APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

1928.

May, 4.

MAHARAJA CHANDRA MOULESHWAR PRASAD SINGH BAHADUR

v.

HEM NALINI DEVI.*

Land-Revenue Sales Act, 1859 (*Act XI of* 1859), *section* 37—*Purchaser of entire estate, suit to recover land by —defendants' claim as lakheraj—onus—lease of land covering tank—section* 37, *exception* (4), *applicability of—assessment of fair and equitable rent, suit for, by co-sharer landlord—absence of other co-sharers—decree, if can be made.*

Section 37, Land-Revenue Sales Act, 1859, provides: "The purchaser of an entire estate in the permanently-settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all undertenants with the following exceptions." Exception (4) exempts "Leases of land...whereon...tanks... have been made.....".

Held, (i) that the purchaser of an entire estate sold for arrears of revenue takes the estate as created at the time of the Permanent Settlement; but in a suit brought by him to recover land claimed by the defendant as lakheraj he must prove a prima facie case that these lands were included in the mal asset of the estate at the time of the Permanent Settlement, and that his mal land has since 1790 been converted to lakheraj.

Hurryhur Mookhopadhya v. *Madub Chunder Baboo* (1), *Sm. Krishna Kalyani Dasi* v. *Mr. R. Braunfield* (2), and *Abdul Rahman Kazi* v. *Baikunth Nath Roy Chowdhury* (3), followed.

*Appeals from Appellate Decree nos. 150 to 153 of 1924 and 288 to 297 of 1924, from a decision of C. J. Monahan, Esq., I.C.S., District Judge of Monghyr, dated the 17th July, 1923, modifying a decision of Babu Sushil Chandra Mukherji, Munsif of Monghyr, dated the 31st January, 1922.

(1) (1871-73) 14 Moore I. A. 152. (2) (1915-16) 20 Cal. W. N. 1028.
(3) (1918) 27 Cal. L. J. 183.

(*ii*) that Exception (*4*) to section 37 does not mean that in order to bring a case within this exception the lease must be a lease for the purposes of excavating a tank thereon; it covers a case of a lease of land upon which the tank in dispute stands.

Asmat Ali v. *Hasmat Khan* (1), distinguished.

Held, further, that in a suit for assessment of fair and equitable rent by a co-sharer landlord, no order can be passed in the absence of the other co-sharers.

Kamal Kumari Chowdhurani v. *Kiran Chandra Roy* (2), distinguished.

These 14 appeals arose out of suits brought by the plaintiff for declaration of title to and recovery of possession of certain lands and houses. The plaintiff was the purchaser of the entire estate bearing Tauzi no. 6104 of the Monghyr Collectorate at a sale for arrears of revenue held on the 25th of March, 1913. She obtained delivery of possession on the 16th of September, 1913, and her name was registered as proprietor of the 16-annas of the estate. The present suits were for a declaration that the lands and houses in dispute were included in this Tauzi no. 6104 and, therefore, by virtue of the purchase at the revenue sale she had acquired a title thereto and was entitled to possession. There was an alternative relief prayed for, for fixing a fair and equitable rent.

Sultan Ahmad (with him *Jagannath Prasad*), for the appellants in second appeals nos. 150-153 of 1924, and for the respondents in nos. 288, 291, 295 and 296.

S. K. Mitter, for the respondents in nos. 150-153 of 1924, and for the appellants in nos. 288-297 of 1924.

P. K. Mukerjee, for the respondents in nos. 289, 292 and 294 of 1924.

S. M. Mullick and *S. N. Bose*, for the respondents in no. 297 of 1924.

The respondents in nos. 290 and 293 of 1924 were not represented.

(1) (1897-98) 2 C. W. N. 412. (2) (1897-98) 2 Cal. W. N. 229.

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KULWANT SAHAY, J.—It has been necessary to deal with these appeals separately as the subject matters of the suits are different and the points raised are not exactly the same in each case.

Appeals nos. 150 *and* 288 *of* 1924.

These appeals arise out of suit no. 454 of 1920, which was appeal no. 78 of 1922 before the District Judge. Appeal no. 150 is by the defendant and appeal no. 288 by the plaintiff. In this suit the plaintiff claimed a tank known as Laloopokhar which was in the exclusive possession of the defendant, the Maharaja of Gidhaur. The plaintiff claims a 4-annas share in this tank as lying within her tauzi and alleges that she is entitled to possession thereof on dispossessing the Maharaja. The defence of the Maharaja was that he had a lakhiraj title to this tank as it was included within an area of 30 bighas of lakhiraj land purchased by him in 1882, and it was not included in the mal land of the tauzi. The Munsif dismissed the suit holding that the tank was ijmal and that the Maharaja had a lakhiraj title thereto. The learned District Judge has found that a 2-annas share of the tank was allotted by batwara to tauzi no. 6104, and that the Maharaja had failed to prove that the 30 bighas of land purchased by him, within which this tank was situated, was lakhiraj land at the time of the Permanent Settlement. He, however, held that the plaintiff was not entitled to oust the Maharaja from possession as the tank came within the 4th exception to section 37 of Act XI of 1859, but was entitled to recover rent for a 2-annas share of the tank. He, however, held that the rent could not be assessed in the present suit as the remaining 14 annas proprietors were not before the court, and he accordingly dismissed the suit.

The Maharaja appeals against this decree, in so far as it is against him, in Second Appeal no. 150 of 1924; and the plaintiff appeals against the decree dismissing the suit in Second Appeal no. 288 of 1924.

The mahal out of which Tauzi no. 6104 was carved out was partitioned twice, once in 1868 and again in 1880. The Tauzi no. of the original mahal was 424. In the partition of 1868, half of the tank was allotted to the estate which retained the old Tauzi no. 424. In the partition of 1880, which was a partition of the estate which retained the old Tauzi no. 424, the tank was not divided, but the income derived from the tank was divided. One-fourth of the income of this tank was by this partition allotted to the patti of Darwesh Muhammad and others, which was given Tauzi no. 6104. Now, this one-fourth was of the one-half of the tank which was allotted to Tauzi no. 424 by the partition of 1868. Therefore, what was allotted to the patti of Darwesh Muhammad and others bearing Tauzi no. 6104 was one-fourth of one-half, i.e., one-eighth of the tank. The learned District Judge, therefore, found that a 2-annas share of the tank was allotted to Tauzi no. 6104 This finding is supported by the Batwara Khasra of 1868 (Exhibit Z-7) and the 16-column register of 1880 (Exhibit 12*a*). It is also supported by the other batwara papers referred to by the learned District Judge. The finding of the learned Judge, therefore, that a 2-annas share of the tank was included in Tauzi no. 6104 is based on the evidence in the case and must be accepted as correct.

The question is whether the plaintiff is entitled to oust the Maharaja on a declaration that the latter had no lakhiraj interest therein. As stated above, the Maharaja claims title to this tank as included in 30 bighas of lakhiraj land purchased by him from Sardhari Lal under a deed of sale, Exhibit A, dated the 10th of August, 1882. These 30 bighas of land were purchased by Girdhari Lal, the father of Sardhari Lal, at a court sale on the 2nd of October, 1852. Exhibit X(*a*) is the sale certificate of Girdhari Lal. It appears, however, that a suit had to be brought by Sardhari Lal for khas possession of this 30 bighas of land and he obtained a decree on the 9th of May.

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1863, and obtained delivery of possession in execution of the decree on the 2nd of August, 1866. The parwana dakhaldehani under which Sardhari Lal obtained possession is Exhibit W and is dated the 17th of March, 1866. In the sale certificate, Exhibit X(*a*), the property is described as 30 bighas situate in Laloopokhar in mauza Salempur Dhamdaha, pargana Monghyr. There is no mention therein that the land was lakhiraj. In the parwana dakhaldehani (Exhibit W) the description of the property is similar to that in the sale certificate, Exhibit X(*a*); but there is a further description that the land was lakhiraj. The learned Munsif held that the land must have been held to be lakhiraj in the civil suit brought by Sardhari Lal and that the description of lakhiraj in the sale certificate might have been omitted by mistake. The learned District Judge, however, observed that there is no reason to suppose that there was a mistake in the description of the property in the sale certificate; he infers that the lakhiraj title might have been created between 1852 and 1866. He, however, found that the Maharaja was actually in possession and no rent was paid by him for this 30 bighas of land; but he was of opinion that this does not establish that the land was lakhiraj since the time of the Permanent Settlement as required by section 37 of Act XI of 1859.

The point taken by the learned counsel for the Maharaja, appellant, is that the learned District Judge has misplaced the onus of proof upon the Maharaja to show that the land was lakhiraj from the time of the Permanent Settlement: he contends that it was for the plaintiff to prove that the land was included in the Permanent Settlement in mal land of the estate, and that the onus was upon the plaintiff to prove that the land was mal land at the time of the Permanent Settlement. In my opinion this contention is sound and ought to prevail. Section 37 of Act XI of 1859 provides that a purchaser of an entire estate shall acquire the estate free from

all encumbrances which may have been imposed upon it after the time of the Permanent Settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with certain exceptions. In *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (1) it was held by the Privy Council that a plaintiff in a suit for resumption of land as part of his mal zamindari for assessment is bound in the first instance to prove a prima facie case of payment of rent since 1790 or that the land formed part of the mal assets of the estate at the Decennial Settlement. When such a prima facie case is made out the onus probandi is shifted on to the defendant, who to exempt himself from assessment must show that his tenure existed rent-free before the 1st of December, 1790. Their Lordships observed: "If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is, that his mal land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal." Their Lordships further observed that "he (plaintiff) may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Decennial Settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790". The principle enunciated by the Privy Council in this case is applicable to the present case. The plaintiff has to prove in the present case that at the time of the Permanent Settlement the land was included within the estate permanently settled as mal land. This principle has been followed in the courts in India in a large number of cases. In *Sm. Krishna Kalyani Dasi* v. *R. Braunfield* (2) it was held by a Division Bench of the Calcutta High Court that a purchaser

(1) (1871-73) 14 Moo. I. A. 152. (2) (1915-16) 20 Cal. W. N. 1028.

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of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must prove a prima facie case that his mal land has, since 1790, been converted into lakhiraj. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden. In *Abdul Rahman Kazi* v. *Baikunth Nath Roy Chowdhury* (1) the same view was taken by another Division Bench of the Calcutta High Court. As was observed by Mookerjee, J., in the last case, the rule is that the purchaser of an entire estate at a sale for arrears of revenue takes the estate as created at the time of the Permanent Settlement, and the question is reduced to this: has the plaintiff established that these lands were included in the estate at the time of the Permanent Settlement, in other words was the revenue assessed on the basis of the assets of these lands. It is clear, therefore, that in order to succeed, the plaintiff in the present case must make out a prima facie case that at the time of the Permanent Settlement the land in dispute was mal land and was included in the estate as such, and that the revenue assessed upon the estate was fixed on consideration of the assets of the land in dispute; in other words, that the assets of the land was taken into account in settling the revenue at the time of the Permanent Settlement. It appears from the decisions of the courts below that there is a total absence of such evidence on the part of the plaintiff. Learned counsel for the plaintiff is unable to point to a single piece of evidence showing that the land in dispute was treated as mal land at the time of the Permanent Settlement. The defendant, Maharaja, has proved that at least since the year 1866 no rent has been paid for the 30 bighas of land within which the tank in dispute is situate. The learned District Judge has relied on the absence of the description of the land as lakhiraj in the sale certificate [Exhibit X(*a*)]. This, in my opinion, is not sufficient in law to show that the land was mal at the time of the Permanent Settlement.

(1) (1918) 27 Cal. L. J. 133.

Under the circumstances, I am of opinion that the decision of the learned District Judge that the land was not lakhiraj land, and that the plaintiff was entitled to possession of the land but for the Exception (4) to section 37 of the Act, is not sound. The plaintiff having failed to prove that the land was mal at the time of the Permanent Settlement her suit for declaration of title and possession in respect of this tank must fail.

In this view of the case it becomes immaterial to consider the appeal of the plaintiff, namely, Second Appeal no. 288 of 1924. Her contention in this appeal is that the learned District Judge was wrong in holding that the case came within Exception (4) to section 37 of the Act, and that she was entitled to oust the Maharaja from possession, or in any event she was entitled to have a rent assessed in respect of the 2-annas share of the tank which the District Judge had found to appertain to her estate Tauzi no. 6104 and that the proprietors of the remaining 14 annas were not necessary parties to the suit.

As regards Exception (4) to section 37 of the Act it is contended that there is no plea in the written-statement that the tank came within the exception. It is also contended that the leases referred to in the 4th Exception must be leases of lands for the purpose of excavating tanks thereon. In my opinion neither of these contentions can prevail. The defence of the defendant in the present case was that the entire area of 30 bighas within which the tank in dispute was situate was lakhiraj land, and the mere omission of the defendant to take the plea of Exception (4) to section 37 in the written statement will not entitle the plaintiff to a decree for possession.

As regards the second contention, the language of the 4th Exception does not warrant the construction sought to be placed upon it by the learned counsel. It does not say that in order to bring the case within

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this exception the lease must be a lease for the purpose of excavating a tank thereon. Reliance was placed upon the decision of the Calcutta High Court in *Asmat Ali* v. *Hasmat Khan* (1) where it was held that a lease of a tank without any portion of the surrounding land is not protected under clause 4, section 37 of Act XI of 1859, as it was not within the meaning of that clause a lease of land whereon a tank has been excavated. This case has clearly no application to the facts of the present case. In the present case the lease is of 30 bighas of land upon which stands the tank in dispute.

As regards the contention that rent ought to have been assessed for the 2-annas share of the tank even in the absence of the proprietors of the remaining 14 annas share, reliance has been placed upon *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy* (2). That was not a case for assessment of rent and in that case the plaintiffs did not ask for direct or actual possession of the land, but indirect or constructive possession by a receipt of rent to the extent of their share from the cultivating tenants upon a declaration that the intermediate tenure was cancelled by the sale for arrears of revenue. That case is clearly distinguishable from the facts of the present case.

The result is that suit no. 454 of 1920 must be dismissed with costs. Appeal no. 150 of 1924 of the defendant, Maharaja, is decreed, and appeal no. 288 of 1924 of the plaintiff-appellant is dismissed. The defendant, Maharaja, will be entitled to his costs in all the courts. There will, however, be only one hearing fee in the two Second Appeals in this Court.

[The decision in the remaining appeals is not material to this report.]

ROSS, J.—I agree.

(1) (1897-98) 2 Cal. W. N. 412. (2) (1897-98) 2 Cal. W. N. 229.