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prior to the period for which the rents in suit are claimed. And the defendant having so acquiesced, we are of opinion that he is now debarred from disputing the plaintiff's right to a half-share of the rent and from relying on the provisions of section 78 of the Land Registration Act.

30 C. 773=8  
C. W. N. 193.

In this case a lessee of the registered proprietor is in possession of the remaining share of the estate, and he is clearly endeavouring by setting up the defendant to put forward his defence in this case to annul the previous amicable arrangement among the co-sharers.

We hold therefore that the judgment and decree of the Subordinate Judge is right, and dismiss the appeal with costs.

*Appeal dismissed.*

30 C. 778 (=8 C. W. N. 357.)

[778] APPELLATE CIVIL.

AHSANULLA v. MANJURA BANOO.\*

[6th and 15th May, 1903.]

*Arrears of cess—Cess Act (Bengal IX of 1880) s. 99—Cess whether a charge on an estate.*

The amount of cesses payable to a Collector under the Cess Act (IX B. C. of 1880) is not a charge on the estate in respect of which they are due.

*Shekaat Hosain v. Sasi Kar* (1) referred to; *Chairapat Singh v. Grindra Chunder Roy* (2) discussed.

[Ref. 14 C. L. J. 292=11 I. C. 465=16 C. W. N. 351. Foll. 1 Pat. 218.]

SECOND APPEAL by the plaintiff, Nawab Ahsanulla.

This appeal arose out of an action brought by the plaintiff to recover a certain sum of money from the defendants, Manjura Banoo and others. The allegation of the plaintiff was that revenue-paying taluk Hussainaddi of the Tipperah Collectorate formerly belonged to one Golam Mowala, the husband of defendant No. 1 and father of defendants Nos. 2 and 3; that in execution of a mortgage decree obtained against Golam Mowala, the said taluk was sold and purchased by him on the 16th August 1897, and the sale was confirmed on the 5th March 1898; that for arrears of road cess due up to March 1897 the Collector of the district filed a certificate against the defendants, but no property belonging to the debtors having been found, the Collector took proceedings under s. 99 of the Cess Act; that thus he was obliged to pay the cess due, and hence was this suit to recover the said amount from the defendants.

The defence mainly was that the payment being a voluntary one, the plaintiff was not entitled to be reimbursed; and that the cesses being a charge on the estate, the plaintiff was bound to pay.

[779] The Court of First Instance having held that the payment made by the plaintiff was voluntary dismissed the suit. On appeal, the Subordinate Judge of Tipperah, holding that although the payment by the plaintiff was not voluntary, yet the cesses being a charge on the estate the plaintiff was bound to pay, confirmed the decision of the first Court.

Dr. Ashutosh Mookerjee (Babu Surendra Nath Guha with him). The question in this case is whether cess is a charge upon the property. Although the Collector took proceedings under s. 99 of the Cess Act, yet

\* Appeal from Appellate Decree No. 2250 of 1900, against the decree of Sham Kishore Bose, Subordinate Judge of Tipperah, dated Aug. 27, 1900, affirming the decree of Ram Lal Das, Munsif of Comilla, dated Dec. 22, 1899.

(1) (1892) I. L. R. 19 Cal. 733.

(2) (1880) I. L. R. 6 Cal. 389.

it could not be a charge. Ss. 41 and 42 of the Act show that the liability is a personal liability only. S. 45 provides that the arrears of cesses are recoverable within three years; s. 98 provides that the amount may be recovered as a public demand. If so recovered, it is recovered only as a personal debt. The case of *Shekaat Hosain v. Sasi Kar* (1) supports my contention. Looking into the scope of the Act, it could not be said that cesses are a charge upon property. Even if they are taken to be a charge, it ceases to be so as soon as the debt is satisfied. Under s. 99 of the Act notification is to last as long as the arrears are not realized.

Moulvi *Shamsul Huda* for the respondent. My client was not bound to pay the cesses. Cess is generally a charge upon the property. From the preamble of the Cess Act it appears to be so. It is an Act which provides for the levying of road cess and public works cess on immoveable property. S. 5 says that an immoveable property shall be liable to the payment of a road cess and a public works cess. So it appears that the initial liability is the immoveable property upon which cesses are levied. There are two modes of realizing cesses—*first*, by certificate, and, *secondly*, by proceeding against the property. S. 99 of Cess Act provides that it is not necessary to issue a certificate; the Collector may proceed direct against the property. S. 99 does not for the first time create a charge: it only says what will be the nature of the charge. Charge is really created by the provisions of s. 5 and the preamble of the Act. Even if s. 99 for the first time creates a charge, the plaintiff's right to contribution does not arise. The [780] present question was not considered in the case of *Shekaat Hosain v. Sasi Kar* (1). In that case the real question was, what was the effect of a sale in execution for road cess? The case of *Chatraput Singh v. Grindra Chunder Roy* (2) is an authority in my favour.

In the Revenue Sale Law nowhere is it said that revenue is a charge upon the property, except that there is that section where it is said that the purchaser at a revenue sale purchases free of all encumbrances. It does not at all show that cess is a personal liability, for the mere fact that in the Cess Act it is not mentioned that the purchaser buys free of all encumbrances. For the purposes of contribution cess is a charge upon immoveable property. Supposing initially it is not a charge, no sooner the Collector proceeds under s. 99, it becomes a charge. In the case of *Shekaat Hosain v. Sasi Kar* (1) no proceeding under s. 99 was taken, and therefore no charge was created. But in this case, proceeding under s. 99 was taken. In deciding what is or is not a charge, a Court should not take into consideration under what procedure the Collector proceeded. The fact that the Collector may proceed one way or other is not the test to decide whether cess is a charge or a personal liability.

Dr. *Ashutosh Mookerjee* in reply.

*Cur. adv. vult.*

BRETT AND MITRA, JJ. The plaintiff purchased a revenue-paying estate then belonging to the defendants in execution of a mortgage decree, and the sale was confirmed on the 5th March 1898. The defendant had not paid to the Collector the amount of cesses due under Act IX (B. C.) of 1880 up to March 1897, and after the purchase by the plaintiff, the Collector proceeded to realize the same under section 99 of

(1) (1892) I. L. R. 19 Cal. 793.

(2) (1880) I. L. R. 6 Cal. 399.

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the Act. The plaintiff had to pay up the amount, and he then instituted the present suit for recovering it from the defendants.

The lower Courts have held that the amount of cesses payable by the holder of an estate under Act IX (B. C.) of 1880 is a charge on it, and the plaintiff having purchased subject to all [781] existing charges was not entitled to be reimbursed by the defendants.

The decision in this case depends on the answer to the question, whether before a Collector proceeds under section 99 of the Cess Act, the amount payable to him as cesses is a charge on an estate.

In *Shekaat Hosain v. Sasi Kar* (1) it was held that an amount due on account of cesses under the Bengal Cess Act, 1880, was only a personal debt and could not properly be recovered from the property on which it was assessed, if it should so happen that the property belonged to a third person.

The ordinary mode of recovering the amount from the holder of an estate is by means of a certificate under the Public Demands Recovery Act, which has the effect of a personal action against the debtor named in the certificate. There is no provision in the Cess Act, IX (B. C.) of 1880, except section 99, which we shall presently consider, making the amount recoverable by the Collector a charge on the estate in respect of which it is due. In cognate Acts relating to the dues of the State there are express provisions for the avoidance of encumbrances on sales for the recovery of such dues or words expressly making such dues charges on land. We may refer to section 37 of Act XI of 1859, section 12 of Act VII (B. C.) of 1868 and section 15 of Act XXXVI of 1871 as amended by Act XXI of 1876.

We do not think that the words in section 5 of the Cess Act, 1880, "all immoveable property shall be liable to the payment of a road cess or a public works cess" are sufficient in themselves to lead us to conclude that the amount assessed as cesses is a charge.

Under section 99 of the Act, the Collector has the power to recover any sum due under the Act from the tenants in an estate, after recording a proceeding and giving notice to the tenants to that effect. It is a power in the nature of a right to attach the rents payable to the person from whom the dues are recoverable. The Collector by recording a proceeding under section 99 constitutes himself a Receiver for the collection of dues to the State. It does not appear that the Collector has the power to realize the amount by the sale of the estate, as if it was a charge [782] having priority over other charges. In the last clause of section 99, the priority of the claim for the arrears of cesses "over any other demand or claim or lien" existing upon any estate or tenure attaches, if and when the Collector sees fit to proceed under the first clause of the section.

The charge contemplated by the last clause is not one ordinarily existing on an estate, but becomes one only on the Collector's taking action under the first clause. Section 99, it seems to us, shows that an amount recoverable as cesses under the Public Demands Recovery Act is not ordinarily a charge.

*Chatraput Singh v. Grindra Chunder Roy* (2) is not in conflict with the view taken by us. The question raised before us was not raised in

(1) (1892) I. L. R. 19 Cal. 783.

(2) (1880) I. L. R. 6 Cal. 389.

that case, and there is only a stray observation in the judgment of White, J., that "revenue and cesses constitute a standing encumbrance and first charge on the land subject to them." Cesses were then levied under Bengal Acts X of 1871 and II of 1877, and these Acts have now been replaced by Bengal Act IX of 1880. The defendants in that case were exonerated from liability to pay the amount deposited by the plaintiff as revenue and cesses on the main ground that they had become due after the purchase by the plaintiff, and the decision of the question whether cesses constitute a charge was not necessary and was not shared in by Field, J.

In the present case the amount of cesses levied by the Collector was payable by the defendants as a personal debt, and the plaintiff was compelled to pay it on account of the proceedings taken under section 99 of the Cess Act. We think the plaintiff is entitled to be reimbursed; and this appeal is, therefore, decreed with costs in all Courts.

*Appeal allowed.*

30 C. 783.

[783] APPELLATE CIVIL.

KALI CHARAN GHOSAL v. RAM CHANDRA MANDAL.\*

[11th May, 1903.]

*Evidence—Secret trust—Will—Unregistered agreement—Registration Act (III of 1879) s. 17, sub-ss. (b), (h)—Non-testamentary document—Admissibility of Evidence.*

A party setting up a secret trust must adduce evidence to prove that it was communicated by the testator to the universal legatee, and that the legatee agreed to accept the property bequeathed on the terms of the trust.

*Jones v. Badley* (1) referred to.

In proceedings for obtaining Letters of Administration, the parties having settled their disputes presented a petition to the Court to the following effect:—"That I, Gyanoda Sundari Dassi, will get 10-anna share of all the moveable and immoveable properties left by Kristomoni, deceased, and I, Ishwar Chandra Sarkar, will get the remaining 6-anna share." . . . . "Be it explicitly expressed that after taking out the Letters of Administration I, Gyanoda Sundari Dassi, shall amicably take 10-anna share, and I, Ishwar Chandra Sarkar, shall take 6-anna share of the moveable and immoveable properties after dividing the shares by demarcation." No order was made on this petition. The properties were of the value of over hundred rupees:—

*Held*, that the petition, unless registered, would be inadmissible in evidence.

*Pranal Anni v. Lakshmi Anni* (2) referred to.

[(1) Registration Act, s. 17, sub ss. (b), (h). Ref. 34 Cal. 193=5 C. L. J. 611; 35 Cal. 1010=12 C. W. N. 854=8 C. L. J. 90. Foll. 36 Mad. 46. Dist. 27 P. R. 1906=11 P. L. R. 1906.

(2) Party setting up a secret trust—Evidence. Ref. 1. C. L. J. 988; 31 Mad. 187=18 M. L. J. 158. Appr. 21 M. L. J. 870=12 I. C. 317.]

SECOND APPEALS by the defendants, Kali Charan Ghosal and another.

These two appeals arose out of an action brought by the plaintiffs to recover possession of 25 bighas of land on establishment of their title thereto. The allegation of the plaintiffs was, that one Kristomoni Dassi on the 17th Chait 1287 B. S. (29th March 1881) executed a will in

\* Appeals from Appellate Decrees Nos. 2286 and 2478 of 1900, against the decree of W. Knox, District Judge of Murshidabad, dated Aug. 29, 1900, reversing the decree of Saroda Prosad Bose, Munsif of Jangipore, dated Oct. 3, 1899.

(1) (1868) L. R. 3 Ch. A. C. 362.

(2) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.