1884

LOBURI DOMINI v. THE ASSAM RAILWAY AND TRADING CO., LD.

to form an opinion in the course of his executive duties and to give effect to that opinion upon his own authority, though subject to control from the Local Government.

In the present case, although we shall not now make these rules absolute, yet we feel bound to say that, under the circumstances, the petitioners were justified in applying to this Court; and in this view we think they are entitled to some costs. We allow them a gold mohur in each case and discharge the rules.

Rules discharged.

Before Mr. Justice Field and Mr. Justice Beverley.

1884
June 18.

ASSANULLAH (PLAINTIFF) *v.* BUSSARAT ALI CHOWDRY (LUNATIC) BY HIS GUARDIAN PRANKRISTO DASS (DEFENDANT.)*

Enhancement of rent, Liability of land comprised in a zemindari to—Burden of proof in respect thereof—Dependent taluq—Resumed lakhiraj—Regulation XIX of 1793.

In a suit for enhancement of rent in respect of land which the defendant claimed to hold as a dependent *taluq*; *held*, the *onus* was upon the zemindar to show that the land was included in the zemindari at the time of the permanent settlement.

A ZEMINDAR, who was a purchaser from Government, brought certain suits for enhancement and arrears of rents in respect of some land comprised in his estate. The Munsiff dismissed the suits, on the ground that as the predecessors of the defendants had held the land in question as *lakhiraj*, and Government whilst in *khas* possession had resumed the land upon the terms and under the provisions of ss. 8 and 9 of Regulation XIX of 1793, the land must be considered as a dependent *taluq* and was as such exempted from enhancement of rent. The Subordinate Judge confirmed the judgment of the first Court. The plaintiff (zemindar) then preferred an appeal to the High Court.

Baboo *Rashbehari Ghose* for the appellant, contended, *inter alia*, (*a*) that the resumption in question was in reality made

* Appeals from Appellate Decrees Nos. 479 and 1373 of 1883, against the decrees of Baboo Roma Nath Seal, Second Subordinate Judge of Tipperah, dated the 2nd of February and 14th of March respectively, affirming the decrees of Baboo Janokee Nath Dutt, Munsiff of Commillah, dated 26th of January and 19th of May 1882.

1884

ASSANULLAH v. BUSSARAT ALI CHOWDRY.

under s. 10, Regulation XIX of 1793, and the land was settled with defendant according to the provisions of s. 5, Regulation IX of 1825, and consequently the defendant could not claim exemption from enhancement.

(*b*) That the *onus* of proof was entirely upon the defendant to prove distinctly that the tenure held by him was not liable to enhancement and that he had wholly failed to discharge it.

The Senior Government Pleader (Baboo *Annoda Pershad Bannerjee*) for the respondent.

The judgment of the Court (FIELD and BEVERLEY, JJ.) was delivered by

FIELD, J.—This was a suit for enhancement. The plaintiff is a purchaser from Government. The Subordinate Judge has found that the plaintiff is not entitled to enhance the rent, because the land in respect of which the suit has been brought was resumed *lakhiraj* such as is referred to in s. 9 of Regulation XIX of 1793; in other words, that it was a resumed grant which had been made before 1790, and that, according to the last clause of the section just recited, the defendant, after resumption and settlement, was entitled to hold the land as a dependent *taluq* subject to the payment of a revenue fixed for ever. The learned vakeel for the appellant has addressed to us a long argument, in the course of which he has referred to a large number of cases bearing upon the intricate questions of *lakhiraj* land and resumption. There are really two points in this argument which require our consideration. The *first* point contended for is, that the burden of showing that the land formed a grant created before 1790 was upon the defendant; and the *second* point is, that the defendant has failed to discharge the burden of proof which ought to be placed upon him. As to the *first* point we think that the burden of proof was not upon the defendant but upon the plaintiff. The plaintiff seeks to enhance. The defendant contends that the land is not liable to enhancement because it constituted a grant created before 1790. In this state of the pleadings it is evident that, if no evidence were given on either side, the defendant must succeed. Therefore, according to the ordinary rule, the burden

1884

ASSANULLAH v. BUSSARAT ALI CHOWDRY.

of proof is upon the plaintiff. But it is said, that there is a *presumption* that the zemindar is entitled to enhance the rents of all the lands situated within his zemindari, and that the effect of this presumption, is to cast upon the defendant the burden of showing that the land held by him is an exception to that general rule. No doubt there is, as decided by the Privy Council, a presumption that a zemindar is entitled to enhance the rents of all lands situated within his zemindari, in other words which would be more precise, of all lands which formed an integral portion of his zemindari at the time of the permanent settlement. But that principle can have application only, when it is admitted, or proved, that lands were included within a zemindari at the time of the permanent settlement: and it assumes this to have been admitted. In the present case the whole question is, whether the lands in dispute did form a part of the zemindari, that is, whether they were included within the zemindari at the time when the permanent settlement was made. In cases of *lakhiraj* grants antecedent to 1790, it is well-known law that these lands were not included within the settlement, and did not form a part of the assets upon which the calculation for the permanent settlement was made. In the case of grants made after 1790, the converse of this proposition is true. Now, there is no presumption in the case of lands which are admittedly *lakhiraj* one way or the other; no presumption, that is, that the grant was antecedent to 1790 or subsequent thereto. This is matter of evidence. It is clear, therefore, that the presumption as to the right to enhance cannot apply to a case of this kind. Before the presumption can apply, it must be admitted, or proved, that the lands to which it is sought to apply it, were included in the zemindari at the time of the permanent settlement. This is not admitted; it is denied in the present case. It must therefore be proved. The plaintiff cannot succeed unless he proves it: and the burden of proof is therefore on him. But although we are of opinion, that the burden of proof was upon the plaintiff to show that these lands were lands forming a portion of a grant made subsequent to 1790, and therefore lands the rents of which he was entitled to enhance, we will assume, for the purposes of argu-

ment, that this was not so, and that it lay upon the defendant to prove that this particular grant was a grant antecedent to 1790. Even in this view of the case, we think, there is enough upon the resumption proceedings to show that the grant was antecedent to 1790. It may be observed that there is no direct evidence as to the period when the *lakhiraj* grant was created, and that all information in the shape of evidence is to be derived from the resumption proceedings. The Subordinate Judge says in his judgment: "It is clear from the resumption proceedings, that Government did not consider it as an invalid grant made subsequent to 1st December 1790, nor resume it according to the provisions of s. 10 of Regulation XIX of 1793." This is rather a negative observation, but, we think there are two facts to be discovered from the resumption proceedings, which are strong to show that the invalid grant so resumed was a grant antecedent to 1790. The first of these facts is, that a settlement was made with the *ex-lakhirajdar* at half rates.

This is in accordance with the provisions of s. 5 of Regulation XIX of 1793, and it is clear upon the regulations, that in cases of land forming part of a grant invalid by reason of having been made subsequent to 1790, the settlement must have been at full rent. The fact therefore that the settlement was made at half rate, is strong evidence to show that the revenue authorities dealt with the grant as one antecedent to 1790.

The other fact is concerned with the quantity of land. It appears, that the Deputy Collector first proposed to release the land, because being less than ten bighas, it came within the purview of clause 4 of s. 3 of Regulation XIX of 1793. Now, that clause is an exception to the general rule applicable to grants made after 1765 and before 1790, and the very fact that the Deputy Collector regarded this particular land as coming within the exception, assumes the application of the rule itself—a rule, which applies only in the case of grants antecedent to 1790. It is true, that the authority superior to the Deputy Collector took a different view, and was of opinion that this particular land did not come within the exception, but there is nothing to show that in considering that the exception did not apply, the superior revenue authority further considered that the grant

1884

ASSANULLAH v. BUSSARAT ALI CHOWDRY.

did not come within the purview of the rule applicable to grants made antecedent to 1790. We think, therefore, that even assuming that the burden of proof lay upon the defendant, there is enough in the resumption proceedings to show that this grant was an invalid grant executed antecedent to 1790, and that after resumption and settlement, it became a dependent *talug*, to be held at a fixed rate of rent for ever, and therefore protected from enhancement. These appeals must therefore be dismissed with costs.

Appeals dismissed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

1884 *June* 26.

NOBIN CHANDRA ROY (PLAINTIFF) *v.* MAGANTARA DASSYA AND ANOTHER (DEFENDANTS).*

Hindu Law—Joint owners—Suit against one sharer—Decree against property—Claim by other co-sharer allowed—Suit against both sharers—Res-judicata.

Through ignorance of the position of affairs, one only of two persons, joint owners in a property, was sued for a debt for which the property had been pledged by the person sued, and a decree was obtained and execution issued against the property; and in such execution proceedings the other sharer put in a claim, and obtained an order releasing her share of the property from attachment. A second suit was then brought by the judgment-creditor against both sharers, for the purpose of making the share of the co-sharer, who had not been previously sued, available to satisfy the defendant, and praying that the order releasing the property from attachment might be set aside; *held* that such a suit would lie, and would not be barred *as res-judicata*.

IN December 1880 one Nobin Chandra Roy brought a suit against one Chunilal, who had executed a *karbarnama* dated the 25th Srabun 1285 B.S., in the plaintiff's favour, under which certain properties had been given as security for a loan account which was opened for the purposes of Chunilal's business. Nobin Chandra Roy, in August 1880, obtained a decree against Chunilal, making the property secured under the *karbarnama* liable, and in execution this property was attached.

* Appeal from Original Decree No. 321 of 1884, against the order of Babu Motilal Sarkar, Roy Bahadoor, Subordinate Judge of Rungpore, dated the 18th of September 1882.