APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

1910
Feb. 23.

JANAKI NATH CHOWDHRY
v.
KALI NARAIN ROY CHOWDHRY.*

Title, suit for—Partition—Jurisdiction of Civil Court—Permanent tenure—Estates Partition Act (Beng. VIII of 1876) ss. 7, 111, 149.

The plaintiffs and the defendants were co-owners of a certain *taluk*. In the course of proceedings under the Estates Partition Act (Beng. VIII of 1876), the plaintiff raised a claim to a *miras*, or permanent tenure, in respect of certain lands comprised in the said *taluk*. The Revenue Officer held in favour of the defendants that the plaintiff's title to the *miras* was not established. Thereupon, the plaintiff sought relief in the Civil Court, asking that his title to the *miras* be declared. The contention raised on behalf of the defendants appellants was that the order of the Revenue Officer was made under s. 111 of the said Act, and that the suit was not maintainable by reason of s. 149 of the same Act :—

Held, that s. 111 of the Act provided for cases of permanent intermediate tenures, and prescribed the mode in which partition was to take place when the fact of such permanent tenures was established, and had no application to the present case; and that a suit for declaration of title to the permanent tenure was maintainable, the object of s. 149 being not to exclude the jurisdiction of the Civil Court in matters which involved a question of title.

Ananda Kishore Chowdhry v. *Daije Thakurain* (1), referred to.

Held, further, that if in the course of a partition proceeding under Bengal Act VIII of 1876, any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors. It would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings.

Where the tenant based his title to the permanent tenure on the existence of the tenure for 75 years and more, prior to the institution of his suit for declaration of his title, and on his purchase and possession from the date

* Appeal from Appellate Decree, No. 1044 of 1907, against the decree of Durga Charan Sen, Subordinate Judge of Dacca, dated Feb. 25, 1907, affirming the decree of Siddheswar Chakrabarti, Munsif of Manikgunge, dated Feb. 27, 1903.

(1) (1909) I. L. R. 36 Calc. 726.

of his purchase up to the date of the partition proceedings under the Estates Partition Act:

Held, that under the circumstances the tenancy was a permanent one.

Nilratan Mandal v. *Ismail Khan* (1), *Naba Kumari Debi* v. *Behari Lal Sen* (2) referred to.

Abdul Wahed Khan v. *Shaluka Bibi* (3), distinguished.

The only effect of such a decree is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose.

SECOND APPEAL by the defendants, Janaki Nath Chowdhry and others.

The facts are as follows. The plaintiff, Kali Narain Roy Chowdhry, and the defendants were the co-owners of a certain *taluk*, with respect to which partition proceedings were instituted under the Estates Partition Act (Beng. VIII of 1876). In the course of these proceedings the plaintiff set up his title to a portion of the lands comprised in the said *taluk* as *mirasdar* or permanent tenure-holder. The defendants disputed this title, and the Collector held that the *miras* was not established. Thereupon, the plaintiff brought a suit against the defendants in the Civil Court for declaration of his title to the *miras*, and in support of his contention based his title to the tenure as a permanent tenure-holder on the existence of the tenure for 75 years and more prior to the present suit. He further contended that he had purchased the tenure from an Indigo concern in 1879, and though a suit was instituted against the plaintiff by the proprietors in respect of a *raiyati* holding purchased by him at the same time from the Indigo concern, and a decree for ejectment was made in 1880 in favour of the proprietors against the plaintiff in respect of the *raiyati* holding, the plaintiff had remained in undisturbed possession from the date of his purchase up to the time when, in the partition proceedings, the existence of his tenure was denied by his co-sharers, the defendants.

The Court of first instance decreed the plaintiff's suit in his favour. The defendants appealed, with the result that

(1) (1904) I. L. R. 32 Calc. 51. (2) (1907) I. L. R. 34 Calc. 602.
(3) (1893) I. L. R. 21 Calc. 496.

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the Subordinate Judge held that the suit was barred under the Limitation Act, Schedule II, Art. 14. On appeal to the High Court this decision was set aside, and the suit was remanded to the Subordinate Judge, who affirmed the decision of the Court of first instance. Whereupon, three of the defendants appealed to the High Court, contending that the order of the Revenue Officer was made under section 11 of the Estates Partition Act, and that the suit was not maintainable by reason of the provisions of section 149 of the same Act, and further, that the facts found were not sufficient to justify the inference that the tenure alleged by the plaintiff was of a permanent character and extended over the whole of the land in dispute.

Babu Jogesh Chandra Roy (with him *Babu Haran Chandra Banerjee*), for the appellants. In the proceedings before the Revenue Officer, the permanency of the tenure with respect to certain lands was alleged by the plaintiff to be existent, but was held by the officer as not established: so that there was no permanent tenure existing at the time of the plaintiff's suit. The plaintiff, therefore, is not entitled to come to the Civil Court and ask for declaration of his title with respect to such tenure after this decision of the Revenue Court. Section 111 of the Estates Partition Act is conclusive against him. Furthermore, his suit is barred by section 149 of the same Act. As regards the permanent character of the tenure existing or not, with reference to the lands in suit, the question is a mixed one of law and fact. The tenure is not of a permanent character. The absence of documents declaring such lands a permanent tenure is admitted, and, further, the defendants have denied the existence of the tenancy; moreover, there was no recognition of the tenancy by them in the rent receipts produced on behalf of the plaintiff. If it be maintained that the defendants acquiesced in the plaintiff erecting permanent structures, such acquiescence merely does not establish the permanent character of the tenure. The onus is, therefore, on the plaintiff to show not only that the tenure was permanent, but, in order to be permanent, that its boundaries should have been defined

and its rent fixed in perpetuity. The facts found here are insufficient for inferring that the land was a permanent holding. Permanency can only be attributable to the actual land occupied by the *pucca* structures. As to how far the period of existence of the tenure and the erection of *pucca* structures thereon would aid in establishing the permanency or otherwise of the tenure, see *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1), *Naba Kumari Debi* v. *Behari Lal Sen* (2), *Abdul Wahid Khan* v. *Shaluka Bibi* (3), *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepary* (4), *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (5), *Beni Ram* v. *Kundan Lall* (6), *Mahim Chandra Sarkar* v. *Anil Bandhu Adhicary* (7).

Mr. B. Chakravarti (with him *Babu Baikuntha Nath Das*), for the respondent, was called upon to address the Court only on the question whether, on the evidence, the respondent had the right to hold the land at a fixed rate of rent.

MOOKERJEE AND TEUNON JJ. The plaintiff respondent commenced the action out of which this appeal arises for declaration of his title as a *mirasdar* in respect of five *khadas* and fifteen *pakis* of land. The plaintiff and the defendants are co-owners of a *taluk* within which the disputed land is comprised. The first and the third defendants are proprietors of the superior interest to the extent of four annas; the second defendant owns another four annas; the fifth and the sixth defendants claim four annas, and the remaining four annas belong to the plaintiff and the fourth defendant. In the course of proceedings for partition of the estate by the Revenue authorities under Act VIII of 1876, the plaintiff alleged that he was in occupation of the disputed land not as proprietor, but as *mirasdar* under the entire body of landlords. This allegation was challenged by the co-proprietors of the plaintiff, and the result was a summary investigation by the Collector,

(1) (1904) I. L. R. 32 Calc. 41.
(2) (1907) I. L. R. 34 Calc. 902.
(3) (1893) I. L. R. 21 Calc. 496.
(4) (1877) I. L. R. 3 Calc. 696.
(5) (1882) I. L. R. 8 Calc. 960.
(6) (1899) I. L. R. 21 All. 496; L. R. 26 I. A. 58.
(7) (1909) 9 C. L. J. 362.

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who came to the conclusion that the *miras* set up by the plaintiff was not established. The plaintiff, thereupon, commenced this action for declaration of the alleged *miras* title, and he has met with varying fortune in the course of the litigation. The Court of first instance made a decree in his favour. Upon appeal, the Subordinate Judge came to the conclusion that the suit was barred by limitation under Art. 14 of the second schedule of the Limitation Act. This decision was subsequently set aside by this Court on the ground that the suit was not one to set aside any order of a Revenue Officer within the meaning of that Article. On remand, the Subordinate Judge found on the merits in favour of the plaintiff and affirmed the decision of the Court of first instance. Three of the defendants have appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the suit is not maintainable by reason of the provisions of section 149 of the Estates Partition Act (VIII of 1876, B. C.); and, *secondly*, that the facts found are not sufficient to justify the inference that the tenure alleged by the plaintiff was of a permanent character and extended over the whole of the land in dispute.

In support of the first contention, reliance has been placed upon section 111 of Act VIII of 1876 as the section under which the order of the revenue authorities was made. In our opinion, there is no foundation whatever for this contention; section 149 provides that no order of a Revenue Officer made under Part IV, V, VI, VII, VIII or IX shall be liable to be contested or set aside by a suit in any Court or in any manner other than that expressly provided in that Act. The learned vakil for the appellant has suggested that the order of the Revenue Officer, holding that the tenure set up by the plaintiff had no existence, was made under section 111 which is comprised in Part VIII of the Act. Section 111 provides for cases of permanent intermediate tenures, and prescribes the mode in which partition is to take place when the fact of such permanent tenures is established. The section lays down that whenever the Deputy Collector shall find in the parent estate any lands

which are held at a fixed rent, or a *putni*, or other permanent intermediate tenure falling within exception 2 or 3 of section 7, the Deputy Collector is to take certain action. When we turn to section 7, it becomes obvious that exception 2 has no possible application. The only provision which can have any application to the present case is the third exception, which provides as follows: "If any land is held on a tenure which, although not protected as aforesaid, is admitted by all the recorded proprietors of the estate to be a permanent tenure created by all the proprietors of the estate, subject only to the payment of an amount of rent fixed in perpetuity, and of such a nature that the rent thereof is not liable to be enhanced under any circumstances by the proprietor of the said estate, or any person deriving his title from such proprietors, the rent payable by the holder of such tenure (whether he be known as talukdar, putnidar, mukararidar, or by any other designation) shall be deemed to be the rental of such land." It is obvious, from the phraseology of this exception, that it is applicable only to cases where the existence of the tenure is admitted by all the recorded proprietors of the estate, and it is by common consent allowed to be a permanent tenure subject to payment of rent fixed in perpetuity. In the case before us, it is not admitted at all that there is a permanent tenure, much less is it admitted that the rent of the tenure is fixed in perpetuity. It is clear, therefore, that section 111 has no application. There is, however, another consideration which proves conclusively that section 111 cannot possibly apply. The Deputy Collector has authority to take action under section 111 only when he finds that in the parent estate there are situated lands held at a fixed rent. If the Deputy Collector finds that there is no such tenure as is alleged by one of the parties, he cannot take action under section 111. The order of the Deputy Collector, therefore, in the present case cannot be treated as one made under section 111.

It has next been sought to be argued upon general principles that as there has been a decision by the revenue authorities against the plaintiff as to the reality and extent of this tenure, it is not open to the plaintiff to have the matter reagitated in a

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Civil Court. No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be overruled. It is manifest that if, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would, in our opinion, be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings. The learned vakil for the appellant has suggested that section 149 bars a suit of this description; but this contention is obviously unsound, because, as pointed out by this Court in the case of *Ananda Kishore Chowdhry* v. *Daije Thakurain* (1), the object of section 149 is to exclude the jurisdiction of the Civil Court in cases where the question relates to the decision of the Government revenue or to the details of the partition. We are unable to hold that the policy which underlies section 149 is to exclude the jurisdiction of the Civil Court in matters which involve a question of title. The result, therefore, is that the first ground upon which the decision of the Subordinate Judge has been assailed must be overruled.

In support of the second contention urged on behalf of the appellants, it has been argued that the facts are not sufficient to justify the inference of the Subordinate Judge that the tenure was of a permanent character. Now, the facts found are these: the tenure has been in existence for at least 75 years before the commencement of the suit; its origin is unknown, but it appears to have been created in favour of an Indigo concern, the proprietors of which erected substantial structures

(1) (1909) I. L. R. 36 Calc. 726.

on about an one-fifth portion of the land comprised in the tenancy; the Indigo concern was in occupation of the land for about half a century, till the 28th February 1879, when they transferred the tenure to the present plaintiff. Shortly after this transaction, the plaintiff was sued by the proprietors in respect of a *raiyati* holding purchased by him at the same time from the Indigo concern. That action was commenced on the ground that, as the lands of the holding were not transferable, he had not acquired a valid title by his purchase. On the 7th June 1880, a decree for ejectment was made in favour of the proprietors against the plaintiff in respect of this *raiyati* holding. The plaintiff, however, has been left in undisturbed possession of the lands of the tenure from the date of his purchase up to the time when, in the partition proceedings, the existence of the tenure was denied by his co-sharers. We may further state that in the conveyance executed in favour of the plaintiff, his vendors asserted that they had a *miras* right in respect of the land now in dispute, and the boundaries of the land comprised in the *miras*, as also of the land included in the *raiyati* holding, were set out in detail in different schedules. Under these circumstances, the inference is perfectly legitimate that the tenure was of a permanent character. This view is amply supported by the decision of the Judicial Committee in the cases of *Nilratan Mandal* v. *Ismail Khan* (1) and *Naba Kumari Debi* v. *Behari Lal Sen* (2). The learned vakil for the appellant has, however, contended that it would not be proper to hold that the tenure was of a permanent character, inasmuch as there was no recognition of the tenancy by the appellants in the rent receipts produced on behalf of the plaintiff; and, further, that the mere acquiesence of the landlord in the erection of a permanent structure by the tenant does not show that the tenancy was of a permanent character. In our opinion there is no force in either of these contentions. No question of recognition arises in the case before us. The sole point in controversy is whether, from the events which have happened, the inference may legitimately be drawn that the tenancy in its

(1) (1904) I. L. R. 32 Calc. 51. (2) (1907) I. L. R. 34 Calc. 902.

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inception must have been of a permanent character. To that question only one answer is possible. No question also of any acquiescence arises in the present case. The learned vakil for the appellant invited our attention to the decision of the Judicial Committee in the case of *Abdul Wahid Khan* v. *Shaluka Bibi* (1), in which a decree for ejectment was made against the tenant, although he had been for several years in possession of his tenancy and had erected substantial structures thereon. That case, however, is obviously distinguishable, because there the terms of the tenancy were known, as the original grant was produced, and what their Lordships held was that if the tenancy was of a temporary character, the mere circumstance that the tenant with full knowledge of his limited rights had erected substantial structures thereon, would not enable him to resist successfully a decree for ejectment in favour of the landlords. Under these circumstances, we must hold that the view taken by the Subordinate Judge as to the nature of the tenancy is correct.

A question has been raised as to the precise effect of the decree made in favour of the plaintiff. In the first prayer clause, the plaintiff had asked for a declaration, not only that the tenancy was a permanent one, but also that the rent was fixed in perpetuity. The facts found by the Court below, however, though they justify the inference that the tenancy was of a permanent character, do not support the conclusion that the rent was not liable to enhancement. In reality, this part of the case was not made the subject of discussion in either of the Courts below. We, therefore, declare that the only effect of the decree in favour of the plaintiff is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

O. M.

(1) (1893) I. L. R. 21 Calc. 496.