APPELLATE CIVIL.

Before Mitter J.

1931

June 9.

JAGATDWIPTENDRANARAYAN BHUP

v.

BILASH RAY AGARWALLA.*

Landlord and Tenant—Suit by landlord for assessment of fair and equitable rent—Recital in deed of sale executed by tenant's predecessors-in-interest to his transferee alleging that the land was rent-free, if admissible in evidence—Evidence, admissibility of—Bengal Tenancy—Entry in record-of-rights—Presumption—Adverse possession—Non-payment of rent—Claim to be rent-free tenant—Indian Evidence Act (I of 1872), ss. 13, 32—Indian Limitation Act (IX of 1908), Sch. I, Art. 144.

Where the tenant, after admitting that the land in suit belonged to the landlord, resisted the landlord's suit for assessment of fair rent (which was filed after the publication of the record-of-rights declaring the land in suit to be liable to enhancement of rent) on the ground of his holding the land rent-free under grant from the landlord's predecessors, and, in proof thereof, put in evidence deeds of sale, executed by his predecessors in favour of third parties containing recitals alleging the land to be rent-free,

held that such recitals were not admissible in evidence for proving the land to be rent-free, as these were hearsay evidence in matters in which hearsay was not admissible under section 32 of the Indian Evidence Act.

Brojendra Kishore Roy Chaudhuri v. *Mohim Chandra Bhattacharji* (1) referred to.

Jnanendra Nath Dutt v. *Nasea Dasi* (2) distinguished.

Quaere, whether such deeds of sale are admissible in evidence as "transaction" under section 13 of the Indian Evidence Act.

Held, further, that the mere fact of non-payment of rent for a very long period by such a tenant is not sufficient, by itself, to constitute adverse possession.

Jagdeo Narain Singh v. *Baldeo Singh* (3) followed.

In order to prove a rent-free title, the tenant has to show that he has been relieved of his obligation to pay rent either by contract or by some old grant recognised by the Government.

Held, also, that the entry in the record-of rights raises the statutory presumption that it is correct until the contrary is proved.

Aman Gazi v. *Birendra Kishore Manikya* (4) and *Gour Chandra Chuckerbutty* v. *Birendra Kishore Manikya* (5) followed.

*Appeal from Appellate Decree, No. 2020 of 1929, against the decree of L. Rahaman, Subordinate Judge of Jalpaiguri, dated March 27, 1929, affirming the decree of Kshitishchandra Chatterji, First Munsif of Jalpaiguri, dated June 30, 1927.

(1) (1926) 31 C. W. N. 32.

(2) (1923) 39 C. L. J. 526.

(3) (1922) I. L. R. 2 Pat. 38; L. R. 49 I. A. 399.

(4) (1912) 16 C. W. N. 929.

(5) (1917) 22 C. W. N. 449.

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SECOND APPEAL by the plaintiff.

The material facts are set out in the judgment.

Atulchandra Gupta, *Sunanda Sen* and *Rajendra-bhusan Bakshi* for the appellant.

Samarendrakumar Datta and *Nirmalchandra Mitra* for the respondents.

MITTER J. This is an appeal by the plaintiff and arises out of a suit brought by him through the Regency Council, Cooch Behar, for assessment of fair and equitable rent for 5 acres and 14 decimals of lands which have been recorded in *khatiyan* No. 2197 of *mouzâ* Tetulia. The case of His Highness the Maharaja Jagatdwiptendranarayan Bhup Bahadur is that the suit land lies within the ambit of his *zemindâri* and in the record-of-rights, which was finally published in 1914, he has been recorded as the landlord in respect of the suit lands and the lands are shown as being liable to enhancement of rent. The defendants contend mainly, first, that they and their predecessor-in-interest were in possession of the lands in suit for nearly 100 years or more under a rent-free title; and, secondly, they contend that the suit is barred by the statute of limitation, as the defendants and their predecessor have been exercising right over these lands openly with the knowledge of the plaintiff as rent-free holders for over 100 years. It is not necessary to set forth here the precise statement made in paragraph No. 4 of the written statement filed by the defendants, for the purpose of showing that the defendants do not set up adverse possession to the fullest extent in the sense of possession adverse to the rights of his Highness the Maharaja as *zemindâr*. But in paragraph No. 4 of the written statement they distinctly allege that there had been a grant by some predecessor-in-interest of the present Maharaja to the predecessor-in-interest of the defendants and that the rent-free grant was made by the former to the latter. This portion of the written statement is material for the purpose of

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considering the question of limitation, which has been found in favour of the defendants by both the courts below. The Munsif of Jalpaiguri, who tried the suit in the first instance, rightly held that the burden of establishing that the defendants held under a rent-free title lay on the defendants themselves, for in the record-of-rights these lands are shown as belonging to the *zemindâr* and as forming part of their *mâl* assets at the time of the Permanent Settlement and as liable to be assessed with rent. The Munsif, notwithstanding the view that he correctly took on the question of the burden of proof, held that from long continued uninterrupted open possession for over 40 or 50 years without payment of rent by the defendants, and their predecessor-in-interest, rent-free title might be inferred on the theory of lost grant. On the question of limitation, the Munsif relied on Ext. E and the petition which was put in before the Assistant Settlement Officer in the course of settlement proceedings and the Munsif came to the conclusion that "the defendants made the "assertion of an independent title, hostile to the "plaintiff." Consequently, the present suit, not having been instituted within 12 years of the date of this assertion, the suit is barred by Article 144 of the Indian Limitation Act.

Against this decision, an appeal was taken to the court of the Subordinate Judge of Jalpaiguri, and he has affirmed the decision of the Munsif on both the points, accepting the defence of the defendants on the question of rent-free title, as well as the question of limitation.

Against this decision, the present appeal has been brought and two points have been taken by Mr. Atulchandra Gupta, who appears for the appellant. It is argued, in the first place, that the decision of the lower appellate court on the question of defendants' rent-free title as claimed by them is vitiated by the reception of inadmissible evidence. It is argued, in the second place, that the lower appellate court has

gone wrong on the question of limitation. With regard to the first point taken, the argument for the appellant is put in this way: In arriving at the conclusion that the defendants had been holding the lands in suit without payment of rent for a very very long period, the lower appellate court has relied on the recitals in the two *kabâlâs* or deeds of sale as also on some oral evidence to show that the lands were possessed as *niskar brahmottar* by the predecessors of the executants of the *kabâlâs*, which are dated 1308 B. S. and 1312 B. S. respectively. It is argued that, while these documents are admissible in evidence as transactions within the meaning of section 13 of the Indian Evidence Act, the recitals in the said *kabâlâs* to the effect that the predecessors-in-interest of the executants of the *kabâlâs* were holding the lands in proof of the right claimed by the defendants namely, *nishkar* right, were not admissible under the law. I think that this contention is well founded and is in accordance with the authorities of this court. Reference may be made in this connection to a recent decision of this court in the case of *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji* (1), where it was held that the recitals in the *kabâlâ*, which was executed in 1874, whereby the predecessor of the executant of the *kabâlâ* purported to sell the plaint lands with other lands, alleging that the lands were *nishkar brahmottar* and that his father was in possession of them in *nishkar* right, was not admissible in evidence under section 13 of the Indian Evidence Act. In reply to this contention, the learned advocate for the respondents referred to the decision of the learned Chief Justice in the case of *Jnanendra Nath Dutt* v. *Nasea Dasi* (2), where it was held that an assertion in the *kabâlâ* executed by a tenant in favour of his transferee that his right in it was a permanent one, was admissible in evidence in such a suit, under section 13 of the Evidence Act. This case is sought

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to be distinguished by the appellants on the ground that, although this case is inconsistent with the decision in the case of *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji* (1), in so far as this case held that the recital that the executants of the *kabâlâ* were holding the lands in *nishkar brahmottar* right was inadmissible in evidence, this case is not inconsistent with the contention which has been raised for the appellants to the effect that the recital of the *kabâlâ* to the effect that the plaintiff's predecessors the executants of the *kabâlâ* had *nishkar* right which they enjoyed for 50 years, is not admissible. It appears to me that to allow such a recital to be used as evidence against the plaintiff, who was no party to the two documents, would really be to let in hearsay evidence in matters in which hearsay is not admissible under the Evidence Act. Under any circumstances, the case does not come under section 32 of the said Act, which allows introduction of hearsay evidence in matters of pedigree, and other cases referred to in that section. I think, therefore, the judgment and decree of the lower appellate court is vitiated by the reception of the recital with reference to the possession of the predecessors of the executants of the *kabâlâ* in *nishkar* right as evidence against the plaintiff.

It is next argued for the respondent that there are other evidence apart from these recitals to support the findings of the lower appellate court. That may be so. But it is difficult for this Court to say unless it is prepared to look into this matter under the amended provisions of section 103 of the Code of Civil Procedure and to examine the evidence here as to what influence these recitals might have had on the mind of the Subordinate Judge in arriving at the conclusion on the question of the rent-free title of the defendants. These recitals have been used in evidence for the purpose of showing that, for nearly 40 or 50 years before the date of these *kabâlâs*, the

(1) (1926) 31 C. W. N. 32.

predecessors-in-interests of the executants of these *kabâlâs* were holding these lands without payment of rent in their *nishkar* right; and from this long possession without payment of rent in their *nishkar* right, the Subordinate Judge has come to the conclusion that the rent-free character of the land must be presumed. The Subordinate Judge will, when the case goes back to him, determine, on evidence other than those furnished by these recitals, as to whether the possession of the defendants without payment of rent is for such a long period as to give rise to the presumption of a rent-free title.

With regard to the reasoning of the Subordinate Judge that the suit is barred by limitation, it appears that he has fallen into an error. It is clear from paragraph 4 of the written statement, to which I have already referred, that the defendants do not set up a title altogether independent of the plaintiff's title as *zemindâr*. Their whole case is that they had been enjoying the lands under some grant from the *zemindârs'* predecessors. They, therefore, do not deny the right of the plaintiff as *zemindâr* in respect of this land. All that they say is that they are not liable to payment of rent and that they were in adverse possession to that limited extent. In support of the contention, that the suit is not barred by adverse possession by reason of the assertion of hostile title in the petition of objection before the Assistant Settlement Officer, Ext. E, the appellant has relied on two cases of this Court. But before I refer to those cases, it is to be observed that, although the defendants have asserted a rent-free title in that petition, Ext. E, the record-of-rights was made against them in spite of such an assertion, and to such a state of facts the observations of Mr. Justice Richardson in the case of *Gour Chandra Chuckerbutty* v. *Birendra Kishore Manikya* (1) applies with great appositeness. Mr. Justice Richardson was also a party to the decision

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in the earlier case of *Aman Gazi* v. *Birendra Kishore Manikya* (1). He adhered to the view which he took in that case and reiterated in the decision of the case of *Gour Chandra Chuckerbutty* v. *Birendra Kishore Manikya* (2) that his decision in the case of *Aman Gazi* v. *Birendra Kishore Manikya* (1) was correct in principle. What the learned Judge says is this: "An entry in a record-of-rights is not conclusive but "it is an entry to which by statute the presumption "attaches that it is correct unless and until the "contrary is proved by legal evidence. In these cases "the entries necessarily imply that the landlord, the "respondent Maharaja, was entitled when the "record-of-rights was finally published to have a fair "rent assessed on the land held under him by the "appellant tenants. At that time, therefore, the "possession of the tenants was *primâ facie* a possession "which was subject to the liability to payment. "Whatever adverse claim the tenants had previously "set up, the landlord then succeeded in obtaining an "authoritative declaration importing that the claim "was unfounded. *Primâ facie* again the subsequent "possession of the tenants was a possession consistent "with the entries." The contention of the appellant really is supported by the judgments in these two cases and, having regard to the case made out in the written statement acknowledging title of all the *zemindârs*, I do not think that it can be said that the mere fact of non-payment of rent for a period say up to 1909 or before was sufficient to constitute adverse possession. In this connection, reference may be made to the recent decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (3). In that case, as in the present case, the lands in dispute lay within the ambit of the *zemindâri* estate, for which they had to pay revenue assessed on the *mouzâ*, and the Judicial Committee held that, in those

(1) (1912) 16 C. W. N. 929. (2) (1917) 22 C. W. N. 449.
(3) (1922) I. L. R. 2 Pat. 38 (52); L. R. 49 I. A. 399 (412).

circumstances, it lay upon those, who claimed a rent-free title, to show that they had been relieved of the obligation to pay rent, either by contract or by some old grant recognized by Government. There, as here, plea of adverse possession was taken, and, with regard to that, their Lordships of the Judicial Committee observed thus: "Again, mere non-payment "of rent or discontinuance of payment of rent has not, "by itself, been held in India to create adverse "possession. The identical question came for decision "before the Calcutta High Court in the case of "*Prasanna Kumar Mookerjee* v. *Srikantha Rout* (1), "where Mookerjee J. affirmed the proposition in clear "terms." The case would have been very different, as I indicated to the learned advocates on both sides in the course of the argument, if the defendants had set up title by adverse possession challenging the right of the *zemindârs* to these lands. In that case, if the *zemindârs* had not recognised the defendants as tenants and the tenants had set up the position of trespassers, by possession for more than the statutory period, undoubtedly the suit of the Maharaja would have been decided adversely to the Maharaja on the question of limitation. In these circumstances, I am of poinion that the decision of the question of limitation arrived at by the lower appellate court is wrong.

The result, therefore, is that the judgment and decree of the Subordinate Judge must be set aside and the case must be sent back to him in order that he might re-hear the appeal on the question of the defendants' rent-free title, after eliminating from consideration the recitals in these two *kabâlâs*, on other evidence, both oral and documentary, in this case. If, after considering such evidence, he is of opinion that the defendants have failed to establish that they had rent-free title to the disputed lands, the plaintiff will have a decree. If, on the other hand, the lower appellate court comes to the conclusion

(1) (1912) I. L. R. 40 Calc. 173.

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that the defendants have established, on the evidence, apart from the evidence of the recital in the *kabâlâs*, that they had got a rent-free title and a lost grant is to be presumed in their favour, the plaintiff's suit will be dismissed.

Costs of this appeal will abide the result.

Leave has been asked for to appeal under section 15 of the Letters Patent, but I do not consider this to be a fit case where such leave should be granted. The leave is refused.

Case remanded.

A. K. D.