

the suit. We reverse the decree of the District Judge and restore that of the Subordinate Judge with costs throughout on the defendants who contested the plaintiff's claim.

Decree reversed.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

WASUDEV LAKSHMAN BHAGVAT AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS, v. GOVIND MAHADEV GHATE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

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October 4.

Land Revenue Code (Bom. Act V of 1879), sections 3 (11), 109, 197 and 217(1)—‘Holder’—A person in whom a right to hold land is vested—Occupants—Entry in the revenue register—Misunderstanding of an order—‘Oversight’—Rectification of the register—Natural justice.

The term ‘holder’ as defined by section 3 (11) of the Land Revenue Code (Bom. Act V of 1879) signifies the person in whom a right to hold land is vested.

* Second Appeal No. 252 of 1909.

(1) Sections 3 (11), 109, 197 and 217 of the Land Revenue Code (Bom. Act V of 1879) are as follows :—

3. In this Act, unless there be something repugnant in the subject or context—

(11) “Holder” or “land-holder” signifies the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust for another person, or for a class of persons, or for the public; it includes a mortgagee vested with a right to possession.

109. The survey officer, or, if the survey settlement have been introduced under the provisions of section 103 by the Collector, or Assistant or Deputy Collector, the Collector or Assistant or Deputy Collector shall at any time correct or cause to be corrected any clerical errors, and any errors which the parties interested admit to have been made in the settlement register;

he shall also receive and inquire into all applications made to him at any time within two years after the introduction of the survey-settlement for the correction of any wrong entry of a registered occupant's name in the said register, and if satisfied that an error has been made, whether through fraud, collusion, oversight

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Where persons are not 'holders' their claim as occupants cannot be supported by section 217 of the Land Revenue Code (Bom. Act V of 1879).

Where an entry in the revenue register was due to a misunderstanding of a certain order,

Held, that the cause of the error being of the same nature as 'oversight' falling within the description of errors in section 109 of the Land Revenue Code (Bom. Act V of 1879), the rectification of the register, so as to bring it in accord with the order passed after hearing both parties, was not contrary to natural justice. It was a case in which the revenue officer concerned was authorized under section 197 of the said Code to dispense with any judicial or quasi-judicial inquiry.

SECOND appeal against the decision of F. X. DeSouza, District Judge of Thana, reversing the decree of S. J. Kharkar, Subordinate Judge of Pen.

The plaintiffs sued to obtain a declaration of their title to the *varkas* lands in suit situate at the village of Ramraj and sought to restrain the defendant from obstructing their enjoyment thereof and for restoration of possession if it were held that the possession of the lands was with the defendant at the date of the suit. The plaintiffs alleged that the said

or otherwise, shall correct or cause the same to be corrected, notwithstanding that all the parties interested do not admit the error; but he shall not receive any such application at any time after two years from the date of the introduction of the survey settlement, unless good cause be shown to his satisfaction for the delay in making such application, and no such correction of the said register shall be made in consequence of any application made after the said period of two years, except with the previous sanction of Government.

197. An inquiry which this Act does not require to be either formal or summary, or which any revenue officer may on any occasion deem to be necessary to make, in the execution of his lawful duties, shall be conducted according to such rules applicable thereto, whether general or special, as may have been prescribed by the Governor in Council, or any authority superior to the officer conducting such inquiry, and, except in so far as controlled by such rules, according to the discretion of the officer in such way as may seem best calculated for the ascertainment of all essential facts and the furtherance of the public good.

217. When a survey-settlement has been introduced, under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such settlement extends, shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by, under the provisions of this Act, and all the provisions of this Act relating to occupants and registered occupants shall be applicable, so far as may be, to them.

lands belonged to one Shivram Raghunath Sahasrabuddhe and were in his possession and *vahivat* as owner; after Shivram's death, in 1901, his trustees and executors sold the lands by public auction and plaintiffs became purchasers thereof under a sale-deed, dated the 18th October 1903, in the name of plaintiff 4, Balkrishna Govind Ghate. They further alleged that the defendant, who was the inamdar of the village of Ramraj in which the lands were situate, was only entitled to receive assessment and had no other rights over the lands; still the defendant obstructed plaintiff's enjoyment and himself exercised such rights as cutting trees, etc., and was setting up his own title. Hence the suit.

The defendant replied that as inamdar he was the owner of all the *varkas* lands in the village including those in suit, that Shivram Raghunath Sahasrabuddhe had no right to or *vahivat* over the plaint lands, that Shivram's executors sold only rice lands and not *varkas* lands, that in the plaintiff's sale-deed the *varkas* lands were improperly included, that the plaintiffs had got no valid title and that the suit was time-barred.

The Subordinate Judge found that the plaintiffs had not proved their title to and possession of the lands in dispute and that the defendant had proved his title and possession. He, therefore, dismissed the suit. In support of his conclusion he relied upon the decision in *Vasudev v. The Collector of Thana*⁽¹⁾ and on an unreported interlocutory judgment in second appeal No. 214 of 1903.

On appeal by the plaintiffs, the District Judge concurred with the Subordinate Judge in his view of the case but the case was remanded for the following reason:—

There is, however, another aspect of the case which has not been noticed in the judgment of the lower Court nor touched in the arguments at the Bar. I refer to the position created by the introduction of the revenue survey in the village on 9th July 1894 and its legal effect on the rights and liabilities of the parties.

For a right comprehension of this phase of the case, the following facts are essential. The defendant acquired the village in the year 1892 by purchase of a 14 annas 6 pies share and mortgage of the remainder. At the request of his

(1) (1879) P. J. 274.

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predecessor, survey operations had been commenced in 1887, the jungle *Kharda* (exhibit 188) was prepared by the survey officers in 1891, village form No. V (exhibit 189) was prepared from this in 1893-94 and the survey was declared on 9th July 1894.

It is admitted that in the papers as originally prepared, the plaint lands were entered in the khata of Shivram ; and evidence of the Circle Inspector (exhibit 58) and the manager of the inam village (exhibit 79) is relied on to show that the entries were made after due inquiry as to the *vahivat* and with the acquiescence of the then inamdar.

The present defendant however was not content that all the *varkas* land in the village should be entered in the names of private Khatedars. He made an application (exhibit 219 dated 23rd July 1894) to the Mamlatdar, complaining that some *varkas* lands had been wrongly entered in the survey records in the name of the tenants, and he submitted a statement (exhibit 150) of the lands which he alleged were so wrongly entered. It is important to notice that in this application the defendant expressly disclaimed any interest in those *pot varkas* pieces which are in kharif numbers and which were entered in the names of the tenants. Accordingly we find that in the statement (exhibit 150) put in by him out of the plaint lands, he takes objection to only five plots, *viz.*, survey Nos. 17 (4), 22 (2), 43 (10), 50 (1 and 4), measuring 16 acres 39 gunthas in the aggregate being entered in Shivram's name. The revenue authorities made certain departmental inquiries (*vide* exhibits 209 to 219) ; it is alleged that the inquiry was entirely *ex parte* and that the tenants were not made parties thereto. Eventually orders are said to have been passed in the year 1895 directing that the records should be corrected by entering all the *varkas* land in the inamdar's name, and exhibit 189 was accordingly so corrected. Exhibit 207 is a copy of the corrected record.

It is pointed out that the corrections then made were admittedly erroneous at least in part, for we find that on 2nd March 1896 the defendant himself made an application (exhibit 221) to the Mamlatdar, bringing to his notice that certain kharif lands to which he had no claim had been wrongly entered in his name ; that entries were made in the inamdar's name of certain *pot varkas* pieces in kharif lands, title to which he had expressly disclaimed in his application (exhibit 220) ; that the inquiries made by the Collector as disclosed in exhibits 209 to 219 proceeded entirely on a wrong basis inasmuch as it is assumed that this was a revision survey ; whereas, as a matter of fact, it was the first survey introduced in the village, and that in any case the corrections were irregular and could not have the effect claimed for them since the *varkas* lands are shown as *khalsa* and entered in the name of Laxman Narayan (the defendant) in his own name and not in the name of inamdar as such, although defendant was the owner of a 14 annas 6 pies share only in the village.

It is argued that by the introduction of the survey in 1894, Shivram became the occupancy tenant of the plaint lands under the joint operation of sections 103 and 217 of the Land Revenue Code ; that the correction in the records subsequently made was *ultra vires* and illegal having regard to the provisions of section 109 and that the defendant is estopped from disputing that Shivram was an occupancy

tenant of his *varkas* lands by the acquiescence of the former inamdar in the declaration of his status as such, since it was only on that understanding that Shivram consented to become the occupancy tenant of the kharif lands.

But as the phase of the case was not touched in the lower Court, it is necessary that it should go down for further evidence and finding on the following issues :—

(1) What were the survey papers read out to the ryots when the survey was declared on 9th July 1894?

(2) Whether the introduction of survey invested Shivram with the rights of an occupancy tenant in the plaint lands having regard to sections 103 and 217 of Bombay Act V of 1879?

(3) When was the correction made in the survey records on the application of the defendant?

(4) Whether the correction was illegal and *ultra vires* having regard to the provisions of section 109, Land Revenue Code?

(5) Whether the correction was with the knowledge of Shivram; if not, can it affect Shivram's rights?

(6) Whether the former inamdar acquiesced in the entry of the plaint-varkas lands in Shivram's khata?

(7) If so, is the defendant estopped from disputing the entry now?

Findings to be certified within two months.

The Subordinate Judge having forwarded his findings, the District Judge found on the said issues as follows :—

(1) Village form No. V, copy of which is exhibit 189.

(2) In the affirmative.

(3) Between 27th August 1895 and 4th September 1895.

(4) In the affirmative.

(5) In the negative.

(6) In the negative.

(7) In the negative.

With respect to the finding on issue 4 the District Judge remarked :—

Issue 4.—This issue mainly turns upon the correct interpretation of section 109, Land Revenue Code. The admitted facts are that, on the same day as the introduction of survey settlement in his village, the defendant made an application to the Collector to have all *varkas* lands, including those entered in Shivram's name, transferred to his own. Thereupon he was directed by the Mamlatdar to be present with his evidence on 17th July (*vide* exhibit 222); exhibit 219 is his statement before the Mamlatdar made on 23rd July that he was in the habit of collecting the produce from all *varkas* land but that he laid no claim to *pot varkas* lands, which class of lands he accordingly omitted in the statement (exhibit 150) submitted to the Mamlatdar on the same day. So far, then, as the *pot varkas* lands in

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suit are concerned, *viz*, survey No. 4 (phalni Nos. 1 and 3), 11 (1), 12 (1 and 2), 418 (3) and 51 (1) there was no application at all made by the defendant to have a mutation of names effected in his favour.

The nature of the inquiry made by the authorities is disclosed on a perusal of exhibits 224, 229, 225, 223. It appears from these exhibits that the Collector forwarded the application of the defendant to the survey authorities for disposal. Those authorities did not give any notice to Shivram or any other registered occupant who were interested; they merely referred to earlier orders Nos. 1460 and 1461 (dated 15th October 1892) in which the Superintendent had directed that all lands, kharif as well as varkas in both villages, should be entered in the inamdar's name, and finding that these orders were untenable on the face of them they fell back on the ledger for the year 1888-89 and directed that there should be a mutation of names of registered occupants in conformity with the entries in that ledger. The effect of this order was that the elaborate inquiries made by the survey officers as a preliminary to the introduction of survey on 9th July 1894 were superseded and the *status quo ante* restored by a stroke of the Superintendent's pen.

It was obvious that this procedure would result in grave irregularities; the defendant himself pointed out to the Mamlatdar that certain kharif land to which he had no title was wrongly entered in his name (*vide* his application, exhibit 221, dated 2nd March 1896). I have above shown that several plots of *pot varkas* lands to which defendant laid no claim were also entered in his name. We have now to see what is the legal effect of a mutation of names effected in the manner above summarized.

This question must be answered by a reference to the terms of section 109, Land Revenue Code, which is the only section empowering corrections to be made in the settlement register. We are here concerned with clause 2, the requisites of which seem to be (1) an application for correction to be made to the survey officer or revenue officer, (2) an inquiry by the officer who receives the application, (3) proof that the error has been made through fraud, collusion or otherwise.

There can be no ambiguity as to the first requisite above enumerated.

Turning to the second requisite, it seems to me that the inquiry to be held should be of a judicial or a quasi-judicial character, because the concluding portion of the clause "notwithstanding that all parties interested do not admit the error" contemplates that an opportunity should be given to the parties interested to show cause against the application.

Mr. Shingne contends that the section should be construed in the light of the provisions of sections 193—197, Land Revenue Code, and that the inquiry contemplated being neither a "formal" nor a "summary" inquiry within the meaning of those sections need not necessarily be of a judicial or quasi-judicial character. He further refers to the analogous provisions of section 24 of the Registration Act (III of 1877), and argues that when the legislature has conferred a discretion on certain affairs, it is not for the Courts to question the exercise of that discretion by those officers. In support of this contention, he cites I. L. R. 21 Bom.

69, 699 and 6 All. 460. This argument involves an obvious confusion between the conditions precedent to the exercise of discretion on the one hand and the mode in which the discretion is exercised on the other. It is always the duty of the Courts to determine whether the conditions prescribed by the legislature before discretion can be lawfully exercised have accrued though the Courts will generally be loth to interfere with the exercise of discretion in a particular manner.

As to the third requisite I am of opinion that the phrase "or otherwise" should be construed so as to apply to causes *ejusdem generis* with the preceding causes and that a correction can be made under section 109, Land Revenue Code, only when an error has been made through fraud, collusion, oversight or other causes of a like nature. To hold otherwise would be to clothe the Assistant or Deputy Collector with a general power of revision over the results of the survey operations which would entirely defeat the scheme of the Land Revenue Code.

If this is the correct interpretation of section 109, Land Revenue Code, it is obvious that the mutation of names with regard to survey No. 4 (1 and 3), 11 (1), 12 (1 and 2), 48 (3), 51 (1) was *ultra vires*, because there was no application for correction with regard to them, while with regard to the remaining survey numbers it must also be held to be illegal because it was effected without notice to the interested parties and the error was not due to fraud, collusion or oversight or other cause of a like nature.

On the strength of the aforesaid findings the District Judge reversed the decree of the Subordinate Judge and passed a decree in the following terms :—

I declare that the plaintiffs are the registered occupants of the plaint survey numbers entitled to hold them in perpetuity, subject to the payment to the defendant of the amounts due on account of land revenue for the same and subject to the other conditions specified in section 68, Land Revenue Code, and I direct that an injunction do issue restraining the defendant from obstructing the plaintiff's enjoyment of the said lands.

While the appeal in the District Court was pending the original defendant, Lakshman Narayan Bhagavat, died and his two legal representatives were brought on the record and they preferred a second appeal.

Jayakar, with *P. B. Shingne*, for the appellants (defendants).

G. S. Rao (Government Pleader), for the respondents (plaintiffs).

SCOTT, C. J. :—The plaintiffs are tenants of certain rice lands in the alienated village of Ramraj in the Thana District. The

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defendant is the inamdar of the village, being owner of a share of 14 annas and 6 pies and mortgagee of the remaining interest.

The plaintiffs sue for a declaration of their title to the *varkas* lands described in the plaint and to restrain the defendant from obstructing their enjoyment thereof and for restoration of possession if it be held that possession was with the defendant at the date of suit. In the first Court the plaintiff's suit was dismissed but in the lower appellate Court the District Judge, though agreeing with the lower Court upon the questions originally raised, held that by reason of certain proceedings of the revenue authorities taken on the introduction of the survey settlement to the village of Ramraj, the plaintiffs were occupants of the lands they claimed and entitled to hold them in perpetuity subject to payment of assessment to the defendant-inamdar.

The rights of tenants of rice lands over adjoining waste land of their superior holder is, by custom in the Thana District, confined to the use of portions of the waste for obtaining the manure without which the rice lands could not be cultivated or the assessment on the rice land earned and paid. Upon the evidence the Subordinate Judge held, and the learned District Judge agreed, that the presumption that the user by the rice lands' tenants of the *varkas* land was with the leave and permission of the inamdar un rebutted, that no permanent tenancy was proved and that the claim to hold the *varkas* lands as part and parcel of the rice lands was excluded by the pleadings and could not be sustained.

The learned District Judge in reversing the decree of the lower Court reasoned as follows:—

The survey settlement was declared in the village on the 9th of July 1894. In the register of occupants under that settlement the defendants were entered as occupants of the *varkas* lands in dispute. Section 217 of the Land Revenue Code provides that when a survey settlement has been introduced into an alienated village, the holders of all lands to which such settlement extends shall have the same rights as

occupants in unalienated villages under the provisions of the Act. Therefore, the plaintiffs are entitled to all the rights of occupants of the lands in suit.

It is true that the entry of the plaintiffs' names was contrary to an order of the revenue authorities passed on the 15th of October 1892 after hearing the plaintiffs and the inamdar; it is true that on the 9th of July 1894 the very day of the introduction of the survey settlement the inamdar protested against the mistake which had been made, it is true that after inquiry the revenue authorities rectified the register by entering against the lands in suit the name of the inamdar; but the learned Judge answers that the order of the 15th of October 1892 was untenable on the face of it and that the inquiry held by the revenue authorities was *ultra vires* and their rectification of the register unauthorised.

In considering whether the plaintiffs can claim the benefit of section 217 of the Land Revenue Code it is necessary to consider whether they were 'holders' of the lands in suit at the date of the introduction of the survey settlement.

Now 'holder' under the Code is defined by section 3 (11) as signifying the person in whom a right to hold land is vested. We have only to turn to the finding of the Subordinate Judge, which was concurred in by the District Judge, to convince ourselves that the plaintiffs were not 'holders' of the lands in suit; their claim as occupants cannot therefore be supported by section 217 of the Code. It is the only ground upon which the decree was passed in their favour. The defendants' appeal must therefore succeed.

We think it desirable however to examine the reasons of the learned Judge for holding that the rectification of the register was unauthorised.

It is to be observed that he gives no reasons for stating that the order of the 15th of October 1892 was untenable. As regards the inquiry instituted by the revenue authorities on the defendants' complaint, it was a departmental inquiry for the purpose of ascertaining why the order of the 15th of

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October 1892 had not been obeyed. Upon the explanation of the classer it appeared that the entry of the defendants' names instead of that of the inamdar was due to a misunderstanding of the order. This seems to us a cause of error of the same nature with 'oversight' and one falling within the description of errors in section 109.

As the order of the 15th of October had been passed after hearing both the defendants and the inamdar, we are not prepared to hold that the rectification of the register so as to bring it into accord with the order was contrary to natural justice. It was a case in which the revenue officer concerned was authorised under section 197 to dispense with any judicial or quasi-judicial inquiry. It is to be noted that inquiries of the latter nature are only imperatively prescribed by the Code under sections 59, 85, 87, 91, 93, 125, 129, 142, under all of which orders have to be passed of a very different nature to correcting a mistake in a register.

We reverse the decree of the lower Court and restore that of the Subordinate Judge. The prayer for injunction relates apparently to the assertion of a permanent title by the plaintiffs and does not seem to be necessary in relation to the undisputed facilities accorded to the plaintiffs of taking 'rab' from the *varkas* lands. The plaintiffs must pay the defendants' costs throughout.

Decree reversed.

G. B. R.
