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blishes between the zemindar and the holder of the land, the relationship of landlord and the person liable to pay rent to such landlord. We have already shown above that in the resumption suit the land was adjudged liable to be assessed with the payment of rent. The decree on the face of it shows that the lands were adjudged to be *mâl* lands of the plaintiff, special appellant, and that the defendant is only entitled to occupy these lands on payment of rent to the zemindar. The present suit is brought to have that rent assessed and for a kabuliat for a period of three years. We think that, under the rulings in *Rani Shama Sundari Debi.* v. *Sital Khan* (1), *Madhusudan Sagory* v. *Nipal Khan* (2), *and Rohini* independent talookdar, and to have the revenue assessed under Regulation XIX of 1793. The suit was properly brought under Act VIII of 1869 (B.C.) and ought to be remanded under that Act. The appellant will get the costs of this appeal.

LOCH, J.—I propose to add a few words to the judgment of the Chief Justice, as I was one of the Judges who passed the Judgment in *Madhab Chandra Bhadory* v. *Mahima Chandra Mazumdar* (a).

The special appellant has pointed out to us that the case now before the Court is not on all fours with that judgment; and I agree with him. We held in that case that, where proceedings have been taken under the provisions of s. 30, Regulation II of 1819, all such proceedings were proceedings for resumption of lands admittedly held under invalid lakhiraj titles prior to December 1790; and that lands which are resumed under that law should be assessed as provided for by the old Regulation of 1793. But in the present case there can be no doubt from the form of the plaint that the plaintiff distinctly claims the land as part of his talook, and that the defendant was holding under an invalid lakhiraj title; and he prayed to be allowed to assess it as part of his talook; and obtained a decree to assess it as such. It is therefors clear that this was not a case which came under s. 30 of Regulation II of 1819; but was one which could be tried by a Civil Court, or under s. 28 of Act X of 1859.

I think, therefore, there is no ground for saying in this case, as the lower Courts have done, that the suit for assessment is barred by anything that has been stated in the judgment in *Madhab Chandra Bhadory* v. *Mahima Chandra Mazumdar*(a). And I concur in the order proposed by the Chief Justice that the case should go back for trial upon the merits. The appellant will have his costs in the appeal.

(1) *Ante*, p. 85.

(2) *Before Mr. Justice Ainslie and Mr. Justice Paul.*

The 25th April 1871.

MADHUSUDAN SAGORY AND OTHERS (PLAINTIFFS) v. NIPAL KHAN AND OTHERS (DEFENDANTS.)*

Baboos *Rames Chandra Mitter* and *Girish Chandra Mookerjee* for the appellants.

Baboo *Durga Das Dutt* for the respondents.

AINSLIE, J.—The plaintiff sues to obtain from the defendant a kabuliat for certain lands which were resumed as invalid lakihraj under a decree dated 14th March 1862. The defendant denies that the relation of landlord and tenant exists. Both the Courts below have based their decision dimissing the suit on a ruling of this Court in *Madhab Chandra Bhadory* v. *Mahima Chandra Mazumdar*(a), in which it was held that, when land is resumed as invalid lakhiraj under s. 30, Regulation II of 1819, the proper procedure for assessing it is that laid down in s. 9, Regulation XIX of 1793. The plaintiff appeals specially and contends that the resumption decree was not made under s. 30, Regulation II of 1819.

Apparently in the case cited, the decree

* Special Appeal, No. 1967 of 1870, from the decree of the Additional Judge of Nundea, dated the 13th August 1870, affirming a decree of, the Deputy Collector of Meherpore, dated the 26th May 1870.

(a) *Ante*, p. 83.

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Nandan Gosain v. *Ratneswar Kundu* (1), such a suit will lie under the provisions of Act X of 1859.

purported to have been made under the particular Regulation, though from the terms of the judgment it was attempted to be shown that that Regulation did not really apply. The Court remarked that they were bound to take the decree as it stood, and had nothing to do with the reason on which the judgment which led to that decree was based. It was also observed that, if the lands in question were really alienated as lakhiraj subsequently to the 1st December 1790, the Court which passed the decree had no jurisdiction to pass it, under the provisions of s. 30, Regulation II of 1819.

In the present case, there is nothing on the face of the decree to show that it was made under Regulation II of 1819, and it is further urged that the plaint in the suit was not framed as a plaint under that Regulation. The plaintiff contends that the Court made the decree under the general powers of the Court to hear and determine civil suits. On the other hand, it is admitted that the Court adopted a procedure which is only sanctioned in the special case provided for by s. 30, Regulation II of 1819, and from this it is argued that the decree was made under that Regulation. This inference is not one which must of necessity be drawn. But even if I thought myself bound to take this decree as a decree made under s. 30, Regulation II of 1819, I could not concur in holding that this would of itself fix the date and character of the grant resumed, and determine the procedure to be adopted for assessing the lands. It must be borne in mind that, up to the Full Bench ruling in *Sonatun Ghose* v. *Moulvi Abdul Farar* (a), decided on 25th January 1865, it was supposed that all resumption suits were triable under s. 30, Regulation II of 1819 (b). Three out of seven Judges who sat at the hearing of that case maintained this view of the law, and the contrary view was only affirmed by a majority of one. Therefore, I do not think that we can infer from the form of a decree of earlier date than 1865, even when professedly made under Regulation II of 1819, that the resumed rant 'was of earlier date than 1st December 1790. Consequently, when the nature of the title set aside is not stated on the face of the decree, we are entitled to look to the judgment (and record if necessary) to ascertain it. If we do so in the case in hand, we find that it was not alleged by the plaintiff, or shown by the defendant that the grant resumed by the decree was in existence prior to 1st December 1790. Although the Full Bench decision determines that decrees cannot properly be made under Regulation II of 1819, for the resumption of grants of later date than 1st December 1790, it certainly did not, and could not lay down that decrees had never been made as under that Regulation for the resumption of such grants;—the contrary was admitted. I do not think that we can hold all such decrees to be void, or that we are bound to hold that the existence of a decree under Regulation II of 1819 establishes that the grant resumed was of earlier date than 1st December 1790. Granting that the Courts acted under a mistaken view of the law, we cannot assume, for the purpose of making those decrees technically good, a state of facts which in many cases is contradicted by the records. We must take the decrees as we find them, and as doubtless they were intended to be, as establishing resumptions of the particular tenures found existing in each case, whether they were created before or after 1st December 1790. If the decrees can be impeached and set aside, well and good; but if they cannot, or so long as they are not set aside, we must take them to be binding as they stand, and not resort to a fiction contradicted by the records, and asume that they establish what, in the view of the law taken when they were passed, they were never intended or supposed to establish. If the resumption decree now before us professed to be a decree under Regulation II of 1819, I think we should be obliged to refer the case to a Full Bench; but as I have already said, it does not, on the face of it, appear to be anything but a decree made in the exercise of the ordinary jurisdiction of the Court.

(1) *Post*, p. 89.

(a) B. L. R., Supl. Vol., 109.

(b) See *per* Loch and Seton-Karr, JJ., in *Khelatchunder Ghose* v. *Poornochunder Roy*, 2 W. R., 258 at p. 259.

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

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.)*

Baboo *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.