

Procedure for these reasons:—Musammat Amri, the widow of Narain Das, entered into possession of her husband's property upon his death. She made a gift of portion of it to one Gopal Sahai; whereupon the plaintiffs, claiming to be the reversionary heirs of Narain Das, instituted a suit to have this gift in favour of Gopal Sahai set aside as against them. The gift was set aside on the ground that Musammat Amri had only a widow's life estate and was not entitled to dispose of the property of Narain Das beyond her life estate. The court below was of opinion that the plaintiffs in that suit ought to have claimed the property which they seek to recover in this suit, but in this the learned Subordinate Judge is clearly in error. The claim in the former suit to have the deed of gift set aside was based on a distinct cause of action. It was not incumbent on the plaintiffs in it to join a claim to recover the property owned by Musammat Ishri.

The preliminary grounds upon which the court below dismissed the suit are untenable, and it will be necessary therefore to remand the suit to that court for trial upon the merits. We accordingly allow the appeal, set aside the decree of the court below, and remand the suit to that court under the provisions of order 41, rule 23, of the Code of Civil Procedure, with directions that it be readmitted in the file of pending suits and be disposed of according to law. The appellants will have the costs of this appeal in any event. All other costs will abide the event.

Appeal allowed and cause remanded.

Before Mr. Justice Richards and Mr. Justice Tudball.

SADANAND PANDE (PLAINTIFF) v. ALI JAN AND OTHERS (DEFENDANTS)*.
Act (Local) No. III of 1901 (United Provinces Land Revenue Act) sections 56,
86—Market Right to levy tolls—Cess.

Held that the levy by the owner of a private market of market dues at so much per head for every beast sold and of rent for land occupied by stalls is not illegal. *Sukhdeo Prasad v. Nihal Chand* (1) distinguished.

THE facts of this case were as follows:—

The plaintiff asked for a declaration that he was entitled to realize the income and profits of a certain fair jointly with the

* First Appeal No. 198 of 1908, from a decree of Srish Chandra Basu, Subordinate Judge of Ghazipur, dated the 18th of June 1908.

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defendants in proportion to his share in the village, and further claimed to recover the sum of Rs. 2,415-9-9, the amount which the defendants had wrongfully realized and converted to their own use. The fair had been established long ago jointly by the plaintiff and the defendants and was held on land which belonged jointly to them in certain proportions. The profits of the market were derived from levying a toll of so much per head upon every beast bought and sold and also from persons who were granted the privilege of putting up their stalls during the time the fair was held. The defendants admittedly had been collecting and receiving the profits derived from the fair in question. The court below, however, dismissed the suit on the ground that as there had been no sanction by the Government to the levying of the tolls and market dues, their exaction was illegal.

The plaintiff appealed and the defendants filed certain objections.

Mr. B. E. O'Connor (with him Munshi *Haribans Sahai*), for the appellant, contended that the cesses contemplated by the Land Revenue Act were cesses payable by a tenant to his zamindar. Here the payments were made by people who came from outside of their own free will and made use of the land. The defendants had admittedly realized the income and the plaintiff was entitled to his share, as such payments were not in the nature of cesses and did not need to be recorded. Section 56 of the Land Revenue Act contemplated cesses in the nature of rent and section 86 contemplated cesses in the nature of an impost. He cited *Sukhdeo Prasad v. Nihal Chand* (1), *Balwant Singh v. Shankar* (2), *Muhammad Abdul Hai v. Nathu* (3), *Ram Suran Singh v. Alrabh Ravi* (4) and *Amir Hasan v. Gobind* (5).

Mr. R. K. Sorabji, for the respondents, submitted that the recovery of any such payments unless recorded was illegal. Sections 56 and 86 of the Land Revenue Act, were enacted with the object of informing the Government of the total income that was derived from the land so that the revenue might be correctly

(1) (1907) I. L. R., 29 All., 740.

(3) (1904) I. L. R., 27 All., 183.

(2) (1908) I. L. R., 30 All., 235.

(4) Weekly Notes, 1892, p. 244.

(5) Weekly Notes, 1899, p. 77.

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assessed. It would be defeating the intention of the law if such profits were allowed by a court without their being recorded in the manner indicated by those sections. Moreover, Regulation VII of 1822 rendered the holding of private markets and levying of market dues illegal.

RICHARDS and TUDBALL, JJ.—This appeal arises out of a suit in which the plaintiff asked for a declaration that he was entitled to realize the income and profits of a certain fair jointly with the defendants in proportion to his share in the village. He further claimed to recover the sum of Rs. 2,415-9-9, the amount which the defendants had wrongfully realized and converted to their own use. The facts found by the court below are shortly as follows:—The fair was established some years ago jointly by the plaintiff and the defendants. It was held on land which belonged to them jointly in certain proportions. So far as the findings of fact are concerned we are in entire accord with the court below; in fact the evidence as to these facts has been practically admitted by the respondents' counsel. The learned Judge, however, notwithstanding the finding of facts in favour of the plaintiff, held that, inasmuch as there had been no sanction by Government to the levying of tolls and market dues, their exaction was illegal, and on this legal ground he dismissed the plaintiff's suit. It must be remembered that no question arises between the alleged owners of the market and the persons who are called upon to pay the market dues, nor is there any question as to the rights of the owners of rival fairs or markets. The defendants admittedly have been collecting and recovering the profits derived from the fair in question. There is no doubt that if the taking of market tolls and customs is illegal, the learned Judge was right in refusing to make a declaration that the plaintiff was entitled, and the only question we have to consider in the present appeal is whether or not the taking of market dues and customs in a private market is legal. The profits of the market are derived from levying toll of so much per head upon every beast bought and sold and also from persons who are granted the privilege of putting up stalls during the time the fair is held. *Prima facie* any person is entitled to charge persons who of their own free will and accord make use of his

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land for any purpose. Two provisions of the United Provinces Land Revenue Act, III of 1901, are relied on by the defendants as showing that the exaction of market tolls and dues is illegal. We have not been referred to any other enactment. Section 56 provides as follows:—"In the North-Western Provinces all cesses which are payable by tenants on account of the occupation of land and which are of the nature of rent payable in addition to the rent of tenants, or in lieu of which proprietary rights may be assigned under section 78, clause (b), shall be recorded by the record officer under the appellations by which they are known, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court." The other section is section 86. Sub-section (1) is as follows:—"A list of all cesses other than those referred to in section 56 levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the settlement officer, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court; and no such list shall be altered or added to during the currency of settlement."

It can hardly be contended that the taking of the market dues in the present case comes within section 56. The dues are not payable by tenants as such at all. They are payable by persons who come and use the land in question on fair days for the purpose of buying and selling. We do not think that market dues can possibly come under section 86 either. In the first place, we feel the greatest difficulty in holding that the moneys paid by the frequenters of markets are "cesses" at all. They are voluntary payments made by persons who are under no obligation whatever to make use of the market unless they please. They are not levied in accordance with any village custom. We think that the cesses mentioned in sections 56 and 86 of the Land Revenue Act are rates levied as a rule by the zamindar upon tenants and residents of villages. We may give a few examples. A levy made by the zamindar for the karinda, chaukidar or patwari would all be cesses. Probably, if a zamindar thought fit to establish a market and attempted to levy a rate upon the tenants and occupiers, for the up-keep of the market and the payment of the market officials, this also would be a cess within the

meaning of one or other of the sections. The learned Judge refers to the case of *Sukhdeo Prasad v. Nihal Chand* (1). The point in question in the present appeal was not before the court in that case. Some reliance was placed upon Regulation VII of 1822. We think it extremely doubtful that any of the provisions of the Regulation rendered the holding of private markets and the taking of market dues illegal; but even assuming that it did, we may point out the Regulation VII of 1822 is repealed by Act XIX of 1873 so far as it relates to these Provinces. The learned Judge very properly decided most of the issues of fact. There are, however, two issues which still remain to be decided before the appeal can be finally disposed of, namely, as to the amount realized by the defendants and what proportion of that amount the plaintiff is entitled to. We accordingly refer the following issues to the lower court:—

(1) What amount was realized by the defendants in respect of the fair mentioned in the plaint and for the years therein mentioned?

(2) How much of the amount so realized is the plaintiff entitled to?

The court below may, if it finds it necessary, take any additional evidence to dispose of these issues. Upon the return of findings ten days will be allowed for filing objections.

The objections taken on behalf of the respondents fail and are dismissed with costs.

Issues remitted.

(1) (1907) I. L. R., 29 All., 740.

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