

undivided estate, and that she obtained formal possession of her share in execution of the decree passed in that suit, we do not think that the ruling in the case of *Gulzari Lal v. Madho Ram* (1) bars her right to maintain the present suit. When the defendant resisted her claim to have her name recorded as owner in respect of her share, she was, we think, justified in instituting the suit out of which this appeal has arisen, which is one in substance for the declaration of her title to a share as against the defendant, who in the mutation proceedings denied her title, thereby throwing a cloud on it. She cannot obtain proprietary possession of the share unless she takes partition proceedings, and in so far as the Court of first instance granted her a decree for proprietary possession, that decree cannot be upheld. We allow the appeal, set aside the decree of the learned Judge of this Court and also the decree in the lower appellate Court and decree the plaintiff's claim for a declaration of her title as claimed with costs in all Courts.

Appeal decreed.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burkitt.*

BALWANT SINGH AND ANOTHER (PLAINTIFFS) v. SHANKAR
(DEFENDANT) *

Wajib-ul-arz—Construction of document—House tax—Cess—Rent.

Under the *wajib-ul-arz* of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held* that this payment (which was called "gharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction.

THE plaintiff in the suit out of which this appeal arose was the zamindar of the village of Radhakund in the district of Muttra and the defendant occupied a house in the *abadi* of that village. The plaintiff sued to recover three years' rent of the house so occupied by the defendant. The suit was based upon the *wajib-ul-arz* of the village which provided that the zamindar was entitled to one *taka* (that is, 6 pies) per month for every house from the occupants of the village and also from the owners

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* Appeal No. 68 of 1907 under section 10 of the Letters Patent, from a judgment of Griffin J., dated the 25th of July, 1907.

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of shops and temples. The defence set up by the defendant was that this rent had never been paid and was not leviable by the plaintiff.

The Court of first instance (Munsif of Muttra) decreed the plaintiff's claim, and this decree was affirmed on appeal by the Additional Subordinate Judge of Agra, the lower Court finding that the alleged custom was proved. On second appeal, these decrees were set aside by a single Judge of the High Court, and the plaintiff's suit dismissed, upon the ground that the payment claimed was in the nature of a cess, and, being unauthorized, was not legally recoverable. From this decree the plaintiff appealed under section 10 of the Letters Patent.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Lala Kedar Nath, for the respondent.

STANLEY, C.J., and BURKITT, J.—The plaintiff appellant is the zamindar of the village of Radhakund in the district of Muttra and the defendant occupies a house in the *abadi* of that village. The claim of the plaintiff is to recover three years' rent of the house so occupied by the defendant. Under the *wajib-ul-arz* of the village the zamindar is declared to be entitled to one *taka* (that is, 6 pies) per month for every house from the occupants of the village and also from the owners of shops and temples. The defence set up by the defendant was that this rent had never been paid and was not leviable by the plaintiff. The Court of first instance decreed the plaintiff's claim and this decree was affirmed on appeal, the lower Courts finding that the alleged custom was proved. On second appeal, however, the learned Judge of this Court allowed the appeal, reversed the decision of the Courts below and dismissed the plaintiff's suit.* The judgment is largely based on the meaning of the word "*gharghanna*" which is used in the *wajib-ul-arz* as descriptive of the money payable to the zamindars in respect of houses in the village. The learned Judge observes that the word "*gharghanna*" is understood to be a house-tax. For this no authority is cited. He also states that the contention on behalf of the defendant was that a house-tax is a cess, and that before a zamindar can recover a cess, it must first find a place in the list prepared by

* See Weekly Notes, 1907, p. 247, *c. v. Shankar v. Balwant*.

the Settlement Officer and be sanctioned by the Local Government as provided for by section 66 of Act No. XIX of 1873. The learned Judge then refers to section 56 and section 86 of the Land Revenue Act, III of 1901, and holds that, reading these two sections together, it was the intention of the Legislature that no demands apart from rent by a landlord against tenants should be recognized in the Civil Courts which had not been recorded by the Settlement Officer and sanctioned by the Local Government as regular cesses. Now in the first place we may point out that the only rent demanded by the zamindar in respect of the occupation of houses in the abadi of the village is this charge of half an anna per month. No other rent is payable. Section 56, therefore, has no application, because it refers to cesses which are payable by tenants in addition to the rent paid by those tenants. The charge in question is not a charge in addition to any rent. It is in fact the rent paid in respect of the site upon which the house of the occupier stands, or in other words a ground rent. Section 86 has also, we think, no application, for this reason, that the reservation sanctioned by the wajib-ul-arz of a monthly payment is the reservation of a ground rent and not a cess within the meaning of the Revenue Act. We think that the learned Judge of this Court was wrong in the interpretation which he put upon the word "*gharghanna*" as used in the wajib-ul-arz, and that that word means nothing more than the rent payable in respect of the houses in the abadi of the village and is in no sense a house-tax or cess, as laid down by him. We therefore allow the appeal, set aside the decision of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

Appeal decreed.

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 BALVANT
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