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BHAWANI SINGH v. DILAWAR KHAN.

AIKMAN, J.—I concur in the judgment of my learned colleague and in the order proposed by him and have nothing to add.

GRIFFIN, J.—I also concur.

BY THE COURT.—The decree of the District Judge on the preliminary point is reversed and the case remanded under order XLI, rule 23 of the Code of Civil Procedure (Act V of 1908) with directions to re-admit the appeal under its original number in the register and to proceed to determine it on the merits. Costs will abide the result.

Appeal decreed and cause remanded.

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January 14.

Before Mr. Justice Sir George Knox, Mr. Justice Aikman and Mr. Justice Griffin.

GOBINDI (PLAINTIFF) v. SAHEB RAM AND ANOTHER (DEFENDANTS). *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 201 *(3)—Presumption—Question of title decided by Civil Court—Subsequent suit for profits by recorded co-sharers.*

When a Civil Court of competent jurisdiction has decided a claim to property, and this has been followed by a wrong entry in the revenue papers, *held* that in a subsequent suit for profits the claim must be in proportion to the share obtained under the Civil Court decree and no presumption arises under section 201 of the Agra Tenancy Act.

THE facts of this case are as follows :—

The plaintiff in 1901 obtained certain shares in immovable property under a decree of the Munsif of Hathras. She applied for entry of her name in the revenue papers but owing to some error her name was recorded in respect of a larger share than she had obtained under the decree. She sued the defendants for profits calculated on the share as entered in the Revenue papers. The defendants pleaded that the plaintiff was entitled to profits in proportion to the share decreed in her favour and not as entered in the *khewat*. The Court of first instance decreed the claim for profits in her favour in proportion to her recorded share. The lower appellate Court (Additional Judge of Aligarh) modified the decree holding that the plaintiff was entitled to profits proportionate to the share she had got under the Civil Court decree. The plaintiffs appealed to the High Court.

* Second Appeal No. 942 of 1907, from a decree of Khetter Mohan Ghosh, Additional Judge of Aligarh, dated the 8th of June 1907, reversing a decree of G. Flowers, Assistant Collector 1st Class, of Aligarh, dated the 21st of November, 1906.

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The appeal was referred to the Full Bench on the recommendation of RICHARDS and GRIFFIN, JJ.

Dr. *Satish Chandra Banerji*, for the appellant, submitted that the plaintiff's name was entered in respect of a half share by a competent Revenue Court after a consideration of the decree of the Civil Court and the objections preferred by the present defendants. The latter submitted to the order of the Assistant Collector, which became final. That order could not now be treated as a nullity, and the Revenue Court under section 201 (3), Agra Tenancy Act, was bound to give effect to the mutation of names carried out in pursuance of that order.

Section 201, Tenancy Act, provides for two classes of cases, namely, (1) where the name of the plaintiff is not recorded and (2) where the name is recorded in the Revenue papers. Where, the plaintiff's name has already been put upon the record by the Revenue Court, in a subsequent suit before the same court, it is not called upon to embark upon a further enquiry, but is entitled to act upon the entry as conclusive for its purposes. Sections 44 and 57 of the Land Revenue Act show that there is a rebuttable presumption in favour of the truth of entries in Revenue papers, and if the legislature intended no higher presumption than that provided for in those sections, it was not necessary to enact section 201 (3), Tenancy Act. The words "shall presume" were not terms of art or technical words known to the common law of England or elsewhere. Taylor, for instance, in part I, Chapter V, of his *Law of Evidence*, had not used that expression though he had classified presumptions of law as conclusive and disputable. The expression "shall presume" had not been defined in the Tenancy Act or the General Clauses Act. There was a definition in the Indian Evidence Act, but as that Act was not *in pari materia* with the Tenancy Act there was no warrant for interpolating that definition into the Tenancy Act. The intention of the legislature being clear should be given effect to, as the words used were capable of bearing the meaning which the legislature intended and there was nothing in the context or the scheme of the Tenancy Act which compelled the Court to defeat the obvious intention of the legislature by putting a restricted meaning upon the words used.

See *Budge* v. *Andrews* (1), *Umachurn* v. *Ajadannissa*, (2) *Q.-E.* v. *Hori* (3). Where the legislature had intended only a rebuttable presumption in the Tenancy or the Land Revenue Acts, it had been careful to qualify the words "shall presume" by other words like "until the contrary is shown" [section 35, 108 (2), Act II of 1901]. In section 9 of that Act the words "conclusive proof" had been used, but the entry in that case was conclusive for all courts and no right of civil suit in favour of any party had been reserved. The plaintiff who had succeeded in getting his name recorded in Revenue registers should not be placed in a worse position than one who had failed to do so, as he clearly would be if the Revenue Court had power to determine the question of title adversely to him and he had no right to obtain an adjudication from the Civil Court. The object of the legislature was that Revenue officers should prepare the record of rights with care and abide by the same, and it was only if they did so that multiplicity of actions could be prevented.

He referred to *Dil Kunwar* v. *Udai Ram* (4), *Banwari Lal* v. *Niadar* (5), *Dhanka* v. *Umrao Singh* (6), *Niaz Ali* v. *Govind Ram* (7), *Bachan Singh* v. *Karan Singh* (8).

Munshi *Gulzari Lal*, for the respondents, submitted that there was a clear decree of the Civil Court deciding that the plaintiff was entitled to a definite share. This decree had become final and should be given effect to. Sections 199, 201, 202, Tenancy Act, show that the policy of the legislature was that questions of title were to be decided by the Civil Court and that decision was to bind the Revenue Court. Why should the parties here be referred again to the Civil Court? He submitted that the legislature did not mean a conclusive presumption by the words "shall presume" in section 201, Tenancy Act. Wherever the legislature meant a conclusive presumption, it used words like "conclusive evidence." He referred to Criminal Procedure Code (Act No. V of 1898), section 7; Land Acquisition Act (I of 1894), section 6; and the Criminal Tribes Registration Act (XXVII of 1871), section 6. In no other Act the words

(1) (1878) L. R., 3 C. P. D., 51, 521.
(2) (1885) I. L. R., 12 Calc., 430.
(3) (1899) I. L. R., 21 All., 391, 396.
(4) (1906) I. L. R., 29 All., 148.
(5) (1906) I. L. R., 29 All., 158.
(6) (1907) 4 A. L. J. R., 166; s. c. on appeal, I. L. R., 30 All., 58.
(7) Weekly Notes, for 1908, p. 187n.
(8) (1908) 5 A. L. J. R., 495

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"shall presume" have been used to mean a conclusive presumption. The argument based upon the proviso to section 201, was not sound, because the right of suit was given not to the defendant alone but to any person. The provisions of section 199 had not been made applicable to section 201(3), but if the plaintiff had the title it could not be taken away by an order of the Revenue Court. The Revenue Court did not sometimes correct an erroneous *khewat* even if moved to do so.

If the policy of the Act is not clear, the words "shall presume" should be interpreted in the sense in which they are ordinarily understood by lawyers in India. He referred to Maxwell, *Interpretation of Statutes*, p. 51; S. A., No. 358 of 1907 decided by Knox and Aikman, JJ., on May 27, 1908, *Dil Kunwar* v. *Udai Ram*, and *Dhanka* v. *Umrao Singh*.

Dr. *Satish Chandra Banerji* heard in reply.

The following judgments were delivered:

KNOX, J.—The facts out of which this appeal arises are as follows:—

The appellant Musammat Gobindi was plaintiff in the court of first instance. She brought the suit out of which this appeal has arisen to recover Rs. 397, principal and interest, on account of profits for the years 1310, 1311 and 1312 Fasli. She alleged that her share in the village Lahra was half, and that the defendants respondents owned the other half. The respondents replied that she had not correctly given the extent of her share, that under an arbitration award which had been made a decree of court, 73 bighas 3 biswas were given to her out of 89 bighas, 2 biswas, half of a 3 biswas *haqiat* in *khata khewat* No. 6 of mauza Lahra. Other matters were also urged in reply. But we are not concerned with those at present. The court of first instance held that the appellant's share was half 3 biswas as recorded in the *khewat*, refused to go behind the recorded share, and decreed profits in her favour in proportion to this recorded share. The lower appellate court refused to accept the entry in the *khewat*, held that it was an incorrect entry, that the appellant owned only 73 bighas 3 biswas of land, and that on this footing was entitled to no profits. It accordingly set aside the decree of the lower court and dismissed the plaintiff's suit. In appeal before us it has

been urged that as the appellant is a recorded co-sharer of half of 3 biswa share, she is under section 201, clause (3) of the Tenancy Act of 1901, entitled to a decree for the full amount claimed by her, that the court below could not go into the question as to whether the plaintiff's proprietary title was to be restricted to a lesser area than that recorded in the *khewat*. On this case coming before this court, it was at first thought that the decision of the questions raised in the appeal turned upon the interpretation to be put upon clause (3), section 201, of the Local Act No. II of 1901, and as that clause had been differently interpreted by learned Judges in this court in *Dil Kunwar* v. *Udai Ram* (1), *Banwari Lal* v. *Niadar* (2), and *Dhanka* v. *Umrao Singh* (3), the learned Chief Justice directed that the appeal should be laid before a Full Bench of this Court.

In view however of the fact that the extent of the proprietary rights of the appellant has been the subject of a decision by a Civil Court of competent jurisdiction, it seems to me that we need not in this case consider and that we ought not to consider the interpetation to be placed upon clause (3), section 201, of Act No. II of 1901. I refer to the decree passed by the Munsif of Hathras on the 8th of October 1901, in the suit brought by Musammat Gobindi against Saheb Ram and Birj Narain. That suit was referred to arbitration, and on the 8th of October 1901, the award was made a decree of court—and out of 89 bighas, 2 biswas, *i.e.* half of a 3 biswas *haqiat*, *khata khewat* No. 6 of mauza Lahra, now in dispute, 73 bighas 3 biswas were given to Musammat Gobindi and 15 biswas odd to Birj Narain. It was further added in the decree that Musammat Gobindi must pay Government revenue for the full half share of 89 bighas 2 biswas. This was followed upon the 19th of October 1901, by an application presented by Musammat Gobindi to the Revenue Court, for the entry of her name over 73 bighas 3 biswas *haqiat* out of 89 bighas 2 biswas of *khata khewat* No. 6 of mauza Lahra. The Tahsildar who made an inquiry recommended to the subdivisional officer that Musammat Gobindi's name should be entered as prayed for by her. The Assistant Collector acting upon this report on the 18th of

(1) (1905) I. L. R. 29 All., 143. (2) (1906) I. L. R. 29 All., 158.
(3) (1907) I. L. R. 30 All., 58.

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November 1902, passed an order to the effect that Musammat Gobindi's name be entered in the *khewat* as recommended by the Tahsildar. Owing to some error, however, Musammat Gobindi's name was entered in respect of 89 bighas odd. It has thus been established by suit in Civil Court that Musammat Gobindi has only proprietary right over 73 bighas 3 biswas and not over half share in *khata khewat* No. 6 of mauza Lahra. Owing to this decision of the Civil Court which was long prior to the date on which the present suit was instituted out of which this appeal arises, there is nothing left for the court to presume. The view taken by the lower appellate court is a correct view and in my opinion this appeal should be dismissed with costs.

AIKMAN, J.—I concur in the judgment of my learned colleague and have nothing to add.

GRIFFIN, J.—I also concur.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

1909

January 14.

Before Mr. Justice Aikman.

JAGAN NATH PRASAD, (DECREE-HOLDER) *v.* MULCHAND AND OTHERS (JUDGMENT-DEBTORS).*

Act No. VII of 1870 *(Court Fees Act), section* 5—*Reference—Schedule I, Articles* 4 *and* 5—*Court fee—Interlocutory order—Review of.*

Held that an application for review of an interlocutory order was properly stamped with a court fee stamp of Rs. 2 and that neither Article 4 nor Article 5 of schedule I of the Court Fees Act refers to an interlocutory order. *Bom. Printed Judgments*, 1892, p. 383 followed.

THIS was a reference by the Taxing officer to the Taxing Judge under section 5 of the Court Fees Act.

An application for review of an order passed by a Division Bench under section 566, Code of Civil Procedure, 1882, was presented on a court fee stamp of Rs. 2. The Stamp Reporter reported that the application was insufficiently stamped on the ground that the application being one for review of judgment should have been stamped under schedule I, article 4 of the Court Fees Act, and the proper fee was the fee leviable on the memorandum of appeal.

* Stamp Reference in Second Appeal No. 1143 of 1907.