APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Bell.

BRINDABAN BEHARI LAL

v.

BHAWANI SAHAI.*

1908
May 22.

Grant—Regulation XIX of 1793—Act XI of 1859—Sale—Encumbrance—Liability to pay rent.

Some years before the acquisition of the Dewani by the East India Company, the Zemindar made a rent-free grant of village P. to one D. Since then D. and after him his heirs continued in possession of the village, until the institution of this suit. After the acquisition, the Company made an assessment of the lands in the Bengal Province, and village P. was then and again at the time of the Permanent Settlement, assessed at *sicca* Rs. 80, which assessment was accepted by the zemindar, and he and his heirs continued to pay the assessed amount.

In the year 1900 the zemindar made default in payment of the revenue for the September *kist*, and the village was sold under the provisions of Act XI of 1859.

The purchaser instituted a suit for recovery of possession or for assessment of rent and mesne profits.

Held, that the right created under the grant was an encumbrance, which existed from before the time of the Permanent Settlement; but the plaintiff could not be affected by the laches of the defaulter or his predecessors; he was entitled to hold the estate in the same condition as it was at the time of the Permanent Settlement, when the revenue was assessed at *Sicca* Rs. 80 and to recover that amount with cesses from the defendants.

Held further, that s. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid before the Permanent Settlement; the rent is not enhancible according to the law now in force, as the land must be considered to be comprised in a tenure existing from before the time of the Permanent Settlement.

Hurryhur Mookhopadhya v. *Madhub Chunder Baboo* (1) referred to.

APPEAL by the plaintiff.

About 17 years previous to the grant of the Dewani of Bengal and Bihar to the East India Company in August 1765, one Karta Narain Singh, a zemindar under the Mahomedan

* Appeal from Original Decree No. 27 of 1906 against the decree of Sarda Pershad Basu, Subordinate Judge of Chapra, dated the 20th September 1905.

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Government, made a rent-free grant of the village Paterha in *mahal* Khaja Sarai in the District of Saran to one Dhansiram. Since then and up to the present time Dhansiram and his successors in title continued to be in possession of the village without paying any rent to the owner or any revenue to the Government. After the acquisition of the Dewani by the East India Company, attempts were made to re-assess all the lands in the Bengal Provinces, and in 1773 a settlement for 30 years of the villages, including the village Paterha held by Karta Narain Singh, was made, and the said village was assessed at *sicca* Rupees 80. The said assessment was accepted by the zemindar, who was an heir of Karta Narain, the Collector recognizing him as being in possession, though as a matter of fact the heirs of Dhansiram, the grantee, were in possession; the zemindar took upon himself the liability to pay the revenue assessed on the village Paterha and continued to pay the same. At the Decennial Settlement of 1790, the amount of assessment was not varied; the revenue authorities accepted *sicca* Rupees 80 as the revenue payable in respect of this village by the zemindar, but they did not come to know that it was in the possession of the predecessors of the present defendants under a rent free grant. The Permanent Settlement in 1793 was made with the zemindar, who succeeded Karta Narain. He, as proprietor, instituted a suit for recovery of possession of Paterha against the predecessors-in-title of the defendants; the said suit was dismissed by the first Court on the 26th May 1796, and the decree dismissing the suit was on the 9th of July 1798 confirmed on appeal. After Regulation II of 1819 came into operation, an attempt was made to resume Paterha, as if it was held under a *lakheraj* grant; but the resumption proceedings failed and the revenue authorities declared on the 16th of February 1838 that Paterha was incapable of resumption. In the year 1843, another attempt was made by the proprietor to recover from the then holders of Paterha, the Government revenue payable in respect thereof, but the suit was dismissed on the 29th of November 1843. Since then and up to the year 1900 the predecessor-in-title of the defendants continued to be in possession without paying any rent or revenue and without being molested in any way.

The proprietors of the estate fell into arrears of the September *kist* of 1900. The estate was sold under Act XI of 1859 on the 7th January 1901, and the sale was confirmed on the 2nd of May 1902. The purchaser, who is the present plaintiff, took possession in the usual way through the Collectorate, but failed to obtain actual possession of Paterha. The present suit, which was based on the right conferred by s. 37 of Act XI of 1859, was instituted on the 14th April 1904 either for recovery of possession or for assessment of rent of Paterha and for mesne profits or rent for the period antecedent to the institution of the suit.

The Subordinate Judge dismissed the plaintiff's suit, holding that the village held by the defendants as rent-free from before the time of the Permanent Settlement was a valid *lakhiraj* and that the Government or a purchaser at a revenue sale was conclusively barred from bringing any suit for resumption.

The plaintiff appealed.

Dr. Rash Behari Ghose, *Babu Umakali Mukherji* and *Babu Makhan Lal* for the appellant.

The Advocate-General (*The Hon'ble Mr. S. P. Sinha*), *Moulvi Mahomed Yusuf* and *Babu Duarka Nath Mitter* for the respondent.

MITRA AND BELL JJ. There cannot be much doubt as to the facts of this case. The difficulty lies in determining the relation between the parties and their respective rights and liabilities.

It appears that some years before the grant of the Dewani to the East India Company, *i.e.*, 12th August 1765, Karta Narain who held certain villages under the Mahomedan Government as zamindar made a grant of the village Paterha, which is the subject-matter of dispute in the present case, to one Dhansiram. The grant was rent-free, and Dhansiram and his heirs continued to be in possession of the village as rent-free from the time of the grant to the date of the Dewani and thereafter until the present day. The precise nature of the grant cannot now be ascertained, as there is an absence from the record of the grant itself. It was not, however, an Imperial grant, which would be covered by Regulation XXXVII of 1793. It was a grant by a zemindar,

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which would be covered by Regulation XIX of 1793, and, if the grantee was in possession under a rent-free title, section 2 of Regulation XIX of 1793 would, as we shall presently show, exonerate the land from liability to pay any share of the Government revenue.

After the grant of the Dewani to the East India Company, attempts were made to reassess all the lands in the Bengal Province, and the assessment that we come across in the Behar Districts is an assessment made under Nawab Hoosiar Jung.

The Kanungo's register of 1773, which was prepared under the superintendence of Nawab Hoosiar Jung, shows that a settlement was made for 30 years of the villages held at one time by Karta Narain, and which included the village Paterha. This village along with another village Khaja Serai, was assessed at *sicca* Rs. 160, *i.e.*, Rs. 80 *sicca* for each of the villages. The assessment was accepted by the zemindar, who was recognised as being in possession of these villages by the Collector, but, as a matter of fact, possession of Paterha was with the heirs of Dhansiram. The grantee from Karta Narain or his legal representatives might have asked the revenue authorities to either exonerate Paterha from liability to assessment or to assess it separately. But they were satisfied with holding the village rent-free under the zemindar, the entire assessed amount of these villages falling on the zemindary. For reasons, which are not quite plain on the record, the zemindar of Khaja Serai took upon himself the liability to pay the revenue assessed on Paterha.

This state of things continued until the Decennial Settlement of 1790. According to the settlement-register of that year, the amounts assessed on the two villages were not varied. The revenue authorities accepted Rs. 80 *sicca* as the revenue payable in respect of each of these two villages. Even then it was not given out that Paterha was a village held by the predecessors of the present defendants as revenue-free or rent-free. Shortly after the Permanent Settlement—and the Permanent Settlement was made with the zemindar, who succeeded Karta Narain—the zemindar instituted a suit against Parmeswar Singh, who was then in possession of Paterha. The record of that suit is not before us, and we are informed that, though an attempt was

made to obtain copies of the record, they could not be had. All that we know is that a suit for possession was instituted by the proprietor of the estate against the holder of Paterha. That suit was dismissed by the first Court on the 26th May 1796, and the decree was ultimately affirmed on appeal on the 9th July 1798. Since then and for some years, Paterha was dealt with as a *lakheraj* village and the register of 1202 F. S. describes it as *lakheraj*. Copies of other papers have been produced from the Collectorate showing the same thing, namely, that Paterha was *lakheraj*. After Regulation II of 1819 came into force, an attempt was made to resume Paterha, as if it was held under an invalid *lakheraj* grant. The revenue officers, however, were evidently mistaken in trying to resume Paterha, because there could be no resumption of land, which had already been assessed with Government revenue and settled with a proprietor under the Permanent Settlement. That was the case with Paterha. Whatever the relation between the proprietor of the estate and the holder of Paterha might be, the Government having assessed Paterha with a revenue of *sicca* Rs. 80 could not call it either towfir or excess land or revenue free land as contemplated by section 36, of Regulation VIII of 1793 or by Regulation II of 1819. The resumption proceedings failed, and the revenue officers declared Paterha to be incapable of resumption on the 16th February 1838. The papers of the proceedings under Regulation II of 1819 and III of 1828 show that the then holders of Paterha claimed to have possession of this village from a period of 17 years before the grant of the Dewani and they disclosed the names of the successive holders up to the time of the commencement of the resumption proceedings.

It is also quite clear that the proprietor could not realize any rent from Paterha, having lost the suit, which was finally disposed of on the 9th July 1798. In or about the year 1843, a further attempt was made by the proprietor of the estate, which now bears on the Collectorate record No. 661, to assess Paterha with rent or the proportionate amounts of revenue payable jointly with respect to the two villages. Such a suit, however, was evidently not maintainable on the ground of limitation as against the then holders of estate No. 661. The suit

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was dismissed on the 29th November 1843. Since then and for nearly 60 years, the persons holding Paterha continued to be in possession without payment of any rent or revenue. They were not molested in their possession in any way.

The proprietors of the estate fell into arrears of the September *kist* of 1900. The estate was sold under Act XI of 1859, on the 7th January 1901, and the sale was confirmed on the 2nd May 1902. The purchaser, who is the present plaintiff, took possession in the usual way through the Collectorate, but failed to obtain actual possession of Paterha. The present suit was instituted on the 14th April 1904 either for recovery of possession or for assessment of rent of Paterha and for mesne profits or rent for the period antecedent to the institution of the suit.

The claim was based on the right conferred by section 37 of Act XI of 1859. The plaintiff contended in the lower Court, and that contention has been repeated here by his learned counsel, that he is entitled to possession on the ground that the defendants were holding as encumbrancers, the encumbrance having been created subsequent to the Permanent Settlement. The defendants on the other hand contended that the encumbrance, if any, which was created on Paterha had been so created before the Permanent Settlement and section 37 did not give the plaintiff a right to obtain possession. The lower Court dismissed the suit holding that Paterha had been held as rent-free from before the Permanent Settlement and it could not be resumed.

The present appeal before us is on behalf of the plaintiff. The question raised is one of some difficulty, the difficulty having arisen from the fact that the state of things, which we find in the present case, was not contemplated by the Regulation Code of 1793 or the later enactments relating to assessment of revenue-free lands or resumption of rent-free tenures. That the encumbrance, if any, was created before the Permanent Settlement, is quite clear. Karta Narain granted Paterha as a rent-free village. If it was a rent-free village and was accepted as such by the revenue authorities or was not assessed by the revenue authorities, section 2 of Regulation XIX of 1793 would have protected it from resumption. The Government could not have resumed it under Regulation II of 1819 under the procedure laid

down in Regulation III of 1828. But it was assessed. Section 2 of the Regulation of 1793 expressly provides that grants of land by zemindars or other competent authorities made before the grant of the Dewani are not resumable, if the lands were held *bonâ fide* by the grantees, *and no revenue was assessed on them.* In this case, the revenue was assessed before the Permanent Settlement and the Government always received the assessed revenue from the proprietor of estate No. 661 after the Permanent Settlement. The case set up on behalf of the defendants that they are entitled to hold the village as revenue-free or rent-free must, therefore, fail.

Our attention has been drawn to several cases, notably the case of *Hurryhur Mokopadhyaya* v. *Madhab Chandra Baboo*(1) as authority for the proposition that the land could not at this distance of time be resumed. But in that case the Judicial Committee laid down that the burden of proving that the land was *mal*, by which they meant that either no revenue had been paid at any time since the Permanent Settlement or that the land was not assessed, was on the plaintiff, the person who attempted to resume. It is apparent in this case that, at the Decennial or the Permanent Settlement, Paterha was not considered to be a rent-free village, but it was assessed with revenue We feel, therefore, no difficulty in coming to the conclusion that the lower Court was wrong in holding that Paterha was a rent-free village and could not be assessed.

What then was the relation between the parties, the present proprietor of estate No. 661 and the present defendants? The plaintiff is a purchaser free of encumbrances. He cannot be affected by the laches of the defaulter or his predecessors. He is entitled to hold all the lands of the estate in the same condition as they were at the time of the Permanent Settlement. At the time of the Permanent Settlement, Paterha was asssessed with a revenue of Rs. 80, which according to the value of the rupee at the present day would be Rs. 85-5-5. We see no reason why the plaintiff should not have the same position as the Government would have, if the Government had purchased the Mahal at a sale for arreare of Government revenue. The Government would have been entitled to say;—"This land was assessed and the assessed revenue

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was Rs. 85-5-5, and the Government is entitled to realise this sum from Paterha." The position of the plaintiff is the same. The incumbrance, which had been created by the laches of the defaulters or the actions of their predecessors, was not binding on the present plaintiff. He was not bound to recognize a rent-free title, but he was entitled to say "pay me what you would have to pay at the time of the Permanent Settlement, that is the sum of *sicca* Rs. 80." Section 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid from before the Permanent Settlement, notwithstanding that no rent was levied from a long series of years.

It might be that Karta Narain allowed the defendants to hold the land rent-free, that is to say, did not realize any rent from Paterha. It might also be that, since 1793, the holders of the estate never realized any rent. They might be barred by the rules of limitation. The ground of estoppel might operate against them or they might not choose to realize any rent. That is no reason why the purchaser should not be allowed to realize the assessed revenue as rent. We are, therefore, of opinion that the defendants in the present case are bound to pay to the plaintiff the sum of Rs. 85-5-5 per annum with cesses as laid down in the Bengal Cess Act. If there are any other charges, which are leviable with respect to such tenures, the defendants are bound to pay the same to the plaintiff.

We, accordingly, modify the decree of the lower Court and declare that the plaintiff is entitled to recover from the defendants the sum of Rs. 85-5-5 per annum with cesses according to the Cess Act in four quarterly instalments and he is also entitled to recover the arrears for three years preceding the institution of the suit and for the period during the pendency of the suit with interest at six per cent., the annual amount being assessed as above payable in quarterly instalments. We may add that this rent of Rs. 85-5-5 arrears is not enhanceable according to the law now in force, as the lands must be considered to be comprised in a tenure existing from before the Permanent Settlement.

We direct that each party do pay his own costs in both Courts.