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the applicant, if he is so minded, from applying for a grant, and if he does so, it is open for him to apply to adopt such material proceedings as have been taken in the present suit.

O. M

Application dismissed.

Attorney for the appellant : *A. C. Ghose.*
Attorney for the caveators : *N. C. Bose.*

APPELLATE CIVIL.

Before Richardson and Beachcroft JJ.

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Jan. 30.

LAKSHMI NARAYAN ROY

v.

SECRETARY OF STATE FOR INDIA.*

Peshkosh—Abwab—Antiquity and purpose of payment—Contractual foundation—Bengal Tenancy Act (VIII of 1885), ss. 74; 30(c)—Public Demands Recovery Act (Beng. I of 1895).

Where the Collector in execution of a certificate issued under the Public Demands Recovery Act, realised from the plaintiffs certain charges described as *peshkosh* levied on two estates from time immemorial, and the plaintiff sued for a declaration that it was illegal and prayed for the cancellation of the certificate for the refund of the amount thereunder, and for a perpetual injunction restraining the defendant from levying the *peshkosh* in future :—

Held, that *peshkosh* could not be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions enacted on that subject. Such payment came out of the land and the right thereto was an interest in the land to which a title might be made by prescription.

* Appeal from Appellate Decree, No. 2465 of 1915, against the decree of G. B. Mumford, District Judge of Midnapore, dated June 4, 1915, confirming the decree of Nalini Kanta Bose, Munsif of Contai, dated Aug. 26, 1914.

Held, also, that the peculiar situation and character of the land and antiquity and purpose of the payment all pointed to a legitimate contractual foundation.

Udoy Narain Jana v. *The Secretary of State for India in Council* (1) referred to.

SECOND APPEAL by Lakshmi Narayan Roy and others, the plaintiffs.

The present suit out of which this appeal arose related to a charge described as *peshkosh* levied by the Collector on two temporarily-settled estates known as Jalamutha and Majnamutha in the district of Midnapore, and realised from the plaintiffs by virtue of a certificate under the Public Demands Recovery Act. These estates were liable to inundation and village embankments were maintained to protect the cultivable lands. On the 4th December 1913, the plaintiffs instituted this suit against the Secretary of State for a declaration that the levy of *peshkosh* was illegal, and prayed for the cancellation of the certificate, for the refund of the amount levied thereunder and for a perpetual injunction restraining the levying of *peshkosh* in future. The defendant contended that *peshkosh* was a fixed annual sum payable as a contribution towards the large expense incurred annually by the proprietors in repairing the embankments. The estates being under direct management, that expense was now met by the Government. On the 26th August 1914, the Court of first instance dismissed the suit and found as a fact that the practice of levying and paying *peshkosh* had existed from a very long time. On appeal the lower Appellate Court, on the 4th June 1915, dismissed the appeal holding that there must have been at some time an agreement between the proprietor of the two estates and those who held lands therein, that the former should maintain and repair

(1) (1915) S. A. No 44 of 1912 (unreported).

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the embankments in the estates with the aid of the funds contributed by the latter.

From that decision the plaintiffs preferred this appeal to the High Court.

Babu Jyotish Chandra Hazra, for the appellants, contended that anything realised over and above the rent was *abwab* and not recoverable: see s. 10 of Act X of 1859. Even if it were revenue, *peshkosh* was illegal. It was once realised by virtue of a certificate in 1912, and apart from that there was no evidence of any subsequent realisation. Even if *peshkosh* were paid down to 1844, the subsequent statutory enactments would make it illegal, and realisation for any number of years would not make it valid: see s. 3 of Regulation V of 1793 and ss. 54, 55 of Regulation VIII of 1793. If it were revenue, the Bengal Tenancy Act would apply: see s. 74 of the Bengal Tenancy Act. If it were a public demand, it would be realisable, but it was not so; it did not come under any of the items in the Schedule of the Act.

The Senior Government Pleader (*Babu Ram Charan Mitter*), for the respondent, contended as to what was the position of a *nisphidar* as tenant. He was not a tenant; he held an estate. The question of *abwab* would not arise if he held an estate. Moreover, Government constructed the embankment and levied *peshkosh*. It was a cess in addition to rent. It could not be said to be an *abwab*, and the basis of the claim was long continued, payment being from time immemorial.

Babu Jyotish Chandra Hazra, in reply.

RICHARDSON AND BEACHCROFT JJ. This appeal is preferred by the plaintiffs in a suit against the Secretary of State, and relates to a charge described as

peshkosh which the Collector has levied from the plaintiffs in execution of a certificate issued under the Public Demands Recovery Act (Bengal Act I of 1895). The plaintiffs sue for a declaration that the levy of *peshkosh* is illegal, and they further pray for the cancellation of the certificate, for the refund of the amount levied thereunder, and for a perpetual injunction restraining the Secretary of State from levying *peshkosh* in future.

It appears that there are two estates, known as Jalamutha and Majnamutha, in the district of Midnapore, the history of which is adverted to in the judgments of the Courts below. At the time of the Permanent Settlement the proprietors refused to accept the settlements offered to them, and the estates have ever since been temporarily settled. Their situation renders them liable to inundation and *grambheries* or village embankments are maintained to protect the cultivable lands. It is asserted for the Secretary of State that *peshkosh* is a fixed annual sum payable by the *nisphidars* (holders of resumed lakhiraj lands) and *lakhirajdars* of these estates, as a contribution towards the not inconsiderable expense, which has to be incurred every year by the proprietors for the time being, in repairing the embankments. As the estates are at the present time under direct management, that expense is now met by the Government.

Both the Courts below have found as a fact, that the practice of levying and paying *peshkosh* has existed from a very long time. The learned Munsif in the trial Court says that the proprietors from time out of memory have been realising *peshkosh* from *lakhirajdars* and *nisphidars* and in some cases from the tenants of *lakhirajdars* and *nisphidars*. The learned District Judge in the lower Appellate Court says similarly "There can be no doubt from the oral and

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documentary evidence adduced for the defendant, that *peshkosh*, although its actual origin is unknown, was being realized by the proprietors of the two estates from *lakhirajdars* (whether their title was valid or not) and from *mal* tenants from 1207 (1800 A.D.) and that it was taken as a contribution by the aid of which the proprietors were to repair the village embankments within the estate." The inference which the District Judge has drawn from the evidence is, that the practice has existed for so long, that it must be referred to some legal origin, and he holds that there must at some time have been an agreement between the proprietors of the two estates and those who hold land therein, that the former should maintain and repair the *grambheries* in the estates with the aid of funds contributed by the latter. He refers to Mr. Bayley's Report on the settlement of Majnamutha in 1844 as authority for the statement that prior to that year, probably in 1827, in the case of *mal* tenants or tenants of rent paying lands, *peshkosh* was amalgamated with rent. In the case of the *lakhirajdars* no such amalgamation could take place and when some of the *lakhiraj* lands were afterwards resumed, the *nisphidars* continued to pay under a separate head and apart from their rent, the sum which they had previously paid on this account as *lakhhirajdars*.

The annual payment for which the plaintiffs have been found liable was fixed in 1844 or before, at Rs. 13-1-8 gds.

The main contention of the learned pleader for the plaintiffs is that *peshkosh* is an *abwab* and as such is prohibited by the tenancy law in this country. If that contention has any substance, it is somewhat surprising that the fact was not discovered before this. The collection of *abwabs* has now been prohibited for a great number of years. So far as we are aware the

objection taken on this ground has only once been taken before and then unsuccessfully, in a case to which I shall shortly refer. We are satisfied that *peshkosh* cannot be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions which have been enacted from time to time on that subject. The plaintiffs own *kabuliyat* of 1844 shows, that the amount due on account of *peshkosh* was deducted from the assets of the land and that rent was assessed only on the balance of the assets, after this deduction had been made. That indicates that the payment comes out of the land and that the right to it is an interest in the land to which a title may be made by prescription.

The peculiar situation and character of the land and the antiquity and purpose of the payment, all point to its having a legitimate contractual foundation. If the statutory law governing the relations of landlord and tenant must be applied, the modern analogue is to be found not in section 74 of the Bengal Tenancy Act relating to illegal cesses, but rather in the provisions of that Act relating to improvements [Chapter IX and section 30 (*c*)].

We are supported in the view we take, by an unreported decision of Sir Lawrence Jenkins C. J. and Holmwood J. (Second Appeal No. 44 of 1912, decided 30th July 1915.) Sir Lawrence Jenkins, referring to a claim for *peshkosh* in the Majnamutha estate, said that the basis of the claim was long continued payment beyond the memory of man which was in itself a title in favour of the recipient of the payment. He referred to *Sumbhoo Lal* v. *Collector of Surat* (1), where the payment in question might have had a vicious origin, and added, that there was no vice in the origin of

(1) (1859) 8 Moo. I. A. 1, 40.

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peshkosh, the consideration for which on the contrary was most beneficent work.

It was suggested in the argument that in the case of the plaintiffs it has not been shown that they have regularly paid *peshkosh*. It is in evidence, however, that *peshkosh* was levied from them under the certificate procedure in the year 1904, and *peshkosh* is mentioned in their *kabuliyat* of 1844. We are satisfied that there are materials on the record upon which the Court below was entitled to come to the conclusion that *peshkosh* is payable in respect of the land held by the plaintiffs.

The learned pleader for the appellant has not pressed the point taken in the Court below that the Public Demands Recovery Act was not applicable for the purpose of enforcing the payment. The terms of the Act of 1895 are sufficient to meet the point and it could not have been urged with success.

The appeal must, accordingly, be dismissed with costs.

L. R. *Appeal dismissed.*