which the judge, holding to be a contravention of the law, has reversed the decision of the lower court for this portion of the property.

The ground of special appeal is that a *benamee* purchase is not in itself invalid, and that the judge should therefore have tried whether the *benamee* purchase as pleaded by petitioner was proved, or not.

We agree with the petitioner that there is no law forbidding purchases in the name of other parties. The transaction is regarded simply as would be the purchase by an agent, where the principal was not disclosed. The judge should therefore have tried and determined whether the purchase, as pleaded, was proved or not. We remand the case that the point may be tried and determined by the lower court on its merits.

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[4] *The 8th January*, 1858.

PRESENT: C. B. TREVOR, G. LOCH, AND H. V. BAYLEY, ESQRS. *Officiating Judges.*

CASE NO. 100 OF 1855.

Regular Appeal from the decision of Mr. C. McDonald, Principal Sudder Ameen of Bhaugulpore, dated 24th January 1855.

DEGUMBER PUNDA (*Defendant*), *Appellant* v. RAJA LEELANUND SINGH AND OTHERS (*Plaintiffs*), *Respondents*.

[Lakhiraj—*Suit by zamindar for possession—Land in possession of lakhirajdar—Burden of proof—Zamindar to give* prima facie *proof that land did at one time form part of his malgoozaree estate—Excess land not covered by sunnud—Burden still on Zamindar to give* prima facie *proof of his right to possession.*]

A zemindar suing for the possession of lands which he claims as appertaining to his permanently settled estate and which are in the possession of a lakhirajdar, who claims them as part of his rent-free tenure, must give *prima facie* proof that the identical lands did at one time form part of his malgoozaree estate. Where the suit is for possession and not for resumption, the fact of the area of the lands in the possession of the lakhirajdar being greater than that covered by the sunnud is not sufficient to throw the burden of proof on the lakhirajdar, nor to establish the zemindar's right to such excess. He must give *prima facie* proof that such excess did appertain to his estate.

Vakeel of Appellant—Baboo Ramapersaud Roy.

Vakeels of Respondents—Moonshee Ameer Ali and Baboo Kishenkishore Ghose.

SUIT valued at rupees 6,897-5-5, to recover possession with mesne profits.

Plaintiff purchased the zemindaree of Khurruckpore at a revenue sale in January 1840. Owing to the opposition of the former proprietor, he was unable to get immediate possession, and other parties taking advantage of the confusion, acquired possession of lands appertaining to the zemindaree and have forcibly retained the possession so acquired. The defendants have a grant for 100 beegas in mouza Burhutta, pergunnah Godah, within the limits of the said zemindaree and have taken possession of 60 beegas of the malgoozaree lands of that village in excess of the area comprised in the sunnud. Plaintiff being a Hindoo does not wish to question the validity of the defendant's sunnud as the lands were granted for religious purposes, though he has every right to do so, as the tenure is comprised in his zemindaree, but he seeks to recover possession of that portion of the malgoozaree lands of which the defendant has acquired and retained possession in excess of the area covered by the sunnud.

The defendants claim the whole of mouza Burhutta as *lakhiraj* according to the sunnud and plead that they are in possession of 100 beegas and no more; that the lands were granted without measurement, and the plaintiff cannot, on the allegation that the area in defendant's possession measured by a short cord exceeds 100 beegas, claim the excess. The village was released from attachment as *lakhiraj* by order of the former zemindar, Raja Rahmut Alee Khan in 1242, and as the sunnud is dated 200 years ago and a chukbund shows the existence of the tenure 100 years [5] ago, and neither plaintiff nor the former zemindars ever had possession, the plaintiff's claim is barred by Regulation V of 1805 and Regulation III of 1793. Plaintiff has included in the area of the village a bund or reservoir of water, comprising 60 or 70 beegas which formed no part of the *lakhiraj* tenure, but defendant's cultivated lands exclusive of that reservoir do not exceed 100 beegas.

The case was remanded by this court on 4th April 1854 (*vide* Decision for that year, page 143) for inquiry into the question of limitation, and the principal sudder ameen after taking further evidence, again gave a decree for the plaintiff awarding possession of 57-6 beegas, measured with the long rope with mesne profits with interest.

The defendant now appeals from the decision, urging that as the suit was one for possession and not resumption, and plaintiff admitted the right of the defendant to *lakhiraj* lands in the village, but alleged that part of the area in his possession was *mal*, the case resolved itself into a boundary dispute and plaintiff was bound to shew that the lands he claimed did ever form part of his zemindaree. Whereas the lower court had thrown the burden of proof upon the defendants, and because the area of the village found by the ameen exceeded 100 beegas, the principal sudder ameen had given a decree for the plaintiff for the lands in excess of that quantity. The plaintiff had distinctly stated that he was ousted subsequently to his purchase in January 1840, he was bound to prove this, and if he could not, his case must fall to the ground, that the evidence of his witnesses contradicted the statement in the plaint, for they distinctly proved the possession of the defendant's previous to the plaintiff's purchase in 1840, and consequently this main plea was entirely disproved.

The statement alleged to have been made by the defendant to the deputy collector that he was in possession of 100 beegas and no more, could not be assumed as proof of the plaintiff's claim, who was bound to prove his allegation of dispossession.

It was held by the court that as the plaintiff, an auction-purchaser, was, as is admitted, never in actual possession of the village and merely charges the defendant with retaining possession of the *mal* lands forcibly acquired, for such appears to be the real purport of his statement, it was unnecessary for him first to prove previous possession, but as he had shewn that the defendant was only entitled to 100 beegas, (whereas defendant held possession of a larger area) and had thereby made out a *prima facie* right to possession, the defendant was bound to show that he held possession of the land as *lakhiraj* anterior to the permanent settlement, while the plaintiff was bound to produce some *prima facie* evidence that the lands in question did form part of the malgoozaree lands of his estate.

[6] The evidence of the witnesses called by defendant, prove his possession for 20 or 22 years, and they state that the lands in dispute were always considered *lakhiraj*. The documents filed by the defendant consists of a chukbund conveying a grant for 100 beegas with certain boundaries, dated 15th Phalgoon 1178 Hijeree, a chukbund and a release from the former zemindar of mohalat Khurruckpore of the same date giving up lands of mouza Burhutta in conformity with the chukbundee, and it was contended that if the

defendant held possession only of the lands comprised in the boundaries specified, the plaintiff could have no right to the possession of any part of those lands. Defendant further showed a purwannah from Raja Rahmut Alee Khan, dated 21st Maugh 1242 F.S., directing the tehseeldar to release the crops of mouza Burhutta as it was *lakhiraj*.

For the (plaintiff) respondent, it was urged that defendant was unable to prove possession beyond 20 or 22 years, that the documents filed by him were unproved, and consequently inadmissible as evidence; that admitting for argument's sake that the release of 15th Aughun 1178 Hijeree was an original document, the defendant was bound by that, and it showed the western boundary of the *lakhiraj* land to be the river Daradur as acknowledged by both parties and defendant was entitled to 100 beegas from that boundary and all in excess of that area was malgoozaree land, belonging to the plaintiff's estate; that the evidence of the witnesses summoned by the principal sudder ameen after the case had been remanded, particularly that of Ootum Roy who held a teeka potta of the *lakhiraj* lands of mouza Burhutta, which potta was produced before the darogah of thanna Jeypore on the occasion of a dispute between the Pundas and has been attested by Talokenath Jha, the then darogah, clearly proved, that defendant had previous to the sale of the mohalat Khurruckpore possession only of 100 beegas; that in 1242 this area was measured by the Punda on occasion of its being given in teeka to the father of Ootum Roy; that the lands now claimed by plaintiff, really appertained to the malgoozaree estate and that previous to the sale of mohalat Khurruckpore, the Raja's people collected rents therefrom.

The documentary evidence filed by the appellant not having been attested is inadmissible. The oral evidence shows that the appellant's possession dates from some 20 to 22 years previous to the institution of this suit, but there is no proof of his or his ancestor's possession beyond that period. On the other hand the respondent has given no satisfactory proof that the lands he now claims ever did belong to his malgoozaree estate. Proof of identity is wanting and no sufficient reason is assigned why, the lands in litigation are claimed as part of the malgoozaree lands in preference to other lands in the possession of the (defendant) appellant. The [7] evidence of the witnesses taken before the principal sudder ameen in 1855, is as much against as for the plaintiff, while the witnesses brought by him in 1852 distinctly depose to the defendant's possession previous to the plaintiff's purchase, and one of them, Bucknaw Chowdree asserts that the present defendant has held possession 15 or 16 years, and that Fuqueerchand Punda was in possession previously. In suits like the present which is for possession and not for resumption, the *onus* of proving a *prima facie* title to the lands claimed and that they appertain to a particular estate rests undoubtedly, with the party preferring such claim, whereas in suits for resumption it rests with the lakhirajdar to prove his case.

It is a matter of notoriety that lakhirajdars generally hold possession of a greater area than is entered in the sunnud, and such appears to be the case in the present instance, and plaintiff considering the defendant entitled only to the specific area, claims possession of the surplus as *mal*. He is however unable to give any credible proof that the lands in dispute have since the decennial settlement formed part of his malgoozaree estate and seems to have laid his claim arbitrarily, assuming that the fact of there being an excess over and above 100 beegas specified in the sunnud in the defendant's possession entitled him to obtain possession thereof as part of his malgoozaree land. In the absence of any proof that the litigated area did at any time form part of the malgoozaree lands appertaining to mohalat Khurruckpore, we think that the

plaintiff has not made out a *prima facie* title to obtain possession and it is therefore unnecessary for us to go into the defendant's case. We therefore give a decree for the appellant with costs and reverse the decision of the lower court. The present decision will be no bar to a suit for resumption if brought within time.

The 9th January, 1858.

PRESENT: A. SCONCE AND J. S. TORRENS, ESQRS., *Judges.*

PETITION NO. 878 OF 1857.

[*Procedure—Suit for joint possession dismissed by first court as barred by limitation—Appellate court omitting to give decision on point—Decision on merits by appellate court—irregularity—Remand.*]

Case remanded to the judge as in trial of the appeal he had overlooked a plea urged on limitation.

[8] *Vakeels of Petitioners*—Baboos Ramapersaud Roy, Shumbhoonath Pundit and Kishenkishore Ghose.

Vakeels of the Opposite Party—Moonshee Ameer Alee and Mr. R. T. Allan.

IN THE MATTER OF THE PETITION OF SOROOPCHUNDER BANERJEA AND OTHERS, filed in this court on the 18th June 1857, praying for the admission of a special appeal from the decision of Mr. E. S. Pearson, officiating additional judge of Dacca, under date the 31st March 1857, reversing that of Moonshee Nyeemooddeen, sudder ameen of that district, under date the 14th December 1855, in the case of Jugbundoo Bose and others, plaintiffs, *versus* Soroopchunder Banerjea and others, defendants.

The object of this case was to procure a decree for joint possession in an estate which as asserted by the plaintiffs, had been so held by them along with the defendants, until the latter, by means of orders issued under Act IV of 1840, had ejected plaintiffs. The defence was to the effect that the lands were not ijmalee, and had never been so held by the plaintiffs. The sudder ameen dismissed the suit on plea of limitation, finding that within 12 years plaintiffs had not been shown to be in the joint possession they asserted.

Plaintiffs having appealed, the judge without taking notice in his judgment of the issue as to limitation, went into the merits and determining that the records referred to and the evidence proved the property had been held ijmalee, reversed the orders of the lower court. The special (appellants) defendants object to the decision, urging that when the judge had the issue on limitation before him, he should have come to a distinct decision upon it, and that if he found that the sudder ameen was in error in throwing out the plaintiffs on that plea, he should then have remanded the case in order that these should have been tried before the court of first instance, on the merits.

As we find that the sudder ameen only gave judgment with reference to the plea of limitation, and that he held no trial on the merits, we remand the case to the judge that he may give distinct judgment on the plea of limitation, and should he differ from the lower court that he may return the case for trial there, on the merits.