1894

FARKAN v. SOMSHER MAHOMED.

or would not have found that there was a common object such as converted the assembly in this case into an unlawful assembly. Where the law allows an appeal, the appellant is entitled to have an explicit opinion from the Court of appeal that has to deal with them on the questions of fact involved in the case. The case seems to us to be exactly similar to the two cases referred to above, and, following those two cases, we make the rule absolute, set aside the judgment of the Appellate Court and direct the appeal to be re-heard.

H. T. H. *Rule made absolute and judgment set aside.*

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894
May 17.

KARMI KHAN (DEFENDANT) *v.* BROJO NATH DAS (PLAINTIFF.)*

Bengal Tenancy Act (VIII of 1885), Chapter X, sections 101, 102—Power of Revenue Officer—Decision of Special Judge—Res judicata—Question whether land is mal or lakhiraj—Limitation—Sale for arrears of revenue—Act XI of 1859, sections 37, 53—Incumbrance—Adverse possession.

The plaintiff had been proprietor of an estate which was sold for arrears of Government revenue and repurchased from the then purchaser by the plaintiff in 1886. He applied under Chapter X of the Bengal Tenancy Act for the measurement of the estate and the preparation of a record of rights, and the Revenue Officer deputed for these purposes found that a portion of the estate held by the defendant was *mal* land, though it was held as *lakhiraj* under certain *sanads*, and as he also found that no rent had ever been paid for it, it was entered on the record of rights as *mal* land held under those *sanads* as *lakhiraj*. The Special Judge on appeal by the plaintiff held that the land having been found to be *mal* should have been entered as *mal* land unassessed with rent. In a suit to have the land assessed with rent, it was found that the *sanads*, under which the defendant claimed to hold, were granted not by any predecessor in title of the plaintiff, and were of a date anterior to the Permanent Settlement: *Held*, (reversing the decision of the lower Appellate Court) that the Special Judge had no jurisdiction to determine whether the land was *mal* or *lakhiraj*, and that his judgment as to its being *mal* did not therefore operate as *res judicata*. *Secretary of State for India v. Nitye Singh* (1) referred to; *Gokhul Sahu v. Jodu Nundun Roy* (2) distinguished.

* Appeal from Appellate Decree No. 523 of 1892, against the decree of Babu Rabi Chandra Ganguli, Subordinate Judge of Midnapore, dated the 22nd of January 1892, reversing the decree of Babu Ram Jadab Tolapatro, Munsif of Tamlukh, dated 30th of March 1891.

(1) I. L. R., 21 Calc., 38. (2) I. L. R., 17 Calc., 721.

1894

KARMI KHAN v. BROJO NATH DAS.

Held, also, that the adverse possession set up by the defendant was, within the meaning of section 53 of Act XI of 1859, an incumbrance subject to which the plaintiff, as a proprietor whose estate had been sold, took it on repurchase. If such adverse possession therefore were sufficiently long the suit would be barred by limitation. The plaintiff could not be regarded as a person who had acquired the estate "free from all incumbrances which may have been imposed upon it after settlement," as provided by section 37 of Act XI of 1859, and could not therefore claim (as held by the lower Appellate Court) that his suit was not barred, having been brought within twelve years from the date of the sale for arrears of revenue.

The case was remanded for findings whether the land was *mal* or *lakhiraj*, and whether the defendant's adverse possession was long enough to bar the suit.

THE facts of this case are sufficiently stated in the judgment appealed from which was as follows :—

"This appeal arises out of a suit for assessment of rent on 16 *khatas*, 5 *chattaks* of land, and also for recovery of the rent for the year 1295 and 1296 and a portion of the year 1297. The plaintiff was one of the proprietors of the estate in which the land sought to be assessed with rent is situated. The estate was sold in 1885 for arrears of Government revenue and purchased by one Prosonno Kumar Shamant, and the plaintiff re-purchased it from Prosonno Kumar Shamant in 1886. He applied under Chapter X of the Bengal Tenancy Act for the measurement of the *mehal* and the preparation of a record of rights, and a Revenue Officer was deputed to make the measurement and prepare a record of rights. The land to which the suit relates was found by the Revenue Officer to form the slope of an old embankment, and as such to be *mal* land. But as no rent, it was found, was ever paid for it, it was entered as *mal* land held by the defendant as *lakhiraj* under colour of certain *sanads*. The plaintiff appealed to the Special Judge, who held that the land being found to be *mal* land should be shown as *mal* land unassessed with any rent. The land being found to be *mal* land the plaintiff has brought the present suit to have it assessed with rent. The defence is that the land is a portion of the defendant's *lakhiraj* ; that no rent was ever paid for it ; that Prosonno Kumar Shamant was merely a *benamidar* for the plaintiff ; and that the suit is barred by limitation.

"The learned Munsif in the Court below is of opinion that the Revenue Officer appointed to prepare a record of rights had no power to determine the question whether the land was *mal* or *lakhiraj* ; and that his finding is not at any rate conclusive on the point. He has accordingly re-opened and tried the question whether the land is *mal* or *lakhiraj*, and being of opinion that it is the defendant's valid *lakhiraj* land he has dismissed the plaintiff's suit.

"The plaintiff has appealed. The points for determination in this appeal are :—

1894

KARMI KHAN v. BROJO NATH DAS.

"1. Is the suit barred by limitation?

"2. Is the land *mal* or *lakhiraj*, and is it liable to be assessed with rent?

"3. What may be the fair rent payable for it?

"The question whether the land is *mal* or *lakhiraj* land was raised before the officer deputed to prepare a record of rights. He tried that question and found that it was *mal* land forming the slope of an embankment. But as there was no evidence to show that the defendant ever paid rent for it, he chose to enter it as land held by the defendant as *lakhiraj*. In appeal the Special Judge was of opinion that it should be shown as *mal* land unassessed with any rent. The question whether the land is *mal* or *lakhiraj* has therefore been finally set at rest, and the first Court had no jurisdiction to re-open that question [see *Gokhul Sahu* v. *Jodu Nundun Roy* (1)]. The defendant is admittedly the holder of some *lakhiraj* lands. The land to which the present suit relates is not his *lakhiraj* land, but he seems to have encroached upon it and held it without payment of any rent for a number of years. However this may be, the decision of the Special Judge on the point is final and operates as *res judicata* in the present suit. The land is found to be *mal* land, and it is liable to be assessed with rent.

"The estate was sold for arrears of Government revenue and purchased by Prosonno Kumar Shamant. The plaintiff, who was one of the proprietors before the revenue sale, has repurchased it from Prosonno Kumar Shamant. It is contended that Prosonno Kumar was merely a *benamidar* for the plaintiff; but of this there is no sufficient evidence. It was indeed held in a suit by Bishamvar Jana and others against Prosonno Kumar Shamant and others, to set aside the revenue sale, that Prosonno Kumar was a *benamidar* for Brojo Nath Das; but that suit was dismissed on other grounds, and therefore the finding in it that Prosonno Kumar was merely a *benamidar* for Brojo Nath Das is not conclusive evidence on the point. The plaintiff has purchased the *mehal* from the purchaser at a sale for arrears of revenue, and this suit, brought within twelve years from the revenue sale is not barred by limitation.

"The Revenue Officer who prepared a record of rights found the rate of rent payable for this kind of land to be Rs. 5 *per bigha*. The defendant does not contest the rate of rent claimed. At the rate of Rs. 5 *per bigha* the rent payable for 16 *khatas* 5 *chattaks* of land is Rs. 4-1-8 a year, exclusive of cesses. The rent assessed on the land is Rs. 4-1-8 a year. I see no reason why one-half of the fair rent should be assessed on the land. The defendant may have held it for a number of years without paying any rent for it. But it is in evidence that before the revenue sale he was for about twenty years the *darputnidar* and *ijaradar* of the *mehal*, and the land is not invalid *lakhiraj* resumed. It forms the part of the slope of an embankment, and there is reason to think he encroached upon it and held it without

(1) I. L. R., 17 Calc., 721.

payment of rent on the false pretence that it was a part and parcel of his *lakhiraj*. The full rent should be assessed on it.

"The appeal is allowed, the decision of the first Court reversed, and the plaintiff's suit is decreed with costs in both the Courts."

From this decision the defendant appealed on the grounds that the Special Judge had no jurisdiction to try the question whether the land was *mal* or *lakhiraj*, and his decision on that question was consequently not *res judicata*, as held by the lower Appellate Court; that as the defendant claimed to hold the land as *lakhiraj* under *sanads* granted to his predecessors before the Permanent Settlement, the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1) was not applicable; that as the Special Judge found that the defendant never paid rent in respect of the disputed land, the finding substantially amounted to finding that the land was *lakhiraj*; that the finding that the tenure was *mal* on the ground that it is the slope of an embankment was merely conjectural and unsustainable in law, and that there was no evidence to show that the defendant ever paid rent for it, or that it was the *mal* land of the plaintiff; that the lower Appellate Court was in error in throwing upon the defendant the *onus* of showing the land to be *lakhiraj*; that the finding that the defendant had encroached on the plaintiff's *mal* land was one not based on any evidence; that Prosonno Kumar was merely a *benamidar* for the plaintiff, and as the plaintiff himself was the defaulting proprietor, the lower Appellate Court ought to have held that he had not by his purchase acquired the rights of the auction-purchaser, and that his suit was therefore barred by limitation.

Babu *Lal Mohan Das*, and Moulvie *Mahomed Habibullah* for the appellant.

Babu *Srinath Das*, Babu *Tarak Nath Palit*, and Babu *Bidhu Bhusan Ganguli* for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

This was a suit for assessment of rent. The facts which led up to it are thus clearly stated in the judgment of the Subordinate Judge: "The plaintiff-appellant was one of the proprietors of

(1) I. L. R., 17 Calc., 721.

1894

KARMI KHAN v. BROJO NATH DAS.

the estate in which the land sought to be assessed to rent is situated. The estate was in 1885 sold for arrears of Government revenue and purchased by one Prosonno Kumar Shamant and the plaintiff repurchased it from Prosonno Kumar Shamant in 1886. He applied under Chapter X of the Bengal Tenancy Act for the measurement of the *mehal* and the preparation of a record of rights, and a Revenue Officer was deputed to make the measurement and prepare a record of rights. The land to which the suit relates was found by the Revenue Officer to form the slope of an old embankment and as such to be *mal* land. But as no rent, it was found, was ever paid for it, it was entered as *mal* land held by the defendant as *lakhiraj* under colour of certain *sanads*. The plaintiff appealed to the Special Judge, who held that the land being found to be *mal* land should be shewn as *mal* land unassessed with any rent. The land being found to be *mal* land, the plaintiff has brought the present suit to have it assessed with rent."

The defence to this action is that the land is *lakhiraj*, and that the claim is barred by the law of limitation.

The Court of first instance dismissed the suit, being of opinion that the defendant is entitled to hold the land as valid *lakhiraj*.

On appeal, the Subordinate Judge is of opinion that the judgment of the Special Judge in the proceeding under Chapter X of the Bengal Tenancy Act operates by way of *res judicata*, as regards the question whether the land is *mal* or *lakhiraj*; and in support of this view he quotes a decision of this Court, *Gokhul Sahu* v. *Jodu Nundun Roy* (1). The Subordinate Judge has further expressed an opinion to the effect that the defendant, who is the holder of other *lakhiraj* lands in the village, encroached upon the land, and held it without payment of any rent for a number of years; and upon the question of limitation, he has held that the suit having been brought within 12 years from the date of the revenue sale is within time; and then addressing himself to the question of assessment of rent, he has found that the defendant is liable to pay at the rate of Rs. 5 *per bigha*.

The question whether a Revenue Officer, acting under Chap.

(1) I. L. R., 17 Calc., 721.

X of the Bengal Tenancy Act, has authority to determine the question as to the validity of an alleged *lakhiraj* title has been fully considered in a recent Full Bench case of this Court [*The Secretary of State for India* v. *Nitye Singh* (1)] ; and it has been held that, in preparing a record of rights under section 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands, and to declare them liable to settlement of rent. No doubt, as explained in some of the judgments delivered in that case, the Revenue Officer, in preparing a record of rights, has to determine, when such a question is raised, whether a person holding land within the area under inquiry is a tenant or not within the meaning of section 3, clause (3) of the Act; but that is a very different thing from determining whether the land is valid *lakhiraj* or not. In the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (2) quoted by the Subordinate Judge, the defendant claimed under a *sanad* granted by a predecessor of the then zemindar, and of a date subsequent to the Decennial Settlement ; and he was therefore regarded as a tenant within the meaning of the Bengal Tenancy Act. And this Court therefore held that the Revenue Officer had jurisdiction to enter the particulars of the land in his record of rights. But that is not the case here. The defendant in this case sets up a *sanad* from a person, who is apparently not a predecessor of the plaintiff, and it is of a date anterior to the Decennial Settlement, and he could not therefore be rightly regarded as a tenant within the meaning of the Tenancy Act, unless it be that at some time or other he or his predecessor has either attorned to the zemindar or paid him rent. The Revenue Officer was of opinion that no rent had ever been paid for the land ; he did not find that the defendant was a tenant of the land ; but for certain reasons held that the land was *mal* and not *lakhiraj*, a determination which he was not competent to make.

In this view of the matter, the judgment of the Special Judge cannot operate by way of *res judicata* in the present case.

Then upon the question of limitation that has been raised in this

(1) I. L. R., 21 Calc., 38. (2) I. L. R., 17 Calc., 721.

1894

KARMI KHAN v. BROJO NATH DAS.

case, the Court below is of opinion, as already mentioned, that the defendant has encroached upon the land and held it as part of his other *lakhiraj* lands without any payment of rent for a number of years. He does not, however, find what may be the exact period for which he (the defendant) has thus held the lands; but he is of opinion that the suit having been brought within 12 years from the date of the revenue sale is not barred by limitation.

The plaintiff, as found by the Subordinate Judge, was one of the proprietors of the estate, and has since the revenue sale repurchased it from the auction-purchaser.

Section 53 of the Revenue Sale Law (Act XI of 1859) runs thus: "Excepting shares in estates under *butwarra* who may have saved their shares from sale under sections 32 and 84, Regulation XIX of 1814, and shares with whom the Collector under sections 10 and 11 of this Act has opened separate accounts, any recorded or unrecorded proprietor or co-partner, who may purchase the estate of which he is proprietor or co-partner, or who by repurchase or otherwise may recover possession of the said estate, after it has been sold for arrears under this Act, and likewise any purchaser of an estate sold for arrears or demands other than those accruing upon itself, shall by such purchase acquire the estate subject to all its incumbrances existing at the time of sale, and shall not acquire any rights in respect to under-tenants or ryots which were not possessed by the previous proprietor at the time of the sale of the said estate."

The plaintiff, having recovered the estate by repurchase, has acquired it "subject to all its incumbrances *existing at the time* of sale;" and could not therefore be regarded as a person who has acquired the estate "free from all incumbrances which may have been imposed upon it after the time of settlement," as provided by section 37 of the Act.

If the plaintiff were entitled to avoid the incumbrances existing at the time of sale, and if his right to resume or assess the land first accrued to him on the date of the revenue sale, then no doubt, as held by the Subordinate Judge, he would be entitled, under Articles 121 and 130 of the Second Schedule of the Limitation Act, to bring his suit within 12 years of the revenue sale.

But under section 53 of the sale law, he is bound by the incumbrances existing at the time of sale; and if the right, which the defendant claims, as having been created in him by adverse possession against the old proprietors (the plaintiff inclusive) and by reason of their laches, is an incumbrance within the meaning of section 53 of the Revenue Sale Law, it is obvious that the plaintiff would be barred by limitation (whether this suit be regarded as one for avoiding an incumbrance, or for resumption or assessment of the land), if the defendant has had adverse possession for more than 12 years.

The question, what may be the character of the right thus created in a person by adverse possession against the sold-out proprietor, was on several occasions considered by this Court, as also by the late Sudder Court; and it has always been regarded as an *incumbrance*, which a purchaser at a revenue sale, acquiring rights under section 37 of Act XI of 1859 (or under the older sale laws repealed by that Act), is entitled to set aside. *Thakoordass Roy Chowdhry* v. *Nubeen Kishen Ghose* (1), *Goluckmonee Dossee* v. *Huro Chunder Ghose* (2), *Narain Chunder* v. *Tayler* (3), *Khantomoni Dasi* v. *Bijoy Chand Mahatab* (4), [as regards a patni sale], *Lukhmeer Khan* v. *Collector of Rajshaye* (5), and *Ramsunker Roy* v. *Bejoy Govind Bural* (6).

We take it therefore that the right claimed by the defendant by adverse possession is an "incumbrance" within the meaning of the Revenue Sale Law.

The defendant might have, as the Subordinate Judge finds, encroached upon the land, and included it within his other *lakhiraj* lands, but this would be no less an adverse possession on his part; for the other lands being not the *mal* land of the zemindar, he could not be acquiring this land for the benefit of the zemindar, but for his own benefit.

If, however, it is shewn that the defendant or his predecessors in title at some time or other after the Permanent Settlement either attorned to the zemindar, or paid him rent, the relation of

(1) 15 W. R., 552.
(2) 8 W. R., 62.
(3) I. L. R., 4 Calc., 103.
(4) I. L. R., 19 Calc., 787.
(5) S. D. A., 1851, p. 116.
(6) S. D. A., 1852, p. 824.

1894

KARMI KHAN v. BROJO NATH DAS.

landlord and tenant would be established, and it might then be well presumed that that relation has continued to exist, unless it be proved that the defendant had, more than 12 years antecedent to suit, set up to the knowledge of the zomindar an adverse right to hold the land as *lakhiraj*, and has been holding it as such during that period. If, again, it is shewn that the land had been held as part of the *mal* estate within the last 12 years, before it was taken possession of by the defendant, the suit would be equally within time.

We have already said that the judgment of the Revenue Court does not operate as *res judicata*. The Subordinate Judge has not found, as he ought to have found in this case, whether the land is *mal* or *lakhiraj*, and his decision upon the question of limitation is wrong or otherwise defective.

We therefore think it necessary to remand the case to the lower Appellate Court for retrial with reference to the remarks we have made. Costs to abide the result.

Appeal allowed and case remanded.

J. V. W.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894
May 17.

SATCOWRI GHOSH MONDAL (PLAINTIFF) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS.)*

Fishery, Right of—Right of fishery in tidal navigable river—Right of Government in navigable rivers and fishery therein—Grant by Government of right to private individuals.

As regards this side of India the bed of a tidal navigable river is vested in the Crown; and the right of fishery in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property subject to the right of navigation and such other rights as the public has in such rivers—*Doe d. Seebkristo* v. *East India Co.* (1); *Gureeb Hossein Chowdhree* v. *Lamb* (2); *Bagram* v. *Collector of Bhulloa* (3); *Chunder Juleah* v. *Ram Churn*

* Appeal from Appellate Decree No. 95 of 1893 against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of Burdwan, dated the 9th of December 1892, reversing the decree of Babu Jadupati Banerjee, Munsif of Kulna, dated 28th of March 1892.

(1) 6 Moo. I. A., 267. (2) S. D. A., 1859, p. 1357.

(3) Gap. No. W. R. (1864), p. 243.