
(1873) 03 CAL CK 0003

Calcutta High Court

Case No: Special Appeals No. 866 of 1872

Santiram Panja and
Others

APPELLANT

Vs

Bycunt Panja and
Others

RESPONDENT

Date of Decision: March 15, 1873

Judgement

Mitter, J.

In this special appeal we think we are bound to follow the principle laid down in the decisions in Moolook Chand Mundul v. Modhoosoodun Buchusputty Ante, p. 368 and Shoorendro Mohun Roy v. Bhuggobut Churn Gungopadhya Ante, p., 403. It has been argued that these were cases decided with special reference to the provisions of s. 10 of Beng. Act VI of 1862 and s. 88 of Beng. Act VIII of 1869. But the principle of those decisions appears to be equally applicable to a case like the present, which is brought under s. 37 of the last mentioned Act. The same words "proprietor of the estate or tenure" which occur in s. 38 of Beng. Act VI of 1862 also occur in s. 25 of Beng. Act VIII of 1869; and as it is by s. 25 that the right to measure referred to in s. 37 is to be determined, the distinction relied upon by the appellants must necessarily fall to the ground. We reject the special appeal with costs.

⁽¹⁾ Before Mr. Justice Loch and Mr. Justice Ainslie.

Moolook Chand Mundul and Others (Interveners) v. Modhoosoodun Bachusputty
(Plaintiff).*

The 80th June 1871.

Beng. Act VI of 1862 s. 10--Right of a Co-sharer to measurement--Act X of 1859, s.
112--Beng. Act VIII of 1869--Right of a Co-sharer to distrain.

Mr. C. Gregory and Baboo Debendro Narain Bose for the appellants.

Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose, and Taruck Nath Dutt for the respondent.

The following judgments were delivered:--

Loch, J.--This was a suit under the provisions of s. 10 of Beng. Act VI of 1862 for the measurement of an estate in which the plaintiff alleges he holds an undivided 8-annas share.

The ryots, whose land it was sought to measure and assess, denied that they were tenants of the plaintiff, and Prem Chand and another intervened claiming to be in receipt of rent.

The first Court laid down two issues:

1st, whether the plaintiff had been in receipt of rents; and, 2nd, whether Prem Chand had been in receipt of rent.

The Deputy Collector, found both issues against the plaintiff, but on appeal the Judge reversed the judgment holding that "the intervener"s plea that his ancestors and plaintiffs" ancestors made a division or a partition is not even proved, nor is the date of such partition even given. Such a plea cannot, therefore, be entertained. Plaintiff purchased the estate in 1269 (1862); and as all parties admit his proprietary right to 8-annas share of the estate which is held ijmalī, and that these lands form part of the estate and are situated within it, plaintiff has a right under s. 10 of Beng. Act VI of 1862 to measure these lands, and a decree is given to him accordingly."

A special appeal was preferred by the tenants, but before the Court entered into the case, it was brought to the notice of the Judges that a Judgment had been passed by a Division Bench of this Court, E. Jackson and Ainslie, JJ., dated 15th May 1871 Post, p. 401, which contained a construction of s. 10 of Beng. Act VI of 1862, which, if followed in the present case, would necessarily dispose of this appeal. The Judges there held that the applicant under this (10th) section must be the proprietor of the estate, not a share-holder only in the proprietary lands: that it was not right that such shareholders should have separate measurements; that such proceedings would be productive of great annoyance and harassment to tenants on the estate, and that the law does not say that any shareholder of an estate may apply to the Collector, and that looking to the remarkable provisions of this section, it should not be extended beyond its plain terms.

A judgment of a Division Bench of this Court, in Shumbhoo Chunder Sadhookhan v. Kala Chand Karr 1 W.R., 53, 54, per Trevor and Campbell, JJ., has been referred to as declaring that a shareholder was entitled to measure the lands of an estate; but we find that the judgment in that case was passed with reference to the provisions of s. 26, Act X of 1859, which contemplated a different state of things from that provided for by s. 10 of Beng. Act VI of 1862. S. 26, Act X of 1869, is similar in its terms to s. 9 of Beng. Act VI of

1862 which declares the rights of a proprietor of an estate or tenure or other person in receipt of the rents of an estate or tenure to make a general survey and measurement of the lands comprised in such estate or tenure, and to invoke the assistance of the Collector should the tenant, when duly served with notice, fail to attend and point out his land; but s. 10 of Beng. Act VI of 1862 contains provisions not to be found in any section of Act X of 1859. It was enacted probably to assist auction-purchasers in discovering the lands they had purchased, and the tenants who occupy such lands. I cannot suppose that the law ever contemplated that the provisions of this section should be made use of, unless in very exceptional cases, by landholders who have been for any period in quiet possession of their estates receiving rents from the tenants.

S. 10 of Beng. Act VI of 1862 provides:-- "If the proprietor of an estate or tenure or other person entitled to recover the rents of an estate or tenure is unable to measure the lands comprised in such estate or tenure or any part thereof by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands or any part of the lands comprised therein. He may petition the Collector, who shall proceed to measure the lands, and to ascertain and record the names of the person in occupation of the same; and on the special application of the proprietor or other person aforesaid, the Collector shall proceed to ascertain, determine, and record, the tenures and under-tenures, the rates of rent payable in respect of such land, and the persons by whom respectively the rents are payable." Then comes the penal clause, which is as follows:-- "If after due enquiry the Collector shall be unable to measure the land, or to ascertain or record the names of the persons in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands or any part thereof, then and in any such case he may declare the same to have lapsed to the party on whose petition he has made the enquiry." Taking these words as they stand, it would follow that, if the party upon whose petition the enquiry was made was the proprietor of half an anna share in the estate, the whole of the property regarding which the enquiry took place would be handed over to him. It may be said that only so much as is in proportion to his share would be made over to him, but the law nowhere says so, nor does the law give the Collector any authority to enquire into and determine what is the share of the petitioner in the estate, but directs that in such case the Collector may declare the same i.e., the property of which the measurement and assessment is sought, "to have lapsed to the party on whose petition he has made the enquiry," be the right of that party what it may.

Possibly, if a person's co-sharers refused to join in making an application to the Collector, they might be made parties to the case, and the measurement &c., proceed in the presence of all parties and so the tenants be preserved from the harassment arising from separate measurements being frequently made by the various shareholders. All parties must be before the Collector, and therefore I concur in the view taken by E. Jackson and Ainslie, JJ., that proceedings, under s. 10 of Beng. Act VI of 1862, cannot be taken on the application of one shareholder in a joint undivided estate. Under this view of the law, I

think this special appeal should be decreed, and the judgment of the lower Appellate Court reversed, and that the suit should be dismissed with costs in all Courts.

Ainslie, J.--The question is whether the words "if the proprietor of an estate or tenure" in s. 10 of Beng. Act VI of 1863 are to be read as if they were "if any sole proprietor or any one of several co-proprietors of an estate or tenure," or whether they simply a sole proprietor or entire body of joint proprietors owning an estate or tenure.

Loch, J., has pointed out how the tenants may be harassed if every shareholder of a minute fraction of the estate is allowed to have a separate measurement, and how inconsistent the provision in the section in question is with the theory that every share-holder can separately call on the Collector to measure. I would further refer to s. 112, Act X of 1859 (and the corresponding s. 68 of Beng. Act VIII of 1869) in which it is provided that "no sharer in a joint estate or other tenure in which a division of the lands has not been made amongst the sharers shall exercise the power of distraint otherwise than through a manager authorised to collect the rents of the whole estate or tenure on behalf of all the shares in the same." The words used in the earlier part of this section are:-- "The zamindar, lakhirajdar, farmer, or other person entitled to receive rent immediately from such cultivator, may recover the same by distraint and sale of the produce of the land on account of which the arrear is due." The words used to describe the persons entitled to distrain are in the singular number, and are much the same in form as those in s. 10 of Beng. Act VI of 1862, but the proviso shows that they are to be taken as limited to the owner, farmer, &c., defined lands or to the whole of the co-owners of such lands acting as one body. And it is clear that, if this were not so, the ryot might be infinitely annoyed, and the co-sharers put at a great disadvantage. Reading Beng. Act VI of 1862 by the light of this section, and it must be remembered that it is, so far as these measurement sections are concerned, merely an extension of s. 26, Act X of 1859, and that by s. 21 (Beng. Act VI of 1862), it is to be read with and taken as part of the earlier Act. I entertain no doubt that the proper construction of "estate or tenure" in s. 10 is one that limits these terms to certain specific lands, the whole of the rents of which go to the person presenting the petition.

The provisions of s. 108 of Act X of 1859 (now s. 64 of Beng. Act VIII of 1869) also show clearly that a single shareholder's rights under the Act are by no means co-extensive with those of a sole proprietor or body of joint proprietors. He cannot sell the tenure on which the default accrued at all until he has proceeded against the moveable property of the defaulter and brought it to sale (if any be found), and when he does sell the tenure, he cannot sell it under s. 105 of Beng. Act VIII of 1865, but can only sell rights and interests of the defaulter under s. 110 of Act VIII of 1869.

I entertain no doubt that in the 10th section of Beng. Act VI of 1862, the word "proprietor" must be read as implying the sole proprietor or whole body of proprietors of the whole of the land for the measurement of which application is made.

* Special Appeal, No. 126 of 1871, from a decree of the Additional Judge of Nuddea, dated the 21st November, 1870, reversing a decree of the Deputy Collector of that district, dated the 11th March 1870.

(2) Before Mr. Justice E. Jackson, and Mr. Justice Ainslie.

Mahomed Bahadoor Mojoomdar and Another (Defendants) v. Rajah Raj Kishen Singh (Plaintiff).*

The 15th May 1871.

Beng. Act VI of 1862, s. 10--Right of a Co-sharer to Measurement.

Baboos Romesh Chunder Mitter and Hem Chunder Banerjee for the appellants.

Mr. R.T. Allan and Baboos Unnodaprosad Banerjee and Shoshee Bhoosun Sein for the respondent.

The judgment of the Court was delivered by

Jackson, J.--I do not agree with the Judge in the view he has taken of the law, s. 10 of Beng. Act VI of 1862. In the first place, I think it is most important that the applicant to the Collector under this section should prove that he "cannot ascertain who are the persons liable to pay rent in respect of the lands, or any portion of the lands, comprised in his estate, and that on that account he is entitled to measure the lands comprised in his estate." These are the words of the law, and they show the state of facts upon which alone there can be an application to the Collector, and upon which alone the Collector can assist the applicant. The Judge admits that there was no enquiry made to ascertain whether any such state of facts, existed. One of the tenants of the estate who objected to the application appeared and alleged that there was no truth in the averments made in the application, and that the applicant had long been in possession, and could not be in ignorance of the lands or tenures comprised in the estate, and that the application was only made to harass the tenants. But still no issue was fixed upon the point, and no enquiry made regarding it. The result is that the Collector had not jurisdiction to act in the matter, and that all the proceedings must be set aside as invalid. It is worthy of remark that some of the clauses of the section are penal, and deprive the ryot of his tenure. It is, therefore, the more important that no proceedings should be taken under this section except in instances where the interference of the Collector is absolutely necessary, and in such exceptional circumstances as are laid down in the section. The applicant must first prove what steps he has taken to obtain the knowledge of the tenures in his estate, and that he is unable to measure because he cannot ascertain them. The applicant in this case makes general assertions, but does not state what steps he took to ascertain the tenures, and how he failed.

I think also that the applicant under this section must be "the proprietor of the estate," not a shareholder only in the proprietary body. It is not right that such shareholders should have separate measurements. Such proceedings would be productive of great annoyance and harassment to the tenants in the estate. The law does not say that any shareholder of an estate may apply to the Collector; and looking to the remarkable provisions of this section, it seems to me that it should not be extended beyond its plain terms.

I would set aside the Judge's order and dismiss the plaintiff's application with all costs.

* Special Appeal, No. 2482 of 1870, from a decree of the Officiating Judge of Mymensingh, dated the 30th August 1870, affirming a decree of the Deputy Collector of the district, dated the 31st May 1870.

(3) Before Mr. Justice Kemp and Mr. Justice Glover.

Shoorendro Mohun Roy and Others (Plaintiffs) v. Bhuggobut Churn Gungopadhyaya and Other (Defendants).*

The 8th August 1872.

Beng. Act VI of 1862, s. 10--Right of a Co-sharer to Measurement.

Baboos Sreenath Doss, Shosheebhooson Sein, and Girjasunker Mojomdar for the appellants.

Baboos Nulit Chunder Sein and Issur Chunder Chuckerbutty for the respondents.

The judgment of the Court was delivered by

Glover, J.--These appeals have been heard together, and one decision will govern both cases, The matter has been extremely complicated by the action of the Courts below, and it is with some difficulty that we have been able to get to the real state of the case. The suit is by a 2-annas co-sharer in an estate called Rooil, for a measurement of the lands under the provisions of s. 10 of Beng. Act VI of 1862, his ground of action being in accordance with that section that he wishes to know, and cannot ascertain who are the persons liable to pay rent in respect of the lands of his estate unless a measurement is made. The Collector in the first instance, notwithstanding the objections which were made by the opposite party that such a suit would not lie, ordered the measurement to be made. The Judge on appeal confirmed that order, and sent the papers back that an ameen might be deputed to make the measurement. Sometime afterwards a different Collector took up the case, and expressed a very decided opinion that it ought never to have been brought under Beng. Act VI of 1862 at all; he ordered however the ameen to go out and measure the lands, considering himself bound, as no doubt he was, under the circumstances by the decision of the Judge's Court. The ameen thereupon went and

measured the lands, both parties objected to his measurement on various grounds, and the Collector gave a decision, which was partly in favor of each. The case then went on appeal to the Judge, who upheld the decision of the Collector, and it is against this decision that the present appeals are made. The only point necessary for us to consider in special appeal is the point of law, namely, as to whether a co-sharer in an undivided estate or tenure is entitled to apply under s. 10 of Beng. Act VI of 1862 for a measurement.

We are clearly of opinion that he is not so entitled. The words of the section are that "if a proprietor of an estate or tenure or other person entitled to receive the rents of an estate or tenure." We understand "proprietor" to mean either the sole owner of the estate, or the corporate body of owners acting together for that purpose, or any person or body of persons having the right to collect the entire rents of the entire estate. There is nothing in the section which entitles a factional shareholder in the property against the wishes of the great mass of his co-sharers to harass every ryot on the estate by insisting upon a measurement of the lands. The point in question has on more than one occasion been decided by Division Benches of this Court. In the case of Moolook Chand Mundul v. Modhoosoodun Bachusputty Ante, p. 398, it has been held that the word "proprietor" implies the sole proprietor or the whole body of proprietors of the land for the measurement of which application is made: and again in the case of Mahomed Bahadoor Mojoomdar v. Rajah Raj Kishen Singh Ante, p. 401, it was held that an applicant under s. 10 of Beng. Act VI of 1862 must be "the proprietor of the estate," and not a shareholder only in the proprietary body. Another objection and an equally fatal one to the plaintiff's case would be that a party applying for a measurement must do so because he cannot ascertain who are the persons liable to pay rent to him. Now this is an estate which has been settled for very many years, the mehal was measured when it was settled, and, as observed by the Collector, there was a full record of the tenures of the estate, so that there could have been no difficulty in ascertaining from the thakbust proceedings what were the holdings of every particular ryot on the estate. In every point of view, therefore, the decision of the Court below is erroneous. It is true that the Judge has not now decided the case on this particular point, but it is equally true that the objection was taken by the objector before him from the very beginning of the case, and it is on this point that the appeal is preferred.

We reverse the decision of the Courts below, and reject the application for measurement.

Special appeal No. 174 will therefore be decreed, and special appeal No. 276 will be dismissed with costs.

* Special Appeal, Nos. 174 and 276 of 1872, from the decrees of the Judge of Dacca, dated the 30th September 1871, modifying and affirming the decrees of the Collector of that district, dated the 30th June 1871.