1918
December, 11.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KALKA PRASAD (DECREE-HOLDER) *v.* RAJ RANI AND OTHERS (JUDGMENT-DEBTORS).*

Act (Local) No. II of 1903 *(Bundelkhand Alienation of Land Act), sections* 3, 4, 6 *and* 9—*Court bound to prevent an alienation which is not permitted by the Act from taking effect—Mortgage executed by a member of an agricultural tribe—"Ghosis."*

Where, at any stage of a suit, it is brought to the notice of a court that an alienation forming the subject of the suit is an alienation made in contravention of the provisions of the Bundelkhand Alienation of Land Act, 1903, the court is bound to take notice of the fact and to pass such orders as may lead to an ultimate compliance with the requirements of the Act. So, where a mortgage had been executed by a member of an agricultural tribe in a form not permitted by the Act, and a preliminary decree for sale had been passed thereon without opposition on the part of the mortgagor based on his status as a member of an agricultural tribe, it was *held* that the court to which application for a final decree was made was not merely justified in taking, but was bound to take, action under section 9 of the Act.

Held also that the Hindu *ghosis* of the Jalaun district are a sub-division of the Ahir caste and therefore members of an "agricultural tribe" within the meaning of the above-mentioned Act.

THE facts of this case were as follows :—

The appellant brought a suit for sale on a simple mortgage of the year 1909, and a preliminary decree for sale was passed on the 9th of October, 1915. On the 14th of April, 1916, the plaintiff decree-holder applied to the court for the passing of a final decree for sale. The court thereupon held that the defendants, being by caste Hindu *ghosis* and residents of the Jalaun district, were members of an "agricultural tribe" in respect of whom the provisions of the Bundelkhand Alienation of Land Act (United Provinces Act, II of 1903) were applicable, and that consequently no decree for sale of the property could be passed. No objection on this score had been taken by the defendants when the preliminary decree was passed. The court refused to make a final decree and took action under section 9(3) of the said Act. On appeal, the District Judge confirmed this decision. Hence this second appeal.

Dr. *Surendra Nath Sen*, for the appellant :—

The principal question in appeal is whether the *ghosis* of the Jalaun district are an "agricultural tribe" within the meaning

*Second Appeal No. 261 of 1917, from a decree of H. J. Bell, District Judge of Jhansi, dated the 18th of December, 1916, confirming a decree of Ganga Prasad Varma Munsif of Orai, dated the 19th of August, 1916.

of section 4 of the Bundelkhand Alienation of Land Act. In accordance with that section a notification was made in the *United Provinces Government Gazette* of the 27th of June, 1903, Part I, p. 490, in which there were eleven groups of "agricultural tribes" specifically mentioned by name, but the *ghosis* are not enumerated therein. It was urged in the court below that the *ghosis* were a sub-caste of *ahirs*, who were enumerated among the eleven groups. Reliance has been placed upon a judgment of Mr. Ferard, Commissioner of the division, dated the 20th of August, 1912, who observes that the *ghosis* have been treated as a sub-caste of *ahirs* by the Subordinate Revenue Courts, as also by the Board of Revenue; that they have been treated as such in the Census Reports of 1865, 1901 and 1911, as also in Crooke's Tribes and Castes of the North-Western Provinces and Oudh, Vol. I, pp. 53, 68, and in Sherring's Hindu Tribes and Castes, Vol. I, p. 334. Mr. Ferard's judgment is not admissible in evidence under any of the sections 40 to 43 of the Evidence Act. Nor does it constitute a "transaction" or a "fact" within the meaning of section 13 of the Evidence Act; *The Collector of Gorakhpur* v. *Palakdhari Singh* (1). If that judgment, and the opinions expressed in the Census Reports and in the books of Messrs. Crooke and Sherring, be regarded as opinions of experts, they are not relevant under any of the sections 45 to 51 of the Evidence Act. Further, assuming that they are relevant, it appears that the majority of the *ghosis* of the Jalaun district are Musalmans, and they follow the same occupation as the Hindu *ghosis*; so, there would seem to be no reason or principle for extending the protection of the Bundelkhand Act to Hindu *ghosis* to the exclusion of the Musalman *ghosis*. But that would be the effect of taking the "*ghosis*" to be a sub-caste of "*ahirs*." The fact that in the Government notification the *muraos* and *kachhis* have been separately mentioned, and the further fact that *Thakurs* and *Rajput Musalmans* have also been separately grouped, go to show that if the Government had intended, in pursuance of section 4 of the Act, to include the Hindu *ghosis* it would have done so by specifically naming them in the notification. Secondly, even assuming that

(1) (1889) I. L. R., 12 All., 1.

1918

KALKA PRASAD v. RAJ RANI.

the defendants are members of an agricultural tribe within the meaning of the Bundelkhand Alienation of Land Act, section 9, clause (3), of the Act is not applicable to the present case; for, a preliminary decree having been passed on the mortgage, the mortgage has merged in the decree; and the application for a final decree which has given rise to the present appeal cannot be said to be a suit on the mortgage. Similarly section 16, clause (1), of the Act is inapplicable, inasmuch as the preliminary decree is incapable of execution. Lastly, the defendants having failed to raise the plea that by reason of their belonging to an agricultural tribe the jurisdiction of the Civil Court was ousted, and a preliminary decree having been passed against them which was never appealed against, it was not open to the defendants to raise the plea now. The Civil Court could pass a preliminary decree against them only if they were not members of an agricultural tribe; and the court in passing such a decree must be deemed to have decided the question as to the status of the defendants by implication.

Babu *Jogindro Nath Mukerji*, for the respondents, during the course of the appellant's argument cited certain passages from Crooke's Tribes and Castes, Volume I, but was not called upon to reply.

PIGGOTT, J. :—The questions raised by this appeal concern the operation of certain provisions of an Act of the Local Legislature, the Bundelkhand Alienation of Land Act (No. II of 1903). The suit was on a mortgage of the year 1909, and the defendants were described in the plaint as being by caste *ghosis*, which they admittedly are. The mortgage was a simple mortgage providing for the sale of the mortgaged property in the event of non-payment; that is to say, it was admittedly not a form of a simple mortgage permitted to a member of an agricultural tribe in the Jalaun district by section 6, clause (*b*), of the Act above referred to. The defendants never pleaded that they were members of an agricultural tribe and the court proceeded to pass, on the 9th of October, 1915, a preliminary decree for sale of the mortgaged property. On the 14th of April, 1916, the plaintiff decree-holder applied to the court for the passing of a final decree for sale. The court recorded an order to the effect that, upon inquiries made

1918

KALKA PRASAD v. RAJ RANI.

Piggott, J.

since the passing of the preliminary decree, it had come to entertain doubts whether the defendants were not members of an agricultural tribe subject to the provisions of the Bundelkhand Alienation of Land Act. It went on to hold judicially that the defendants, being *ghosis* professing the Hindu religion, were members of an agricultural tribe as aforesaid and that consequently no decree for sale could be passed in respect of the land in suit. It held that, in spite of the fact that a preliminary decree for sale had already been passed, the only order in conformity with law which could be passed, by reason of the provisions of section 9, clause (3), of the Alienation of Land Act, was an order referring the case to the Collector with a view to his dealing with the matter in the manner provided by the Act. There was an appeal against this decision, but it has been affirmed by the District Judge. The second appeal before us raises a number of questions which require to be separately considered. The first and most essential question to be determined is whether the defendants are or are not members of an agricultural tribe within the meaning of Local Act No. II of 1903. By section 4 of that Act it is provided that the Local Government shall by notification in the Gazette determine what bodies of persons, in any district or sub-division of a district subject to the operation of the said Act, are to be deemed agricultural tribes for the purposes of the Act. The Local Government has published a notification dealing with the Jalaun district in which the parties to this suit reside. In that notification persons who are by caste *ahirs* are declared to be members of an agricultural tribe as aforesaid. The courts below have held that *ghosis* professing the Hindu religion are a sub-caste of *ahirs* and are therefore included in the notification in question. By consulting standard books of reference on this question the following facts are ascertainable. The word '*ghosi*,' strictly speaking, seems to connote an occupation rather than the name of a caste. The meaning of the word is "*shouter*," and it is applied to herdsmen with reference to the vociferations resorted to by them in the herding of their cattle on the pasture lands. The majority of persons calling themselves *ghosis* are converts to the Muhammadan religion or descendants of such converts,

1918

KALKA PRASAD v. RAJ RANI.

Piggott, J.

and there is reason to believe that they consist mainly, if not entirely, of the descendants of families once belonging to the *ahir* caste and still following their hereditary profession of herdsmen. A certain number of *ghosis*, however, still profess the Hindu religion. They do not appear to be very numerous in the Jalaun district and the question whether they are to be treated as a distinct caste of Hindu *ghosis*, or as a sub-division of the *ahir* caste, has had to be considered by the authorities on various occasions, apart from the operation of the Alienation of Land Act. We find that in the census returns prepared under the orders of the Local Government, both at the census of 1901 immediately before the passing of Local Act No. II of 1903, and also at the next census of the year 1911, the Hindu *ghosis* in Jalaun, as well as in other districts of Bundelkhand, were classified as a sub-caste of *ahirs*. It has been suggested in argument that a statement of this sort in a census publication is not relevant to the question now before the Court for trial. What we have to determine is the meaning of the word, '*ahir*' in a certain Government notification. We have to decide, with reference to this word as it appears in this notification, whether it does or does not include the Hindu *ghosis* of the Jalaun district. As bearing upon the meaning of the word in the notification it seems to be a relevant fact that in the returns prepared at two consecutive census enumerations of the population, under the orders of the same Government, the Hindu *ghosis* were enumerated and classified as a sub-caste of *ahirs*. It seems a reasonable argument that when the Local Government used the word *ahirs* in this notification it intended to include all sub-castes, or sub-divisions of the *ahir* caste, referred to in the recent census enumeration prepared under its own orders. That the same classification was maintained at the census of 1911 seems to be also a relevant fact, as showing that there has been no change in what may be called the official attitude on the question. It is further to be noticed that the question which we have now before us has had to be considered by another authority competent to pronounce a judicial opinion on the point, namely by the Board of Revenue of these provinces. We are entitled to take judicial notice of the constitution of the Government of these

provinces, including such facts as the judicial and executive powers exercised by the Board of Revenue. The Bundelkhand Alienation of Land Act was passed in close connection with a kindred statute, namely, the Bundelkhand Encumbered Estates Act, which is Local Act No. I of 1903. The administration of this Act was left in a very peculiar manner to the Board of Revenue; and we are fairly entitled to conclude that in such a matter as the preparation of the list of agricultural tribes the opinion of the Local Government would be based largely upon advice received from the Board of Revenue. From every point of view, therefore, it seems to be a relevant fact in the case that the Board of Revenue, having had to consider the very question which is now before us, has come to the conclusion that the Hindu *ghosis* were intended to be included under the designation of *ahirs*, as a sub-caste of the *ahir* caste, in the notification published under section 4 of Alienation of Land Act (No. II of 1903). On these grounds, therefore, I would hold that the decision of the courts below was right and that these defendants are in fact members of an agricultural tribe, namely the *ghosi* sub-division of the *ahir* caste, in the Jalaun district.

The next point taken is that the provisions of section 6 of Local Act No. II of 1903 do not affect this case, or in the alternative that the contention upon which the case has been decided by the courts below could not be raised after the passing of the preliminary decree for sale. The policy of the Alienation of Land Act in Bundelkhand was to afford statutory protection to certain classes of land-holders as regards the alienation of their proprietary rights in land, while at the same time restricting their right to make such alienations. Section 6 deals with the question of the mortgages which a landed proprietor who is a member of an agricultural tribe may lawfully contract. He has an unlimited power of mortgage in favour of members of the same agricultural tribe as himself residing within the same district; but otherwise his right of dealing with his own property by way of mortgage is subject to severe restrictions. We are concerned in this case with clause (*b*) of the section. This provides, in effect, that a member of an agricultural tribe subject to the provisions of this Act cannot lawfully enter into a contract of mortgage by which

1918

KALKA PRASAD v. RAJ RANI.

Piggott, J.

he authorizes the mortgagee, in the event of non-payment, to bring to sale the mortgaged property. The utmost he can do is to covenant that, in the event of his failure to pay the stipulated sum on due date, the mortgagee shall be entitled to obtain through the intervention of the Collector possession over, and enjoyment of, the mortgaged property for such term of years as the Collector shall consider reasonable under the circumstances. This is on the one hand a restriction on the proprietary rights of the intending mortgagor and would operate no doubt as a restriction on his credit. On the other hand, it is a protection of those proprietary rights by preventing their being brought to sale in execution of a decree passed upon a simple mortgage in the ordinary form. This object is further carried out by the provisions of sections 9 and 16 of the same Act. Under clause (3) of section 9 it is provided that in a suit like the present, if the proprietor who is a member of an agricultural tribe has, in contravention of the provisions of section 6, entered into a contract of simple mortgage in the ordinary form, that is to say, providing for sale of the mortgaged property in default of payment, the court shall not pass a decree for sale, but shall on the contrary give the mortgagee the only relief to which he would have been entitled if the mortgagor had not broken the the law. It must refer the case to the Collector in order that he may deal with it by giving the mortgagee possession over the mortgaged property for such term of years as he considers just. Under section 16 the Legislature has further provided a general prohibition against the bringing to sale of land belonging to a member of an agricultural tribe in execution of any decree or order of any Civil Court made after the commencement of the Act. With reference to this latter section it has been contended before us that the learned District Judge was not justified in referring to it, inasmuch as the question of the actual sale of the mortgaged property in this case could only arise upon an application for execution of a decree absolute for sale. It seems to me that the learned District Judge was entitled to refer to the provisions of section 16 as enforcing the propriety of the order passed by the first court and upheld by him on appeal. A reference to section 16 shows that, even if the trial court in this

case had gone on to pass a decree absolute for sale, that decree would have been unenforceable in execution, once the court was satisfied that the judgment-debtor was a member of an agricultural tribe. This is a good reason for not passing such a decree and for giving the plaintiff mortgagee in lieu thereof the best relief obtainable by him under the Statute. The contention that the parties to the litigation are bound by the terms of the preliminary decree and that the question of the position of the defendants as members of an agricultural tribe was not one which should have been raised after the passing of the preliminary decree, does not impress me, because I look upon the entire provisions of the Bundelkhand Alienation of Land Act as mandatory upon the Civil Courts of the district. If a proprietor who was a member of an agricultural tribe were permitted to evade those provisions, by not claiming the benefit of his status as a member of such tribe, it would make those provisions of no effect in the case of any proprietor who elected to evade them. I am satisfied that this was not the intention of the Statute and that this is not the effect of its provisions. Both in section 9, clause (3), and in section 16, clause (1), the word used with reference to the proceedings of the Civil Court is "shall," and the provisions in question in my opinion are binding upon the Civil Courts independently of any pleading raised by the defendants in a particular suit. For these reasons, therefore, I am of opinion that the decision of both the courts below in this case was correct, and I would dismiss this appeal with costs.

WALSH, J.—I entirely agree. As two matters have been strenuously argued, I will add a word or two about them. In the first place, in my opinion a decision of the Board of Revenue on a question of this sort, although not binding upon the parties or upon this Court, is a matter which any Civil Court is bound to examine very closely. It is a matter essentially for the decision of a Revenue Court, and all revenue officials are of course bound in deciding the question when it comes before them, by any decision passed by the Board of Revenue. In my opinion any Civil Court, although not bound, ought to follow such a decision of the Board in a matter peculiarly within its knowledge and jurisdiction, unless there were some over-riding reason to the contrary.

1918

KALKA PRASAD v. RAJ RANI.

There seem to be several legal grounds on which that court's order was justified. If the decision of the Board of Revenue were reported, it is obvious that a Civil Judge deciding the case would have looked at it. The fact that it is unreported makes no difference. I should have thought that in any event under section 49 of the Evidence Act, the Board's decision is a relevant fact as an opinion of an expert upon the meaning of a term applicable to the scheduled districts. The second point which Dr. *Sen* argued was that the defendant himself had let this question go by default at the original hearing of the suit. To my mind it is not a question of pleading, or of the rights of the parties strictly so-called. It is a question of jurisdiction. Once the circumstances provided by the Act are established in fact, the jurisdiction of the Civil Court is ousted, and a court which did not take notice of the provisions of the Act whether the parties pleaded them or not, would be acting outside its jurisdiction.

BY THE COURT.—We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR *v.* SAKHAWAT ALI*

1918 *December*, 18.

Criminal Procedure Code, sections 145, 435 *and* 439—*Government of India Act, 1915, section* 107—*Revision*—*Powers of High Court.*

Section 107 of the Government of India Act, 1915, does not give to a High Court the power to interfere in revision, despite the provisions of section 435 of the Code of Criminal Procedure, with orders passed under Chapter XII of the Code. *Ananda Chandra Bhattacharjee* v. *Carr Stephen* (1) not followed. *Jhingai Singh* v. *Ram Partap* (2) *Sundar Nath* v. *Barana Nath* (3) and *Syeda Khatun* v. *Lal Singh* (4) referred to. *Girdhari Singh* v. *Hurdeo Narain Singh* (5) distinguished.

THE facts of this case were as follows :—

On the report of a Circle Inspector of police stating that he apprehended a breach of the peace on account of the strained

* Criminal Revision No. 757 of 1919, from an order of Mumtaz-ullah Khan, Magistrate, First class, of Basti, dated the 7th of September, 1918.

(1) (1891) I. L. R., 19 Calc., 127. (3) (1918) I. L. R., 40 All., 364.
(2) (1903) I. L. R., 31 All., 150. (4) (1914) I. L. R., 36 All., 233.
(5) (1876) L. R., 3 I. A., 230.