1939

ALLAHABAD BANK, LIMITED, LAHORE v. SPECIAL OFFICIAL RECEIVER, PUNJAB AND DELHI.

Receiver called upon the Allahabad Bank to lead evidence to prove their debt due from Sohan Lal, insolvent. The learned Official Receiver till he is satisfied that there is evidence which would entitle him to go behind the decree cannot do so; whether he does so or not will depend upon the evidence led by the other creditors.

*A. K. C.*

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Tek Chand and Dalip Singh JJ.*

1939

*June 15.*

MUSSAMMAT NAZIR-UL-NISA AND OTHERS (PLAINTIFFS) Appellants,

*versus*

MOHAMMAD ISHAQ (DEFENDANT) Respondent.

**Regular First Appeal No. 290 of 1938.**

*Tenancy — permanent or at will — land "attached" by the Government after Mutiny — attached land divided into plots — granted to various persons for building shops thereon — attached properties subsequently released to original owners — grantees directed to pay shop rents to such owners — Such tenants whether permanent tenants or tenants-at-will — Attachment by Government — Whether confiscation by Government — (Act X of 1858), SS. 10, 13 — Whether apply.*

The site in dispute along with other properties in and around Delhi was "attached" by the British Government soon after the Mutiny. These properties were divided into small plots and were granted to various persons for construction of shops thereon with a view to establish a Saddar Bazar. Subsequently the Government "released" the land in dispute to the original owners who had been receiving rent at a fixed rate from the present defendant-respondent and his predecessors from 1860 to 1936. The plaintiffs brought the

1939

MUSSAMMAT NAZIR-UL-NISA v. MOHAMMAD ISHAQ.

present action for ejectment of defendant, claiming that he was a tenant-at-will under them. The defendant averred that he was holding the site under plaintiffs as a pemanent tenant and that they were not entitled to eject him or to enhance the rent.

*Held*, that the " attachment " by the Government of the land of the ancestors of the plaintiffs was an " Act of State " by which Government had become absolute owner of the land, and had full power to create a tenancy of whatever nature on it. The subsequent restoration of the seized property to the original owners was a re-grant to them on certain conditions and conferred a new title on them.

*Muhammad Suleman* v. *Hari Ram* (1), and other case-law, referred to.

*Held also*, that the site in question had been granted under the proclamation of 29th September, 1858, and the tenancies created thereby were permanent, heritable and transferable.

*Held further*, that the confiscation in this case was not made under Act X of 1858, nor was the remission made by the Governor-General in Council or the Executive Government, and sections 10 and 13 of the Act of 1858 did not apply to the present case.

*First Appeal from the decree of* Chaudhri *Bashir Ahmad, Subordinate Judge, 1st Class, Delhi, dated 28th June, 1938, granting the plaintiffs a decree for Rs.19-2-9 against the defendant but dismissing the suit for ejectment of the defendant from the site in dispute.*

MEHR CHAND MAHAJAN and BHAGWAT DYAL, for Appellants.

WAHID-UD-DIN AHMAD, for Respondent.

TEK CHAND J.—This appeal arises out of a suit brought by the plaintiffs against the defendant for declaration of title, ejectment and recovery of arrears of

TEK CHAND J.

(1) L. L. R. [1940] Lah. 363.

1939

MUSSAMMAT NAZIR-UL-NISA v. MOHAMMAD ISHAQ.

TEK CHAND J.

rent. It is common ground between the parties that the plaintiffs are the owners of the site in dispute and the defendant owns the superstructure of a shop and a *bala khana* standing on the site. The plaintiffs allege that the defendant holds the site as a tenant-at-will under them, while the defendant claims to be a permanent tenant, liable to pay to the plaintiffs a fixed ground rent of Re. 0-6-0 per lunar month. Admittedly, the plaintiffs and their ancestors had been receiving rent at this rate from the defendant and his predecessors-in-interest continuously from 1860 to the beginning of 1936, and during this period the tenancy has passed by succession and transfer to various persons.

Early in 1936 the plaintiffs intimated to the defendant their intention to terminate the lease on the old terms, offering to grant a fresh lease at a considerably enhanced rental. They further stated that if the defendant was not willing to avail himself of this offer, he should vacate the site within a specified time. The defendant denied the plaintiffs' right to enhance the rent, alleging that he was holding the site on a permanent tenure at a fixed rent. The plaintiffs then served a notice on the defendant to remove the superstructure and restore the site to them. On the defendant's refusal to do so, the plaintiffs, on the 21st of August, 1936, instituted this suit claiming a decree for (1) declaration that they were the owners of the site and the defendant was a tenant-at-will under them, (2) ejectment of the defendant from the site by removal of the superstructure and (3) recovery of Rs.21-10-0 as arrears of rent.

The defendant admitted that the plaintiffs were the owners of the site, but averred that he was holding

it under them as a permanent tenant and that the plaintiffs were not entitled to eject him or to enhance the rent. He admitted his liability to pay rent at Re.0-6-0 per mensem for some months, which had been offered to the plaintiffs but they had wrongfully refused to accept, and which he (defendant) offered again to pay.

The trial Judge found that the defendant was a permanent tenant under the plaintiffs, that he had not contravened any of the terms of the tenancy and was not liable to ejectment. He further held that the plaintiffs were, in any case, estopped by their acts and conduct from claiming that they had a right to eject the defendant. He accordingly dismissed the suit for declaration and ejectment, but granted the plaintiffs a decree for Rs.19-2-9 as arrears of rent at the rate admitted by the defendant. From this decision the plaintiffs have preferred a first appeal to this Court.

Most of the facts relating to the previous history of the site in question are no longer in dispute. It is admitted that it was a part of a big area of 20 *bighas* and 14 *biswas* in Jahan Numa (outside the city walls of Delhi), which originally belonged to Karim Bakhsh and Khuda Bakhsh, ancestors of the plaintiffs. The whole of this land, along with various other properties in and around Delhi, was " attached " by the British Government soon after the Mutiny. Government then established a Military Camp in this locality and decided to have a Sadar bazar near it. For this purpose the " attached " properties were divided into small plots, which were granted to various persons, who undertook to construct shops at their own expense. The site, now in dispute, was taken by one Bakhtawar Singh, and on it he built a shop. After several shops

1939

MUSSAMMAT NAZIR-UL-NISA v. MOHAMMAD ISHAQ.

TEK CHAND J.

had been built by the grantees (including Bakhtawar Singh), and when peace and order had been restored, Government decided to release the "attached" properties to those of the original owners, who could "establish their innocence" during the Mutiny. Karim Bakhsh and Khuda Bakhsh applied to the authorities that they were innocent, and after a lengthy enquiry, this land, 20 *bighas* and 14 *biswas* in area, was "released" to them in June, 1860, and the persons who had constructed the shops on this land were directed to pay in future the rent to Karim Bakhsh and Khuda Bakhsh. Bakhtawar Singh accordingly continued in possession of the shop during his lifetime. On his death, the shop was inherited by his son Umrao Singh; and on Umrao Singh's death it devolved on his son Lal Chand. On the 2nd of March, 1885, Lal Chand sold it to Mohammad Ismail by a registered sale-deed (Exhibit D. 7); and several years later, when Mohammad Ismail died, it was inherited by his son Mohammad Usman. Mohammad Usman then mortgaged it to Dr. Ram Parshad by a registered deed, describing himself as a permanent tenant under the plaintiffs paying a fixed monthly rent of Re.0-6-0. As the mortgage-money was not paid within the stipulated time, Dr. Ram Parshad instituted a suit against Mohammad Usman for sale of the shop and obtained a decree. Before the auction sale, however, Mohammad Usman, by a sale-deed executed and registered on the 27th of August, 1931 (Exhibit D. 14), sold the equity of redemption to Dr. Ram Parshad, who thus became the full owner of the shop. Subsequently, on the 22nd of November, 1931, Dr. Ram Parshad sold the shop to Mohammad Ishaq, defendant, for Rs.3,300 by a registered-deed (Exhibit D.4). In this deed also it was stated that the shop had been

constructed on a site belonging to the plaintiffs which the vendor held on a permanent tenure. After the purchase, Mohammad Ishaq rebuilt the shop and the *bala khana* and let it to a tenant at a monthly rental of Rs.26.

All these facts have been duly proved on the record and their correctness has not been disputed before us by the learned counsel for the appellants. It is also conceded by him that there is no proof of any objection having been raised by the plaintiffs, or their predecessors-in-interest, to any of these transfers or successions; on the other hand, it appears that they had continued to receive rent at the fixed rate of Re.0-6-0 per mensem from the successors of the original tenant or their transferees. He, however, contends that it has not been established that the tenancy was permanent at its inception, or that the plaintiffs or their ancestors ever led Bakhtawar Singh or his successors or transferees to believe that it was so. In support of this contention he raised a three-fold argument before us :

(1) that the " attachment " by the British Government of the property of Karim Bakhsh and Khuda Bakhsh in 1858 did not amount to " confiscation " and, therefore, Government did not become its owner and it had no legal right to create a permanent tenancy over it;

(2) that the tenancy in favour of Bakhtawar Singh was not created under the proclamation of the 29th of September, 1858 (Exhibit D. 2, printed at page 114 of the paper-book), but it was under a later proclamation, issued on the 10th of February, 1859 (Exhibit P. 8, printed at page 80) the terms of which show that the tenancy was not permanent; and

1939

MUSSAMMAT NAZIR-UL-NISA v. MOHAMMAD ISHAQ.

TEK CHAND J.

(3) that the decision of the lower Court holding that, in any case, the plaintiffs by their acts and conduct were estopped from denying the permanent nature of the tenancy, is erroneous.

After hearing counsel at length and examining the record I have no doubt that all these arguments are without substance. The exact nature and effect of the "attachment" of the private property of the inhabitants of Delhi and its neighbourhood in 1857 and 1858 and its subsequent "release" has been the subject of consideration by Courts on numerous occasions since 1866 and it has been uniformly held that the "attachment" was "nothing less than appropriation by the (British) Government who became the *de jure* as well as *de facto* owner thereof," and that the subsequent restoration of the seized property to the original owners was a re-grant to them on certain conditions, and conferred a new title on them. Reference may in this connection be made to *The Secretary of State for India in Council* v. *George Wagentrieber* (1), Civil Appeal No.1379 of 1866 (*Karim Bakhsh* v. *Shadee Ram*); *Hakim Saaduddin* v. *Secretary of State for India in Council* (2); *Rai Balkishen* v. *Jasram* (3); *Karim Bakhsh* v. *Balak Ram* (4) and the recent decision of this Court *Hafiz Muhammad Suleman* v. *Hari Ram* (5), in which the question was discussed at length and the previous decisions reviewed. It may be stated that some of these cases related to plots which formed part of the area of 24 *bighas* and 14 *biswas* in Jahan Numa referred to above, of which the site now in dispute is also a part,

(1) 6 P. R. 1867.
(2) 12 P. R. 1874 (F. B.).
(3) 52 P. R. 1881.
(4) 112 P. R. 1886.
(5) I. L. R. [1940] Lah., 363.

and to those cases the present plaintiffs or their ancestors Karim Bakhsh himself was a party. The learned counsel for the appellants frankly admitted that his clients have not brought forward any fresh materials in this case, nor was he able to urge any new argument which might justify a different conclusion being reached on this point. He merely referred us to Act X of 1858 which, he urged, had not been considered in any of the previous cases. A reference to that Act shows, however, that none of its provisions has any bearing on the "attachment" of Karim Bakhsh's land and the creation of tenancies thereon by Government. The Act authorized the "confiscation of *villages*, imposition of fines on, and forfeiture of certain offices held by inhabitants of *villages* or members of tribes" who had been "guilty of rebellion" during the Mutiny and other crimes connected therewith. It did not in terms apply to the town of Delhi and to the property situate on its outskirts, except that section 10 extended the provision of the Act relating to the "*imposition and assessment of fines* on inhabitants" to "a *mohalla* or division of a city or town." This section, however, did not authorize the *confiscation of immovable property* in any *urban* area. It is, therefore, clear that the "attachment" or confiscation of the land of Karim Bakhsh in Jahan Numa was not, and could not have been, made under this section. Counsel next referred to section 13, but that section is equally inapplicable. It empowered the Governor-General-in-Council or the Executive Government to remit any confiscation *made under the Act* and directed that "all persons affected by such confiscation were to be restored to their rights as if no such confiscation had ever taken place." In the case before us, however, the "confiscation" had not been made under

1939

MUSSAMMAT NAZIR-UL-NISA v. MOHAMMAD ISHAQ.

TEK CHAND J.

the Act, nor was the "remission" made by the Governor-General-in-Council or the Executive Government. These provisions of the Act, therefore, are not relevant. As already shown, the seizure by Government of the land of the ancestors of the plaintiffs was an "Act of State" by which Government had become absolute owner of the land, and had full power to create a tenancy of whatever nature on it. The first contention is, therefore, devoid of force and must be rejected.

The next question is whether the tenancy in favour of Bakhtawar Singh was created under the proclamation of the 29th of September, 1858 (Exhibit D. 2) as alleged by the defendant and found by the lower Court, or under the later proclamation of the 10th of February, 1859), (Exhibit P. 8), as contended for by the plaintiffs. It is conceded that in the numerous cases that have come before the Courts in respect to other shops built on sites parcelled out of this area of 20 *bighas* and 14 *biswas*, commencing with Civil Appeal No.1379 of 1866 (*Karim Bakhsh* v. *Shadee Ram*) and ending with *Hafiz Muhammad Suleman* v. *Hari Ram* (1), Karim Bakhsh or his successors never urged that the grant of any of the sites was under the second proclamation (Exhibit P. 8). In all these cases it had invaribly been held that the sites in question had been granted under the proclamation of the 29th September, 1858, and that the tenancies created were permanent. In the present case it has been urged for the first time, that the grant was under the second proclamation (Exhibit P. 8). The materials on the record, however, do not substantiate this contention. Indeed, the terms of this proclamation (Exhibit P. 8), itself show that it did not relate

(1) I. L. R. [1940] Lah. 363.

to sites which formed part of lands, which had been "attached" in 1857 or 1858 and were subsequently released on the original owners "*proving his innocence*"; but it referred to shops which had been built on the land of persons, which had apparently been encroached upon and of which they "proved their ownership." This is clear from the opening sentence of the proclamation which speaks of the nature of "the *abadi* being irregular and not of uniform description," and the penultimate sentence of the first paragraph, which expressly states that if a "person proves his *ownership* of the land and *for this reason* it is released in his favour." In the application (Exhibit P. 32 at page 73) made by Karim Bakhsh and Khuda Bakhsh they based their claim for release of their land not merely on their ownership, but upon their "innocence of the offence of rebellion." This application and the enquiry which followed clearly show that grants of sites on this land had been made under the first proclamation (Exhibit D. 2) and not under the second (Exhibit P. 8). This is further supported by Exhibit D. 3 (printed at pages 127—131), which is a list containing an account of the rent of shops in Sadar Bazar, including that built by Bakhtawar Singh; the *robkar* of the Cantonment Joint Magistrate, dated the 7th January, 1860 (Exhibit P. 39 at page 86) the report of the *peshkar*, dated the 21st May, 1860 (Exhibit P. 38 at page 88); and the order, dated the 3rd October, 1860 (Exhibit P. 13 at page 90) directing that in future the rent be realized by Karim Bakhsh. All these documents, taken together, unmistakably lead to the same conclusion.

After carefully considering all the available materials and giving due weight to the arguments of

1939

MUSSAMMAT NAZIR-UL-NISA v. MOHAMMAD ISHAQ.

TEK CHAND J.

counsel, I agree with the finding of the lower Court that the grant of the site in dispute to Bakhtawar Singh was made under the first proclamation of the 29th of September, 1858, and that by this grant he acquired a permanent, heritable and transferable tenure. It is not alleged that the defendant has committed breach of any of the terms of the tenancy. On these findings, therefore, the claim for ejectment cannot be sustained.

I also uphold the decision of the lower Court on the question of estoppel. The conduct of the plaintiffs and their predecessors-in-interest, extending over a period of 76 years, unmistakably shows that they had admitted Bakhtawar Singh, his successors and transferees, as permanent tenants, and they are now estopped from alleging that the defendant is a tenant-at-will under them.

The appeal fails and I would dismiss it with costs.

DALIP SINGH J.

DALIP SINGH J.—I agree.

*A. K. C.*

*Appeal dismissed.*