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contention. There are no rules prescribed as to the mode in which the scrutiny is to be conducted. The only test to be applied is, whether the party who takes exception to the votes recorded has been prejudiced by the procedure adopted. We are unable to say that there was any genuine attempt made by the appellant to support his allegation by the production of evidence. There is nothing to show that he asked the Commissioner or the District Judge to take evidence in support of his assertions. In these circumstances we are not satisfied that he has a real grievance in this matter.

The result is that we affirm the decree made by the District Judge and dismiss the appeal with costs.

B. M. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mookerjee and Chotzner JJ.

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July 19.

NABADWIP CHANDRA NANDI

v.

SECRETARY OF STATE FOR INDIA*.

Peshkosh—Abwab—Holders of permanently-settled estate—Statutory or contractual liability—Public Demands Recovery Act (Beng. III of 1913).

Where the holders of a permanently-settled estate under the Government were assessed with *peshkosh* by the Government in addition to the revenue paid by them:

Held, that in the absence of any evidence to show the method of assessment and the realization of *peshkosh* from time out of memory, it

* Appeal from Appellate Decree, No. 2020 of 1920, against the decree of Haripada Majumdar, Subordinate Judge of Midnapore, dated June 16, 1920, affirming the decree of Suresh Chandra Sen, Munsif of Contai, dated Dec. 11, 1918.

was not recoverable unless there was a special liability either statutory or contractual.

Udoy Narain Jana v. *Secretary of State for India* (1), and *Lakshmi Narayan Roy* v. *Secretary of State for India* (2) distinguished.

SECOND APPEAL by Nabadwip Chandra Nandi and Adhar Chandra Nandi, the plaintiffs.

This appeal arose out of a suit for cancellation of a certificate filed under the Public Demands Recovery Act, for refund of Rs. 41-11 realized in execution of the certificate and for a perpetual injunction. Some lands in Mouza Mouhati at Contai in the district of Midnapur were permanently settled on the appellants, and a revenue was assessed. In addition to that the Government levied a certain sum in the shape of *peshkosh* for the preservation of the village embankments. This the appellants refused to pay on the ground that it was an *abwab*, and, therefore, not legally recoverable. A certificate was issued, and the appellants were compelled to pay the money in satisfaction of the debt They preferred an objection before the Revenue Authorities which was rejected. They then brought this suit which was dismissed by both the lower Courts.

Dr. Dwarka Nath Mitter (with him *Babu Santosh Kumar Pal* and *Babu Pramatha Nath Bandopadhya*), for the appellants. The appellants held permanently settled lands for which they pay revenue, and nothing in excess of that is recoverable. *Peshkosh* is an *abwab*, and, therefore, not legally recoverable.

Babu Surendra Nath Guha, for the respondent. *Peshkosh* is legally demanded for the maintenance of the village embankments by which the appellants' lands are benefited. It is not an *abwab*.

(1) (1915) 22 C. W. N. 823.

(2) (1918) I. L. R. 45 Calc. 866 ; 28 C. L. J. 285 ; 22 C. W. N. 824.

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MOOKERJEE AND CHOTZNER JJ. This is an appeal by the plaintiffs in a suit for cancellation of a certificate made under the Public Demands Recovery Act, 1913, for recovery of the sum paid in satisfaction thereof and for an injunction to restrain the Secretary of State for India in Council from making and enforcing similar certificates in future.

The case for the plaintiffs is that on the 7th March, 1917, a certificate was made against them for Rs. 40-3 on account of *peshkosh* in respect of land situated in Mouza Mouhati, Hudda Sham Chok, Pargana Koormal, within the jurisdiction of the Court at Contai. The plaintiffs preferred an objection before the Revenue Authorities on the 30th May, 1917, which was summarily rejected without investigation. Thereupon the plaintiffs were constrained to pay the sum claimed on the 5th July, 1917, when their goods were attached in execution of the certificate. The substance of the contention of the plaintiffs is that the sum claimed as *peshkosh* is not legally recoverable from them. On behalf of the Secretary of State for India in Council, a written statement was filed in which the following allegations were made: "The plaintiffs are liable to pay *peshkosh* for the lands of Naukar Mahal situated in village Dihi Francha in Pergana Koormal Taraf Francha, that the *peshkosh* payable in respect of the above lands is annexed to the mal assets of the estate Jallamutha and the plaintiffs are therefore liable to pay *peshkosh* to the proprietors of the estate Jallamutha, that is, to the Secretary of State for India in Council who is in possession of the estate; that there is no mal land of Jallamutha in village Dihi Francha; the *peshkosh* in question which is a mal asset of the Jallamutha estate used to be collected for the sake of convenience with the mal rent of village Mouhati in estate Jallamutha which is close to it."

The Courts below have dismissed the suit on the ground that *peshkosh* is payable for the upkeep of the embankment by which the lands of the village are benefited. In support of this view reliance has been placed upon the decisions in *Udoy Narain Jana* v. *Secretary of State for India in Council* (1) and *Lakhi Narain Roy* v. *Secretary of State for India in Council* (2). The decision of the Subordinate Judge has been challenged before us on the ground that the cases mentioned have no application to the circumstances of the present litigation.

In the case of *Udoy Narain* v. *Secretary of State for India in Council* (1) it was ruled that an annual sum levied by Government for the upkeep of embankment is not an *abwab* and that consequently when it is established that there has been a long continued payment from time immemorial, that itself constitutes a title in the recipient and is a good and sufficient basis of the claim. That was a suit instituted by the Secretary of State not as landlord but as representing the Government and claiming payment of that which was payable to the Government in respect of certain embankments the upkeep of which was necessary for the preservation of lands including that to which the defendant was entitled. The claim consequently did not rest in any sense on the relation of landlord and tenant. There was further the evidence of long continued payment beyond the memory of man. In these circumstances, it was held on the analogy of the decision of the Judicial Committee in *Sumbhoolall* v. *The Collector of Surat* (3) that a legal origin for the demand must be assumed. In the case of *Lakhinarayan Roy* v. *Secretary of State for India* (2) it was

(1) (1915) 22 C. W. N. 823.
(2) (1918) I. L. R. 45 Calc. 866
(3) (1859) 8 Moo. I. A. 1; 28 C. L. J. 285; 22 C. W. N. 824.

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ruled that *peshkosh* was a fixed annual sum levied by Government from lakhirajdars and nishpishdars of estates under direct management of Government, for the maintenance of village embankments and was not an imposition in the nature of an *abwab*. In that case also, there was evidence to show that proprietors had from time out of memory realised *peshkosh* from lakhirajdars and nishpishdars, and in some instances from the tenants of lakhirajdars and nishpishdars. The inference which the Court drew from the evidence was that the practice had existed for so long that it must be referred to some legal origin; in other words that there was an indication that at some time there was an agreement between the proprietors of the two estates and those who held land therein that the former should maintain and repair the embankments in the estates with the aid of funds contributed by the latter.

It is plain that the circumstances of the case before us are entirely of a different description. The plaintiffs are the holders of a permanently settled estate under the Government. The demand which is now made upon them is in addition to the revenue payable by them in respect of their estate. Such an additional demand can be recoverable if there is a special liability either statutory or contractual. It is conceded that there is no statutory liability on the plaintiffs to make the payment of *peshkosh*. Is there then a contractual liability? There is no evidence on the record to show when the liability was first imposed, a liability for the maintenance of a village embankment which protects the land from inundation. There is no indication as to the time when these embankments were erected. If the embankments were in existence at the time when the estate claimed by the plaintiffs was permanently settled with them, the

inference would be legitimate that the sum payable in respect of the maintenance of the embankment was included in the revenue assessed. On the other hand, if the embankments were erected after the creation of the permanently-settled estate, it is conceivable that there was an agreement between the Government on one hand and the proprietor on the other, for payment by the latter of a contribution towards the maintenance of the embankment. There is further no evidence to show how this sum was assessed and on what basis the figure was calculated; nor is there evidence to show that this sum has been realized by the Government from the proprietor from time out of memory. No doubt, revenue papers have been produced which go back to the year 1838 and contain mention of the liability of holders of nankar lands to pay *peshkosh*. That statement appears to have been reproduced in subsequent documents of the years 1843, 1874, 1875 and 1876. These do not, however, support the claim of the Government to levy *peshkosh*. There is no evidence that the sum was actually realized; on the other hand, it is curious that the collection papers have all disappeared. It is difficult to believe that the collection papers have so completely disappeared that no evidence can be traced of realization of this sum at any time except once in 1904. An amount was then levied under the Public Demands Recovery Act; but the proprietors protested against the demand levied as an illegal exaction. We must further bear in mind that even though *peshkosh* may be leviable on nankar lands, it has still to be established that, when the nankar lands have been resumed and have been transformed into a permanently-settled estate, there is still a liability on the proprietor to make the payment in addition to the revenue assessed. There is thus no

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escape from the conclusion that the claim put forward on behalf of the Government has not been established. We have anxiously considered what direction should be given in these circumstances. We have arrived at the conclusion that the right course to follow would be to allow the appeal, set aside the decrees of the Courts below and to remand the case to the Court of first instance in order that the suit may be retried and opportunity afforded to the Government to establish that the claim put forward is well founded. There may be papers with the revenue authorities which may elucidate the history of this demand, when it originated, whether it has ever been enforced and on what basis it rests.

The result is that this appeal is allowed, the decree of the Court below set aside and the case remanded to the Court of first instance for retrial. The appellants will be entitled to their costs both here and before the lower Appellate Court. The costs in the Court of first instance will abide the result of the retrial.

B. M. S. *Appeal allowed.*