Privy Council Appeal No. 22 *of* 1929.
Bengal Appeal No. 22 *of* 1927.

Rai Rajendra Kumar Ghosh Bahadur, since deceased (now represented by Hemanta Kumar Ghosh and others), and others - *Appellants*

v.

Rash Behari Mandal and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD MACMILLAN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* LORD BLANESBURGH.]

This is a plaintiffs' appeal from a decree of the High Court of Judicature at Fort William, in Bengal, reversing a decree of the Subordinate Judge at Khulna and dismissing as against the respondents, the appellants' suit.

The respondents appearing are 9 out of an original concourse of 414 defendants who at the commencement of the litigation on April 30th, 1921, were, so far as was physically possible, in occupation of an area of lands approximately 6,000 bighas in extent, situate in the Collectorate of District Khulna, in Bengal. The appellants' claim in the suit was to recover from the impleaded defendants khas possession of these lands. Their case in substance—it will suffice to state it in the barest outline—was that the respective interests of the defendants in the lands were no more than incumbrances within the meaning of Section 11 of Bengal Regulation VIII of 1819, and that the appellants as auction purchasers of the putni in which the 6,000 bighas were

comprised had right to avoid these incumbrances and recover for themselves khas possession of the entirety of the lands. Very many of the defendants submitted in the course of the proceedings to the appellants' demand for possession of their holdings, and at the trial the claim was resisted by the respondents alone, the area of their occupancies representing a mere fraction of the acreage originally in suit. The respondents' resistance had no immediate result. The learned Subordinate Judge as has been seen decreed the suit against them. On appeal their resistance was more successful. By the decree of the High Court of the 9th February, 1927, the suit as against them was dismissed. Hence the present appeal, made pursuant to a certificate of fitness granted by the High Court on the 15th August, 1927.

To the competence of the appeal so authorised a preliminary objection was at once taken by the appearing respondents. This was, they said, " an appeal from a decree passed on appeal by a High Court "—case (*a*) of s. 109 of the Code of Civil Procedure. For such a decree to be appealable to His Majesty in Council the requirements of paragraph 1 of section 110 of the Code must be observed, the respondents rightly observing that the second paragraph of the section is, in view of the decision of the Board in *Gudivada Mangamma* v. *Maddi Mahalakshamma*, 57 I. A. 56, 60, inapplicable to the present case. Section 110, paragraph 1, provides that :—

> " the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

In granting a certificate that the case was a fit one to be taken to His Majesty in Council the High Court, in the respondents' submission, had omitted to have regard to the fact that the value of the subject matter of the suit in the Court of first instance had at the instance and on the evidence of the appellants themselves been found to be Rs. 5,100 and no more. The respondents accordingly objected that in these circumstances there was no warrant in law for the certificate which the High Court had granted : that the appeal was incompetent, and ought not to be entertained. This objection of the respondents, fatal to the appeal if well taken, was at once argued as a preliminary issue and with it this judgment is alone concerned.

The true effect of Section 110 of the Code, as above quoted, is in two presently relevant respects, well settled by authority. First, the word " and " where it occurs in the section means " and " and not " or " : each condition must be separately fulfilled. Secondly, as regards " the amount or value of the subject matter of the suit in the Court of first instance," the material date is that of the institution of the suit. The facts relied upon by the respondents in support of their objection must be regarded with the true, although not perhaps the obvious, construction of

the section in view. Thus regarded, these facts are so striking that, as their Lordships think, it must have been through some oversight that their compelling significance was not apparently fully appreciated in the High Court.

The question of the value of the suit at the date of its commencement was from the outset a matter of controversy. As plaintiffs, the appellants, in their plaint, stated the value of the lands brought into suit to be Rs. 5,000, and they restricted their claim for mesne profits to Rs. 100. It was at once objected by the Sheristadar that the plaint had been undervalued and the appellants were directed to produce their auction sale certificate to assist the Court in determining the proper value. On the 28th April, 1921, apparently in the absence of the parties, the Court fixed that value at "about Rs. 50,000" and directed the appellants to pay within 15 days, the sum which on that footing represented the deficit Court fee. Against the order so made the appellants, on the 13th May, 1921, petitioned the Court. In their petition they stated that the sum of Rs. 5,000, at which they had valued their plaint, was the proper market value of the lands in suit, ascertained after careful inquiry: that the stamp paid by them was proper and adequate, and no excess Court fee was leviable upon the plaint. They also offered to adduce evidence that their valuation was correct and they prayed that the operation of the order complained of might be suspended pending the final disposal of their objection to it. In response to the appellants' petition, the Court, on the 13th May, 1921, made an order which, after stating that the market value of the lands in suit could not be determined unless the Court got an idea as to the area of the lands under cultivation and as to the produce, directed the appellants to file an affidavit stating the area of culturable lands and the approximate produce per bigha and valuations of those lands. In obedience to that direction the appellants duly filed, on the 19th May, 1921, an affidavit of Jogandra Nath Chakraharti, who was then and had been for seven years the Naib of Taraf Sahapur belonging to the appellants, and who spoke with an intimate knowledge of the lands in question for 25 years. Their Lordships would at once emphasise a fact which has apparently escaped notice in India, that this affidavit is the sworn statement filed by the appellants as to the then value of the lands in suit; that it remains the only evidence upon that subject; and that the appellants have never sought to withdraw the affidavit nor in any respect to correct or qualify its statements. And it is clear, precise, and unambiguous. After giving in the earlier paragraphs elaborate reasons for his opinion the deponent thus states the conclusion of the whole matter:—

> "On the aforesaid grounds the value of the lands in suit can by no means exceed Rs. 5,000. This is true to my knowledge."

The affidavit was accepted by the Court of the Subordinate Judge, and the plaint was ordered to be registered with no increase of Court fee.

But the matter did not rest there. In the written statements of the respondents or of some of them, it was again objected that the value of the suit land was higher than that stated in the plaint, and upon that allegation the following issue was framed : " Is the suit properly valued and stamped " ; on which issue the finding of the learned Subordinate Judge, in his judgment on the 27th September, 1924, after trial, was that it had not been shown on the respondents' side that the stamp paid on the plaint was insufficient. And that was the end. The finding was, for the purposes of their appeal to the High Court, accepted also by the present respondents. They valued their appeal, in respect of their fractional acreage at the proportionate figure of Rs. 400, a valuation accepted both by the officials of the High Court and by the present appellants ; and the appeal proceeded without check on that score.

Upon findings so clear it is not easy to assign responsibility for the confusion in this matter which, with results disastrous in the matter of wasted expenditure, crept into the subsequent proceedings. It is probably traceable to the terms of the appellants' petition to the High Court, on the 20th May, 1927, for leave to appeal to His Majesty in Council from the decree against them of the 9th February, 1927. In paragraph 16 the appellants say

> " The value of the subject matter of the suit in the Court of first instance is above ten thousand rupees and the value of the subject matter in dispute on appeal to His Majesty in Council is above ten thousand rupees."

The allegation, it will be seen, is taken almost textually from Section 110 of the Code, but with a variation which suggests the assumption that the values in each case need only be the values at the date of the petition, and not, to take only the subject matter of the suit in the Court of first instance, its value at the date of commencement—in this case more than six years before. And this assumption seems to have been accepted by the High Court, for, in spite of an affidavit on behalf of the respondents, in which it was stated that the subject matter of the suit in the Court of first instance had been determined at Rs. 5,000, the High Court, on the 20th June, 1927, ignoring that fact altogether and stating that there was a dispute between the parties as regards the value of the subject matter of appeal to His Majesty directed the Court of first instance purporting to act in terms of Order 45, Rule 5, to inquire into the matter and to submit a report as regards that value, and nothing more.

On the 25th July, 1927, the learned Subordinate Judge duly made his report as so directed, and in the result found that the value referred to was not less than Rs. 20,000.

The report, as was right, left entirely untouched the value of the property in suit in the Court of first instance. No such question was referred. But the affidavit on that subject of Naib Jogendra is alluded to in the report. It had, it would

seem, been vouched by the respondents for the purpose of showing that the high valuation of a mere fraction of the property then being put forward by the appellants could not be accepted. And its correctness was apparently taken for granted on all sides, because in his report the learned Judge answers the respondents' argument by stating that the affidavit refers to the date of the institution of the suit in 1921; that six years had passed and that the settlement record shows very clearly that in the interval the quantity of land under cultivation had greatly increased. In other words, no doubt is by the report cast upon the correctness of the affidavit either by the learned Judge, by the appellants, or by anyone else. It remains the authentic record of the facts, to which it deposes.

In that position of matters the application for the grant of a certificate finally came before the High Court on the 15th August, 1927, and on that day it was granted. The original valuation in the Court of first instance is regarded by the learned Judges as being merely a question of Court fees paid by the appellants after challenge of their valuation. The case they say had been treated as a case of first appeal to the High Court; that consequently the under-valuation, if such there was, had not affected the course taken by the case upon appeal; and that in the circumstances there was no estoppel. The report as to the value of the subject matter of appeal was unexceptionable and the correct course was to grant the certificate as asked.

The Board is unable to accept either the reasoning of the learned Judges or their conclusion. They have not addressed themselves to what was really the only question, namely, whether the appellants had established that each of the two conditions imposed by Section 110 had been separately fulfilled. In truth, the appellants had not even attempted to establish the first of these conditions. Their own evidence on the subject negatived the case which it was necessary for them to prove. And no question of estoppel arose for the reason that the appellants did not attempt to question the correctness of the evidence they had adduced, nor did they express any desire either to vary or to qualify it. It is unnecessary for their Lordships to express any opinion upon the question how far any such attempt could, in this case, have succeeded had it been made. It was never made. In the result their Lordships cannot escape from the conclusion that the certificate of fitness was unwarranted, and it must be disregarded. The Board is not in a position to entertain the appeal. It ought, irrespective of merits or otherwise, to be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

RAI RAJENDRA KUMAR GHOSH BAHADUR, SINCE DECEASED (NOW REPRESENTED BY HEMANTA KUMAR GHOSH AND OTHERS), AND OTHERS

v.

RASH BEHARI MANDAL AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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