APPELLATE CIVIL.

Before Nasim Ali and R. C. Mitter JJ.

1937

Feb. 4, 5, 8.

BIJAY GOPAL DE CHAUDHURI

v.

GOPEE DAS RAY.*

Limitation—Suit for assessment of rent on mâl *lands—Effect of decree as creating or not relationship of landlord and tenant—Indian Limitation Act (IX of 1908), s. 28; Arts. 130, 131, 144.*

A decree passed in 1867 in *zemindâr's* suit for resumption of land, declaring the land to be *mâl* land in the wrongful possession of the defendant without any right since after 1790, and without any *lâkhirâj* grant either before or after 1790, has not the effect of a decree in a suit for resumption of *lâkhirâj* grant made since December 1, 1790, and does not create any relationship of landlord and tenant. Nor does it convert adverse possession into permissive possession.

A subsequent suit instituted in 1932 by the successor of the plaintiff against the successor of the defendant in respect of the same lands (then recorded as a *nishkar* tenure of the successor of the defendant in the finally published record-of-rights) is barred by limitation, the rights of the plaintiff (in the later suit) and his predecessors to the said lands being extinguished by the successive limitation Acts in force between the two suits.

APPEAL FROM APPELLATE DECREE by the plaintiffs.

The material facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Naresh Chandra Sen Gupta, Gopendra Krishna Banerji and *Soureendra Kumar Ghosh Chaudhuri* for the appellants.

Atul Chandra Gupta, Sudhangshu Shekhar Mukherji (Jr.) and *Amaresh Chandra Ray* for the respondents.

Beereshwar Chatterji for the Deputy Registrar.

The judgment of the Court was as follows :—

This appeal arises out of a suit for assessment of rent in respect of certain lands which have been recorded in the finally published record-of-rights as

*Appeal from Appellate Decree, No. 1868 of 1934, against the decree of S. S. R. Hattiangadi, Additional District Judge of Burdwan, dated June 2, 1934, affirming the decree of Basanta Kumar Ray, Additional Subordinate Judge of Burdwan, dated June 26, 1933.

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being in the possession of the defendants as a *nishkar* tenure appertaining to *touzi* No. 11 of the Burdwan Collectorate held by the plaintiffs in *patni* right. The Courts below have dismissed the suit on the ground that it is barred by limitation. Hence this Second Appeal by the plaintiffs.

The only point for determination in this appeal is whether the Courts below are right in holding that the suit is barred by limitation. The facts which are relevant to the question of limitation are these :—

In the year 1842 Government instituted a suit for resumption of these lands under s. 6 of Regulation XIX of 1793 in the Court of Special Deputy Collector, District Burdwan. That suit was dismissed on the ground that the area of the land was only 36 *bighâs*, 2½ *cottâs* and the Government had no right to resume lands, the area of which did not exceed 100 *bighâs*. In 1862 a suit was instituted by the then proprietors of *touzi* No. 11 for resumption of these lands on the ground that they formed part of the *mâl* lands of their *touzi* and that the predecessors-in-interest of the defendants came into possession of these lands after 1790 and were possessing them without any right. The predecessors of defendants in that suit contended that they were holding these lands as *lâkhirâj* from before December 1, 1790. This suit was decreed on December 31, 1867. It was held in that case that there had been no *lâkhirâj* grant in respect of these lands either before or after 1790 and that it was a part of the *mâl* lands of *touzi* No. 11 and that the defendants' predecessors who were the former proprietors of this *touzi*, were in wrongful possession of the lands as *nishkar*, after their title to the *touzi* came to an end. Thereafter the proprietors of the *touzi* did not take any steps to eject the defendants' predecessors from the lands or to assess rent on them. In 1905 the predecessors of the defendants filed a road-cess return asserting therein their *nishkar* right in the lands

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to the knowledge of the then *patnidâr* of the village. In the year 1931 in the course of the District Settlement operations the disputed lands were recorded as a *nishkar* tenure of the defendants within *touzi* No. 11 on the basis of the decision in the suit for resumption instituted by Government in the year 1842. The present suit was instituted on February 29, 1932.

It appears from the record-of-rights published in the year 1931 that the revenue authorities recorded these lands as a rent-free tenure on the basis of the decision of the Special Deputy Collector in the year 1842. But the judgment in the suit which was instituted by the proprietors of the *touzi* in the year 1862 clearly show that these lands are *mâl* lands of the *touzi*. The presumption arising out of the entries in the record-of-rights in favour of the defendants is therefore rebutted by this judgment. The contention of Dr. Sen Gupta appearing on behalf of the appellants is that Art. 130 of the Indian Limitation Act does not apply to this suit as the disputed lands are not rent-free. His contention is that the present suit comes under Art. 131 of the Indian Limitation Act and as there has been no refusal of plaintiffs' right to get rent from these lands beyond 12 years from the date of the institution of the suit, the Courts below were wrong in dismissing the suit on the ground of limitation. Mr. Gupta appearing on behalf of the defendants conceded that the present suit does not come under Art. 130. His contention, however, is that Art. 131 is of no assistance to the appellants as that Article contemplates suits in cases where the plaintiff's right to the property has been already extinguished by adverse possession of the defendants and in the present case the adverse possession of the predecessors of the defendants commenced before 1842 at any rate from December 31, 1867. Dr. Sen Gupta's answer to this contention of Mr. Gupta is that the effect of the decree in the suit of 1862 was to create a relationship of landlord and tenant between the

plaintiffs' predecessor and the defendants' predecessor and as mere non-payment of rent did not put an end to that relationship, the plaintiffs' right to the property was not extinguished. In support of his contention Dr. Sen Gupta placed much reliance on the following observations of this Court in the case of *Bir Chunder Manikya* v. *Raj Mohun Goswami* (1) :—

"It has been held in certain cases by this Court that a decree for resumption of a *lâkhirâj* grant before December, 1790 does not by itself create such "a relation" (relationship of landlord and tenant between the parties); "that "it is after the decree has been followed up by a proceeding assessing the "revenue payable by the *lâkhirâjdar*, and when the latter agrees to pay "the revenue assessed, that such a relationship is created; while in the case "of a grant subsequent to the year 1790, the decree declaring the *zemindâr's* "right to assess rent does establish such a relation. See *Madhab Chandra* "*Bhadory* v. *Mahima Chandra Mazumdar* (2) and *Shama Sundari Debi* v. "*Sital Khan* (3)."

The actual decision, however, in that case was that no relationship was created between the parties by the resumption decree and the ground of the decision was that there was a *lâkhirâj* grant before 1790. No reasons, however, were given in that case in support of the observation that in the case of a grant subsequent to the year 1790 the decree declaring the landlord's right to assess rent establishes the relationship of landlord and tenant. But reference was made to *Madhab Chandra's* case (2) and *Shama Sundari's* case (3). In *Madhab Chandra's* case (2) Dwarka Nath Mitter J., while dealing with the effect of a decree for the resumption of certain lands alienated as *lâkhirâj* subsequent to December 1, 1790, under the provisions of s. 30 of Regulation II of 1819, observed as follows :—

The revenue assessable upon invalid *lâkhirâj* lands below 100 *bighâs* must be fixed by the Collector subject to the confirmation of the Board of Revenue, and it is only after the proprietor of the *lâkhirâj* lands has agreed to pay the revenue thus fixed that he is to be considered as a dependent *tâlukdâr* entitled to hold his *tâluk* from generation to generation subject to the payment of that revenue. There can be no doubt that the relation of landlord and tenant cannot come into existence until the *lâkhirâjdâr* has consented to pay the revenue fixed by the Collector, and it is therefore

(1) (1889) I. L. R. 16 Cal. 449, 454. (2) (1869) 8 B. L. R. (App.) 83 (note), (3) (1871) 8 B. L. R. (App.) 85 (note).

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clear that the plaintiff ought to have adopted the course prescribed by the section above quoted, instead of bringing this suit for a *kabuliyat*, under cl. (*1*), s. 23, Act X of 1859.

It has been argued that the provisions of s. 9, Regulation XIX of 1793, are not applicable to this case, inasmuch as the Court which passed the decree under s. 30, Regulation II of 1819, declared that the lands in question were alienated as *lâkhirâj* subsequent to December 1, 1790. But the answer to this argument is very plain. In the first place, we are bound to take the decree as it stands, and we have nothing to do with the reasons upon which the judgment which led to that decree was based. And in the next place it is perfectly clear that, if the lands in question were alienated as *lâkhirâj* subsequent to December 1, 1790, the Court which passed that decree had no jurisdiction to pass it under the provision of s. 30, Regulation II of 1819.

This case therefore is no authority for the proposition that in the case of a grant subsequent to the year 1790 a decree declaring the *zemindâr's* right to assess rent establishes the relationship of landlord and tenant between the parties. The decision in *Shama Sundari's* case (1) supports the view that a decree in a suit declaring the right of the *zemindâr* to assess rent on lands held under a grant subsequent to December 1, 1790, "establishes as between the person "in possession of such land and the *zemindâr* the "relation of landlord and the person liable to pay "rent to such landlord." No reasons are given in that judgment in support of the view.

Ainslie J. in *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (2) observed as follows:—

The effect of the decree in the resumption suit was to declare that the land in the possession of the defendant had been part of the permanently-settled estate, and had been separated from it by an invalid grant, and thereon to resume the same and re-annex the lands to the *zemindârs'* estate. It did not, however, interfere with the grantee's right to continue in possession, if he should be so minded; but it necessarily forced him, if he continued in possession, to hold as tenant of the *zemindâr*. The words of s. 10, Regulation XIX of 1793, and of s. 28, Act X of 1859, show clearly that it was only in respect of the alleged proprietary right under a grant that there was to be dispossession, and it seems to me that there is nothing in the law which indicates that there was to be an absolute ouster from the land. The position of the grantee after decree is not therefore that of a person holding adversely to the *zemindâr*, but just the reverse; he was holding adversely before the decree, as he was holding on an allegation of title in himself, but after decree, if he did not vacate the land, he must be taken to hold it, as what it has been declared to be, part of the *zemindâr's* estate, subject to the liability in respect of rent which attaches to all persons holding

(1) (1871) 8 B. L. R. (App.) 85 (note). (2) (1878) 2 C. L. R. 569, 569-72.

by license of the *zemindâr*. The decree in the resumption case having left the defendant in the position of a tenant, he cannot, without an intermediate surrender of the land to the landlord, change his position and assert that he holds as squatter or trespasser. The fact that no rent was settled or paid does not alter the character of the holding subsequent to decree in the resumption suit. Where defendant elected to hold on, notwithstanding the declaration that he could only do so as tenant of the plaintiff, he elected to hold as such tenant on whatever might be found to be fair and equitable terms. He has had the advantage of plaintiff's remissness in escaping payment of rent for a number of years, but this cannot be extended into giving him a future right to hold rent free.

The case of *Saudamini Debi* v. *Sarup Chandra Roy* (1), which was cited by the Munsif, gives a considerable body of authority in support of the view therein adopted. A recent case (Special Appeal No. 2858 of 1876), supposed to be inconsistent with this view, has been cited by the appellant, but it seems to me that there was a peculiarity about that case in that the plaintiff was seeking to eject the defendant as a trespasser, and falsely alleged the existence of a *lâkhirâj* grant. It may very well be that, if the occupation of the defendant was adverse *ab initio*, limitation was not to be avoided by the decree of an intermediate suit to cancel as invalid a rent-free grant, the existence of which was in fact denied from the first. A suit under s. 28, Act X of 1859, presupposes the existence of a grant the efficacy of which is disputed, and I see no reason to suppose that the mere existence of a so-called resumption decree necessarily protects a *zemindâr* from the effect of his own statements in a suit, when such statements, by denying the existence at any time of a grant, go to show that his resumption decree was wrongly obtained.

In the case before us the existence of a grant at any time whether before or after 1790 was denied by the plaintiff in the suit of 1862. The predecessors of the defendants asserted in that suit that they were in possession of these lands on the basis of a *lâkhirâj* grant in their favour before 1790. The finding in the suit of 1862 was that there had been no *lâkhirâj* grant in favour of the defendants' predecessors either before or after 1790. It was also found that the defendants in the suit who were the former proprietors of the estate and were in possession of the lands as proprietors of the estate wrongfully retained possession of these lands after their proprietary right came to an end. The occupation of the defendants' predecessors which evidently continued from before 1842 was therefore adverse *ab initio* and the cause of action for ejecting them arose before 1842. Although the suit of 1862 was brought on the ground that the disputed lands formed part of the plaintiff's estate

(1) (1872) 8 B. L. R. (App.) 82.

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and was enjoyed by the defendants as *lâkhirâj* after 1790 without any *lâkhirâj* grant, that is, without any right, there was no prayer for ejectment. It purported to be a suit under s. 30 of Regulation II of 1819 for resumption of lands under s. 10 of Regulation XIX of 1793 which gives right to the *zemindâr* to dispossess the grantee of the *lâkhirâj* grant made since December 1, 1790. The case of both the parties in the suit of 1862 was that there had been no *lâkhirâj* grant in favour of the defendants since December 1, 1790. The effect of the decree in that suit therefore cannot be the same as that of a decree passed in a suit for resumption of *lâkhirâj* grants since December 1, 1790, under s. 10 of Regulation XIX of 1793 or s. 28 of Act X of 1859. This decree did not and could not convert this adverse possession into permissive possession. No relationship of landlord and tenant between the parties was therefore created by this decree. The right of the plaintiffs and their predecessor to recover possession of the property and their right to the property were therefore extinguished by the early part of 3rd Article of Bengal Regulation II of 1805, cl. (*12*) of s. 1 of Act XIV of 1859, s. 29 and Art. 145 of the Limitation Act of 1871, and s. 28 and Art. 144 of the Limitation Acts of 1877 and 1908. As the plaintiffs have lost their right to recover possession of the lands from the predecessors of the defendants who were possessing these lands from before 1842 and were denying the plaintiffs' proprietary right to the lands all along and were asserting their *lâkhirâj* right to the lands on the basis of grants before 1790, no action can be brought now to assess or recover rent in respect of these lands, as rent "is the compensation for the "occupation that occupation having always been of one "and the same character, in fact, rent-free"—See *Chundrabullee Debia* v. *Luckhea Debia Chowdrani* (1).

(1) (1865) 10 M. I. A. 24.

The Courts below were therefore right in dismissing the suit.

The appeal is accordingly dismissed with costs.

The application for acceptance of further evidence in this Court is not pressed and is therefore dismissed.

Appeal dismissed.

A.K.D.