

a suit within the time fixed in this bond and recover the money. I will not transfer or mortgage to any one the hypothecated property till the principal and interest of this debt is paid up; if I do so it will be illegal." Then he goes on: "These few lines have therefore been written as an unconditional bond hypothecating my property, so that it may serve as a document and be of use when required. *P.S.*—I have taken this Rs. 4,100 over and above the Rs. 3,200 borrowed by me, by hypothecation of the property, by the mortgage deed attested on 17th March 1873."

Looking at the whole of this deed, their Lordships cannot place any other interpretation upon it than that it was a mere hypothecation of the taluq which was then under management.

Then with regard to s. 4, cl. 3, which says, "that, so long as such management continues, the taluqdar and his heir shall be incompetent to mortgage, charge, lease, or alienate their immovable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom," it appears to their Lordships that this deed, being a mere hypothecation of the property, falls clearly within the clause, and consequently that it was invalid. Both the Courts have held that the deed was invalid within the meaning of the Act; and their Lordships think that those decisions are right. They will therefore humbly advise Her Majesty to affirm the decision of the Court; and the appellant must pay the costs of this appeal.

Solicitors for the appellant: Messrs. *Watkins and Lattey*.

Solicitors for the respondent: Messrs. *Barrow and Rogers*.

### APPELLATE CIVIL.

*Before Mr. Justice Tottenham and Mr. Justice Norris.*

GOPAL CHUNDER SIRCAR (PLAINTIFF) v. ADHIRAJ APTAB  
CHAND MAHATAB (DEFENDANT).\*

*Cesses, Liability for—Debutter land—"Owner and holder"—Bengal Act IX of 1880, s. 56.*

Bengal Act IX of 1880 contemplates the payment of the cesses by persons beneficially interested in the land in respect of which the cesses are levied.

\* Appeal from Appellate Decree No. 1686 of 1883, against the decree of Baboo Jogesh Chunder Mitter, Second Subordinate Judge of Burdwan, dated the 26th of March and 29th of March 1883, reversing the decree of Baboo Gopal Chunder Bose, Second Sudder Munsiff of Burdwan, dated the 15th of December 1882.

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The words "owner and holder" in s. 56 of that Act are not limited to any one person, nor for the purposes of that section must the owner be in actual possession. The plaintiff, who was a putnidar of the defendant, having paid certain cesses in respect of what he described in his plaint to be "debutter lakhraj lands" lying within the ambit of his putni, sued the defendant to recover the amount of such cesses. The defendant admitted that he was proprietor of the estate in which the lands were situated, but denied his liability for the cesses.

*Held*, that the defendant was not liable to pay the amount of the cesses, but that the person liable was the idol through its shebait, or some person in receipt of the rents and profits of the land, or some person in actual possession of the land in occupation of it.

In this case the plaintiff, who was a putnidar of the defendant, had to pay certain road and public work cess in respect of lands described in the plaint as the debutter lakhraj lands of an idol named Shib Thakoor. The plaintiff alleged that the defendant was the proprietor and in possession of the land, and as such was liable to make good the amount paid in respect of the cesses.

Before the Munsiff the defendant admitted his title to the land in question, but contended that he was not liable, and that the plaintiff should have sued the person who was in actual occupation of the land. The Munsiff, however, gave the plaintiff a decree for the amount claimed, on the ground that he was entitled to have the amount of the cesses paid by the defendant, inasmuch as he was the *proprietor* of the rent-free land.

On appeal the Subordinate Judge reversed the decree of the Munsiff, and dismissed the suit on the following grounds, as stated in the judgment:—

"The plaint in this case does not appear to have been rightly framed. The property from which cess was claimed was described as the debutter lakhraj property of some idol, Shib Thakoor. Nevertheless, the plaint stated that the Maharajah defendant was the proprietor and was in possession. If the property is actually debutter, the idol is, and must be presumed to be, the malik, and if the Maharajah is in possession he cannot but be the trustee or shebait. The suit does not seem to have been framed against the defendant in his character as shebait or trustee. The Maharajah in his written statement says that on enquiry he finds that he is not in possession, and that those in possession

should have been sued, and he pleaded non-liability for the plaintiff's claim. The lower Court decreed the plaintiff's claim in this state of the pleadings, saying that he has the undoubted right to sue the proprietor of the rent-free land, and therefore the defendant was liable. I think this view of that Court is not supported by the law. Section 56 of Act IX. of 1880 recognises three classes of persons as bound to pay cesses for rent-free lands:—

- (1.) Owner and holder of any rent-free land.
- (2.) Every person in receipt of the rents and profits.
- (3.) Every person in possession and enjoyment of the land.

“The Maharajah does not admit that he is in possession or enjoyment of the land, nor has the plaintiff adduced evidence to show that he is so in possession. If the Maharajah is in receipt of the rents, he is the shebait of the debutter property. This does not seem to be the plaintiff's case. Nor has it been proved by the evidence. The Maharajah may be ‘owner,’ but it has not been shown that he is also the ‘holder.’ The word ‘and’ in the section couples the words ‘owner’ and ‘holder.’ It does not, as urged by the respondent's pleader, disjoin them. So that there is nothing to show how the Maharajah can be held liable.”

Against that decision the plaintiff now specially appealed to the High Court.

*Baboo Grija Sunkur Mozoomdar* for the appellant.

*Baboo Chunder Madhub Ghose* and *Baboo Basunt Coomar Bose* for the respondent.

The judgment of the High Court was as follows :

TOTTENHAM, J. (NORRIS, J., concurring).—In this case the plaintiff, who is the appellant in this Court, was a putnidar of the Maharajah of Burdwan. As a putnidar he had to pay road cess and public work cess, in respect of certain debutter lands lying within the ambit of his putni. He sues the Maharajah to recover these cesses from him.

In the first Court there appears to have been an admission made by the Maharajah's pleader that the Maharajah had some

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right in the lands in dispute. The Munsiff says: "The defendant, admitting his title to the land in question, urges in his written defence that the plaintiff should have sued the person who is in actual occupation of the lands"; and the Munsiff was of opinion that that defence had no foundation in law, that inasmuch as the Maharajah admitted himself to be the proprietor of the rent-free lands he was liable for the cesses. The first Court therefore made a decree in favor of the plaintiff.

On appeal the Subordinate Judge reversed the decision of the Munsiff and dismissed the suit apparently on two grounds. He thought that the plaint had not been rightly framed, for whereas the plaint described the property as debutter, *i.e.*, the lakhraj property of an idol, Shib Thakoor, the defendant Maharajah was sued in his capacity of proprietor, though the land belonged to an idol and not to the Maharajah. If the Maharajah was the holder of it at all, he must have held it as shebait. The Maharajah not being sued in that capacity the Subordinate Judge thought that he was not liable for the amount claimed. The Subordinate Judge further differed from the first Court as to the construction to be put upon the words of the Cess Act, s. 56, Bengal Act IX of 1880. The Munsiff held that it was quite enough for the defendant to admit his ownership of the land to make him liable for the cesses thereof. The Subordinate Judge says that it was not enough. The defendant must not only be proved to be the owner, but also the actual holder of the land. He points out that s. 56 recognises three classes of persons as bound to pay cesses for rent-free lands: *First*, the owner and holder of any rent-free lands; *secondly*, any person in receipt of the rents and profits; and, *thirdly*, every person in possession and enjoyment of the land. The Subordinate Judge holds that the terms "owner and holder" must relate to the same person, that the owner is not liable to pay cesses unless he is also a holder; and that in the present case the Maharajah, not having admitted being in possession, nor having been proved to have been in possession in any capacity, he is not liable for the cesses claimed.

As regards the first ground stated, we think the Subordinate

Judge was right, and that upon the suit as framed, the plaintiff had no right to recover the cesses from the Maharajah. From the plaintiff's own showing the debutter land belongs to an idol. The party liable to those cesses is therefore that idol, through its shebait, or some person in receipt of the rent and profits of the land, or some person in actual possession of the land in occupation of it. The suit against the Maharajah in his capacity of proprietor must, we think, fail. He is not the proprietor of the rent-free lands if they belong to an idol; and in his capacity of proprietor of the estate within the limits of which geographically the debutter lands are situated he would not be liable, excepting he paid the cesses in the first instance and recovered them from the idol afterwards, or from the plaintiff putnidar. Upon that ground alone, therefore, we think that the decree of the lower Appellate Court should be affirmed.

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As regards the other ground stated by the Subordinate Judge, we are of opinion that he is mistaken in his construction of the law. We do not take the words "owner and holder" in s. 56, when referring to rent-free lands, to be limited to any one individual, or that the owner must also be in actual possession. We think that these words are intended to apply to both classes of cases, namely, where the lakhraj land is the actual property of the owner, and where, as in the present case, the debutter being the property of an idol is held on behalf of that idol by a trustee or shebait. We think that the Act contemplates the payment of the cesses by persons beneficially interested in the land in respect of which the cesses are levied, and that in the present case, the Maharajah, neither being admitted nor found to be beneficially interested in this debutter land, the lower Court was justified in holding him free from the liability which the plaintiff seeks to impose upon him.

The appeal is dismissed with costs.

*Appeal dismissed.*