APPELLATE CIVIL.

Before Mitter and Patterson JJ.

1931

May 1.

SHASHISHEKHAR SEN BISWAS

v.

BIR BIKRAMKISHORE MANIKYA.*

Notice—Bengal Embankment Act (Beng. II of 1882), s. 69—Indian Evidence Act (I of 1872), s. 114—Cess Act (Beng. IX of 1880)—Bengal Tenancy Act (VIII of 1885), ss. 12, 13.

A notice under section 69 of the Bengal Embankment Act is not essential for creating liabilities for embankment costs as between a *zemindâr* and his tenure-holders, nor is such notice a condition precedent for creating such liabilities.

Ashanullah Khan Bahadur v. *Trilochan Bagchi* (1) and *Shiba Prosad Samanta* v. *Rakhalmani Dasee* (2) distinguished.

Jitendranath Ghosh v. *Manmohan Ghosh* (3) and *Narendra Lal Khan* v. *Jogi Hari* (4) referred to.

THE facts appear fully from the judgment.

Bijaykumar Bhattacharya and *Nripendrachandra Das* for the appellants.

Jogeshchandra Ray, Rameshchandra Sen and *Santimay Majumdar* for the respondents.

MITTER J. A meticulously careful argument has been addressed to us by Mr. Bijaykumar Bhattacharya, who appears for the defendants-appellants in these two appeals. But, after listening to that argument and after hearing the argument of the respondent, we are unable to agree with the contention and we can come to no other conclusion than that this appeal must be dismissed. It appears that the plaintiff, the

*Appeals from Appellate Decrees, Nos. 1037 and 1038 of 1930, against the decrees of N. K. Guha, Additional District Judge of Tippera, dated Sept. 23, 1929, affirming the decrees of Tridibchandra Banerji, Fifth Munsif of Comilla, dated Jan. 25, 1929.

(1) (1886) I. L. R. 13 Calc. 197.

(2) (1913) I. L. R. 41 Calc. 130.

(3) (1930) I. L. R. 58 Calc. 301; L. R. 57 I. A. 214.

(4) (1905) I. L. R. 32 Calc. 1107.

1931

Shashishekhar Sen Biswas v. *Bir Bikram-kishore Manikya.*

Mitter J.

Maharaja of Tippera, instituted two suits for arrears of embankment costs due from the defendants in the two suits respectively, according to the apportionment made by the Collector under the provisions of the Embankment Act—Bengal Act II of 1882. The defence to these two suits was common, and it was said, in the first place, that the defendants are not liable to pay the embankment costs as the notice provided for by section 69 of the Act has not been proved to have been served upon them. A further defence was taken that, by the terms of the engagement between the Maharaja of Tippera and the defendants, an engagement which was entered into on the 17th *Ashar*, 1256 B. S., the plaintiff Maharaja has precluded himself from realising the embankment costs, which have been imposed by a subsequent enactment of the Bengal legislature. Both these defences were negatived by the Munsif, who granted a decree to the plaintiff in the two suits against defendants. These decrees were affirmed on appeal by the Additional District Judge of Tippera. In Second Appeal, these two defences have been repeated before us by Mr. Bhattacharya, and his contention is that the lower appellate court was clearly in error in arriving at the finding that, under section 114 of the Indian Evidence Act, it has to be presumed that the notice under section 69 had been duly served. It is argued that, in the absence of any evidence as to the service of these notices, the courts below should not have merely relied on the presumption arising out of section 114 of the Evidence Act, and should have held that the plaintiff has failed to establish the service of these notices. It is argued that, as by section 74 of the Embankment Act a charge is created on the estate of the tenure-holders-defendants for realisation of the embankment costs, the service of notice under section 69 is a condition precedent to the liability for the embankment costs.

With regard to the first branch of the argument, as to whether the courts below were right in relying on the provisions of section 114 of the Evidence Act

1931

Shashishekhar Sen Biswas v. *Bir Bikramkishore Manikya.*

Mitter J.

for the purpose of raising a presumption, it is to be noticed that there has been a recent decision of the Judicial Committee in the case of *Jitendranath Ghosh* v. *Manmohan Ghosh* (1), where Sir George Lowndes in delivering the judgment of their Lordships seems to lay down that, in the absence of evidence to the contrary, it has to be presumed that the procedure laid down by sections 12 and 13 of the Bengal Tenancy Act was duly followed and that proper statutory notice was given of the various incumbrances and execution sales from which the respondents' title have evolved. It is true that there are a number of decisions in the Indian courts, which have laid down that it is not sufficient for the purpose of proving service of notice to rely on the presumption arising out of section 114 of the Evidence Act. Reference may be made to one of the cases cited by the appellants, namely, the case of *Narendra Lal Khan* v. *Jogi Hari* (2). The soundness of the decisions of this type may have to be considered in view of recent pronouncement made by their Lordships of the Judicial Committee. It is argued for the appellants that those observations of their Lordships may have to be taken with the special facts of the particular case, and it is pointed out that in the case before their Lordships there was uncontradicted evidence to the effect that notices had been served. But, it is to be observed that their Lordships dealt with this question apart from that of evidence of service. Their Lordships said this: "But apart from this, their Lordships have no "hesitation in presuming, in the absence of evidence "to the contrary, that the procedure laid down by "sections 12 and 13 of the Act was duly followed, and "that the proper statutory notice was given of the "various incumbrances and execution sales from which "the respondents' title has evolved." It appears, however, in this case that the notice, the service of which is in question before us, was not a notice, the service of which was a condition precedent to the

(1) (1930) I. L. R. 58 Calc. 301; L. R. 57 I. A. 214.

(2) (1905) I. L. R. 32 Calc. 1107.

1931

Shushishekhar Sen Biswas v. *Bir Bikram-kishore Manikya.*

Mitter J.

creation of a liability, as was the case which has been decided with reference to the Road Cess Act and which was decided by Mr. Justice Romesh Chunder Mitter in *Ashanullah Khan Bahadur* v. *Trilochan Bagchi* (1). An examination of the Cess Act, to which our attention has been drawn by Mr. Jogeshchandra Ray, who appears for the respondent, shows that in the case of *Ashanullah Khan Bahadur*, the service of notice was a condition precedent for fixing the liability for the cess. It appears, from the examination of the provisions of the Bengal Embankment Act, that the notice under section 69 is a notice informing the *zemindârs* and tenure-holders of the order which is passed finally under section 68 of the Act. Section 68 runs as follows: "On the completion of any charge or apportionment "under this Act, the Collector shall make an order "specifying the estates and tenures in respect of which "any sum charged or apportioned is payable, and the "sums payable in respect of each of the instalments "of such sums, and the dates on which such sums are "payable." Section 69 relates to service of notice of this final order of apportionment, so that the notice, which is said to be a condition precedent to liability under Embankment Act, is not a notice under section 69, but a notice under the earlier provisions of other sections, namely, of sections 56 and 57 of the Act. The service of notice under these sections was not denied before the lower appellate court, and the question was never debated that notices under these sections were not served and the whole case proceeded on the footing that notice under section 69 was not served. Mr. Bhattacharya realised the difficulty in this matter. We hold that notice under section 69 is not essential for fixing liability for the embankment costs. Mr. Bhattacharya admits that the question debated was only with reference to notice under section 69. The first ground taken, therefore, fails.

With regard to the second ground taken that the *zemindâr* has precluded himself from recovering

(1) (1886) I. L. R. 13 Calc. 197.

embankment costs by reason of terms of his engagement, we have no doubt, on a reading of the document, that there is no such term in the instrument which can justify the contention of the appellant. Stress has been laid on the words used in the translation, which has been supplied to us by the appellants, and which are as follows: "No demand "shall be made either for any excess *jamâ* or for any "other imposition over and above the aforesaid "*mokarrari jamâ.*" It is argued, on the strength of these words, that the *zemindâr* has precluded himself from recovering even the statutory obligation which is imposed not on the *zemindâr*, but on the tenure-holder. The answer to this contention is that, before effect can be given to such a contention, it must be shown that, by the express terms of the instrument, the *zemindâr* has precluded himself from the liability which may by a subsequent statute be imposed on the tenure-holder in respect of his tenure. No such express words are to be found in the document. The present case is clearly distinguishable from the case of *Shiba Prosad Samanta* v. *Rakhalmani Dasee* (1), where, as Chief Justice, Sir Lawrence Jenkins, pointed out, the terms were express and were explicitly to the effect that the *zemindâr* was not to get anything from the tenant by way of Embankment Cess, whether imposed at the time the engagement was made or subsequently. This contention also fails.

The result is that these two appeals must be dismissed with costs.

PATTERSON J. I agree.

O. U. A.

(1) (1913) I. L. R. 41 Calc. 130.