APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

MAHENDRANARAYAN RAY CHAUDHURI

v.

JANAKINATH RAY.*

1930

Feb. 5, 20.

Appeal to Privy Council—Valuation—When party debarred from proving value of property—Code of Civil Procedure (Act V of 1908), s. 110; O. XLV., r. 5.

The doctrine, that a party cannot both approbate and reprobate, applies to the case where he appeals to the lower appellate court upon a valuation inconsistent with the valuation upon which he seeks a certificate enabling him to appeal to the Privy Council.

Rameshwar Khemka v. *Siddeshwar Ghosh* (1), *Mutusawmi Jagavera Yettapa Naiker* v. *Vencataswara Yettio* (2) and *In re Rance Bhugobutty Debia* (3) followed.

Satish Chandra Joardar v. *Birendra Nath Roy* (4) explained and dissented from.

The value referred to in section 110 of the Code is the real or market value and where under the Court-fees Act or otherwise a plaint or memorandum of appeal is not required to be valued according to the real or market value, but is allowed or required to be valued upon some other basis, the doctrine of "approbate and reprobate" does not apply.

A party, who sues in or appeals to a court which would have no jurisdiction if the value exceeds Rs. 10,000, debars himself from claiming at a later stage to have the subject matter of the suit in the court of first instance treated for purposes of an appeal to England as exceeding Rs. 10,000.

Surendra Nath Roy v. *Dwarka Nath Chakravarti* (5) distinguished.

PRIVY COUNCIL APPLICATION by the defendant.

The facts of the case, out of which this application for leave to appeal to His Majesty in Council arose, appear in the judgment of the Chief Justice, under report herein and are supplemented by the following extract from the judgment of S. K. Ghose and Panckridge JJ., dated 26th June, 1929 :—

The plaintiffs, who are the purchasers of a *patni táluk* in execution of a mortgage decree, allege that the defendant's vendor held a tenure under the *patni* created by a *dowl kabuliyat* bearing the date, 19th *Ashwin*, 1249.

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(1) (1924) 45 C. L. J. 225.
(2) (1865) 10 M. I. A. 313.
(3) (1870) 14 W. R. 62.
(4) (1926) 31 C. W. N. 268.
(5) (1916) I. L. R. 44 Calc. 119.

According to the plaintiffs' case, the tenure is *non*-permanent and *non*-transferable. The defendant having purchased for Rs. 10,000 in 1330 B. S. the plaintiffs sue to eject him. The defence is that the tenure is permanent and transferable. The learned Additional District Judge, on appeal, has agreed with the trial court in holding that the *dowl kabuliyat* created a *non*-permanent and *non*-transferable tenure, but he has found that, as the result of a compromise arrived at in a rent suit of 1911, the tenure in suit has become permanent and transferable. He has, therefore, reversed the decree of the trial court and dismissed the suit.

The plaintiffs' Second Appeal having been allowed, the defendant applied for leave to appeal to the Privy Council alleging that the subject-matter of the suit in the court of first instance was of the value of Rs. 10,000, which was the real market value of the land.

Nareshchandra Sen Gupta and *Jogeshchandra Singha* for the appellant.

Sharatchandra Ray Chaudhuri and *Jatinmohan Basu* for the respondents.

RANKIN C. J. This is the defendant's application for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council. The suit was brought in 1926 for possession of certain land and ejectment of the defendant therefrom, on the footing that the defendant purchased the tenancy right of certain persons who had only a non-transferable *jamâ*. The defendant's contention was that the tenancy in question was a permanent tenancy at fixed rate and therefore transferable. The trial court decreed the plaintiff's suit and the defendant appealed to the Additional District Judge, who allowed the appeal and dismissed the suit. Upon a Second Appeal to this Court, that decree was reversed and the judgment of the trial court restored, so that the plaintiff succeeded in ejectment.

Upon the affidavits before us, there is a dispute as to the value of the property, which is the subject-matter of the suit, and in the ordinary course we would call for a report from the trial court upon this question under rule 5 of Order XLV of the Code. For the plaintiffs, it is contended, however, that the

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defendant cannot be heard to allege that the subject-matter of the suit in the court of first instance was of the value of Rs. 10,000 by reason that the case was one in which court-fee was payable upon the market value of the land and the plaintiff having valued the lands for purposes of court-fee at Rs. 2,658 the defendant adopted and accepted this valuation when he appealed to the District Judge, whereas, if in fact the subject-matter of the suit exceeded Rs. 5,000, the first appeal lay to this High Court.

The question is constantly giving rise to difficulty. In *Satish Chandra Joardar* v. *Kumar Birendra Nath Roy Bahadur* (1), the plaintiffs had valued the land at Rs. 930 only. The High Court in Second Appeal having dismissed their suit, they applied for a certificate to enable them to take the case to the Privy Council alleging that the value exceeded Rs. 10,000. A Division Bench having referred the matter of valuation to the trial court and that court having reported that the value of the land was Rs. 3,286 and this Court being of opinion that it was at least Rs. 3,448 a certificate was granted; other claims in the suit were shown to make up the difference between Rs. 3,488 and Rs. 10,000. Objection was taken to the effect that the plaintiff was estopped from saying that the land was worth so much as Rs. 3,448 by reason that he had valued the land in his plaint at Rs. 930. The difference between these figures made no difference as regards the court in which the suit should be tried. The appeal to the lower appellate court had been brought by the plaintiff and the appeal to the High Court had been brought by the defendant. I find that, upon reference to certain cases, I took the view that it had not been laid down in any case that a person proposing to appeal to the Privy Council was estopped from alleging that the value of the subject-matter of the suit exceeded Rs. 10,000 by reason that he had taken

(1) (1926) 31 C. W. N. 268.

an appeal to a lower court on the basis of the lower valuation.

Mr. Ray Chaudhuri, in the present case, has referred us to the decision in *Rameshwar Khemka* v. *Siddeshwar Ghosh* (1) and has pointed out that this case is an authority for the proposition, which in *Satish Chandra's* case (2) was rejected as being without authority. In *Rameshwar's* case (1) the plaintiff had valued his suit at Rs. 2,737. The defendant objected to the valuation, but did not press his objection, and the question of value was in the trial court decided in favour of the plaintiff. The plaintiff having succeeded in the trial court, the defendant appealed to the District Judge, valuing his appeal at the same figure, namely, Rs. 2,737. The appeal being decided in favour of the defendant, the plaintiff appealed to the High Court and succeeded there. The defendant then applied for a certificate to enable him to go to the Privy Council and claimed that the value exceeded Rs. 10,000. Sanderson C. J. and Buckland J. refused the certificate on the ground that the defendant had valued his appeal to the District Judge at Rs. 2,737 only, thereby acquiescing in the valuation which the plaintiff had put on the suit. They pointed out that in that case a main ground of appeal to the Privy Council was that the High Court should have accepted the findings of fact of the lower appellate court and that, if the defendant had alleged at the proper time that the value of the suit exceeded Rs. 10,000, the lower appellate court and its findings of fact would have had nothing to do with the case—the appeal would have lain direct to the High Court and would have been a first appeal.

In the case now before us, I do not find that there is any complaint that the High Court has wrongly interfered with the findings of fact, but it is clear enough that one Second Appeal cannot be differentiated from another upon such a ground.

(1) (1924) 45 C. L. J. 225. (2) (1926) 31 C. W. N. 268.

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Rameshwar's case (1) and the observations of Lord Chelmsford in *Mutusawmi Jagavera Yettapa Naiker* v. *Vencataswara Yettia* (2) are distinct authorities to show that the doctrine that a party cannot for this purpose both approbate and reprobate applies to the case where he appeals to the lower appellate court upon a valuation inconsistent with the valuation upon which he seeks a certificate enabling him to appeal to the Privy Council. I find, moreover, that there is an old authority to the same effect in *In re Ranee Bhugobutty Debia* (3). Had these cases been cited to me in *Satish Chandra's* case (4), they would have shown that the reasoning, which I then accepted, was inconsistent with authority.

It is I think clear that the value referred to in section 110 of the Code is the real or market value and that where, under the Court-fees Act or otherwise, a plaint or memorandum of appeal is not required to be valued according to the real or market value, but is allowed or required to be valued upon some other basis, the doctrine of "approbate and "reprobate" does not apply [*Hari Mohan Misser* v. *Surendra Narain Singh* (5), *Basanta Kumar Roy* v. *Secretary of State for India in Council* (6)]. There is no representation by the party as to the market value when he brings his suit or his appeal. In this province, however, suits for land are usually suits for land which forms part of a revenue-paying estate, but is not a definite share of such estate and is not separately assessed to revenue. Accordingly, under section 7 (*v*) (*d*), court-fee is payable upon the market value of the land. There are other cases also where the real or market value is the test. In all such cases a party, who sues in or appeals to a court which would have no jurisdiction if the value of the land exceeded Rs. 10,000, debars himself from claiming at a later stage to have the value of the subject-matter of the suit in the court of first instance treated for

(1) (1924) 45 C. L. J. 225.
(2) (1865) 10 M. I. A. 313.
(3) (1870) 14 W. R. 62.
(4) (1926) 31 C. W. N. 268.
(5) (1903) I. L. R. 31 Calc. 301.
(6) (1910) 14 C. W. N. 872.

purposes of an appeal to England as exceeding Rs. 10,000. Whether the judgment be in his favour or against him, he has adopted a course of litigation as appropriate to the case and cannot claim a right of appeal which is inconsistent with the course adopted.

For these reasons, the application for a certificate must be refused with costs three gold mohurs.

It ought to be mentioned that the case of *Surendra Nath Roy* v. *Dwarka Nath Chakravarti* (1) has not escaped our attention. That, however, was not a case in which the suit for purposes of court-fee or jurisdiction was to be valued according to the market value of the land.

GHOSE J. I agree.

Application for certificate refused.

G. S.

(1) (1916) I. L. R. 44 Calc. 119.