

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUBARAK FATIMA (PLAINTIFF) v. MUHAMMAD QULI KHAN
(DEFENDANT).*

1921
May, 23.

Act (Local) No. 11 of 1901 (Agra Tenancy Act), section 201—Suit for profits—Previous civil suit for declaration of title—Civil Court decision not relating to whole of the rights of the parties—Amendment of entry in the revenue papers after institution of suit for profits.

In a suit for profits in a Revenue Court respecting an interest in a share amounting in all to 7 biswas, it appeared that the plaintiff had been during the period for which profits were claimed, and was at the date of the institution of the suit, recorded as having an interest in the whole 7 biswas. On the other hand, the Civil Court had previously decided that the plaintiff owned a one-sixth interest in half the 7 biswas, though it came to no decision in respect of her interest in the remaining half, which was *waqf* property. During the pendency of the suit for profits the entries in the revenue papers were amended by the revenue authorities and the plaintiff recorded as having an interest in half of the 7 biswas only.

Held that the alteration of the revenue records pending the plaintiff's suit for profits could not affect the plaintiff's rights, as they stood when the suit was filed, prejudicially. *Harju Lal v. Mad Singh* (1) distinguished. *Lachman Prasad v. Shitabo Kunwar* (2) followed.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are fully stated in the judgment under appeal, which was as follows :—

"The facts are as follows :—Musammat Mubarak Fatima was the recorded proprietor of a share of 3 biswas, 12 biswansis, 11 kachwansis, 9 tanwansis and 10 anwansis in mahal Sufaid, Mundia Jagir village, Bareilly district. Muhammad Quli Khan, otherwise known as Muhammad Hasan Khan, was also recorded co-sharer in that mahal. The lady applied to the revenue authorities for partition of her share under the provisions of Chapter VII, Local Act, III of 1901. Muhammad Quli objected to her proprietary title. He was directed under the provisions of section 111 of the Act to institute within three months a suit in the Civil Court for the determination of the question. He instituted a suit accordingly. This suit was dismissed by the Subordinate Judge, Bareilly, on the 10th of August, 1915. Muhammad Quli filed an appeal in the court of the District Judge, Bareilly. The District Judge decided that the lady was entitled only to "possession of a one-sixth share by partition. The remaining two-thirds (one-sixth was found to be the property of Muhammad Quli) must continue in the joint names of Amir Hasan Khan (i.e., Muhammad Quli) and Mubarak Fatima." To that extent Muhammad Quli's claim was decreed. The decision of the District Judge is dated the 26th of January, 1916. It has become final.

* Appeal No. 75 of 1919 under section 10 of the Letters Patent.

(1) (1915) 29 Indian Cases, 509. (2) (1920) I. L. R., 43 All.,

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"No correction of the khawat had taken place up till the end of July, 1916. At the end of July, 1916, Musammat Mubarak Fatima instituted a suit for profits under the provisions of section 164, Local Act, II of 1901, in the court of an Assistant Collector against Muhammad Quli on the basis of the old entry that was still in existence recording her proprietor of a biswa 3-12-11-9-10 share. The partition proceedings were still in progress. On the 11th of January, 1917, the partition court on the authority of the decision of the 26th of January, 1916, reduced the lady's share to biswa $\frac{3-12-11-9-10}{6}$. The hearing of the profits

case dragged on. It was decided on the 5th of May, 1917. The Assistant Collector took into account the fact that under the decision of the 26th of January, 1916, the lady had title only to one-sixth of her share as previously recorded, and awarded her profits on that one-sixth share alone. She appealed to the District Judge on this and other points. The District Judge decided her appeal on the 19th of July, 1917. He decided in her favour (a) that the defendant was not entitled to charge lambardar's dues as the share was revenue-free (a minor point) and (b) that she must be allowed profits on her share as recorded, i.e., on the whole biswa 3-12-11-9-10, and could not be awarded less, until the khawat was corrected. In support of his decision on the latter point he relied on the Full Bench ruling in *Durja Prasad v. Hazari Singh* (I. L. R., 33 All., 799).

"Muhammad Quli filed this second appeal on the 8th of August, 1917. His learned counsel in the course of argument put in a certified copy to show that the khawat was corrected, and the recorded share of the lady was altered to biswa $\frac{3-12-11-9-10}{6}$ on the 20th of April, 1918. I am usually averse to admitting additional evidence in appeal, but the circumstances here are exceptional. It will save further complications to accept the fact that the lady's share has been recorded as biswa $\frac{3-12-11-9-10}{6}$ since the 20th of April, 1918.

"I am told that she is making attempts to get the entry altered once more. I am not concerned with any such attempt, as I have no judicial knowledge of any.

"The case thus stands. The lady's share, when she instituted the suit for profits, was recorded as biswa 3-12-11-9-10. It is now recorded as one-sixth of that. Her cause of action was for one-sixth of the profits which the District Judge has awarded her. I do not agree with the learned District Judge's application of the principles of I.L.R., 33 All., 799. That decision lays down that a Rent Court in a profit suit is to accept the entry recorded in the papers, and not to go into questions of title, but to this is added a proviso. The recorded entry usually settles the matter. There may be occasions—such as in the present case—when the recorded entry does not indicate the title as determined by a competent court. In such case the Rent Court will decide according to the title as determined by the competent court and not according to the recorded entry. The main principle laid down in the Full Bench ruling in question is that Rent Courts are not to decide questions of title in such cases, but to award profits on the title as determined by

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competent Civil Courts, such title usually being indicated by the recorded entry. But when there has been no time to alter the entry before the institution of the profits suit, and the title is other than the title recorded on the determination of a competent Civil Court, the Rent Court will award the profits on the title, not on the entry.

"This is how I read the law on the subject in view of the remarks of RICHARDS, C. J., at pages 806, 807 (I.L.R., 33 All.): "Furthermore, it must be remembered . . . amend their records." I consider that the same view was taken in S.A. No. 342 of 1915, Hargu Lal and others v. Med Singh and others, decided on the 18th of May, 1915, by BANERJI and RAJIB, JJ.

"The share of Mubarak Fatima as determined up to the present by a competent Civil Court, and as at present recorded is Biswa $\frac{3-12-11-9-10}{6}$, she can be awarded profits on that share only.

"I restore the Assistant Collector's decision on that point. On the minor point whether lambardar's dues can be claimed by the appellant, I agree with the learned District Judge. Lambardar's dues are payable to the lambardar as his fee for his trouble in collecting the land revenue. In this mahal there is no land revenue to collect, the mahal being revenue-free. Lambardar's dues cannot accordingly be charged.

"The decree will be modified accordingly.

"The appellant having succeeded on the major point the respondent will pay her own costs in this Court and those of the appellant. She will pay her own costs and those of the appellant in the court of the District Judge. The costs in the court of the Assistant Collector will be as directed by his order of the 5th of May, 1917."

The plaintiff appealed.

On this appeal—

Munshi Shiva Prasad Sinha, for the appellant.

Mr. S. A. Haidar, for the respondent.

BANERJI, J.:—The suit which has given rise to this appeal was brought by the plaintiff appellant in the Revenue Court for her recorded share of profits for the years 1320, 1321 and 1322 Faslî. Property comprising 7 biswas and odd belonged to one Rahim-un-nissa Bibi. She had three sons, two of whom predeceased her. The plaintiff is the daughter of one of the predeceased sons. The defendant is the son of a third son who survived her. In the revenue papers the name of the plaintiff was entered in respect of a 3 biswas and odd share, i.e., one half of the 7 biswas and odd which belonged to Rahim-un-nissa. The plaintiff applied for partition of her recorded share in the Revenue Court. Her application was resisted by the defendant, who alleged that she owned no share in the property, her father

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having predeceased Rahim-un-nissa. He was referred by the Revenue Court to the Civil Court under the provisions of section 111 of the Land Revenue Act. Thereupon he brought a suit in the Civil Court for a declaration that the present plaintiff had no interest in the property in question. This suit was tried by the Civil Court, and it was finally decided that what Rahim-un-nissa had done was this. She made a *waqf* of one half of the property and appointed the plaintiff and the defendant trustees of this *waqf*; as regards the other half the plaintiff was to get one-third, the defendant one-third and the sons of the second predeceased son were to get a third share; but the names of the plaintiff and the defendant only were to be recorded in the revenue papers in regard to this portion of the property, namely, one half of the 7 biswas and odd. The plaintiff's name thus was recorded in regard to 3 biswas and odd, that is to say, one half of the 3 biswas and odd which became *waqf* property and one half of the remaining 3 biswas and odd, total 3 biswas and odd. It was in respect of this 3 biswas and odd that the plaintiff claimed profits. During the years in question her name was recorded in regard to the 3 biswas and odd, and at the time when she instituted her suit her name was similarly recorded. The plaint clearly shows that she claimed profits for the whole of 3 biswas and odd, and this, as we have said above, includes the *waqf* property as well as the remainder of the property, in regard to both of which her name was recorded in respect of one-half. The court of first instance granted a decree to her for a sixth share. This was clearly erroneous, because in the civil suit, to which we have referred, what the court held was that in her own right she was entitled to one-sixth of the 7 biswas and odd, that is to say, to one-third of 3 biswas and odd. But it came to no decision and it passed no decree in respect of the $3\frac{1}{2}$ biswas and odd which was *waqf* property, but it stated in its judgment that she was to have a half share in the *waqf* as one of the two trustees of the *waqf*. The lower appellate court was of opinion that as the name of the plaintiff was during the years in question and at the time of the institution of the suit recorded in respect of 3 biswas and odd, she was entitled to a decree for the whole of her claim

and for this view it relied upon the decision of the Full Bench of the whole court in the case of *Durga Prasad v. Hazari Singh* (1). A second appeal was preferred to this Court and the learned Judge of this Court who heard the appeal reversed the decree of the lower appellate court and restored that of the court of first instance. The learned Judge relied on the fact that since the institution of the suit the Revenue Court had caused the entry of the name of the plaintiff to be amended and had entered her name in regard to one-sixth of 3 biswas odd. It is manifest, having regard to the decision of the Civil Court, to which we have referred above, that this entry was clearly wrong. What the Civil Court held was that the plaintiff was entitled in her own right to one-sixth of the whole of the 7 biswas and odd, and not to one-sixth of 3 biswas and odd, which was one-half of the 7 biswas and odd. The Revenue Court in entering her name in regard to one-sixth of 3 biswas and odd was thus clearly in error. But we have not to deal with that question in the present case, inasmuch as at the time when the suit was instituted and during the years for which profits were claimed the name of the plaintiff stood recorded in regard to 3 biswas and odd. Her name was rightly recorded in regard to the whole of that share because she was trustee of one-half and she was to remain recorded according to the will of Rahim-un-nissa in respect of the remaining half of Rahim-un-nissa's share. The fact that the Revenue Court had during the pendency of the suit made alterations in the papers could not affect the question which the court had to decide in the suit brought by the plaintiff. This was the view of the learned Judges of this Court who decided the case of *Lichman Prasad v. Shitabo Kunwar* (2). Reliance was placed on behalf of the respondents on the case of *Hargu Lal v. Med Singh* (3). That case is distinguishable from the present. In that case, before the institution of the suit for profits the Civil Court had already decided the question of the title of the parties and had held that the plaintiff had no title. Therefore, in accordance with the ruling of the Full Bench in *Bhawani Singh v. Dilawar Khan* (4),

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(2) (1920) I. L. R., 43 All., 177. (4) (1909) I. L. R., 31 All., 253.

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the provisions of section 201 of the Agra Tenancy Act did not apply to the case. In the present suit the decision of the Civil Court did not relate to the whole of the rights of the parties. It only decided the question relating to her personal share in the property under the will of Rahim-un-nissa Bibi which she had made orally before her death and which was in accordance with the written will deposited by her with the Registrar. The question of title had not been completely decided before the institution of the present suit, and therefore in the present suit the plaintiff was entitled to obtain profits in respect of the share which stood recorded in her name at the date of the institution of the suit and during the years for which profits were claimed. In this view the decision of the lower appellate court was correct and it must be restored.

MEARS, C. J.:—On the main question I entirely agree, and also on the subsidiary question that the order of the Revenue Court of the 11th of January, 1917, was incorrect. This can be proved to demonstration by taking figures; approximately, the net income derived from the 7 biswas odd, which formed the property of Musammat Rahim-un-nissa, comes to Rs. 960: on a proper division of that Rs. 960 the *waqf* would get Rs. 480, the plaintiff would get Rs. 160, the defendant would get Rs. 160, and Abid Husain and Hamid Hasan, the two sons of Fida Husain, would get Rs. 80 each. The addition of all those sums exhausts the Rs. 960. So therefore it will be seen that the share of the plaintiff in this matter was 7 biswas odd over 6 and not 3 biswas odd over 6, and that the result of the decision of the Revenue Court is that they have cut down the lady's share by one-half in complete violation of the terms of the oral will and the decision of the Civil Court.

This series of litigation between the parties is lamentable and we trust that they will agree jointly to present a petition to the Revenue Court so that they may get fair and just entries made in respect of this property so as to prevent future litigation. If the defendant desires to carry out the terms of the oral will, nothing is simpler than that he and the plaintiff should meet at proper intervals and that he should then give an account of the collections. One-half of those collections

should be set aside for the trust, one-third of the remainder appropriated to himself, one-third of the remainder handed to Mubarak Fatima and the final one-third made over to the two sons of Fida Husain. Between themselves they should agree as to the way in which the one-third allocated to the trust should be dealt with.

By THE COURT:—We allow the appeal, set aside the decree of this Court and restore that of the lower appellate court with costs of both the hearings in this Court.

Appeal decreed.

*Before Sir Grimwood Mears, Knight, Chief Justice, and Justice
Sir Pramada Charan Banerji.*

RAM SARUP AND ANOTHER (PLAINTIFFS) v. BHARAT SINGH AND OTHERS
(DEFENDANTS).*

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May, 31.

Hindu law—Joint Hindu family—Mortgages executed by father—"Antecedent debt"—Civil Procedure Code, 1908, order XXI, rule 66—Sale proclamation not mentioning existence of decree-holder's mortgage—Whether mortgage enforceable against auction purchaser—Estoppel.

The father of a joint Hindu family first borrowed Rs. 500 on a promissory note. It was stated in the note that the money was borrowed in order that it might form part of a mortgage thereafter to be executed. He then, having borrowed some more money from the mortgagee, executed a mortgage of the joint family property for Rs. 1,000. There was no satisfactory evidence that any of the money purporting to be secured by this mortgage was borrowed for family necessities or that any part of the debt was incurred apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. Subsequently, the mortgagor borrowed more money on promissory notes and executed a second mortgage for Rs. 5,000 consolidating all the previous debts.

Held, on suit by the mortgagee for sale on the basis of the second mortgage, that it was not proved that any of the money purporting to be secured by this mortgage was an "antecedent debt" within the meaning of the ruling in *Sahu Ram Chandra v. Bhup Singh* (1).

Held also, that where the plaintiffs, mortgagees, who also held a simple money decree against the mortgagors, applied for the sale of certain property of the judgment-debtor, expressly mentioning that it was subject to their mortgage, but, for some reason unconnected with any action or statement of the plaintiffs, the mortgage was not notified in the sale proclamation, the plaintiffs were not thereby precluded from subsequently enforcing their mortgage against the auction purchasers.

* First Appeal No. 393 of 1918 from a decree of Rama Das, Subordinate Judge of Farrukhabad, dated the 30th of August, 1918.