1907
July 30.

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Dillon.

SUKHDEO PRASAD AND ANOTHER (PLAINTIFFS) *v.* NIHAL CHAND (DEFENDANT).*

Market—Right of zamindar to establish a market on his own land—Regulation No. XXVII of 1793*—Regulation No. VII of* 1822*, section* 9.

There is no legal objection to the holding by any person of a "hat", or market, whenever and wherever he may please, provided that he does so on his own land and in such a way as not to be a nuisance to neighbouring landholders who have equal rights with him. *Kedarnath* v. *Raghunath* (1), *Sheikh Bisharut Ally* v. *Seetul Misser* (2), *Meeta Sahoo* v. *Sheikh Surwur Ali* (3), and *Bhinuk Chowdhree* v. *The Collector of Jounpore* (4), referred to.

THE plaintiffs in this case came into Court alleging that from time immemorial they and their ancestors enjoyed the exclusive privilege of holding markets within the entire area of the five mahals of the village of Shamsabad, and of collecting *chaudharahat* dues on all articles and live-stock sold within that area either upon market days or on other occasions. They also alleged that from time immemorial no other market had been held within that area. Their cause of action was stated to be that the defendant had, on or about the 21st of July 1901 started a new market within the above-mentioned area, and within a few yards distance of the old market place, and had been collecting *chaudharahat* dues upon cattle and other things sold there. The plaintiffs prayed for an injunction restraining the defendant from opening any new "hat" within the limits of the five mahals of the village Shamsabad and from interfering with the plaintiffs' rights. They also asked for damages. The Court of first instance (Subordinate Judge of Agra) dismissed the plaintiffs' suit for an injunction, but gave them a decree for damages upon the finding that the defendant had used improper means to prevent persons from going to the plaintiffs' market. From this decree the plaintiffs appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellants.

* First Appeal No. 45 of 1905, from a decree of Babu Raj Nath Prasad, Subordinate Judge of Agra, dated the 10th of October 1904.

(1) N.-W. P., H. C. Rep., 1874, 104.
(2) N.-W. P., H. C. Rep., 1869, 40.
(3) (1860) 14 S. D. A., N.-W. P., 439.
(4) N.-W. P., H. C. Rep., 1867, 271.

1907

SUKHDEO PRASAD v. NIHAL CHAND.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the respondent.

KNOX, ACTING C. J., and DILLON, J.—The plaintiffs, Sukhdeo Prasad and Ganeshi Lal, who represent themselves as residents of Shamshabad, brought a suit against one Lala Nihal Chand in which they prayed that an injunction be issued upon the defendant preventing him from commencing any new 'hat' within the limits of the five mahals of the village Shamshabad and from interfering with the plaintiffs' rights. They also asked for damages. The case, as stated by them in the plaint is that from time immemorial the plaintiffs and their ancestors have the exclusive privilege of holding markets within the entire area of the five mahals of the village Shamshabad, and of collecting *chaudharahat* dues on all articles and live-stock sold within that area either on market days or any other occasions. They further alleged that from time immemorial no other market has been held within that area; that on or about 21st July 1901, the defendant has started a new market within that area, and within the distance of a few yards of the old market place, and has been collecting *chaudharahat* dues upon cattle and articles sold.

In reply the defendant contends that he is the owner and zamindar of the mahal within which, and of the land on which, he has held a 'hat,' and that he has a perfect right to hold the 'hat' on his own land and within his own area, and the plaintiffs have no right to impeach his acts. He puts the plaintiffs generally to strict proof of the allegations contained in the plaint, most of which he expressly denies. He adds that the 'hat' complained of is held on land appertaining to mauza Patti Siktara and not to Shamshabad. The Court below dismissed the plaintiff's suit with the exception of the claim for damages, which it allowed, upon the ground that the defendant had made use of improper means to force buyers and sellers from going to the plaintiffs' 'hat' and compel them to go to his own 'hat.'

The pleas taken in appeal are three in number:—

(1) That upon the evidence it has been proved that the plaintiffs are the Chaudhris of mauza Shamshabad, which includes Patti Siktara, and they have the exclusive right to hold the

1907

SUKHDEO PRASAD v. NIHAL CHAND.

market within that area and to realize the bazar dues; (2) that the right claimed has been proved to be an ancient and immemorial one; (3) that the plaintiffs have proved the full amount of damages claimed by them.

The defendant filed a cross appeal in which he urged that it had not been proved that improper means were used by him to prevent people from resorting to the plaintiffs' 'hat' and that no right to compensation had been made out.

Before proceeding to state the arguments that were addressed to us during the hearing of this appeal by the learned advocates on both sides, it would be as well perhaps if we were to make it clear what the plaintiffs' case was in the lower Court. It is clear to us from paragraph 5 of the plaint, as well as from the plaintiff's own evidence, p. 59A, and his statement at p. 1A and from the evidence of his witnesses, that his case was that the right to hold a market had accrued to his predecessors by reason of the fact that they were the full owners of Shamshabad and of its four pattis. That after having acquired the right in this way they claimed that the rights still subsisted, although they had lost all their rights in patti Siktara, and nearly all in Shamshabad. Having made this quite clear, we now proceed to state the case that was set up for the plaintiffs by their learned advocate at the hearing of this appeal.

It was argued that the right claimed had its origin in a grant by the Moghul Government and that that grant was ratified by the British Government when the province of Agra was ceded to them in 1804. The plaintiffs had no documentary evidence of the grant in their possession, but its existence must be assumed, they said, because they have been in peaceful enjoyment of the right since 1839. It is important that the two cases set up by the plaintiffs should be clearly differentiated, because in the case as set up in the plaint they might have the right of continuing to hold a market in Shamshabad although they had lost their rights as owners, but this could not authorize them to interfere with the rights inherent in the owners of Siktara and other adjacent mahals to set up markets in their own mahals. In the case of a grant or franchise (which, as we have already said, was the case set up by the plaintiffs here) on the analogy of the English law,

they would have the right to restrain others from holding a market within such a distance from their own as to raise the inference that such action would interfere with their rights under the grant.

Looking at the case as presented by the learned advocate for the appellants, we had to consider (1) whether the plaintiffs have proved any grant from sovereign authority such as they claim was made in their favour; (2) whether the grant was of such a nature as would authorize us to issue an injunction restraining the respondent from holding the market set up by him on the ground that it amounted to an infringement of the appellants' right.

It was asserted, and apparently on good authority, that in England markets are derived from royal grant or prescription which presumes a grant; and further that if it is proved to be to the damage of a market already existing, the grant may be repealed by *scire facias*, for the King has been deceived in his grant. *R.* v. *Butler* (1). It has been also held (2 Saund., 174) that whether the new market is a nuisance to the old one is a matter of evidence.

So far as Upper India is concerned much valuable information on this subject can be derived from the preamble to Regulation XXVII of 1793. The preamble sets out that "it has ever been a well-known law of the country, that no person can establish a 'gunge,' 'haut' or 'bazar,' without authority from the governing power. Grants from the sovereign or his representative delegating this authority, as well as universal tradition, prove that this right was asserted by the Muhammadan Government; and the orders of the Honourable Court of Directors, as well as repeated declarations and promulgations by the British Administration, demonstrate that this right was constantly asserted by the Company. It was, however, judged advisable to leave the exercise of this privilege to the landholders, Government contenting themselves with imposing general regulations for the prevention of undue exactions, and occasionally interfering to modify or abolish particular imposts as they occurred or were discovered. Experience having at length proved that prohibitory

(1) 1603, 3 Lev., 220.

1907

SUKHDEO PRASAD v. NIHAL CHAND.

orders for preventing oppression were not attended with the desired effect, it was determined on the 11th June 1790, to take from the landholders the power of imposing and collecting duties altogether, and to exercise this privilege immediately and exclusively on the part of Government." Careful distinction was made in the Regulation between 'sayar' which was an impost, and 'sayar' which was not in reality a duty but a consideration for the use of grounds, shops, and other buildings belonging to the landowner. The Government, while pointing out that landholders were not entitled to any compensation, still determined to compensate holders of malguzari lands who had been permitted to collect gunge, haut, bazar or other dues on their land. After providing for such compensation, the preamble continues as follows :—"It was, in consequence, determined, on the 28th July 1790 to abolish the sayar collections (with certain specified exceptions) throughout the three provinces, leaving it to future consideration what internal duties or taxes should be imposed in lieu of them." It was further provided that "no landholder, or other person, of whatever description, shall be allowed to collect, in future, any tax or duty of any denomination," and the privilege of imposing and collecting internal duties of all kinds was finally resumed from landholders, and all duties, taxes and other collections coming under the denomination of 'sayar,' with certain exceptions, which do not apply to the present case, whether made by Europeans or natives, either on their own or on the public account, in gunge, haut, or bazar were abolished. This Regulation extended to the three provinces of Bengal, Behar and Orissa, and was never, so far as we have been able to ascertain, made law in the province of Agra. Since the passing of this Regulation several attempts have been made, from time to time in the provinces to which it refers, to set up rights similar to those which are claimed by the plaintiffs in this case, but the claim has been invariably disallowed, as will be seen from the following cases: *Mussammat Dooleh Bibia* v. *Raja Oodwunt Singh* (1), *Poorunmul* v. *Khedoo Sahoo* (2) and many others, which, as they relate to other provinces, we do not think it necessary to set out in detail here. In these provinces

(1) 2 S. D. A., L. P., 303. (2) 7 S. D. A., L. P., 282.

the question does not seem to have been thoroughly dealt with until the year 1822. In that year Regulation VII found a place in the Statute book, and was afterwards extended by Regulation IX of 1825 to all lands not included within the limits of estates for which a permanent settlement has been concluded in the manner prescribed by Regulation VIII of 1793 and Regulation II and XXII of 1795. By Regulation VII of 1822 the Government determined to ascertain and settle and record the rights, interests, privileges and properties of all persons and classes, owning, occupying, managing or cultivating the land, &c., &c., or paying or receiving any cesses, contributions or perquisites to or from any persons resident in or owning, occupying, or holding parcels of any village or mahal. Collectors on revising the settlement of the land revenue were to prepare as accurate a report as possible, and the information collected was to be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of judicature. It was also enacted by the closing words of section 9 of the same Regulation "that all cesses or collections not avowed and sanctioned nor taken into account in fixing the Government 'jama' shall be held illegal and unauthorized unless now or hereafter specially sanctioned by Government."

In order to bring their claim within the provisions of the law, the appellants maintained that their claim was sanctioned. In support of their contention they referred us to paper No. 171, page 89 of the appellant's book.

In that paper in the column of remarks will be found this entry:—"A bazar is held twice a week, when grain and cotton cloths are principally disposed of." They also referred us to papers Nos. 359c, 32c, and 360c. All these papers will be found printed at pp. 82, 83 and 84 of the appellant's paper-book. The first is headed as an "Extract copy of an agreement as to the revision of settlement under Regulation IX of 1833, in respect of village Kasba Shamshabad, pargana Iradatnagar, district Agra." The only portion of this paper that is at all of any value is where it declares that two chaukidars get their pay from the weighment fees collected in the market. The remaining two papers are copies of the wajib-ul-arz. In the former it is said

1907

SUKHDEO PRASAD v. NIHAL CHAND.

that the chaukidars are paid by Pitambar Das out of weighment fees levied in the market. Paper No. 360c does not help at all. Nowhere in these papers do we find that the cesses claimed by the appellants were avowed or sanctioned by Government, and still less do we find that they were taken into account in fixing the Government jama. If they were so taken into account, notice of the fact would most undoubtedly appear in the record made by the settlement officer which is to be found in the forefront of every settlement misl (record). From the fact that that paper has not been produced, we have no alternative but to infer that these cesses were not taken into account in fixing the Government jama and that they are illegal and unauthorized.

Therefore if we were to hold, which we do not, that the appellants have established a grant from Government in their favour, their case would not be helped any further, because, in addition to the grant, they would have to show that the cesses which, by virtue of this grant, they claim to enforce were avowed and sanctioned and taken into account in fixing the Government jama, or that they were, after the settlement which was made under regulation VII of 1882, specially sanctioned by Government. No attempt has been made to prove any such sanction. We learn, moreover, from paper C.66, dated the 10th of December 1830, that the lambardar had the right of establishing a bazar on his land on any day he thought proper. Claims to establish a right similar to that which is claimed by the plaintiffs in this case have apparently been rare in the province of Agra. Only some two or three cases are to be found in the reports dealing with a similar question. The first of these is an unreported case of *Lala Bansidhar* v. *Baijnath Bharke* (1). That case is on all fours with the case before us. It was a suit brought by some tenants against the zamindars of Kurma in the district of Allahabad on the allegation that they had had a long established market in their mauza, from the dues and profits of which they derived a considerable income; that the defendants had recently established a new market very near to the plaintiff's market, and that both markets being held on the same day in the week the plaintiffs were deprived of the profits of their market. It was held by

(1) First Appeal No. 121 of 1869, decided 15th December, 1869.

the learned Judges in that case, (Morgan C. J., and Ross, J.,) that there was no authority to show that a suit of this description can be maintained here: that though in England a market could be held only by charter from the Crown or by long usage from which a grant would be presumed, the prerogative of conferring this right is not known here. From what we have already said it will be seen that, with all deference to the learned Judges who decided that case, we are not prepared to agree with them in this part of their judgment, but we do agree with them when they go on to hold that the owner of land is free to use it for a market or for any other lawful purpose, and the owner of a neighbouring market has no right of suit for the loss which may ensue by the establishment of the new market. This case was followed in *Kedarnath* v. *Raghunath* (1). From several decisions it would appear that the Sadar Dewani Adalut of these provinces held that claims of this nature were claims which could not be enforced by Courts of law unless they had been sanctioned by Government through the Settlement Officer. Vide *Sheikh Bisharut Ally* v. *Seetul Misser* (2), *Meeta Sahoo* v. *Sheikh Surwur Ali* (3), *Bhinuk Chowdhree* v. *The Collector of Jounpore* (4).

Further, we learn from the Circulars of the Court of Nizamut Adawlut of these provinces edited by J. Carrau (1855), p. 135, that the Sadar Diwani Adalat "decided on appeal from an order of the Commissioner of circuit of the 15th Division that zamindars and other proprietors of land have a right to establish *hauts* or fairs on their own land and to hold them on any day that they think proper, and that it is not competent to Magistrates to prohibit the establishment of *hauts* or fairs, or to fix the day on which they may be held, on the plea of interfering with the right of a neighbouring *haut*-holder or on any other ground." The value of this is that it shows what view was taken by the Sadar Diwani Adalat of the law as it then stood.

In opening his case the learned advocate for the appellants drew our attention to certain papers which are to be found at page 61, *et seqq.*, of the appellants' book as showing that immediately after the Mutiny others had tried to open markets in Shamshabad

(1) N-W. P., H. C. Rep., 1874, 104.
(2) N-W. P., H. C. Rep., 1869, 40.
(3) (1860) 14 S. D. A., N-W. P., 439.
(4) N-W. P., H. C. Rep., 1867, 271.

1907

SUKHDEO PRASAD v. NIHAL CHAND.

and been prevented. It would appear that on the 15th of November 1870 the Magistrate authorized the Deputy Magistrate of the pargana, if he apprehended any disturbance on account of the rival claims to hold markets, he was to initiate a case under (*sic*) section 182 of Act No. V of 1861—obviously a mistake for section 282 of Act No. XXV of 1861. The action taken by the Magistrate, as he himself is careful to point out in the same paper in no way deals with the claims of the parties. They are referred to the Civil Courts. All that he was concerned with was to prevent a breach of the peace between the two angry claimants to hold a market.

But to return to what we have in the preceding part of our judgment pointed out as the view taken by the Civil Courts, and by the Chief Criminal Court in these provinces.

No precedent to the contrary has been shown to us, and in the face of what we therefore believe to be the uniform current of decisions on this subject, we are not prepared to resort to such an extreme step as to interfere with the liberty of the subject to hold a *haut* whenever and wherever he may please, provided he do so on his own land in such a way as not to be a nuisance to neighbouring landholders who have equal rights with himself. In the present case the person who asks us to interfere with the rights of a landholder is himself no longer a landholder. He was originally one, and as such would have had the right to establish a *haut* on any portion of his estate. But when he lost his status as landholder, his privileges presumably would lapse with the loss of the land.

Be this as it may, he certainly has no status whereby he can ask us to interfere with the rights which belongs to the respondents who are landholders.

The result is that the pleas taken in appeal fail, and the decree of the lower Court is affirmed so far as it sets aside the plaintiffs' claim, and the plaintiffs' claim is dismissed *in toto*. The respondent will get his costs both of this Court and the Court below.

Appeal dismissed.