

## APPELLATE CIVIL.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

GOLAM MAHOMED

v.

SHIBENDRA PADA BANERJEE.\*

*Civil Procedure Code (Act XIV of 1882) s. 373—Act X of 1859—Suit for rent—Withdrawal of suit.*

The provisions of s. 373 of the Civil Procedure Code (Act XIV of 1882) have no application to suits instituted under Act X of 1859, which is a complete Code by itself.

*Nilmoni Singh Deo v. Taranath Mukerjee* (1), *Sadai Naik v. Serai Naik* (2) discussed and distinguished.

*Mokunda Bullaw Kar v. Bhagaban Chunder Das* (3), *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (4), *Nagendro Nath Mullick v. Mathura Mohun Parhi* (5), *Hare Krishna Mahanti v. Bishun Chandra Mahanti* (6) referred to.

SECOND APPEAL by Sheikh Golam Mahomed and others, the defendants Nos. 1 to 4.

The plaintiffs sued on the 13th June, 1904, for the recovery of arrears of rent and cesses for 1308 to 1311, in the Court of the Deputy Collector of Puri, under Act X of 1859.

Shibendra Pada Banerjee, the principal plaintiff-respondent, held a two-anna share in the *jagir* named Garjit Andhari, in which the taluk in suit is situated.

The plaintiff had previously instituted a suit for arrears of rent for the years 1306 to 1309 against the same defendants; but on his application to withdraw the suit, with liberty to bring a fresh suit, it was dismissed on the 30th January, 1903.

\* Appeal from Appellate Decree, No. 1830 of 1906, from a decision of J. J. Platel, District Judge of Cuttack, dated June 14, 1906, confirming a decision of Radha Kanta Banerjee, Deputy Collector of Puri, dated April 14, 1905.

(1) (1882) I. L. R. 9 Calc. 295.

(4) (1893) I. L. R. 21 Calc. 428.

(2) (1901) I. L. R. 28 Calc. 532.

(5) (1891) I. L. R. 18 Calc. 363.

(3) (1894) I. L. R. 21 Calc. 514.

(6) (1908) F. C. L. J. 426.

The order of dismissal was in these terms :—“ The plaintiff’s pleader applies for withdrawing the suit. Withdrawal permitted, the suit being dismissed. The application for withdrawal was filed before delivery of judgment.”

The defendants Nos. 1 to 4 only contested the present suit, and the rest did not enter appearance at all. The defence was that the plaintiff had no title, and that the defendants were the *jagirdars* themselves.

The Court of first instance decreed the plaintiff’s suit and the District Judge on appeal affirmed that decree.

The defendants preferred a second appeal to the High Court on the ground, amongst others, that the Court below was wrong in holding that the plaintiff could bring a fresh suit for arrears of rent for the years 1308 and 1309, although his claim for that period had been previously dismissed as found by that Court.

*Babu Gunada Charan Sen*, for the appellants. The claim for the arrears of rent for the years 1308 and 1309 is barred under s. 373 of the Code of Civil Procedure, a previous suit in respect of the arrears for those years having already been dismissed without reserving to the plaintiff any liberty to institute a fresh suit. Act X of 1859 is not a complete Code, and the provisions of s. 373 of the Civil Procedure Code are, therefore, applicable to suits brought under that Act: see *Nilmoni Singh Deo v. Taranath Mukerjee* (1), *Sadai Naik v. Serai Naik* (2) and *Hare Krishna Mahanti v. Bishun Chandra Mahanti* (3).

*Babu Provasch Chunder Mitter*, for the respondents. The cases of *Mokund Bullav Kar v. Bhngaban Chunder Das* (4) and *Radha Madhub Sontra v. Lukhi Narain Roy Chowdury* (5) are conclusive on the point. The Full Bench case of *Nagendro Nath Mullick v. Mathura Mohun Parhi* (6) shows that Act X of 1859 has all along been treated as a Code complete by itself. The cases cited by the other side do not touch the point and they are distinguishable. It is submitted that Act X of 1859 being a complete Code,

(1) (1882) I. L. R. 9 Calc. 295.

(2) (1901) I. L. R. 28 Calc. 532, 537.

(3) (1908) 7 C. L. J. 426.

(4) (1894) I. L. R. 21 Calc. 514.

(5) (1893) I. L. R. 21 Calc. 423.

(6) (1891) I. L. R. 18 Calc. 368.

1908  
 GOLAM  
 MAHOMED  
 v.  
 SHIBENDRA  
 PADA  
 BANERJEE.

s. 373 of the Code of Civil Procedure has no application to the present case.

CASPERSZ AND SHARFUDDIN JJ. This appeal arises out of a suit for recovery of arrears of rent and cesses, together with damages, for the years 1308, 1309, 1310 and 1311 by Shibendra Pada Banerjee, a fractional co-sharer of the *jagir* mehal, in which the taluk in suit is situated. The suit was instituted in the Court of the Deputy Collector of Puri under Act X of 1859.

It appears that the plaintiff had previously brought a suit for arrears of rent for the years 1306, 1307, 1308, and 1309 against the appellants, which he withdrew, and the suit was thereupon dismissed. In the first suit, which was subsequently withdrawn, the plaintiff had put in an application on the 30th January 1903 for permission to withdraw from his suit, with liberty to institute a fresh suit, on which the order passed was to the following effect:—"The plaintiff's pleader applies for withdrawing the suit, withdrawal permitted, suit being dismissed. The application for withdrawal was filed before delivery of judgment." This order was passed on the 30th January, 1903. In the present case, the First Court decreed the plaintiff's suit and that decree has been affirmed on appeal by the District Judge of Cuttack on the 28th June 1906.

In second appeal before us, the points urged are, *first*, that the plaintiff cannot recover any rent from the appellants on the ground of want of title; *secondly*, that, under section 373 of the Civil Procedure Code the claim of rent for 1308 and 1309 is barred, inasmuch as in withdrawing from the previous suit, the plaintiff did not obtain any permission to institute a fresh suit, and that not having done so, he cannot maintain this suit in respect of the years 1308 and 1309; and, *thirdly*, that the plaintiff cannot maintain a suit for a proportionate share of the rent.

The findings of the lower Appellate Court on the first and third points conclude us, as there were distinct findings for the plaintiff with regard to his title and separate collection. The findings are in the following terms:—"Now plaintiff has conclusively shown himself to be entitled to 2 annas share of the

rents payable by the *sikmi* tenure-holders. It does not matter whether appellants have also a share as superior landlords or not. Appellants as tenure-holders cannot question the right or title of a registered proprietor:” and the finding with regard to the separate collection is—“The estate has been split up and the several co-sharers are collecting their shares of the rents separately. Defendant’s agent admits that the Collector of Puri is collecting his share of the rents separately. This being the case, plaintiff was justified in suing for his share of the rents alone.”

With regard to the second contention as to whether section 373 of the Civil Procedure Code has any application to suits under Act X of 1859, we think the authorities, to which our attention has been invited on behalf of the appellants, are not in point. The case of *Nilmoni Singh Deo v. Taranath Mukerjee* (1) is one of the authorities relied upon by the appellants. The question raised in that case was whether the Deputy Commissioner of Manbhum, who had made certain decrees in a rent suit under Act X of 1859, could transfer these decrees for execution to another district. The attention of their Lordships in that case was mainly directed to the question of transfer of decrees from the Court at Manbhum to another district, and the solution of this question depends upon the construction of the expression “Civil Courts” used in section 77 of Act X of 1859 and some other kindred sections. It was held that the Rent Court is a Civil Court, in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and being a Civil Court in that sense, it comes within the provisions of Act VIII of 1859, which was the old Civil Procedure Code. It was decided that the Rent Court being a Civil Court under that Act, it had the power of transferring decrees for execution to another district.

The next authority referred to for the appellants is the case of *Sadai Naik v. Serai Naik and Matangini Dasi* (2). This case deals with the question whether a second appeal would lie to this Court from an appellate decree of the District Judge in a suit under Act X of 1859, which suit had been tried by a Deputy-Collector and the first cited decision of the Privy Council in

(1) (1882) I. L. R. 9 Calc. 295.

(2) (1901) I. L. R. 28 Calc. 532.

1908  
 GOLAM  
 MAHOMED  
 v.  
 SHIBENDRA  
 PADA  
 BANERJEE.

*Nilmoni Singh Deo v. Taranath Mukerjee* (1) was relied upon; but it was held that, inasmuch as the suit was dealt with on appeal, by the District Judge, though it was a suit for rent under Act X of 1859, the decree of the Appellate Court became a decree of the Civil Court, and hence an appeal would lie to the High Court. Neither of the cases cited relates to the question whether section 373 of the Civil Procedure Code applies to suits under Act X of 1859.

On the other hand, we find in *Mokunda Bullav Kar v. Bhagaban Chunder Das* (2), that it has been distinctly held that section 373 of the Civil Procedure Code does not apply to suits under Act X of 1859, which is a complete Code by itself. The same view was taken in the case of *Radha Madhab Santra v. Lukhi Narain Roy Chowdhry* (3). We find that in these two cases, the facts were very similar to those of the present case and that in both the cases the plaintiffs, in withdrawing from the previous suits, had not obtained any permission to institute fresh suits.

In *Mokunda Bullav Kar v. Bhagaban Chunder Das* (2) the decision of the Judicial Committee in *Nilmoni Singh Deo v. Taranath Mukerjee* (1) was referred to, and there, also, it was held that the question discussed by the Privy Council was simply whether a Revenue Court under Act X of 1859 had any authority to transfer an execution case from its own file to the Civil Court of another district for the purpose of execution of the decree.

In *Nagendro Nath Mullick v. Mathura Mohun Parhi* (4), it was held that the provisions of section 14 of Act XV of 1877 (the Limitation Act) are not applicable to suits for arrears of rent under Act X of 1859, since that Act has always been considered as a complete Code by itself.

In *Hare Krishna Mahanti v. Bishnu Chandra Mahanti* (5), the learned Judges discussed the authorities with reference to Act X of 1859 being a complete Code by itself. In this case it was held that the provisions of sections 560 and 588 sub. s. (27) were applicable by reason of the provisions of section 161 of Act X of 1859, and Stephen J. in his judgment goes on to say;—"This

(1) (1882) I. L. R. 9 Calc. 295.


(3) (1893) I. L. R. 21 Calc. 428.

(2) (1894) I. L. R. 21 Calc. 514.

(4) (1891) I. L. R. 18 Calc. 368.

(5) (1908) 7 C. L. J. 426.

view is amply supported by the judgment in *Sadai Naik v. Serai Naik*(1), following, as it does, the Full Bench decision in the *Sudder Dewani Adalat* in *Hallodhar Biswas v. Mohesh Chunder Haldar*(2) and *Nilmoni Singh Deo v. Taranath Mukerjee*(3).” We would also cite in the same case the remarks of Mookerjee J: “In this view of the matter, it is unnecessary to deal at length with the first branch of the contention of the appellant, which raises the question, whether the proposition, that Act X of 1859 is a complete Code in the sense that no provision of the Code of Civil Procedure is applicable to proceedings thereunder, may not require to be qualified in view of the decision of the Judicial Committee in *Nilmoni Singh Deo v. Taranath Mukerjee*(3).”

1908  
  
 GOIAM  
 MAHOMED  
 v.  
 SHIBBENDRA  
 PADA  
 BANERJEE.

On review of the cases we are of opinion that the provisions of section 373 of the Civil Procedure Code have no application to suits instituted under Act X of 1859; and, therefore, the plaintiff, that is, the present respondent, was not debarred from instituting a fresh suit with regard to rents for 1308 and 1309, notwithstanding the fact that he had not obtained distinct permission to do so.

We have already observed that on the 30th January, 1903 an application was made by the plaintiff to withdraw from his suit, with liberty to institute a fresh suit, on which an order was passed on the same day giving permission to withdraw from the suit. Although nothing was said in that order as to the plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the application, on which it was passed. In that application we find a distinct prayer to be allowed to withdraw from the suit with liberty to institute a fresh suit on the same cause of action, and the Deputy Collector appears to have taken particular care in noting that the application for withdrawal was filed before delivery of judgment, that is to say, before the order of dismissal was passed.

In these circumstances, the judgment of the lower Appellate Court is correct, and we therefore dismiss this appeal with costs.

*Appeal dismissed.*

B. D. B.

(1) (1901) I. L. R. 28 Calc. 532.

(2) (1861) S. D. A. 144.

(3) (1882) I. L. R. 9 Calc. 295.