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RAMANATH DASS v. BOLORAM PHOOKUN.

We have had some doubt whether, having regard to the difficulty of the subject, and the apparently contradictory nature of some of the decisions upon it, we ought to refer this case to a Full Bench; but, on the whole, we do not find that any of the authorities are so opposed to our present view as to render that course necessary. We, therefore, dismiss the appeal with costs.

McDONELL, J.—I concur in dismissing the appeal. I would merely add, that it seems to me, that all that the plaintiff purchased under his sale, which was held under the old law, was the right, title, and interest of the mortgagor; and as, at the time of the sale to plaintiff, the mortgagor had no right, title, or interest remaining, the plaintiff purchased nothing, and is not entitled to the relief he claims in the present suit.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Field.

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July 25.

BROJENDRO COOMAR ROY (PLAINTIFF) *v.* KRISHNA COOMAR GHOSE AND OTHERS (DEFENDANTS).*

Appeal—Decree—Civil Procedure Code (Act X of 1877), *s.* 540*—Survey—Measurement—Beng. Act VIII of 1869, ss. 25, 37, 38.*

An order made under s. 37, Bengal Rent Act (Beng. Act VIII of 1869), is a decree within the meaning of the definition contained in the Civil Procedure Code (Act X of 1877), and an appeal lies therefrom under the provisions of s. 540.

A proprietor of an estate or tenure has a right to make a general survey and measurement of the lands comprised in his estate, under the provisions of s. 37 of the Rent Act, without proving that he is in receipt of the rents, there being nothing in law which prevents him from making such a survey or measurement, as is contemplated by ss. 26 and 37, merely because his estate happens to be sublet to a number of tenure-holders.

The only excepted case is where there is a special agreement to the contrary.

IN this case the plaintiff sought, under the provisions of s. 37 of Beng. Act VIII of 1869, to establish his right to measure certain

* Appeal from Original Decree, No. 270 of 1880, against the decree of Baboo Gungachurn Sircar, Subordinate Judge of Dacca, dated the 31st July 1880.

lands comprised in Mouza Akhari and several other mouzas. He alleged that he had purchased the zemindari, at a revenue-sale, on the 4th October 1877, for Rs. 10,000, and duly obtained the sale-certificate and delivery of possession under the provisions of s. 29, Act XI of 1859; that he, subsequently, sent an amin to measure all the lands of the zemindari set out in the plaint, but that the defendants resisted such measurement being made, and therefore he was obliged to make the present application to the Court.

A number of the defendants appeared and filed written statements resisting the application on various grounds, and denying that the plaintiff had any cause of action against them; and the following issues were settled amongst others:—

1. Is the suit untenable by reason of its having been brought against all the defendants jointly?

2. Is the suit bad on the ground of nonjoinder?

3. Is the plaint, or rather the application, defective in consequence of the plaintiff's omission to state therein the quantity of land held by each of the defendants, the kismut in which it is situated, and the value thereof?

4. Was the plaintiff formerly a 4-annas shareholder in the zemindari, of which he applies to make measurement on the strength of his having purchased it at a revenue-sale? And should this application be disallowed in consequence thereof?

5. Should the suit be rejected because the plaintiff served no notice upon the defendants?

6. Is the plaintiff entitled to measure the lands of those defendants who say that they held those lands in virtue of their mokurari tenures?

7. Has the plaintiff no right to measure the lands because he has been out of possession from before?

The lower Court found the first five issues in favor of the plaintiff, holding, that although the plaintiff admitted that, previous to the purchase, he owned a 4-annas share in the zemindari, he was not on that account disentitled to the relief he sought.

With regard to the sixth and seventh issues the Judge found that the plaintiff intended to make a minute measure-

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ment of the lands; that most of the lands were covered by howladari and other intermediate tenures; and that most of the ryots held under such intermediate holders, and paid their rents to them and not to the plaintiff; and that it was admitted on both sides that the plaintiff was never in possession of the estate by receiving rent from the ryots or from the intermediate tenants. On these grounds, therefore, he held, that the plaintiff was not entitled to the relief he sought, and dismissed the suit accordingly.

Against that order the plaintiff accordingly now appealed to the High Court.

Baboo *Srinath Dass* for the appellant.

Baboo *Rash Behary Ghose*, Baboo *Mohiny Mohun Roy*, and Baboo *Lall Mohun Das* for the respondents.

The judgment of the Court (PRINSEP and FIELD, JJ.) was delivered by

PRINSEP, J.—We think that the judgment of the Subordinate Judge in this case is clearly erroneous. The plaintiff is the purchaser of an estate at a sale for arrears of Government revenue, and he has brought this present suit, under s. 37 of the Bengal Rent Act (Beng. Act VIII of 1869), in order to make a measurement of the estate so purchased.

A preliminary objection was taken which we may well dispose of in the first instance. It is contended that no appeal lies in a case of this sort. We think, however, that the order made by the District Judge under the provisions of s. 37 of the Rent Act is a decree within the meaning of the definition contained in the existing Code of Civil Procedure. 'Decree' means "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit." This is the portion of the definition essential to the present case. Now the right here claimed is the right to make a measurement of the estate, and it is quite clear that the Subordinate Judge has adjudicated upon the right. But then

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it is contended that this was an application, and not a suit. We think, however, that this objection is effectually disposed of by the language of the section itself, wherein we find the following words: — "The person claiming the right to measure such land may apply, to establish his right to measure such land, in the Court which would have jurisdiction in case such suit had been brought for the recovery of such land." The Legislature here, although it uses the word 'apply' in the first portion of the passage cited, has deliberately termed this application a suit in the concluding words just quoted. We are then clearly of opinion that, having regard to the provisions of s. 540 of the Code of Civil Procedure, this appeal will lie.

The Subordinate Judge, dealing with the right of the plaintiff to make a measurement, says :—" With regard to the sixth and seventh issues, which ought to be tried together, I have to observe, that, from the plaint it appears, that the plaintiff intended to make a minute measurement of certain land contained in the zemindari purchased by him, but it is shown by the evidence adduced on the part of the defendants, that most of the lands are covered by the howladari and other intermediate tenures, which some of the defendants have in the said estate. Whether these intermediate tenures are valid or not, is a question which need not be enquired into in this suit; but it is clear that the ryots, at least most of the ryots, of the mehal hold their lands under the said intermediate holders and pay rents to them and not to the plaintiff. Besides, it is admitted on both sides, that the plaintiff, either before or after purchase, was never in possession of the estate by receiving rents from the ryots or from the intermediate tenants. Under such circumstances I am of opinion, that the plaintiff is not entitled to measure the lands, especially when he seeks to make a minute measurement of the mehal." Now, in the first place, it is not clear to us that the plaintiff wants to make a minute measurement of the mehal, if by that the Subordinate Judge means such a measurement as is contemplated by s. 38 of the Rent Law. It is not set out in so many words in the plaint under what section the plaintiff has applied to the Court; but if we refer to the matter of the plaint, it is

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quite clear that this matter brings the case within s. 37, and that there is nothing in the plaint which affords the details contemplated by s. 38. Under these circumstances we assume that this is a case under s. 37, and we shall deal with it accordingly; and we may further say that the vakil for the appellant has assented to this view. Now s. 25 of the Rent Act is as follows:—"Every proprietor of an estate or tenure, or other person in receipt of the rents of an estate or tenure, has the right of making a general survey and measurement of the lands comprised in such estate or tenure or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands." Whether the words "in receipt of the rents of an estate or tenure" are here to be construed as qualifying as well "proprietor of an estate or tenure" as "other person," is a question as to which there has been some difference of opinion. In the case of *Wise* v. *Ram Chunder Bysaek* (1), decided upon the corresponding section in Beng. Act V of 1862, Norman and Seton-Karr, JJ., thought that they did. In the later case of *Ranee Krishto Motee Debia* v. *Ram Nidhee Sircar* (2), the Court took a contrary view; and Seton-Karr, J., appears to have changed his opinion, and is at pains to show that the decision in the prior case proceeded on the ground that the plaintiff was seeking to establish a title which was disputed. If the words be taken as qualifying "other person" only, it may be said, that the expression "other person in receipt of the rents of an estate or tenure" implies that the person previously mentioned, *i.e.*, the proprietor of an estate or tenure, is a "person in receipt of the rents, &c." This construction would show it to be the intention of the Legislature, that only a proprietor who is in actual possession by receipt of rent—a *de facto* and not merely a *de jure* proprietor—can measure; and this is in accordance with other cases; see *Pureejan Khatoon* v. *Bykunt Chunder Chuckerbutty* (3), *Kalee Doss Nundee* v. *Ramguttee Dutt Sein* (4), *Durga Charan Mazumdar* v. *Mahomed Abbas Bhuya*(5). If, instead of 'other,' the word 'any'

(1) 7 W. R., 416.
(2) 9 W. R., 331.
(3) 7 W. R., 96.
(4) 6 W. R., Act X Rul., 10.
(5) 6 B. L. R., 361.

had been used, there might have been more room for doubt. It is to be observed that the words "entitled to receive the rents of an estate or tenure" are to be found in s. 38, with which, as already pointed out, the present suit is not concerned; but do not occur in s. 37, which is as follows :—"If any person intending to measure any land which he has a right to measure, is opposed in making such measurement by the occupant of the land, &c." Now, in order to ascertain what persons have a right to measure, we naturally refer to s. 25 already quoted. If that section is to be construed as giving the right to measure to persons in receipt of the rents and to those only, it is difficult to account for the use of the words "entitled to receive the rents" in s. 38, while they are omitted from s. 37. It could scarcely have been intended to use the term 'entitled' of a *de jure* title merely which was not also a *de facto* title. Such a construction would give a dangerous extension to s. 38. "Entitled to receive the rents" probably means no more than "in receipt of the rents;" and the natural construction to be put upon the omission of these words from ss. 37 is, that the class of persons referred to in this section, and who have a right to measure under s. 25, is not necessarily the same class as is mentioned in s. 38; in other words, that the proprietor of an estate or tenure has a right to measure under s. 37 without proving that he is in receipt of the rents. The case of *Raj Chunder Roy* v. *Kishen Chunder* (1) agrees with this view. There can be no doubt that the plaintiff in the present case is the proprietor of the estate, and in this view it is clear that, as a proprietor, he has the right to make a general survey and measurement of the land comprised in his estate. The defendants, in their written statement, do not deny the plaintiff's title; they say that they are not unwilling to pay him rent; and although he has not, since his purchase, actually received any rent from them, in all probability owing to this dispute about measurement, he is, nevertheless, the person admitted to be entitled to the receipt of the rents. There is nothing in the law which precludes the proprietor of an estate from making a general survey and measurement such as is contemplated by

(1) 4 W. R., Act X Rul., 16.

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ss. 25 and 37, merely because his estate happens to be sublet to a number of tenure-holders. The only excepted case is where there is a special agreement, and no such special agreement is pleaded in the present case. Under these circumstances, we think the judgment of the Subordinate Judge must be set aside, and this case must be remanded in order that he may proceed to do that which the law empowers him to do. The costs will be assessed on the same scale on which the lower Court has assessed them, and will abide the result.

Appeal allowed and case remanded.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881 *June* 11.

KHOSHELAL MAHTON AND ANOTHER (DEFENDANTS) *v.* GUNESH DUTT, *alias* NANHOO SINGH, AND ANOTHER (PLAINTIFFS)*

Limitation—Time for presenting Plaint—Beng. Act VIII of 1869, *s.* 31—*Limitation Act (XV of* 1877), *s.* 5.

The provisions of s. 5 of the Limitation Act (XV of 1877) apply equally to suits under the Bengal Rent Act (Beng. Act VIII of 1869).

In a suit for rent, where it appeared that a deposit had been made in Court under the provisions of the Bengal Rent Act (Beng. Act VIII of 1869), and that the six months allowed by s. 31 of that Act for the purpose of instituting a suit had expired on a day when the Court was closed for an authorized holiday, but that the plaint had been filed on the first day the Court re-opened,—

Held, that the provisions of s. 5 of the Limitation Act (XV of 1877) applied to such cases, and that, consequently, the suit was not barred.

Golap Chand Nowluckha v. *Krishto Chunder Dass Biswas* (1) and *Hossein Ally* v. *Donzelle* (2) followed.

Purran Chunder Ghose v. *Mutty Lall Ghose Juhira* (3) dissented from.

THIS suit, which was instituted on the 3rd December 1879, was brought to recover arrears of rent for the years 1284 to

* Appeal from Appellate Order, No. 297 of 1880, against the order of H. Beveridge, Esq., Judge of Patna, dated the 24th June 1880, reversing the order of Baboo Sheo Surun Lal, Munsif of Behar, dated the 13th February 1880.

(1) I. L. R., 5 Calc., 314. (2) *Ibid*, 906.

(3) I. L. R., 4 Calc., 50.