We therefore reverse the decision of the lower Court, and remand this case to be tried on the merits. Costs to follow the result.

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Decision reversed and case remanded.

It is true that the Court did adopt a procedure only applicable to suits under the special law; but as the decree does not show that it was made under that law, and therefore, according to recent construction of the law, wrongly made, I think we are bound to presume that it was rightly made; and, if we are to qualify facts to suit our views of the law, that it should be treated as a decree on confession of judgment, which substantially it was, as soon as the defendant, in answer to the notice to disclose his title, failed to show any grant earlier than 1st December 1790. At any rate, error in procedure in the trial does not *per se* render void a decree, which on the face of it is one which the Court was competent to make. Taking this, then, to be a good decree for the resumption of lakhiraj land held under a grant of later date than 1790, made in the exercise of the ordinary jurisdiction of the Court, I hold that the plaintiff is entitled to recover the rents of the resumed land, and to institute a suit under cl. 1. s. 23, Act X of 1859, for the determination of the rate of rent to be paid and to obtain a kabuliat accordingly. In this view, I would remand the case to the first Court for trial on the merits.

The appellant should get the costs of this Court and of the lower Appellate Court, costs in the first Court being left as costs in the suit.

PAUL, J.—I agree with Ainslie. J, in holding, for the reasons assigned by him and under the circumstances of this case, that no presumption arises that the decree of March 1862 was passed under the provisions of Regulation II of 1819.

The plaintiff in his plaint, filed in the suit in which the last mentioned decree was made, stated that the defendant was holding the lands in dispute under a pretended lakhiraj title, without specifying whether that title was alleged to be anterior or posterior to 1790, and prayed for the resumption of the lands so held. In the judgment, on which the decree of March 1862 is based, it is found that the defendant had not proved that this alleged lakhiraj existed prior to 1790. Under these circumstances, it cannot be contended either that the plaintiff admitted or the defendant substantiated the existence of the alleged lakhiraj prior to 1790.

Having regard to the silence of the plaint and decree in the resumption suit, with reference to Regulation II of 1819, it would be unfair and unreasonable to infer, merely from the reference made to the Collector, with a view to ascertain the validity or otherwise of the lakhiraj title pleaded, that the proceedings in which the decree of March 1862 was pronounced were taken under Regulation II of 1819. The decree of March 1862, as it appears to me, was one for resumption passed in a suit in which there was no admission of the existence of the defendant's alleged lakhiraj prior to 1790, and it is final between the parties. The result of such finality is that the plaintiff is entitled to assess the lands in the possession of the defendant, and his suit is consequently maintainable.

I concur in the propriety of the order made by Ainslie, J.

(1) *Before Mr. Justice Kemp and Mr. Justice Glover.*

The 4th April 1871.—

ROHINI NANDAN GOSAIN AND OTHERS (PLAINTIFFS) *v.* RATNESWAR KUNDU AND OTHERS (DEFENDANTS.)*

Babu *Ashutosh Dhur* for the appellants.

Baboo *Krishna Sakha Mokerjee* and *Ambika Charan Banerjee* for the respondents.

KEMP, J.—This was a suit under the provisions of cl. 1, s. 23, Act X of 1859, for determination of the rates of rent and for the delivery of a kabuliat. The first Court gave the plaintiff a decree apparently not for the sum claimed, but for a smaller sum, namely for Rs. 17-2-10

*Special Appeal, No. 2281 of 1870, from a decree of the Officiating Judge of East Burdwan, dated the 25th July 1870, reversing a decree of the Deputy Collector of that district, dated the 26th February 1870.

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No question or plea as to the jurisdiction of the Court was raised either in the first Court or in appeal to the Judge, but the Judge, without going into the case at all, holds that the decision in *Madhab Chandra Bhadory* v. *Mahima Chandra Mazumdar* (a) is on all fours with the present case. He, therefore, decreed the appeal and seversed the decision of the Deputy Collector.

In special appeal it is contended that the Judge ought not to have raised the point of jurisdiction, when it was not raised in the Court of first instance or in appeal; 2ndly, that the Judge ought to have held that the resumption decree was conclusive evidence of the right of the plaintiff to demand rent from the defendant, and also of the relationship of landlord and tenant; and 3rdly, that the precedent quoted by the Judge is not applicable to the circumstances of this case.

We think that the Judge was right in raising the question of jurisdiction, although not raised in the first Court or in appeal; but on the 2nd and 3rd grounds we differ from the Judge. It appears that the plaintiff in this case sued to have 18 bigas 1 kata of land declared to be *mâl* and appertaining to his zemindari. We may observe here, before proceeding further, that the suit to have this land declared *mâl* was originally brought by the zemindar; that subsequently the plaintiff as patnidar stands in the shoes of the zemindar; that the decree was passed in the absence of the defendant who did not appear, and the plaintiff proved that the land was *mâl*; and therefore it was ordered that a decree should issue in favor of the plaintiff, and that it be held that the land was the *mâl* land of the plaintiff. On obtaining this decision the plaintiff now comes in for a declaration of the rates of rent to be paid by the defendant, and for the delivery of a kabuliat at these rates, claiming the sum of Rs. 36-6 as the fair and proper rate to be charged, and demanding a kabuliat at that jumma. The first Court did not give the plaintiff a decree for what he asks, but for the lesser sum of Rs. 17 odd annas. Whether, under the Full Bench Ruling, this decision will stand or not, it is for the Judge to decide if it is raised before him.

With referrence to the ruling in *Madhab Chandra Bhadory* v. *Mahima Chandra Mazumdar* (a), we think that that decision does not apply to the circumstances of the present case. It is clearly mentioned by Mitter J., in that decision that the plaintiff in that case obtained a decree under the provisions of s. 30, Regulation II of 1819. In the present, case the decree was not passed under that section; the decree was simply to the effect that the lands in suit were the *mâl* lands of the plaintiff.

We may observe further that there is a decision of the late Sudder Court of the 13th July 1861, Raikes and Trevor, J.J., which applies precisely to the circumstances of this suit, and in which those learned Judges held that the provisions of cl. 1, s. 23, and s. 31 apply; that the zemindar or patnidar, as in this case, was entitled to bring a suit for determination of rates and delivery of a kabuliat. We also fail to see how it can be argued in the face of the decision which distinctly declares the defendant's lands to be the *mâl* lands of the plaintiff that the plaintiff is not entitled to rent for these *mâl* lands. His only remedy was to have the rates at which he is authorized under s. 10, Regulation XIX of 1793, to collect the rents determined, and to obtain a kabuliat according to such rates as may be found to be fair and equitable; and, to enable him to do so, the only course open to him was that which he has pursued, namely, to sue in the Collector's Court, under cl. 1, s. 23 of Act X of 1859, to have it determined what are fair and equitable rates payable on the land, and for delivery of a kabuliat at those rates.

We therefore remand the case for the Judge to try it on the grounds raised in the first Court, and also to take into consideration, if necessary, whether under the Full Bench Ruling, and with reference to the claim having been made for a kabuliat at a fixed jumma of Rs. 36-6, and the Court of first instance having decreed the delivery of a kabuliat for a lesser sum, namely, Rs. 17 odd annas, the suit of the plaintiff is liable to dismissal or not.

Costs to follow the result.

(a) *Ante*, p. 83.