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January 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DURGA SINGH (PLAINTIFF) *v.* BISHESHAR DAYAL AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Sale of zamindari share and appurtenances—Indigo factory not appurtenant—Court fee—Act No. VII of 1870 *(Court Fees Act), section* 7, *sub-section V(b)—Land—Valuation of suit—Limitation—Civil Procedure Code, section* 54.

When a Court fixes a time under clause *(a)* or *(b)* of section 54 of the Code of Civil Procedure, it must be a time within limitation, and section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. *Jainti Prasad* v. *Bachu Singh* (1) followed. *Moti Sahu* v. *Chhatri Das* (2) referred to.

On the sale of a share in zamindari property, buildings, such as indigo factories, will not ordinarily pass to the vendee along with the zamindari share sold, unless there is distinct evidence of the user of such buildings as part and parcel of, or as appurtenant to, the zamindari. *Abu Hasan* v. *Ramzan Ali* (3), *Bankey Lal* v. *Damodar Das* (4) and *Salig Ram* v. *Debi Parshad* (5) referred to.

The term "land" as used in the Court Fees Act, 1870, does not include buildings. A claim, therefore, for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to Government, must be valued, and court fees paid thereon, according to the value of the buildings constituting the factory, and not according to the value of the site. Such buildings as constitute an indigo factory would fall within the meaning of the term "houses" as used in the Court Fees Act.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

Mr. *A. E. Ryves*, Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Aligarh dismissing the plaintiff's claim.

The claim was made by the plaintiff as a co-sharer for pre-emption of 15 biswas zamindari property of mauza Godha, consisting of the thoks of Gokul Singh and Hira Singh, each comprising 7½ biswas, an indigo factory, and the wells, buildings

* First Appeal No. 301 of 1898 from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Meerut, dated the 14th September 1898.

(1) (1892) I. L. R., 15 All., 65.
(2) (1892) I. L. R., 19 Calc., 780.
(3) (1882) I. L. R., 4 All., 381.
(4) Weekly Notes, 1900, p. 31.
(5) (1874) 7 N.-W. P. H. C. Rep., 38.

and apparatus appertaining to it in thok Gokul Singh, the share in another indigo factory occupying one pakka bigha and one biswa of land, a grove measuring 6 pakka bighas and 15 biswas, houses and shops, etc., and all rights in respect of the property upon payment of Rs. 45,500, or such other sum as the Court might adjudge to be the amount of the consideration which was paid by the defendant vendee. The claim is based upon a custom of pre-emption which is thus described in the wajib-ul-arz:—"Every proprietor has power to transfer his share, but he shall first offer it to a near sharer, and on his refusal, to another pattidar. If no one in the village be willing to take it, he shall transfer it to any person he may like, but should any person allege a fictitious price to deprive a pre-emptor of his right, the matter shall be decided by a reference to arbitration or by order of the Court." In the plaint the suit is valued for the purposes of jurisdiction at Rs. 45,500, and for the purposes of the Court fee the value of the property is stated as follows, namely, Rs. 7,521-0-8, five times of Rs. 1,504-3-4, the annual amount mentioned in the record of rights, (by which is clearly meant the annual revenue Rs. 147-0-8) the arrears of rent due by tenants, Rs. 6,339-0-4, the estimated value of both the indigo factories and the garhi, and Rs. 1,200, the estimated value of the grove, total Rs. 15,258-9.

In her written statement Bibi Hamid-un-nissa, the vendee, alleged that the Court fee paid by the plaintiff was incorrect, and that the value of the suit stated by him was wrong; also she alleged that the plaintiff had not in any event any right of pre-emption in regard to the indigo factories, the houses, the grove and the shops, etc., also that the value of the indigo factories and the houses, etc., as stated by the plaintiff was wrong and excessive, and that the sale was made at the price of Rs. 55,500, and that too after the plaintiff was requested to purchase the property and had refused to do so, and that so he had lost his right of pre-emption. The defendant vendees in their written statement say that the real price of the property was Rs. 55,500.

The following issues were settled at the trial:—

(1) Has sufficient stamp duty been paid?

(2) Is the claim barred by time?

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(3) Was the sale in favour of the vendee concluded after the plaintiff's refusal to purchase?

(4) What was the sale consideration actually paid?

The Court, after recording the evidence of the plaintiff's witnesses, found that the sum paid for Court fees was insufficient, and by order of the 20th of June, 1896, directed that the deficiency should be made good by the following day. This order was complied with by the plaintiff and the deficiency paid. It was the value which the Court placed upon one of the indigo factories which we shall term the new indigo factory which necessitated the payment of an additional Court fee. The suit was instituted on the 23rd of September, 1897, within the period of limitation, but the payment of the deficiency in stamp duty was made beyond the period of limitation, so that if the latter date is to be taken as the date of the institution of the suit, the claim would be statute-barred according to a ruling of a Full Bench of this Court. When a Court fixes a time under clause *(a)* or clause *(b)* of section 54 of the Code of Civil Procedure, it has been held that it must be a time within limitation, and section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits; *Jainti Prasad* v. *Bachu Singh* (1). This decision has not been followed in the Calcutta High Court in the case of *Moti Sahu* v. *Chhatri Das* (2). In that case it was held by Prinsep and Banerji, JJ., that the date of the institution of a suit should be reckoned from the date of the presentation of the plaint, and not from the date on which the requisite Court-fees are subsequently paid so as to make it admissible as a plaint. Whatever our individual views may be upon this subject we are bound to follow the decision of a Full Bench of this Court. The learned Subordinate Judge in this case, in his judgment after a review of the evidence, found that the plaint was insufficiently stamped at the date on which it was presented, and that the additional stamp duty ordered to be paid, and paid by the appellant was not paid within the period of limitation, and so that the plaint was originally invalid, and only became valid after the suit had become barred by limitation. Upon this finding he dismissed the plaintiff's claim. The only ground of appeal which

(1) (1892) I. L. R., 15 All., 65. (2) (1892) I. L. R., 19 Calc., 780.

has been supported before us by the learned advocate for the appellant is that the plaint was all along sufficiently stamped, and that the Court below erred in regard to the basis upon which the valuation for the purposes of the Court Fees Act ought to be made. His contention is that the entire subject-matter of the suit was *land paying annual revenue to Government* within the meaning of section 7, paragraph 5*(b)* of the Court Fees Act, and that under this section the amount at which the plaintiff was bound to value the relief sought by him was five times the revenue payable to Government, and no more. It is admitted that the revenue is not permanently settled, so that if the property, the subject-matter of the suit, only comprised land within the meaning of the section of the Court Fees Act above mentioned, the suit was apparently sufficiently valued by the plaintiff. The plaintiff, it is to be observed, claimed a right to pre-empt the new indigo factory and the buildings, etc., appertaining to it and also a share in another indigo factory, a *garhi* (fort) and a grove, and the contention of the respondents is that these properties are separate and distinct from, and would not pass as appurtenant to, the zamindari property, and also that the factories are not land, as this expression is used in the Court Fees Act, but houses, and should have been valued as houses for the purposes of the Act; that, as a matter of fact, the new factory was claimed by the plaintiff independently of, and as distinct from the zamindari property, and that consequently the plaintiff was bound to value these properties, as he in fact purported to do, at their market value, and that as he undervalued them his plaint was in the first instance invalid, and only became valid when the deficiency in the Court fees was made good, at which time the suit was statute-barred. It appears from the plaint that the plaintiff himself valued the factories, the fort, and the grove separately from the revenue-paying property, and paid Court fees in respect of these properties. He valued, as we have mentioned, the indigo factories at Rs. 6,339-0-4 and the grove at Rs. 1,200, but the Subordinate Judge found that the old indigo factory was worth Rs. 400, that the grove was worth Rs. 2,000, and that the new indigo factory was worth Rs. 10,000. On the part of the plaintiff it is admitted

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that he claimed a right to pre-empt the entire new indigo factory and not merely a share in it. The case made by his learned advocate is that the plaintiff's claim was for pre-emption of a share of the zamindari property consisting of the two thoks of Gokul Singh and Hira Singh, and whatever appertained to this share, and nothing else, and that the indigo factories, fort and grove form part of the zamindari property and passed as appurtenant to it, and that the sites of the factories were, under the subsisting land settlement, actually charged with and paying annual revenue to Government, and so the subject-matter of the suit was entirely *land* within the meaning of section 7, para. 5*(b)*, and not houses. The word "land" as used in the Court Fees Act, it is contended on behalf of the plaintiff, includes everything upon the land, such as groves, houses, factories, etc. If this contention be well-founded, then, instead of having paid insufficient Court fee on the presentation of his plaint, the plaintiff paid an excessive amount. The fact that in his plaint the plaintiff himself set a separate value and paid Court fees upon the factories, fort and grove is not consistent with the suggestion that his claim was only in respect of the zamindari property. But let us for the moment pass over this inconsistency, and consider, in the first place, whether or not, as a matter of fact, the factories, etc., would pass as being appurtenant to the zamindari. From the language of the deed of sale of the 12th of October 1896, made in favour of the defendant, Bibi Hamid-un-nissa, and also the land settlement record which we have inspected, it is clear that the factories, fort and grove in question were within the area of the two thoks, and were conveyed to her along with the 15 biswas zamindari share. The deed purports to convey the 15 biswas zamindari share constituting the two thoks, together with an indigo factory situate on a specified piece of land, that is the new indigo factory, and a share in another indigo factory, also described as to its situation, also a garhi or fortress, grove, etc., and all the interest and adventitious rights appertaining to or existing in the said share, etc., including the arrears of rent due by the tenants. The factories, fort and grove were conveyed apparently as being appurtenant to the 15 biswas zamindari share purchased by this defendant.

It is said, however, on the part of the respondents that a factory, fort and grove cannot be regarded as part and parcel of, or as appurtenant to a zamindari, and would not pass as such, so that the right of pre-emption did not attach to them, but that inasmuch as the plaintiff in his plaint claimed the right to pre-empt them, he was bound to pay Court fees in respect of them, to be computed according to their market value under sub-section *(e)*, para. 5 of section 7. The case of *Abu Hasan* v. *Ramzan Ali* (1) was relied on on behalf of the appellant. In this case it was held that a killa (fort) passed to a purchaser of the rights and interests in a village of one Kadir Ali Khan a zamindar. Kadir Ali Khan had purchased a village, and with it the killa, some 30 years before the suit was instituted. The killa had always been occupied by him and his family as a residence, and, it was held, would seem to have belonged to him *qua* zamindar, and that as the zamindari rights and interests were brought to sale in 1873, and purchased by the plaintiff, the presumption was that the killa was included, unless there was anything to show that it was excluded expressly or by implication, as to which there was no evidence. This decision does not far advance the plaintiff's case, inasmuch as it was based on the fact that the killa was occupied by the former owner *qua* zamindar as a dwelling-house. In the present case there is no evidence to show and it is most unlikely, that the indigo factories were held by the owner *qua* zamindar. The case of *Banke Lal* v. *Damodar Das* (2) was also relied on by the plaintiff's advocate. In this case the late Sir Arthur Strachey, Chief Justice, held that certain kothis or houses and out-houses, which were included in the area of zamindari property, passed upon an execution sale to a purchaser of the rights and interests of the zamindar in a village. The kothis had been specifically mentioned in the application for execution and in the warrant of attachment, and were found by the Court to have been actually attached. The learned Chief Justice held that, in the absence of evidence to the contrary, a kothi or other building situate within a zamindari area is included in, and passes with, the zamindari; that no doubt the contrary may be shown by evidence, that is to say, evidence of the

(1) (1882) I. L. R., 4 All., 381. (2) Weekly Notes, 1900, p. 31.

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circumstances connected with the acquisition, construction or user of the building, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been so severed or held so separately from it as to form a separate and distinct property of the zamindar. In that case there was no evidence to show for what purpose or in what manner either of the kothis was used at any time up to the sale. In the case before us such cannot be said, so far at least as regards the new indigo factory, for it admittedly was, and is, used as a factory, and was conveyed in its entirety as such to the respondent Bibi Hamid-un-nissa. It was apparently treated as being separate and distinct from the zamindari property, in which the vendor had only a share. On behalf of the respondents the case of *Salig Ram* v. *Debi Parshad* (1) was strongly relied on as showing that a right of pre-emption does not extend to a factory, bungalow or garden situate on the land comprised in a thok. In that case the claim was based on a clause in the wajib-ul-arz which was as follows:—"Every shareholder is at liberty to transfer by sale or mortgage his own share or the land appertaining thereto." A Division Bench, consisting of Turner and Brodhurst, JJ., held that the right of pre-emption was only intended to extend to the ordinary rights of a zamindar in the village, and to such buildings in the village *as are held ordinarily with such zamindari rights, and that it does not extend to such properties, as for instance a family residence or an indigo factory.* A bungalow and garden were accordingly excluded from the claim for pre-emption. Upon the facts disclosed in the present case we are unable to discover any grounds for holding that the new indigo factory, which was purchased by Bibi Hamid-un-nissa, formed any part of the zamindari property, or that it passed to her as such, or as appurtenant thereto. Upon this question we cannot accede to the argument which has been advanced on behalf of the appellant.

We now come to the remaining portion of the argument of the learned advocate. His contention is, that the sites of the factories being assessed and chargeable with Government revenue, as appears to be the case, the land upon which the factories stand with the factories upon it are, for the purposes of the Court Fees

(1) (1874) 7 N.-W. P. H. C. Rep., 38.

Act, to be treated as "land" merely, and valued as such under sub-section *(b)*, para. 5 of section 7, and not also under sub-section *(c)* of the same section. It becomes necessary for the determination of this question to consider the meaning and significance of the word "land," and the word "houses" as used in the Court Fees Act. The word "land" in its wider signification would no doubt include not only the surface of the ground, but also every thing on or under it, for *cujus est solum ejus est usque ad cœlum*. We are not aware that there is any definition of the word "land" as used in the statutes in this country such as is found in the English statute 13 and 14 Vic., Cap. XXI, section 4. In the Court Fees Act the word would seem to be used in a restricted sense, for the Act provides a distinct mode of ascertaining the amount at which relief should be valued according as the subject-matter of the suit is land, or houses or gardens. If the subject-matter of the suit is land, there are two modes of computing the Court fee according as the land is revenue-paying or not, and if it be a house or garden another and distinct mode of computation is provided. The word "land" appears to be used in the section in contradistinction to houses or gardens. In suits, such as the present suit, to enforce a right of pre-emption, the computation is directed to be made in accordance with the value of the land, houses or gardens, in respect of which the right is claimed, such value to be computed in the modes subsequently prescribed. Now in this case the plaintiff admittedly claims the right of pre-emption of the whole of one indigo factory as also a share in another. We may exclude from our consideration the old factory, which is in ruins and of little or no value. It was the amount, namely, Rs. 10,000 at which the new factory was valued, which necessitated the payment of the additional Court fee. This factory, it is contended, and we think rightly, should have been valued according to its market value as coming within the meaning of the term houses as used in the Court Fees Act. It was not suggested on the part of the appellant that the word "house" as used in that Act was not sufficiently comprehensive so as to include an indigo factory, and we do not think that such a contention, if it had been raised, woul dhave been tenable. Substantial and permanent buildings, such as constitute a factory, clearly,

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we think, come within the meaning of the expression "houses." In the present case the new indigo factory was built subsequently to the date of the last settlement of the lands in dispute, and the site of it is assessed with Government revenue, but this coincidence cannot, we think, be regarded in determining the true meaning of the section of the Court Fees Act to which we have referred. The substantial subject-matter of the suit, so far as regards the new indigo factory, was not the site of the factory, but the factory itself. If the subject-matter of the suit had been the new indigo factory alone, it seems to us that it could not reasonably have been argued that the Court fee was to be computed according to the amount of revenue payable to Government in respect of the site, and not according to the market value of the buildings, &c.

We are of opinion for these reasons that the plaintiff, when he claimed in his plaint a right to pre-empt the new indigo factory, was bound to value it according to its market value for the purposes of the Court fee, as in fact he did purport to do. Unfortunately he undervalued it and must take the consequences. The case is no doubt a hard one upon him, for he paid the additional Court fee which was required of him only to find that his suit was statute-barred. We must, for these reasons, dismiss the appeal with costs.

Appeal dismissed.

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January 16.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BURI SINGH AND ANOTHER (PLAINTIFFS) *v.* NAWAL SINGH AND OTHERS (DEFENDANTS).*

Parties to suit—Practice—Suit by some only of several persons entitled to sue, the others being joined as co-defendants.

Where out of several persons who apparently had a right to bring a suit as co-plaintiffs, some only appeared as plaintiffs and joined the others as co-defendants. *Held* that the suit ought not to have been dismissed merely because the plaintiffs failed to show that the persons whom they joined as co-defendants refused to appear with them as plaintiffs. *Pyari Mohun Bose* v. *Kedar Nath Roy* (1) followed. *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (2) referred to.

* First Appeal No. 305 of 1898 from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Mainpuri, dated the 29th September 1898.

(1) (1899) I. L. R., 26 Calc., 409. (2) (1889) I. L. R., 17 Calc., 160.