendant's name in place of the plaintiff respecting two

* Appeal from Appellate Decree, No. 1512 of 1923, against the decree of Haripada Majumdar, Subordinate Judge of Pabna, dated Feb. 15, 1923, affirming the decree of Jogesh Chandra Chatterjee, Munsif of Serajganj, dated March 28, 1922.

mouzas of the aforesaid Taluq, and the Revenue Officer after taking evidence as to title allowed defendant's application. In consequence thereof plaintiff's right in that mahal was jeopardised and the plaintiff was thereby dispossessed from the mahal. Thereupon the plaintiff brought this suit in the 2nd Court of the Munsif at Seraiganj for a declaration of his title to the land in suit and for khas possession of the same. At the conclusion of the trial, plaintiff withdrew his prayer for correction of the settlement entry and thereby escaped limitation. The main contentions of the defendants were limitation and *res judicata*. The trial Court decreed the plaintiff's suit, and the defendants having lost on appeal preferred this second appeal to the Hon'ble High Court.

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Dr. Dwarka Nath Mitter, Advocate, and *Maulvi Syed Nausher Ali*, for the appellants.

Babu Joyesh Chandra Roy, *Babu Ramani Mohan Chatterjee* and *Babu Kebati Mohan Chatterjee*, for the respondents.

MUKERJI J. This appeal arises out of a suit for declaration of the plaintiff's title to and recovery of possession in respect of certain shares in a taluk bearing Touzi No. 328 of the Mymensingh Collectorate. The plaintiff's name was recorded in the finally published record-of-rights as the owner of 8 gandas 3 karas and 5 dantis. The defendant No. 1 of the present suit thereupon instituted a suit under section 106 of the Bengal Tenancy Act for a correction to be made in the entry of the names of the owners of the taluk and alleged that she had 14 annas and odd share therein and in the said suit she made one *Jowhar Ali Mia*, who is defendant No. 2 in the present suit, *pro forma* defendant, alleging that the

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said Jowhar Ali had 1 anna odd gandas share in the said taluk. The defendant No. 1 was successful in the said proceedings. The plaintiff thereupon has instituted the present suit. In the suit as originally framed, there were, besides the prayers for declaration of title and recovery of possession, a prayer for setting aside the order of the revenue officer made in the proceeding under section 106 of the Bengal Tenancy Act and also a prayer for an order for recording the plaintiff's name as owner in respect of the said 8 gandas and odd share. These two latter prayers however, were withdrawn and the suit was decreed by the Court of first instance, giving the plaintiff declaration of his title to the said share and a decree for khas possession in respect of the same. That decision has been affirmed on appeal by the learned Subordinate Judge. The defendants then have preferred this appeal.

Two grounds have been urged in support of this appeal. The first ground is to the effect that the decision in the suit under section 106 of the Bengal Tenancy Act operates as *res judicata* in respect of the plaintiff's claim in the present suit. This contention however is against a series of decisions of this Court amongst which reference may be made to the cases of *Padmalav v. Lukmi Rani* (1), *Kali Sundari Debya v. Girija Sankar Sanyal* (2), *Ram Chandra Bhanja v. Nandanandananda* (3) and *Pran Krishna Saha v. Trailakhya Nath Choudhuri* (4). It has been urged on behalf of the appellants that although there are these decisions of this Court upon the point in question, the earliest decision upon which the later ones proceed, namely, *Padmalav's* case, (1) relates to the provisions of Chapter X of the Bengal Tenancy Act prior to the

(1) (1907) 12 C. W. N. 8.

(3) (1913) 18 C. W. N. 935.

(2) (1911) 15 C. W. N. 974.

(4) (1915) 19 C. W. N. 911.

amendment in 1907. The argument in substance is that now that the revenue officers have much wider powers under the provisions of that Chapter and inasmuch as in framing the record under section 102 of the Bengal Tenancy Act the revenue officer has to record under clause (dd) of that section the name of each proprietor in the local area or estate, it necessarily follows that the revenue officer has got to consider and determine the question of title as between rival proprietors. I am of opinion that notwithstanding the introduction of clause (dd) in section 102 of the Bengal Tenancy Act, the rulings to which reference has been made must still be regarded as laying down the law correctly. Section 101 clause (4) of the Act lays down that the survey shall be made and the record-of-rights prepared in accordance with the rules made in this behalf by the Local Government, and it stands to reason that an entry made in accordance with the rules by the revenue officer cannot be altered or corrected in a suit under section 106 of the Bengal Tenancy Act. Rule 49 clause (4) says that the application under section 101 sub-section (2)(a) made by a proprietor shall not be admitted unless the name of the applicant and the extent of his interest are registered under the Land Registration Act of 1876. Rule 58 says that the petition recording the ownership of the land or the ownership of any interest in land shall be decided by the revenue officer on the basis of actual possession. What the revenue officer has to go upon primarily is the question of possession, and in making an entry in the record of the name of each proprietor in the local area or the estate under clause (dd) of section 102 the revenue officer has to do the same. A party who is not in possession cannot seek to recover possession in a suit under section 106 of the Act. The alteration in the law therefore has not, in my

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opinion, affected in any way the authority of the decision in *Padmalav's* case (1) to which I have referred and the reasons upon which the said decision is founded still hold good. The first contention urged on behalf of the appellants therefore fails.

The next contention urged on behalf of the appellants in substance amounts to this. The plaintiff in his plaint stated that he had been dispossessed by reason of the entries that had been made in accordance with the order passed in the suit under section 106 of the Bengal Tenancy Act. The defendants in their written statements alleged that they were in possession for a period long over 12 years and that the plaintiff's rights had been barred. There was a decree for partition amongst the co-sharers on the 24th March 1909. The suit was instituted against the defendant No. 1 on the 17th January 1921 but the defendant No. 2 was not made a party to the suit till the 1st December 1921. The learned Subordinate Judge in disposing of the question as to whether the suit was barred by limitation or not held that it was not barred, inasmuch as the partition decree was dated the 24th March 1909 and the suit was filed on the 13th January 1921. The learned Subordinate Judge appears to have overlooked the fact that the defendant No. 2 was not made a party till the 1st December 1921. The institution of the suit on the 13th January 1921 cannot possibly be taken to have affected the defendant No. 2 against whom the suit must not be treated as having been instituted till the date on which he was made a party. The question of limitation so far as the defendant No. 2 is concerned therefore does not seem to have been properly considered by the Subordinate Judge.

In this view of the matter I set aside the decree passed by the learned Subordinate Judge and send the

case back to his Court in order that he may determine the question of limitation taking into consideration the fact that defendant No. 2 was made a party to the suit on the 1st December 1921 and having regard to all the other facts and circumstances of the case. This is the only question which now remains for his determination.

The costs will abide the result.

GREAVES J. I agree.

G. S. *Appeal allowed; suit remanded.*

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ABANI NATH MUKHERJEE

v.

SECRETARY OF STATE FOR INDIA.*

1926
 June 24.

Cess—Re-valuation—Mode of levy of cess on revaluation—Date from which revaluation is to take effect—Cess Act (Beng. IX of 1880), ss. 12, 15, 40, 182—Rules made by the Board of Revenue under the Cess Act, rule 30, if ultra vires.

Section 40 of the Cess Act is applicable only where there is any cess to be levied in the district as a whole, that is, if there is a district revaluation. Where there is a revaluation only of an estate or a tenure in any district, it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of section 40.

Rule 30 made by the Board of Revenue under the authority given by section 182 of the Cess Act is not *ultra vires* of the law and it is the Board of Revenue which has to fix a date from which revaluation is to take effect.

* Appeal from Appellate Decree, No. 736 of 1924, against the decree of H. C. Liddell, District Judge of Hooghly, dated December 21, 1923, reversing the decree of Lal Behary Chatterji, Subordinate Judge of that district, dated August 22, 1921.