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sanctions the view that rent may be something paid in cash and also something paid in kind. When this is borne in mind we are of opinion that the lower appellate court has approached the evidence it had to consider from a wrong point of view. There is on the record the wajib-ul-arz of 1870. We had that wajib-ul-arz read to us and we see nothing in the language which will justify the inference that the matters recorded in paragraph 2 were unlikely or improbable. We look upon that paper as a statement made fifty years ago more or less, by a person who was qualified and had the knowledge necessary to make it. It is not a statement narrating a tradition, but it is a statement by a person possessing an interest and an existing right in the village. It is extremely improbable that the person was making a statement to perpetrate a fraud or was making a statement which was false to be used fifty years afterwards. There was nothing to rebut that statement, and we hold that the payment of *parjot* by the respondent to the appellant is proved thereby.

We accordingly set aside the decrees of both the courts below and decree the plaintiff's claim with costs in all courts and future interest at the usual rate.

Appeal decreed.

APPELLATE CIVIL.

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July, 23.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD ISA KHAN (PLAINTIFF) *v.* MUHAMMAD KHAN (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 154 *and* 158—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove but restored to the position of agricultural land before suit.*

Where a certain area had been held rent-free for fifty years and by two successors to the original grantee, but part of the area had at one time been occupied by a grove, which, however, had ceased to exist some fifteen years before suit, it was *held*, on suit for resumption, that there was no justification for drawing a distinction between that part of area which had at one time been a grove, and the rest, which had all along been culturable land, and

* Second Appeal No. 1793 of 1915, from a decree of W. F. Kirton, Second Additional Judge of Aligarh, dated the 17th of August, 1915, reversing a decree of Muhammad Azim-ullah, Assistant Collector, First Class, of Aligarh, dated the 7th of April, 1915.

that, as section 154 of the Agra Tenancy Act, 1901, did not apply, no portion of the area could be resumed.

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THIS was a suit under chapter X of the Tenancy Act for resumption of a rent-free grant. It was found that part of the area had formerly been a grove, but that the trees had been cut down and the land brought under cultivation something more than 12 years before suit. It was also found that the whole of the area had been held rent-free for over 50 years and by two successors to the original grantee and that it was not liable to resumption under section 154 of the Tenancy Act. The first court held with respect to the portion on which the grove had existed that it had not been held for 50 years as "land" within the meaning of the term as defined in the Tenancy Act and could not therefore get the benefit of section 158. The court held that the defendant was an occupancy tenant of this portion and assessed it to rent. On appeal the District Judge held that "if the land was not *muafi*, then from the time that the grove was cut it became liable to rent, and as no suit was brought with respect to it within 12 years, the plaintiff's suit must be dismissed and the defendant has acquired a proprietary title in it by adverse possession The District Judge held accordingly that the whole of the area was held in proprietary possession by the defendant. A second appeal by the plaintiff to the High Court was heard by a single Judge who referred the case to a Bench of two Judges.

Dr. *S. M. Sulaiman*, (with Mr. *M. L. Agarwala*), for the appellant :—

The lower appellate court has erred in holding that the mere fact that no suit for rent was brought for 12 years makes the the defendant's possession adverse. The defence did not even allege adverse possession.

[Maulvi *Iqbal Ahmad*, for the respondent, intimated that he would support the decree on the ground that the requirements of section 158 had been fulfilled by the portion of the area in question.]

It has been consistently held by this Court that an area covered by a grove is not "land" as defined by section 4, clause (2), of the Tenancy Act as it is not held for "agricultural purposes"; *Habibullah* v. *Kalyan Das* (1), and the authorities there referred

(1) (1914) 12 A. L. J., 1080.

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to. The word "land" is used in chapter X of the Tenancy Act in the same sense as in section 4, clause 20; *Hadi Hasan Khan* v. *Pati Ram* (1). The area in question has not been held as "land" for more than 50 years and does not satisfy the conditions laid down by section 158.

Maulvi *Iqbal Ahmad*, for the respondent:—

It is submitted that the view, that an area covered by a grove is not "land" as defined in the Tenancy Act is not sound. A reference to section 4, clause (12) (*c*), shows that the planting of trees is an agricultural purpose. The Board of Revenue took the correct view in *Ram Sunder Koiri* v. *Joji Khatik* (2). The subsequent case of *Megh Singh* v. *Musammat Nazar Fatma* (3) drew a distinction without a difference between a guava grove and a mango grove. The next question is whether the word "land" is used in section 158, and the other sections of chapter X of the Tenancy Act, in the restricted sense which has been given to it in section 4, clause (2). The definitions given in that section are subject to the opening words "unless there is something repugnant in the subject or context," and to interpret the word "land" as used in chapter X in the restricted sense would be repugnant to the subject. Further, according to the findings, the land ceased to be a grove and became "land" in the restricted sense before the coming into operation of the present Tenancy Act and has continued to be so up to the present time. The former Acts contained no provision restricting the meaning of the word "land" and under those Acts grove lands were undoubtedly "land" within the meaning of those Acts. So that, during the whole of the period for which this area has been held rent-free it has at each point of time been held as "land" within the meaning of the Act in force at that time. It has, therefore, fulfilled the conditions of section 158. That section does not say that the land must have been held for 50 years "as land within the meaning of the definition given in the present Act." The case *Hadi Hasan Khan* v. *Pati Ram* (1) is distinguishable, as there the grove continued as such after the coming into operation of the present Act right up to the date of suit.

(1) (1913) I. L. R., 35 All., 200. (2) Selected Decisions, No. 1 of 1908.

(3) Selected Decisions, No. 4 of 1911.

Dr. *S. M. Sulaiman*, in reply :—

Section 4, clause (12) (*c*), is of no help, for it pre-supposes a "holding" *i.e.*, land which is let or held for agricultural purposes, and goes on to say that the planting of trees on the "land" may be an improvement if it is suitable to the holding and consistent with the purpose thereof. It has not been shown how the interpretation of the word "land" in chapter X in the sense of its definition would be repugnant to the subject.

PIGGOTT, J.—This is a second appeal by the plaintiff in a suit for resumption brought under the provisions of chapter X of the Tenancy Act, (Local Act No. II of 1901). The court of first instance found that the whole of the area specified at the foot of the plaint had been held rent-free by the defendant for 50 years, and by two successors to the original grantee. It also found that the land was not liable to resumption at the pleasure of the grantor, or under any of the other conditions laid down by section 154 of the same Act. The learned Assistant Collector, however, felt himself compelled to draw a distinction between two portions of the area in suit. With regard to plots of land making up a total area of seven bighas, which had never been anything but cultivated or culturable land, the finding was that the provisions of section 158 of the Tenancy Act clearly applied and that the defendant must be deemed to hold the same in proprietary right. With regard to the remaining 9 bighas, 16 biswas, it was found that this area had at one time been occupied by a grove. This grove had ceased to exist something more than 12 years, probably about 15 years, prior to the institution of the suit, and during this latter period the land had been under cultivation. The Assistant Collector, however, in accordance with certain decisions of this Court and also with what appears to be the latest pronouncement of the Board of Revenue on the subject, held that land constituting a grove was not land let or held for agricultural purposes within the meaning of the definition in section 4, clause 2, of the Tenancy Act, No. II of 1901. From this he went on to conclude that the provisions of section 158 of the same Act could not apply to this area because it was not shown to have been held for 50 years as "land" within the meaning of the definition above referred to. He went on to conclude that the plaintiff was

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entitled to have rent assessed on this area, and he framed his decree accordingly. Both parties appealed to the District Judge. On the main question in issue the learned Judge has agreed with the first court. We must accept the findings of fact arrived at, namely, that the entire area in suit had as a matter of fact been held rent-free for 50 years by the defendant and by at least two successors to the original grantee. We find it also impossible to interfere with the decision of the lower appellate court that the provisions of section 154 of the Tenancy Act do not apply to to any portion of the area in suit. On these findings the appeal of the plaintiff in the court below against that portion of the decree of the Assistant Collector which was adverse to him was necessarily dismissed. The learned Judge then went on to consider the appeal of the defendant. He was evidently of opinion that the area in suit, forming part of a rent-free holding, must necessarily be subject to the provisions of section 158 of the Tenancy Act. He endeavoured, however, to place his decision in the form of a dilemma against the plaintiff. With regard to the area of 9 bighas, 16 biswas, which the first court had ordered to be assessed to rent, the lower appellate court remarks that this area was either a part of a rent-free grant or it was not. Supposing, says the learned Judge, that it was not, then the only possible conclusion from the facts is that the defendant had been holding it adversely to the plaintiff for a period of more than 12 years prior to the institution of the suit. There was an appeal to this Court which came in the first instance before Mr. Justice TUDBALL. It may be said at once that it is somewhat difficult to affirm the decision of the lower appellate court on the precise ground on which it proceeds. The plain fact of the matter is that the land in suit is part of a rent-free grant. The plaintiff himself said so in his plaint and framed his plaint on that assumption. It seems impossible, therefore, to decide the question on the hypothetical assumption of a state of things which is clearly contrary to the pleadings as well as to the ascertained facts. The defendant respondent nevertheless supports the decision of the court below on the broad ground that the whole of the area in suit, and not merely part of it, must be held to fall within the provisions of section 158 of the Tenancy Act. In this connection the learned Judge of this Court before whom

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the case first came was asked to reconsider the question of the applicability of the definition of the word "land" already referred to. In view of the decision of a Bench of this Court in *Hadi Hasan Khan* v. *Pati Ram* (1), as to the correctness of which he evidently entertained serious doubts, Mr. Justice TUDBALL referred this case to a Bench of two Judges. The matter has now been fully argued out before us. There seems to have been a long course of decisions in this Court on the definition of the word *land* as applied to groves. An elaborate pronouncement on the subject by Mr. Justice SUNDAR LAL is to be found in *Habib-ullah* v. *Kalyan Das* (2). In view of the fact that the amendment of the Local Tenancy Act is now under the consideration of the authorities, I am particularly anxious not to reconsider or unsettle, except under pressure of necessity, any principles which seem to have been definitely affirmed by this Court with regard to the provisions of the existing Tenancy Act, nor do I think that it is really necessary in the present case to determine whether an area covered by trees and forming a grove is or is not land let or held for agricultural purposes, or even the narrower question whether in chapter X of the Tenancy Act, or at least in some of the sections falling within that chapter, it should not be held that there is something repugnant in the context to the application of strict definition of the word "land." I think that the present case may be quite satisfactorily and most conveniently decided upon its own facts. The appeal now before us is confined to the area of 9 bighas, 16 biswas, which at one time formed a grove. We do not know for certain whether this grove was planted by the original grantee or formed part of the original grant in the sense that the grant when made was one of a grove along with certain cultivated or culturable land. In any case there is no suggestion in the pleadings, or in the evidence, that there were more than one grant. The area in question in this appeal therefore did form part of a rent-free grant in favour of the predecessors in title of the present defendant. The grove ceased to exist before the present Tenancy Act, No. II of 1901, came into force. Under the previous Act, namely, the Rent Act, No. XII of 1881, there was no express definition of the word

(1) (1913) I. L. R., 35 All., 200. (2) (1914) 12 A. L. J., 1080.

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land, but the provisions of that Act undoubtedly applied to groves just as much as to cultivated or culturable lands. The area now in suit, therefore, was always land to which the provisions of the Tenancy Act for the time being in force applied. The ruling in *Hadi Hasan Khan* v. *Pati Ram* (1) cannot possibly be applied to the facts of the present case, because the area in question having been brought into cultivation more than 12 years before the institution of the suit was always "land" within the strictest meaning of the definition, both at the time when the present Tenancy Act, No. II of 1901, came into force and right down to the date of the institution of the suit. I think, therefore, that it is impossible to distinguish, as the Assistant Collector endeavoured to do, between the two portions of the area in suit. The whole formed a rent-free grant and was subject to the provisions of Chapter X of Act II of 1901, under any possible interpretation of the word "*land*," because the entire area had always been under cultivation while that Act was in force. If, therefore, the conditions laid down by section 158 of the Tenancy Act are proved to have been satisfied in respect of the entire area in suit, and it is so found by the lower appellate court, there seems no valid reason for drawing a distinction against the area now under appeal merely on the ground that it had at one time formed a grove. On this ground alone I would dismiss this appeal with costs.

WALSH, J.—I agree. The circumstances of this case are exceptional. I have come to the conclusion that in an admitted tenancy such as this was, the word *land* in section 158 must be held capable of including land other than land as defined in section 4. It would be "repugnant to the subject," to quote the language of section 4, to hold that the word *land* in this particular case did not include the land on which this grove had stood. The result of doing so would be that, while holding chapter X of the Tenancy Act applicable to the tenancy, we should be driven to hold that it did not apply to land which formed the subject of tenancy, and that I think is the very thing which is meant by the somewhat unusual language in the definition clause, namely, "repugnant to the subject." I wish carefully to guard myself against being

(1) (1913) I. L. R., 35 All., 200.

taken to hold anything more. In my opinion it by no means follows that all or any groves held for more than 50 years by two successors to the original grantee come within section 158, or that, for example, section 4 can be used by an occupant or grove-holder by adopting the construction which is the right one in this particular case. It is for that reason that I think it necessary to say that I adopt the very closely reasoned judgement of Mr. REYNOLDS, the Senior Member of the Board, to be found in the Selected Decisions of the Board of Revenue, No. 4 of 1911. I think the view there clearly laid down in a series of propositions is not only correct but entirely consistent with the view which we are taking :—"The custom generally prevailing in these Provinces is that the grove-holder is a tenant paying rent. This was crystallized in the definition of *rent* and *tenant* given in section 4. Groves are in my opinion equally clearly not *land* as defined in section 4. If they were *land* within that definition, there would be no need to differentiate them from *land* in the definition of rent. If a land-holder seeks to get rid of a grove-holder, he cannot take action under chapter X, as that chapter refers to *land* only. But he may sue to eject under section 58, as the grove-holder is a non-occupancy tenant." The Senior Member then goes on to discuss the nature of tenancy and adds :—"Probably in the majority of cases, either by village custom or by special contract, a grove-holder holds not from year to year but so long as the grove exists. In all cases then, when a land-holder seeks to eject a grove-holder, the question of the existence of such custom or contract should almost invariably be made a matter in issue. It follows from what I have said that a grove-holder cannot generally acquire rights of occupancy in the land on which the trees grow." These statements of the law, which I take to be correct, obviously apply to a vast majority of cases of ordinary tenancy between a grove-holder and a land-holder. The case we are dealing with is not one of those ordinary cases. It is a case admittedly of a tenancy wholly independent of and unconnected with a grove as such. It appears to me a mere incident or accident in its history that at one time it became, or a portion of it became, a grove so as not to be *land* within the strict definition of the term. I think we are both

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agreed that that accident does not make it any the less tenancy of *land* within the meaning of section 158, and therefore the rights of the parties under that section have been rightly applied.

BY THE COURT.—We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1917
July, 28.

Before Mr. Justice Piggott.

KHURSHED ALAM KHAN AND OTHERS (PLAINTIFFS) *v.* RAHMAT-ULLAH KHAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), order XLVII, rule 7—Review of judgement—Appeal from order granting review—Grounds of appeal.

In an appeal under order XLVII, rule 7, of the Code of Civil Procedure, 1908, from an order granting an application for review of judgement, the appellant is strictly limited to the grounds set forth in the rule.

THE facts of this case are fully set forth in the judgement. Briefly stated they were as follows :—The plaintiffs' suit for possession, mesne profits and certain sums of money was decreed in part and dismissed as to the rest. More than 90 days afterwards the plaintiffs applied for a review of judgement on two grounds, (1) that the court had overlooked the defendants' admission of liability in respect of a particular item of money which ought to have been decreed; and (2) that in view of the facts found the court should have, in accordance with the plaintiffs' general prayer "for any other relief," granted them joint possession with the defendants of certain holdings, although the plaintiffs had claimed exclusive possession of a half share, and that claim was dismissed as being in contravention of section 32 of the Tenancy Act. The defendants objected, *inter alia*, that the application for review was made beyond time. The court overruled the plea with the observation that "there was no force in the plea," and granted the application for review and modified the decree accordingly. The defendants appealed against the order granting the application for review, and the principal grounds of appeal were that there were no adequate grounds for granting the application for review, and that it was barred by time. The appellate court held that according to Article 173 of the

* Civil Revision No. 21 of 1917.