

(1894) 05 CAL CK 0011
In the Calcutta High Court

Brojo Nath Das

APPELLANT

Vs

Karmi Khan

RESPONDENT

Date of Decision : 17-05-1894

Acts Referred:

Bengal Land Revenue Sales Act, 1859 — Section 53
Bengal Tenancy Act, 1885 — Section 102

Citation : (1895) ILR (Cal) 244

Hon'ble Judges : Gordon, J; Ghose, J

Bench : Division Bench

Judgement

Ghose and Gordon, JJ.—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 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 over 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."

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

3. The Court of First Instance dismissed the suit, being of opinion that the defendant is entitled to hold the land as valid lakhiraj.

4. 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* I.L.R.Cal. 721. 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...

5. The question whether a Revenue Officer, acting under Chap. IX 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* I.L.R Cal. 38] and it has been held that, in preparing a record of rights u/s 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 53, 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* I.L.R Cal. 721 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.

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

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

8. 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.

9. 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."

10. 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.

11. 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 u/s 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.

12. 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 u/s 37 of Act XI of 1859 (or under the older sale laws repealed by that Act), is entitled to set aside. *Thakoordass Boy Chowdhry v. Nupeen Kishen Ghose* 15 W.R. 552 *Goluckmonee Dossee v. Euro Chunder Ghose* 8 W.R. 62 *Narain Chunder v. Tayler* ILR Cal. 103 *Khantomoni Dasi v. Bijoy Chand Mahatab* I.L.R.Cal. 787 [as regards a patni sale], *Lukhmeer Khan v. Collector of Rajshaye* S.D.A. 1851 116 and *Ramsunker Roy v. Bejoy Govind Bural* S.D.A. 1852 824.

13. 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.

14. 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 zamindar, but for his own benefit.

15. 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 zamindar, or paid him rent, the relation of 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 zemindar an adverse right to hold the land as lakhiraj, and has been holding it as such during that period. If, again, it is shown 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.

16. 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.

17. We therefore think it necessary to remand the case to the Lower Appellate Court for re-trial with reference to the remarks we have made. Costs to abide the result.