any part of this particular contract. The argument therefore which was addressed to us upon those words entirely fails.

We think that the questions referred to us should be answered as follows: The first and fourth questions should be answered in the affirmative. The second question of course, does not arise; and as to the third, we do not see that the Nagri writing is at all inconsistent with the English contract.

The defendants must pay the costs of this reference.

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CARLISLES, NEPHEWS & Co. v. HURMOOK ROY.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

IN No. 308.—TITU BIBI (DEFENDANT)
„ „ 357.—MUNSURUNNISSA BIBI (DEFENDANT)
„ „ 358.—IBRAHIM MALLA (DEFENDANT)

v.

MOHESH CHUNDER BAGCHI AND OTHERS (PLAINTIFFS.)*

1883 *February* 28.

Sale for arrears of rent—Patni tenure—Darpatni tenure—Under tenure—Incumbrance—Beng. Act VIII of 1869, *ss.* 59, 60, 66.

The sale of a patni tenure for its own arrears under ss. 59 and 60, Beng. Act VIII of 1869, does not *per se* avoid the darpatni tenures, but only renders them voidable at the option of the purchaser.

An under tenure is an incumbrance within the meaning of s. 66, Beng. Act VIII of 1869.

THIS case was referred to a Full Bench by MCDONELL and FIELD, JJ., on the 29th of June 1882. The facts are as follows: The plaintiffs claimed rent as darpatnidar of a certain mehal. The patni mehal was sold for its own arrears in Pous 1285, (December 1878) and purchased by certain persons who were not made parties to this suit. The amounts claimed are arrears for the year 1285 (1878). The ryots objected to the suit on the ground that the patni mehal having been sold for its own arrears the darpatni rights had been extinguished, and that in consequence they were not liable to pay the rent to the plaintiffs for the

* Full Bench Reference made by Mr. Justice McDonell and Mr. Justice Field, dated the 29th June 1882, in appeal from Appellate Decrees Nos. 308, 357, and 358 of 1881.

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period subsequent to the sale. They also alleged that they had paid rent for that period to the new purchaser. The Judge of the lower Appellate Court held that the sale of Pous 1285 did not *ipso facto* avoid the darpatni, and he gave the plaintiffs a decree, there being no evidence to show that the purchasers of the patni had ever taken possession of the mehal. The following is the reference to the Full Bench:—

"The question raised in this case is, whether upon the sale of an under tenure, under the provisions of ss. 59 and 60 of Beng. Act VIII of 1869, a subordinate under tenure is *ipso facto* avoided by the sale; or is not avoided until the purchaser by some overt act indicates his intention to exercise his power of avoidance. In the present case a darpatnidar sued the tenants immediately under him for rent; and they have set up as a defence that in consequence of the sale of the patni tenure for its arrears in 1285, the darpatni was *ipso facto* avoided, and the darpatnidar's rights came to an end.

"The lower Appellate Court has held that the darpatni was not *ipso facto* avoided; that the effect of the sale was to make it avoidable only; and that there is nothing to show that the purchaser of the patni has exercised his option of avoidance.

"It is now contended before us, upon the authority of the cases of *Unnoda Churn Dass Biswas* v. *Mothura Nath Dass Biswas* (1), and *Mohini Chunder Mozumdar* v. *Jotirmoy Ghose* (2), that this decision is wrong, and that the Subordinate Judge should have held that the effect of the sale was to avoid the darpatni, irrespective of any act of the purchaser. The question is one of some intricacy, and the decisions of this Court are conflicting. A sale for arrears of revenue and a sale for arrears of rent have, on many occasions, been regarded as analogous; and in considering the consequences of a sale for arrears of rent, an argument has been drawn from the consequences of a sale for arrears of revenue. In the case of *Ranee Surnomoyee* v. *Suteeshchunder Roy* (3), their Lordships of the Privy Council say, [Here his Lordship quoted from 10 Moore's I. A., pp. 143 to 147: "Upon

(1) I. L. R. 4 Calc., 860; S. C. 4, C. L. R., 6.

(2) 4 C. L. R., 422.

(3) 10 Moore's I. A., 123: S. C. 2 W. R., P. C., 14.

the argument before their Lordships"——"According to usages and rate of the Parganas."]

"The case just referred to was followed by the case of *Khajah Assanoollah* v. *Obhoy Chunder Roy* (1), and this latter case is discussed in case of *Kazee Munshee Aftabooddeen Mahomed* v. *Sanioolla* (2). Then comes the case of *Raja Suttya Sarun Ghosal* v. *Mahesh Chandra Mitter* (3). In this case the principle laid down in the case of *Ranee Surnomoyee* was applied to a sale under the subsequent Regulation XI of 1822; and it was laid down that the option of avoidance was to be exercised within a reasonable time. The language of s. 30 of Regulation XI of 1822 was: "All tenures which may have originated with the defaulter or his predecessors, *&c.*..... *shall be liable to be avoided and annulled by the purchaser, &c.*" To the same effect is the case of *Tara Chand Dutt* v. *Mussummat Wakenoonnissa Bibee* (4), which was also decided upon s. 30 of Regulation XI of 1822. In the case of *Koylash Chunder Dutt* v. *Jubur Ali* (5), the same principle was extended to sales under s. 37 of Act XI of 1859, and it was further held that the assignee of a purchaser may exercise the power of avoidance. The language of s. 37 of Act XI of 1859 is: "The purchaser... shall acquire the estate *free from all incumbrances* which may have been imposed upon it after the time of settlement, and shall be entitled to avoid and annul all under tenures and forthwith to eject all under-tenants with the following exceptions." The same language "*acquire it free of all incumbrances*" is used in s. 66 of Beng. Act VIII of 1869.

"In the case of *Madhusudan Kundu* v. *Ram Dhan Ganguli* (6) the same principle was extended to patni sales. Markby, J., referring to the decision upon the Revenue Sale Law, said: "It is true that these decisions turned upon words of the law not precisely similar to those of Regulation VIII of 1819,

(1) 13 Moore's I. A., 317.
(2) 23 W. R., 245.
(3) 2 B. L. R., P. C., 30: 11 W. R., P. C., 10.
(4) 7 W. R., 91.
(5) 22 W. R., 29.
(6) 3 B. L. R., A. C. 431; 12 W. R., 383.

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s. 11, cl. 1, but it is clear to my mind that it would be impossible to put a construction upon that Regulation different from that put in those decisions on the Regulation of 1793, of 1822, and Beng. Act VI of 1862 which are all in *pari materia*; and I think it must now be taken as an established principle of law that no sales for arrears of rent have *ipso facto* the effect of cancelling tenures created by defaulting owners, but merely to give to the purchaser the power to do so if he thinks proper, which has not been done in this case." In the case of *Gobind Chunder Bose* v. *Alimooddeen* (1) the same principle was applied to a sale under Beng. Act VIII of 1865. Bayley, J., there said: "The expression used by the first Court is not that it finds that the intervenor was so in receipt of such rents, but to the effect that, *even if he were*, the plaintiff's auction-purchase would over-ride every position that the intervenor might have under the law. In my opinion this is quite erroneous. Section 16, Beng. Act VIII of 1865 enacts 'that the purchaser of an under tenure, sold under this Act, *shall acquire it free of all incumbrances* which may have accrued thereon by any act of any holder of the said under tenure, his representatives or assignees, unless the making of such incumbrances shall have been expressly vested in the holder by the written engagement under which his under tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees.' But it does not follow that without any act on the part of the auction-purchaser, or any notice of an intention to cancel a pre-existing *miras* tenure, an auction-purchaser might avoid any incumbrance. The real duty of the first Court, therefore, on Beckwith's intervention, was to fix an issue and take evidence and try whether, *firstly*, at the time of the auction-purchase, Beckwith, as dur-mirasdar of Kristo Jibun, was in actual receipt and enjoyment of the rents *bonâ fide* or not. This will include the question as to whether there was any notice given by the auction-purchaser of the cessation of Beckwith's dur-maurasi right, and of the auction-purchaser's intention to exercise his right with reference to the provisions of s. 16, Beng. Act VIII of 1865."

(1) 11 W. R., 160.

"Now, up to this case, there seems to have been a *consensus* of decision that the same principle applied to sales for arrears of revenue and sales for arrears of rent. But then come the cases of *Unnoda Churn Dass Biswas* v. *Mothura Nath Dass Biswas* (3), and *Mohini Chunder Mozumdar* v. *Jotirmoy Ghose* (4), in which a contrary view has been taken. In this conflict of decisions we refer the following questions to a Full Bench :—

"(1) Has a sale under ss. 59 and 60 of Beng. Act VIII 1869 the effect of avoiding incumbrances irrespective of any act done by the purchaser in order to the exercise of the right of avoidance? (1) Is an under tenure an incumbrance within the meaning of s. 66 of Beng. Act VIII of 1869? With reference to the last question, it is to be observed that while the patni regulation provides expressly for incumbrances and under tenures, s. 66 of Beng. Act VIII of 1869 provides for incumbrances only."

Baboo *Nil Madhub Bose* for the appellants.

No one appeared for the respondents.

The judgment of the Full Bench was delivered by

GARTH, C.J.—In answer to the questions referred to us, I think that an under tenure is clearly an incumbrance within the meaning of s. 66 of the Rent Law of 1869, and I also think that, for the purposes of this case, the effect of a sale for arrears of revenue under Regulation VIII of 1819 is substantially the same as that of a sale for arrears of rent under s. 37 of the Rent Law. In either case the under tenures are not *ipso facto* avoided by the sale, but are voidable only at the option of the purchasers.

In the case of *Unnoda Churn Dass Biswas* v. *Mothura Nath Dass Biswas* (2) the question which we have now to decide was hardly considered. That case came up on appeal before my learned brothers and myself from a decision of Mr. Justice Markby and Mr. Justice Prinsep, who had differed as to the time within which a purchaser under the Rent Law was bound to bring a suit to cancel an under tenure.

(1) I. L. R., 4 Calc., 860 : S. C., 4 C. L. R., 6.
(2) 4 C. L. R., 422.

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Mr. Justice Markby thought that the purchaser, in order to entitle himself to sue, must give some notice of his intention to cancel the under tenure within a reasonable time after the sale. Mr. Justice Prinsep was of opinion that the purchaser was not bound to give any notice; and that what was a reasonable time for cancelling the under tenure had been defined by Art. 120 of the Limitation Act of 1871.

In this I agreed with my brother Prinsep, and all that we really decided in that case, so far as I am aware, was, that it is not necessary, for the purpose of avoiding an under tenure or other incumbrance, that the purchaser should give any notice, or to do any act before bringing his suit; and that his suit must be brought within the time prescribed by the Limitation Act.

I fear, however, that my own judgment in that case was not as carefully worded as it ought to have been, and that it may have led to an impression, which appears to have been acted upon in subsequent cases, that we intended to lay down as law, that under s. 37 of the Rent Law incumbrances including under tenures were absolutely avoided by the sale.

I consider the view of the learned Judges who referred this case to be quite correct, namely, that for the purpose of the question which we have to determine, the same principle applies to sales of arrears of rent as to sales for arrears of revenue, and that both are only voidable at the option of the purchaser.

The appeals, therefore, in all the cases depending upon our decision will be dismissed.

Appeals dismissed.