

count for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed: "The point to be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges."

This equitable doctrine appears to have a strong application to the facts of this case, where we have the borrower, a *parda-nashin* lady; the lender, her own *mukhtar*, under the cloak of a *benamidar*; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances.

C. B.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lambert, Petch, & Shakespear.*

Solicitors for the respondent Kali Prossunno Ghose: *Messrs. Barrow & Rogers.*

THE OFFICIAL TRUSTEE OF BENGAL (PLAINTIFF) v. KRISHNA CHANDRA MOZUMDAR AND OTHERS (DEFENDANTS.)

[On appeal from the High Court at Calcutta.]

Appellate Court, Powers of—Power to vary decrees as made in the lower Court—Decree confined to rights in issue between parties—Section 565 of the Code of Civil Procedure, 1877.

After the trial of issues raising the question whether the plaintiff was, or the defendants were, entitled to zemindari rights in certain mehals, a decree was made affirming the title of the plaintiff, the evidence in support of the defendants' case being discredited, and the latter were declared by the decree to be the "plaintiff's under-tenure holders of the said mehals."

* Present: SIR B. BRACOCK, SIR R. P. COLLIER, SIR R. COYNE, and SIR A. HOBHOUSE.

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This was modified on appeal by the declaration that "the defendants are putnidars of the same mouzahs."

Held, that it was unnecessary on this appeal to consider whether the Appellate Court was right in its conclusion that the defendants were putnidars; because, upon the case which had been set up for the defendants, and upon the issues framed and tried in the lower Court, the Appellate Court could not properly make such a declaration: the defendants could not be in a better position than they would have been in had they claimed to be putnidars, in which case an issue as to that title would have been framed and tried.

Section 565 of Act X of 1877 (1) does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.

APPEAL from a decree (17th May 1883) of the High Court, varying in certain particulars a decree (30th July 1881) of the Subordinate Judge of the Pubna district.

The questions raised on this appeal were whether the High Court was right on the following points, *viz.*, (a) in making the declaration on its decree, which in other respects affirmed that of the lower Court, that the defendants in the suit were putnidars of certain mouzahs of which the plaintiff had been by the concurrent decisions of both Courts found to be zemindar, and entitled to have his name registered as proprietor under Beng. Act VII of 1876, the defendants having failed to prove their alleged title to be zemindars of the same mehals; and, (b), in making the direction that the plaintiff (who now preferred his appeal) should bear his own costs in both Courts. The appellant, who was the Official Trustee of Bengal, represented the interests of the creditors of N. P. Pogose, who had by purchase become entitled to the zemindari interest in fifteen mouzahs, forming a separate revenue-paying mehal named Bhanguria, in the Pubna district.

Mehal Bhanguria formerly belonged to Azimuddin Chaudhri, by whom it was conveyed to his wife, Najam-ul-Nissa, Khātun, now deceased. N. P. Pogose purchased from her, and as assignee in trust for his creditors, the present appellant obtained an order for possession of the mehal in execution of a decree. Afterwards the present respondents, who were not parties to the above order,

(1) This section is identical with s. 565 of Act XIV of 1882.

applied to the Deputy Collector, under Beng. Act VII of 1876 to have their names registered as proprietors of villages included in Mehal Bhanguria. To this application objections were filed by the present appellant, who alleged that the applicants were dependent talukdars, and not zemindars, and that they held only a subordinate interest in the mouzahs.

Both the Deputy Collector and the Collector, however, the former on the 31st December 1878 and the latter on appeal on the 27th March 1879, made orders disallowing these objections on the part of the Official Trustee, and granting the application.

The Official Trustee thereupon sued the defendants in the Court of the Subordinate Judge of Pubna. Setting forth his title to the zemindari right, through Pogose, in virtue of a *bil ewas hibba*, obtained by the latter from the previous owner, he alleged that he had obtained possession with the aid of the Civil Court. The orders made by the Deputy Collector and Collector in 1878 and 1879 had been obtained upon the production of false evidence, *viz.*, two fabricated *kobalas* purporting to have been executed on the 8th and 15th of Cheyt, 1207, respectively. The only rights in the mehal which the defendants in fact had were to remain in possession of certain mouzahs therein on payment of rent to the zemindar; this being in virtue of their having acquired, therein, from the plaintiff's predecessor in estate, Azimuddin Chaodhri, "ordinary subordinate jimmadari rights." The plaintiff asked that the *kobalas* might be set aside as false and fabricated; that the orders above mentioned might not receive effect, but that his right as zemindar to have registration of his name under Beng. Act VII of 1876 might be declared, and that he might receive his costs with interest. The defendants having denied the plaintiff's title, and asserted their own, the Subordinate Judge, Baboo J. K. Chatterjee, fixed issues, among others, as to the genuineness of the *kobalas* as to the plaintiff's zemindari right, and as to whether the defendants were "jimmadari under-tenure holders," or zemindars of the disputed mehals.

He summed up his conclusions as follows:—

"Under these circumstances, I hold that both the *kobalas* are not genuine documents, and they were never acted upon, and they seem to me to have been forged by the defendants for the

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purpose of establishing their zemindari right over the disputed mehals which they hold as under-tenure-holders under the plaintiff and his predecessors. I, on a careful consideration of the evidence, find that the plaintiff has satisfactorily proved that the defendants held these disputed mehals as under-tenure-holders under the plaintiff's predecessor Azimuddin Chaodhri, and paid their putni rents to the said Chaodhri up to the year 1279 B.S., (1872-73), and I also find that the plaintiff has proved that he is the zemindar of disputed mehals by virtue of his purchase and decree, and he has been in possession of them by paying Government revenue to the Collector for the disputed mehals. On the other hand, the defendants have totally failed to establish that they purchased the zemindari right of the disputed mehals from the plaintiff's predecessors and their co-sharers, or that they ever paid Government revenue to the Collector. I, therefore, hold that the defendants are not the proprietors of the disputed mehals but under-tenure-holders or putnidars under the plaintiff, and therefore their names should be removed from the Collector's register, because the Collector was wrong in registering the defendants' names as proprietors of the disputed mehals. After considering all the circumstances and evidence in this case I come to the clear conclusion that the plaintiff is entitled to get a declaratory decree by establishing his zemindari right in the disputed mehals, and the present suit is not barred by general limitation, because the plaintiff has proved his possession within twelve years before the institution of this suit; and I also hold that both the *kobalas* and the Collector's *namjari* order are liable to be set aside."

The decree followed this judgment with costs.

On appeal, the High Court (McDONELL and TOTTENHAM, JJ.) altered the decree upon the points above mentioned, declaring the defendants to be putnidars and directing that each party should pay their own costs.

Mr. E. Macnaghten, Q.C., and Mr. J. T. Woodroffe, for the appellant, argued that the decree in respect of the declaration that the defendants were putnidars, was wrong on two grounds: First, as no issue as to this right on the part of the defendants had been framed, and as it had not been set up in the first Court, the High

Court had no power to import it into its decree. Secondly, the declaration that the defendants were putnidars was incorrect; their being putnidars was inconsistent with their having attempted to establish, (an attempt which they had made by producing false evidence), their rights as zemindars. Also the High Court's discretion as to costs had been rightly exercised.

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Mr. J. Graham, Q.C., and Mr. R. V. Doyne, for the respondents, argued that the variation made by the High Court in the decree of the Court below was warranted by the facts that appeared on the record, and was permissible as a matter of procedure. Practically, the High Court was acting so as to prevent future litigation by giving the Court's final determination on the relative position of the parties. The evidence, and the language of the judgment of the first Court, were in no way inconsistent with the case that the defendants were putnidars.

Reference was made to s. 565 of Act X of 1877.

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant brought a suit in the Court of the Subordinate Judge of Pubna against the defendants, alleging that the whole of 15 mouzahs named in the schedule to the plaint was the zemindari right of the late N. P. Pogose, and having obtained possession with the aid of the High Court, the appellant, as the Official Trustee appointed under the orders of the High Court, was entitled to and possessed of the same. And he prayed the Court to set aside an order of the Deputy Collector of Pubna, dated the 31st December 1878, and a subsequent order of the Collector, dated the 27th of March 1879, for registration of the defendants' names with reference to the mouzahs, and to pass a decree for registration of his name, after cancelling the registration of the defendants' names, in zemindari right. He also asked the Court to set aside, as fabricated and fraudulent, two false *kobalas*, which purported to have been executed on the 8th and 15th Chéyt 1207.

The suit was occasioned by the proceedings of the defendants under Act VII of 1876, who applied for the registration of their names as proprietors of certain specific portions of the estate composed of these mouzahs, and produced in support of

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the application the *kobalas* referred to. The appellant objected, and asserted that they were dependent talukdars, and consequently were not entitled to have their names registered, but the Deputy Collector overruled the objections, and ordered the names to be registered as applied for. This order was on an appeal affirmed by the Officiating Collector of Pubna. The defendants in their written statements relied upon the *kobalas*, and claimed to be co-sharers in the zemindari. Issues were framed, of which it is now necessary to notice only three. They were:—"8th. Whether the defendants' *kobala* deeds are genuine or collusive; if so, whether they are liable to be set aside. 9th. Whether the plaintiff is in possession of the disputed mehals as zemindar or not. 10th. Whether the defendants are jimmdar under-tenure-holders or zemindars of the disputed mehals." The last issue seems to have been put in this form in consequence of a statement in the plaint that the defendants had acquired from the plaintiff's predecessor ordinary subordinate jimmdari rights, but the question raised by it was whether the defendants were zemindars. The Subordinate Judge decided that both the *kobalas* were forged, and said that they seemed to him to have been forged by the defendants for the purpose of establishing their zemindari rights over the disputed mehals, which they held as under-tenure-holders under the plaintiff and his predecessors. He made a decree in these terms: "That this suit be decreed, with costs, after establishment of the plaintiff's zemindari right to the disputed mehals; that the defendants be declared to be the plaintiff's under-tenure-holders of the said mehals; that the false *kobalas* and the Collector's order for registration of name be set aside; that the plaintiff is entitled to register his name to the disputed mehal in place of the names of the defendants in the Collectorate register."

The defendants appealed to the High Court, and, among other grounds of appeal, said the Court below ought to have held on the evidence that the defendants were part owners of the zemindari, and not mere under-tenure-holders, and that, at any rate, it ought not to have made a decree in favour of the plaintiff, leaving the status and rights of the defendants wholly undefined. The High Court agreed with the Subordinate Court, that the

kobalas were not genuine, and that the plaintiff was entitled to be registered zemindar; but they went on to say: "The learned Advocate-General wishes us simply to declare that the plaintiff is entitled to be registered as zemindar of the property in question to the exclusion of the defendants, and invites us to say nothing as to the status of the latter. But we are certainly not disposed in any view of the plaintiff's case, to leave the defendants at his mercy, or to leave him the power of treating them in any future suit as the holders of ordinary subordinate jimmadari rights in these mouzahs, as he has described them in his plaint, or as undefined under-tenure-holders, as the lower Court has pronounced them to be. On the contrary, we are of opinion that, even should we feel bound to hold that the defendants' rights in these mouzahs fall short of absolute proprietorship, as to which technical proof seems alone to be wanting, their status is shown, even by the evidence adduced by the plaintiff, to be at the very least as high as that of putnidars and one which cannot now be disturbed." The decree was: "It is ordered and decreed that the decree of the lower Court be set aside, and in lieu thereof it is ordered and decreed that the plaintiff is entitled to have his name registered as zemindar in lieu of the names of the defendants, under Beng. Act VII of 1876, in the Collectorate of the district of Pubna, in respect of the mouzahs mentioned below, and that the defendants are putnidars of the same mouzahs." And each party was ordered to pay his own costs in that Court and in the Court below.

The plaintiff has appealed to Her Majesty in Council against the declaration that the defendants are putnidars. The High Court founded this declaration upon certain statements in the documentary evidence which had been put in by the plaintiff. Their Lordships do not think it necessary to consider whether they were right in their conclusion that the defendants were putnidars because they are of opinion that upon the case which had been set up in the defence, and the issues which had been framed and tried by the lower Court, the High Court could not properly make such a declaration. The defendants had not claimed to be putnidars, but had set up a false claim to be zemindars, and had attempted to prove it by forged deeds, and they ought certainly not to be in a better position than they would have been in if

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they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title would have been framed and tried by the lower Court. The proceedings in this suit were regulated by Act X of 1877, and their Lordships do not find any provision there which would authorize the Appellate Court to do what has been done in this case. Section 565, which enables the Appellate Court in some cases to determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the lower Court. Their Lordships are, therefore, of opinion that the decree of the High Court should be varied by striking out the declaration that the defendants are putnidars of the mouzahs and the order as to costs, and ordering that the defendants do bear the costs of the suit in the High Court and the lower Court. They will humbly advise Her Majesty accordingly, and the respondents will pay the costs of this appeal.

C. B.

Decree varied.

Solicitors for the appellant: Messrs. *Lawford, Waterhouse & Lawford.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice Grant.

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DROBOMOYEE CHOWDERAIN (DEFENDANT) v. SHAMA CHURN
 CHOWDERY (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Hindu Law—Adoption—Vested estate divested by adoption—Power to adopt.

A, a Hindu, having succeeded to his father's estate died unmarried, leaving him surviving his father's mother *S.* and his step-mother *N.* After *A's* death, *N.*, under a power from her husband, adopted *B* as a son to *A's* father.

Semble, that the adoption did not divest the estate of *S.* in whom *A's* estate had vested on his death.

* Appeal from Appellate Decree No. 2719 of 1883, against the decree of Baboo Jiban Kristo Chatterji, Rai Bahadur, Subordinate Judge of Purna and Bogra, dated the 15th of August 1883, affirming the decree of Baboo Aghore Chundra Hazra, Extra Munsiff of Nawabgunge, dated the 10th of April 1882.