

## APPELLATE CIVIL.

*Before Das and Ross, JJ.*

RANI BHUNESHWARI KUER

v.

MAHARAJ KUMAR GOPAL SARAN NARAYAN SINGH.\*

*Cess Act, 1880 (Beng. Act IX of 1880), sections 41, 47 and 58—penal sum, suit for, whether a suit for arrears of rent—limitation.*

A suit for the recovery of a penal sum under section 58, Cess Act, 1880, is not a suit for the recovery of an arrear of rent within the meaning of section 47, and the claim is only an ordinary money claim governed by the rule of 3 years' limitation.

Appeal by the defendant.

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

*S. M. Mullick and S. N. Roy*, for the appellant.

*D. L. Nandkeolyar*, for the respondent.

Ross, J.—This is an appeal by the defendant in a suit for cess from 1921 to 1924. The defendant is the owner of the 7-annas Tikari Raj and the plaintiff is the owner of the 9-annas Tikari Raj. It appears that when the Raj was partitioned in 1840 by complete mahals, certain lands in mahals allotted to one of the proprietors were given to the other proprietor, in different estates, for the purposes of equality; and it is in respect of such lands that this suit has been brought.

The first contention was that as it was expressly stipulated in the partition deed that "malguzari"

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\*Appeals from Appellate Decrees no. 1667 of 1926 and nos. 162, 163 and 164 of 1927, from a decision of H. L. L. Allanson, Esq., I.C.S., District Judge of Gaya, dated the 16th of September, 1926, confirming a decision of Maulavi Saiyid Nasiruddin Ahmad, Munsif of Gaya, dated the 13th of March, 1926.

was to be paid by the person to whom the estate was allotted, the intention was to give these separate lands free of all liabilities. But cess is a liability which was imposed by a subsequent statute which could not have been in contemplation of the parties at the time of the partition; and there is nothing in the partition deed which can relieve the defendant of the statutory liability.

It was then contended that the defendant is not a rent-free tenure-holder. It was admitted that she is a tenure-holder under the definition in the Act. It was further conceded that no rent was payable and it seems to follow consequently that she is a rent-free tenure-holder. It was argued, however, that the true position is not that she is not paying rent but that she is, in effect, by reason of this mutual arrangement, paying revenue through the plaintiff. This suggestion finds no support in the stipulation in the deed.

The substantial question in the appeal is the question of limitation. It is contended that this is a suit for money and only the arrears of three years and not the arrears of four years are recoverable. Now section 47 of the Cess Act provides that every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest as if the same were an arrear of rent; and section 41 states what sums are payable under the Act. The present suit has been brought under the provisions of section 58 which does not deal with the sums payable under the Act, but with a penal sum which is recoverable in default of payment of the instalment payable under the Act. It cannot be said that this penalty is payable. The penalty is only recoverable; and, in my opinion, the plaintiff had the choice to bring a suit either for four years' arrears of cess with interest, claimed as if it was an arrear of rent, or for the penal amount provided by section 58, as an ordinary money claim. I hold therefore that the claim for 1921 is barred and to this extent the

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appeal must be decreed and the decree of the Court below modified. The plaintiff is entitled to costs on the sum decreed in his favour throughout.

DAS, J.—I agree.

*Appeal decreed.*

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## APPELLATE CIVIL.

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*Before Das and Ross, JJ.*

PANDIT DURGA MISSIR

v.

BALJNATH SARAN.\*

*Mortgage—mortgagee paying off prior mortgage, whether entitled to priority—intention to give first charge to mortgagee sufficient—keeping alive prior mortgage, question as to, whether material.*

In order that a subsequent mortgagee, who has paid off a prior mortgage, should have priority over the rest, it is sufficient to show that the parties intended that the mortgagee should have the first and only charge, and it is immaterial whether there was any intention to keep alive the prior mortgage.

*Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1), followed.

*Mohesh Lal v. Mohant Baican Das* (2), distinguished.

*Adams v. Angell* (3), referred to.

Appeal by the defendant no. 6.

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

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\*Appeal from Appellate Decree no. 918 of 1926, from a decision of J. Chattarji, Esq., Additional District Judge of Shahabad, dated the 5th of February, 1926, reversing a decision of Babu Tulsidas Mukharji, Subordinate Judge of Arrah, dated the 29th of May, 1924.

(1) (1902) I. L. R. 29 Cal. 154, P. C.

(2) (1883) I. L. R. 9 Cal. 961, P. C.

(3) (1877) L. R. 5 Ch. Div. 684.