1879

GUNNES CHUNDER HAZRA v. RAMPRIA DEBIA.

necessary to find whether the defendant was not protected from enhancement by reason of the tenure having been held at an uniform rate since the permanent settlement.

The notice is bad, and all the points which arise in the case have not been tried. This being so, we think that a declaratory decree ought not to be passed in this case. The suit must, therefore, be dismissed with costs in all the Courts.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

1879 *April* 25.

TEKAIT CHOORAMUN SINGH (PLAINTIFF) v. DUNRAJ ROY (DEFENDANT).*

Enhancement of Rent—Grounds of exemption—Increase in value from natural causes.

In a suit for enhancement of rent, bare proof that the productive powers of the land in suit have been increased by the agency, or at the expense of the defendant or his ancestor, is not sufficient to exempt the defendant altogether from enhancement. In such a case, where the value of similar lands in the same locality, but not sharing the especial advantages resulting from works or improvements erected or effected, by or at the expense of the defendant or his ancestor, has been increased by natural causes, it must be assumed that the lands of the defendant owe their increased value to that extent to natural causes, and are to that extent liable to enhancement.

THE plaintiff in this case sued to recover from the defendant arrears of rent and road-cess under the following circumstances:—Previous to 1284 (1877) the defendant had for a long time been a tenant with rights of occupancy under the plaintiff paying rent fixed at Rs. 3 per biga. The productive powers of the land having increased, the plaintiff served the defendant with a notice under s. 13 of Act X. of 1859, that from that time he must either pay rent at the rate of Rs. 5 a biga, or give up possession of the land. The defendant retained possession of the land, and, at the conclusion of the year refused to pay rent at the enhanced rate.

* *Appeal from Appellate Decree, No.* 1428 *of* 1878, against the decree of R. Towers, Esq., Judicial Commissioner of Chota Nagpore, dated the 11th of May 1878, reversing the decree of C. A. S. Bedford, Esq., Assistant Commissioner of Pachamba in that district, dated the 29th of September 1877.

1879

TEKAIT CHOONDUR SINGH v. DUNRAJ ROY.

The plaintiff thereupon instituted the present suit, in which he also claimed damages and the ejectment of the defendant. The defendant pleaded and proved that in the year 1842, his father had excavated on the land in suit a tank, and, in the year 1861, constructed an *ahir*, or reservoir; and that the productive power of the land in suit had thus been greatly increased at his expense. The lower Court found that, although the productive powers of the land had beyond doubt been increased by the excavation of the tank and the construction of the reservoir, yet its increased present productiveness was not attributable solely to those works; and that as similar lands in the immediate vicinity, which did not derive any advantage from the tank or the reservoir constructed by the defendant's father, and which formerly bore a lower rental, were now let at an enhanced rate of Rs. 5 per biga, that was a fair rate at which to assess the land of the defendant, and accordingly gave a decree to the plaintiff at the rate claimed with damages; and ordered the defendant to be ejected at the end of the year if the full amount of the decree and costs were not paid within fifteen days.

The Judicial Commissioner on appeal held, that the construction of the tank and reservoir by the defendant's father exempted him from enhancement, or, at all events, exempted him from enhancement until he had for a reasonable time enjoyed a return for the capital and labor expended by him, and accordingly dismissed the plaintiff's suit with costs in both Courts.

Against this decision the plaintiff appealed to the High Court.

Baboo *Doorga Dass Dutt* for the appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Aukil Chunder Sen* for the respondent.

The judgment of the Court (Mitter, J., and Tottenham, J.) was delivered by

MITTER, J.—This is a suit for arrears of rent at an enhanced rate. The rate at which the defendant pays being Rs. 3 per biga, the plaintiff in this action seeks to raise it to Rs. 5.

1879

TEKAIT CHUNDRAMUN SINGH v. DUNRAJ ROY.

The plaintiff also prays for ejectment of the defendant from the tenure and recovery of damages for non-payment of rent. The Court of first instance decreed the claim in full, but on appeal, that decree has been reversed by the Judicial Commissioner, and the plaintiff's claim dismissed with costs.

Concurring with the Assistant Commissioner, the Judicial Commissioner finds that the prevailing rate of rent in the neighbourhood is Rs. 5. Nevertheless he has dismissed the suit, because he is of opinion that the defendant's father excavated a tank in 1842, and constructed an *ahir*, or reservoir, in 1861, and that the productive powers of the land in suit have been thus increased by the agency and expense of the defendant's father.

Furthermore he says,—"Almost all the witnesses for plaintiff, who say that they are now paying Rs. 5 for lands like defendant's, say that they have only been doing so for the last three years; before that the rate was lower, Rs. 2-8, 3, or 4. Such being the case, it seems to me that defendant, having been all along paying at the same rate as those whose lands in no way benefited by their own exertions, cannot be said to have had a reasonable time allowed him for a return of the labor and capital expended by him on the land, and for this reason I consider the present suit must fail."

The judgment of the Judicial Commissioner seems to me to be erroneous. He finds that ryots in the neighbourhood, who derive no especial advantage from the existence of a tank or a reservoir, pay Rs. 5 for lands like defendant's. The defendant, by spending labor and capital, has improved the land, and its productive powers have been increased. The return for that labor and capital will be probably the proportionate increase in the produce of the defendant's land, compared with that derived from the neighbouring lands. But the defendant must pay at the prevailing rate paid by other ryots for similar lands in the neighbourhood, which do not enjoy these especial advantages. The rise in the prevailing rates in respect of these lands is evidently due from natural causes, because they do not possess any advantages of irrigation from any artificial excavation. The defendant's land, therefore, in common with other similar lands in the neighbourhood, must share the liability of paying

1879

TEKAIT CHOORAMUN SINGH v. DUNRAJ ROY

the higher prevailing rate which is due from natural causes. We are supported in the view we take of this point by the case of *Luhhun Magilla* v. *Sreeram Chatterjee* (1).

The decision of the lower Appellate Court must, therefore, be set aside; but we cannot restore the decree of the first Court, because this is not a case in which the plaintiff is entitled to a decree for damages and ejectment. There should be a decree in favor of the plaintiff for the principal amount of rent and road-cess claimed, with interest at the rate of 12 per cent. from the beginning of 1285 F. S. to this date, and the aggregate amount thus decreed is to bear interest at 6 per cent. per annum from the date of the decree to the date of payment. The defendant must pay the costs of this suit throughout in all the Courts.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

ELLOKASSEE DOSSEE *v.* DURPONARAIN BYSACK.

1879
March 17
& 25.

Will—Period of Distribution—Contingency—Survivorship.

A, a Hindu, made the following provisions by his will:—"I have two sons living, *B* and *C*; they, and an infant son of my eldest son, the late *D*, and my wife *E* (four persons), shall succeed to the whole of my estate: these four persons will receive equal shares. If any of these four persons happen to die, which God avert, the survivor of them will receive this estate in equal shares; but if there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his share: if there be a daughter or granddaughter in the female line surviving, such survivor shall receive a share of the property; the expense of the marriage of such female child only shall be defrayed out of the estate:" and also provided that "so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided."

All the persons named survived the testator.

Held, that they took absolute interests in the shares named; and that the estate became divisible on the infant son of *D* attaining majority.

Soorjeemoney Dossee v. *Denobundhoo Mullick* (2) discussed.

(1) 2 Hay, 427. (2) 9 Moo. I. A., 123.