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rateably among all such persons." It cannot be supposed that the attaching-creditor is to be at liberty to take an assignment of the mortgage, and then sell, subject to the mortgage, retaining the mortgage for his own benefit. But if he is to sell the property discharged from the mortgage, how is he to get credit for what he has paid to discharge it? It would, I think, be a strained construction of the words "costs of realization" occurring in the context in which they do, to make them include a mortgage debt paid off.

I am of opinion that an attaching-creditor has not, as such, any right to redeem a mortgage.

This suit will, therefore, be dismissed with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiff: Mr. *Goodall.*

Attorney for the defendant: Baboo *B. M. Doss.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

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AKBUR ALI (PLAINTIFF) *v.* BHYEA LAL JHA AND OTHERS (DEFENDANTS).*

Onus of Proof—Suit to have certain Lands declared Mâl—Documents once received without objection by lower Court.

Where it is admitted that the defendants hold certain lands within the plaintiff's zemindari, some at least of which are rent-paying; the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some *primâ facie* evidence of the fact, before they can call upon the plaintiff, the zemindar, to prove that the whole or any part of the lands are mâl.

* Appeal from Appellate Decree, No. 1787 of 1879, against the decree of F. Cowley, Esq., Judge of Purneah, dated the 28th May 1879, affirming the decree of Baboo Prosunno Coomar Bose, Munsif of Arrarea, dated the 12th February 1879.

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An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection.

THE plaintiff, one Akbur Ali, stated that one Bechan Biswas had formerly held a rent-paying tenure within his patni; and that, on the death of Bechan, the land was held by his widow Darshunia and by his brother Lokhun Biswas (the defendants in the suit); that one Bhyea Lal Jha obtained a decree against Darshunia and Lokhun, and in collusion with them, in execution of that decree, caused thirty-five bighas of Bechan's tenure, containing four distinct plots, to be sold on the 16th August 1877 as a rent-free holding, and that at such sale Bhyea Lal Jha himself became the purchaser.

On the 7th August 1878, the plaintiff brought the present suit, asking that the lands in question might be declared to be his mâl lands, and that the sale of August 1877 might be reversed, and for the ejectment of the defendants from these lands. Bhyea Lal Jha contended, that plots 1 and 2 and 4 in the lands in question were milik, and not mâl lands, but that as neither the plaintiff nor his superior landlord had claimed the land for more than twelve years before the institution of the suit, the claim was barred; and that lot No. 3 was mâl, but that he had relinquished it to the plaintiff. The other defendant did not enter appearance.

The Munsif held, that the onus of proving the lands to be mâl was on the plaintiff, and that he had failed to establish that fact; and further found that, on the evidence adduced by the defendants, plots Nos. 1, 2, and 4 were rent-free lands, and that the plaintiff had failed to prove that he had realized rent for these lands within twelve years preceding the suit; and that, therefore, the suit was barred.

The plaintiff appealed to the District Judge, who held that the onus of proof lay on the plaintiff, and that he having failed to adduce proof that the lands included in plots 1, 2, and 4 were mâl, he dismissed the suit; that as regarded plot No. 3, it was admitted that it was mâl, but as that plot appeared to be a portion of the rent-paying tenure of Bechan, and as the holders

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had a right of occupancy, no decree for possession could be made as to that plot. In the course of the hearing, he refused to take as evidence certain copies of chakbunds, which had been admitted without objection as evidence in the lower Court, in the absence of the original documents and of proof of the circumstances under which secondary evidence could be given.

The plaintiff appealed to the High Court.

The defendants filed cross-objections as to the question of the admission of the documents last mentioned.

Moonshee *Mahomed Yusuff* for the appellant.

Baboo *Taruck Nath Sen* for the respondents.

The following judgments were delivered :—

GARTH, C. J.—I think that this case ought to go back to the Court below for retrial.

It seems to me that the lower Appellate Court has thrown the burden of proof upon the wrong party.

The suit is brought to have it declared that four plots of land, which lie within the zemindari of which the plaintiff is the patnidar, are the mâl lands of the zemindari; and the occasion which gave rise to the suit is this :

The defendants Nos. 2 and 3 were the tenants to the plaintiff of a large portion of land within the zemindari; and a judgment was obtained against them by the defendant No. 1, under which certain plots of land lying within the ambit of the zemindari, and as far as we know, within the ambit of the lands held by the defendants Nos. 2 and 3 as tenants to the plaintiff, were sold as being the rent-free lands of the defendants Nos 2 and 3; and they were bought by the defendant No. 1. The plaintiff, therefore, brings this suit to have those plots declared to be his mâl lands.

Assuming that these plots were within the ambit of the land which was held by the defendants Nos. 2 and 3 as the plaintiff's tenants, I think that the rule that has been applied to enhancement suits would also apply here,—namely, that it being admitted that the defendants hold lands within the zemindari, some of which at least are rent-paying, if they want to show that any

of those lands are rent-free, they ought to give some *primâ facie* evidence of it, before they can call upon the zemindar to prove that the whole or any part of the lands are mâl (see Full Bench case of *Gooroo Persad Roy* v. *Juggobundoo Mozoomdar* (1), *Nehal Chunder Mistree* v. *Huree Pershad Mundul* (2), and *Beebee Ashrufoonissa* v. *Umung Mohun Deb Roy* (3). The plots in dispute are numbered 1, 2, 3, and 4; and with regard to plot No. 3, it is now admitted that it belongs to the plaintiff.

The question remains with regard to plots Nos. 1, 2, and 4. Those plots were shown to the satisfaction of the first Court to be rent-free; and accordingly that Court, as to those plots, dismissed the suit. The lower Appellate Court, on the other hand, appears to have thrown the burden of proving that those plots are mâl upon the plaintiff. The Judge, no doubt, goes into the question, whether the defendant has given any proof that the plots in question are rent-free; but the evidence upon that head is, to say the least of it, unsatisfactory, and it seems very doubtful whether he really intended to find that the defendant made out a *primâ facie* case that they were so. In the latter portion of his judgment he certainly says, that "the burden of proof lies entirely upon the plaintiff;" and if he has acted upon that principle, it appears to me that he has not tried the case.

If the fact is, as I understand it to be, that the plots in question adjoin, or are contained within the ambit of, the land held by the defendants Nos. 2 and 3 as tenants, then the defendant No. 1 must first satisfy the Court by *primâ facie* proof that those plots, or some or one of them is rent-free. If he does so, then the onus of proof will be thrown upon the plaintiff to prove such plot or plots to be mâl.

Then there have been cross-objections filed by the defendant with reference to certain documents, which appear to me to call for some notice from the Court.

The defendants filed copies of chakbunds dated respectively the 5th of Kartick, the 11th of Zikaud, and the 29th of Ramzan 1168, and also the copy of a sanad dated 4th Bysack 1168. As far as I can see, the first Court admitted copies of these documents as evidence without any objection being made by the

(1) W. R., Sp. No., 15. (2) 8 W. R., 183. (3) 5 W. R., Act X Rul., 48.

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other side; and if it did, then the lower Appellate Court had no right to reject them *as inadmissible,* because it is clear that where copies of documents are admitted and read in the Court of first instance without objection, no objection to their admissibility can afterwards be taken in a Court of Appeal.

"I observe," he says, "that in the absence of the original documents, and of proof of the circumstances under which secondary evidence could be given, these go for nothing." By this I understand him to mean, that as the originals of these documents were not produced, and as no facts were proved which would justify the Court in receiving secondary evidence of them, they ought not to have been admitted in the lower Court; and consequently the Court of Appeal is bound to reject them. Now, in this he was clearly wrong. Of course the Appeal Court has a perfect right to attach such weight to the documents as it thinks proper, or to say whether they ought to be treated as evidence as against particular parties to the suit; but it has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection. The case will go back to the Court below to be tried again with reference to the above remarks; and the costs in both Courts will abide the result.

FIELD, J.—The plaintiff in this case is the patuidar of Talook Danti Maldwar. One Bechan Biswas held a considerable jote within that patni. Bechan Biswas is dead, and has been succeeded by his widow Darshunia and his brother Lokhun. Bhyea Lal Jha, the defendant No. 1, in execution of a decree against Darshunia and Lokhun, brought to sale, and himself purchased, four plots of land, which form the subject of this suit. These plots were sold and purchased as lakhiraj lands; but the plaintiff in the present case contends that they are not lakhiraj but mâl lands: and he brings this suit to obtain a declaration "to this effect and to recover possession of the land comprised in the four plots."

As to plot No. 3, the real defendant Bhyea Lal Jha does not now contend that it is milik or lakhiraj land; and in respect of this plot the decree ought to be a simple declaration that the land comprised therein is mâl land.

With respect to plots 1, 2, and 4, the first point to be considered is, whether the District Judge has rightly started by casting the entire burden of proof upon the plaintiff. It appears to me that he has not. The person under whom Bhyea Lal Jha claims title, was admittedly a tenant of the plaintiff for a considerable portion of land, and the substantial allegation of Bhyea Lal Jha is, that a certain other portion of land within the same zemindari and in the occupation of the same tenant is not mâl but lakhiraj.

It appears to me that the Full Bench decision quoted by the District Judge is applicable to those cases only in which the zemindar sues to resume or assess land held under a lakhiraj title (alleged invalid), such land being either held by a person who is not a tenant of the plaintiff for other land, or being occupied as a separate parcel or holding, or otherwise in such a manner as to be entirely distinct from any other land held by the same person as a tenant under the plaintiff.

There are a number of decisions of this Court, which go to establish the proposition that this principle is not applicable to the case of a person who is admittedly a tenant of the zemindar, and who sets up the plea of lakhiraj in respect of a portion of the land held by him, which portion is not distinguished in the manner which I have described from the rest of the land, as to which he admits a tenancy.

Now, in this case it has been contended, that these four plots of land are so distinct from the land which constitutes the jote of Bechan Biswas that the principle of the Full Bench decision ought to apply. The pleader who has put forward this contention has, however, been unable to point out to us upon the map that these four plots constitute a separate holding of this nature, and therefore I think that the case falls within the principle to which I have adverted, and that it lay upon Bhyea Lal Jha, claiming title under Bechan Biswas, to start his case by giving some *primâ facie* evidence that these plots, Nos. 1, 2, and 4, are lakhiraj.

The District Judge must, therefore, in the first place, consider whether this *primâ facie* evidence has been given, and then proceed to consider whether the plaintiff has or has not suffi-

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ciently rebutted such *primâ facie* evidence. In considering whether the defendant has given such *primâ facie* evidence, the plot No. 2 and the plots Nos. 1 and 4 will have to be separately considered. As to plot No. 2, the District Judge was of opinion that the oral evidence without further corroboration was not sufficient to show that the land was milik or lakhiraj. As to plots Nos. 1 and 4, the Judge was of opinion that the oral evidence was corroborated by a map and khusra, which showed that these plots were, on a previous occasion, measured as rent-free lands of Bechan Biswas. It has been admitted at this hearing that as the map and khusra contain no boundaries, and as no local investigation was made by an Amin in order to identify plots 199 and 201 with plot No. 1 of the plaint, and plot No. 50 of the map and khusra with plot No. 4 of the plaint, it is impossible to say from a mere inspection of the map and khusra, and a comparison of them with the plaint, that the lands are identical. It follows that, in respect of plots 1 and 4, the corroboration relied upon by the District Judge fails; and he must, therefore, see whether in respect of those plots the rest of the evidence to be found in the case satisfies him that the defendant has established a *primâ facie* case of lakhiraj.

With reference to the copy of the chakbund dated the 5th Kartick 1168, and of another dated the 11th Zikand 1168, and of a third dated 29th Ramzam 1168, and also the copy of a sanad to one mehal dated 9th Bysack 1168, we think it right to say that the parties ought to have an opportunity of producing any such additional evidence as may have the effect of supplying any link of proof which may be desirable from those documents. There is nothing on the face of those papers to show exactly under what circumstances the chakbunds were made, and we abstain from pronouncing any opinion as to the weight which ought to be attached to them when they are connected by such additional evidence with the land in question. The plaintiff will also be at liberty to adduce fresh evidence to rebut any evidence which may be produced by the defendant as to these chakbunds and sanads.

Appeal allowed, and case remanded.