1869

FAKIRUDDIN MOHAMMED AHASAN v. MR. C. J. PHILLIPPS.

The Judge supposes that, by the appointment of a sezawal, the plaintiff evicted the defendant and turned him out of the land demised; consequently he held that the plaintiff could not be made liable for the arrears of rent which accrued subsequently to the appointment of the sezawal in the month of Aswin 1273; and as the collections made by the sezawal exceeded the amount of rent due up to that date, the Judge was of opinion that there was nothing in respect of which the plaintiff was entitled to a decree in this suit. We think that in this suit, which is a suit for rent under Act X. of 1859, the plaintiff is entitled to a decree for arrears of rent, at the rate of rupees 1,200 per annum, as claimed in his plaint From the total rents which were originally due must be deducted what the plaintiff has received on account of those rents. In order to see what was the amount realized by him and applicable to the satisfaction of his claim, we must take not the gross rents collected from the ryots by the sezawal, but the net profits, that is to say, the realization less what in this case called the "wages of the sezawal," or, in other words, the cost of collection. The ultimate balance of the account is the rent due to the plaintiff.

The two cases referred to by the Judge do not show that a lease is avoided by the appointment of a sezawal. In the latter case, which was an Act X suit, the plaintiff sought to make the defendant responsible for fraudulent conduct on the part of the sezawal who had apparently embezzled rents collected by him. In the case in 1862, the plaintiff had kept a sezawal for a length of time, and treated the tenure as having been resumed by him.

In the present case the sezawal was making the collections under the inspection of the defendant himself; and it is clear that, by the original contract, the parties intended to treat the interest of the defendant as continuing, notwithstanding the appointment of the sezawal.

The case is remanded to be re-tried with reference to the above remarks. The appellant will get his costs of this appeal.

Before Mr. Justice Loch and Justice Mitter.

SHIB JATON ROY (PLAINTIFF) *v.* PANCHANAN BOSE AND OTHERS (DEFENDANTS.)*

1869
May 10.

Declaratory Decree—Act VIII. *of* 1859, *s.* 15.

Where a defendant resists the plaintiff's title, he cannot afterwards object that a suit for a declaratory decree will not lie.

SEE ALSO 15 B.L.R. 82

THE plaintiff sued, under section 15 of Act VIII. of 1859, for a declaration of his right and title to certain lands, which he stated had been wrongly surveyed in villages not belonging to him, but of which he was still in possession.

*Special Appeal, No. 1371 of 1868, from a decree of the Judge of Jessore, dated the 11th March 1868, reversing a decree of the Subordinate Judge of that district, dated the 29th December 1867.

1869

SHIB JATON RAY v. PANCHANAN BOSE.

The Principal Sudder Ameen first dismissed the plaintiff's suit; and on appeal to the Judge, the case was remanded in 1866 for a local enquiry, after which the Principal Sudder Ameen gave a decision in favor of the plaintiff. A second appeal was preferred from this decision to the Judge. He referred to decision of the High Court, passed on the 20th June 1867 (and, therefore, some time subsequent to the previous order of remand) in the case of *Motee Lal* v. *Ranee, the wife of Maharaja Bhoop Sing* (1), and dismissed the plaintiff's suit, remarking that the plaintiff ought to have gone to the Deputy Collector of Survey, and pointed out to him what he considered wrong in the survey, and his reasons for it.

From this decision the plaintiff appealed.

Baboo *Rupnath Banerjee* for appellant.

Baboos *Bangshidhar Sen* and *Girija Sankar Mazumdar* for respondents.

The judgment of the Court was delivered by

LOCH, J.—Plaintiff sued for a declaration of title to certain lands, which he alleged had been erroneously surveyed as part of the defendant's village. The defendant denies the plaintiff's right to and possession of the lands, and the Lower Appellate Court, looking to a judgment of a Division Bench of the High Court in *Motee Lal* v, *Ranee the wife of Maharaja Bhoop Sing* (1), held that it was not a proper suit for a declaratory decree.

The Judge says that the High Court has ruled that cases of this nature are not proper suits in which to grant a declaratory decree.

We think the Judge has taken a mistaken view of the judgment to which he refers. The Court in that case held, that though the law permits declaratory decrees to be given, yet a Court of Justice is not bound to make such a decree on every application; and in the case then before it, the Court considered that no declaratory decree should be made, as the plaintiff had failed to take proper steps, before the proper authorities, to have the error in the survey map rectified.

In the present case, however, we see that the act of the Survey Authorities has had the effect of throwing a cloud on the plaintiff's title, for the defendant claims the lands as part of his property. It is true that the proper course for the plaintiff to take, was in the first instance to have applied to the Survey Authorities to correct the map; and had he done so, the present litigation might have been saved. We have been referred to a case, *Kenaram Chuckerbutty Dinonath Panda* (2) in which it was held by a Division Bench (BAYLEY and PHEAR, J.J.) that, in order to entitle a plaintiff to a bare declaration of right under section 15, Act VIII. of 1859, he must make out, to the satisfaction of the Court, some act done by the defendant, which is hostile

(1) 8 W. R., 64. (2) 9 W. R, 325.

1869

SHIB JATON ROY v. PANCHANAN BOSE.

to and invades that right, and which would justify an injunction, or a decree for damages, or a decree for delivery of possession being passed against the defendant, if the Court had so thought fit to exercise its discretion. We concur generally in the opinion expressed above, but do not think the rule laid down is quite applicable to the present case, for though the plaintiff might have had relief from the Survey Authorities, yet we see that in the suit the defendant has resisted the title of the plaintiff, and claims the lands as his own, and the contention has been carried on to the extent that a remand, for the purpose of making a local investigation, was ordered by the lower Appellate Court. After this local enquiry, the first Court again took up and disposed of the case on the merits, and we think it is too late now for the opposite party to raise the objection that the plaintiff has no cause of action. Under this view of the case, we remand it to the Judge to be tried on its merits.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

GABIND CHANDRA (PLAINTIFF) *v.* THE COLLECTOR OF DACCA AND OTHERS (DEFENDANTS) *

1869
May 13.

Mehal—Batwara—Government Revenue—Limitation—Act XIV. of 1859, *s.* 1 *cl.* 15 & 16.

During the pendency of a batwara the plaintiff purchased a share in an ijmali mehal, and as the proportion of the Government revenue of each shareholder had not been ascertained, the shareholders including the plaintiff's vendor and subsequently the plaintiff paid to the Collectorate what they thought due from them on account of Government revenue. Upon an account stated in 1857, it was ascertained that after all necessary deductions a sum of rupees 655 was due to the plaintiff, who in 1864 applied to the Collector for payment of the amount, but the application was rejected as the money had been previously drawn away by certain creditors of his vendor.

In 1867 he sued the Collector for recovery of the amount. The defence set up was that the suit was barred by lapse of time.

Held, that the Collector was not a depositary under the meaning of clause 15, sec 1, Act XIV. of 1859; that the cause of action did not arise on the demand for and refusal of payment, but on adjustment of the account; and that the case came under clause 16, sec. 1, Act XIV. of 1859.

Baboos *Ramesh Chandra Mitter* and *Mahini Mohan Roy* for appellants.

Baboos *Anakul Chandra Mookerjee* and *Srinath Banerjee* for respondents.

BAYLEY, J.—I am of opinion that this appeal should be dismissed with costs. The plaintiff in the year 1842 purchased the 3 annas 4 gandas share of one

* Special Appeal, No. 3228 of 1868, from a decree of the Judge of Dacca, dated the 5th September 1868, affirming a decree of the Principal Sudder Ameen of that district, dated the 19th November 1867.