## APPELLATE CIVIL.

1934.

*February*, 8.

*Before James and Dhavle, JJ.*

PADMA CHARAN NAIK

*v.*

ASUTOSH CHANDRA MITRA.*

*Orissa Tenancy Act*, 1913 (*Beng. Act II of* 1913), *section* 193(*b*)—*part of the claim cognizable by civil court and part by revenue court—Civil Court, jurisdiction of, whether ousted.*

Section 193 of the Orissa Tenancy Act, 1913, provides:

"The following suits and applications shall be cognizable by the Collector, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other court except as provided in this Act, namely,.....

(*b*) all suits by landlords and others in receipt of the rent of land, against any agents employed by them in the management of land or the collection of rents, or against sureties of such agents, for money received, or accounts kept by such agents in the course of such employment, or for papers in their possession."

*Held* (*i*) that the jurisdiction of the Civil Court can only be ousted where the subject of dispute is exclusively such as is annexed to the jurisdiction of the revenue court by the special provision of section 193(*b*).

(*ii*) that where there is no misjoinder of causes of action the Civil Court may entertain a suit which cannot be brought in the revenue court, although a portion of the claim is of a nature of which the exclusive cognizance is given to revenue courts.

*Oosman Khan* v. *Chowdhry Sheoraj Singh*(1), *Umrao Bahadur* v. *The Secretary of State*(2) and *Kumod Narain Bhoop* v. *Purna Chunder Roy*(3), followed.

*Susila Bala Dasi* v. *Udaynath Mahanty*(4), not followed.

* Circuit Court, Cuttack. Appeal from Appellate Decree no. 12 of 1932 from a decision of Babu Brajendra Prasad, Additional Subordinate Judge of Cuttack, dated the 31st January, 1931, confirming a decision of Babu Sachindra Nath Ganguly, Munsif, 2nd Court, Cuttack, dated the 5th October, 1928.

(1) (1873) 5 N. W. P. H. Rep. 42.
(2) (1914) 24 Ind. Cas. 788.
(3) (1878) I. L. R. 4 Cal. 547.
(4) (1933) A. I. R. (Pat.) 90.

*Secretary of State for India in Council* v. *Natabar Mangraj*(1), distinguished.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of James, J.

*A. Dutt* and *S. N. Sen Gupta*, for the appellants.

*B. Mohapatra* and *B. K. Roy*, for the respondents.

JAMES, J.—This is a second appeal from the final decree in a suit for accounts. The defendant Fakir Naik had been employed by the plaintiffs and their ancestor as tahsildar and treasurer, collecting rents from tenants, and also conducting a mahajani business for his employers. Fakir Naik, who had been sued as the managing member of a joint family, died after the preliminary decree of the trial court while the appeal was pending; but the suit continued against the surviving members of the joint family who were substituted as defendants. After the appeal against the preliminary decree had been dismissed, the account was taken by a commissioner on whose report the Munsif made his final decree, from which the defendants preferred an appeal, which was dismissed by the Subordinate Judge.

The learned Advocate for the appellants argues in the first place that the whole of the proceedings in this suit are without jurisdiction, on the ground that the case is one falling, for the greater part, within the provisions of section 193(*b*) of the Orissa Tenancy Act. It is there provided that the court of the Collector and no other court may take cognizance of

"suits by landlords and others in receipt of the rent of land, against any agents employed by them in the management of land or the collection of rents, or against sureties of such agents, for money received, or accounts kept by such agents in the course of such employment, or for papers in their possession ".

The objection is one which ought to have been taken at an earlier stage in the litigation; but if the civil

(1) (1926) I. L. R. 6 Pat. 358.

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courts have no jurisdiction the final decree must be void; and when this matter is thus brought to our notice we are obliged to consider it. The learned Advocate relies in the main upon a decision of a single Judge of this Court in *Susila Bala Dasi* v. *Udaynath Mahanty*(1) which was based upon the decision of the Divisional Bench in *Secretary of State for India in Council* v. *Natabar Mangraj*(2). In *Susila Bala Dasi* v. *Udaynath Mahanty*(1), Mr. Justice Rowland had before him a case which on the facts stated appears to be very similar to the case which is now before us.

The suit was instituted in the court of the Subordinate Judge against a tahsildar who had collected rent and had also carried on paddy-lending and money-lending business. The Subordinate Judge held that the suit was maintainable in the civil court only so far as it referred to money received in respect of paddy-lending and money-lending; and that so far as it referred to money received on account of collection of rent it was within the exclusive jurisdiction of the revenue court. He accordingly directed the plaintiffs to withdraw that part of their claim which was based on collection of rent, in order that they might institute a suit regarding it before the Collector. Mr. Justice Rowland declined to interfere with the order of the Subordinate Judge. We have not before us all the details of that case. It is possible that the two forms of business were carried on in such a manner as to be completely distinct, so that two separable causes of action were joined in one suit which is probably the reason why Rowland, J. relies on the decision in *Secretary of State* v. *Natabar Mangraj*(2). In that case a suit in ejectment was instituted on behalf of the Secretary of State against two defendants, one of whom had purchased a portion of a

(1) (1933) A. I. R. (Pat.) 90.
(2) (1926) I. L. R. 6 Pat. 358.

tenure which was said to be not transferable. The other defendant was the tenure-holder who was alleged to have forfeited the area remaining in his possession owing to a breach of the conditions on which he held the tenure. The Judges directed that the two causes of action should be severed; that the suit against the tenure-holder should be prosecuted in the court of the Collector which under the Orissa Tenancy Act was the proper court to entertain it, while the suit against the trespasser would proceed in the civil court. In that case two essentially separate suits were joined in one. It would have been open to either of the defendants in whatever part of these provinces such a suit might have been instituted to object to the joinder of causes of action. The purchaser was not in any way concerned with the question of whether his vendor had forfeited by his misconduct title to the land of which he remained in possession. Wherever that suit might have been instituted, each of the defendants would have been entitled to insist on severance of the causes of action. It need not be questioned that where two such clearly distinct causes of action, one of which would properly be triable in the revenue court, and the other in the civil court, are joined together in one suit which is instituted in one court or the other, the causes of action must be severed; and each must be tried in the court having jurisdiction to try it. The attention of Rowland, J. was also drawn to a case similar to the case before him and that before us, *Kumod Narain Bhoop* v. *Purna Chunder Roy*(1). The provisions of section 193(*b*) of the Orissa Tenancy Act are in effect the re-enactment of section 24 of Act X of 1859, which came under consideration in the Calcutta case. In that case a zamindar sued his diwan for accounts, alleging in the plaint certain items of advance for which the defendants had failed to account, and also misappropriation. The account filed with the plaint disclosed that much of the money alleged to have been misused had been received by the defendant as rents of the plaintiff's estate; and the

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court of the first instance held that under section 24 of Act X of 1859 the suit was cognizable only by the revenue court. The decision was affirmed by the District Judge. It was held by the Judges of the Calcutta High Court that since a part of the plaintiff's claim was not cognizable by the revenue court, the suit was properly instituted in the civil court, on the ground that the jurisdiction of the civil court could only be ousted where the subject of dispute was exclusively such as was annexed to the jurisdiction of the revenue courts by the special provisions of Act X of 1859. With due respect to Rowand, J. we consider that the grounds on which he distinguished this case are open to criticism. The Divisional Bench of the Calcutta High Court, delivering judgment in the case, laid stress rather on those parts of the plaintiff's claim which were not cognizable by the revenue court than on those parts which were. They remarked at the end of their judgment that this was a suit of which certainly not the whole, and possibly not any part, was cognizable by the revenue court. Rowland, J. distinguished that case on the ground that in the case before him a portion of the claim was clearly within the jurisdiction of the revenue court. But from the statement of facts in the case before the Calcutta High Court it is clear that a large part of the plaintiff's claim was on account of money received as rent and that that part of the claim, if it could have been severed from the rest, would have been cognizable by the revenue court. In another case under Act X of 1859, *Oosman Khan* v. *Chowdry Sheoraj Singh*(1) the judges observed, "there is authority for holding that the civil courts may entertain suits which cannot be brought in the revenue court, although a portion of the claim is of a nature of which the exclusive cognizance is given to revenue courts". The learned Judges did not base their decision in that case on this proposition, but it is one with which we entirely agree.

(1) (1873) 5 N. W. P. H. Rep. 42.

The learned Advocate for the respondents has drawn our attention to the fact that the statement of the rule by the learned Judges in *Oosman Khan's*(1) case has been accepted by the Board of Revenue of the United Provinces as authority for the rule that when a case is partly cognizable by the civil court and partly by the revenue court, the civil court must decide the whole case [*Umrao Bahadur* v. *The Secretary of State*(2)]. In the present case there appears to be no misjoinder of causes of action; and it does not appear that the suit for an account could have been instituted in any other form than that which the plaintiffs in this case have chosen to adopt. Among the rents which the tahsildar collected from tenants there was a considerable amount of paddy collected from tenants paying produce rent. Part of this paddy appears to have been disposed of in other ways, and part appropriated to form the stock of a paddy-lending business carried on by Fakir Naik on behalf of his employer. It does not appear that there could be any proper taking of account without considering the accounts of both the paddy-lending business and of the paddy received as rent. The account of disposal of paddy received as rent could not have been checked without reference to the account of stock of the paddy-lending business; and the account of stock of the paddy-lending business could not be properly checked without reference to the account of paddy received as rent. In the present suit part of the plaintiff's claim is cognizable by the civil court, and part by the revenue court; and in the circumstances we must hold that the suit was properly instituted in the civil court.

The position would be different if the suit were essentially one which ought to have been instituted in the revenue court; and some unnecessary or unwarrantable addition had been made to the claims in the plaint, in order to make it appear that the case came within the cognizance of the civil court, as for

(1) (1873) 5 N. W. P. H. Rep. 42.
(2) (1914) 24 Ind. Cas. 788.

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instance, if in a pure suit for accounts the plaintiff were to add an unnecessary prayer for a declaration of his title as zamindars—*Anu* v. *Ghulam Muhammad Khan*(1). The case before us is not one of that nature and we cannot hold that the decree is without jurisdiction.

The suit was originally instituted against Fakir Naik in his personal capacity and as managing member of the joint family. On Fakir Naik's death the surviving members of the joint family were substituted in his place. The learned Advocate for the appellants suggests that the survivors of the family ought not to be made liable for the dues of Fakir Naik, on the ground that they should not be held answerable for debts dishonestly incurred by the father and they must not be required to make good his defalcations. In the first place it is to be observed that the preliminary decree makes the joint family property in the hands of these defendants liable; and no objection to the form of the preliminary decree can be entertained at this stage. Moreover, the trial court found that Fakir Naik and his sons and grand-sons were a joint family; that the tahsildar's work was treated as the work of the family of the defendants and that the remuneration which Fakir Naik received as tahsildar was spent for family purposes. This is not an action in tort; the decree merely directs that the members of the joint family shall return to the plaintiffs what they have taken without accounting for it.

It is further argued on behalf of the appellants that the finding of the learned Subordinate Judge on one point in his judgment is self-contradictory and so ought not to be affirmed. Certain rent receipts had been placed before the commissioner, purporting to bear the signature of Fakir Naik, which the commissioner on comparison of hand-writing regarded as genuine. The learned Subordinate Judge remarked that the commissioner was not a hand-writing expert and he would not rely on these receipts. He proceeded

(1) (1883) I. L. R. 6 All. 110.

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to point out that there were other facts which led him to come to the conclusion that the commissioner and the Munsif had correctly decided what amount was due from the appellants. He pointed out that the decision of the commissioner was supported by the evidence of witnesses given on oath, and that this evidence taken with the rent receipts agreed with the arrears shown in the wasilbaki account and with the realizations of 1336. The learned Advocate suggests that if the receipts were not genuine, the evidennce and the papers would not be true; but this appears to be a misunderstanding of the reasoning of the Subordinate Judge. He merely says that he does not exclusively rely on the rent receipts and there is nothing in his decision on this question of fact which can be regarded as an error of law.

The decree of the lower appellate court must accordingly be affirmed and this appeal must be dismissed with costs.

DHAVLE, J.—I agree.

*Appeal dismissed.*

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## APPELLATE CIVIL.

*Before Khaja Mohamad Noor and Agarwala, JJ.*

MUKTAKESHI PATRANI

*v.*

THE MIDNAPUR ZAMINDARY COMPANY, LIMITED.*

1934.

*Jan.* 12, 22, 23, 24.
*Feb.* 19, 26.

*Subsoil rights, ownership of—permanently-settled zamindari—presumption in favour of zamindar—grant—express dedication must be proved—minerals—adverse possession—necessary ingredients to be proved—Reports of Government officers and official documents, probative value of—ghatwal, whether is necessarily a subordinate tenure-holder—land*

* Appeal from Original Decree no. 230 of 1930, from a decision of Babu Ashotosh Mukherji, Subordinate Judge of Purulia, dated the 7th May, 1930.