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and in applying it to the present case we think that the decree of the 27th March 1877 is inoperative as against the plaintiffs in the present case. The parties consequently will be placed in the position that they occupied before that decree was passed, but with the consent of the pleader for the respondents, we think that the liability of the plaintiffs to the debt incurred by Showrobini, which can be conveniently tried in the present suit on the second and third issues, should be so tried. These issues have been determined by the Court of first instance, and therefore it remains for the lower Appellate Court to come to a distinct finding on them. For this purpose we direct that the case be remanded to the lower Appellate Court for trial on its merits. We would add that, in the event of the debt being found binding on the present plaintiffs, they will be liable for the whole amount, and not merely for the amount stipulated on their behalf in the compromise.

Costs will abide the result.

Case remanded.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883
March 2.

BACHARAM MUNDUL (DEFENDANT) *v.* PEARY MOHUN BANERJEE (PLAINTIFF.)*

Onus probandi—Resumption, Suit for—Lakheraj—Rent-free lands—Landlord and Tenant.

In suits for the resumption of lands alleged by the defendant to be lakheraj, the burden of proof is in the first instance on the plaintiff to show that the lands are *mal*. The fact that the defendant is a tenant of the plaintiff's is a matter to be taken into consideration by the Court in determining whether, on the facts of the case, the plaintiff has made out a *primâ facie* case; but unless the Court finds that the plaintiff has made out a *primâ facie* case, judgment should be given for the defendant.

Hurryhur Mukhopadhya v. *Madhub Chunder Baboo* (1); *Akbar Ali* v. *Bhy Ea. Lall Jha* (2); and *Newaj Bundopadhya* v. *Kali Prosunno Ghose* (3), cited.

* Appeal from Appellate Decree No. 708 of 1882, against the decree of Baboo Promotho Nath Mukerjee, Subordinate Judge of Burdwan, dated the 27th March 1882, reversing the decree of Baboo Chunder Coomar Dass, Munsiff of Boodbood, dated the 4th January 1881.

(1) 8 B. L. R., 566 : 14 Moore's I. A., 153. (2) I. L. R., 6 Calc., 666.

(3) I L. R., 6 Calc., 543.

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In this case, the plaintiff who is the talukdar of mouzah Bhuri, pergunnah Bhaga, in the district of Burdwan, sued one Bacharam Mundul, and nine others, named Pal. These latter defendants had been holders of a jote within the plaintiff's taluk, which jote yielded a jama of Rs. 30-5-6½, and was registered in the name of one Manikram Pal, deceased. In 1879 the plaintiff obtained a decree for rent against all the Pal defendants. In execution of that decree he attached the tenure under s. 59 of the Rent Law, and gave a schedule of all the lands comprised in the jote. The defendant Bacharam preferred a claim to three of those plots, alleging that they were lakheraj lands, and that he had purchased them as such from five of the Pal defendants, the owners thereof. This claim was allowed on the 17th of January 1880; and on the 1st of July 1880, the plaintiff brought the present suit for a declaration that the lands were not lakheraj but were comprised in the tenure registered in the name of Manikram Pal; and for possession. Bacharam Mundul's defence was that the lands claimed are lakheraj, and that he is in possession of the same.

The Court of first instance found that each party had failed to prove the case set up by him, and, throwing the *onus* on the plaintiff, dismissed the suit with costs. On appeal the Subordinate Judge said: "The evidence on both sides has been held by the lower Court to be equally unsatisfactory. The decision of the case therefore hinges on the question of onus. It seems to me the lower Court has wrongly placed the onus on the plaintiff under the rulings of the High Court—*Akbar Ali* v. *Bhy Ea Lall Jha* (1); *Newaj Bundopadhya* v. *Kali Prosunno Ghose* (2).

The Subordinate Judge then referred to *Sheeb Narain Roy* v. *Chidam Doss Byragee* (3); *Gungadhur Singh* v. *Bimola Dossee* (4); *Rám Narain Singh* v. *Bistoo Thakoor* (5); *Khorshed Ali* v. *Dhoondharee Singh* (6), which had been cited for the defendant, and, holding that the onus lay upon the defendant to prove his lakheraj title, reversed the judgment of the Court of first instance

(1) I. L. R., 6 Calc., 666.
(2) I. L. R., 6 Calc., 548.
(3) 6 W. R. (Act X), 45.
(4) 5 W. R., (Act X), 37.
(5) 15 W. R., 299.
(6) 20 W. R., 457.

and gave the plaintiff a decree. The defendant appealed to the High Court.

Baboo *Kaly Churn Banerjee* for the appellant.

Baboo *Rash Behary Ghose* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The plaintiff in this case sued to recover possession of certain lands as *mal*, on the ground that his title had been impugned by an adverse order in the case No. 1654 of 1879. The defendants denied that the lands were *mal*, and claimed them as their rent-free holding.

The first Court dismissed the suit. On appeal the Subordinate Judge was of opinion that the onus of proving that the land was lakheraj lay upon the defendants, and finding that they had not proved it to be so, he decreed the claim. The findings of fact upon which his decision is based are—*first*, that the defendants are the plaintiff's tenants in respect of certain *mal* lands; and, *second*, that the lands which are alleged to be lakheraj, and which form the subject of this suit, are within the ambit of the plaintiff's zemindari. In the case of *Hurryhur Mukhopadhya* v. *Madhub Chunder Baboo* (1), their Lordships of the Privy Council declared that in suits for the resumption of lands alleged to be held as lakheraj the onus lies on the plaintiff. They said: "The only other point to be decided on this appeal is, whether there is any peculiarity in this case, which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. Doyne argued that the defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the appellant's estate; 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 *mal* lands—in fact the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint,

(1) 8 B. L. R., 566: 14 Moore's I. A., 153.

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the decree dismissing his suit was right." In this case, as in that, the lands are within the ambit of the plaintiff's zemindari, and as there, so here, the defendants assert that the lands are lakheraj. The Privy Council decision just quoted is binding on this Court, and has been followed by the decisions in *Arfunnessa* v. *Peary Mohun Mookerjee* (1), and *Koylash Bashiny Dossee* v. *Gocool Moni Dossee* (2).

It has, however, been argued before us that where a tenant holds lands in a zemindari, if he claims any other lands as lakheraj, the onus is shifted from the plaintiff to the defendant, and in support of this contention two cases have been brought to our notice. The first is the case of *Akbar Ali* v. *Bhy Ea Lall Jha* (3). In that case if we take certain paragraphs by themselves, it certainly would appear that something in the nature of the proposition now contended for was laid down, but when we turn to the decision of the Chief Justice Sir Richard Garth, we find in his statement of the facts that the land in dispute was included within the ambit of the *mal* land held by the defendant, and he came to the conclusion that under the whole circumstances of the case the onus was on the defendant. The next case cited is that of *Newaj Bundopadhya* v. *Kali Prosunno Ghose* (4) reported in 8 C. L. R., p. 7. There the Judges laid down that the onus lay upon the defendants; but no doubt the decision turned on the special facts of the case, and these are not given in the report.

In neither of these cases was the judgment of the Privy Council, to which we have already referred, or the subsequent case which followed it *Arfunnessa* v. *Peary Mohun Mookerjee* (1) quoted. We do not understand these cases to decide that if in an estate a man held one piece of land in one corner and another piece in another corner, because he paid rent for the former the onus would lie on him to prove his lakheraj title to the latter. Indeed this would be distinctly opposed to the view laid down by the Judicial Committee of the Privy Council. What their Lordships held was that the onus lay on the plaintiff, and he must prove that the land in dispute was part of the *mal* land of his estate, and that he could do, either by proof of receipt of rent or that its proceeds were taken into account at the perma-

(1) I. L. R., 1 Calc., 378.
(2) I. L. R., 8 Calc., 230.
(3) I. L. R., 6 Calc., 666.
(4) I. L. R., 6 Calc., 543.

nent settlement, or by any other sufficient means. And they distinctly declared that, unless plaintiff could make out a *primâ facie* case, that is a case in which he would be entitled to a decree if the defendant did not produce evidence, his suit should be dismissed.

In the present caseit appears from the schedule to the plaint that the land in dispute is surrounded by other lands held by the defendants for which rent is paid. This is a matter which should be taken into consideration in dealing with the case. If it be true, as stated in the plaint, that the land is so surrounded by ryotti lands of the defendants, it is some evidence to go before a Jury or Judge to show that the land forms part of the tenure of the defendants, and is not their lakheraj holding. But no decree can be passed adversely to the defendants on it, unless the Judge is of opinion that it establishes a *primâ facie* case of the nature already described.

The case will be remanded to the Subordinate Judge in order that he may decide whether the land belongs to the tenure of the defendants, or, as is asserted by them, is their lakheraj holding.

Costs will abide the result.

Case remanded.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

UPENDRA NARAIN MYTI (PLAINTIFF) *v.* GOPEE NATH BERA AND OTHERS (DEFENDANTS.)*

1883 *March* 9.

Hindu Widow—Reversioner—Declaratory Decree—Waste by Hindu Widow—Compromise by Hindu Widow—Setting aside compromise—Joint Family—Separation—Partial Separation.

Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature.

The separation of one member of a joint Hindu family does not

* Appeal from Appellate Decree No. 339 of 1882, against the decree of F. W. Badcock, Esq., Officiating Judge of Midnapore, dated the 27th December 1881, reversing the decree of Baboo Jodu Nath Roy, First Subordinate Judge of that district, dated the 27th September 1880.