

between the parties, and that the controversy had arisen because the defendant's then assertion of right involved an interference with that which the plaintiff now claims.

In other words, part of the cause of action which he then had was the interference by the defendant both with the plaintiff's possession of the trees and with the access to them.

He did not then include this claim in his suit; he did not obtain the leave of the Court to omit it: and he is therefore barred by section 43 of the Civil Procedure Code.

The appeal is therefore dismissed with costs.

*Appeal dismissed.*

A. F. M. A. R.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*

RIPOO MURDAN SINGH AND OTHERS (PLAINTIFFS) *v.* RAM REKHA LAL AND OTHERS (DEFENDANTS).\*

1892  
July 26.

*Public Demands Recovery Act (Bengal Act VII of 1880), s. 10—Act XI of 1859, ss. 5, 6, 7, 17—Sale, Notification of—Attachment under Certificate Procedure.*

Where a notice under section 10 of Bengal Act VII of 1880 was served, and a certificate issued by the Collector for default of payment of road cess of a revenue-paying estate, and, the Government revenue being in arrears, no notification under section 5 of Act XI of 1859 was issued, and the estate was subsequently sold for arrears of Government revenue, *held*, that the sale was valid, and sections 5 and 17 of Act XI of 1859 did not apply, the certificate issued by the Collector being not an attachment as contemplated by section 5.

*Ram Narain Koer v. Mahabir Pershad Singh* (1) referred to.

THIS suit was brought to set aside a sale of mauza Deokund, held for arrears of Government revenue, at which the mauza was purchased by the defendant No. 1.

The plaintiffs and the defendants Nos. 2 to 14 were the joint-owners of mauza Deokund, in respect of a portion of which a notice under section 10 of Bengal Act VII of 1880 was served,

\* Appeal from Original Decree No. 35 of 1891 against the decree of Moulvi Syed Fakhruddin Hossain, Subordinate Judge of Gaya, dated the 22nd of September 1890.

1892  
 RAJOO  
 MURDAN  
 SINGH  
 v.  
 RAM REKHA  
 LAL.

and a certificate issued by the Collector for arrears of road cess for the month of March 1887. The Government revenue for the instalment of September 1887 being in arrears, the mauza was sold by auction on the 8th January 1888.

The plaintiffs contended that the sale was held in an irregular manner, that the notifications under sections 6 and 7 of Act XI of 1859 were not properly made, and that the mauza sold being at the time of the sale under attachment for arrears of road cess, and such an attachment being in the nature of an attachment of a Civil Court, a notification under section 5 of Act XI of 1859 was necessary. They also contended that the sale could not be held, having regard to the provisions of section 17 of Act XI of 1859.

The defendant No. 2 contended that no notifications under Act XI of 1859 were necessary, that the property was not exempt under section 17 of Act XI of 1859, and that the sale was good in law.

The Subordinate Judge dismissed the suit, and on the fourth issue, viz., whether any certificate under Bengal Act VII of 1880 was served on any share of mauza Deekund, and if so, whether it had the effect of an attachment by a "judicial authority" within the meaning of clause 3 of section 5 of Act XI of 1859, observed as follows:—

"There is another objection of the plaintiffs that owing to the arrears of road cess, a portion of the village was attached by order of the Collector under section 10 of Act VII of 1880, and a certificate with a notice was issued, and this attachment was made by judicial authority, so the sale of the property in suit was illegal and against the provisions of sections 5 and 17 of Act XI of 1859. I see there is no evidence at all on the record to show that for the demand of road cess any portion of the village was attached by order of the Collector, neither notice nor certificate of such attachment have been tendered on behalf of the plaintiffs, nor has it been proved even by oral evidence that a share or portion of the mauza was really attached as alleged by the plaintiffs. Supposing there be any attachment under section 10 of Bengal Act VII of 1880, then the question is whether such an attachment by order of the Collector was by a judicial authority, or was it an executive proceeding. Mr. Grimley's notes show that the certificate and notice under section 10 of Bengal Act VII of 1880 are not judicial but executive—*vide Ram Narain Koer v. Mahabir Pershad Singh* (1). Under this view of the case I think that the issue of a

(1) I. L. R., 13 Cal., 208.

certificate against the proprietor of an estate cannot exempt the estate from sale, and I decide this issue against the plaintiffs."

The plaintiffs appealed to the High Court.

Mr. C. Gregory and Baboo Mohabir Sahai for the appellants.

Baboo Durga Mohan Das and Moulvi Mahomed Yusuff for the respondents.

The arguments appear sufficiently in the judgment of the High Court (PIGOR and RAMPINI, JJ.), which was as follows :—

We think the appeal must be dismissed. The only questions raised before us were those arising with respect to the fourth issue. Now, no notification such as is required under section 5, Act XI of 1859, was issued in this case—at least we understand that that is the allegation upon which the appeal is brought. No notification under that section having been made, the appellant contends that the sale was bad. We agree with the lower Court in thinking that that contention cannot prevail. It is argued that inasmuch as before the date of the sale, a notice under section 10, Bengal Act VII of 1880, had been served, and a certificate issued by the Collector in pursuance of that section, that amounted to an attachment such as is contemplated by the third heading at the close of section 5, Act XI of 1859. The ground on which that is contended is that it is enacted by section 10, Bengal Act VII of 1880, that the service of such notice and certificate shall have the same effect, or, to use the words of the section, "shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of section 274 of the Code of Civil Procedure." On the face of the words of the section, it is not an attachment, but it has the effect of an attachment, although an attachment had taken place for certain purposes. It has been held with regard to that section in *Ram Narain Koer v. Mahabir Pershad Singh* (1), that a proceeding under section 10, Bengal Act VII of 1880, is not a judicial attachment, but the 7th heading at the end of section 7 requires as an element of the description of the property which is intended to be sold without a notification that it should have been

1892

RIPOO  
MURDAN  
SINGH

2.  
RAM REKHA  
LAL.

1892  
 RIPOO  
 MUNDAN  
 SINGH  
 " "  
 RAM REKHA  
 LAL.

in the words of the section "under the provisions of any law for the time being in force been taken under the charge of or managed by the Court of Wards or the Revenue authorities." This is not the case here, nor is it contended that the property was managed by the Collector or the Court of Wards. Therefore, section 5 does not apply. Then, it is contended that under section 17 the property was exempt from sale completely for the same reason or for a similar reason, that the proceedings under section 10, Bengal Act VII of 1880, caused the estate to be held under attachment by the Revenue authorities. Now, the case of *Ram Narain Koer v. Mahabir Pershad Singh* (1) negatives that view. The Court says :—"It is very clear," speaking of this section, "that what that section points to is not an attachment in the sense in which the term is used in the Code of Civil Procedure, but an attachment such as is provided for in the Criminal Procedure Code—such an attachment as takes the property out of the possession of the ordinary owner, and places it in the possession of the Collector," and such, we think, for instance, as a proceeding under section 99 of the Road Cess Act, under which the property is taken out of the possession of the owner so far as the perception of rents and profits is concerned, and placed in the hands of the Collector. Neither of these sections applying, the objections to the validity of the sale must fail, and the appeal must be dismissed.

*Appeal dismissed.*

A. F. M. A. R.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*

1892  
 July 13.

KHALILUL RAHMAN (PLAINTIFF) v. GOBIND PERSHAD  
 AND OTHERS (DEFENDANTS).\*

*Hindu Law—Mitakshara, Family—Ancestral property, alienation of—Suit by mortgagee against father and minor son for sale of ancestral property—Antecedent debt—Interest, rate of—Penalty—Form of decree.*

In the case of a Mitakshara family consisting of a father and minor sons, where the father hypothecates ancestral property, there being no

\* Appeal from Original Decree, No. 205 of 1890, against the decree of Babu Karuna Das Bose, Subordinate Judge of Patna, dated the 23rd of May 1890.