

decision. The plaintiff seeks to recover arrears of rent from the defendant in respect of the year 1278. And he states the amount of those arrears at Rs. 98-11 annas. The defendant admits that he owes rent to the plaintiff for the year 1278, but he says that the rent which he owes is less than Rs. 98-11 annas. And indeed there seems to be scarcely any doubt that the plaintiff in this suit seeks to recover from the defendant a higher rate of rent than he has hitherto been receiving from the defendant. In other words, he is seeking to recover arrears of rent at an enhanced rate, although he does not say so in terms, neither has he made any foundation for a claim of this kind according to the provisions of the Rent Law. It seems, however, that the cause of action upon which he comes into Court to make this claim upon the defendant is, that he has lately taken a settlement from Government of land, of which this is a portion, at a higher rate of revenue than that at which he held it before. And the Subordinate Judge says: "It would be quite contrary to equity if the plaintiffs pay to Government at the rate of Rs. 3 per beegha, and receive rents from the ryots at a less rate. There is no need of issuing a notice for obtaining rent equal to the amount of malgoozaree fixed by Government in the settlement. On the contrary, a notice is necessary to be issued when the plaintiffs wish to obtain rents more than that fixed by Government in the settlement, or if, after the settlement by Government, the plaintiffs themselves had realized from any tenant at a less rate."

The position thus taken up by the Subordinate Judge is, we think, unsound. If the defendant is a ryot having a right of occupancy, then his rate of rent can only be enhanced in the mode prescribed for that purpose by the Rent Law. If he be not a ryot having a right of occupancy, then the plaintiff has laid no foundation for this suit. He can only claim arrears of rent upon the footing of actual agreement, express or implied. The first Court took the view which we have just endeavoured to explain, and gave the plaintiff a decree simply for the rent at the old rates; in fact, the rates admitted by the defendant. And it appears to us that this was a right decision. Accordingly we reverse the decree of the Lower Appellate Court, and affirm that of the first Court. The appellant must have his costs in this Court and in the Lower Appellate Court.

The 28th April 1874.

Present:

The Hon'ble W. Ainslie, *Judge.*

Partition—Revenue-paying Land—Jurisdiction—Declaratory Decree.

Case No. 1730 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 23rd July 1873, reversing a decision of the Moonsiff of Hæwla, dated the 24th April 1873.

Ruttun Monee Dutt and others (Plaintiffs),
Appellants.

versus

Brojo Mohun Dutt and another (Defendants),
Respondents.

Baboo Aukhil Chunder Sen for Appellants.

Baboo Sreenath Banerjee for Respondents.

A suit for partition of revenue-paying land is not cognizable by a Civil Court; and it cannot succeed even as to lakhiraj land unless it specifies quantity and situation.

Failing in such a suit, a plaintiff cannot as of right claim a declaratory decree.

THIS was an application for a partition of a certain plot of land described as comprising 3 dags, No. 124 of nowabad property, and Nos. 125 and 126 of resumed lakhiraj land.

The plaintiff claimed two-thirds of the whole, and asserted a local custom whereby the elder brother was, on a partition taking place, entitled to claim the northern portion of the block. The defendant, amongst other things, disputed the right of the plaintiff to more than one-half. The first Court gave the plaintiff a decree for two-thirds of the land.

The second Court reversed that decision, holding that a suit of this nature "for partition of land of a joint undivided revenue-paying mehal is not cognizable by the Civil Court." It seems to me that the Subordinate Judge is perfectly right on this point. If the Civil Court could direct the partition of a small quantity of revenue-paying land, the Civil Court could also divide a larger quantity or successive small quantities making up the whole, without the intervention of the Collector, on whom the power to make a division is expressly conferred by Regulation XIX. of 1814.

It is said that dag No. 124 is rent-free land, and capable of being divided by the

Civil Court. If this land stood by itself, it might perhaps be divided by the Civil Court, but in the plaint it is mixed up as a portion of one block along with the other two dags. If these dags are struck out, it is impossible to say how the plaintiff's application for the northern portion of the property would apply. It may be that the whole of it would fall within the northern two-thirds or southern one-third.

The plaintiff now says that, though it is found that he is not entitled to succeed under the law, as to one portion of the property, and as to the other by reason of not specifying the quantity and situation of it, he is at least entitled to a declaratory decree in respect of his share. But, when the plaintiff has failed in obtaining a partition, he cannot as of right claim to have a declaratory decree; and in this case I do not think it would be right to make a declaratory decree, which apparently would materially affect the parties in respect of the whole estate.

The appeal is dismissed with costs.

The 28th April 1874.

Present :

The Hon'ble W. Ainslie, *Judge.*

Unregistered Titles—Registration Act.

Case No. 1594 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 18th April 1873, affirming a decision of the Moonsiff of Satkaneah, dated the 21st January 1873.

Munsoor Ali (one of the Defendants),
Appellant,

versus

Woomed Ali (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for
Appellant.

Baboo Grish Chunder Ghose for
Respondent.

In setting up an unregistered title against a registered title, it is necessary for a defendant to show that the transaction on which he relies was a genuine one, complete in every respect, and was followed by peaceful possession before the passing of the Registration Act.

THERE is a concurrent finding on the facts by both the lower Courts in this case, and, although I cannot say that I think them altogether correct on all points, yet I do not

consider that, with reference to the provisions of the Indian Evidence Act, I should be justified in interfering with their decisions.

There is no doubt that the written statement of the defendant is only evidence against himself, and the judgment of 1872, which has been relied upon, ought not to have been used. So also I think the mode in which the effect of registration has been applied is erroneous.

But, looking at the judgment of the Lower Appellate Court to the effect that the pottah of the defendant was not a genuine pottah, and that the plaintiff is entitled to obtain possession of the disputed lands by virtue of his etmamee title, it can hardly be said that the decision is based on a consideration that the defendant has attempted to set up an unregistered title against the registered title of his adversary. To support such a plea, it was necessary to show that the transaction on which defendant relied was a genuine one, and complete in every respect, and followed by peaceful possession before the passing of the Registration Act.

It seems to me that limitation cannot be pleaded against the zemindar who can give title.

The appeal is dismissed with costs.

The 28th April 1874.

Present :

The Hon'ble W. Ainslie, *Judge.*

Rents—Cesses or Abwabs.

Case No. 1631 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Kungpore, dated the 5th April 1873, modifying a decision of the Moonsiff of Buddergunge, dated the 17th September 1872.

Jeeatoollah Paramanick (Defendant),
Appellant,

versus

Jugodindro Narain Roy (Plaintiff),
Respondent.

Baboo Tarinee Kant Bhuttacharjee for
Appellant.

Baboo Grija Sunkur Mojoomdar for
Respondent.

If a zemindar demands a cess over and above the original rent, and the ryot consents and contracts to pay it, this demand and the old rent form a new rent lawfully claimable under the contract.