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the defendant No. 1 has since died. It appears to us on the complaint that the plaintiff's suit to recover the document was only against the defendant No. 1. The document was found to be under his control; and, although it is said that the withholding of the document by his deceased father was chiefly owing to the instigation of the defendant No. 2, we think there was no cause of action against the latter.

The appeal is allowed, and the order for costs as against the appellants must be set aside with costs in this Court and the lower Court.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

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 July 29.

NARENDRA NARAIN RAI (PLAINTIFF) v. BISHUN CHUNDRA DAS
 AND OTHERS (DEFENDANTS.)*

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

In a suit for resumption of lands where the defendants allege that the lands are *lakheraj*, the onus is on the plaintiff, in the first instance, to show that the lands are *mal*, and if he fails to make out a *prima facie* case the suit should be dismissed.

Bacharam Mundul v. Peary Mohun Banerjee (1) followed.

Newaj Bundopadya v. Kali Prosono Ghose (2); and *Akbur Ali v. Dhya Lal Jha* (3) cited and distinguished.

In this case the plaintiff sued to obtain possession of some 24 bighas of land situate in a mehal called Lukhipur. He alleged that the whole mehal was put up to sale for arrears of Government revenue on the 6th April 1871, and purchased by him, and that by reason of such purchase he was entitled to obtain possession of all *mal* lands within the zemindari. The plaintiff went on to state that the defendants held a jote of some 15 bighas under the plaintiff, paying rent for the same, and that in addition to such 15 bighas the plaintiff had ascertained that the

* Appeal from Appellate Decree No. 1839 of 1884, against the decree of B. L. Gupta, Esq., Officiating District Judge of Birbhoon, dated the 30th of June 1884, reversing the decree of Baboo Menn Lal Chatterji, Subordinate Judge of that District, dated the 14th of December 1883.

(1) I. L. R., 9 Calc., 813.

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

(3) I. L. R., 6 Calc., 666.

defendants were in wrongful possession of 24 bighas of *mal* land and refused to give up possession to the plaintiff; that the lands in suit were lying waste at the time of the permanent settlement, and a tank, which formed a portion of the lands in suit, was in the zemindar's khas possession, and that the ancestor of the defendants gradually took possession of the same without right or title; that the only rent-free lands in the zemindari were those to be found recorded in a chitta, after a measurement which had taken place in the year 1198 (1786), and as no other *lakheraj* lands had been registered in the Collectorate, the plaintiff claimed that the lands in suit were *mal*, and that he was entitled to obtain possession with mesne profits for a period of three years.

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The defendants, in addition to pleading that the suit was barred by limitation and *res judicata*, alleged that the land was *lakheraj* and had been so since the 1st December 1790.

The first Court, while holding that it lay on the plaintiff to make out a *prima facie* case that the lands were *mal* before the onus shifted on to the defendants, came to the conclusion that the plaintiff had proved that branch of his case, and that the defendants' witnesses were unworthy of credit. Deciding the other issues raised in favor of the plaintiff, that Court decreed the suit with costs.

The lower Appellate Court reversed that decree. Upon the question as to whether the lands were *mal* or *lakheraj*, the judgment of the Court was as follows: "Having heard the whole of the evidence read and discussed, I feel bound to say that, although the defendants have failed to make out a satisfactory *lakheraj* title, the evidence adduced by the plaintiff is at least equally poor. It rests almost exclusively on the oral testimony of the plaintiff's servants and defendants, and there is not a scrap of document to prove that any of these lands ever paid rent. Thus the defendants, being in long and undisturbed possession of the lands as *lakheraj* lands, and the plaintiff on whom lies the *onus probandi* having failed to adduce satisfactory evidence, the lower Court should have dismissed the suit. The decision is accordingly reversed and the appeal decreed with costs."

The plaintiff now preferred a special appeal to the High Court,

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Baboo *Mohini Mohun Rai*; and Baboo *Saroda Prosunna Rai*,

for the appellant.

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The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

In this case it appears that the plaintiff on the 6th April 1871 purchased the whole of a certain zemindari at a sale for arrears of revenue. The present suit is for possession of 24 bighas of *mal* land appertaining to certain jotes in the zemindari. The defendants contend that the land is *lakheraj*. The lower Appellate Court held that the onus was on the plaintiff to show that the lands were *mal*, that he had failed to discharge it, and dismissed the suit. The case of *Bacharam Mundul v. Peary Mohun Banerjee* (1), in which the decision was based upon a ruling of the Privy Council in *Harihar Mukhopadhyaya v. Madab Chandra Babu* (2) is a distinct authority for holding that in a suit for resumption of lands, when the defendant alleges that the lands are *lakheraj*, the onus is on the plaintiff, in the first instance, to show that the lands are *mal*, and that if he fails to make out a *prima facie* case the suit should be dismissed. The cases of *Newaj Bundopadaya v. Kali Prosono Ghose* (3) and *Akbur Ali v. Bhyea Lal Jha* (4) upon which the other side relied, assumed the lands in dispute to be within the ambit of, or intermingled with, lands admittedly held as *mal*. In the present case upon the pleadings no such assumption can be made. We think, therefore, that the District Judge was right in dismissing the suit upon this ground. That being so, it becomes unnecessary to consider the other questions as to *res judicata* and limitation which were argued at the hearing. The appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R., 9 Cal., 813.

(2) 8 B. L. R., 566; 14 Moore's I. A., 153.

(3) I. L. R., 6 Cal., 666.

(4) I. L. R., 6 Cal., 543.