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or malicious motive in this matter to that officer; but then there is this difficulty that, under Bengal Act IV of 1870, the Commissioner of the Division is the Court of Wards; and under section 19, the Collecto· was bound to make a report to the Court of Wards; and that Court under section 24 can order the Collector to apply to the Civil Court under the provisions of Act XXXV of 1858; but there was no report to the Commissioner, and no authority given to the Collector to set the Civil Court in motion, and consequently the proceedings are informal *ab initio*. It has been contended that the proceedings taken were under section 27, Act IV of 1870 (B. C.); but if so (and certainly it does not appear that they were under this section), they equally required the order of the Court of Wards, before any steps could be taken in the Civil Court.

Under these circumstances we are unable to express any opinion upon the merits of the finding recorded by the Judge below. The proceedings are null and void, and the finding of the 24th July 1871 is set aside.

Before Mr. Justice Bayley and Mr. Justice Paul.

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BRAJA NATH KUNDU CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* A. STEWART (DEFENDANT). *

Enhancement of Rent, suit for—Act VIII of 1869 (B. C.)—Jurisdiction—Lands occupied by Buildings.

A suit for enhancement of rent under Act VIII of 1869 (B. C.) will not lie in respect of lands occupied by buildings. A landlord who allows his lessee to invest capital in erecting buildings on land let for cultivation, and raises no objection for a considerable number of years, will not be allowed to disturb the holding. The fact of buildings having been permitted without objection to stand on lands for a considerable number of years is *primâ facie* proof that the land had been originally leased for building purposes.

Baboos *Kali Prasana Dutt* and *Mahendra Lar Seal* for the appellants.

Baboos *Sham Lal Mitter* and *Amarendra Nath Chatterjee* for the respondent.

THE facts of this case and the arguments of the pleaders are sufficiently set forth in the judgment delivered by

PAUL, J.—These cases have taken unusual time in argument, but in fact there is very little to be said in them. The facts are shortly these :—

The plaintiff who is not the original zemindar, but the representative of the original zemindar, and who has recently come into possession of the zemindari within which the lands in dispute are situated, has chosen to institute this highly speculative suit, without making due and proper enquiry, and he has attempted to support it by false allegations and false suggestions. It

*Special Appeals, Nos. 534, 535, and 536 of 1871, from the decrees of the Judge of Hooghly, dated the 14th February 1871, affirming the decrees of the Moonsiff of that district, dated the 28th November 1870.

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would be sufficient, for the purposes of this judgment, to point out those false allegations and false suggestions, and then to dismiss the suit. The admitted facts of the case are these :—That some time, as far back as the years 1845, 1846, 1847, not precisely disclosed, Messrs. Fergusson and Co. erected a rum distillery at Bally, upon about 3 bigas of land; that the whole of the 3 bigas of land was surrounded by a wall, and constituted the house and premises of this rum distillery; that continuously from the time of its erection, down to the institution of this suit on the 24th July 1870, during a period of twenty-five years, the defendant in possession and his predecessors have paid a fixed rent of Rs 22 a year in respect of the premises occupied by them as this rum distillery. The plaint, however, on its face sets out a state of facts which, by no construction whatever, would embrance the particular facts to which I have alluded *viz.*, that the locality in question has been built upon, and is now occupied by a rum distillery. The plaint alleges that the defendant by right of a cultivating jote is in possession of 3 or 4 bigas of land, in respect of which he is in the habit of paying at a certain rate per biga, which is less than the prevailing rate paid by the same class of tenants, *viz.*, cultivating tenants for lands of a similar description and with similar advantages in the neighbourhood, and that consequently the plaintiff is entitled to enhance the rent paid by such cultivating ryot to the extent of the prevailing rate, *viz.*, from Rs. 22 to Rs. 276, or at the rate of Rs. 20 per biga; and further that the lands held by the defendant as cultivating ryot are greater in extent than the quantity of land for which rent has been paid.

Now, we have no hesitation in saying that the facts mentioned in the plaint are false. The defendant has never been a cultivating ryot, because it is clear that he and his predecessors have had uninterrupted possession for twenty-five years of the rum distillery at a fixed rate of rent. Assuming however that the term "jote" includes a tenure of that description, the allegation that ryots of the same class, *viz.*, ryots who own rum distilleries, pay for similar lands at a higher rate of rent, is wholly false, for this is admitted to be the only rum distillery in and about the locality in question. Therefore whether it be taken that the plaint intended to charge a liability upon the defendant on the ground of his being a cultivating ryot, or as an occupier of land by reason of the building imposed on it, in either view the allegations in the plaint are false; and the present attempt to enhance the rent of a party, whose rent is apparently not enhancible, by reason of an artfully concocted plaint, is, to say the least highly reprehensible. If we were to stop here, we might fairly dismiss the plaintiff's suit, without passing any opinion on the merits, because the plaint itself discloses a state of facts sufficient to justify the dismissal of the suit, without entering into the merits of the case. The lower Courts, however, have not taken this view of the case. They have decided that the land occupied by the defendant was used for building purposes, and therefore a suit for enhanced rent was not maintainable.

This finding has been challenged in special appeal upon the ground that there is no evidence whatever on the record to justify such a finding.

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The defendant produced a mokurrari potta of the execution of which no evidence was given in the first Court. Whether that potta was actually questioned in the first Court or not does not appear. Probably, if that potta had been distinctly challenged in the first Court, the defendant would have had no difficulty in proving it; because it appears to be an old document and connected with a great many English title deeds produced in Court. However, this mokurrari potta has all the appearance of genuineness, and its authenticity is corroborated by the board facts of the case; and if it had been necessary to determine the case on the merits of this document, we should have given the defendant an opportunity of proving it. While on the one hand we admit that this document is not legally proved, we cannot shut our eyes to the fact that it exists, that it has been placed on the record, and that it naturally accounts for the expenditure of large capital on the lands in suit.

The first Court has come to a very proper conclusion on the facts of the case. It says with reference to the first issue:—"It is to be observed that the "three plots of land were originally let to Messrs. Fergusson and Co. and "Messrs. Burn and Co., who built thereon a rum distillery, generally known "under the name of Bally Rum Distillery; that the entire plot was almost "surrounded by a brick built wall. It also appears that the plaintiffs and those "under whom they claim continued to receive the old rent without objection "or claim to enhance." This circumstance, no doubt, might lead to the inference that the grant of the land was for the purpose for which it was used, and then the Court goes on to state that the plaintiff made no attempt to show that the land was let for agricultural or horticultural purposes. Now, here the Court draws what appears to us a very fair inference from two admitted facts, *viz.*, that, since the lease was taken by Messrs. Fergusson and Co., the rum distillery had been built upon the land, and built without objection on the part of the zemindar; and that the plaintiff continued to receive the same rent all along without objection or claim for enhancement. To show that such an inference is quite right, I will refer to the case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1), where the late Chief Justice Sir Barnes Peacock refers to the remarks of Mr. Justice Kemp, which he quotes with approbation. He says:—"Mr. Justice Kemp thinks that in equity plain-"tiff was not entitled to turn the defendants out of the land, because he stood "by and saw them erecting pukka buildings on the land without any objection "whatever. If he allowed the defendants to erect pukka buildings upon the "land without objecting, it appears to me that he was bound in the same way "in equity as if he had granted them a potta, with the privilege of building "pukka houses on the land, and I think that Mr. Justice Kemp is right in "holding that the plaintiff was precluded by his conduct from turning the "defendants out of possession."

The inference therefore seems reasonable and fair that the land was let for building purposes, and it really seems unlikely that the buildings should have

(1) 7 B. L. R., 152.

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been erected without the consent of the landlord previously obtained. The two lower Courts are of opinion under these circumstances that this suit will not lie under Act VIII of 1869 (B. C.)

This is a suit for enhancement of rent of land covered with a building, the enhancement being attributable to the increased value of the land by reason of the distillery existing thereon, and not being attributable to any one of the three causes specified in section 17, which clearly relate to lands to let out for agricultural purpose. Having regard to this view of the case, we consider the lower Appellate Court was right in determining that the present suit would not lie under Act VIII of 1869 (B. C.)

Taking into considering the fact that a large amount of capital was expended on the erection of this rum distillery, it is almost impossible to believe there was not any express understanding existing at the time authorizing the erection of ths manufactory, and the existence of a specific understanding or agreement is suggested by the existence of the lease on the records of the case. The right of the parties must depend on the arrangement which took place at the time the original lessees entered into possession, and took up these lands for building purposes. As to what was the precise arrangement we have no evidence, and the plaintiff has wholly ignored it. Even assuming that this suit for enhancement will lie, it will be impossible, under the circumstances stated, to say whether the plaintiff is entitled to enhance the rent of the land on which the house is built. The real facts of the case ought to have been alleged and proved, in order to obtain a decision on the subject of enhancement. Instead of such a case being stated, a case purely hypothetical in character has been put forward by the plaintiff; and I consider such a case is righteously met by a dismissal of it with all costs.

As to the question of lakhiraj lands, it has not been seriously pressed. There is no proof whatever that the plaintiff received any rent on account of these lands, and the Court has found as a fact that the land is lakhiraj.

The special appeal is dismissed with costs.

BAYLEY, J.—I quite concur. I think it is a simple attempt, on the part of the plaintiff, to enhance the rent by a side wind, as it were, under the words of section 17, as if for ordinary culturable lands, which, under the circumstances and the finding of facts on the evidence with which we cannot interfere in special appeal, he had no right to do; and that the plaintiff has no right whatever to enhance, except under an express contract to that effect.