APPELLATE CIVIL.

Before M. C. Ghose and Mukherjea JJ.

BENGAL YOUNGMEN'S ZEMINDARI CO-OPERATIVE SOCIETY, LTD.

1936
Nov. 25, 26, 30.

v.

NRITYA GOPAL SINGHA.*

Jurisdiction—Civil Court—Sale of portion of touzi*—Revenue, Apportionment of—Land Registration Act (Ben. VII of 1876), ss. 70, 74.*

A civil Court deciding a suit contemplated by s. 74 of the Land Registration Act, 1876, has jurisdiction to apportion the revenue.

It is not necessary for the purpose of apportioning the revenue to have a survey of the assets in such manner as is required under the Estates Partition Act. The Court can proceed on such materials as are adduced by the parties, and which it considers to be fair and equitable.

There could be a prayer for refund of Government revenue already paid in a suit brought in pursuance of an order under s. 74, Land Registration Act, on payment of proper Court-fees.

APPEAL FROM APPELLATE DECREE by the defendants.

The material facts of the case and the arguments in the appeal appear in the judgment.

Atul Chandra Gupta and *Samarendra Krishna Deb* for the appellants.

Gopendra Nath Das for the respondent.

Cur. adv. vult.

MUKHERJEA J. This appeal is on behalf of the defendant and arises out of a suit commenced by the plaintiff in pursuance of a reference made by the Commissioner, Burdwan Division, under s. 74, Land Registration Act (Bengal Act VII of 1876). The facts shortly stated are these: Gobardhan Bihari Basu

*Appeal from Appellate Decree, No. 1091 of 1934, against the decree of K. C. Basak, District Judge of Hooghly, dated Jan. 15, 1934, reversing the decree of Pranendra Narayan Chaudhuri, Additional Subordinate Judge of Hooghly, dated July 31, 1932.

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and others were the proprietors of *touzi* No. 3500 of the Hooghly Collectorate, which is a revenue-paying estate, comprising four *mouzâs*, *viz.*, Tegâchiâ, Bhabânipur, Nârâyanpur and a certain share of Kaikâlâ, the annual revenue being Rs. 894-13-7. The defendant company purchased two of the *mouzâs*, *viz.*, Nârâyanpur and Kaikâlâ by a private conveyance, dated May 12, 1916, and in that *kabâlâ* there was a recital made by the vendors to the effect that the revenue payable in respect of the two *mouzâs* that were sold to the defendant was Rs. 200 a year. On July 21, 1919, the remaining two *mouzâs* were mortgaged by the receiver appointed in respect of the said property to the defendant company, who brought a suit to enforce the mortgage, and recovered a decree, in execution of which these two *mouzâs* were sold and purchased by the plaintiff in 1926. After his purchase, the plaintiff applied for opening a separate account in respect of these two *mouzâs* under s. 70 of the Land Registration Act. This prayer was granted by the Collector and the shares of the total revenue payable by the plaintiff and the defendant company were fixed at Rs. 439-12 and Rs. 455-1-7, respectively. The defendant moved against this order to the Divisional Commissioner, who referred the parties to the civil Court. The present suit was since then started by the plaintiff and he prayed for a declaration that the amount fixed by the Collector, or such amount as the Court would think proper, might be declared payable by him in respect of his separate account. There was an additional prayer for refund of the sums paid by him in excess of the said amount. The defendant company resisted the claim of the plaintiff on grounds *inter alia* that the recital in the *kabâlâ*, which mentioned the revenue payable by the defendant in respect of the two *mouzâs* Nârâyanpur and Kaikâlâ as Rs. 200 a year, was binding on the plaintiff, who was the successor-in-interest of the original proprietors and that the Court had no jurisdiction to fix the revenue. It was further

contended that, in any event, there could be no apportionment of revenue without ascertainment of the assets of the *mouzâs*. The trial Court came to the conclusion that the recital in the *kabâlâ*, fixing the revenue in respect of the two *mouzâs* sold, was not binding on the plaintiff. It was held, nevertheless, that the plaintiff's suit must fail, as he did not produce proper materials before the Court, from which the asset of the *touzi* could be determined. It was not proper, according to the Subordinate Judge, to apportion the revenue upon the basis of area alone.

The plaintiff appealed against this decree to the Court of the District Judge at Hooghly. The District Judge agreed with the trial Court that the plaintiff was not in the least affected by the term of the *kabâlâ* mentioned above. He, however, disagreed with the Subordinate Judge on the other point and held that, there being no question of a partition of the estate, determination of the assets of the *touzi* was not necessary, and the calculation of separate revenue, made by the Collector on the basis of area, was quite proper and satisfactory. In this view of the case, the learned Judge reversed the decision of the trial Court and declared the revenue determined by the Collector to be the proper revenue payable by the plaintiff in respect of his separate account. As regards the claim for refund of the excess amounts made by the plaintiff, the matter was sent back to the trial Court for a proper finding as to the exact amount due to the plaintiff.

Against this decision the present appeal has been preferred. The proceedings in the trial Court was, however, not stayed, even after the filing of the appeal, and the Subordinate Judge recorded a finding that a sum of Rs. 1,017-2, together with interest, was due to the plaintiff on account of the excess revenue paid by him. On receipt of this finding, which was accepted by the District Judge, a fresh decree was prepared by him incorporating the previous decree on

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the question of separate revenue, and the present decision regarding the amount of money payable by the defendant to the plaintiff. This subsequent decree and the judgments of the Courts below have been brought up here and treated as a part of the record of the Second Appeal mentioned above.

Mr. Atul Chandra Gupta, who has appeared on behalf of the appellant in this case, has assailed the propriety of the decision on the following four points: He has contended in the first place that a Court, deciding a suit contemplated by s. 74 of the Land Registration Act, has no jurisdiction to apportion revenue. It can only decide a question as to whether the amount alleged by the plaintiff to be paid heretofore as revenue in respect of the portion of the estate was in fact paid or not.

In the second place, he has argued that the plaintiff as successor-in-interest of the previous proprietors cannot go back upon the terms of the *kabâlâ* in favour of the defendant, under which the latter was bound to pay Rs. 200 a year as revenue and nothing more.

Mr. Gupta's third contention is that, if the question of apportionment arises at all, it cannot be properly made unless the assets are determined; and, as the plaintiff has not adduced any evidence on the point, his suit must fail.

Lastly, it is said that the claim for refund of excess amounts paid as revenue is outside the purview of a suit under s. 74 of the Land Registration Act, and no such prayer can be joined in a suit under that section.

Now, on the first point, it appears that, when a part-proprietor makes an application for separate account under s. 70 of the Land Registration Act, the application must contain a specification of the lands which he holds and must state the amount of

the Government revenue heretofore paid on account of such undivided interest. Notice is thereafter served by the Collector on the other co-sharers, and if no objection is made by any recorded proprietor a separate account is opened in terms of the petition.

If objection is raised by any recorded proprietor that the amount, stated to be heretofore paid on account of revenue for the applicant's portion of the land, is not the amount which has been recognised by the sharers as Government revenue thereof, the Collector refers the parties to the civil Court, and suspends all proceedings till the question at issue is judicially determined. From this it seems that the Collector has simply to record the share and the revenue payable for it as stated in the application of the proprietor, if there is no objection by the other recorded proprietors. In case of dispute, the Collector cannot enquire or adjudicate but must refer the parties to the civil Court. Mr. Gupta argues that the only point at issue before the civil Court is as to what was the amount of revenue paid heretofore in respect of the share, and the Court can go no further than that and determine as to what should be the proper amount payable. We are unable to agree with this restricted interpretation of the section. If this argument is accepted then no separate account can be opened in respect of shares or portions of estate for which no separate revenue was heretofore being paid. In our opinion, the essential thing in such cases is to determine as to whether there is an agreement among the co-sharers, that the share of revenue payable in respect of the applicant's share is what is stated by him in his petition. If there is no agreement, then the matter has got to be judicially determined by the civil Court and the Collector stays his hands till it is done. In the present case the amount of revenue stated by the plaintiff in his application for separate account has been disputed by the other co-sharers. No agreement on this point has been found by the

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Court. Under such circumstances, we think that it is incumbent upon the Court to determine the plaintiff's share of revenue, on the materials placed before it. If the civil Court were to stop at the finding that there was no agreement among the proprietors on the point, and not to proceed any further, the result would be that the matter would again go back to the Collector, who is powerless to enquire into or adjudicate on the matter. In our opinion the determination of the amount of separate revenue rests with the civil Court, where no agreement is admitted or found. It will be seen further that, when the Collector refers the parties to civil Court, he does not refer any particular point, which has got to be decided. As soon as he finds that there is dispute he asks the parties to approach the civil Court, and after the civil Court has determined the point upon which there is disagreement, *viz.*, the amount of revenue payable in respect of the portion of the plaintiff's estate, the party comes back to the Collector who fixes the *jamâ* payable for the separate account accordingly. We, accordingly, overrule the first contention of Mr. Gupta.

As regards the second point, Mr. Gupta argues that the present plaintiff is nothing but a successor-in-interest of the old proprietors, he is, therefore, bound by any contract which the latter had entered into with the defendant, and he relies upon the recital in the defendant's *kabâlâ*, where the revenue payable in respect of the two *mouzâs* purchased by the latter is stated to be Rs. 200 a year. One may say, in the first place, that there is no contract here between the vendor and the purchaser, that the purchaser would pay only Rs. 200 a year as revenue in respect of the purchased portion of the estate in respect of what may legally be due as Government revenue of that portion. It was a statement of a fact and at the most can be taken as an admission. The admission is not conclusive, and can be explained away and

shown to be wrong: *Chandra Kunwar* v. *Narpat Singh* (1); *Ajit Narain Chattopadhaya* v. *Aswatha Narayan Chatterjee* (2). That it was a wrong statement is clear from the findings of both Courts, even if we do not go to the length of saying what the lower Courts have done, *viz.*, that it was a fraudulent recital. In the second place, it is not a clear admission in respect of the *mouzâs*, which the plaintiff subsequently purchased at the execution sale. The statement related to the other two *mouzâs*, and it is only inferentially that the statement could affect the *mouzâs* purchased by the plaintiff. But we have yet a stronger reason to hold that the recital is not binding on the plaintiff. The plaintiff is a purchaser at a mortgage sale. He, therefore, has stepped into the shoes of both the mortgagor and mortgagee and represents them both. The defendant company were themselves the mortgagee decree-holders and, in the sale proclamation, which was issued at their instance, not only they did not mention the separated revenue in respect of the two *mouzâs*, which they were going to sell, but they mentioned the total revenue in respect of the entire *touzi*, implying thereby that there was no separate payment in respect of any portion of the same. Even, assuming that this representation does not amount to estoppel, the admission in the *kabâlâ* in favour of the defendant becomes altogether valueless and we are unable to hold that the plaintiff is bound thereby.

The third point raised by Mr. Gupta relates to the basis on which the revenue should be apportioned. We think that the opening of separate account does not mean a partition of the estate, where of course assets have got to be determined after proper survey and preparation of record-of-rights. The Government's security for revenue is not jeopardised in the least by opening of separate accounts, and it is not

(1) (1906) I. L. R. 29 All. 184; L. R. 34 I. A. 27.

(2) (1935) 40 C. W. N. 75.

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possible to think that the civil Court would be bound to have a survey of the assets, much like that which is done under the Estates Partition Act, when it has got to determine the revenue payable in respect of a separate account. The civil Court, in our opinion, should determine the revenue payable by a sharer by following a method which appears to it to be reasonable and proper under the circumstances. If there is no evidence that the quality of lands vary from place to place within the *touzi*, we think the allotment or revenue on the basis of area is not improper or illegal. After all, it is a measure of convenience and nothing else, and the party who feels any grievance has always the right to demand a partition of the estate in the strict sense of the word.

The fourth point is a purely technical one, and Mr. Gupta, with his usual fairness, has not laid stress on it. It is true that a suit instituted, in pursuance of an order made under s. 74 of the Land Registration Act, does not ordinarily contemplate a refund of money on account of excess payments made by the plaintiff. But there was nothing wrong in instituting a suit of a more comprehensive character, in which relief of an incidental nature which flow from the main relief is claimed by the plaintiff on payment of proper Court-fees. It was particularly necessary here as the claim would be otherwise barred by limitation.

We think, therefore, that all the points raised by Mr. Gupta fail and the appeal must be dismissed with costs.

M. C. GHOSE J. I agree.

Appeal dismissed.

A. K. D.