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

1910
July 15.

RAGHUNATH KALWAR AND OTHERS (PLAINTIFFS) *v.* BALA DIN KALWAR AND OTHERS (DEFENDANTS).*

Act No. I *of* 1872 *(Indian Evidence Act), section* 44*—Res judicata—Fixed rate tenancy—Partition—Power of joint tenants to partition—Suit to recover joint possession.*

A certain holding owned jointly by tenants at fixed rates was partitioned by an award. One party sued on the award to recover exclusive possession of certain plots and obtained a decree for possession and mesne profits, which was executed. Subsequently the other party sued to regain joint possession of these plots and pleaded that the former decree was by a court not competent to pass it and therefore not binding on them. There was nothing to show whether the former suit was filed before or after the coming into force of the Agra Tenancy Act, 1901, or whether the landlord had or had not assented to the partition.

Held that the plaintiffs had failed to show that the former decree was passed by a Court which had not jurisdiction, and that the present suit was barred. *Achhey Lal* v. *Janki Prasad* (1) explained.

THIS was an appeal under section 10 of the Letters Patent from a judgement of TUDBALL, J., The facts of the case are stated in the following judgement of Piggott, J., before whom the case first came in appeal.

"The plaintiffs in this case sued for a declaratory decree to the effect that they were jointly entitled to possession as co-sharers in certain cultivatory holdings, together with an injunction to restrain certain defendants from interfering with their joint cultivation. In the alternative a decree for joint possession was asked. The question in dispute on second appeal has narrowed itself down and now relates only to certain particular plots, which the courts below describe as those shown in list (B). With respect to these plots the case for the defendants is that the plaintiffs' suit is barred by the principle of *res judicata*. It has been shown that as recently as June the 21st, 1906, the defendant, Bala Din, obtained as against the present plaintiffs a decree for exclusive possession of these particular plots together with mesne profits. The present suit is clearly intended to annul the effect of that decree so far as these particular plots are concerned. In reply to the plea of *res judicata*, which was accepted by the court of first instance, the plaintiffs pleaded that the decree of the 21st June, 1906, can have no effect as *res judicata*, because the court which passed it, the learned Munsif of Jaunpur city had no jurisdiction to make any such decree. It is, therefore, contended that under the provisions of section 44 of the Indian Evidence Act the plaintiffs are entitled to show and that they have in fact shown that the judgement and decree pleaded by the defendant, Bala Din, under section 40 of the same Act, was delivered by a court not competent to deliver it.

* Appeal No. 28 of 1910 under section 10 of the Letters Patent.

(1) (1906) I. L. R., 29 All., 66.

1910

RAGHUNATH KALWAR v. BALA DIN KALWAR.

The learned District Judge has held, first, that the decree of the 21st June, 1906, amounts to a division of a tenant-holding and is in contravention of the provisions of section 32 of the Tenancy Act of 1901; secondly, that it was, therefore, a decree passed without jurisdiction and one which can have no operation as *res judicata*. I am unable to concur in either of those findings. The plaint in the suit decided on the 21st June, 1906, is not on the record. Like the learned District Judge, I can only refer to the judgement and decree of the Munsif of Jaunpur city in order to ascertain the nature of that suit. It appears from the decree that the relief sought was simply exclusive possession of certain particular plots described as being a fixed rate holding and that the ejectment of the defendants in that suit (present plaintiffs) was sought as in an ordinary action in ejectment against trespassers. The Munsif of Jaunpur was a court of competent jurisdiction to entertain a suit for the ejectment of trespassers in wrongful possession of the fixed rate holding in question, supposing the plaintiff to be able to prove that he was himself the rightful tenant of these fields and entitled to possession of the same. The judgement shows that the case was defended, but no plea of want of jurisdiction on the part of the court by reason of the operation of section 32 of the Tenancy Act was raised. It is also clear, however, as remarked by the learned District Judge, that the defendant, Bala Din, relied upon a certain award according to which he claimed that the plots then in suit had been assigned to him while certain other plots had been assigned to the opposite party. From this fact the learned District Judge has presumed that the suit was in effect one to enforce an agreement under which a certain occupancy holding had been divided and was, therefore, not maintainable in any court by reason of the provisions of section 32 of the Tenancy Act. In support of this view reliance is placed on the decision of this court in *Achhey Lal* v. *Janki Prasad* (1). I may refer also to the later case of *Najib-ullah* v. *Gulsher Khan* (2), in which this decision was considered and explained, though it seems to me that the head-note goes somewhat too far in noting it as having been overruled. It seems to me sufficient with regard to the point immediately in issue before me to say that it is really not proved by the evidence on the record that the effect of the award relied on by Bala Din in the suit of 1906 was in fact to split up a particular holding and not, for instance, to apportion different occupancy holdings amongst different members of the same family. I may add that it is also not proved that the landholder concerned was not a consenting party to the arrangement whatever may have been effected under the award relied on by Bala Din in the suit of 1906. Passing on to the second of the points indicated by me above I have to consider what would have been the position of the present plaintiffs if they had resisted the suit of 1906 on the ground that it was in effect a suit for division of a holding and calculated to defeat the provisions of section 32 of the Tenancy Act. I have shown that if this point had been taken evidence might have been offered by Bala Din to satisfy the court as to the nature of the suit and as to its being distinguishable from the case of *Achhey Lal* v. *Janki Prasad*. Suppose now that an issue had been raised on this point and that after

(1) (1906) I. L. R., 29 All., 66. (2) (1909) I. L. R., 31 All., 343.

considering the pleadings to the parties and the evidence, if any, adduced by them the learned Munsif had come to the conclusion that the suit was not in its nature obnoxious to the provisions of section 32 of the Tenancy Act, would the defendants in that case have been entitled to submit to the decree resulting from such finding, but to treat it hereafter as a nullity on the ground that they would be entitled in any future proceeding to raise again in virtue of the provisions of section 40 of the Indian Evidence Act the very point which had been decided against them? I concede not, and on this point I am content to refer to the cases of *Ketlilamma* v. *Kelappan* (1), *Sardarmal Jagonath* v. *Aranvayal Sabhapathy Moodliar* (2) and the decision of this Court in *Nathu Ram* v. *Kalian Das* (3). This being so, I am unable to hold that the present plaintiffs are in any better position because they made no attempt in the suit of 1906 to set up a defence based on the provisions of section 32 of the Tenancy Act, but appear on the contrary to have asked the court to examine carefully the effect of the award relied on by Bala Din and to give judgement in accordance with its terms. For these reasons, I accept this appeal, set aside the decree of the lower appellate court and restore that of the court of first intance. The plaintiffs must pay all costs in this and in the lower appellate courts."

As, however, PIGGOTT, J., retired from the court before signing the above judgement, the appeal was reargued before TUDBALL, J., who decreed it by the following judgement:—

"This appeal was argued before Mr. Justice PIGGOTT, who delivered the above judgement, but without signing it, prior to his retirement from this Court. The case has been reargued before me, and I find myself in accord with all that Mr. Justice PIGGOTT has said above. In respect of the lands in list B which alone are in dispute in this appeal, the defendants appellants brought a suit to eject the plaintiffs respondents as trespassers. The lands were held as a fixed rate tenure from the landlord. Admittedly at some time past it belonged to the common ancestor of the parties and the latter separated at the latest in 1899; after which the there was a dispute which was submitted to arbitration, and the arbitrators, in part at least, partitioned the tenure. There is nothing to show whether this occurred prior to the first of January, 1902, when the Tenancy Act came into force, or subsequently thereto. There is nothing to show whether or not the consent of the zamindars was obtained to this partition. Be that as it may, in 1906, the defendants appellants came into court alleging that they were the sole owners of the tenure in so far as these plots were concerned. The plaintiffs respondents met them by pleading that some of the plots belonged exclusively to themselves and one was still joint and undivided. The court held as against them that the plots were the exclusive property of the then plaintiffs, the present appellants, and gave them a decree for possession and mesne profits. The decree has been executed. The plaintiffs respondents now come into court alleging that this decree was null and void because the court had no jurisdiction to entertain any such suit. This plea was based upon the provisions of section 32, clause *(b)* of the Tenancy

(1) (1889) I. L. R., 12 Mad., 228. (2) (1896) I. L. R., 21 Bom., 205.
(3) (1904) I. L. R., 26 All., 522.

1910

RAGHUNATH KALWAR v. BALA DIN KALWAR.

Act. It is clear that if the decree was made in a suit of such a nature that no court, Civil or Revenue, could entertain it, it would be null and void, and no decision therein could operate as *res judicata* between the parties. The only materials before the court are the judgement and the decree, and there is nothing on the face of them to show that the suit as brought was one in which the court had no jurisdiction. The partition may have been carried out prior to the first of January, 1902, or may even have been made with the sanction and approval of the zamindars. The burden therefore lay on the plaintiffs to show that that decree was passed without jurisdiction. They have failed to place any materials before the court in order to enable it to arrive at such a conclusion. Presumably the decree was one made with jurisdiction, and it was for the plaintiffs to show the opposite if they wished to treat it as a nullity. Partition of a holding made by the co-sharers thereof with the sanction of the landlord is not an illegal act, and if once made, could be maintained in a suit brought in a civil court for possession, in case of dispossession by either party; and it could not be said that a decree for possession in such a suit would be one made without jurisdiction. There being insufficient materials to enable the Court to hold that the former decree was passed in a suit, the entertainment of which by the court was forbidden by law, the court is bound to hold the former decision operates as *res judicata* between the parties. I therefore fully agree with the decision arrived at by Mr. Justice PIGGOTT. I accept the appeal, set aside the decree of the lower appellate court, and restore that of the court of first instance. The appellants will have their costs in this and in the lower appellate court."

The plaintiffs appealed.

Mr. *Ishaq Khan*, for the appellants.

Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J.—I am of opinion that the judgements of the learned Judges of this Court from which this appeal has been preferred are not open to objection. They have very fully dealt with the facts and the law, and it is unnecessary for me to add anything to what they have said, save and except that I desire to make an observation upon the judgement in *Achhey Lal* v. *Janki Prasad* (1), to which judgement I was a party. In that case it was held that "neither a Civil or Revenue Court can partition or divide an occupancy holding. Such partition or division can only be effected out of court with the consent of the landholder." If these words are interpreted as meaning that tenants cannot agree to divide a holding amongst themselves without the consent of the landholder, the judgement in my opinion goes too far. There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts

(1) (1906) I. L. R., 29 All., 66

1910

RAGHUNATH KALWAR v. BALA DIN KALWAR.

of the joint holding, provided that their so doing in no respect prejudices the rights of the landholder. Under such an agreement the tenants continue to be liable to the landlord for the entire rent, and the arrangement between them is not a partition which is enforceable as between them and the landlord. A partition to bind the landlord must be a partition with his consent. I therefore would dismiss this appeal with costs.

BANERJI, J.—I also am of opinion that there is no force in this appeal. The former suit was not one for partition of a holding or the distribution of the rent thereof, but was a suit for exclusive possession of certain plots of land which the then plaintiff claimed to be his separate property. The court which tried that suit had jurisdiction to entertain it and its judgement has the effect of *res judicata*. I agree in dismissing the appeal.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1910
August 1.

Before Mr. Justice Chamier.

EMPEROR *v.* RAM DAYAL.*

Act (Local) No. I *of* 1900, *(Municipalities Act), sections* 87 (5), 147, 152—*Municipal Board—Order for demolition of building—Order ultra vires—Revision—Jurisdiction.*

Held (1) that section 152 of the Municipalities Act, 1900, does not apply where the prohibition, notice or order issued by the Board is *ultra vires*, and (2) that section 87 (5) of the Act applies only to buildings of the kind referred to in the preceding sub-sections, that is, new buildings in respect of which notice should have been given under sub-section (1). *Alopi Din* v. *The Municipal Board of Allahabad* (1) and *Hyam* v. *The Calcutta Corporation* (2) referred to.

THE facts of this case are as follows:—

In 1865 certain shop-keepers at Etawah entered into an agreement with the Municipal Commissioners for the construction of a *ganj*, now known as Hume Ganj. The agreement provided that if the buildings were erected in contravention of the plans, the Municipal Commissioners would be entitled to interfere, and

* Criminal Revision No. 350 of 1910 from an order of H. Dupernex, Sessions Judge of Mainpuri, dated the 26th of February, 1910.

(1) Weekly Notes, 1907, p. 2. (2) (1906) 10 C. W. N., 1004.