APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

NANI LAL MANDAL

v.

PRIYA NATH RAY.*

1929.

Feb. 22.

Fisheries, rights over—Special rule of limitation—Bengal Tenancy Act (VIII of 1885), ss. 193, 184, 185.

Where right of fishery had been granted in respect of two pieces of land, surrounded on all sides by embankment, and described in the lease as "*bheri jami jalkar*,"

held that the expression "rights over fisheries," to be found in section 193 of the Bengal Tenancy Act, includes also the user of land for the purpose of fishing or for the purpose of repairing embankments in the interest of fishing. The special rule of limitation provided for by sections 184 and 185 of the said Act applies to a case like this.

Krishna Lal Choudhuri v. *Salim Mahamed Choudhury* (1) distinguished.

Mahananda Chakravarti v. *Mangala Keotani* (2) referred to.

APPEAL FROM APPELLATE DECREE, by defendant.

This was a suit for the recovery of rent of a *jalkar* as well as its subsoil and embankments and was heard and decided by the Second Subordinate Judge of the 24-Parganas. The case of the plaintiff before him was that, by a registered lease, executed on the 4th January, 1918, the defendants took lease of the *jalkar* and its subsoil and embankment for three years and agreed to pay rent at Rs. 4,500 a year. After about one year, the defendants made default in the payment of instalments of rent. The defendant, amongst others, took the defence of the special period of limitation of three years applicable to a suit for recovery of rent under the Bengal Tenancy Act. The learned Subordinate Judge decreed the suit of the plaintiff in part. From this decision, the defendants took an

*Appeal from Appellate Decree, No. 635 of 1927, against the decree of L. B. Chatterjee, Additional District Judge of the 24-Parganas, dated Jan. 10, 1927, modifying the decree of Surjya Mani De, Subordinate Judge of Alipore, dated April 28, 1926.

(1) (1914) 19 C. W. N. 514. (2) (1904) I. L. R. 31 Calc. 937.

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appeal to the First Additional District Judge of the 24-Parganas. The only point that was urged before him on behalf of the defendant was that the *kabuliyat* clearly showed that it was the fishery only which formed the subject matter of the lease, whereas the plaintiff maintained that interest was created in the land and subsoil also and as such the case came outside the Bengal Tenancy Act. The learned Judge agreeing with the said submission of the plaintiff dismissed the defendant's appeal with costs. Against this dismissal, the defendant preferred the present appeal to the High Court.

Mr. Rishindranath Sarkar and *Mr. Nasim Ali*, for the appellant.

Dr. Bijankumar Mukherji, for the respondent.

RANKIN C. J. In this case, the question is whether the claim by the plaintiff must be deemed to be subject to the special rule of limitation laid down by the Bengal Tenancy Act. That rule of limitation gives three years only for the bringing of the plaintiff's claim. Now the claim is in respect of rent of a *jalkar*. But the question before us depends to some extent on whether that description is adequate and sufficient, and we have to turn, in this case, to the language of the memorandum of agreement between the parties. That agreement is an agreement in writing, dated the 4th January, 1918, and, according to the English translation before us, it is called a memorandum of agreement for lease for a term of three years in respect of the right to fishery over two pieces of *bheri* land. The first of these two pieces of *bheri* land is described as Gobardanga *bheri*, surrounded on all sides by embankment. The second piece of *bheri* land is described as Santiram Nashkar *bheri* land, surrounded on all sides by embankment. The document goes on to describe the two pieces of land as *bheri jami jalkar* and it recites that these two pieces of *bheri* land *jalkar* are in the possession and enjoyment of the grantees under a previous lease. Then it recites that a proposal has been made for granting a lease of the said

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bheri land *jalkar* and the terms of the agreement are these: that for the right to fishery over the first *bheri*, Rs. 500 shall be paid in advance as *selami* and the rent shall be fixed at Rs. 3,000 per annum and that for the right to fishery over the other *bheri* land, Rs. 500 shall be paid in advance as *selami* and the rent shall be fixed at Rs. 1,500 per annum. In this way, the total annual rent of the said two pieces of *bheri* land *jalkar* is fixed at Rs. 4,500. It then recites "On the "aforesaid understanding, we take lease of the said "two pieces of *bheri* land *jalkar* running from a cer- "tain month and having the right of possession over "the said two pieces of *bheri* land *jalkar* as *nij-jote* "and execute this *kabuliyat*" in terms therein described. The document then recites. "We shall at our "own costs make necessary and regular repairs of the "sluices and the embankments surrounding the *bheri* "during the term of the lease and we shall make other "necessary expenses. We will be in possession by "growing fish and catching them." There are various provisions as to the payment of rent. The grantees further covenant in these terms: "We shall keep "intact the boundary and shall make regular repairs "of the embankment on all sides to keep them as "strong and durable as they were previous to our "taking the lease."

Now we have to consider whether the provisions of section 193 of the Bengal Tenancy Act are applicable to the claim by the plaintiff for rent contracted for in this agreement. The language of the Act we have to deal with is this "The provisions of this Act appli- "cable to suits for the recovery of arrears of rent "shall, as far as may be, apply to suits for the re- "covery of anything payable or deliver- "able in respect of any rights of pasturage, forest "rights, rights over fisheries and the like." Now the first thing that is argued before us by the learned advocate for the respondent is that the general principle of the matter is this that *jalkar* rights do not come under the Bengal Tenancy Act unless they are part of agricultural holdings. That principle I

shall; for the purposes of this case, accept. Then we have the particular provision in section 193. The argument on that section is not that we have to read into this section a provision that the section, shall apply in respect of rights of pasturage, forest rights, rights over fisheries "being parts of agricultural "holdings," but that, in order to come within this section, the rights over fishery must be pure incorporeal rights and that if, for any purpose, there is any right in the land itself, whether it is purely ancillary to the purpose of fishing or not, the section does not apply. It is said that if we apply the section to a case of this sort, we would be violating a principle governing these matters and making the Bengal Tenancy Act applicable to cases where certain rights are granted in the land which are not rights granted for agricultural purposes. In my opinion, that is not the way in which this section is to be looked at or to be considered for the purpose of the present case. The learned Additional District Judge has held that section 193 of the Bengal Tenancy Act does not apply to this case, because the tenant was expressly given certain rights in respect of the embankments, outlets, etc. He says: "This to my mind created some sort "of right in the soil and in the attached land (the "embankments) although the right be confined to the "raising of it or repairing of it regarding to the "necessity of the tenants and although the same was "to be restored in its original condition to the lessor "on expiry of the term of the lease." In other words, it is stated that if there is any right given in the land, then section 193 cannot possibly be applied. In support of that contention the case of *Krishna Lal Choudhuri* v. *Salim Mahamed Choudhury* (1) is cited to us. It appears that there it was contended that the lease not merely conferred a right over fishery but also created an interest in the land and that, accordingly, it did not come within the purview of the Bengal Tenancy Act. In that particular case, the court was

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in no difficulty in finding an answer to that contention, because, on an examination of the lease, it turned out that it did not convey any interest in land over and above the mere grant of a right to fishery and, on that view, it was not necessary to struggle with any difficulty at all. We have also been referred to the case of *Mahananda Chakravarti* v. *Mangala Keotani* (1), where, for reasons which do not appear to be very cogent to me, it was argued that because the rent was a definite rent per annum, the tenant taking the risk of being able to get enough fish from the tank, the letting was not the letting of a mere *jalkar*. On looking at the agreement before me, it appears to me that it is a question of fishery and nothing but fishery throughout. The language of the section is not right of fishery but rights over fisheries and that expression comes after such special rights as pasturage and forest rights and is succeeded by the general phrase "and "the like." I have to refer to this document to see whether this is a case of rights over fishery or something more. I need not say that I quite agree that if you look at a letting and find that it is a letting for residential purposes of certain land coupled with a letting of a right to fishery with a single rent reserved for both, the case would not come within the purview of section 193. In the same way, if in this case it was open to the tenant to use the embankment for non-agricultural purposes with no reference to fishery, *e.g.*, for industrial purposes, paying a consolidated rent for the whole thing, it would not come under section 193. When I come to the agreement in this case, it appears to me perfectly true, as the learned Additional District Judge says, that some sort of right in the soil may be created by the grant. But what sort of right in the soil? If it refers to the right of user of the land and water for the purpose of fishing, or if it refers to the liability undertaken by the grantee to repair the embankment in the interest of fishing, it does not seem to me that it, in any way, conflicts with

(1) (1904) I. L. R. 31 Calc. 937.

principle to hold that the case is covered by the expression " rights over fisheries " to be found in section 193. One of the conditions, upon which the considerable amount of rent was agreed to for the right of fishing over this water, was that the grantee should be entitled to use the embankment for the purposes of growing fish or catching them and also to use the embankment for the purpose of keeping their obligation to repair the embankment in order that their fishing rights might not be affected. There is no suggestion in this document of the grantee having a right to use the embankment for purposes unconnected with fishing and unconnected with agriculture.

I, therefore, think that the special rule of limitation does apply to this case and that this appeal must be allowed and that the suit must be dismissed with costs in this Court and in the courts below.

GHOSE J. I agree.

Appeal allowed.

O. U. A.