Before Mr. Justice McDonell and Mr. Justice Field.

DAVID (PLAINTIFF) *v.* GRISH CHUNDER GUHA (DEFENDANT).* 1882 *June* 30.

Mufassal Small Cause Court Act (XI of 1865), s. 6—Res judicata—Interest in Land—Jalkar—District Road Cess Act (Beng. Act X of 1871).

A suit to recover road cess and public works cess is not a claim for money on bond or other contract, but is a claim created and made recoverable by a special enactment of the Legislature, and does not fall within the provisions of s. 6 of the Mufassal Small Cause Court Act.

The decision of a District Judge deciding that the plaintiff is not entitled to sue in a suit for road cess, where the amount claimed is less than Rs. 100, and therefore no second appeal lies to the High Court, is a bar to a second suit in which the amount claimed is above Rs. 100.

A jalkar does not impart any interest in the soil itself, and therefore a patni of a jalkar is not "an interest in land" within the meaning of the definition in the District Road Cess Act.

Baboo *Rashbehary Ghose* and Baboo *Lall Mohun Dass* for the appellant.

Baboo *Rajendro Nath Bose* for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court (MCDONELL and FIELD, JJ.), which was delivered by

FIELD, J.—In this case the plaintiff is the proprietor of a *sair* mehal, or jalkar, which is No. 4000 on the rent-roll of the Furridpore Collectorate. The defendant holds under the plaintiff a patni, apparently of the whole of this property. The present suit is brought to recover the sum of Rs. 302-4 annas, on account of road cess and public works cess. A preliminary objection is taken that this is a suit of the Small Cause Court class, and therefore, as the amount is under Rs. 500, no second appeal will lie. It is contended that, with reference to the language of cl. 4 of the proviso to s. 6 of Act XI of 1865—

* Appeal from Appellate Decree, No. 2376 of 1880, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Furridpore, dated the 10th of September 1880, affirming the decree of Baboo Girindro Mohun Chuckerbutty, First Munsif of Bhanga, dated the 25th of August 1879.

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"for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer,"—the claim in the present case is not a claim for which a suit could have been brought before a Revenue Officer at the time when Act XI of 1865 was passed. It is said, therefore, that the case does not fall within the proviso, but comes within the general words of s. 6 of the Act; and that the suit is therefore maintainable in the Small Cause Court alone.

We think it unnecessary to consider whether the suit comes within the language of the proviso or not, because it appears to us that this particular suit does not come within the general words of the section itself. We think that this is not a claim for money on bond or other contract. It is a claim created and made recoverable by a special enactment of the Legislature; and, in our opinion, does not fall within the provisions of s. 6 of the Small Cause Court Act.

The next contention is, that, so far as regards the road cess, the present claim is barred by a previous decision between the same parties, in which it was held that the plaintiff could not recover road cess. In that case the amount claimed was under Rs. 100; and inasmuch as the road cess is declared by the Act to be recoverable in the same way as rent, the provisions of Beng. Act VIII of 1869 were held applicable, and under the provisions of s. 102 of that Act, as the amount sought to be recovered was below Rs. 100, it was held that there was no second appeal; and the District Judge's decision was therefore final. It is now contended that, inasmuch as the amount sought to be recovered in the present case exceeds Rs. 100, and there is therefore a second appeal to the High Court, the principle of *res judicata* is not applicable. But it appears to us that the question as to the liability to road cess was decided by a Court of competent jurisdiction in the former case, and that therefore the principle of *res judicata* does apply. We may observe that the plaintiff could easily have secured his second appeal upon the point which he raises by waiting to sue until the amount sought to be recovered exceeded 100 rupees.

The third question raised is, whether public works cess can be recovered by the plaintiff upon this so-called patni. The

public works cess is provided for by Beng. Act II of 1877, which declares all immoveable property to be liable to the payment of a cess therein called the public works cess. Section 5 enacts that all holders of estates or tenures shall pay the public works cess at the rate determined under s. 4 and in the manner and the proportions prescribed for the payment of the road cess by the District Road Cess Act. Section 9 provides that the words and expressions 'house,' 'estate,' 'tenure,' 'district,' 'immoveable property,' 'holder of an estate or tenure' shall have the meanings attributed to them respectively in the District Road Cess Act. The District Road Cess Act is Act X of 1871 of the Bengal Council, and the definition of 'tenure' as given in that Act is: 'tenure' "includes every interest in land, whether rent-paying or not, save an estate as above defined, and save the interest of a cultivating ryot." Now the question admittedly to be determined is, whether this patni of a jalkar is a tenure within the meaning of the term as used in the District Road Cess Act (Beng. Act X of 1871). 'Land' is defined in the same section to mean "land which is cultivated, uncultivated, or covered with water." It is to be observed that the language of the definition of 'tenure,' which "includes every interest in land," &c.—must be understood as not excluding all the usual and ordinary meanings of the word 'tenure.' It has not been contended before us that the word 'tenure,' apart from the above definition, would include a jalkar, and we think it impossible to say that it would.

Turning then to the definition, can we say that a jalkar is an interest in land, meaning by 'land,' land which is cultivated, uncultivated, or covered with water? It appears to us that we cannot say that it is such an interest. The question whether a fishery implies the ownership of the soil was discussed in England in the case of *Marshall* v. *The Ulleswater Steam Navigation Company* (1). It was there held that the allegation of a several fishery *primâ facie* imports ownership of the soil,—Blackburn, C. J., dissenting, although he held that the Court was bound by the authorities to that effect. Now, in England,

(1) 3 Best and Smith's Reps., 732.

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a several fishery may undoubtedly exist apart from any ownership of the soil under the water. It may exist as an incorporeal right. Where it exists as an incorporeal hereditament, it has been held not to be the subject of occupation, and therefore not to be ratable for the relief of the poor; and it required express words in the Rating Act, 37 and 38 Vict., c. 54, s. 3, to make rights of fishing when secured from the occupation of land, ratable for the relief of the poor. In this country we think that a jalkar does not necessarily imply any right in the soil. In the case of *Radha Mohun Mundul* v. *Neel Madhub Mundul* (1) it was said:—"It is quite familiar that jalkar rights are frequently granted extending over large estates, the property of other persons than the grantee of the jalkar; and it is clear that if, on the water drying up, the land below it become the property of these grantees, the most complicated questions of fact would constantly be arising, because long after the drying up of the beels, the Courts would be called upon to decide how far the water had originally extended, and, as in the very case before us, grants of jalkar are usually conveyed in such terms as to import the use and enjoyment of what may be called purely aqueous rights, such as fishing, gathering of rushes and other vegetation which arise from and are connected with water, and it may be very well conceived that if in such cases the right to the soil were implied in the grant of the jalkar, it would be wholly unnecessary to specify the particular rights. We have mentioned this because if the grantee were the owner of the land, he would, as a matter of course, be entitled to everything on it." Now, if a jalkar does not import any interest in the soil itself, we think it impossible to say that it is an interest in land within the meaning of the definition in the District Road Cess Act, land being there defined to mean land which is cultivated, uncultivated, or covered with water. We may further observe that, in Act VII of 1868 of the Bengal Council, the word 'tenure' is defined to include "all interests in land, whether rent-paying or lakhiraj (other than estates as above defined) and all fisheries." Now, if the word 'tenure,' in its ordinary accepta-

(1) 24 W. R., 200.

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tion, included fisheries, it would have been unnecessary for the Legislature to say in so many words that in Beng. Act VII of 1868 it was to include fisheries. Beng. Act VII of 1868, it is to be observed, was passed before the District Road Cess Act (Beng. Act X of 1871); and if it can be contended that, in the latter Act, the omission of fisheries in the definition was due to an oversight of the Legislature, it is important to observe that no steps have been taken to remedy that oversight in the Cess Act (Beng. Act IX of 1880). The result would seem to be that the Legislature, by deliberately inserting 'fisheries' in the definition of 'tenure' in one Act, and omitting the same matter in the definition of the same word in another Act, passed for different purposes, intended that the term 'tenure' should not include fisheries in the latter Act. We think, therefore, that a patni of a jalkar is not a tenure within the meaning of the Road Cess Act.

The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

NILMONI SINGH DEO (DEFENDANT) *v.* BAKRANATH SINGH (PLAINTIFF) AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

*P. C.** 1882 *Feb.* 6, 7, 8, *& Mar.* 10.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Jaghir—Inclusion of Jaghir Lands in Area of Settled Zemindari—Ghatwali Tenure—Reg. XXIX of 1814.

In the area of a zemindari were included at the Permanent Settlement the mauzas which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zemindari assets on which the jama of the latter was fixed.

Held, that whether this jaghir was a ghatwali tenure or not, within the meaning of the term as applied in Reg. XXIX of 1814 (1), (the zemindari being Pachit, adjoining, and at one time included in, Birbhum,) the jaghir was analogous to such tenure as described in the preamble to the Regulation.

Present:—LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) Relating to "the lands held by the class of persons denominated ghatwals in the district of Birbhum."