

PRIVY COUNCIL.

MAHOMED SOLAIMAN (PLAINTIFF)

P. C.^o

v.

1922

BIRENDRA CHANDRA SINGH (SINCE DECEASED)

Nov. 28.

AND OTHERS (DEFENDANTS)

(AND CONSOLIDATED APPEAL).

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

*Sale for Arrears of Revenue—Arrears—Entry in Collector's Book—
Presumption of correctness—Construction of Kabuliyat—Act XI of
1859—Indian Evidence Act (I of 1872) s. 114.*

A holding was sold under the Bengal Land-revenue Sales Act, 1859, for arrears of revenue appearing from the books kept in the office of the Collector. The holder had taken over an existing holding, and thereupon had signed a kabuliyat dated November 10, 1862, agreeing to pay the annual jama, the date when the rent was due not being mentioned. The High Court held that no revenue was in arrear at the date of the sale because the kabuliyat should be construed as establishing a letting under which the rent was payable, not at the end of the Bengali year, but on November 10, in each year :—

Held, that there was an arrear of revenue, since the kabuliyat could not properly be construed as above mentioned, and the entries in the Collector's books were to be presumed to be correct under s. 114 of the Indian Evidence Act, having regard to illustrations (e) and (f).

The High Court having omitted to express an opinion on an issue whether the under-tenancies were protected under s. 12 of Bengal Act VII of 1868, their Lordships repeated observations made in *Tarakanta Bannerjee v. Puddomoney Dasse* (1) to the effect that it was much to be desired that in appealable cases opinions should be pronounced upon all important points.

Judgment of the High Court reversed.

^o*Present* : LORD PHILLIMORE, SIR JOHN EDGE, SIR LAWRENCE JENKINS
AND LORD SALVESEN.

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Two consolidated appeals (No. 14 of 1922) from a judgment and two decrees (May 25, 1920) of the High Court reversing decrees of the Subordinate Judge (Second Court) of 24-Parganas.

The appellant, who was the purchaser of holdings at an auction sale under Act XI of 1859, for arrears of revenue sued to annul the defendants' under-tenures and to eject them. The defences were that there was no arrear of revenue at the date of the sale, and that in any case the under-tenures were protected by s. 12 of Bengal Act VII of 1868. The Subordinate Judge decided all issues in favour of the plaintiff appellant. Upon appeal the High Court reversed his decision holding that there was an arrear at the date of the sale; the learned Judges pronounced no opinion upon the question whether the under-tenures were protected by the section above mentioned.

The facts appear from the judgment of the Judicial Committee.

Sir George Lowndes, K. C., and *Dube*, for the appellant.

De Gruyther, K. C., and *Kenworthy Brown*, for the representatives of the first respondent to the first appeal.

Wallach, for the first respondent to the second appeal.

The judgment of their Lordships was delivered by

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SIR JOHN EDGE. These are two consolidated appeals from two decrees, dated 25th May 1920 of the High Court at Calcutta, which reversed two decrees, dated the 31st January 1918 of the Subordinate Judge (Second Court) of the 24-Parganas. The decrees from which these consolidated appeals have been brought were respectively made in suits numbered

19 and 20 of 1917. In each of these suits the present appellant was the plaintiff, and some of the present respondents were the defendants in one of the suits and others of the present respondents were the defendants in the other of the suits. The suits were tried together, as were the appeals to the High Court. The suits are suits by an auction purchaser under Act XI of 1859 of lands for ejection of under-tenants and for mesne profits

The lands to which the suits relate are situate within the Collectorate of the 24-Parganas, a permanently settled district of Bengal, to which Act XI of 1859 applies. On the 14th April 1915, the Collector of the District issued notice and proclamation under Act XI of 1859 that the holding No. 20A, which is the land now in question, would be sold under Act XI of 1859 for the realization of Rs. 6, 10 annas and 5 pies revenue in arrears from the year 1320 B.S. The holding was sold by auction on the 17th May 1915, and was purchased by the plaintiff, who subsequently received a sale certificate. The Government revenue for an arrear of which the holding was sold was the revenue for 1320 B.S. The defendants were at the date of the auction sale under-tenants of lands in the holding sold, and the plaintiff claims to be entitled to eject them.

The plaint and the written statement of Kumar Birendra Chandra Singh, a defendant in suit No. 19 of 1917, and the plaint and written statement in suit No. 20 of 1917, are in the printed record.

In his plaints the plaintiff alleged that the Collector of the District on 17th May 1915 put the holding No. 20A up for sale by auction under the provisions of Act XI of 1859 for arrears of the Government revenue, and that he (the plaintiff), having purchased it at the sale, and having obtained the sale certificate,

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had, under s. 37 of Act XI of 1859, acquired it free of all encumbrances, and had become entitled to annul all the subordinate rights, and to recover *khaz* possession of the holding by ejecting the tenants holding any subordinate right, and claimed a decree for ejectment and mesne profits. The defence, so far as it is now material, was that there was no arrear of the Government revenue to recover which the Collector was entitled to sell the holding, and that in any case the defendants were within the exceptions of s. 12 of Bengal Act VII of 1868; that s. 37 of Act XI of 1859 did not apply; and that the plaintiff was not entitled to eject the defendants. The Subordinate Judge fixed five issues, of which issues (2) and (3) are now alone material. Issue (2) was as follows: "Is the sale valid and operative, and has the plaintiff acquired any title under the same by his purchase?" Issue (3) was: "Are the under-tenancies of the defendants protected under s. 12 of Act VII of 1868, and whether they can be annulled?" Their Lordship will later have some observation to make as to issue (3).

The Subordinate Judge found that there was an arrear of the Government revenue of Rs. 6, 10 annas 5 pies for 1320 B.S., which entitled the Collector to sell the estate and that the sale was good, and that the defendants were not within the exceptions of s. 12 of Bengal Act VII of 1868, and he gave to plaintiff a decree for possession and mesne profits in each suit. From these decrees the defendants in each suit appealed to the High Court. In the memorandum of appeal to the High Court, in suit No. 19 of 1917, the 3rd ground of appeal was "That the Court below should have held that there were no arrears due for which the sale could be held." The 17th ground of appeal was "That the Court below ought to have held that the tenure of this defendant has been existing from

the time of the permanent settlement," and the 20th ground of appeal was "That at any rate the Court below should have held that the tenure of this defendant is protected under the provisions of s. 12 of Act VII of 1860 (1868)." In the memorandum of appeal in suit No. 20 of 1917, the 4th, 10th and 14th grounds of appeal were the same as the 3rd, 17th and 20th grounds of appeal in suit No 19 of 1917. The High Court on appeal found that there was no arrear of the Government revenue which entitled the Collector to sell the estate and by its decrees dismissed the suits. From these decrees of the High Court these consolidated appeals have been brought.

The first issue which their Lordships have to consider is—was there an arrear of the Government revenue for 1320 B.S. which entitled the Collector to sell the estate? That is an issue which depends upon the evidence in these suits and not upon the decision of the Board on the facts as found by the Board in *Haji Buksh Elahi v. Durlav Chandra Kar* (1), as the High Court apparently thought it did.

There was no evidence as to when the holding, of which the estate sold by the Collector in 1915, formed part was granted, but there is evidence that one Syed Abdul Ali, who had purchased the holding No. 20-1 in mauza Paikpara from Srimati Dellorus Banu Begum on the 17th day of Bhadra 1269 B.S. appointed on 15th September 1862 mokhtars to apply on his behalf to the revenue authorities for mutation of names in his favour, and that on 10th November 1862 he gave to the Deputy Collector the following acknowledgment of having received a pottah:—

"Holding No. 21—1.—Bounded as on the map and on the pottah.

"I, Syed Abdul Ali, do hereby acknowledge to have received a pottah for (17-5-4-2) of ground found by survey to be contained in the above holding and assessed at the rent of Company's Rs. 20-12-4 per annum and

(1) (1912) I. L. R. 39 Cal. 981; L. R. 39 I. A. 177.

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I give this document as my kabuliyat, consenting to pay the above annual jumma. Dated the 10th day of November, 1862.

“SYED ABDUL ALI.

“Through the pen of

“BIPBADAS BOSE, *Mohhtar*.”

The pottah was evidence of his title to possession. In exchange for the pottah Syed Abdul Ali gave to the Deputy Collector on the 10th November 1862 a kabuliyat which so far as is material was as follows:—

“Holding No. 20—1.—Boundaries as shown on the pottah and map.

“This deed of kabuliyat is executed by Syed Abdul Ali to the following effect:—

“That I have got a permanent mourasi pottah in respect of lands measuring 17 bighas 5 cottahs 4 chattaks and 10 gundahs the particulars of which are stated above, acknowledging as yearly rent thereof at Company’s Rs. 20-12 annas 4 pies. I shall pay the rent year by year. Accordingly on receiving a pottah I execute this kabuliyat. Finis. The 10th November 1862.”

Apparently, Syed Abdul Ali held direct from the Crown and not as an under-tenant, but whether his holding was recognised by the Government as an “estate” their Lordships do not know. Admittedly and obviously the holding of Syed Abdul Ali of 1862 was subsequently partitioned and after that partition the yearly revenue of the partitioned part which was sold by the Collector was Rs. 6, 10 annas, 5 pies.

By s. 2 of Act XI of 1859, it is enacted that:—“If “the whole or a portion of a kist or instalment of any “month of the era, according to which the settlement “and kistbundee of any mahal have been regulated, be “unpaid on the first of the following month of such “era, the sum so remaining unpaid shall be considered “an arrear of revenue.”

By s. 3 of that Act it is enacted so far as is material as follows:—“Upon the promulgation of this Act, the “Board of Revenue at Calcutta shall determine upon “what dates all arrears of revenue and all demands

“ which by the Regulations and Acts in force are directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder.”

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According to the notification of the Board of Revenue, in force at the date of the sale here in question, the 28th June 1914 was the day when the arrears of revenue which had become due for 1320 B.S. should be paid.

The kabuliyat given by Syed Abdul Ali in 1862 does not expressly state when the yearly revenue should be paid. The learned Subordinate Judge came to the conclusion that the letting was for the Bengali year, and having regard to Act XI of 1859 and the notification of the Board of Revenue which was applicable at the time of the sale, he found that one year's revenue, Rs. 6, 10 annas and 5 pies, was due on 1st May 1914 and was in arrear on 17th May 1915, and that the sale was consequently a valid sale.

The learned Judges of the High Court construed Syed Abdul Ali's kabuliyat of 1862 as a letting by which the yearly rent should be payable not at the end of the Bengali year but on the 10th November during the tenancy, and finding that in that view of the case there was no revenue in arrear at the date of the sale, for which the estates could be sold, they held that the sale was invalid and dismissed the suit.

In their Lordships' opinion the learned Judges of the High Court misconstrued the kabuliyat of 1862 in holding that by it the letting was a yearly letting from 10th of November and not for the Bengali year, and incorrectly found that at the date of the sale there was no arrear of revenue for which the Collector could

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sell the estate. The 10th November 1862 was merely the date when Syed Abdul Ali signed the kabuliyat; he had in September 1862 taken over a then existing tenancy of the estate. It appears from the accounts in the Collector's office that the tenancy was for the Bengali year. Although the accounts relating to this estate which were kept in the Collector's office may not be in some matters easily understood by those who are not familiar with the system of keeping accounts in Collector's offices in that part of India, it has not been proved that they were not correctly kept by the native clerk in the office who was under the supervision of the Collector, who would understand what those accounts showed, and their Lordships are entitled to presume, and do presume, under s. 114, Illustrations (e) and (f), of the Indian Evidence Act, 1872, that they were correctly kept, and that there was a Government revenue of Rs. 6, 10 annas and 5 pies in arrear for 1320 B.S. to realize which the estate might have been, and was, in fact, sold on 17th May 1915 by the Collector.

There remains to be considered the issue as to whether the defendants were or were not protected by the exceptions of s. 37 of Act XI of 1859, or by the exceptions of s. 12 of Bengal Act VII of 1868.

The learned Subordinate Judge considered all the evidence in any way relating to the tenure of the defendants, and he found that none of those under-tenures was shown to have existed at the time of the Permanent Settlement, and that none of the defendants was within the fourth exception, of s. 12 of Bengal Act VII of 1868. With those findings their Lordships agree. It may, however, possibly be, as the plaintiff's case in his plaint apparently was, that this was the case of a sale of an estate under Act XI of 1859 and not of a tenure not being an estate under

s. 11 of Bengal Act VII of 1868, and consequently that the exceptions to be considered were the exceptions of s. 37 of Act XI of 1859 and not the exceptions of s. 12 of Bengal Act VII of 1868. That question has not been considered by either of the Courts below, and on the evidence before their Lordships they are unable to decide it. In these consolidated appeals, however, the question as to whether the defendants were within the exceptions of s. 37 of Act XI of 1859 or were within the exceptions of s. 12 of Bengal Act VII of 1868, is not substantially material, as it has not been proved that the third exception of s. 37 of Act XI of 1859 or the third exception of s. 12 of Bengal Act VII of 1868 applies to the defendants or to any of them, and the wording of the fourth exception of s. 37 of Act XI of 1859 and of the fourth exception of s. 12 of Bengal Act VII of 1868 are for present purposes practically the same, as it is not suggested that in any of these under-tenancies mines have been sunk, and the gardens of the fourth exception of s. 37 of Act XI of 1859 must mean permanent gardens. There was some evidence that there were wells on the lands, but they seem to have been very shallow and small wells, and not such wells as were meant by the fourth exception, and it has not been suggested that this exception would apply to them. The Subordinate Judge did not refer to the evidence of Baiju Nunia, who said that on one of these under-tenancies there was a two-storied pucca house. Probably the Subordinate Judge thought that that witness's evidence was not worth considering. In their Lordships' opinion it was worthless. No one else said that there was a pucca two-storied house on any of the holdings, and the witness, when he gave his evidence, was about 80 years of age and had been blind for 10 years.

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Before concluding this judgment, their Lordships must allude to the fact that the learned Judges of the High Court, before whom the appeal to their Court was heard, did not express any opinion as to whether the defendants or any of them were protected from ejection by any of the exceptions of section 37 of Act XI of 1859, or of section 12, Bengal Act VII of 1868. The issue on that subject was before them and they should have considered it and found upon it. Their Lordships will quote for the information of those learned Judges what Lord Justice Turner in delivering the judgment of the Board in *Tarakant Bannerjee v. Puddomoney Dossee* (1) said as to the duty of High Court Judges to pronounce their opinions on all important issues in cases before them. The Lord Justice said:—"The cause has not been decided in either Court on the principal point—whether the lands formed part of the *jote* tenure or of the *talook*. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below, should, as far as may be practicable, pronounce their opinions on all the important points."

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed with costs, the decrees of the High Court should be

(1) (1866) 10 Moo. I. A. 476 488.

set aside with costs and the decrees of the Subordinate Judge should be restored.

Solicitors for the appellant : *Watkins & Hunter.*

Solicitors for the respondents : *T. L. Wilson & Co.; Pugh & Co.*

A. M. T.

Appeals allowed.

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Before Richardson and Sukrawardj JJ.

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June 7.

Dower—Limitation—Limitation Act (IX of 1908) Sch. I, Arts. 103, 104, 116—Suit for share of dower by heir of deceased wife where dower fixed by registered document.

Where, on the death of a Mahomedan lady, whose dower was fixed by a registered instrument, a suit was instituted by her father within six years of her death, for recovering his share of the dower :—

Held, that the suit was governed by Art. 116 of the Limitation Act and was within time.

Shahzada Mohamed Faiz v. Shahzadi Omdah Begum (1) not followed.
Tricom Das Cooverjee Bhoja v. Gopinath Jiu Thakur (2) referred to.

Second Appeals Nos. 1346 and 1162 of 1920.

These were two appeals by the defendants which arose out of two suits brought by the father of a

* Appeals from Appellate Decrees, Nos. 1162 and 1346 of 1920, against the decrees of Hem Chandra Bose, Subordinate Judge of Sylhet, dated Jan. 28, 1920, reversing the decrees of Nalini Nath Das Gupta, Munsif of Moulvie Bazar, dated July 30, 1919.