

APPELLATE CIVIL.

Refore B. B. Ghose and S. K. Ghose JJ.

SUDHINKUMAR PAL

v.

ASGAR.*

1929

Aug. 29.

Embankment Cess—Embankment charges, how far first charge on estate—Zemindâr's right to recover—Patni sale, provisions of, how far applicable for recovery of embankment charges—Apportionment of embankment charges—Effect of splitting up of tenure by Zemindâr—Presumption of registration of document about khârij—Bengal Embankment Act (Beng. II of 1882), ss. 59, 68, 74, 86.

S and G, holders of a *mourasi mokarrâri* tenure, in a large area of land, sold the bulk of it in plots to plaintiffs, retaining a residuary portion of about 20 *bighâs* to themselves. The *zemindârs* constituted the different plots into separate tenures by distributing the original rent between them. According to the Collector's apportionment of the cesses, under the Bengal Embankment Act, 1882, which were due from the estate, the portion of the cess, due from the tenure-holders, was allotted as between S and G only, no portion being allotted to the plaintiffs. Some of the heirs of S, having defaulted their share of the charges, the *zemindâr* had the entire original tenure sold under section 74, and the same was purchased by B, who sought to oust the plaintiffs from the plots in their possession. Upon the plaintiffs filing seven separate suits against the heirs of the *zemindârs*, the heirs of S and G, and B for a declaration that their interests as *mourasi mokarrâri* tenure-holders were not affected by the auction-sale,

held, that all the provisions of a *patni* sale do not apply to a sale for the recovery of embankment charges, but that, under the proviso to section 74 of the Act, the rights and interests of the plaintiffs, who held from the defaulters, were not affected by the sale.

Held, also, that the *zemindârs*, having split up the original tenure into several distinct tenures, if the *zemindârs* represented to the Collector that there was only one tenure and the Collector made an apportionment of the charges on that basis, the *zemindârs* had no right to bring all the several tenures to sale by taking proceedings against the holders of one of the tenures under section 74.

Held, further, that the plaintiffs' *kabâlâs* being registered documents, the registering officer must have demanded the statutory fee, and the question of the payment of the *khârij* fee to the *zemindârs* was not material.

SECOND APPEALS by plaintiffs.

These suits related to certain lands which originally were taken by Ramsebak Biswas and Ramgati Biswas on *mourasi mokarrâri* lease from

*Appeal from Appellate Decree, Nos. 1486 to 1492 of 1926, against the decree of Ram Dulal Deb, Subordinate Judge, 24-Parganas, dated March 27 1925, reversing the decree of Surendra Nath Sen, Munsif of Baruipore, dated Feb. 28, 1923.

1929
 SUDDHINKUMAR
 PAL
 v.
 ASGAR.

the *zemindârs* in the year 1296 B.S., corresponding to 1888-89 A.D. and, by amicable arrangement, each was in possession of a half share. Ramsebak was the predecessor of defendants Nos. 4, 5 and 6 and Ramgati was the predecessor of defendants Nos. 8 and 9. The plaintiffs' purchases covered the whole of Ramsebak's share of the lands, with the exception of an area of 20 *bighâs* roughly, which remained with Ramsebak's heirs, and the whole of Ramgati's share. The *zemindârs* divided the original rent upon the various plots and thus constituted the different plots into separate tenures and they went on receiving the rents, thus fixed, separately, along with proportionate shares of the embankment cess, which the Collector had originally apportioned as between the *zemindâr*, Ramsebak and Ramgati only. The embankment was constructed in 1906 and cess enforced in 1910. The other material facts necessary for this report are set out in the judgment of Mr. Justice B. B. Ghose.

Mr. Brajalal Chakravarti, Mr. Pyarilal Chatterji and Mr. Krishnalal Banerji, for the appellants.

Dr. Saratchandra Basak and Mr. Diptendramohan Ghosh, for the respondents.

Mr. Ramendramohan Majumdar (for *Mr. Birajmohan Majumdar*), for the Deputy Registrar, representing minor respondents.

B. B. GHOSE J. These appeals arise out of several suits brought by different persons, for declaration of their right to and recovery of possession of certain lands, on the ground that these lands appertained to their several tenures under defendants Nos. 1 to 4, who are the *zemindârs* with regard to the property in question. A *mourasi mokarrâri* tenure of 80 *bighâs* odd was held by two persons Ramsebak Biswas and Ramgati Biswas, the predecessors-in-interest of defendants Nos. 5 to 9. The tenure was reduced to some extent by acquisitions being made by the Government, for constructing embankments. Nothing turns upon that fact. The

original tenure-holders subsequently sold specific plots of land to the plaintiffs in the different suits, out of which the appeals before us have arisen. The *zemindâr* landlords recognised these different sales and constituted the different plots of land so sold into different tenures, bearing separate shares of the original rent. Subsequently, it appears that there were dues under the Bengal Embankment Act (Beng. II of 1882) which had to be realised from the estate and, according to the provisions of sections 59 and 68 of that Act, the Collector had to apportion the cesses due under the Act between the *zemindâr*, the owner of the estate, and the tenure-holder. What was done apparently was that the names of the holders of the original tenure, *viz.*, Ramsebak and Ramgati, were only given to the Collector who made a certain allotment as payable by those tenure-holders. Defendants Nos. 5 to 7 allowed their share of the embankment charges to fall into arrears and the *zemindârs*, thereupon, proceeded to sell the entire original tenure under the provisions of the Embankment Act. The sale was held on the 17th June, 1915, and the tenure, as described by the *zemindâr* landlords, stated to comprise the original lands in the possession of the heirs of Ramsebak and Ramgati, was sold and purchased by defendant No. 10. The plaintiffs, however, remained in possession of their different allotments and defendant No. 10 tried to obtain possession of those lands on the strength of his auction-purchase. There was a struggle between the parties and the inevitable proceedings under section 145 of the Code of Criminal Procedure were launched. The magistrate attached the disputed properties under the provisions of section 146 of the Criminal Procedure Code by his order, dated the 26th August, 1920. Thereupon, the plaintiffs brought their several suits in August, 1921. The Munsif decreed the suits; but, on appeal, the Subordinate Judge reversed the decision of the Munsif and dismissed the suits. The plaintiffs have appealed to this Court.

1929

SUDHINKUMAR
PAL
v.
ASGAR.

B. B. GHOSE J.

1929

SUDHINKUMAR

PAL

v.

ASGAR.

B. B. GHOSE J.

The learned Subordinate Judge took the view that the apportionment made by the Collector cannot be questioned by the civil court. That view is quite correct, having regard to the provisions of section 86 of the Embankment Act. The learned Subordinate Judge next refers to section 72 of the Act and held that under that section the embankment cesses are a first charge on the tenure. Apparently, he misread that section, which only says that the embankment charges should be a first charge on the estate and that section only refers to the amount recoverable by the Government only from the estate as well as its subordinate tenures. The section that refers to the right of the *zemindârs* to recover the share of the embankment charges payable by tenure-holders under him is section 74 and the question is whether the lands within the tenures created by the *zemindârs* passed under the provisions of that section. The learned Subordinate Judge decided the case on the supposition that all the provisions of a *patni* sale apply to the sale for recovery of embankment charges. It is quite true that by the sale under the *Patni* Regulation, if properly conducted, the whole interest in the *patni* passes and it is not necessary to serve notice on each of the defaulting proprietors. The question, however, is whether all the provisions of the *Patni* Regulation apply to such a sale as this and the most important thing to consider is the proviso to section 74, which runs thus: "Provided that the right or interest of any person holding from the defaulter shall not be affected by any sale held under these provisions." There is no question that the plaintiffs are persons whose interest is held from the defaulters and, if that is so, then their interest would not pass by a sale under section 74 of the Act. It is contended by Dr. Basak, on behalf of the respondent, that that proviso refers only to persons holding an interest subordinate to that of the defaulter; or in other words, he asks us to read the words "from the defaulter" as "under the defaulter." I do not see any reason for restricting

the interpretation of the word in that way. The word "from" is wider than the word "under" and I do not find any reason why a transferee from the defaulter should not fall within that proviso. There is, however, a further important point in this case which has been lost sight of by both the courts below. The Collector is to apportion the embankment charges between the *zemindârs* and the holders of tenures under him. It is true that there was originally one tenure of 80 *bighas* under the *zemindârs* in this case. But it appears that this one tenure was split up at the instance of the *zemindârs* into several smaller tenures. If the *zemindârs* represented to the Collector that there was only one tenure and the Collector made an apportionment on that basis, the *zemindârs* have no right to bring all the several tenures to sale by taking proceedings against the holders of one of the tenures under section 74 of the Embankment Act and affect the interests of all the other tenure-holders, who hold lands comprising different tenures, on the parent tenure being split up into several other tenures. The whole proceedings before the Collector would amount to a nullity, so far as the holders of the newly created tenures are concerned. When the *zemindârs* represented to the Collector that there was only one tenure to be dealt with in making the apportionment, no doubt notices must have been served upon the owners or their representatives of the original tenure and they would be bound by the apportionment made by the Collector and the lands which they held must be held to have passed by the sale. But this sale cannot affect the interests of the plaintiffs, because the *zemindârs* had themselves created several tenures in the place of one original tenure.

The learned Subordinate Judge lays great stress upon the fact that no *khârij* fee was paid to the *zemindârs* and, therefore, the transfer was not according to law. I confess I fail to understand this view. The *zemindârs* may make a *khârij*, that is, register the name of a purchaser in their books, without

1929

SUDHINKUMAR
PAL
v.
ASGAR.

B. B. GHOSE J.

1929

SUDHINKUMAR

PAL

v.

ASGAR.

B. B. GHOSE J.

demanding any fee at all. But the next observation which the learned Subordinate Judge makes seems to be against obvious facts. He says that there was no transfer according to law, as no fee was paid by the purchaser. As the documents were registered, the registering officer must have demanded the usual statutory fee. There is one important fact, which the Munsif has noticed in his judgment, which shows that there was a separation of the lands purchased by the plaintiffs at the instance of the *zemindârs*, as he says in deciding issue No. 10, amongst other things, that when the landlords applied to the Collector for steps to realise embankment cesses from the defaulter, on that very day they filed a suit to recover arrears of rent from the holders of a separated tenancy. That shows beyond all controversy that the landlords did split up the original tenure into several distinct tenures. On this ground, the appeals must be allowed, the judgment and decree of the Subordinate Judge set aside and those of the Munsif restored with costs in both the Courts.

S. K. GHOSE J. I agree.

Appeal allowed.

R. K. C.