PRIVY COUNCIL.

RAJA DHAKESHWAR PRASAD NARAIN SINGH

v.

GULAB KUER*

1926.

May, 10.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 22(2), 103B—*Occupancy Right—Record-of-rights - khudkasht bakasht—order on partition—limitation—Limitation Act*, 1908 (*IX of* 1908), *Schedule I*, *Article* 14—*Estates Partition Act*, 1897 (*Ben. V of* 1897), *section* 13(*xv*).

The appellant-zamindar sued to eject the respondents from lands in a village in Bihar which had been partitioned under the Estates Partition Act, 1897. In a record-of-rights made in 1908 under section 103-B of the Bengal Tenancy Act, 1885, the land had been described as the appellant's "bakasht". That term is used by revenue officers in Bihar to describe land which is either khudkasht (i.e., proprietor's private land) or land temporarily in his possession. The order on partition, while stating that the land was originally raiyati, allotted it to the appellant as "bakasht" and assessed a rent payable to him.

The defence to the suit was that the land had been the raiyati land of the first respondent's husband, deceased; further, that as the suit was not brought within one year of the order on partition, it was barred by the Limitation Act, 1908, Schedule I, Article 14.

Held, that the appellant was entitled to khas possession; the record-of-rights was to be presumed to be correct, and there was no evidence to show to whom the alleged raiyati kasht belonged, or when it came into the possession of the first respondent's husband; the suit being in ejectment was not governed by Article 14.

Section 13 (*xv*) of the Estates Partition Act, 1897, does not give power to assess rent when a raiyati kasht falls within the allotment of a proprietor.

Section 22, sub-section 2, of the Bengal Tenancy Act, 1885, applies only when there has been a transfer of land in which an occupancy right is shown to exist.

Judgment of the High Court reversed.

* PRESENT.—Lord Blanesburgh, Lord Darling, Sir John Edge, Mr. Ameer Ali, and Lord Salvesen.

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Appeal (no. 98 of 1924) from a decree of the High Court (June 18, 1923) reversing a decree of the second Subordinate Judge of Patna (May 26, 1920).

The appellant sued the respondents claiming khas possession of certain land, part of a village in Bihar, in respect of which there had been partition proceedings under the Estates Partition Act (Ben. V of 1897). The question in the appeal was whether the defendants had a right of occupancy, and whether the suit was barred by limitation.

The facts are fully stated in the judgment of the Judicial Committee.

The trial Judge made a decree in favour of the appellant. On appeal to the High Court (Ross and Jwala Prasad, J.J.) the suit was dismissed. The reasons of the learned Judges appear from the present judgment.

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Dunne, K. C., E. B. Raikes and *K. Ali Afzal*, for the appellant.

Dube, for the respondents.

The judgment of their Lordships was delivered by—

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Patna pronounced on the 18th June, 1923, which, reversing the decree of the Subordinate Judge made on 26th May, 1920, dismissed the plaintiff's suit.

The action is for the possession of some lands lying in a village, or, rather, in a conglomeration of villages and hamlets, called collectively mauza Katauna, situated in pargana Bihar, district Patna. In this district proprietary rights are often split up amongst numbers of owners and frequently run into very small fractions. The present case furnishes not only an illustration of the infinity of subdivision, but also of the inconvenience to revenue

officers in dealing with the shares. Until its partition in 1914, to which reference will be made particularly later on, mauza Katauna bore one tauzi number (10905) and paid to the Government a consolidated jama (revenue) of Rs. 1,542. The mauza was held by a number of proprietors (maliks) in specific but undivided shares. Apparently when the partition was started there were some fourteen sets of co-sharers. The plaintiff owned a little over 4 annas or one-fourth; whilst one Munshi Bakhori Lal, now deceased, the husband of the first defendant, held an anna and a fraction. Besides his proprietary or milkiat interest in the village, he owned a mukurrari, or permanent tenure, and some lands which were in his direct cultivation.

It should be observed here that besides Bakhori Lal, the other maliks also held possession, in proportion to their milkiat shares, the same class of lands which appear to have been called minhai khudkasht—minhai because the lands by private arrangement among the co-sharer proprietors had been exempted from payment of rent, and khudkasht because they were the owner's "private lands." The definition of the zamindar's "private lands" in section 120 of the Bengal Tenancy Act (VIII of 1885) will be referred to later.

It is to these lands held by Bakhori Lal that the present dispute relates.

Long before the Government resolved to institute a survey and have a record-of-rights prepared under Chapter X of the Bengal Tenancy Act, preliminary to a partition among the several maliks, Bakhori Lal had parted with almost the whole of his proprietary rights and interests in the village. The fractional share he retained was held ijmali with the purchasers.

To the sale-deeds their Lordships will refer later, as they throw considerable light on the question for determination in this appeal.

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This joint holding appears to have been maintined by the Batwara officer.

The survey settlement officer, on the conclusion of the record-of-rights, made an entry under section 103-B, as follows (omitting the boundaries of the plots):—

SURVEY KHATIAN OF VILLAGE KATAUNA.

Village—Katauna No. 307. Estate — Mohamoodpur Bhaidi, Mohanpur Bhaidi, Ugarsenpur Bhaidi, Rajpur Bhaidi, otherwise called Katauna. Name of proprietor and number in proprietary Khewat —Babu Dhakesar Prasad Narain Singh alias B. Harihar Prasad Narain Singh and others, Khewat no. 3.

Tauzi no.—10905.

Patti.—Katauna.

Name of tenure-holder and number in tenure-holder's Khewat, if any—Samilat Bakhori Lal and others recorded in Khewat no. 14.

Bakasht of Malik and others.	3598	Paddy 4 Kitas.	31	30	In possession of Bakhori Lal with field.		
	3625	Do.	16	26	In possession of Bakhori Lal.		

It will be noticed that in the above entry Bakhori Lal is described as tenure-holder and the lands are stated to be in his direct cultivation. There is no mention of any raiyati kasht. The two plots no. 3598 and no. 3625 appear to have been included by the survey officer in the plaintiff's property.

Broadly speaking, the Bengal Tenancy Act classifies agricultural lands under two heads: (1) Raiyati lands, in respect of which a raiyat acquires a right of occupancy which is explained in Chapter V; and (2) lands which are held by the malik or owner, in his own direct cultivation, and are called in the Act the "private lands" of the zamindar. In these lands the raiyat cannot acquire a right of occupancy.

The zamindar's "private lands" are dealt with in Chapter XI under the heading of "Non-accrual of occupancy rights, etc." Section 116 (as amended by the Bengal Act I of 1907) provides:—

"Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to,

[lands acquired under the Land Acquisition Act, 1894, for the Government or for any Local Authority or for a Railway Company, or lands belonging to the Government within a Cantonment, while such lands remained the property of the Government, or of any Local Authority or Railway Company, or to]

a proprietor's private lands known in Bengal as khamar, nij or nijjot [and in Bihar as ziráat, nij, sir or khamat], where any such land is held under a lease for a term of years or under a lease from year to year."

Then dealing with the powers of a revenue officer appointed in any particular locality to make a survey of the proprietor's "private lands," it is provided by section 120:—

"(1) The revenue officer shall record as a proprietor's private land—

(*a*) land which is proved to have been cultivated as khamar [ziráat, sir,] nij, nijjot [or kamat] by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and

(*b*) cultivated land which is recognised by village usage as proprietor's khamar [ziráat, sir] nij, nijjot, [or kamat].

"(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom, and to the question whether the land was, before the second day of March, 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown."

It is evident from the present record that besides the words sir and zirait the term khudkasht is in common use in this part of Bihar as a synonym of sir. Khudkasht literally means "one's own cultivation."

It appears that a new designation has sprung up in Bihar. In the course of proceedings under the Partition Act (V of 1897) and in the record-of-rights survey the revenue officers found in the landlords' possession, and under their cultivation, lands in

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regard to which it was difficult to ascertain whether they were sir or zirait, or whether they were raiyati lands temporarily in the possession of the zamindar. These officers appear to have solved the difficulty by inventing a new designation for this kind of lands. They called it bakasht. The word bakasht literally means "in the cultivation of," and when the word malik is added to it, the difference between khudkasht and ba-kasht-i-malik becomes very slight.

The idea was apparently to leave it to the civil courts to find out on the evidence of the parties the origin and nature of the lands held by the zamindar as bakasht.

The question now presented for the determination of the Board relates to the interpretation to be attached to the entry in the record-of-rights. Shortly after the survey the partition proceedings in the present case followed. They were long drawn and complicated, and their Lordships are not surprised that the Batwara officer was bewildered. There were fourteen parties represented by nine pleaders and legal practitioners. The present defendant (Gulab Kuer) and the vendees of her husband claimed to have the sixty-seven bighas of bakasht lands in a single takhta.

On the 14th September, 1914, the Batwara officer made the following order, which their Lordships consider should be set out in full.

"*14-9-1914.* Read petition no. dated 12th September 1924, filed by Musammat Gulab Kuer, wife of Bakhori Lal. Also petition on behalf of parties I, III, V and XIII filed, petitions rejected.

"I have heard the parties at great length. The bakasht lands of about 67 bighas which has been entered in the record-of-rights as being in possession of the Ijmal Maliks (Bakhori Lal) has been assessed to rent under section 3, *xv*, of the Batwara Act (1). It is doubtful if section 77, Act V of 1897, will apply to the case of the bakasht lands of 67 bighas of Ijmal party as the explanation to section 77 seems to exclude all Khanear lands, etc., and to apply to raiyati lands only. These lands were original raiyati lands as was admitted by Bakhori Lal in his deposition in the civil court in case no. 54 of 1891 (Munsif of Bihar). These bakasht lands of 67 bighas and odd of party Ijmal were evidently in this original raiyati land. The roadcess

(1) Estates Partition Act V of 1897, Ben.

return of 1894 supports this view. Section 22, Cl. 2, of the Bengal Tenancy Act will apply in this case; so far as I can make out these lands will retain this raiyati character subject to payment of rent assessed thereupon by me, in case these lands fall outside the takhta of ijmal. *The point is not free from doubt and the question can only be finally decided by the civil court.*"

Their Lordships desire to lay proper emphasis on this passage. The Batwara officer continues thus:

"I have followed the record-of-rights and applied the [batwara law (section 3, XV (6)]. Upon it I will give takhta to ijmal according to his share in Reg. D and Ijmal has been recorded as bakasht malik in 67 bighas 11 katthas 15 dhurs of khudkasht lands as shown in amin's report of khudkasht lands. Section 77, Act V of 1897, will not apply to this 67 bighas 11 kattahs 15 dhurs of khud (?) land of Ijmal party. This is to be governed by section 22 of the Bengal Tenancy Act.

"I have heard all the objections urged before me.

"Plot nos. 7362-7362 (?) to go to Ijmal as they are in possession of Bakhori Lal."

Then followed a series of petitions and expostulations on the part of Gulab Kuer. She claimed that the lands of which a part had been allotted to the plaintiff were her husband's bakasht, lands of which he had been long in possession, and that the Batwara officer had no power to assess rent thereon.

Her contention went in appeal after successive stages to the Board of Revenue, and was dismissed by the revenue authorities in succession. Throughout the proceedings in the revenue courts she never appears to have taken her stand on the claim that those lands formed part of a raiyati kasht. In the result the takhta allotted to the plaintiff included some 47 bighas of the lands which were held by Bakhori Lal "in his own cultivation." The plaintiff thereupon attempted to take possession of the same; he was resisted, which led to criminal proceedings in the Magistrate's court. As the defendant was in possession of the lands in dispute, the plaintiff was referred to assert his right in the civil court. Accordingly, he brought this action on the 4th February, 1919, in the second court of the Subordinate Judge of Patna.

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The defendants in the action are Gulab Kuer, the widow of Bakhori Lal, his daughter, and the daughter's son, Gopalji, who is the reversioner to Bakhori's estate.

The defendant no. 1 alleged, in her written statement, that the lands in suit had always been held by her husband for many years past as a raiyati holding, and that the Batwara officer's award was illegal. With reference to the previous statements regarding the khudkasht or bakasht nature of the lands, she made this further allegation:—

"As during the survey the husband of this defendant no. 1 being very old could not personally look after the survey proceedings and moreover as he had also become the proprietor of a fractional share in mauza Katauna aforesaid, the survey authorities wrongly and in utter disregard of the legal aspect recorded the disputed land constituting his raiyati kasht as his bakasht land, although the said land had been his raiyati kasht for a long time."

The question for determination thus narrowed itself to two issues: first, whether the entry in the record-of-rights was correct; and, secondly, what was meant by bakasht lands.

In other words, were the bakasht lands, as the defendant contended, Bakhori Lal's raiyati kasht? The Subordinate Judge held that the defendant was bound by the entry in the record-of-rights, and that the lands were sir lands of Bakhori Lal, and that the allotment to plaintiff was valid. He also held that the receipts and luggit statements adduced by the defendant to establish her allegation that the lands were a raiyati kasht were not genuine. He considered them to be unworthy of credit, for reasons he stated in his judgment. He accordingly made a decree in favour of the plaintiff. The defendants appealed to the High Court of Patna. The learned Judges, differing from the first court, reversed its order and dismissed the plaintiff's suit.

ROSS, J., was of opinion that section 22(2) of the Bengal Tenancy Act, as amended by Act I of 1907, applied to the case. He also relied on the receipt and luggits produced by the defendant, and came to the

conclusion that the lands held by the defendant's husband formed a raiyati kasht. Jwala Prasad J., in his judgment, dealt with the case from a different point of view. He proceeded on different premises, but came to the same conclusion—that the expression bakasht in this case denoted a raiyati kasht. The learned Judges accordingly dismissed the plaintiff's suit for the actual or khas possession of the lands allotted to him. Hence this appeal to His Majesty in Council.

Before dealing with the point at issue their Lordships desire to observe that section 22 (2) of the Bengal Tenancy Act, which has been held by the High Court to apply to the subject-matter of the suit, runs as follows:—

"If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them; and, if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure holder or a raiyat, as the case may be, in respect of the land."

It can only apply on the assumption that an occupancy right existed in the lands, which right is transferred to a person jointly interested—in other words, that a raiyati kasht existed in fact. In the present case the raiyati right is in controversy, and consequently the section has no application until the claim is established.

With regard to the view expressed by Jwala Prasad, J., it is enough to observe that although the Batwara officer, following the survey officer, declared the lands held by Bakhori Lal to be kasht lands, and although the Batwara officer stated dubitante that Bakhori Lal at one time had stated he held a raiyati kasht, the entry, in fact, records the lands to be bakasht lands. So far as this declaration is concerned the entry made by the survey officer under section 103, B (3), is to assumed to be correct until the contrary is proved. The defendant Gulab Kuer has

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challenged its correctness. The question is, Has she established her allegation?

Bakhori Lal, as already stated, conveyed to a number of persons, by several deeds of sale, shares of his milkiat or proprietary interest which he possessed in the village. In the kabala executed by him to one Dundi Sahu, on 13th September, 1888, after reciting the share he was conveying, he states what he does not include under the sale in the following terms:

"With the exception of jagir lands, etc., etc., and lands excepted under the Muhammedan law and by the standing customs, as well as of the minhai khudkasht lands which have been partitioned among the 16 annas co-sharers in proportion to their shares."

In another document executed on 29th March, 1890, in favour of one Chintaman Singh, he excepts from the sale the khudkasht lands, known as minhai land, to the extent of the share allotted under private partition among the 16 annas co-sharers.

In another document of the same date executed in favour of Nilkanth Singh, the following passage is embodied:—

"Be it known that the said purchaser has willingly agreed to exclude in proportion to the share sold the khudkasht land called minhai land partitioned by the 16 annas co-sharers. To this the said purchaser or his heirs or representatives shall have no claim or contention."

The same exception is made in other conveyances.

It is to be observed here that a large area of khudkasht lands in this village have been partitioned among the co-sharers, which, as already stated, being exempted from payment of rent, are called minhai. There is absolutely nothing to show on the evidence to what other lands these clauses in the deeds of sale relate.

Their Lordships have no doubt that when Bakhori Lal excluded from his sale khudkasht lands, he was referring to lands which he had under his own cultivation, described in the record-of-rights and the batwara khatian as bakasht lands.

The term bakasht, invented by the revenue officers to meet a certain contingency, conveys to all intents and purposes the same meaning as khudkasht, which is admittedly the same as sir or zirait. It might, however, imply raiyati lands that had temporarily come into the possession of the landlord and were temporarily under his cultivation. In the present case, however, there is no evidence, and certainly nothing is brought to their Lordships' notice, to show to whom the alleged raiyati kasht belonged, or when it came into the possession of Bakhori Lal. The defendants' allegation accordingly is not established. Some stress is laid in the judgment appealed against on the fact that the Batwara officer assessed rent on the lands allotted to the plaintiff as indicating that he regarded it as a raiyati holding. Section 3 (xv) of Act V of 1897, to which reference is made, empowers the partitioning officer, for the purpose of equalising the allotment, to assess the rents on the lands allotted. Clause XV defines "assets" as follows:—

> "Assets, when used with reference to land, means:—
>
> (*a*) In the case of land held by cultivating raiyats, the rent payable by them.
>
> (*b*) In the case of land which is occupied by a proprietor, the rent which might reasonably be expected to be payable by cultivating raiyats if the land were occupied by them.

This has, in their Lordships' opinion, nothing to do with the fixing or assessment of rent when a raiyati kasht falls within the allotment of a proprietor. That question appears to be dealt with by other sections.

With regard to the objection put forward by counsel for the respondents, that the plaintiff's suit is barred under Article 14, Schedule 1, of the Limitation Act, their Lordships desire to observe that this suit is not brought for the purpose of setting aside any order of the revenue court; it is simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plaintiff.

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On the whole, their Lordships are of opinion that this appeal should be allowed, the decree of the High Court should be reversed, and that of the Subordinate Judge restored with costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *W. W. Box and Co.*

Solicitors for respondents: *Ranken Ford and Chester.*

APPELLATE CIVIL.

Before Dawson Miller, C. J., and Foster, J.

1926.

April, 29, 30; May, 11.

ACHUTANAND JHA

v.

SURJANARAIN JHA.*

Hindu Law—family property, sale of—consideration, portion of, not justified by legal necessity—sale, whether should be set aside—son's pious obligation to pay father's time-barred debt.

A sale of joint Hindu family property to a bona fide purchaser should not be set aside merely because the consideration paid is somewhat greater than the actual requirements of the joint family.

Lal Bahadur Lal v. *Kamleshar Nath*(1), *Felaram Roy* v. *Bagalanand Banerjee*(2), *Chattar* v. *Chote*(3), *L. A. Niqlakanta Sarma* v. *Ganesha Iyer*(4) and *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan*(5), followed.

*Second Appeals nos. 1056 of 1923 and 41 of 1924, from a decision of Ashutosh Chattarji, Esq., District Judge of Darbhanga, dated the 30th June, 1923, modifying a decision of Babu Parmeshwari Dayal, Munsif of Darbhanga, dated the 14th June, 1923.

(1) (1926) I. L. R. 48 All. 183, F. B.
(2) (1909-10) 14 Cal. W. N. 895.
(3) (1917) 40 Ind. Cas. 269.
(4) (1925) 91 Ind. Cas. 310.
(5) (1922-23) 27 Cal. W. N. 365; (1922) A. I. R. (P. C.) 307.