APPELLATE CIVIL.

Before Cuming and Mukerji JJ.

LATIFA KHATUN

v.

TOFER ALI.*

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June 2

Accretion—Recession of river—Award by revenue authorities—Limitation Act (IX of 1908) Art. 45—Prayer for setting aside award, if necessary.

An "award" within the meaning of Article 45 of the Limitation Act means an award after a contest and a proper investigation into the points at issue.

Nabo Kissen Roy v. *Gobindo Chandra Sein* (1), *Radha Prosad Singh* v. *Ram Jewan Singh* (2) and *Kristomani Gupta* v. *The Secretary of State* (3 referred to.

In a previous suit possession of certain lands had been decreed in favour of the plaintiffs on the basis that they were accretions to the holding of their predecessor-in-title. In a subsequent suit for declaration of title to and confirmation of possession of other lands on the ground that they were further accretions to the former : *held*, that it was unnecessary to pray for the setting aside of an award wrongly made by the revenue authorities with another person and that the plaintiffs, if successful in their suit, would obtain the benefit of such settlement.

Midnapore Zemindary Co. v. *Naresh Narain Roy* (4), followed.

The plaintiffs' right to "accretio" in the last accreted lands is unaffected by the fact that no settlement was made of a portion of the previously accreted lands by the revenue authorities as there is no question of limitation or adverse possession. There being no refusal to take a settlement on the part of the plaintiffs' predecessor-in-title or on the part

*Appeal from Appellate Decree, No. 40 of 1925, against the Decree of Ashutosh Ghose, Subordinate Judge, Chittagong, dated Sep. 25, 1924, reversing the decree of Kiran Chandra Mitra, Munsif of Patiya, dated April 6, 1923.

(1) (1866) 6 W. R. 317.
(2) (1869) 11 W. R. 389.
(3) (1898) 3 C. W. N. 99
(4) (1921) I. L. R. 49 Calc. 37.

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of the plaintiffs or their vendor or an abandonment of proprietary rights in lieu of *malikana*, the plaintiffs' predecessor-in-title and through him the plaintiffs became entitled to the lands as soon as they accreted.

Soudamini Dasya v. *The Secretary of State for India* (1) referred to and explained.

SECOND APPEAL by the plaintiffs, Latifa Khatun and another.

There were three successive accretions to the ryoti holding of one Gholam Ali by the recession of the river Sanko. The Government leased out the lands of the first two accretions to Gholam Ali in 1901-02 and in 1904-05, respectively, each time leaving a strip next to the river unsettled. The lands of the third accretion which really were accretions to the lands of the second accretion were settled with one Ali Hossein a relation of Gholam Ali and one Abdul Karim Chaudhury in 1909-10 by a *bandobusti kabuliat* dated 11th June 1911.

In 1909 Gholam Ali's interest in his holding was sold in execution of a mortgage decree and the auction purchaser sold the same to the plaintiffs. The latter on finding their possession disturbed brought a suit in 1913 against Gholam Ali, Ali Hossein and Abdul Karim and obtained a decree for the lands of the first two accretions only in the trial Court. In appeal therefrom they withdrew the claim with regard to the third accretion with liberty to bring a fresh suit therefor inasmuch as the Secretary of State was considered a necessary party to such a suit. In the present suit, which was instituted on the 23rd September 1921, the plaintiffs' claim was for declaration of title and confirmation of possession with respect to the lands of the third accretion against Gholam Ali, his 2 sons, the heirs of Ali Hossein, the Secretary of State and Abdul Karim Choudhury. The last-named

(1) (1923) I. L. R. 50 Calc. 822, 848.

compromised the suit with the plaintiffs, but as against the other defendants the trial Court granted a decree to the plaintiffs. On two separate appeals by the heirs of Ali Hossein and by the Secretary of State, the Subordinate Judge allowed both the appeals and dismissed the plaintiffs' suit holding that the lands in suit could not be deemed to be accretions to the lands of the previous two accretions because a portion of the former was in existence at the time when the latter were leased out to Gholam Ali and also because at each of the two previous settlements a strip next to the water had been left unsettled. He also held that the suit was barred by Article 45 of the Limitation Act. Against this the plaintiffs filed the present appeal to the High Court.

Dr. Basak and *Babu Chandra Sekhar Sen*, for the appellants. Upon the facts found the Court below erred in law in holding that the disputed land is not an accretion. Merely because the Government kept a portion of the previous accretions unsettled, that would not deprive the tenant of the lands accreted to the unsettled portion. Admittedly there was no refusal to take settlement or abandonment of proprietary right in lieu of *malikana*, see *Soudamini Dasya* v. *The Secretary of State for India* (1). Article 45 does not apply. The facts necessary to apply that Article are not pleaded. An "award" presupposes a contest. In this case there was no appearance on behalf of the plaintiffs as no notice was served. There was no notice to set aside the award, see *Midnapore Zemindary Co.* v. *Naresh Narain Roy* (2).

Babu Surendra Nath Guha and *Babu Paresh Chandra Sen*, for the respondents. There cannot be any accretions to lands to which the plaintiffs had no

(1) (1923) I. L. R. 50 Calc. 822. (2) (1921) I. L. R. 49 Calc. 37.

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tenancy right. As the portion was not settled, the plaintiffs must be deemed to have lost their rights if any.

The suit is barred by limitation. An "award" means a judgment. It does not necessarily follow that there must be a contest.

Babu Chandra Sekhar Sen, in reply, referred to *Kristamani Gupta* v. *The Secretary of State* (1).

MUKERJI J. To appreciate the contention that has been urged in this appeal it is necessary to set out the facts which led up to the litigation out of which it has arisen. It will be convenient to specify the plots of land with which we are concerned by reference to their Cadastral Survey Numbers and to their configuration as shown in the maps Exts. G, G-1 and G-2 which are on the record.

One Gholam Ali held a rayati holding in the Government Khas Mehal in the district of Chittagong. The holding lay by the side of the river Sanko. By the gradual recession of the river, lands were formed and accreted to the holding of Gholam Ali. In 1901-02 some of these accreted lands were settled with Gholam Ali. These lands appertained to Cadastral Survey plots Nos. 1658, 2006-4 and 1658-1 (*vide Ex.* G). The lands thus settled, though contiguous to Gholam Ali's holding, did not extend right up to the river, but a small tongue between the lands and the river was left out. This small tongue-shaped land is Cadastral Survey plot No. 2006-6. There were further accretions thereafter, and in 1904-05 there was another settlement with Gholam Ali of these additional lands which appertained to Cadastral Survey plots Nos. 2006-8 and 2006/12 (*vide Ex.* G-2). There were lands to the south of these two plots at the time lying

(1) (1898) 3 C. W. N. 99.

between the said plots and the river, but they were left unsettled. It may be noted that Cadastral Survey plot No. 2006/6 was also left unsettled as before. Similarly in 1909-10 there was a fresh settlement of the further accreted lands comprising of Cadastral Survey plots Nos. 2006/16, 2006/17 and 2006/18 (*vide Ex.* G.-1). This settlement was made with one Ali Hossein and one Abdul Karim Chaudhury. The Bandobasti Kabuliat executed in respect of this settlement was dated the 11th June 1911.

In the meantime and before the settlement of 1909-10 Gholam Ali's interest in these properties was sold in an auction held in execution of a decree on a mortgage and was purchased by one Girish Mohajan on the 8th February 1909 who thereafter sold the same to the plaintiffs on the 1st April 1909.

The lands of the settlement of 1901-02 are described in Schedule 2 of the plaint in the present suit, those of 1904-05 in Schedule 3, and those of 1909-10 in Schedule 1. The plaintiffs' possession in these lands being disturbed or jeopardised he in 1913 instituted a suit being Title Suit No. 480-76 of 1913 against Gholam Ali, Ali Hossein and Abdul Karim Chaudhury in respect of the lands of Schedules 1, 2 and 3. The suit was decreed in his favour in respect of the lands of Schedules 2 and 3 and he was allowed to withdraw his claim as regards the lands of Schedule 1 as the Secretary of State for India in Council was considered a necessary party for the determination of the said claim.

The present suit was thereafter instituted in respect of the lands of Schedule 1. In this suit Gholam Ali is the defendant No. 1; his sons are the defendants Nos. 2 and 3; the defendants Nos. 4 to 10 are the heirs of Ali Hossein; the Secretary of State for India in Council has been impleaded as the defendant No. 11,

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and Abdul Karim Chaudhury is the defendant No. 12. The suit was for declaration of title and confirmation of possession.

The substance of the plaintiffs' claim was that Ali Hossein or Abdul Karim Chaudhury did not take the settlement of the lands of Schedule 1 or possess or pay rent for the same, but that Gholam Ali took it in their names: that if this *benami* nature of the transaction was not proved, then the Government had no right to settle the said lands with Ali Hossein or Abdul Karim Chaudhury as the lands were accretion to the lands of Schedules 2 and 3 of which Gholam Ali had already obtained settlement in 1901-02 and 1904-05 respectively; and that the plaintiff having acquired Gholam Ali's interest in the original holding as well as the Schedule 2 and 3 lands, his title to the lands of Schedule 1 should also be declared and his possession therein confirmed.

The plaintiff and the defendant No. 12 Abdul Karim Chaudhury settled the dispute between them on compromise. The defence of the heirs of Ali Hossein was, besides a denial of the plaintiffs' title under his purchase, that Gholam Ali did not take the settlement of the disputed lands in the names of Ali Hossein, that Ali Hossein had taken settlement from Government on his own account and had been in possession for upwards of 20 years. The position taken up by the Secretary of State was that the lands of Schedule 1 were accretion to those of Schedule 3 which again were accretions to the lands of Schedule 2, but that when the lands of Schedule 2 and 3 were settled, the settlements were not made of all the lands that had accreted, but because an intervening strip of land between the lands settled and the river was left unsettled, Gholam Ali was not entitled to have the settlement of the lands of Schedule 1, and

consequently the plaintiffs had no title to the same.

The Munsif decreed the suit. From this decision appeals were preferred by some of the heirs of Ali Hossein and by the Secretary of State for India in Council. The Subordinate Judge who dealt with the appeals, allowed the same, and reversing the Munsif's decision dismissed the suit. The plaintiffs have thereupon appealed to this Court.

The Subordinate Judge has, in effect, upheld the contention of the Government, and held that because in the settlements of 1901-02 and 1904-05 all the lands up to the river had not been settled with Gholam Ali, but a strip of land by the side of the river was left unsettled, Gholam Ali was not entitled to claim the lands of Schedule 1, as accretions to those of Schedules 2 and 3. He has also held that the suit is barred as being governed by article 45 of the Limitation Act. Both these grounds have been challenged before us as unsound.

So far as the question of limitation is concerned it appears from the written statement filed on behalf of the heirs of Ali Hossein that the limitation pleaded therein was 12 years from the date of the auction sale, or three years from the date of the settlement with Ali Hossein or two years from Ali Hossein's taking possession. The only case as to limitation that appears to have been sought to be made out in the trial Court was Article 142 or Article 144 of the Limitation Act, and the finding of that Court on this question was: "The statement of the defendant No. 4 "and those of his witnesses regarding the alleged "possession of the disputed land for 20 or 25 years is "absolutely unreliable. It is sufficiently clear from "the evidence that the plaintiffs are in possession of "the land for five or six years. From all these facts

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"and circumstances of the case I hold that the suit is "not barred by limitation". These findings do not appear to have been challenged before the Appellate Court. At any rate they have not been reversed by that Court. The foundation of a case as to limitation under Article 45 was laid in the written statement, but it is conceded that there are absolutely no materials on which such a case may be supported. It is well-settled that the "award" contemplated by Article 45 of the Limitation Act presupposes a contest between the parties and a decision after proper investigation into the points at issue (See *Nabo Kissein Roy* v. *Gobinda Chandra Sein* (1), *Radha Pershad Singh* v. *Ram Jewan Singh* (2), *Kristomoni Gupta* v. *The Secretary of State* (3). There is nothing to indicate in the present case, that there was any contest or a decision on any investigation. Moreover as pointed out in the case of *Midnapore Zemindari Co.* v. *Naresh Narain Roy*, (4), there was no necessity for the plaintiff in a case like this to sue to set aside the award, if any, by the Revenue Authorities. The object of the present suit being that the plaintiffs may be confirmed in their possession of the lands, if they succeed in it, the settlement made by the Revenue authorities, in so far as it determines the amount of the revenue payable in respect of the disputed property, will in no way be affected, the only result being that the plaintiffs will, in that case obtain the benefit of the settlement which Ali Hossein obtained from the Government. The decision of the Subordinate Judge on the question of limitation cannot be upheld.

On the question of Gholam Ali's title to the lands of Schedule 1 also the view taken by the learned

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(2) (1869) 11 W. R. 389.
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Judge, in my opinion, is erroneous. The true view of the law of Alluvion (sec. 4 of Reg. XI of 1825) is that "physically land is added to land; in point of "right, the right to the new land is *accretio* to the "right to the old". (Per Rankin J. in *Soudamini Dasya* v. *The Secretary of State for India* (1). The fact that no settlement of revenue is made of a portion, such as there was in the present case, cannot affect this *accretio* to the right, unless any question of limitation or adverse possession arises. In the present case there was no refusal to take settlement on the part of Gholam Ali or of the plaintiff or his vendor or an abandonment of proprietary rights in lieu of *Malikana* such as arose in the case of *Soudamini Dasya* v. *The Secretary of State* (1). Gholam Ali was therefore entitled to the lands of Schedule 1 as soon as they accreted and the plaintiff too was similarly entitled.

In my judgment the Subordinate Judge's decision cannot be supported. The appeal must therefore be allowed, the judgment of the Subordinate Judge set aside and that of the trial Court restored with costs of this Court as well as of the lower Appellate Court.

CUMING J. I agree.

R. K. C. *Appeal allowed.*

(1) (1923) I. L. R. 50 Calc. 822, 848.