

APPELLATE CIVIL

Before Jwala Prasad and Ross, JJ.

PITAMBER CHOUDHURY.

v.

SHEIKH RAHMAT ALI. *

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Cess Act, 1880 (Ben. Act IX of 1880), sections 5, 41, 47, and 64A—Sale in execution of decree for cess, what passes under—onus—rent-free land, when is liable for payment of cess—contract to pay cess, legality of—*res judicata*, whether decree for cess operates as—*Chota Nagpur Landlords and Tenants Procedure Act, 1879 (Ben. Act 1 of 1879), section 123.*

Section 5 of the Cess Act, 1880, does not create any charge on property which is declared to be liable to the payment of cess.

Ahsanulla v. Manjura Banco (1), and *Shekunt Husain v. Sasi Kar* (2), followed.

Even if section 47 of the Act applies to rent-free lands cess is not "payable under the provisions of the Act", within the meaning of that section, in respect of such lands, until the requirements of Chapter IV have been complied with.

Ashamullah Khan Bahadur v. Trilochan Bagehi (3), *Bhagwati Kulari Chowdhurani v. Chutterput Singh* (4), and *Rash Behari Mukerjee v. Pitambori Chowdhurani* (5), followed.

Unless the provision of Chapter IV have been complied with the special provisions relating to the realisation of sums payable under the Act, as provided in section 47, do not apply, and all that passes at a sale held in execution of a decree for cess is the right, title and interest of the judgment-debtor.

Malkarjun v. Narhari (6) and *Moti Lal v. Karrabuddin* (7), referred to.

A mere finding that a tenure is liable to pay cess does not by itself mean that the cess is a first charge upon the property so as to pass it free of encumbrances at a sale held in execution of a decree for cess.

A decree for cess does not operate as *res judicata*. Therefore a person against whom a decree for cess has been obtained is not

*Appeal from Appellate Decree No. 54 of 1920, from a decision of C. H. Reid, Esq., Judicial Commissioner of Chota Nagpur, dated the 27th November, 1919, confirming a decision of Babu Suresh Chandar Sen, Subordinate Judge of Ranchi, dated the 10th June, 1918.

(1) (1908) I. L. R. 30 Cal. 778. (4) (1898) I. L. R. 25 Cal. 725.

(2) (1892) I. L. R. 19 Cal. 783. (5) (1888) I. L. R. 15 Cal. 237.

(3) (1886) I. L. R. 13 Cal. 197. (6) (1901) I. L. R. 25 B. 337 (P. C.)

(7) (1896) I. L. R. 25 Cal. 179 (P. O.).

debarred, in a subsequent suit for cess, from pleading that no cess is payable under the Act.

A contract by a tenant to pay to his landlord a larger sum for cess than he is liable for under section 41 is not illegal.

Ashutosh Dhar v. Amir Mollah (1), followed.

A person who has purchased property in execution of a decree for cess levied under the Cess Act, 1880, and who sues for a declaration that he has purchased the property free from encumbrance, on the ground that the cess was a first charge on the property, must prove that the property was liable for the payment of cess under the Act and that, therefore, the property passed free from incumbrance under section 47 or section 64A.

The facts of the case material to this report were as follows :—

In village Darida, which belonged to Ramnarain Singh, *Manki* of Tarai, 42 *kats* of *don* land were held by the latter's uncle, Bharat Singh, as a rent-free *khorphosh* grant. The rule of lineal primogeniture governed succession in the family whereby the eldest member succeeded to the estate and the junior members were allowed rent-free grants for maintenance. Such a grant was transferable subject to the grantor's right to resume the subject-matter of the grant, free from encumbrances, on failure of the male heirs to the original grantee.

On Ramnarain's death in 1898 there was a dispute between his widow and Ganganarain as to the right of succession. Rajab Ali and Sher Ali, two cousins of Ramnarain, advanced money to Ganganarain and his brother Ramgopal for the purpose of the litigation. The suit was decided in favour of Ganganarain in 1905 and he therefore succeeded Ramnarain. He had two brothers, Ramgopal and Harakh. Sometime before 1896, during his occupancy of the rent-free tenure, Bharat had executed an usufructuary mortgage of 12 *kats* out of the 42 *kats* in favour of Regree Babu. In 1896 he had executed an usufructuary mortgage of the remaining 30 *kats* to Pitamber Chowdhury, defendant No. 1, in consideration of a sum of Rs. 1,000. The term of the first mortgage expired sometime previously and the term of the second mortgage expired in 1923 (*i. e.*, 1906).

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In 1897 the proprietor, Ramnarain, had executed an usufructuary mortgage of the whole village in favour of Rajab Ali and Sher Ali for a term which expired in 1912, and in the same year the mortgagees obtained a decree for cess against Bharat in the revenue court.

In 1899 Ganganarain and Ramgopal, the two elder sons of Bharat, executed a simple mortgage of the 42 *kats* in favour of Pitamber Chowdhury, defendant No. 1, in consideration of a sum of Rs. 700. In 1901, Rajab Ali and Sher Ali executed their decree for cess against Ganganarain and the latter's right, title, and interest in the property was sold in execution of the decree in November, 1901, under the proviso to section 124 of the Chota Nagpur Landlords' and Tenants' Procedure Act, 1879. In execution of that decree the property was purchased by Baldeo Sahay.

In 1902 Ganganarain executed a *kabala* in favour of Rajab Ali and Sher Ali and three others, in lieu of the advance made by them for the purposes of the litigation against the widow of Ramnarain.

In February, 1902, Ganganarain and Ramgopal executed a *mukarrari* of the 42 *kats* in favour of Pitamber Chowdhury, defendant No. 1, and in July of that year, the latter sued to enforce the mortgage of 1899, abandoning his right under the *mukarrari* of 1902. He obtained a preliminary decree in September, 1902, for sale of the mortgaged properties, subject to his own prior mortgage of 1896.

In April, 1904, Rajab Ali obtained a decree for cess against Baldeo Sahay, the purchaser, under the decree of 1901, and in August of that year the land was purchased by the plaintiff, Rahmat Ali, in execution of the decree for cess. In 1903, section 124 of the Chota Nagpur Landlords' and Tenants' Procedure Act had been repealed and the sale at which Rahmat Ali purchased the property purported to be held under section 123.

In 1911 Pitamber Chowdhury brought the property in execution of his mortgage decree of 1902 and he obtained delivery of possession in 1912.

Rahmat Ali instituted the present suit for a declaration that he had purchased the land free from encumbrances and for possession and mesue profits. The suit was decreed by the trial court and the defendant No. 1 appealed. The decision of the trial court was affirmed.

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Defendant No. 1 appealed to the High Court.

S. Sultan Ahmed (with him *Gursaran Prasad*), for the appellant.

Kulwant Sahay and *Siveshwar Dayal*, for the respondents.

JWALA PRASAD, J.—The courts below have decreed the plaintiff's suit. The defendant No. 1 has therefore come to this court in second appeal. It is unnecessary to give in any detail the pleas taken by the defendant No. 1 in his written statement. The following issues framed by the trial court will show the nature of the different pleas: (1) Is the suit barred by limitation? (2) Has the plaintiff acquired any right to the disputed land? Whether the suit brought by Sher Ali and Rajab Ali is fraudulent? Whether any cess was payable in respect of this land? (3) Whether the decree and sale in execution of it is bad in law? (4) Whether the plaintiff can avoid the encumbrance to which the disputed land was subject? (5) To what relief, if any, is the plaintiff entitled in this suit?

The first and the foremost question upon which the decision of the present appeal hinges is as to whether the tenure in question was liable for the payment of cess to the superior landlord and whether such a cess was chargeable upon the tenure. The trial court held upon the construction of the provisions in the Cess Act (Act IX of 1880) and the admissions contained in paragraphs 6 and 7 of the plaint in the mortgage suit brought by the defendant Pitamber to enforce his mortgage against the sons of Bharat, that the tenure in question was liable to pay cesses. The Subordinate Judge, however, referred to *Ers. R, L* and *13* upon the record and recorded the following finding:—

“Defendant on the other hand contends that the tenure which was a rent-free one was not liable to pay any cesses. In support of his

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contention defendant has filed a copy of a valuation roll (*Ex. R*) for the year 1930 which does not show any assessment in respect of this tenure. It is further argued on behalf of the defence that under section 36 of the Cess Act this assessment continued to be in force for a period of 5 years. So in 1904 when the suit against Baldeo was brought for arrears of cesses the tenure was as a matter of fact not liable for such a charge. Plaintiff has produced a valuation roll (*Ex. 13*) which proves that the tenure held by Baldeo was assessed to cesses and valued at Rs. 50-1-3. The cess returns are not now available to prove the state of affairs in existence in 1897, when the first decree for cesses was obtained by Rajab Ali against Bharat Singh, or at the date of the subsequent decree obtained against Baldeo Sahai. Under section 50 of the Cess Act all lands are assessable to cesses unless exempted under sections 2 and 3 of that Act. There is no evidence to prove that the tenure was exempted from such assessment. *Ex. 13*, valuation-roll, at least disproves the defendant's contention that the tenure was not liable to pay any cesses."

Then he refers to paragraphs 6 and 7 of the plaint which has already been adverted to and concludes his finding upon this point in the following words :

"So I have not the least doubt that the tenure was liable to pay cesses as alleged by the plaintiff."

On appeal the learned Judicial Commissioner set aside this finding of the Subordinate Judge and referred in detail to the documents, namely, the cess-valuation papers referred to by the Subordinate Judge and said :

"*Ex. R* is very strong evidence that Rajab Ali and Sher Ali made such a return in obedience to an order passed when a revaluation of the estate which includes Mauza Darida was going on, and that they omitted from it any mention of the rent-free tenure in suit. In the absence of any evidence to explain or to rebut the entries in this statement I find such to be the case. It is suggested that the tenure of Baldeo Sahay may have been shown elsewhere but in face of the return this suggestion which is improbable should not be accepted unless it is proved."

And as a consequence of this omission the learned Judicial Commissioner held that Baldeo Sahay, the holder of the tenure, although he may not have known it, "was not liable to pay cess". This is a finding of fact which is binding upon this Court in second appeal. It has not been shown to us that in arriving at this finding the Court below anywhere misconstrued the documents referred to by it or in any way misguided itself. Therefore, the plaintiff failed to prove that the tenure in question was shown in the return submitted by the superior

landlord under the Cess Act or that any cess was assessed upon this tenure as payable to the superior landlord. The plaintiff seeks to have a declaration that he purchased the property free from any encumbrance on the ground that cess was the first charge thereon. He must prove it; in other words the onus lay upon him.

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The learned Vakil on behalf of the respondents has employed the argument advanced by the Subordinate Judge in support of the contention, that whether any cess was actually assessed upon the tenure or not and whether the tenure in question was shown in the return submitted by the superior landlord to the Collector under the Cess Act or was omitted therefrom, the holder of the tenure is liable to the superior landlord within whose estate the tenure in question is geographically situated. He contends that such a liability is enforced by the Cess Act. He has referred to the definition of "tenure" in sections 5, 41, and 47 of the Act in support of his contention. The definition of "tenure" includes both rent-paying and rent-free tenures. Section 5 of the Act makes all immovable property situate in any district or part of a district liable to the payment of road-cess and public works cess. This is a liability to the Government but the liability enforced by section 5 does not in itself create any charge on any estate or tenure. So far as the liability to the Government is concerned it is only a personal one which is enforced by the provisions of the Public Demands' Recovery Act and for the realisation of which the right, title and interest only of the judgment-debtor passes. This is settled law and hardly needs any authority. Reference may, however, be made to *Ahsanulla v. Manjura Banoo* (1) and *Shekat Hosain v. Sasi Kar* (2). Therefore when the section says that all immovable property situate in a district shall be liable to the payment of cess, it does not in any way create any charge upon the property. Section 41 of the Cess Act deals with the mode of payment of road-cess and public works cess Clause (1) deals with the modes of such payment by the holder of an estate to the Collector and clause (2) deals with the modes of payment by the holder of a

(1) (1908) I. L. R. 39 Cal. 778.

(2) (1892) I. L. R. 19 Cal. 783.

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tenure to the holder of the estate or tenure within which the land held by him is included. But such liability is subject to the exceptions that may be contained in other portions of this Act for the section opens with the most important words "Except as otherwise in this Act provided." Section 42 which fixes the time for the payment of road-cess applies only to the rent-paying tenures as is expressly provided in clause (3) of the section. The subsequent sections in Chapter III deal with the modes of payment relating only to the rent-paying tenures. In order to secure the cess payable to the Government the Act provides for a penalty upon the holders of estates and tenures on account of their omission to submit their returns of all the lands situate within their estates or tenures. In cases of rent-paying lands, whether in possession of tenure-holders or in possession of cultivating tenants, section 20 of the Act precludes the superior landlord from suing for or recovering any rent for such lands unless the same are entered in the return submitted to the Collector. This provision applies to the case of rent-paying tenures; and in respect of such tenures, as well as of rent-paying lands in possession of cultivating tenants, section 47 of the Act entitles the holder of an estate or tenure to recover the cess payable from the rent-paying tenants and from the cultivating tenants under the same penalties and in the same manner as if the same were arrears of rent due to him. This provision is for the benefit of the holder of an estate or tenure who is required to show all his lands within his estate or tenure so that he may be able to discharge his responsibility to the Government in respect of the cesses conveniently and without any loss. Ordinarily section 47 will, therefore, apply to a rent-paying tenure only and as there was a doubt as to whether the provisions of that section extended to the case of rent-free tenures section 64A was added in Chapter V containing provisions similar to those of section 47. But suppose for a moment that section 47 is wide enough to apply to rent free tenures also; but to apply this section one most important condition must be satisfied and that is that the sum claimed as cess for rent-free tenure "must be payable under the provisions of this Act". Now in order to make cess

payable under the provisions of this Act with respect to rent-free lands the requirements of Chapter IV must be complied with. Section 50 of the Act deals with the inclusion of rent-free lands in estates or tenures. Section 51 enjoins upon the holder of an estate or tenure in which a rent-free tenure is included to enter such land in the return to be submitted to the collector; and section 52 then requires a notice to be served upon the holder of rent-free land with the extract of the valuation roll. It also provides for the publication of such notice and extract. The subsequent sections deal with the disposal of objections, if any, filed by the rent-free tenure-holders. Section 56 is an important section and it says—

“After publication of the extracts from the rent roll as provided in section 52, and in cases in which publication of the notice mentioned in section 54 is required after publication of such notice *and not otherwise*, every owner and holder of any rent-free land included in such extracts, and every person in receipt of the rents and profits or in possession and enjoyment of such land, shall be bound to pay year by year to the holder of the estate or tenure in the return of which such land has been included the amount of the road-cess and public works cess which may thereafter become due to such holder, calculated on the annual value of such land as entered in such extracts, or on any other annual value which may have been determined by the Collector under section 53, at the full rate or rates which may have been fixed under this Act for the levy of such cesses respectively in the district generally for the year.”

Therefore it is only after the publication of the extracts from the valuation roll that the liability to pay cess to the superior landlord arises in the case of a rent-free tenure. When the provisions of Chapter IV are thus fully complied with then a cess becomes *payable under the Act* and such a cess a superior landlord is entitled to realize “with the same penalty and in the same manner as if it were an arrear of rent.”

Now, as observed already, the onus was upon the plaintiff to prove that the tenure in question was made liable to the payment of cess under section 64A of the Act and that the necessary notices and publications were served upon the tenure and that it was entered in the return submitted by the superior landlord. In the case of *Ashanullah Khan Bahadur v. Trilochan Bagchi* (1) it

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was held that no presumption under section 114, clause (e), of the Evidence Act applies with respect to the notice provided by section 52 of the Road Cess Act and that the person who claims that a right or obligation such as the payment of cess by a tenure-holder has accrued must prove that the liabilities had been incurred and the things described in the Act had been actually done. In the case of *Bhagwati Kuwari Chowdhurani v. Chutterput Singh* (1) a distinction was drawn between a rent-paying and rent-free tenure and it was said that "the owners of rent-free lands are not bound to pay road-cess before the publication of the valuation rolls under section 52". The point was, however, directly raised and decided in the case of *Rash Behari Mukherjee v. Pitambari Chowdhurani* (2). There can therefore be no doubt that the tenure in question was not liable for the payment of cess to the superior landlord under the Act. The fact that on a previous occasion a decree for cess was obtained in the year 1897 against Bharat does not at all make the cess payable under the Act, inasmuch as a decree for cess cannot operate as *res-judicata*, cess being a recurring charge. The fact that Baldeo himself purchased the property at the previous sale in execution of a cess decree does not at all change the aspect of the question. The Subordinate Judge relied upon certain admissions in the plaint filed by Pitambar in the mortgage suit (*Ext. 4*) in order to show that the tenure was admittedly liable to pay cesses. The liability to pay cesses may arise in different ways. It may arise on account of a contract between the parties for instead of the rate or proportion fixed under the Act a tenant may agree to pay the entire cess, or a larger amount than is fixed by the Collector, to the superior landlord. A contract to pay cess is not at all illegal nor is it prohibited under the provisions of section 41 or any provision of the Cess Act, *Ashutosh Dhar v. Amir Mollah* (3). The Subordinate Judge simply held that the tenure was liable to pay cess and stopped short there. That would not itself make the cess a first charge upon the

(1) (1898) I. L. R. 25. Cal. 725.

(2) (1888) I. L. R. 15 Cal. 237.

(3) (1906) 3. Cal. L. J. 887 F. B.

property so as to pass it at an auction sale free from any encumbrance. The Judicial Commissioner has gone further and, in my opinion, has rightly held that the tenure was not liable to pay cess under the Act. Therefore, it could not be enforced and realised in the same manner and with the same penalty as if it were an arrear of rent. Baldeo might have been liable to pay cess and the sale in question might have passed his right, title, and interest ; but the holding itself did not pass so as to entitle the plaintiff to hold it free from the encumbrance created upon it by the mortgage of 1899 in execution of which the defendant has purchased the property. The learned Judicial Commissioner himself upon his finding would have been inclined to dismiss the plaintiff's suit, but he felt embarrassed by the decision in the case of *Malkarajan v. Narhari* (1) and the case of *Motilal v. Karrabuldin*, (2). None of these cases stand in the way of the sale being held to have passed only the right, title, and interest of the judgment-debtor. Baldeo Sahay, in the tenure. The second case has distinctly said that there is a wide difference between the setting aside of a sale and deciding that the plaintiff's right was not affected by it. The first case simply held that a sale will not be treated as invalid provided the court had jurisdiction to execute it even if there had been a material irregularity. The defendant need not have the sale of the plaintiff set aside and declare it invalid for he is in possession of the property on the strength of a court sale in execution of a mortgage decree. The plaintiff wants to have the mortgage lien annulled and to recover possession of the property on the strength of a superior title. That title is based upon a sale which, as observed above, passed only the right, title, and interest of the judgment-debtor and not the property itself. The fact that the sale took place under the provisions of section 123 of Act I of 1879 as amended in 1903, does not at all affect the title of the defendant in the property or give a higher title to the plaintiff in it when as a matter of fact there was no charge created

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(1) (1901) I. L. R. 25 Bom. 337, F. C.

(2) (1898) I. L. R. 25 Cal. 170, P. C.

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upon the property by the decree in execution of which he purchased the property.

I, therefore, set aside the decree of the courts below and dismiss the suit of the plaintiff with costs throughout.

Ross, J.—I agree.

Decree set aside.

APPELLATE CIVIL.

Before Justice Prasad and Ross, JJ.

MUSSAMMAT RAM DEVI

v.

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Code of Civil Procedure, 1908 (Act V of 1908), Order XXIII rule 1(4)—withdrawal of suit by some of several co-plaintiffs—fresh suit, whether barred by res judicata—Partition, cause of action for, is recurring.

Where a court has allowed a suit to be withdrawn in contravention of Order XXIII, rule 1(4), of the Code of Civil Procedure, 1908, and has granted leave for a fresh suit to be brought on the same cause of action, a second suit is nevertheless barred.

Raj Kumar Malhotra v. Ram Khelawan Singh (1), distinguished.

In the the present case, however, the suit was one for partition and inasmuch as the cause of action in such a suit is a recurring one the High Court held that the suit was maintainable.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Ross, J.

Bankin Chandra De, for the appellant.

Purnendu Narain Sinha and *Murari Prasad*, for the respondents.

Ross, J.—This is an appeal by the plaintiff in a suit for partition which was dismissed by the Subordinate Judge of Patna. The parties are widows of two persons who were

*Appeal from Original Decree No. 96 of 1918, from a decision of B. Abinas Chandra Nag, Subordinate Judge of Patna, dated the 17th November, 1917.