APPELLATE CIVIL.

1931

June 5, 10, 29; July 8.

Before Mukerji and Guha JJ.

NIBARANCHANDRA MUKHERJI.

v.

HARENDRALAL RAY.*

Landlord and Tenant—Revenue-paying lands—Lâkhirâj—Principles of ascertainment—Mâl—" Estate "——" Mehâl "—Mouzâ—Touzi—Settlement-Khatiyân—Record-of-rights—Presumption—General Register—Land Registration Act (Beng. VII of 1876), Preamble, ss. 3, 4.

There is no real foundation for the supposition that the Judicial Committee in the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (1) said something contrary to what they laid down in the case of *Harihar Mukhopadya* v. *Madab Chandra Babu* (2).

Sashi Bhusan Hazra v. *Abdulla* (3), *Chattra Nath Chowdhury* v. *Babar Ali* (4), *Kiran Chandra Roy* v. *Srinath Chakravarti* (5), *Makhan Lal Parel* v. *Rup Chand Maji* (6) and *Abdul Bari Dewan* v. *Hrishikesh Mittra* (7), dissented from.

Harihar Mukhopadya's case (2) laid down in the clearest possible words that the plaintiff in such a case will have to make out a *prima facie* case: (1) of payment of rent since 1790, or (2) that the land formed part of the *mâl* assets of the estate at the Decennial Settlement. If he does so, the burden of proof shifts on to the defendant to prove that his tenure existed before 1790, and that the mere fact that the land lay within the geographical limits of the plaintiff's revenue-paying *mouzâ* is not sufficient.

In *Jagdeo's* case (1), their Lordships, after referring to the presumption, which arose in favour of the defendants upon the entry in the record-of-rights observed, " Considerable stress has been laid on the presumption on behalf of the respondents. Once, however, the landlord has proved that the land, which is sought to be held rent free, lies within his regularly assessed estate or *mehâl*, the onus is shifted. In the present case the lands in dispute lie within the ambit of the estate, which belongs to the plaintiffs and the *pro forma* defendants and for which they pay the revenue assessed on the *mouzâ*. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent, to show by satisfactory evidence that they have been relieved of this obligation either by contract or by some old grant recognised by Government."

The confusion arises only if the distinction implied by the words " estate " and " *mehal* " on the one hand and the word " *mouzâ* " on the other, used in

*Appeal from Appellate Order, No. 159 of 1930, against the order of G. C. Sankey, Special Judge of 24-Parganas, dated Dec. 16, 1929, reversing the order of Rajendranath Biswas, Assistant Settlement Officer of Basirhat, dated Jan. 10, 1929.

(1) (1922) I. L. R. 2 Pat. 38; L. R. 49 I. A. 399.
(2) (1871) 8 B. L. R. 566; 14 M. I. A. 152.
(3) (1923) 28 C. W. N. 143.
(4) (1924) 29 C. W. N. 333.
(5) (1926) 31 C. W. N. 135.
(6) (1929) 33 C. W. N. 1168.
(7) (1928) 49 C. L. J. 546.

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this passage, is not kept in view, and if it is overlooked that the words "estate" and "*mehal*" used in *Jagdeo's* case (1) do not bear the same meaning as the same words bear in *Harihar Mukhopadya's* case (2).

In *Jagdeo's* case (1) there is no reason to suppose that their Lordships were not using the word "estate" in the sense in which it has been defined in the Indian Land Registration Act; indeed the distinction intended is manifest from the next sentence, where the expressions used are "ambit of the estate" and "for which they pay the revenue assessed on the *mouzâ*." In the said Act "estate" is defined as consisting of revenue-paying lands or revenue-free lands, while "*mouzâ*" means an area [see section 3(2)].

A reference to the preamble of the Act and its different provisions leave no room for doubt that Registers are prepared and kept under the Act for showing revenue-paying and revenue-free lands separately and, when the settlement *khatiyân* enables the court, to connect the lands in suit with the lands shown in the General Register, the court must hold that the landlord has succeeded in discharging the onus.

Where the plaintiff, produced before the High Court the General Register of revenue-paying lands in respect of his *touzi* kept under section 4 of the Land Registration Act and the landlord's portion of the settlement *khatiyân* in respect of the lands in suit, these documents were ordered to be marked as exhibits on behalf of the plaintiff because for the admission of these documents as evidence there could be no reasonable objection.

APPEAL FROM APPELLATE ORDER of remand by the defendant.

The facts and arguments appear in the judgment.

Chandrashekhar Sen, Nalinikumar Mukherji and *Hariprasanna Mukherji* for the appellant.

Prakashchandra Majumdar for the respondent.

Cur. adv. vult.

MUKERJI AND GUHA JJ. In this case the District Judge appears to have proceeded upon a supposition that the Judicial Committee in the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (1) said something contrary to what was laid down in the case of *Harihar Mukhopadya* v. *Madab Chandra Babu* (2). Considerable argument has been addressed to us either in support of the District Judge's view or against it, and reference has been made to a number of cases amongst which may be mentioned the following: *Sashi Bhusan Hazra* v. *Abdulla* (3), *Chattra Nath Chowdhury* v. *Babar Ali* (4), *Kiran*

(1) (1922) I. L. R. 2 Pat 38; L. R. 49 I. A. 399.

(2) (1871) 8 B. L. R. 566; 14 M. I. A. 152.

(3) (1923) 28 C. W. N. 143.

(4) (1924) 29 C. W. N. 333.

Chandra Roy v. *Srinath Chakravarti* (1), *Makhan Lal Parel* v. *Rup Chand Maji* (2) and *Abdul Bari Dewan* v. *Hrishikesh Mittra* (3). We have perused these decisions with care, but we consider it unnecessary to discuss them here, because, for reasons which we shall presently give, we are clearly of opinion that there is no real foundation for such a supposition, and we would respectfully dissent from such of the aforesaid decisions as may lend any colour to it.

In *Harihar Mukhopadya's* case (4), their Lordships referred to the provisions of Regulation XIX of 1793 and pointed out that it divided *lâkhirâj* tenures into two classes, that is to say those created by grants made previous to the 12th August, 1765, and those created by grants made between that date and the 1st December, 1790; that the former were, subject to certain conditions, declared valid, and the latter, with certain exceptions and subject to certain conditions, were declared invalid and as such resumable and subject to future assessment; and that the latter were subdivided into two classes, *viz.*, those which comprised lands not exceeding 100 *bighâs*, and those which comprised lands in excess of that quantity. After dealing with the machineries provided for by the Regulations and the later enactments and also the question of limitation that might arise, their Lordships dealt with the question of burden of proof. Their Lordships referred to the decision of a Full Bench of this Court in the case of *Parbati Charan Mookerjee* v. *Rajkrishna Mookerjee* (5), where it was held that, in any suit which the plaintiff might bring to assess or resume invalid *lâkhirâj* on the allegation that it came into existence since the 1st December, 1790, it lay upon the plaintiff to prove that the case was one falling within the 10th section of Regulation XIX of 1793. This

(1) (1926) 31 C. W. N. 135.
(2) (1929) 33 C. W. N. 1168.
(3) (1928) 49 C. L. J. 546.
(4) (1871) 8 B. L. R. 566; 14 M. I. A. 152.
(5) (1865) B. L. R. Sup. Vol. 162, 165.

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Court had said, "He must prove his allegation that "the land held by the defendant, and which he claims "to be *lâkhirâj*, is part of the *mâl* land of the plaintiff; "if he prove that fact and show that it was assessed "to the public revenue at the time of the Decennial "Settlement, it may be presumed that the right under "which the defendant claims to hold as *lâkhirâj* "commenced subsequently to the 1st December, 1790, "unless the defendant gives satisfactory evidence to "the contrary." Their Lordships then observed (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 *primâ facie* case. His "case is that his *mâl* land has, since 1790, been "converted into *lâkhirâj*. He is surely bound to give "some evidence that the land was once *mâl*. 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 *mâl* assets of the Decennial Settlement of the "estate. His *primâ facie* case once proved, the "burthen of proof is shifted on the defendant, who "must make out that his tenure existed before "December, 1790." Their Lordships then referred to an admission which the defendant had made that the lands in question, with the exception of a small quantity no longer claimed, were within the appellant's estate, and observed: "But such an "admission is obviously not sufficient to meet the "burthen of proof thrown upon the plaintiff. It was "at most an admission that the lands were within the "ambit of the estate, not that they had ever been *mâl* "lands. In fact the defendants strenuously asserted "the contrary." In *Harihar Mukhopadya's* case (1)

(1) (1871) 8 B. L. R. 566 (578); 14 M. I. A. 152 (172).

the suit was, on the face of it, brought under section 30 of Regulation XI of 1819, though to enforce a claim under section 10 of Regulation XIX of 1793, and was instituted after a preliminary proceeding under section 28 of Act X of 1859, and the defendants undertook to prove that their tenures existed before December, 1790. The case, therefore, laid down, in the clearest possible words, that the plaintiff, in such a case, will have to make out a *primâ facie* case (1) of payment of rent since 1790, or (2) that the land formed part of the *mâl* assets of the estate at the Decennial Settlement. If he does so, the burden of proof shifts on to the defendant to prove that his tenure existed before 1790, and that the mere fact that the land lay within the geographical limits of the plaintiffs' revenue-paying *mouzâ* is not sufficient.

In *Jagdeo's* case (1) their Lordships, after referring to the presumption, which arose in favour of the defendants upon the entry in the record-of-rights, have observed: "Considerable stress has been "laid on this presumption on behalf of the "respondents. Once, however, the landlord has "proved that the land which is sought to be held rent-"free lies within his regularly assessed estate or *mehâl*, "the onus is shifted. In the present case, the lands "in dispute lie within the ambit of the estate, which "admittedly belongs to the plaintiffs and the *pro* "*formâ* defendants, and for which they pay the revenue "assessed on the *mouzâ*. In these circumstances it "lies upon those who claim to hold the lands free of "the obligation to pay rent to show by satisfactory "evidence that they have been relieved of this obliga-"tion, either by contract or by some old grant "recognized by Government."

The confusion arises only if the distinction implied by the words "estate" and "*mehâl*" on the one hand and the word "*mouzâ*" on the other, used in this passage, is not kept in view, and if it is overlooked that the

(1) (1922) I. L. R. 2 Pat. 38 (48); L. R. 49 I. A. 399 (408-9).

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words "estate" and "*mehâl*" used in *Jagdeo's* case (1) do not bear the same meaning as the same words bear in *Harihar Mukhopadya's* case (2). In *Jagdeo's* case (1) their Lordships had, previous to this passage, considered various proceedings including a proceeding under the Land Registration Act (VII of 1876), the preamble whereof their Lordships quoted in their judgment, and their Lordships relied on the fact that the defendants' application for registration of their names in respect of the lands had been refused. From all these, their Lordships came to the conclusion that the lands lay within the plaintiffs' regularly assessed estate or *mehâl*. There is no reason to suppose that their Lordships were not using the word "estate" in the sense in which it has been defined in that Act; indeed, the distinction intended is manifest from the next sentence, where the expressions used are "ambit of the estate" and "for which they pay the revenue assessed on the "*mouzâ*." In the said Act "estate" is defined as consisting of revenue-paying lands or revenue-free lands, while "*mouzâ*" means an area [See section 3(*2*)]. Their Lordships, therefore, found that the plaintiffs had succeeded in proving that the land formed part of a revenue-paying estate or *mehâl*, and, on that finding, they held that the defendants claimed to hold an intermediate tenure and so they have to prove the grant in respect of it on the authority of the decision in *Prahlad Sen* v. *Durgaprasad Tewari* (3).

In the case before us, the Assistant Settlement Officer held that it was proved that the lands lay within the geographical ambit of the plaintiffs' *touzi*, but that he had failed to show that they had been assessed to revenue. The District Judge holding, upon the view that he took of *Jagdeo's* case (1), that it was enough for the plaintiff to show that the lands

(1) (1922) I. L. R. 2 Pat. 38 ; L. R. 49 I. A. 399.
(2) (1871) 8 B. L. R. 566 ; 14 M. I. A. 152.
(3) (1869) 2 B. L. R. P. C. 111 ; 12 M. I. A. 286.

fell within the geographical ambit of his *zemindâri*, has remanded the case for assessment of fair and equitable rent.

The plaintiffs, as respondents, have produced before us the general register of revenue-paying lands in respect of his *touzi* kept under section 4 of the Land Registration Act (Bengal Act VII of 1876) and the landlord's portion of the settlement *khatiyân* in respect of the lands in suit. For the admission of these documents as evidence there can be no reasonable objection. On these further materials, which we now order to be marked as documents exhibited on behalf of the plaintiff, there is not the least doubt that the lands in suit are revenue-paying. A reference to the preamble to the Act and its different provisions leave no room for doubt that registers are prepared and kept under the Act for showing revenue-paying and revenue-free lands separately, and, when the settlement *khatiyân* enables us to connect the lands in suit with the lands shown in the general register, we think we must hold that the plaintiff has succeeded in discharging the onus.

The result is that the order of the District Judge remanding the case to the Assistant Settlement Officer must be upheld, though on a ground different from what he has given.

The defendant, as appellant, has contended that upon a document which he has produced, a question of limitation arises. We are unable to deal with the question for want of materials. In view of the fact that the plaintiff respondent has succeeded before us on production of additional evidence, it is only fair to the appellant that he should have an opportunity to raise the question of limitation before the trial court now. If the objection is taken, it will be entertained and the parties, being allowed to adduce evidence on it, the case will be tried out.

There will be no order for costs in this appeal.

Appeal dismissed.

G. S.