

1879

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SINGH
v.
SHEO PRA-
SAD.

SPANKIE, J.—On the facts found by the lower appellate Court that there had been no such default as that referred to in the decree in the payment of instalments, I do not think that I could interfere in second appeal, and this appears to be the more proper course, because the judgment-debtor does not really seem to have denied the payments out of Court allowed by the decree-holder to have been made to him in accordance with the terms of the decree. I would dismiss the appeal and affirm the order with costs.

Appeal dismissed.

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April 29.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

HAR SAHAI MAL AND OTHERS (DEFENDANTS) v. MAHARAJ SINGH
(PLAINTIFF)*

Determination of Title—Act XIX of 1863, ss. 8, 9—Res judicata.

Where *M*, the recorded proprietor of an estate, applied to have his share of such estate separated, and an objection was made to such separation by *H*, another recorded proprietor of the estate, which raised the question of *M*'s proprietary right to a portion of his share, and the Collector proceeded under s. 8 of Act XIX of 1863 to inquire into the merits of such objection and decided that *M*'s interest in such portion of his share was that of a mortgagee and not a proprietor, and *M* did not appeal against such decision and it became final, *held*, in a suit in the Civil Court by *M* against *H* in which he claimed a declaration of his proprietary right to such portion, that a fresh adjudication of his right was barred.

THIS was a suit brought in May, 1877, in which the plaintiff, who was in possession of a share of nineteen biswas and sixteen biswansis and a half in a certain village, claimed a declaration of his right as proprietor to four biswas and ten biswansis of this share. The defendants set up as a defence to the suit that they were the proprietors of the property in suit, and the plaintiff was only in possession of it as a mortgagee and not as a proprietor. The Court of first instance gave the plaintiff a decree, holding on the issue whether the plaintiff was the proprietor or the mortgagee of the property in suit that he was the proprietor of it.

The defendants appealed to the High Court, contending, with reference to certain partition proceedings under Act XIX of 1863 which are set forth in the judgment of the High Court, that the Col-

* First Appeal, No. 127 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 28th June, 1878.

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lector had in 1872 inquired into the plaintiff's title and had declared that the plaintiff's interest in the property in suit was that of a mortgagee and not of a proprietor, and the question of the plaintiff's title to such property was *res judicata* and could not be again tried.

Mr. *Spankie*, with him the *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellants. The question of the plaintiff's title to the property in suit was raised in 1872 in the partition proceedings. The Collector under s. 8 of Act XIX of 1863 inquired into this question and declared the plaintiff's interest in the property to be that of a mortgagee. A decision passed by a Collector under that section is, under s. 9, to be held to be a decision of a Civil Court, and if not appealed from becomes final. The question of the plaintiff's title having been heard and finally determined by a Court of competent jurisdiction is a *res judicata*. It cannot be tried again in this suit.

Pandit *Bishambhar Nath*, with him Pandit *Nand Lal*, contended that the question of the plaintiff's title had not been decided by the Collector, and that a final decision under s. 8 of Act XIX of 1863 on a question of title was no bar to the question being raised again in a suit brought in the Civil Court.

The judgment of the Court was delivered by

PEARSON, J.—Having inspected the Collector's proceedings we are of opinion that the first ground of appeal is valid and must be allowed. It appears that the plaintiff's father applied for a partition of 19 biswas and 16½ biswansis share of the mauza under Act XIX of 1863, and that an objection was taken to this application by Har Sahai and the other defendants in the present suit on the ground that out of the share claimed by him 4½ biswas belonged to them in proprietary right and was in his possession only as a mortgagee. They demanded an inquiry into their objection and claim under s. 8 of the Act above mentioned; and the Collector ordered the Tahsildar to receive the evidence tendered by the parties in support of their respective claims and to submit a report on the point in dispute. The Tahsildar made a full inquiry and submitted a report; whereupon the Collector decided that the applicant for partition was only in possession of 15 biswas and 6

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biswansis as proprietor, the remaining $4\frac{1}{2}$ biswas being held by him as mortgagee. There can be no doubt that his decision was an adjudication of a question of title or of proprietary right which, not having been set aside in appeal in the manner provided by s. 9 of Act XIX of 1863, became final, and bars any fresh adjudication of the question so decided. We have therefore no alternative but to allow the appeal and to dismiss the suit by reversal of the lower Court's decree with costs of both Courts.

Appeal allowed.

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May 6.

Before Sir Robert Stuart, Kt. Chief Justice, and Mr. Justice Spankie.

MANNI KASAUNDHAN (PLAINTIFF) v. CROOKE, SECRETARY TO THE MUNICIPAL COMMITTEE OF GORAKHPUR (DEFENDANT).*

Act XV of 1873 (North-Western Provinces and Oudh Municipalities Act), ss. 40, 43—Suit against Secretary to Municipal Committee—Substitution of President as defendant—Act XV of 1877 (Limitation Act), s. 22.

Where after the notice required by s. 43 of Act XV of 1873 had been left at the Office of a Municipal Committee, such Committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary, instead of in the name of their President, as required by s. 40 of Act XV of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary, held that by reason of such substitution such suit could not be deemed to have been instituted against such Committee when such substitution was made, s. 22 of Act XV of 1877 applying to the case of a person personally made a party to a suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made.

Semle.—S. 43 of Act XV of 1873 contemplates suits in which relief of a pecuniary character is claimed for some act done under that Act by a Committee, or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally, and not a suit against a Committee for a declaration of the plaintiff's right to re-construct a building which had been demolished by the order of such Committee, and for compensation for such demolition.

This was a suit instituted on the 8th November, 1877, against William Croke, Secretary to the Municipal Committee of Gorakhpur, in which the plaintiff claimed a declaration of his right to re-construct certain buildings which the Municipality had directed to be removed by an order dated the 2nd August, 1877, and com-

* Second Appeal, No. 1129 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 29th June, 1878, affirming a decree of Maulvi Azmat Ali, City Munsif of Gorakhpur, dated the 28th January, 1878.