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we would only observe that the suit ought now to be treated not as merely one for that purpose, but as one asking also for a declaration of their title as against the title set up by the defendants Nos. 1 to 3, and the Appellate Court ought to see whether the decree of the lower Court, which has included both within its scope, is right or not as to either.

We reverse the decree and remand the appeal for trial on the merits with reference to the above remarks. Costs to be costs in the cause.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

GOPIKABAI (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMAN (ORIGINAL PLAINTIFF), RESPONDENT.*

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Land Revenue Code (Bombay Act V of 1879), *Sec.* 216—*Holder of an alienated village—Application for introduction of survey by a co-sharer of an inám village.*

Under section 216 of the Land Revenue Code (Bombay Act V of 1879) it is competent to one out of several co-sharers of an alienated village to apply on behalf of and with the consent of all the other co sharers for the introduction of a survey into the village; and it is not open to the cultivators of lands in the village to question the action of Government in introducing the survey on such application.

The section does not require that the application should be made or signed by all the sharers.

APPEAL from a remand order passed by M. B. Tyabji, District Judge of Thána.

Bapuji Sakharam was the principal sharer in the inám villages of Taran Khop and Rámráj in the Thána District.

The villages were entered in Bapuji's name in the Government records and were entrusted to his management by all the co-sharers.

On the 2nd June, 1885, Bapuji applied to Government, under section 216 of the Land Revenue Code (Bombay Act V of 1879), for the introduction of survey into the village.

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At the date of this application Bapuji was owner of 37 out of 40 shares in the villages and was also a mortgagee in possession of the remaining three shares.

In July or August, 1885, Bapuji purchased the remaining three shares in the villages.

Government sanctioned the introduction of survey into the villages, and the new rates of assessment were fixed by a Government proclamation from 28th June, 1894.

In 1891 Bapuji assigned the whole of his interest in the villages to Lakshman (the plaintiff).

In 1897 plaintiff sued the defendants, who cultivated lands in the villages, to recover the amount of assessment and local cess fixed at the survey settlement.

Defendants contended that the introduction of the survey was illegal, as it was made on the application of Bapuji, who was then not a full owner of the villages in dispute.

The Court of first instance held that Bapuji was not competent to make the application under section 216 of the Land Revenue Code as he was not a "holder" of the villages within the meaning of the Code; that the extension of the survey was, therefore, illegal; and that the defendants were not liable to pay the survey rates.

The suit was, therefore, dismissed.

On appeal the District Judge held that the survey was properly introduced into the villages and that defendants were liable to pay the new rates of assessment.

He, therefore, reversed the decision of the first Court and remanded the case for a decision on merits.

Against this order of remand, defendants appealed to the High Court.

Robertson (with *D. A. Khare* and *G. S. Rao*) for appellants.

Inverarity (with *M. B. Chaubal*) for respondent.

PARSONS, J.:—The respondent, who is found by the Judge of the lower Appellate Court to be the holder either as owner or as mortgagee of the whole of the villages of Taran Khop and

Rámráj, sued the appellant, who cultivates lands in his villages, for the amount of assessment fixed on them at the survey settlement, which was applied to the villages under section 216 of the Bombay Land Revenue Code by the Governor in Council under Resolution dated 1st July, 1885, the new rates of assessment having been introduced by proclamation from the 28th June, 1894. The defence raised in the suit was that the extension of the survey was illegal, since it was made on the application not of the holder of the villages but of Bapuji Sakharam, who owned a share of the villages only.

The following facts are proved:—(1), Bapuji alone made the application on the 2nd June, 1885; (2), at the time he owned 37/40 only of the villages, but he was the person who passed the kabuláyat for and managed the whole villages, and the sanad for them stood in his name; (3), in July, or August, 1885, Bapuji bought the remaining 3/40 share of the villages; and (4), in 1891 he assigned the whole to the respondent. It is on these facts that we have to determine the point whether the introduction of the survey was legal.

Section 216 of the Bombay Land Revenue Code, 1879, declares that "it shall be lawful for the Governor in Council, on an application in writing being made by the holder of any such village to that effect, to authorise the extension of all or any of the provisions of the said chapters to any such village." The word "holder" is defined as "the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons or for the public. It includes a mortgagee vested with a right to possession." "To hold land" is defined to mean "to be legally invested with a right to the possession and enjoyment or disposal of such land, either immediate or at the termination of tenancies legally subsisting;" and the word "village" includes all lands belonging to any village (see section 3 (10), (11) and (20) of the Act).

It was argued that Bapuji Sakharam was not the holder of the villages under these definitions and, therefore, that the application made by him for the extension of the survey settlement was *ultra vires* and the extension illegal. It may be at

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once conceded that, if these definitions are to be followed strictly, Bapuji Sakharam was not the holder of the villages,—that is to say, he did not hold the whole of the lands belonging to the villages, but it does not follow that he was not competent to make an application under section 216. That section does not say that the writing shall be that of all the owners of the village or that they shall all sign the application, but merely that an application in writing shall be made by them. This would cover the case of an application made by one owner on behalf of or with the consent of the other owners. The fact that the villages stood in the name of Bapuji Sakharam, and that he was allowed to pass the kabuláyat for them, is enough in itself to show that he was entrusted with the full powers of management of the same, and I consider that the making of an application under section 216 would fall well within the powers of management conferred on him, so that in making it he ought to be considered to be making it on behalf of all. There is nothing to show that the owner of the small share of 3/40 of the villages did not consent to the application; on the contrary, the fact that he never objected, and has not now come forward to say that he did not consent, is entitled, I think, to be treated as *primâ facie* evidence to show that he did consent.

Another argument was adduced in support of the validity of the action of Government in introducing the survey, and that was that even supposing there was a deficiency in the original application, it was cured when Bapuji Sakharam became the holder of the villages, which was in July, 1885, and that after that time the action of Government was perfectly legal, and the new survey rates introduced on and from the 28th June, 1894, can now be recovered by the respondent. There appears to be some force in the argument, but I need not consider it, as I am of opinion that the original application having been made by one owner of land in the villages on behalf of and with the consent of all the other owners, is a valid application under the section in question, and that the cultivators of lands in the villages cannot question the action of Government in introducing the survey on that application.

My learned colleague agrees, and we, therefore, confirm the order, and dismiss this appeal with costs on the appellant.

RANADE, J.:—The respondent-plaintiff in the original suit, as also in twenty other suits tried with it, claimed to be owner of 14 annas 6 pies share by right of purchase, and 1 anna 6 pies share as mortgagee with possession, in two inám villages, and he sought to recover the survey assessment with local cess from the different tenants of the lands who were made defendants in these suits. The plaintiff's case was that his predecessor-in-title, Bapuji, had, as purchaser and mortgagee of the two villages, applied in 1885 under the proviso to section 216 of the Land Revenue Code, and on such application Government had authorised the extension of Chapters VIII to X to the said two villages, and the assessments claimed were, therefore, properly demandable from the tenant-defendants. These defendants raised a preliminary contention that the respondent-plaintiff's predecessor-in-title, Bapuji, was not the holder of the two villages, who could validly apply to the Government under the proviso to section 216, and, therefore, the Government order authorising the introduction of the survey was not proper, and the suits for the enhanced survey assessment were not maintainable. The Court of first instance held that Bapuji was not competent to make the application, as he was not the holder of the two villages, being only part-owner of the same and a mortgagee of the rest. It, therefore, rejected the claim in all these suits. In appeal the District Judge held that Bapuji was entitled to apply under the proviso to section 216, and he accordingly reversed the finding and remanded all these cases for further inquiry. The defendant-appellants before us in all these cases contend that the lower Court was in error in holding that one of the co-sharers of an alienated village could apply under section 216 without the consent of the other co-sharers, and, further, that the Government was competent, on such application, to extend the provisions of Chapters VIII to X to these villages. It was contended that Bapuji's co-sharers were not shown to have assented or acquiesced in Bapuji's act, and that the suits were defective for want of parties. The section 216, on which the whole dispute turns, is in these words: 'The provisions of Chapters VIII to X shall not apply to alienated

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villages, except as is provided for in section 111 and as in this section; but it shall be lawful for the Governor in Council, on an application in writing by the holder of any such village, to authorise the extension of these chapters.' Chapter VIII refers to survey settlements. This chapter does not apply to alienated villages, unless, on the application of the holder thereof, Government authorises the extension of the chapter. The appellant's contention is that plaintiff's predecessor Bapuji was not the holder in entirety of these two villages. He was purchaser of a part and mortgagee of the rest, and on his application it was not lawful for Government to authorise the extension. The whole question, therefore, is whether Bapuji, when he made the application on 2nd June, 1885, to Government, was the holder of the villages in dispute, who was competent to apply to Government. It is admitted that the sanads of the two villages are in Bapuji's name. It is also admitted that he has been managing vahivatdár of both the villages. It is also proved that at the time of the application he was owner of the rights of all the sharers excepting the owners of 3/40th share of whose rights he was a mortgagee; and of these 3/40th, he bought 2/40th share on 15th July, 1885, and the present respondent-plaintiff has succeeded to all Bapuji's rights of ownership, mortgage and management. The Court of first instance thought that these circumstances did not make Bapuji's predecessor the holder of these two villages under section 216. It was of opinion that the villages were held by more than one holder, *viz.*, Bapuji, and the mortgagor of 3/40th share, and as such Bapuji alone could not make a valid application.

It seems to me that this was a too narrow construction of the words "holder of the villages" used in section 216. A "holder" has been defined as being one in whom a right to hold land solely on his own account, or wholly or partly in trust for other persons or a class of persons, is vested. The inclusion of a mortgagee with a right to possession in the word 'holder' makes it clear that Bapuji was a holder of these villages in the strictest sense of the word. As against the tenants, Bapuji was a superior holder with rights against his inferior holders, the tenant-defendants. The subject of Bapuji's application was an alienated village, and it will be seen that wherever the Code speaks of alienated

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villages, or of shares in such villages, it uses the word 'superior holder' throughout—(sections 58, 85, 88—93, 111, 136, 150, 160—163).

The holder of these villages, therefore, is a superior holder as defined in section 3, clause (13). It is not every holder as defined in section 3, clause (11), but the holder who is defined as superior holder, and entitled to receive from other holders rent or revenue of an alienated village who is competent to apply, and in this view Bapuji was a competent person to apply. Of course every superior holder is necessarily a holder, but under section 216 he must be not merely a holder, but a superior holder of an alienated village. A superior holder of an alienated village, or a sharer in such a village, has certain responsibilities attached to him. He has to give receipts (section 58). He has to employ the agency of the village patel to make collections and may not do so himself, and the patel has to account to him for the receipts. He has a right under section 86 for assistance. He may receive a commission under section 88, and exercise the powers so conferred under that and the succeeding sections. He is responsible for the revenue due to Government (section 136). In all these respects, Bapuji and, after him, the respondent-plaintiff was the holder of these villages. The mortgagor of 1/40th share, not having all these powers and responsibilities, was not the holder of these villages, and it was lawful for Government, on the application of such a holder as Bapuji was, to authorise the extension of the survey.

The analogies of the general law, on which the Court of first instance appears to have relied, are not of much value, though it may be noted that the cases relied upon by it, and referred to by the appellant's pleader here, are not very appropriate. In the case of *Balaji* v. *Gopal* [1], the claim was disallowed, because the other sharer had not concurred in bringing the suit. A single co-sharer cannot sue for the rent unless he was acting by consent of the other co-sharers as the manager of them all—*Balkrishna* v. *Moro* [2]. In this case, Bapuji was admitted by both sides to be the sole manager of the villages. The cases of

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Gulu Mahomed v. *Moran* (1) and *Jogendro Chunder* v. *Nobin Chunder* (2) had each its own particular circumstances which do not exist in the present case. *Balkrishna* v. *Moro* (3) is similarly distinguishable, for in the present case there is really no co-sharer in the sense of being a holder of an alienated village, with rights independent of those of Bapuji, in his double character of mortgagee and purchaser. There can be no doubt that the words 'the holder of any such village' used in section 216 are obviously meant to exclude mere holders of shares whose right of possession or management of the villages is recognised by Government. Bapuji alone had these rights, and they have come to the plaintiff-respondent, who was, therefore, properly held by the lower Court of appeal to have been competent to apply to Government, and the action taken by Government on his application was strictly legal, and the suits brought by the respondent-plaintiff were accordingly maintainable.

It appears from the record that the whole of this contention was, to some extent, superfluous, for the tenant-defendants claimed rights under kowls, the legality of which is not admitted by the plaintiff. This is the real point on which the parties seem to be at issue. The preliminary objection had not much bearing on the real contention of the parties. The lower Appellate Court has correctly disposed of the question raised, and the remand order was a proper order under the circumstances, and I would, therefore, confirm it and dismiss the appeal with costs.

Appeal dismissed.

(1) (1878) 4 Cal., 96. (2) (1882) 8 Cal., 353.
(3) (1895 & 1896) 21 Bom., 154.