APPELLATE CIVIL.

Before Derbyshire C. J. and Mukerji J.

AHMAD HOSAIN BEPARI.

1935

Feb. 6, 18.

v.

DIGINDRANARAYAN SINGHA RAY.*

Bengal Tenancy—Record-of-rights—Suit for declaration that entry is wrong—Limitation, when begins to run—Indian Limitation Act (IX of 1908), Sch. I., Art. 120—Bengal Tenancy Act (VIII of 1885), s. 111A.

In a suit for a declaration that the plaintiff's right has not been correctly recorded, *i.e.*, a suit within the proviso to section 111A of the Bengal Tenancy Act, limitation runs not from the date of final publication of the record-of-rights but from the date when his title was in jeopardy, and the suit is to be brought within six years under Article 120 of the Indian Limitation Act.

The entry in the record-of-rights neither creates nor takes away any rights: having been made on the basis of possession, it remains as a piece of evidence with an evidentiary value, namely, with a presumption of correctness attaching to it. It is not absolutely incumbent on, and indeed it is often unnecessary, for a party to avoid the effect of the presumption: a party affected by the presumption can come to court as and when he finds some injury actually arising from it. And so long as he frames his suit to avert or remedy the injury and is in time for that purpose, the fact that he seeks for a declaration as regards the incorrectness of the entry, but only as ancillary to the relief as to injury that he asks for, his suit must be held to be in order.

Rajani Nath Pramanik v. *Monaram Mandal* (1), *Prodyat Kumar Tagore* v. *Bal Gobinda Ditchit* (2), *Abdul Gafur Chaudhury* v. *Abdul Jabbar Mia* (3) and *Asutosh Bhuiyan* v. *Radhika Lal Goswami* (4) distinguished.

Amiruddin v. *Saidur Rahman* (5) dissented from.

Shebait Birendra Nath Roy v. *Surendra Nath Tagore* (6), *Nasarulla Mia* v. *Amiruddi* (7), *Ramgulam Singh* v. *Bishnu Pargash Narain Singh* (8), *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (9), *Seopher* v. *Deo Narain* (10), *Dina Nath Das* v. *Rama Nath Das* (11), *Soroj Kumar Acharji Chowdhuri* v. *Umed Ali Howladar* (12) and *Brij Behari Singh* v. *Sheo Sankar Jha* (13) referred to.

(1) (1919) 23 C. W. N. 883.
(2) (1924) 41 C. L. J. 31.
(3) [1927] A. I. R. (Calc.) 30; 97 Ind. Cas. 635.
(4) (1928) I. L. R. 56 Calc. 407.
(5) (1916) 1 Pat. L. J. 73.
(6) (1933) 58 C. L. J. 120.
(7) (1905) 3 C. L. J. 133.
(8) (1906) 11 C. W. N. 48.
(9) (1902) I. L. R. 30 Calc. 20.
(10) (1912) 17 Ind. Cas. 675.
(11) (1915) 23 C. L. J. 561.
(12) (1921) 25 C. W. N. 1022.
(13) (1916) 2 Pat. L. J. 124.

*Appeals from Original Decrees, Nos. 44 and 68 of 1930, against the decrees of Surendranath Ray, Second Additional Subordinate Judge of Dacca, dated Nov. 25, 1929.

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FIRST APPEALS by the plaintiffs.

The material facts of the case are stated in the judgment.

Jyotishchandra Guha (with him *Sateendranath Ray Chaudhuri*) for the appellants. Time for bringing a suit under section 111A of the Bengal Tenancy Act for a declaration that the finally published record-of-rights is incorrect runs not from the date of final publication of the record or the date of knowledge of the publication, but from the date when the plaintiffs' right and title would be in real jeopardy, or the date of the injury which the entry creates, which is his cause of action.

Ramgulam Singh v. *Bishnu Pargash Narain Singh* (1), *Shebait Birendra Nath Roy* v. *Surendra Nath Tagore* (2), *Nasarulla Mia* v. *Amiruddi* (3) and *Soroj Kumar Acharji Chowdhuri* v. *Umed Ali Howladar* (4) and other cases. Even in *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (5) and *Seopher* v. *Deo Narain* (6) it was held that, unless the cause of action was the entry itself, time did not run against the plaintiff who seeks to have a declaration against the correctness of the entry.

Bhupendranath Ray Chaudhuri for the respondent. The suit for declaration of title as framed is not maintainable and it is barred by limitation, as, being one under the proviso to section 111A of the Bengal Tenancy Act, it must be instituted within 6 years from the date of the final publication of the record-of-rights or at least from the date of plaintiff's knowledge thereof. I rely on *Rajani Nath Pramanik* v. *Monaram Mandal* (7), *Promoda Nath Roy* v. *Asiruddin Mandal* (8) and *Midnapur Zamindari Company, Limited* v. *Secretary of State for India in Council* (9).

(1) (1906) 11 C. W. N. 48.
(2) (1933) 58 C. L. J. 120.
(3) (1905) 3 C. L. J. 133.
(4) (1921) 25 C. W. N. 1022.
(5) (1902) I. L. R. 30 Calc. 20.
(6) (1912) 17 Ind. Cas. 675.
(7) (1919) 23 C. W. N. 883.
(8) (1911) 15 C. W. N. 896.
(9) (1929) I. L. R. 57 Calc. 756; L. R. 56 I. A. 388.

Sacheendrakumar Ray for the appellants in Appeal No. 68.

Kiranmohan Sarkar, *Apoorbacharan Mukherji* and *Jyotishchandra Guha* for the respondents in Appeal No. 68.

Cur. adv. vult.

MUKERJI J. These appeals have arisen out of a suit which was commenced on the following allegations:—

That the lands of *tâluk* No. 1116 of the Dacca Collectorate are owned and possessed jointly by the plaintiffs, the principal defendants and the *pro forma* defendants, the plaintiffs and the *pro forma* defendants having an 8 annas share and the principal defendants the remaining 8 annas share; that a *debattar*, a *brahmottar* and a *shikmi* have been wrongly recorded as interests held under the 16 annas of the *tâluk;* and that, in a partition pending before the Collectorate, the said interests were being treated as such. The plaintiffs, as owners of a 5 annas 12 *gandâs* share in the *tâluk*, alleged that the said interests had no existence in fact, and that at least none of them were held under the 8 annas share belonging to themselves and to the *pro forma* defendants. The reliefs asked for were several; but for the purposes of this appeal they may be taken to have the following:— (a) A declaration that the record, in so far as it mentioned the said interests as under the 8 annas share of the plaintiffs and of the *pro forma* defendants, was wrong, and that the said 8 annas share was free from those interests; and (b) an injunction restraining the principal defendants from claiming such interests.

The defence of the principal defendants was a denial that there was anything wrong in the record that had been made of the said interests, a plea of

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limitation, and an objection as regards the maintainability of the suit. The last two matters go together.

The Subordinate Judge has found—

> There is no *debattar*, *brahmottar* or *shikmi* right under the 8 annas share of the plaintiffs and the *pro forma* defendants, though there are such rights under the 8 annas share of the principal defendants.

This finding, it should be stated, has not been disputed before us. The learned judge, however, has dismissed the suit on the ground of limitation. The two appeals have been preferred by the plaintiffs in two batches.

The learned judge has held that the suit is for a declaration that the plaintiffs' right has not been correctly recorded and so is a suit within the proviso to section 111A of the Bengal Tenancy Act; that the other prayers in the plaint did not convert the suit into one of any other nature; and that as the suit, to which Article 120 of the Limitation Act applied, was not instituted within six years of the final publication of the record-of-rights, it was barred. He overruled the contention that the plaintiffs were entitled to come within six years of the date when their title was in jeopardy. For the view of limitation that he took, he relied on the case of *Rajani Nath Paramanik* v. *Monaram Mandal* (1).

In the case of *Shebait Birendra Nath Roy* v. *Surendra Nath Tagore* (2), it has been observed that so long as the entry does not injure the plaintiff he need not come to court at all, and that, therefore, a plaintiff is not out of time if he institutes the suit within six years of the injury which the entry creates and which is his cause of action. As the law and the authorities bearing on it were not discussed in that case, and as the Subordinate Judge has taken a contrary view, it is necessary to consider the matter further.

Under the substantive part of section 111A, no suit in respect of the order directing the preparation of record-of-rights or attestation of such record or any

(1) (1919) 23 C. W. N. 883. (2) (1933) 58 C. L. J. 120.

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part of it lies in the civil court; not does a suit lie in the civil court in respect of rent settled under sections 104A to 104F., except a suit provided for in section 104H. The proviso contained in section 111A says that a person dissatisfied with any entry in or omission from a record-of-rights, which concerns a right of which he is in possession, may institute a suit for a declaration of his right under Chapter VI of the Specific Relief Act, 1877.

As explained in the case of *Nasarulla Mia* v. *Amiruddi* (3), the first part of section 111A prohibits suits which seek to take undue advantage of mere technical defects in the procedure leading up to or involved in settlement proceedings; and it further prohibits the alteration of rent once settled except to the extent allowed by section 104H, the object of which prohibition is to safeguard the Government revenue and to attach reasonable finality to the fixation of assets upon which the Government revenue is based. Section 104J makes it clear that, subject to the provisions of section 104H, the rent settled shall be deemed to have been correctly settled and to be fair and equitable. But the question is, what is the effect of an omission to institute a suit under the proviso to section 111A as regards a right which has been entered in or omitted from the record-of-rights. Plainly, the only effect is that the entry in the record-of-rights as finally published remains and "shall be presumed to "be correct until it is proved by evidence to be "incorrect" [Section 103B, sub-section (*5*)]. The entry in the record-of-rights neither creates nor takes away any rights: having been made on the basis of possession, it remains as a piece of evidence with an evidentiary value, namely, with a presumption of correctness attaching to it. It is not absolutely incumbent on and indeed it is often unnecessary for a party to avoid the effect of the presumption: a party affected by the presumption can come to court as and when he finds some injury actually arising from it. And so

(1) (1905) 3 C. L. J. 133.

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long as he frames his suit to avert or remedy the injury and is in time for that purpose, the fact that he seeks for a declaration as regards the incorrectness of the entry, but only as ancillary to the relief as to injury that he asks for, it is not possible to see how or why his suit should not be held to be in order. On the words of the statute and on principle, no other view is indeed possible.

Now, let us see what is the state of authorities on the point. In the case of *Ramgulam Singh* v. *Bishnu Pargash Narain Singh* (1), the learned Judges explained the nature of the suit which the proviso to section 111A contemplates, and observed as follows :—

> The proviso to section 111A of the Act speaks of the possibility of a suit by a person who is affected by an entry in the record-of-rights for a declaration under the Specific Relief Act ; and a suit for a declaration, as is contemplated by section 42 of the Specific Relief Act, may be instituted within six years of the date when the cause of action arose. We are of opinion that it was not necessary for the plaintiff to bring a suit to set aside an entry in the record-of-rights.

In this decision as well as in a previous decision, *Agin Bindh Upadhya* v. *Mohan Bikram Shah* (2), to both of which Mitra J. was a party, the learned Judge very clearly pointed out that it was not necessary for a party to bring a suit for avoiding a presumption, but if his cause of action is the entry itself and he wants to have the entry corrected he must come within six years of that cause of action. In *Seopher* v. *Deo Narain* (3) it was held that unless an actual claim was made upon the entry in the record-of-rights time did not run against a plaintiff who seeks to have a declaration against the correctness of the entry. In *Dina Nath Das* v. *Rama Nath Das* (4), along with a prayer for declaration, there was a prayer for confirmation of possession and for an injunction; it was held that the prayer for injunction was a prayer for a consequential relief and so the suit was not a declaratory suit to which Article 120 of the Limitation Act applied. It

(1) (1906) 11 C. W. N. 48.
(2) (1902) I. L. R. 30 Calc. 20.
(3) (1912) 17 Ind. Cas. 675.
(4) (1915) 23 C. L. J. 561.

was further pointed out that entries in a record-of-rights adverse to the plaintiff do not by themselves affect his possession though they may be used in evidence against him in a suit for a declaration of title, and that time does not run against him until an actual claim is made on the strength of the entry in the record-of-rights. In *Soroj Kumar Acharji Chowdhuri* v. *Umed Ali Howladar* (1), it was observed that an entry in the record-of-right merely raises a presumption of correctness and is not a starting point for the computation of the period of limitation. In that case a suit for declaration of title and confirmation of possession was brought more than six years from the date of final publication of the record-of-rights but within six years from the date of the attempted dispossession; and it was held that the right to sue accrued on the latter date and the suit was not barred. In the case of *Profulla Chandra Basu* v. *Kshetra Lal Sinha Roy* (2), the plaintiffs had not asked for correction of record-of-rights, but had incidentally asked for a declaration that the entry therein was incorrect and had also sought for an injunction restraining the defendant from executing a rent decree which the latter had obtained on the basis of the wrong entry; and it was held that the plaintiff was within time, having come within six years of the institution of the suit for rent.

Let us now turn to some of the decisions of this Court in which suits instituted more than six years after the final publication were considered time-barred. The case of *Rajani Nath Pramanik* v. *Monaram Mandal* (3), upon which the Subordinate Judge has relied, is only an authority for the proposition that if the plaintiff sues for a declaration that the entry is wrong and makes the entry itself his cause of action, he must institute his suit within six years from the final publication and not from the date of the signing of the certificate of such publication. It should be noticed that in that case the plaintiff did

(1) (1921) 25 C. W. N. 1022. (2) (1929) 49 C. L. J. 281.
(3) (1919) 23 C. W. N. 883.

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not rely on any other cause of action and did not allege that his possession had in any way been disturbed or threatened to be disturbed by the defendant and yet added a prayer for confirmation of possession; and as the learned Judges pointed out,

> The only cause of action alleged in the plaint was the alleged wrong entry in the record-of-rights.

The same was held in the case of *Prodyat Kumar Tagore* v. *Bal Gobinda Ditchit* (1), the state of facts being similar. So also in other cases, where the cause of action was the entry itself and nothing else, it has being consistently held that the plaintiff must come within six years of the entry [*e.g.*, *Abdul Gafur Chaudhury* v. *Abdul Jabbar Mia* (2), *Asutosh Bhuiyan* v. *Radhika Lal Goswami* (3)]. It should be noted that in the last of these two cases, while it was said that the entry, by reason of the presumption as to its correctness, casts a cloud on the title, meaning thereby that it thus affords a cause of action for a declaration, it was not suggested that the plaintiff was bound to come to dispel the cloud, or, in other words, that if he did not then come for that purpose he would be precluded from challenging the entry in future.

In the Patna High Court, the principle governing suits of this nature was enunciated in *Brij Behari Singh* v. *Sheo Sankar Jha* (4), in these words:—

> This was the view taken in *Amiruddin* v. *Kaidur Rahman* (5), where it was held that if a suit is substantially such a declaratory suit as is contemplated in the proviso of section 111A, Bengal Tenancy Act, then the plaintiff cannot, by adding a prayer for confirmation of possession, escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the record-of-rights. *Ramgulam Singh* v. *Bishnu Pargash Narain Singh* (6), *Legge* v. *Rambaran Singh* (7).

And in the said case it was also clearly pointed out that an entry in the record-of-rights neither creates nor extinguishes rights, but that it is merely a rebuttable piece of evidence.

(1) (1924) 41 C. L. J. 31.
(2) [1927] A. I. R. (Calc.) 30; 97 Ind. Cas. 635.
(3) (1928) I. L. R. 56 Calc. 407.
(4) (1916) 2 Pat. L. J. 124.
(5) (1916) 1 Pat. L. J. 73.
(6) (1906) 11 C. W. N. 48.
(7) (1897) I. L. R. 20 All. 35.

In a later case of the same Court, *Ramji Ram* v. *Sadhu Saran Lal* (1), the learned Judges were not prepared to affirm the view propounded in the case of *Amiruddin* v. *Saidur Rahman* (2), that if the declaration sought for substantially challenged the record-of-rights, the suit for such a declaration must be instituted within six years of the final publication of the record-of-rights; and laid down the principle in the following terms:—

> Where there is a definite challenge to the plaintiff's rights by an entry made in the record-of-rights and where the fact is patent that the plaintiff must have been aware of that challenge to his rights, the suit, if brought upon that challenge, must be brought in accordance with the six years' rule of limitation. If in spite of the challenge the plaintiff retains possession of the property, he is not required to institute any suit upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights.

There are numerous cases, not under the Bengal Tenancy Act, in which entries in settlement papers, having similar probative value, were alleged to be wrong, and reliefs were asked for on that footing; and it has been consistently held by the Allahabad High Court that, independently of the cause of action which arises upon the entry itself, a fresh cause of action, justifying a prayer for a declaration and for other appropriate reliefs, may arise when on the strength of the entry the plaintiff is put in jeopardy. *Kali Prasad* Misir v. *Harbans Misir* (3), *Aftab Ali Khan* v. *Akbar Ali Khan* (4); and the authorities referred to in these cases.

The prayer for injunction, which was there in the present case, was, in fact, a prayer for a consequential relief, which arose out of the claim in the partition proceedings which the defendants put forward on the basis of the entry. So long as the suit was, as it was, instituted within six years of that cause of action, the suit was not barred.

(1) (1917) 2 Pat. L. J. 493.
(2) (1916) 1 Pat. L. J. 73.
(3) (1919) I. L. R. 41 All. 509.
(4) [1929] A. I. R. (All.) 529; 121 Ind. Cas. 209.

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The appeal, therefore, should be allowed; and the decree of the court below being set aside, a decree should be entered giving the plaintiff the declaration and the injunction set out in the beginning of this judgment. The plaintiffs will also be entitled to their costs of the suit and of the appeal as against the contesting defendants. We assess the hearing-fee in this Court at ten gold mohurs in each appeal.

DERBYSHIRE C.J. I agree.

Appeal allowed.

Decree reversed.

A. A.