PRIVY COUNCIL.

BIPRADAS PAL CHOWDHURY (PLAINTIFF)

v.

KAMINI KUMAR LAHIRI AND OTHERS

(DEFENDANTS)

AND CONNECTED APPEALS.

P. C.*
1921
June 14.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Limitation—Patni taluk—Sale for rent—Avoidance of incumbrances—Lakhiraj land—Adverse possession—Validity of notice—Absence of issue—Bengal Tenancy Act (VIII of 1885) ss. 161, 167—Limitation Act (XV of 1877), Sch. II, Art. 121.

The appellant having purchased a patni taluk at a sale for rent, some of the occupiers claimed that they held their lands lakhiraj. He served notices upon them under s. 167 of the Bengal Tenancy Act, 1885, treating the interests claimed by them as incumbrances which he had power to avoid under that Act, and brought civil suits for possession. The occupiers and their predecessors had held lakhiraj for periods greatly exceeding twelve years; the evidence did not establish whether they had commenced so to hold after 1807, when the patni was created:—

Held (without deciding whether an interest not created by a talukdar but allowed to grow up by sufferance was an "incumbrance" within the definition in s. 161 of the Bengal Tenancy Act, 1885), that the suit failed since the onus was upon the purchaser to prove that the holding lakhiraj commenced after the creation of the patni; Art. 121 of Sch. II of the Indian Limitation Act, 1877, contemplating only cases in which the adverse possession commenced after the creation of the patni.

Hurryhur Mookhopadya v. *Madub Chunder* (1) followed.

Judgment of the High Court affirmed.

But, *held*, that the Appellate Court was not entitled to hold that the notices were invalid under s. 167 of the Bengal Tenancy Act, 1885, on

Present: LORD SHAW, LORD PHILLIMORE and MR. AMEER ALI.

(1) (1871) 14 Moo. I. A. 152.

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the ground that the purchaser must have known of the incumbrances more than a year before he gave the notices, no issue having been framed in that matter and the point not having been raised at the trial.

CONSOLIDATED APPEALS, one (No. 65 of 1920) from a judgment and eighty-eight decrees (February 12, 1914) of the High Court, reversing decrees (June 2 and 19, 1911) of the District Judge of Nadia on appeal from the Munsif of Krishnagar; the other (No. 12 of 1920) from a judgment and sixty-three decrees (May 29, 1917) of the High Court affirming decrees (August 30, 1915) of the Additional Subordinate Judge of Nadia on appeal from the Munsif of Ranaghat.

The consolidated appeals arose out of numerous suits brought in the Munsif's Court on November 8, 1907, and on subsequent dates by the appellant against the various respondents. In each case the appellant as purchaser of a patni taluk at a sale under section 165 of the Bengal Tenancy Act, 1885, sued to recover lands occupied by the respondents within the patni taluk alleging that his cause of action arose on November 28, 1899, the date of his auction purchase. The defendants by their written statements pleaded, so far as is material, (i) that the lands in question were lakhiraj and not mal lands; (ii) that the suit was barred by limitation; and (iii) that their tenure was not an incumbrance which the plaintiff could annul by law.

The circumstances in which the suits were instituted and the effect of the judgments in India appear from the judgment of the Judicial Committee.

The judgment of the High Court delivered on February 12, 1914, was followed by the judgments subsequently delivered in India.

De Gruyther K.C. and *Dube*, for the representative of the deceased appellant. The District Judge found that the lands in question in the appeal were

mal lands; that finding of fact was binding upon the High Court upon the second appeal. Upon the pleandigs the issue was narrowed down to whether the lands were in 1790 mal or lakhiraj. If on that issue the appellant succeeded there could be no question but that the suits were in time having regard to Art. 121 of Sch. 2 of the Limitation Act, 1877. A purchaser of a patni taluk sold for rent can avoid incumbrances which have been suffered to grow up: *Womesh Chunder Goopto* v. *Raj Narain Roy* (1), *Khantamoni Dasi* v. *Bijoy Chand Mahatab* (2), *Karmi Khan* v. *Brojo Nath Das* (3), *Nupper Chandra Pal Chowdhry* v. *Rajendro La Goswami* (4). It was a question of fact whether or not the lakhiraj holding had commenced before the creation of the patni. The High Court did not purport to differ from the District Judge's finding. The view of the High Court on the question of limitation cannot be reconciled with the judgment of the Board in *Secretary of State for India* v. *Chellikani Rama Rao* (5). The reasoning of the High Court accords with the rejected contention of respondent in that appeal.

The respondents did not appear.

The judgment of their Lordships was delivered by

June 14.

LORD PHILLIMORE. The plaintiff in the Courts below, now represented by the present appellants, was the purchaser at a public auction of the patni taluk Taraf Santipur, the property having been put up to sale in execution of a decree for rent. When he came to take possession he found that in thirty-eight villages, the tenants, with some small exception, set up a claim to hold their lands as revenue free or as lakhiraj. He

(1) (1868) 10 W. R. 15.
(2) (1892) I. L. R. 19 Calc. 787.
(3) (1894) I. L. R. 22 Calc. 244.
(4) (1877) I. L. R. 25 Calc. 167.
(5) (1916) I. L. R. 39 Mad. 617, 621; L. R. 43 I. A. 192, 204.

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accordingly served notices under section 167 of the Bengal Tenancy Act of 1885 upon 103 occupiers, treating the interests which they claimed as incumbrances upon his purchase, which he had power under the various sections of the Act to avoid or annul. As they persisted in their claims, he instituted in the Court of the Munsif, 103 suits which were heard together.

During the somewhat protracted litigation which followed, fifteen of these suits were disposed of, and do not now come before their Lordships. The remaining eighty-eight are the subject of the first appeal, and there is a further batch of appeals represented in the second consolidated appeal also before their Lordships. The principles governing all these cases are the same, and the decision in one would cover the rest.

The case made by the plaintiff is that the patni taluk in question was created in 1807, that it was put up for sale on Octoebr 2, 1899, and was bought by him free of incumbrances; that the lands in question were not registered as lakhiraj and were in fact mal lands, and that any right of the occupier to hold revenue-free must be derived under some grant made by the talukdar, and that this would be an incumbrance upon the taluk which the plaintiff would be entitled to avoid or annul.

The defences in general form were that no zamindar, patnidar or darpatnidar had been in possession of the land within twelve years, and the claims therefore were barred by limitation; that the lands never were mal lands; that they had in fact been registered as lakhiraj; and certain other objections not material to be discussed in the present judgment.

When the case came for trial before the Munsif he decided in favour of the defendants and dismissed the various suits, and on appeal the District Judge

confirmed his decision. The matter was then taken to the High Court of Judicature at Fort William in Bengal, which Court remanded the case to the District Judge for rehearing the parties upon the evidence, and then addressing himself to the determination of the questions of law, intimating that the whole case would be open before him and that every question of fact and law that arose for consideration upon the issues, must be decided.

On this second hearing the District Judge, who was not the same as the first District Judge, went very carefully into the evidence, and took the view that the burden of proving that the lands were mal lands lay upon the plaintiff, but that he had discharged it except in eight suits, in which he held that the defendants had proved that their lands were lakhiraj. The ground on which he rested his view that the onus was in the first instance upon the plaintiff was that these suits were not suits "for the resumption of lakhiraj lands, but for the eviction of the persons holding them, on the ground that they are trespassers, and therefore had not right or title to hold them."

The materials put before him were partly documentary and partly oral. The plaintiff relied upon the pargana register kept under Reg. VIII of 1800, the kanungo register prepared and kept under Regulations of 1816 and 1819, the register kept under the Land Registration Act of 1876, and copies of the thak maps and thak statements. In none of these were the lands in question shown to be lakhiraj, although there were instances in which other lands were mentioned as being lakhiraj. This was all the evidence which he gave. He did not show that any rent had ever been received in respect of the lands in suit. The way in which the learned District Judge accounted for this is as follows: "It must be remembered that the plaintiff

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is a new-comer having purchased the patni at an auction sale only recently, and when it is borne in mind that some of the outgoing patnidars are at the back of the contending defendants, there is nothing extraordinary in the fact that plaintiff could not produce any collection papers to show that any rents have ever been realized from the defendants for the lands in suit. I therefore hold that the plaintiff by producing series of registers and thakbast maps and thak statements, and showing that the lands in suit do not find any entry in any of these documents as lakhiraj, succeeded in discharging the onus upon him, sufficiently to shift it on the defendants to prove that the lands they hold are lakhiraj lands."

The documentary evidence which the defendants relied upon was the quinquennial register, the terij statements and the taidad registers. The learned District Judge thought that no useful assistance could be obtained from the two former; but with regard to the taidad register, he gave it force wherever the lands could be identified. He thought that there was sufficient identification in eight cases and he decided these in favour of the defendants. All the rest he decided in favour of the plaintiff.

The eighty-eight defendants, who had been unsuccessful, appealed to the High Court. The High Court first dealt with the application of Art. 121 of Sch. 2 of the Indian Limitation Act, 1877, which provides that suits to avoid incumbrances in a patni taluk sold for arrears of rent must be commenced within twelve years from the date when the sale becomes final and conclusive, and therefore by inference permits suits to be brought within that time. But the learned Judges observed that the adverse possession contemplated in these cases is possession which commenced after the creation of the patni tenure. They say truly that the

principle is that the purchaser of the patni taluk at such a sale as the present takes the taluk in the state in which it was initially created; and after assuming the correctness of some decisions to which they refer, they add: "The purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by the act of the defaulting proprietor, his representatives or assignees but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the inaction of the defaulting proprietor." But they add: "This doctrine is plainly limited in its application to cases where the adverse possession commenced after the creation of the patni. In a case in which the proprietor of the estate is out of possession, he cannot, merely by the device of the creation of a subordinate taluk arrest the effect of the adverse possession which has already commenced to run against him, and such possession would be effective not only as against the subordinate tenure-holder, but also as against the superior proprietor. Consequently, if a plaintiff relies upon Art. 121 of Sch. 2 of the Indian Limitation Act, he has to establish that the incumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the patni." They then point out that: "The District Judge has not found that in the cases before us the adverse possession of the defendants and their predecessors commenced after the creation of the patni. On the other hand, there is ample evidence that the adverse possession of the defendants and their predecessors commenced before the creation of patni. There are traces on the record to show that there had been assertions of hostile title before the patni itself was created."

The High Court accordingly reversed the decision of the District Judge and dismissed all the suits.

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The estate of the superior zamindar was created in 1799, and even assuming that there were no lakhiraj lands at the time of the creation of that estate, there would be room for the growth of interests by adverse possession between 1799 and 1807; and as the High Court observes, on the assumption that the possible interests acquired by the defendants by adverse possession constitute incumbrances which can be annulled, the defect of the plaintiff is that he has not established that the adverse possession of the defendants and their predecessors commenced after 1807.

It is here that the strong body of oral evidence, to which the learned District Judge apparently paid little attention, comes in. There is a mass of evidence to show that the defendants and their predecessors had occupied the lands in question revenue-free for periods greatly exceeding twelve years, and there was no evidence of any suggestion in cross-examination to which their Lordships' attention could be drawn to show that this occupation had begun at any particular period. Apparently it went back as far as anything could be traced.

In the absence of any indication that these holdings as revenue-free tenures had an origin either by creation or by the sufferance of a patnidar since 1807, their Lordships think that the High Court was right in saying that the proper presumption was that they ran back to a period antecedent to the creation of the taluk, or to put it in another way, that it lay upon the plaintiff to show an origin subsequent to the creation of the patni taluk if he were seeking to avail himself of s. 167 of the Act, and to annul these interests as incumbrances. In effect the judgment of the learned District Judge had given no weight to the evidence of possession. Whether this possession is to be attributed to the fact that the predecessors of the defendants

were in by title lawfully created before the grant of the taluk in 1807, or to be attributed, as counsel for the appellants insisted, must be the case (if they were to prevail), to interests lawfully created before 1790, or is to be attributed to adverse possession acquired before 1807, makes no difference in the legal result.

The principle upon which their Lordships should proceed has been well expressed in the case of *Hurryhur Mookhopadya* v. *Madub Chunder* (1): "Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *prima facie* case. His case is, that his mal land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the mal assets of the estate at the decennial settlement. His *prima facie* case once proved, the burthen of proof is shifted on the defendant, who must make out that his tenure existed before December, 1790. "It may be objected that the result of this ruling may be that plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the plaintiff to give *prima facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the defendants, or those from whom

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they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving defendants from the burden which every year made it more difficult to support."

It is right to add one observation. The case proceeded in the Courts below upon the footing that an interest not directly created by the talukdar, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given to that word in s. 161 of the Act. There is apparently a current of decisions in India to this effect, and their Lordships have, for the purpose of their judgment assumed, as the Judges in the High Court assumed for their judgment, that this is correct. But it must not be taken that their Lordships have expressed a final opinion upon the point, it being unnecessary that they should do so.

One further point remains. In order to be in a position to use the powers of s. 167, the purchaser must act "within one year from the date of the sale or the date on which he first has notice of the incumbrance whichever is the later." The plaintiff here did not act within one year from the date of the sale; but it is suggested that he did act within one year of his having notice. No point to the contrary was made in the Court below, the High Court, and no issue was taken. In these circumstances, the High Court thought itself entitled to act upon probabilities and to hold that the plaintiff must have had notice more than a year before he acted, and to decide against

him on this ground also. Their Lordships cannot agree with this course of action, and if the point were now of importance they would have acceded to the application of the appellants, and remitted the case in order that an issue as to this point might have been stated and found. But as for the reasons already given they think the plaintiff has failed on the main point, it becomes immaterial to have this issue decided. Their Lordships will therefore humbly advise his Majesty that this appeal should be dismissed. There being no appearance for the respondents, there will be no question as to costs.

A. M. T.

Solicitors for the appellants: *Watkins & Hunter.*

APPELLATE CIVIL.

Before Mookerjee and Buckland JJ.

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March 2.

MIDNAPORE ZAMINDARY CO., LD.,

v.

NARESH NARAYAN ROY.*

Alluvial Land—Periodically settled estate under Government—Reformation—Title suit—Possession in execution of decree made therein—Subsequent dispossession—Fresh suit for recovery of possession without obtaining settlement—Maintainability—Limitation Act (IX of 1908) Sch. I, Art. 45, application of—Partition, whether possible.

Where the plaintiff instituted a suit for the recovery of possession of certain alluvial lands as reformation *in situ* of an estate held under Government, from which he had been dispossessed by the defendants on the strength of a settlement obtained from the revenue authorities notwithstanding a previous decree made in favour of the plaintiff declaring

*Appeal from Original Decree, No. 144 of 1919 against the decree of Nirod Ranjan Guha, Additional Subordinate Judge of Rajshahi, dated May 29, 1918.