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gestion whatever, much less proof, that the respondent No. 2 retains any benefit after the sale in question. In view of all these circumstances and of the fact that on the findings of the court below the dower debt of Rs.25,000 was actually due to the defendant No. 1, on the date of the sale deed, it is impossible to hold that she was not a *bona fide* transferee for consideration.

As to the contention that if the respondent No. 1 had brought a suit for recovery of her dower she could not have obtained a decree for more than Rs.4,000 or Rs.5,000 we may point out that this circumstance does not at all affect the nature of the sale made in her favour. A similar plea was taken in the case of *Bansidhar* v. *Nawab Jahan Begam* (1) referred to above and the learned Judges who decided the case remarked:

> "But this does not by any means imply that the position of the wife is not that of a creditor. The fact that in a particular case the amount of the debt payable by the debtor has to be ascertained by the court cannot take the case out of the category of a debt or the person from whom the debt is payable out of the category of a debtor."

We are of opinion that the appeal has no force and it is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton

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March, 28

COMMISSIONER, LUCKNOW DIVISION, AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MST. BITANA (PLAINTIFF-RESPONDENT)*

Under-proprietary rights—Shankalap—*Claim in settlement court on basis of* shankalap—*Settlement court decree conferring heritable but non-transferable rights—Rent fixed as land revenue plus twenty per cent, as* haq taluqdari—*Decree whether conferred under-proprietary rights.*

Where on a claim made in the settlement court on the basis of a *shankalap* the rights which were actually given by the

*Second Civil Appeal No. 368, of 1936, against the order of Rai Bahadur Pandit Manmatha Nath Upadhyay, District Judge of Sitapur, dated the 11th August, 1936.

(1) (1938) I.L.R., 13 Luck., 655.

settlement court decree were inheritable but non-transferable rights and the amount fixed as payable yearly to the *taluqdar* was the amount of land revenue plus twenty per cent. as *haq taluqdari, held,* that it is clear that the Settlement Officer came to the conclusion that the right conferred was not an under-proprietary right but a hereditary non-transferable right which, because it was non-transferable, was not and could not be an under-proprietary right. A claim based on a *shankalap,* does not always mean an under-proprietary right, nor has the fact that the rent was revenue plus a certain percentage by itself any value.

The words *"naqal faisla az misil maqadama no. 2 . . . . shankalap matahat sir"* in the heading of an order merely mean that case no. 2, was a case in which under-proprietary rights were claimed as being based on a *shankalap,* even if it be presumed that the words *"matahat sir"* were employed to mean under-proprietary rights, and the heading certainly does not show in itself that the decree was understood by the Assistant Commissioner to be one which granted under-proprietary rights. *Lal Sripat Singh* v. *Lal Basant Singh* (1), and *Man Singh* v. *Bindeshwari Bakhsh Singh* (2), distinguished. *Manohar Lal* v. *Achhutanand* (3), and *Mohammad Amir Ahmad Khan* v. *Mahdei* (4), referred to.

Messrs. *M. Wasim* and *Ali Hasan,* for the appellants.

Mr. *Raj Narain Shukla,* for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This is a second civil appeal against a decision of the District Judge of Sitapur who dismissed an appeal against a decision of the Civil Judge of Kheri.

The appellants are the legal representatives of the original defendant the taluqdaria of the Khairigarh Estate against whom a suit was brought by Munnu Lal and Mst. Bitana for possession of 57.88 acres and for mesne profits.

The plaint alleges that the plaintiff No. 2 Mst. Bitana on behalf of herself and plaintiff No. 1, entered into possession as plaintiff No. 1, who was a minor was descended from one Ganga Prasad and as such was entitled to possession of the property, but the defendant got the

(1) (1918) 21 O.C., 180.
(2) (1938) I.L.R., 13 Luck., 409.
(3) (1922) 9 O.L.J., 618.
(4) (1938) O.W.N., 1091.

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name of plaintiff No. 2 entered as occupancy tenant and having filed a suit for arrears of rent obtained a decree and ejected her. The plaintiff No. 1, was found to have no status, but the suit was decreed in favour of the plaintiff No. 2 on the ground that she was an under-proprietor in respect of the land in suit.

It is common ground that Ganga Prasad, the predecessor-in-title of Mst. Bitana, obtained a decree Ex. A9 on the 26th September, 1871. He claimed in the settlement court rights on the basis of a *shankalap* and the rights which were actually given him by the settlement court were heritable but non-transferable rights, the amount payable by him yearly to the taluqdar being the amount of land revenue plus twenty per cent. as *haq taluqdari*. The words used in the decree are "*muddai ko is zamin men haq qabil wirasat wo naqabil intikal hasil rahega*". On the 2nd July, 1872, by an application Ex. 3 the taluqdar asked for the assessment of rent using the following words:

"*arzi dawa tasfiya lagan arazi degree shuda*"

and also in the body of that application he referred to the decree as having given "*haq matahat*". It is on these two words that Counsel for the respondent places great stress as indicating, according to him, the recognition that the decree had conferred under-proprietary rights.

By Ex. 6 the Assistant Commissioner fixed the rent in accordance with the terms of the decree. The learned District Judge has referred to the heading of this order containing the words "*shankalap matahat sir*" as evidence to show that under-proprietary rights had been given, but we find that the full heading is as follows:

"*naqal faisla az misil maqadama no.* 2 . . . *matahat sir*"

which, in our opinion, merely means that case No. 2, was a case in which under-proprietary rights were claimed as being based on a *shankalap*, even if we presume that the words "*matahat sir*" were employed to mean under-

proprietary rights, and the heading certainly does not show in itself that the decree was understood by the Assistant Commissioner to be one which granted under-proprietary rights. In Ex. 9, a khetauni of the settlement of about the year 1873, this land appears in a column the heading of which is *"nam maliq haqdar matahat"*, but the remarks column has a note which refers to the decree as giving heritable but non-transferable rights.

In Ex. 10, a khasra of the same settlement, the land appears in a column which bears the heading *"qabiz darmiani"*, but again in the remarks column there is a reference to the decree as giving heritable but non-transferable rights.

The learned District Judge has not referred to the contents of the remarks column in these two exhibits, and the entries in these columns were certainly put there to make clear the fact that the rights were heritable but non-transferable to contrast them with under-proprietary rights which are transferable. The wajib-ul-arz which is Ex. A2 in paragraph 12 states that no under-proprietary rights were given in this village as all claims for them had been dismissed. In paragraph 13 it states that Ganga Prasad in his *shankalap* land had obtained a decree for heritable but non-transferable rights. In the present settlement the khetauni Ex. A1 shows that the plaintiff was entered as an occupancy tenant, and in the year 1932, when the taluqdar filed a suit for rent against Mst. Bitana he described her as *"kashtkar kabzadar"* by which he presumably meant an occupancy tenant and he certainly did not mean an under-proprietary tenant.

The learned District Judge has held that as the decree conferred a heritable right and the amount of rent fixed was land revenue plus twenty per cent. as *haq taluqdari*, the right granted was an under-proprietary right and consequently the provisions of non-transferability could not be enforced as they detracted from the under-proprietary right which had been conferred.

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Although the learned District Judge has not referred to *Lal Sripat Singh* v. *Lal Basant Singh* (1) in this connection, he perhaps had it in mind and we think it advisable to show that there is a vital difference between the facts of the two cases. In that case the plaintiff and the defendant were closely related and the taluqa of Rajapur was settled with the father of the defendant in 1859. In 1861, in the course of the regular settlement the plaintiff applied for a settlement of a half share on the ground that he was jointly entitled to the estate with the defendant's father and as he was directed to bring a claim at the time of settlement, six years later he applied to have his name recorded as a co-owner in respect of a moiety of the taluqa. The parties effected a compromise and in the petition to the settlement court the plaintiff prayed that a decree for under-proprietary rights of the entire village Daulatpur be passed in favour of the plaintiff. The actual words used were *"kabiz darmiani"* and it was undisputed that they were correctly rendered as meaning an "under-proprietor". On the 1st November, 1867, the Extra Assistant Commissioner made an order that the under-proprietary rights in respect of the lands within his jurisdiction should be decreed in terms of the compromise and as regards Daulatpur, which apparently lay outside his jurisdiction, the petition should be referred for final orders to the Settlement Officer. The Settlement Officer on the 14th June, 1869, passed a final order granting an under-proprietary right in mouza Daulatpur without right of transfer subject to an annual payment of Rs.461-4 and subject also to the other conditions contained in the deed of compromise. On the 21st October, 1872, there was a further agreement between the father of the defendant and the plaintiff who described themselves as "the proprietor and under-proprietor" of village Daulatpur. Their Lordships of the Privy Council decided that as an under-proprietary right had clearly been given by

(1) (1918) 21 O.C., 180.

the compromise and by the decree, the words "without right of transfer" could not take away the under-proprietor's right to transfer his interest which was a necessary incident of his legal status.

Man Singh v. *Bindeshwari Bakhsh Singh* (1) was a very similar case which was decided by a Bench of which one of us was a member. There too there was an agreement between the parties and it was stated in it: "the said Raja may get my name entered in the column of under-proprietor." "If by chance, I, the executant, and my heirs refrain from obeying Raja Sahib then the under-proprietary right enjoyed by me and my heirs be taken to be null and void." In the settlement decree there was a condition in restraint of alienation, but it was held that as under-proprietary rights had been created under the compromise the condition against alienation was void. *Lal Sripat Singh* v. *Lal Basant Singh* (2) was referred to in this connection.

In the present case the decree gave no under-proprietary rights—in fact it refused such a right—because it gave nothing more than a heritable right without the power of alienation. There is, therefore, no contradiction between any two parts of that decree, and the papers of that settlement made it clear by entries in the remarks column that under-proprietary rights were not given and the wajib-ul-arz, if possible, made it clearer still.

The learned District Judge also thinks that the fact that rent was land revenue plus twenty per cent. of *haq taluqdari* is an indication that under-proprietary rights were conferred.

The learned Counsel for the respondent supports the view of the learned District Judge by a reference to *Babu Manohar Lal* v. *Achhutanand* (3). The plaintiffs there filed a suit on the basis of a *shankalap-koshist* for a declaration that they were under-proprietors. At the

(1) (1938) I.L.R., 13 Luck., 409. (2) (1918) 21 O.C., 180.
(3) (1922) 9 O.L.J., 618.

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first regular settlement in 1877, the predecessor-in-interest of the defendant moved the settlment court for assessment of rent on the entire land held by the predecessors-in-interest of the plaintiffs and a decree was passed as follows:

> "Declaratory decree in favour of the plaintiff who is declared to have a right as taluqdar to demand rent from defendants *shankalapdars* on bighas 131-4, such rent being calculated at the incidence of the Government demand plus 10 per cent. or Rs.197 per annum during the currency of present regular settlement."

The Additional Judicial Commissioner who decided this case held that the method of assessment of rent was, to his mind, a clear indication of the holding having been treated as an under-proprietary tenure because in rule 7, sub-rule 3, of the rules laid down in the Schedule of the Oudh Sub-Settlement Act of 1866, it was stated that in no case could the amount payable during the currency of the settlement by the under-proprietor to the taluqdar be less than the amount of the revised demand, with the addition of ten per cent.

It may be that in certain cases the fixing of rent of the land revenue plus a percentage may be a useful indication. We think it, however, advisable to utter a word of caution to prevent the danger of too much importance being given to this. In some cases when claims were made on the basis of *shankalap* or other similar tenures, revenue had not yet been assessed. It was only fair that whether the tenure was an under-proprietary one or something less the proprietors should receive a reasonable sum besides being relieved from the payment of revenue, and until it was known what the revenue would be it was impossible to calculate what would be a fair rent, for the fixing of any figure might result in a rent either too low or too high. The practical way of getting over this difficulty was, therefore, to make the rent payable the amount of land revenue plus a fair percentage.

Both in this connexion and as regards the papers in which these entries occur, we would refer to sections 32 and 79 of the Land Revenue Act. Under section 32(*c*) there is one register of all under-proprietors in a mohal other than those who hold any sub-settlement, and of all lessees whose rents have been fixed by a Settlement Officer or other competent authority.

Under section 79, in Oudh, after declaring the assessment of a mohal, the Settlement Officer shall, in accordance with the provisions of the Oudh Sub-Settlement Act, 1866, so far as they are applicable, and subject to rules made under section 234, determine the rent to be paid by all under-proprietors and by all holders of heritable, non-transferable leases holding under a judicial decision. The Board's Circular 2-1 contains rules under section 234, and in clause 9 it refers to leases which were decreed or ratified by a decree at the last settlement, or were created by an agreement made before or at the time of the last settlement. In such cases, if the rent was fixed in a definite proportion to the revenue, paragraphs 4 and 5 of those rules would apply. Paragraphs 4 and 5 refer also to cases of sub-settlement where the rent was fixed at Government demand plus a definite percentage thereon. The corresponding provisions of the earlier Rent Act are sections 56 and 40. The Deputy Commissioner had to prepare a list of under-proprietors and lessees whose rent had been fixed by a Settlement Officer. Under section 40 lessees were to be assessed like under-proprietors in the absence of a contract to the contrary as section 7 of the Oudh Sub-Settlement Act was to be applied.

It is clear, therefore, that the same method of assessing rent was followed by the Settlement Officer in the cases of under-proprietors and in the cases of lessees with heritable but non-transferable rights, and both classes were entered in the same register. Indeed, under the earlier Act even occupancy rights were entered there. It was, therefore, apparently an entry in the remarks

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column which made it clear when a person entered in the register was not an under-proprietor.

The learned Counsel for the respondent argues that the decree conferred under-proprietary rights as understood at the time because the rent was revenue plus a certain percentage and because the claim was based on a *shankalap,* and Ex. 3, the application of the taluqdar, made it clear that under-proprietary rights were conferred by the decree. We have already shown that the fact that the rent was revenue plus a certain percentage by itself has no value although taken in connexion with other facts it may give an indication. Even if the claim was one for an under-proprietary right because it was based on a *shankalap, shankalap* is not always an under-proprietary right. That was pointed out in *Babu Manohar Lal* v. *Achhutanand* (1), on which the learned Counsel relies, and it is also made clear in Sykes' Compendium of Oudh Taluqdari Law at page 179 and following pages.

It should be remembered that in the case of grants made before the annexation of Oudh, whether the grants were *shankalap, birt, nankar* or anything else, the grantor was not trying to confer certain rights recognised by statutes of British India as those statutes were not in existence. The grantor conferred certain rights, and the Settlement Officer had to interpret those rights in terms of the new Oudh Revenue Statutes, and in doing so he had to look either into the terms of the grant, if that was clear, or examine the parties or see what the terms implied and then come to a conclusion whether the right created was an under-proprietary right or something else.

It is clear that in the present case the Settlement Officer came to the conclusion that the right conferred was not an under-proprietary right but a hereditary non-transferable right which, because it was non-transferable, was not and could not be an under-proprietary right. It

(1) (1922) 9 O.L.J., 618.

does not, therefore, help the respondent to say that because he claimed on the basis of *shankalap* he obtained an under-proprietary right. The nature of his *shankalap* was looked into by the Settlement Officer who decided that this *shankalap* was not one which constituted an under-proprietary right.

As regards Ex. 3, the application of the taluqdar, the word "*matahat*" must be read in connexion with the rest of the contents of that application where the decree is expressly referred to, and this shows that the word "matahat" was not intended to be used by the taluqdar as a recognition that the decree had granted an under-proprietary right but merely that it had created a subordinate tenure the nature of which had been clearly set out in the decree.

In many ways what has been said in *Mohammad Amir Ahmad Khan* v. *Mahdei* (1) will apply to the facts in the present case both as regards the significance of entries in revenue papers and what constitutes a recognition by the superior proprietor in view of his subsequent conduct.

As Ex. 3 must be read as a whole, we find nothing to show that the plaintiff's predecessors-in-title have been treated as under-proprietors by the superior-proprietor.

In short the decree did not confer under-proprietary rights simultaneously with any limitation which detracted from those rights. The plaintiff's predecessor-in-interest was not recognized as an under-proprietor by entries in revenue papers, and the superior-proprietor has not treated him or any successor-in-interest as an under-proprietor.

The claim of the plaintiff, therefore, fails and we allow the appeal and dismiss the suit with costs throughout.

Appeal allowed.

(1) (1938) O.W.N., 1091.