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KING-EMPEROR v. ETWARU DOME.

AGARWALA AND LUBY, JJ.

sentence of whipping " in lieu of, or in addition to any other, punishment " to which the accused is liable.

The reference, in so far as it recommends that the order under section 565 of the Code of Criminal Procedure be set aside is accepted and that order is accordingly set aside. In so far as the reference recommends the passing of a sentence of imprisonment it is rejected.

Reference accepted in part.

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August 5, 16.

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

AMARENDRA KRISHNA GHOSH

v.

LAHABAT MAHTON.*

Service Tenure—Grant in perpetuity subject to the burden of service—performance of service rendered impossible by grantor—land, whether liable to be resumed or assessed with rent.

A distinction exists between the grant of an estate ...ened with certain services and that of an office, the ...mance of whose duties is remunerated by the use of ...lands.

...the lands had been granted in perpetuity, but ...was subject to the burden of a service, namely, ...r of a certain bundh, and the grantor had made ...nce of the service impossible by converting the ...icultural lands.

...the tenant was entitled to hold the land free ... the landlord could not put an end to the ...me the land.

Appellate Decree no. 747 of 1931, from a decision ...ain, Additional District Judge of Manbhum, dated ...931, reversing a decision of Babu Ram Bilas Singh, ... Purulia, dated the 31st January, 1930.

Baboo Kooldeep Narain Singh v. *Mahadeo Singh*(1), followed.

Held, further, that the lands were not liable to be assessed with rent.

Mahadeo Lal v. *Kalanand Singh*(2), followed.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

A. B. Mukherjee (with him *B. N. Mitter* and *S. N. Banerjee*), for the appellant.

R. S. Chattarji, for the respondents.

FAZL ALI, J.—The arguments in this appeal were confined to some 56 bighas of land known as nakhurekh which are set out in schedule 1 of the plaint and which are situated in certain mauzas which are admittedly within the patni estate of the plaintiff. The plaintiff brought the suit, out of which this appeal has arisen, for khas possession of these lands on the allegation that they were held in service tenure by the ancestors of the defendants and that as the service which the defendants and their ancestors were liable to render was no longer rendered, the defendants were not entitled to continue in possession of those lands. It may be stated here that the plaintiff's case was that the defendants held the lands on the condition that they would continue to repair a bundh in the village known as Dewan Bundh and that they had ceased to repair this bundh many years ago.

The main plea of the defendants in the suit was that the lands were their ancestral rent free jalsasan lands and in support of this plea they relied mainly upon the record-of-rights which was prepared sometime in the year 1922.

(1) (1866) 6 W. R. 199 (civil).
(2) (1913) 19 Cal. L.J. 241.

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The trial court did not give the plaintiff a decree for khas possession but held that the lands in question were liable to be assessesd with rent.

The learned Additional District Judge on appeal dismissed the suit in its entirety. He held that the plaintiff was not entitled to get khas possession of the disputed land because in the first place the entry in the record-of-rights had not been shown to be wrong and, secondly, even assuming that the lands in dispute were held on the terms as stated by the plaintiff the suit had been brought more than twelve years after the plaintiff's right to sue for khas possession had accrued. As to the claim that the lands were liable to be assessed with rent the learned Judge observed as follows:—

> "The suit has not been brought with such a prayer and the defendants have not contested it with respect to that. I do not know what defence the defendants may put forward if such a prayer be made. I therefore think that I cannot allow such a declaration in this suit".

It may be stated here that one of the questions of fact on which the parties were not agreed was whether the Dewan Bundh belonged to the defendants or to the plaintiff and his tenants. The learned District Judge has come to the conclusion that it belonged to the defendants' ancestors. It has also been found by both the courts below that the bed of the tank silted up many years ago and was settled by the plaintiff with certain tenants. Upon this finding it has been urged on behalf of the defendants that even if the defendants held the disputed land on condition of repairing the Dewan Bundh, the performance of that condition has been made impossible by the act of the plaintiff in converting the bed of the tank into agricultural lands and settling them with the tenants.

It was argued on behalf of the plaintiff-appellant in this Court that the learned Additional District Judge has not been quite consistent in his findings; and it was pointed out that while on the one hand,

he has found that the entry in the record-of-rights has not been rebutted, he has on the other hand, held that the disputed lands were held " with a condition or an obligation to keep the Dewan Bundh in repair ". It appears to me, however, that what the learned Judge meant was to draw a distinction between the grant of a service tenure which was liable to be determined by the grantor or his successor in interest at his will and a grant of land in perpetuity with a special kind of service annexed to the grant. The learned Advocate for the appellant has in arguing this case referred to the illuminating judgment of the Calcutta High Court in the case of *Radha Pershad Singh* v. *Budhu Dashad*(1) in which reference has been made to various kinds of service tenures. It is stated that a grant may be made either for the purpose of some service of a public nature or for service private or personal to the grantor; and a distinction is also drawn between the grant of an estate burdened with certain services and that of an office the performance of whose duties is remunerated by the use of certain lands. The question to be determined in this case is as to the nature of the defendant's tenure. As I construe the judgment of the learned District Judge, it appears to me that in his opinion the disputed lands had been granted in perpetuity, but the grant was subject to the burden of a service, namely, the repairing of the Dewan Bundh. Such a conclusion being possible from the documents which the learned Additional District Judge had before him, I see no reason to disturb his decision in second appeal.

The next question which arises is whether the defendants are liable to be ejected merely because the alleged service is no longer being rendered. In my judgment the answer to this question may be furnished in the language of Sir Barnes Peacock who while dealing with the identical point in *Baboo Kooldeep*

(1) (1899) I. L. R. 22 Cal. 938.

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Narain Singh v. *Mahadeo Singh*(1) [*See* also *Keval Kuber* v. *The Talukdar Settlement Officer*(2)] observed:—

"I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held whenever he pleases and take back the estate. It is not because the services are released or dispensed with, or become unnecessary that the estate can be resumed. If a grantor release the services, or a portion of the services, upon which lands are holden, the tenant may hold the land free of services; but the landlord cannot put an end to the tenure and resume the land".

Besides, the learned Advocate for the appellant concedes that an occupancy right may be acquired even in service lands and the learned Additional District Judge has clearly found that the record-of-rights which describe these lands as jalsasan lands of the defendants and non-resumable has not been rebutted.

The next question which has to be considered is whether the lands in dispute are liable to be assessed with rent. A similar question arose in the case of *Mahadeo Lal* v. *Kalanand Singh*(3) and Sir Ashutosh Mookerjee answered it in these words:—

"In the case before us, the grant is clearly one subject to a burden of service. The representative of the grantor has of his own accord dispensed with the performance of service. He cannot now turn round and claim that the land be assessed with rent".

The only difference between the present case and the case which was before the Calcutta High Court is that while in the latter case the landlord had of his own accord dispensed with the performance of the

(1) (1866) 6 W. R. 199 (civil).
(2) (1877) I. L. R. 1 Bom. 586.
(3) (1913) 19 Cal. L. J. 241.

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service, in the present case he has made the performance of the service impossible by converting the tank into agricultural lands. In my opinion, however, this distinction is not material and the two cases are governed by the same principle. However that may be, as the learned District Judge has pointed out, the lands cannot be declared to be liable to be assessed with rent as no such prayer was made in the plaint. In fact it appears from several documents which were produced in this case that the defendants have all along contended that the lands in dispute cannot be assessed with rent.

FAZL ALI, J.

Mr. A. B. Mukherjee, who appeared on behalf of the appellant, asked us to allow him to amend the plaint by including a prayer as to assessment of rent, but we think that the prayer should not be granted at this stage.

In my opinion, therefore, the appeal fails and must be dismissed with costs.

LUBY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

1935.

August 28.

Before Fazl Ali and Luby, JJ.

HARLAL KAMTI

v.

JHARI SINGH.*

Execution—preliminary mortgage decree—first application for making the decree final dismissed for default—second application time-barred—decree made final—executing court, whether can go behind the decree—decree, whether a nullity—

*Appeal from Appellate Order no. 64 of 1935, from an order of S. Bashir-ud-din, Esq., District Judge of Darbhanga, dated the 12th December, 1934, affirming an order of Babu Umakant Prasad Singh, Munsif of Darbhanga, dated the 15th June, 1934.