APPELLATE CIVIL.

Before Edgley J.

1939

May 18, 19.

ASHA MOYI BASU

v.

BARANAGORE JUTE FACTORY CO., LTD.*

Revenue Sale—*Annulment of incumbrance—Onus of proof—Tenure held under more than one* touzi, *if can be annulled by purchaser of one* touzi—*Bengal Land-revenue Sales Act (XI of 1859), s. 37.*

In a case in which the plaintiff seeks to recover *khâs* possession of property on the basis of a revenue-sale, the initial onus that lies on the plaintiff is to show that the land lies within his regularly assessed estate or *mehâl* and not merely that it lies within the ambit of his *zemindâri*.

Jagdeo Narain Singh v. *Baldeo Singh* (1) and *Sashi Bhusan Hazra* v. *Kazi Abdulla* (2) relied on.

Makhan Lal Parel v. *Rup Chand Maji* (3) referred to.

After the plaintiff has discharged the initial onus it would be for the defendant to prove that his case would fall within one of the exceptions to s. 37 of the Bengal Land-revenue Sales Act.

When the defendant relies upon a *nishkar* grant, the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *nishkar* grant in respect of the tenure had been made prior to the Permanent Settlement.

Brojendra Kishore Roy Chaudhuri v. *Mohim Chandra Bhattacharji* (4) referred to.

Kanta Mohan Mallik v. *Makhan Santra* (5) distinguished.

A tenure which is held under more than one *touzi*, one of which is sold for arrears of revenue, cannot be annulled by the purchaser under s. 37 of the Bengal Land-revenue Sales Act in part with regard to the *touzi* purchased, and the plaintiff cannot get *khâs* possession of the land.

*Appeal from Appellate Decree, No. 655 of 1937, against the decree of B. M. Mitra, Additional District Judge of 24-*Parganâs*, dated Oct. 13, 1936, modifying the decree of Shailendra Nath Chatterji, First Munsif of Sealdah, dated Aug. 27, 1935.

(1) (1922) I. L. R. 2 Pat. 38; L. R. 49 I. A. 399.
(2) (1923) 28 C. W. N. 143.
(3) (1929) 33 C. W. N. 1168.
(4) (1926) 31 C. W. N. 32.
(5) (1934) 39 C. W. N. 277.

Turner Morrison & Co., Ltd. v. *Manmohan Chaudhuri* (1) relied on.

Kamal Kumari Chowdhurani v. *Kiran Chandra Roy* (2) and *Preonath Mitter* v. *Kiran Chandra Roy* (3) distinguished.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The facts of the case are sufficiently stated in the judgment.

Hira Lal Chakravarti and *Surendra Nath Basu* (*sr.*) for the appellant. The onus of proving that the *ka* schedule lands are *nishkar* lies on the defendants. Apart from the record-of-rights they have not proved by positive evidence that the land is *nishkar*. On the other hand, the plaintiff has proved that the lands lie within the ambit of her *zemindâri*. *Jagdeo Narain Singh* v. *Baldeo Singh* (4) and other cases. As to *kha* schedule lands, the record-of-rights shows that they are liable to assessment of rent and the presumption of their correctness has not been rebutted.

Sarat Chandra Basak, Senior Government Pleader, and *Panna Lal Chatterjee* for the respondents. The record-of-rights having shown that the *ka* schedule lands are *nishkar*, the onus was thrown back on the plaintiffs to show that the lands did not appertain to a *nishkar* tenure which they have failed to discharge. With regard to the *kha* schedule lands the defendants have succeeded in discharging the onus and in proving that they appertain to a *nishkar* tenure. Long possession without payment of rent has been held in similar circumstances to lead to an inference of a grant of rent-free title. *Kanta Mohan Mallik* v. *Makhan Santra* (5). In cases where the plaintiff seeks to annul a tenure, the onus is on the plaintiff to show that it had been created after the

(1) (1931) I. L. R. 59 Cal. 728; L. R. 58 I. A. 440.
(2) (1898) 2 C. W. N. 229.
(3) (1899) I. L. R. 27 Cal. 290.
(4) (1922) I. L. R. 2 Pat 38; L. R. 49 I. A. 399.
(5) (1934) 39 C. W. N. 277.

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Permanent Settlement. In any event, the plaintiffs cannot succeed, as the tenure which she is seeking to annul is held by the defendants not only under *touzi* No. 168 purchased by the plaintiff but also under some other *touzis* of the same Collectorate and she cannot be said to be the purchaser of an entire estate. Ghose and Bartley JJ. in S.A. 797 of 1936.

Chakravarti, in reply. Long possession without payment of rent must be of a very definite and convincing nature so as to justify an inference that there was a *nishkar* grant in respect of the tenure prior to the Permanent Settlement. No such definite proof has been given in this case. *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji* (1).

EDGLEY J. In the suit out of which this appeal arises, the plaintiff, Sm. Asha Moyi Basu, sued the defendants for the establishment of her title on recovery of possession of a certain property which had been purchased by her predecessor-in-interest at a revenue-sale, which was held on January 13, 1922.

The plaintiff's case was to the effect that Kazi Rashid Jaman purchased *touzi* No. 166 of the 24-*Parganâs* Collectorate on January 13, 1922, and his heirs had conveyed this estate to her on January 25, 1929. Thereafter she issued a notice annulling the various tenures under *touzi* No. 166, including two tenures which are recorded in *khatiyâns* Nos. 426 and 322 of the settlement records and comprise certain lands mentioned in Schs. *ka* and *kha* attached to the plaint. From the terms of the plaint, it appears to have been admitted by the plaintiff that these particular tenures, which were the subject-matter of the suit, were held by the defendants, not only under *touzi* No. 166 but also under several other *touzis*, namely, *touzis* Nos. 63, 163, 168 and 222 of the

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

24-*Parganâs* Collectorate. In the record-of-rights, the land included in Sch. *ka* had been recorded as *nishkar* by reason of possession and, as regards the land in Sch. *kha*, the entry in the record-of-rights was to the effect that it was liable to assessment of rent. The plaintiff claimed that by reason of the annulment of the tenures she was entitled to eject the defendants from the land appertaining thereto.

The main case for the defendants in respect of these two tenures was to the effect that the plaintiff, as the successor-in-interest of the auction-purchaser, was not entitled to possession as the land in suit appertained to certain *nishkar* tenures which had been created before the time of the Permanent Settlement. In paras. 8 and 9 of their written statement, a further point was taken by the defendants to the effect that the two tenures mentioned in the plaint could not be legally annulled and that the plaintiff was also not entitled to the relief claimed by her in view of the fact that she had obtained only an undivided fractional interest in the land in suit and was in the position of a co-sharer landlord in respect of this land.

Admittedly the case proceeded to trial on the question whether or not the defendants were entitled to protection, having regard to the existence of their alleged *nishkar* right in the tenures which were the subject-matter of the suit, and in the trial Court no further question seems to have been raised as to the right of the plaintiff to annul the tenures, either by reason of her fractional interest in the *touzis* under which the tenures were held or on account of the fact that these tenures were held not only under *touzi* No. 166 but also under several other *touzis*.

The first Court decided that, as regards the land included in Sch. *ka*, the defendants had established their case. As regards the *kha* schedule land the plaintiff's suit was decreed and she was allowed

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possession in the terms of the relief sought by her in the plaint. The plaintiff then appealed with reference to the *ka* schedule land and the defendants at the same time preferred a cross-objection with regard to the decision against them with reference to the *kha* schedule land. The lower appellate Court dismissed the plaintiff's appeal, but allowed the cross-objection, which had been filed by the defendants. As a result, therefore, of the decision of the lower appellate Court, the plaintiff's suit was dismissed in its entirety. The plaintiff has, therefore, preferred this Second Appeal to this Court.

The first point urged by the learned advocate for the appellant in this case is that the decision of the lower appellate Court with regard to the *ka* schedule land cannot be supported. As already pointed out, the entry in the record-of-rights with regard to this property is in favour of the contention which has been raised by the defendants. In a case of this sort in which the plaintiff is seeking to recover possession of property on the basis of a revenue-sale, the initial onus must lie on the plaintiff to show that land lies within his regularly assessed estate or *mehâl* and not merely that it lies within the ambit of his *zemindâri*. *Jagdeo Narain Singh* v. *Baldeo Singh* (1); *Sashi Bhusan Hazra* v. *Kazi Abdulla* (2); *Makhan Lal Parel* v. *Rup Chand Maji* (3).

Having regard to the fact that the *ka* schedule land is recorded as being *nishkar* in the record-of-rights and in view of the presumptive correctness of this entry, it cannot, in my opinion, be said that the plaintiff has discharged the initial onus which lies upon her in this matter. Even if it be assumed, however, that she has succeeded in discharging this onus the position is that the entry in the record-of-rights is in favour of the defendants. This fact

(1) (1922) I. L. R. 2 Pat. 38; L. R. 49 I. A. 399.
(2) (1923) 28 C. W. N. 143.
(3) (1929) 33 C. W. N. 1168.

would, in my opinion, have the effect of throwing the onus back on the plaintiff in order to prove that the *ka* schedule land did not appertain to a *nishkar* tenure. This onus the plaintiff has failed to discharge. In this view of the case, I am of opinion that the decision of the lower appellate Court with regard to the *ka* schedule land is correct.

As regard the land described in Sch. *kha* the entry in the record-of-rights is to the effect that this land is liable to assessment of rent. The first Court gave the plaintiff a decree with regard to the land of this schedule and pointed out that the defendants had adduced no evidence to discharge the onus which lay on them by reason of the entry in the record-of-rights beyond adducing certain evidence to the effect that they had not paid rent for a certain number of years. When the plaintiff appealed with regard to the dismissal of her suit in respect of the *ka* schedule land, as already pointed out, the defendants preferred a cross-objection with regard to the land covered by Sch. *kha*. This cross-objection was allowed by the lower appellate Court on the ground that the land in question had been in the possession of the defendants for a long time without payment of rent. It may, however, be mentioned that para. 7 of the grounds attached to the memorandum of cross-objection was to the effect that the learned Munsif was wrong in holding that the defendants' tenure could be annulled and that he should have held that the tenure was not liable to be annulled under the law and was not and could not in fact be annulled by the plaintiff as regards the land comprised in Sch. *kha*. In view of the line of reasoning adopted by the learned Additional District Judge no occasion arose in the lower appellate Court to consider the defendants' case in the light of the contention raised in para. 7 of the memorandum of cross-objection.

As already pointed out, the initial onus must lie upon the plaintiff to show that the land in suit lies

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within her regularly assessed estate or *mehâl*. Having regard to the entry contained in the record-of-rights this initial onus appears to have been discharged. The question then arises whether or not it can be said that the defendants have succeeded in discharging the onus which lies on them to prove that the *kha* schedule land appertains to a *nishkar* tenure. In holding that the defendants have succeeded in discharging this onus, the learned Additional District Judge adverts to the fact that the defendants had been in long possession of this land without payment of rent and he holds that this is a circumstance which should be taken into consideration as evidence in support of the defendants' contention. The lower appellate Court places considerable reliance upon the decision of R. C. Mitter J. in the case of *Kanta Mohan Mallik* v. *Makhan Santra* (1). In that case the learned Judge was dealing with an appeal which arose with reference to a suit brought by the plaintiffs for the assessment of rent and he pointed out that long possession without any demand or payment of rent would be evidence of a grant of a rent-free title. It is true that, in a case for the assessment of rent, evidence of long possession without payment of rent might in certain circumstances lead to an inference that a former proprietor of the estate had created a rent-free title in respect of the land in suit. But, even in such a case, it would be essential that such evidence should be of a definite character and cover a sufficiently long period to allow such an inference to be drawn. In this connection, it was pointed out by Sir Lancelot Sanderson C. J. in the case of *Brojendra Kishore Roy Chaudhuri* v. *Mohim Chandra Bhattacharji* (2) that "the time during which the "defendants have been in possession, in my judgment, "has been left indefinite and I am not prepared to hold "that, when the period, during which the defendants "have been in possession is left in an indefinite and "nebulous state that is sufficient, even when taken

(1) (1934) 39 C. W. N. 277. (2) (1926) 31 C. W. N. 32.

"with the fact that no rent has been paid to show that "the entry in the record-of-rights is incorrect". If such is the law with regard to a suit for the assessment of rent, in my opinion, in a case in which it is sought to annul a tenure under s. 37 of the Revenue Sale Law, *a fortiori* the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *nishkar* grant in respect of the tenure had been made prior to the Permanent Settlement. It certainly cannot be said that any such definite proof has been given on behalf of the defendants in the suit out of which this appeal arises. On the other hand, the entry in the record-of-rights clearly indicates that no such *nishkar* grant could ever have been made and, in my opinion, this entry stands unrebutted.

With regard to this point it was argued by the learned advocate for the respondents that, in a case in which the plaintiff is seeking to annul an under-tenure, the onus would lie upon him to prove that the tenure in question had been created after the Permanent Settlement and could therefore be annulled. This proposition, in my opinion, is not one which can be reconciled with the principles which have been laid down in *Jagdeo Narain Singh's* case (*supra*) and the other two cases cited above in which that decision has been explained. I consider that there can be no doubt that, in a case in which the plaintiff has discharged the initial onus which lies upon him in a matter of this sort, it would be for the defendant to prove that his case would fall within one of the exceptions to s. 37 of Act XI of 1859. This onus the defendants have not been able to discharge. It would, therefore, follow that, in my opinion, the decision of the lower appellate Court with regard to *kha* schedule land is wrong and, had the matter rested there, it would have been necessary for me to reverse the decision of the lower appellate Court on this point.

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In this connection, it is urged by the learned advocate for the respondents that, in any event, the plaintiff cannot be entitled to a decree having regard to the fact that admittedly the tenures which she is seeking to annul are held by the defendants not only under *touzi* No. 166 but also under other *touzis* of the 24-*Parganâs* Collectorate. It is argued on behalf of the appellant that the respondents should not be allowed to raise this point at this stage in view of the fact that no argument was raised on this contention at any stage of the case in the Courts below. Having regard to the position taken by the defendants in paras. 8 and 9 of their written statement it is perhaps surprising that they did not forcibly urge in the trial Court that their tenures could not be partially annulled. As already pointed out their case in the first Court was merely to the effect that they were protected by reason of their *nishkar* title. It would appear to be probable, however, that the defendants did not raise this particular point in the first Court in view of the fact that the same learned Munsif had decided a similar point against them in a connected case, namely, Title Suit No. 14 of 1934, which was decided in the Court of Babu Shailendra Nath Chatterji, on January 23, 1935. In that particular suit the main contention of the defendants was to the effect that the plaintiff could not legally annul the tenures which were the subject-matter of that suit inasmuch as these tenures were held by the defendants under the five *touzis* of the 24-*Parganâs* Collectorate to which reference has already been made. When this point was decided against them in the first Court they took the matter of appeal to the Court of the Subordinate Judge and thence to the High Court where they obtained a decision in their favour in Second Appeal No. 797 of 1936, which was decided by M. C. Ghose and Bartley JJ. on March 31, 1938. The decision in that case is based on two previous decisions of this Court in the case of *Sooharam*

Barma v. *Doorga Charan Das* (1) and the case of *Mahomed Guran Choukidar* v. *Basarat Ali* (2). Reference was made in the judgment to two other decisions of this Court in the case of *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy* (3) and that of *Preonath Mitter* v. *Kiran Chandra Roy* (4). As regards the two latter cases I agree with Ghose and Bartley JJ., in thinking that they have no application in connection with this particular matter as the points decided in those cases did not relate to any question in which it was sought to annul any part of a tenure held by the tenure-holders under several different *touzis*. I entirely agree with the view which has been taken by M. C. Ghose and Bartley JJ. to the effect that, if the words of s. 37 of the Revenue Sale Law be given "their natural meaning it is clear "that the auction-purchaser is entitled to eject all "under-tenants who hold their land entirely within "his estate but he is not entitled by this section to "eject an under-tenant who holds an under-tenure "partly within his estate and partly within other "estates".

Although the defendants did not rely on this point in the first Court, the circumstances in which they failed to do so were certainly peculiar. They did, however, raise the point indirectly in ground No. 7 of their memorandum of cross-objection, although no occasion arose for the learned Additional District Judge to consider this ground. In the circumstances of the case I think that for the ends of justice the defendants should be allowed to take this ground at this stage.

It follows, therefore, although the plaintiff has, in my opinion, succeeded in discharging the onus which lies on her with reference to the *kha* schedule land, she nevertheless cannot succeed in obtaining the relief which she seeks as she cannot obtain possession

(1) (1878) 5 C. L. J. 264.
(2) [1920] A. I. R. (Cal.) 920.
(3) (1898) 2 C. W. N. 229.
(4) (1899) I. L. R. 27 Cal. 290.

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of any portion of the land in suit without annulling the tenure to which that land appertains. *Turner Morrison & Co., Ltd.* v. *Manmohan Chaudhuri* (1). As the two tenures with which we are concerned are held by the defendants not only under the *touzi* purchased at a revenue-sale by the predecessor-in-interests of the plaintiff but also under other *touzis*, these tenures cannot be annulled in part and, therefore, the plaintiff is not entitled to any relief by way of ejectment.

The appeal must, therefore, be dismissed.

The parties will bear their own costs.

Leave to appeal under s. 15 of the Letters Patent is refused.

Appeal dismissed.

A. A.

(1) (1931) I. L. R. 59 Cal. 728; L. R. 58 A. I. 440.