

(1926) 05 PAT CK 0014

In the Patna High Court

Maharaja Chandra Mouleshwar Prasad Singh Bahadur

APPELLANT

Vs

Hem Halini Debi
 Hem Halini Debi Vs Maharaja
Chandra Mouleshwar Prasad Singh and Others

RESPONDENT

Date of Decision : 04-05-1926

Acts Referred:

Bengal Revenue Sales Act, 1859 — Section 37

Citation : 96 Ind. Cas. 575

Hon'ble Judges : Ross, J;Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—These 14 appeals arise out of suits brought by the plaintiff for declaration of title to and recovery of possession of certain lands and houses. The plaintiff is the purchaser of the entire estate bearing Touzi No. 6104 of the Monghyr Collectorate at a sale for arrears of revenue held on the 25th of March, 1913. She obtained delivery of possession on the 16th of September, 1913, and her name has been registered as proprietor of the 16-annas of the estate. The present suits are for declaration that the lands and houses in dispute are included in this Touzi No. 6104 and, therefore, by virtue of the purchase at the revenue sale she has acquired a title thereto and is entitled to possession. There was an alternative relief prayed, for fixing a fair and equitable rent.

2. It has been necessary to deal with these appeals separately as the subject-matters of the suits are different and the points raised are not exactly the same in each case.

Appeals Nos. 150 and 288 of 1924.

3. These appeals arise out of Suit No. 454 of 1920, which was Appeal No. 78 of 1922 before the District Judge. Appeal No. 150 is by the defendant and Appeal No. 288 by the plaintiff. In this suit the plaintiff claimed a tank known as Laloopokhar which was in the exclusive possession, of the defendant, the Maharaja of Gidhaur. The plaintiff claims a 4-annas share in this tank as lying

within her touzi and alleges that she is entitled to possession thereof on dispossessing the Maharaja. The defence of the Maharaja was that he had a lakhiraj, title to this tank as it was included within an area of 30 bighas of lakhiraj land purchased by him in 1882, and it was not included in the mal land of the touzi. The, Munsif dismissed the suit holding that the tank was. ijmal and that the Maharaja had a lakhiraj title thereto. The learned District Judge has found that a 2-annas share of the tank was allotted by batwara to Touzi No. 6104, and that the Maharaja had failed to prove that the 30 bighas of land purchased by him, within which this tank was situated, was lakhiraj land at the time of the Permanent Settlement. He, however, held that the plaintiff was not entitled to oust the Maharaja from possession as the tank came within the 4th Exception to Section 37 of Act XI of 1859, but was entitled to recover rent for a 2-annas share of the tank. He, however, held that the rent could not be assessed in the present suit as the remaining 14 annas proprietors were not before the Court, and he accordingly dismissed the still.

4. The Maharaja appeals against this decree, in, so far as it is against him, in Second Appeal No. 150 of 1924, and the plaintiff appeals against the decree dismissing the suit in Second Appeal No. 288 of 1924.

5. The mahal out of which Touzi No. 6101 was carved out was partitioned twice, once in 1868 and again in 1880. The Tousi No. of the original mahal was 424. In the partition of 1868 half of the tank was allotted to the estate which retained the old Touzi No. 424. In. the partition of 1880, which was a partition of the estate which retained the old Touzi No. 424, the tank was not divided, but the income derived from the tank was divided. One-fourth of the income of this tank was by this partition allotted to the Putti of Darwesh Muhammad and others, which was given Tousi No. 6104. Now, this one-fourth was of the one-half of the tank which was allotted to Tousi No. 424 by the partition of 1868. Therefore, what was allotted to the Putti of Darwesh Muhammad and others bearing Tousi No. 6101 was one fourth of one half, i.e., one-eighth of the tank. The learned District Judge, therefore, found that a 2-annas share of the tank was-allotted to Tousi No. 6104.. This finding is supported by the Batwara Khasra of 1868 (Ex. Z-7) and the 16 column register of 1880 (Ex. 12-a). It is also supported by the other batwara papers referred to by the learned District Judge. The finding of the learned Judge, therefore, that a 2-auuaa share of the tank was included in Tousi No. 6101 is, based on the evidence in the case and must be accepted as correct.

6. The question is whether the plaintiff is entitled to oust the Maharaja on a declaration that the latter had no lakhiraj interest therein. As stated above, the Maharaja claims title to this tank as included in 30 bighas of Lakhiraj land purchased by him from Sardhari Lal under a deed of sale, Ex. A, dated the 10th of August, 1882. These 30 bighas of laud were purchased by Girdhari Lal, the father of; Sardhari LaL, at a Court sale on the 2nd of October, 1852, Exhibit X(a) is the sale certificate of Girdhari LaL. It appears, however, that a suit had to be brought by Sardhari Lal for khas-possession of this 30 bighas of land and he

obtained a decree on the 9th of May, 1863, and obtained delivery of possession in execution of the decree on the 2nd of August, 1866. The parwana dakhaldehani under; which Sardhari Lal obtained possession is Ex. W and is dated the 17th of March, 1666. In the sale certificate, Ex. X(A), the property is described as 30 bighas situate in Laloor pokhar in Moitza Salempur Dhamdaha, Pergana Monghyr. There is no mention therein that the land was lakhiraj. In the parwana dakhaldehani (Ex. W) the description of the property is similar to that in the sale certificate [Ex. X (a)], but there is a further description that the land was lakhiraj. The learned Munsif held that the land must have been held to be lakhiraj in the civil suit brought by Sardhari Lal and that the description of lakhiraj in the sale certificate might have been omitted by mistake. The learned District Judge, however, observed that there is no reason to suppose that there was a mistake in the description of the property in the sale certificate. He infers that the lakhiraj title might have been created between 1852 and 1866. He, however, found that the Maharaja was actually in possession and no rent was paid by him for this 30 bighas of land, but he was of opinion that this does not establish that the land was lakhiraj since the time of the Permanent Settlement as required by Section 37 of Act XI of 1859.

7. The point taken by the learned Counsel for the Maharaja, appellant, is that the learned District Judge has misplaced the onus of proof upon the Maharaja to show that the land was lakhiraj from the time of the Permanent Settlement: he contends that it was for the plaintiff to prove that the land was included, in the Permanent Settlement in mal land of the estate, and that the onus was upon the plaintiff to, prove that the land was mal land at the time of the Permanent Settlement. In my opinion this contention is sound and ought to prevail. Section 37 of Act XI of 1859 provides that a purchaser of an entire estate shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of the Permanent Settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with certain exceptions. In *Hurryhur Mookhopadhyaya v. Madhub Chunder Baboo* 14 M.I.A. 152 : 8 B.L.R. 566 : 20 W.R. 459 : 2 Sar. P.C.J. 713 : 2 Suth. P.C.J. 484 : 20 E.R. 743 it was held by the Privy Council that a plaintiff in a suit for resumption of land as part of his mal zemindary for assessment is bound in the first instance to prove a prima facie case of payment of rent since 1790 or that the land formed part of the mal assets of the estate at the Decennial Settlement. When such a prima facie case is made out the onus probandi is shifted on to the defendant, who, to exempt himself from assessment must show that his tenure existed rent free before the 1st of December, 1790. Their Lordships observed: "If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is, that his mil land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mil." Their Lordships further observed that "he (plaintiff) may do it by proving payment of rent at some time since 1790, or by documentary, or other proof, that the land in

question formed part of the mal assets of the estate at the Decennial Settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790." The principle enunciated by the Privy Council in this case is applicable to the present case. The plaintiff has to prove in the present case that at the time of the Permanent Settlement the land was included within the estate permanently settled as mal land. This principle has been followed in the Courts in India in a large number of cases. In *Krishna Kalyani Dasi v. Mr. M. Braunfield* 33 Ind. Cas. 184 : 20 C.W.N. 1028 it was held by a Division Bench of the Calcutta High Court that a purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must prove a prima facie case that his mal land has, since 1790, been converted into lakhiraj, The fact that the lands are within the ambit of the estate is not sufficient to meet" this burden. In *Abdul Rahman Kasi v, Baikunta Nath Roy Ghowdhury* 14 M.I.A. 152 : 8 B.L.R. 566 : 20. W.R. 453 : 2 Sar. P.C.J. 713 : 2 Suth. P.C.J. 484 : 20 E.R. 743 the same view was taken by another Division Bench of the Calcutta High Court. As was observed by Mookerjee, J., in the last case, the rule is that the purchaser of an entire estate at a sale for arrears of revenue takes the estate as created at the time of the Permanent Settlement, and the question is reduced to this: has the plaintiff established that these lands were included in the estate at the time of the Permanent Settlement, in other words, was the revenue assessed on the basis of the assets of these lands. It is clear, therefore, that in order to succeed, the plaintiff in the present case must make out a prima facie case that at the time of the Permanent Settlement the land in dispute was mal land and was included in the estate as such, and that the revenue assessed upon the estate was fixed on consideration of the assets of the land in dispute, in other words, that the assets of the land were taken into account in settling the revenue at the time of the Permanent Settlement. It appears from the decisions of the Courts below that there is a total absence of such evidence on the part of the plaintiff. Learned Counsel for the plaintiff is unable to point to a single piece of evidence showing that the land in dispute was treated as mal land at the time of the Permanent Settlement. The defendant, Maharaja, has proved that at least since the year 1866 no rent has been paid for the 30 bighas of land within which the tank in dispute is situate. The learned District Judge has relied on the absence of the description of the land as lakhiraj in the sale certificate [Ex. X(a)]. This, in my opinion, is not sufficient in law to show that the land was mal at the time of the Permanent Settlement.

8. Under the circumstances, I am of opinion that the decision of the learned District Judge that the land was not lakhiraj land, and that the plaintiff was entitled to possession of the land but for the Exception (4) to Section 37 of the Act, is not sound. The plaintiff having failed to prove that the land was mal at the time of the Permanent Settlement, her suit for declaration of title and possession in respect of this tank must fail.

9. In this view of the case it becomes immaterial to consider the appeal of the

plaintiff, namely, Second Appeal No. 288 of 1924. Her contention in this appeal is that the learned District Judge was wrong in holding that the case came within Exception (4) to Section 37 of the Act and that she was entitled to oust the Maharaja from possession, or in, any event she was entitled to have rent assessed in respect of the 2-annas share" of the tank which the District Judge had found to appertain to her. estate Tousi No. 6104 and that the proprietors of the remaining 14-annas were not necessary parties to the suit.

10. As regards Exception (4) to Section 37 of the Act, it is contended that there is no plea in the written statement that the tank came within the Exception. It is also contended that the leases referred to in the 4th Exception must be leases of lands for the purpose of excavating tanks thereon. In my Opinion neither of these contentions can prevail. The defence of the defendant in the present case was that the entire area of 60 bighas within which the tank in dispute was situated was lakhiraj land and the mere omission of the defendant to take the plea of Exception (4) to Section 37 in the written statement will not entitle the plaintiff to a decree for possession.

11. As regards the second contention, the language of the 4th Exception does not warrant the construction sought to be placed upon it by the learned Counsel. It does not say that in order to bring the case within this Exception the lease must be a lease for the purpose of excavating a tank thereon. Reliance was placed upon the decision of the Calcutta High Court in *Asmat Ali v. Hasmat Khan* 2 C.W.N. 412 where it was held that a lease of a tank without any portion of the surrounding land is not protected under Clause 4, Section 37 of Act XI of 1859, as it was not within the meaning of that clause a lease of land wherein a tank has been excavated. This case has clearly no application to the facts of the present case. In the present case the lease is of 30 bighas of land upon which stands the tank in dispute.

12. As regards the contention that rent ought to have been assessed for the 2-annas share of the tank even in the absence of the proprietors of the remaining 14-annas share, reliance has been placed upon *Kamal Kumari Chowdhurani v. Kiran Chandra Roy* 2 C.W.N. 229. That was not a case for assessment of rent and in that case the plaintiffs did not ask for direct or actual possession of the land, but indirect or constructive possession by receipt of rent to the extent of their share from the cultivating tenants upon a declaration that the intermediate tenure was cancelled by the sale for arrears of revenue. That case is clearly distinguishable from the facts of the present case.

13. The result is that Suit No. 454 pi 1920 must be dismissed with costs. Appeal No. 150 of 1924 of the defendant, Maharaja, is decreed, and Appeal No. 288 of 1924 of the plaintiff-appellant is dismissed. The defendant, Maharaja, will be entitled to his costs in all the Courts. There will, however, be only one hearing fee in the two second appeals in this Court.

Second Appeals Nos. 151, 152, 153, 291, 295 and 296 of 1924.

14. These six appeals arise out of three suits Nos. 453, 456 and 483; the corresponding appeals before the District Judge being Nos. 90, 79 and 82. Appeals Nos. 151, 152. and 153 are by the Maharaja of Gidhaur and Appeals Nos. 291, 295 and 296 are by the plaintiff. Suits Nos. 453 and 456 relate to certain raiyati lands and Suit No. 483 relates to a house which forms part of the 30 bighas of lakhiraj land referred to in Suit No. 454. In these suits the raiyati lands and the house are held by tenants who took settlement thereof from the Maharaja, defendant, and these tenants are also parties to the suit. The learned Munsif found the land to be lakhiraj of the Maharaja and he held that the tenant-defendants could not be ousted. The learned District Judge has held that the lands lie in the plaintiff's Touzi No. 6104 and they are situated within the 30 bighas purchased by the Maharaja and that the tenants have been paying rent to the Maharaja; he, however, found that the 30 bighas of land was not lakhiraj since the time of the Permanent Settlement and that, therefore, the Maharaja defendant was liable to ejectment u/s 37 of Act XI of 1859. In Suits Nos. 453 and 456 the plaintiff wanted to oust the tenant-defendants because in a previous suit for rent instituted by her, these defendants had denied her title as landlord and had set up the Maharaja's title, and the plaintiff seeks to dispossess the tenants on the ground of forfeiture by denial of her title. The learned District Judge has held that the denial of the title by the tenants was a bona fide assertion on their part inasmuch as they took settlement of the lands from the Maharaja and had been paying rent to him. As regards Suit No. 483 which was for the house in possession of the defendant, Latif Mian, there was no denial of title of the plaintiff by the tenant but the learned District Judge found that this case came within Exception (4) to Section 37 of Act XI of 1859 inasmuch as the house was a permanent building erected upon the land. The result was that the learned District Judge gave a decree to the plaintiff for possession as landlord by ousting the Maharaja, defendant, and made a declaration that the plaintiff was entitled to recover rent from the tenant-defendants at rates paid by them to the Maharaja.

15. The points raised in the appeals of the Maharaja are the same as in Appeal No. 150 arising out of Suit No. 454 dealt with above. The land and the house form part of the 30 bighas of the lakhiraj land purchased by the Maharaja and which has continued to be lakhiraj at least since the year 1866. The onus being on the plaintiff to show that the land was included in the mal lauds of the estate at the time of the Permanent Settlement, and there being absolutely no evidence on that point, the plaintiff is not entitled to a declaration of her title as landlord and she is not entitled to oust the Maharaja defendant. That being so, it follows that the tenant-defendants cannot be ousted either. Moreover, the denial of title of the plaintiff was at a time when the plaintiff really was not the landlord, but the Maharaja was the landlord. Even, assuming that the lakhiraj set up by the Maharaja was an encumbrance which could be annulled u/s 37 of the Act, such annulment had not taken place at the time the plaintiff had brought her rent suits. The encumbrance is not annulled ipso facto by the revenue sale: the

purchaser at the revenue sale has to take steps to annul the encumbrance, and at the time the rent suits had been instituted the plaintiff had taken no steps to annul the encumbrance and the Maharaja was really the landlord of the tenants and their denial of the title of the plaintiff was correct.

16. As regards Suit No. 483, the house is, no doubt, not a masonry house but the finding is that it is a permanent house, and even if the Maharaja was liable to ejectment, the tenant-defendant in Suit No. 483 was not liable to ejectment.

17. The result is that these three suits Nos. 453, 456 and 483 will be dismissed with costs. Appeals Nos. 151, 152 and 153 will be decreed with costs. Appeals Nos. 291, 296 and 295 will be dismissed but without costs.

Second Appeal No. 297 of 1924.

18. The appeal arises out of Suit No. 455, the corresponding appeal before the District Judge being No. 91. This appeal is by the plaintiff. The defendants in this case are Babu Deonandan Prasad Singh who claims to be the lakhirajdar of the land in dispute, and Nanha Mian who claims to be a tenant under Babu Deonandan Prasad Singh. The claim of the plaintiff is that the land in dispute forms part of the estate Touzi No. 6104 purchased by her, while the defendant, Deonandan Babu, alleges that the land was lakhiraj and was purchased by him from one Musammam Santo in 1869, and that it does not form part of the plaintiff's estate. The case made by Babu Deonandan Prasad Singh was that the land was lakhiraj in the sense that it was revenue free. The learned District Judge found that the land was not revenue-free, but rent-free. He has referred to the paper of the two partitions of the estate and, to the lakhiraj register and the letter of the Board of Revenue, and to the other evidence in the case; and his finding that the land is lakhiraj in the sense that it is rent-free is based on a consideration of the evidence and must be accepted as correct. The argument of the learned Counsel for the plaintiff-appellant is that Deonandan Prasad Singh having claimed the land as revenue-free, he cannot now be heard to say that it was rent-free. His argument is that the only case before the Court was whether the land was revenue-free or not. But, if the defendant failed to prove the allegation of the land being revenue-free, that is no ground for not accepting the fact as proved by the evidence in the case, namely, that the land was really rent-free and not revenue-free. The learned District Judge has held that the land has been rent-free at least from the year 1866, and it was recognised as rent-free in the batwara proceedings of that year, and that, therefore, a presumption is raised that it has been rent-free since the time of Permanent Settlement and, therefore, although the District Judge found that the land in dispute was included in the estate Touzi No. 6104 purchased by the plaintiff, nevertheless, the plaintiff is not entitled to oust the lakhirajdar from possession as the land has continued rent-free since the time of the Permanent Settlement. In this case, also the land being found to be lakhiraj, it was for the plaintiff to show that it was a part of the mal land of the estate at the time of Permanent Settlement. There being absolutely no evidence to that effect, the plaintiff is not entitled to a decree so

far as the lakhirajdar is concerned. As regards the tenant-defendant, there was also a denial of the plaintiff's title in the previous rent suit, and for the reasons given in dealing with the previous appeals, it is clear that such a denial did not operate as a forfeiture. In my opinion the decree made by the learned District Judge in this suit was correct and Appeal No. 297 must be dismissed with costs throughout.

Appeals Nos. 290 and 293 of 1924.

19. These appeals arise out of Suits Nos. 480 and 485, the corresponding appeals before the District Judge being Nos. 80 and 83. The subject-matter of these suits are houses. The defendant, Hussaini Mian, claims to be lakhirajdar of these lands and the tenants Rajabali and Musammat Bafatunnissa, claim to be tenants under Hussaini Mian. Both the Courts below have held that Hussaini Mian has failed to prove any lakhiraj title. The learned District Judge has found that the land is not lakhiraj and, that, therefore, the plaintiff is entitled to a decree against Hussaini Mian who claims to be lakhirajdar. There is no appeal by Hussaini Mian against this decree and this portion of the decree must, therefore, be affirmed. As regards the tenants, the learned District Judge has held that the houses are permanent dwelling houses and are, therefore, protected under Exception (4) to Section 37 of the Act. The only point taken by the learned Counsel for the plaintiff-appellant is that the houses are not permanent dwelling houses; but, for the reasons given by the learned District Judge, it is evident that the houses are permanent dwelling houses, and the plaintiff is not entitled to oust the tenant-defendants. These appeals are, therefore, dismissed but without costs as the respondents did not appear in these appeals.

Appeals Nos. 289 and 292 of 1924.

20. These appeals are by the plaintiff and arise out of Suits Nos. 481 and 488, the corresponding appeals before the District Judge being Nos. 81 and 85. The defence in Suit No. 481 corresponding to Second Appeal No, 289 was that a portion of the land lies within the, lakhiraj of Khajuri Sahu and the rest, within the Government Khas Mahal. On a consideration of the evidence, the learned District Judge found, that the suit raised a boundary dispute between the plaintiff's putti and the Khas Mahal Estate and that the Secretary of State for India in Council was a necessary party in the suit, and that the question could not be adjudicated upon in his absence. The learned Judge further found that the lands were homestead lands and there were dwelling houses standing thereon, and that the tenant-defendants were protected under Exception (4) to Section 37 of Act XI of 1859. This finding is based upon evidence and cannot be disturbed. The result is that Appeal No. 289 is dismissed with costs.

21. In Suit No. 488 giving rise to Second Appeal No. 292, the defendant, Khajuri Sahu, claimed the land as lakhiraj. Both the Courts below have found that this claim has not been established and there is no appeal on behalf of Khajuri Sahu but the learned District Judge has held that the land in dispute is homestead land

upon which Khajuri Sahu has got a house of a permanent character and that the plaintiff is not entitled to recover khas possession of the land, but that she is only entitled to fair rent. The learned Munsif did not settle any fair rent, but the District Judge has settled the rent at Rs. 2 a katha and has made a decree declaring that she is entitled to recover rent from the defendant at Rs. 2 per katha per annum. Having regard to the finding that the land is home stead land and that there is a dwelling house of a permanent character, it is clear that the plaintiff is not entitled to recover khas possession, and this appeal also must be dismissed with costs.

Second Appeal No. 294 of 1924.

22. This appeal arises out of Suit No. 486 corresponding to Appeal No 84 before the District Judge. The plaintiff is the appellant. In this case, one Lalji Sahu set up a lakhiraj title. In this case also the learned Judge has found that the defendant has failed to prove his lakhiraj title and the plaintiff is entitled to a declaration of her title as landlord, but that she is not entitled to oust the defendant inasmuch as there was a dwelling house of a permanent character standing upon the land. For the reasons given by the learned District Judge, it is clear that the decree made by him is correct. He has fixed a fair rent of Rs. 2 per khatha and has made a declaration in favour of the plaintiff that she is entitled to recover this rent. There is no reason to disturb the finding of the District Judge and this appeal also is dismissed with costs.

Ross, J.

23. I agree.