PRIVY COUNCIL.

RAMKUMAR GHOSE AND OTHERS (DEFENDANTS) *v.* KALIKUMAR TAGORE (PLAINTIFF).

P. C.*
1886
July 3, 6, *and* 24.

[On appeal from the High Court at Calcutta.]

Kabuliyat, Construction of—Stipulations as to rent of new Chur—Hawaladari tenure—Measurement and Assessment of Chur Land—Landlord and tenant —Bengal Act VIII of 1869, *s.* 14.

A kabuliyat, executed by the tenant of land held in hawala tenure, provided that on an adjoining chur becoming fit for cultivation the whole land, old and new, held by the tenant should be measured, and the old having been deducted from the total, rent should be paid for the excess land at a specified rate up to five drones, and for any more at the prevailing pergunnah rates. It provided also that either (*a*) rent should be realized according to law with interest thereon ; or that (*b*) at the close of the year, the owner should, by a notice served on the hawaladar, require him to take a setttlement of the excess land, and within fifteen days to file a kabuliyat ; or (*c*) the excess land might be settled with others.

Such a chur having been formed, the zemindar measured without notice to, and in the absence of, the hawaladar. He then served a notice on the latter requiring him to execute a kabuliyat within fifteen days for payment of a fixed rent upon the excess land as found by the measurement, or to yield up possession.

Disregard of this led to a suit in which the zemindar claimed either khas possession or rent on measurement by order of Court.

Held, that neither the kabuliyat nor the terms of s. 14 of Bengal Act VIII of 1869 precluded a suit for assessment of the rent upon measurement ; nor did the absence of authentic measurement as prescribed by the kabuliyat have that effect, or affect the measurement by the amin ; but that, until both the measurement and the assessment of the rent had taken place (which might be either in the manner prescribed or by judicial determination), the zemindar could not put the hawaladar to his choice between (*b*) executing a kabuliyat for the rent, and (*c*) yielding up possession.

APPEAL from a decree (11th May 1883) reversing a decree (29th June 1881) of the Subordinate Judge of Faridpur.

The respondent, who was plaintiff in the suit out of which this appeal arose, was zemindar, or owner by other superior tenure

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of land in Faridpur, the appellants, who were the defendants, holding under him by the tenure known as hawaladari (1).

The terms on which the latter were to hold additional land fit for cultivation that might be formed by a chur, were entered in a kabuliyat executed on the 23rd April 1850, of which the stipulations are set forth in their Lordships' judgment. The present suit was instituted by the plaintiff to recover either khas possession of, or the rent properly payable for, land formed in or before the year 1876, by a chur, contiguous to the land held in the original hawala tenure granted to the defendants.

The claim to direct possession rested on a provision in the kabuliyat, whereby, in the event of future accretions, measurement was to be made of the land, both original and new, and the defendants were to pay a fixed rent for any amount not exceeding five drones (2), and at the prevailing pergunnah rate for all land in excess of that quantity.

In 1876 a measurement was made by the zemindar, and the excess ascertained, but without notice to the hawaladars, and in their absence. Afterwards the zemindar served the latter with a notice requiring them to appear at his cutcherry and make a settlement for the excess land, or in default of their so doing, to yield possession of the land.

The defendants did not dispute that a chur had formed within the contemplation of the provisions of the kabuliyat, nor did they deny that the plaintiff, if he had brought himself within the terms of the kabuliyat, was either entitled to additional rent, or else to possession. They did, however, deny his right to either of the above, as claimed in the present proceedings, on the ground that (*a*) the plaintiff had not measured the lands in conformity with the terms of the kabuliyat upon due notice given to them; and (*b*) that he had not given them such notice as was required in regard to the fixing of the rent.

Issues having been settled as to these points, the Subordinate Judge found that there had been no such measurement as the

(1) As to this tenure, see the note to *Alimuddi Khan* v. *Kalikrishna Tagore*, reported in I. L. R., 10 Calc., 895.

(2) A drone is equal to 16 khanis, and a khani equals between 5 and 6 bighas.

kabuliyat required, and he ordered that a measurement should be made by an amin of his Court. He found also that neither the assessment of the rent, nor the subsequent demand for it, had been validly made; and he, accordingly, dismissed the suit.

This was reversed by the High Court (CUNNINGHAM and MACLEAN, JJ.), and a decree was made for the plaintiffs. As to the disputed measurement, the Judges held that the evidence established a measurement fairly within the terms of the kabuliyat. They also found that no objection had been taken by the defendants to the notice given of the plaintiff's claim. They, therefore, considered that the latter was entitled to actual possession of the excess lands, which should be ascertained by reference to the map of the Court amin.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellants, argued that the terms of the kabuliyat as regards measurement not having been complied with, the plaintiff was not entitled to a decree. In support of this he referred to part of the judgment in *Jardine Skinner and Co.* v. *Rani Surut Soondari Debi* (1). He added that, even assuming that the amin's measurement was sufficient ground (which was not admitted), still there could be no decree for direct possession before the defendants had had the option of coming to a settlement with the plaintiff. This was his principal ground. He further objected that there was an entire absence of proof as to the prevailing rate. The pergunnah rates were dismissed, and the nature of the proof required in reference to them was explained in *Shadoo Singh* v. *Ramanoograha Lall* (2). It was essential to prove these rates, as appeared from *Kali Krishna Tagore* v. *Golam Ali Chowdhri* (3), which arose in

(1) L. R., 5 I. A., 164.

(2) 9 W. R., 83.

(3) On this appeal, not elsewhere reported, the appellant sought to raise the question, at what rate rent was to be assessed on a chur which was held to be an accretion, under Regulation XI of 1825, s. 4, cl. 1, to his under tenure. Mr. *J. F. Leith*, *Q.C.* and Mr. *R. V. Doyne* appeared for the appellant. Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* for the respondent. The judgment of their Lordships, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, AND SIR A. HOBHOUSE, was delivered by the last named, on the 20th February 1884, as follows:

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the same neighbourhood. That was a case in which the rent of a chur having been held by the High Court to be governed by the terms applicable to the parent tenure, in the absence of proof of the pergunnah rate, the plaintiff failed to obtain any other rate on an appeal heard by the Judicial Committee.

For the respondent, Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne*, argued that the High Court had rightly held on the evidence, and the circumstances of the case, that the measurement was sufficiently made within the terms of the kabuliyat. Also that notice, with demand of settlement, having followed thereon, without objection taken by the defendants, the plaintiff had become entitled to direct possession. It was not a condition precedent to the bringing such a suit as the present,

Having heard the opening of this appeal, their Lordships consider that it would be idle to continue the argument. The Subordinate Judge decided the construction of the Regulation in favour of the appellant, and considered that the accretions ought to be assessed at the pergunnah rate. But inasmuch as the appellant failed to prove any such rate, the Subordinate Judge found no measure of rent except what was given by the kabuliyat, and accordingly he pronounced for that rent. The High Court agreed with the Subordinate Judge in finding that the appellant had not proved the pergunnah rate which he claimed, and with a slight exception they affirmed the decree. But the learned Judges also expressed opinions adverse to the appellant on the construction of the Regulation. Their Lordships now find that the appellant cannot succeed because of the fatal defect in his evidence. All that Mr. Leith can suggest on that point is that the case should be remanded for an inquiry. But the issue was definitely raised and a great deal of evidence given on it, and the appellant must stand or fall by that evidence. It would not be right now to give him the opportunity of making a new case. That being so, the opinion of their Lordships on the Regulation can have no influence on the result of the appeal, and they do not think it desirable to hear further argument on a question which under such circumstances is not a practical one. All they can do is to decide that the appellant, having failed to prove the pergunnah rate which he alleged, cannot have any more favourable decree than that which the High Court have given him. On this ground, without expressing any opinion on the question which of the two Courts has taken the sounder view of the Regulation, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal with costs.

Solicitors for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Oehme & Summerhay.*

that there should have been a measurement; and the High Court had rightly referred to that of the amin.

Mr. *C. W. Arathoon* replied

Their Lordships' judgment was delivered on a subsequent day (July 24th) by

LORD WATSON.—The arguments upon this appeal had reference mainly to the construction of the following stipulations in a kabuliyat, dated 23rd of April 1850, executed by the then tenants, under a hawaladari tenure, of certain lands comprised in "the chur to the east of Makhuakhali," forming part of the zemindari now belonging to the respondent:—

"If a new chur accretes contiguous to the aforesaid hawala, and as *hakiat* of the aforesaid (torn), and no revenue is assessed thereon by the Government, then, when the said chur becomes fit for cultivation, a fresh measurement shall be made of the land of the said chur and of the aforesaid hawala; and after a deduction of the aforesaid 13-6-16 gundahs of land, we shall pay rent at the rate of Rs. 2-7-7 pie for the excess of land up to five drones, and at the *sara* (prevailing) pergunnah rates for land exceeding that quantity. If we fail to do so, the rent will be realized according to the law for the realization of rent, with interest on lapsed instalments according to the demands of the towzi of the said pergunnah; or at the close of the year, you will serve on the spot, and on some conspicuous place in the *mahakuma* (head-quarters) of any hakim, an itlanama (notice) to our address, requiring us to take a settlement of the said excess land, and to file a kabuliyat, and fixing the time at fifteen days; if, thereupon, we do not appear before you and take a settlement and fix a kabuliyat, you will settle the said excess lands with others."

The 13-6-16 gundahs thus referred to was the original extent of the cultivable hawala, and the rent payable for it was fixed by the kabuliyat at Rs. 462. In a suit brought by the zemindar in the year 1865, it was found that 2-11-13 gundahs, &c., had accreted to the said 13-6-16 gundahs, and that for such excess additional rent was payable at the rate of Rs. 2-7-7 pie per khani, in terms of the kabuliyat of 1850. The appellants have

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since continued to be tenants of the hawala and said accreted lands, amounting in all to 16-2-9 gundahs, &c., at a *cumulo* rent of Rs. 570-1-1, &c.

It is not matter of dispute that, at the commencement of the year 1876, a new chur had accreted to the hawala in question, which was to a large extent composed of land fit for cultivation. The respondent alleges that, in April of that year, a new measurement of the original hawala and of the accreted chur was made by his servants under his instructions. The measurement was made without intimation to the appellants, and in their absence. The respondent thereafter, on the 28th March 1878, caused a notice to be served on the appellants, who are the registered tenants of the hawala, setting forth the fact of measurement, intimating the precise amount of the increased rent due in respect of the excess land, according to the rates specified in the kabuliyat, and requiring the appellants to appear either before himself or his principal officer, within fifteen days from service, "and file a kabuliyat for the said quantity of land and for the said amount of rent; otherwise after the expiry of the said fixed period, under the terms of the said kabuliyat, I shall take khas possession of the land in excess of the said Dr. 16-2-9 gundahs of land, for the purpose of settling the same with others."

The appellants paid no attention to the notice, and the respondent, on the 29th March 1879, presented his plaint to the Subordinate Judge, in which he prayed: (1), that the Court should direct a measurement of the excess land and give him khas possession thereof; or otherwise (2), that the Court should, in the event of its declining to give him possession, assess the rent of the excess land payable under the kabuliyat. On the respondent's motion the Judge ordered a measurement of the accreted land, which was made by the Court amin in presence of the parties, and duly reported. Evidence was then heard on both sides, and, on the 29th June 1881, judgment was given dismissing the suit with costs, but the formal decree was not made out and signed until the 27th July 1881. The Subordinate Judge came to the conclusion, though with some hesitation, that service of

the notice of 28th March 1878 was established. He was of opinion that the respondent had failed to prove any measurement of the excess lands as alleged, and had also failed to prove pergunnah rates, both of which he held to be conditions precedent of the respondent's right to possession. And, as matter of law, the learned Judge decided that the stipulation in the kabuliyat with respect to khas possession, which he terms the forfeiture clause, is void. The learned Judge further held that the suit, so far as it prayed for assessment of rent, could not lie, inasmuch as the case was regulated by s. 14 of the Rent Act.

On appeal the decision of the Subordinate Judge was reversed by the High Court, (Cunningham and Maclean, JJ.) who on the 11th May 1883 gave the respondent a decree for khas possession of whatever land might be found, according to the Civil Court amin's map, to be in excess of 16d, 2k, 9g, 2c, 2k. Unfortunately the amin reports two measurements on the map prepared by him, leaving it to the Court to select one or other of them, and the decree does not specify according to which of these the excess lands are to be ascertained.

The learned Judges of the High Court differed in opinion from the Subordinate Judge, as to the fact of a measurement having been made by the respondent before the notice of 28th March 1878 was served. They state that, upon the evidence, they are "unable to find that there has not been a measurement within the terms of the kabuliyat." Upon that view of the facts they seem to have been of opinion that, on receipt of the notice, the appellants ought to have appeared within the fifteen days, and to have then stated any objections which they had to the measurement or to the rent intimated, and that, seeing they raised no objections to either until the present suit was instituted, the respondent was entitled to the alternative of possession.

Their Lordships are of opinion that the Subordinate Judge erred in holding that the provisions of s. 14 of the Rent Act apply to the additional rent, which is stipulated in the kabuliyat of 1850. There is nothing in the terms of that document, or of s. 14 of the Rent Act, which can oust the jurisdiction of the Court, either in regard to the measurement of the excess land, or the assessment of the rent which is to be paid for

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it. It is stipulated that before excess rent is payable, and before the zemindar can call upon his tenants to choose between making a settlement and yielding possession to him, there shall be a measurement, but the document does not specify by whom that measurement is to be made. If the respondent had given the appellants full notice of his intention to make a new measurement, so as to enable them to be present, if they saw fit, at the time it was made, that would have cast upon them the duty of appearing before him within fifteen days after the notice was served; and if they had failed to appear within that period, the Court, if satisfied that the measurement was made in good faith, would probably have held them precluded by their own laches from objecting to it. But the respondent gave them no intimation of his intention to measure; and, in the notice which he served, he did not require them, in terms of the kabuliyat of 1850, "to take a settlement of the excess land, and to file a kabuliyat," but called upon them within fifteen days to "file a kabuliyat for the said quantity of land, and for the said amount of rent." The difference between these two requisitions is not one of form merely, but of substance. What the deed of 1850 contemplates is that after a measurement has been made, within the knowledge of the tenants, and to which they ought therefore to be prepared to state specific objections, they may be required to come in and say whether they are or are not willing and ready to take a lease of the excess land. It does not contemplate that the new kabuliyat must of necessity be executed within the fifteen days. It is obvious that, after the tenants have come in, and have agreed to take a lease of the excess land, they and the proprietor may differ both as to the precise extent of the land and as to the rent to be paid for it; and in that case their differences must be settled by the Court. On the other hand their Lordships are of opinion that, under the terms of the kabuliyat of 1850, the proprietor is not precluded from bringing his suit, without taking any preliminary step, in order to have an authentic measurement made, and the rent assessed; but, in that case, he cannot put the tenants to their election between paying rent and giving up possession until both these things have been done judicially.

In the present case, their Lordships are of opinion that the measurement of 1876, without intimation to the appellants, coupled with the peculiar terms of the notice of March 1878, is not *per se* sufficient to entitle the respondent to insist on his claim for khas possession of the excess land, as now ascertained by the measurement of the Court amin. But the respondent is, in their opinion, entitled to have a decree, in terms of the alternative prayer of his plaint, fixing the extent of the excess land, and assessing the rent payable for it, in terms of the kabuliyat of 1850. Their Lordships are unable to concur in the finding of the Subordinate Judge, to the effect that the respondent has failed to prove "the prevailing pergunnah rates" within the meaning of the kabuliyat. The evidence on both sides clearly shows that there is not now, and probably never was, any such thing as a fixed scale of rents for lands like these within the pergunnah, but that circumstance does not warrant the conclusion that no pergunnah rate has been proved. It leads to the inference that the parties to the kabuliyat must have contemplated payment of a fair rent, to be computed according to the average of rents paid by the tenants of similar lands within the pergunnah, due regard being had to the nature of the tenure. Their Lordships are of opinion that, taking into account the character of the appellant's tenure, the pergunnah rate ought, for the purposes of this case, to be fixed at Rs. 6 4 annas per khani.

In the absence of any evidence enabling them to decide between Statements A and B contained in the report of the Court amin, their Lordships are of opinion that (the onus being upon the respondent) the measurements given in Statement B must be adopted as correct. They are further of opinion that the increased rent now assessed ought to be paid by the tenants for their possession, from and after the date when the respondent's notice was served upon them.

It will be necessary to remit the cause, in order that the precise extent of excess land for which rent is now payable, and also the precise amount of the increased rent may be ascertained in the Court below, and decree given accordingly. When that has been done, it will be in the option of the respondent

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either to realize the rents in terms of law or to serve a fresh notice in terms of the kabuliyat of 1850; and, if the appellants do not come in and make a settlement and file a new kabuliyat, he will then be entitled to khas possession of the excess land which has accreted to the original hawala, and to the lands for which increased rent was found to be payable in the suit No. 178 of 1865.

The parties to this suit seem to have maintained in the Courts below, as they certainly did in this appeal, pleas far in excess of their respective legal rights, the appellants succeeding before the Subordinate Judge, and the respondent, in his turn, succeeding before the Court of Appeal. In these circumstances, it appears to their Lordships that there can be no injustice done by deciding that each of them ought to bear their own costs.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the High Court appealed from, dated 11th May 1883, save in so far as it sets aside the decree of the lower Court, dated the 27th July 1881, and to find that neither the appellants nor the respondent are entitled to the costs of suit incurred by them in either of the Courts below; to declare (1) that the respondent ought to have a decree ascertaining the extent of excess lands in the possession of the appellants, and assessing the rent payable therefor, in terms of the kabuliyat dated the 23rd April 1850; (2) that for the purpose of ascertaining the extent of the said excess land, the measurements contained in Statement B annexed to the report by the amin of the Subordinate Judge's Court are to be taken as correct, and that from the total area of land in the possession of the appellants ascertained by the said amin to be cultivable and properly assessable with rent, there must be deducted 13d, 6k, 16g, the extent of the original hawala as fixed by the said kabuliyat, the balance remaining after such deduction representing the extent of excess lands for which rent is payable; (3) that the rent payable for the excess lands ascertained as aforesaid is at the rate of Rs. 2-7-7 pie per khani for five (5) drones thereof, and for the remainder thereof at the rate of Rs. 6 4 annas per khani; (4) that rent became payable in respect of the said excess lands from and after the 28th day of March

1878; and, subject to these declarations, to remit the cause to the Court below. There will be no costs of this appeal.

Judgment reversed. Cause remitted.

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Solicitor for the appellants: Mr. *A. H. Wilson.*

Solicitors for the respondent: Messrs. *Wrentmore and Swinhoe.*

C. B.

IMAMBANDI BEGUM (PLAINTIFF) *v.* KAMLESWARI PERSHAD AND OTHERS (DEFENDANTS)

P. C.*
1886
June 24, 25 & 26.
July 21.

[On appeal from the High Court at Calcutta.]

Sale for arrears of revenue—Liability to incumbrances—Act XI of 1859, *ss.* 13 *and* 54—*Mokurari lease—Inquiry as to title of alleged owners of share sold—Benami transfers—Surrender of dur-mokurari interest how proved—Limitation Act* (*XV of* 1877), *Sch. II, Art.* 144.

After the sale of a share in an estate under the provisions of Act XI of 1859, a suit was brought to establish a mokurari lease, as an incumbrance under s. 54, upon the share in the hands of the purchaser. This share having been held by several successive benami holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, Sch. II, Art. 144, the twelve years' bar commencing from the date of possession first held adversely.

The mokuraridar having granted a dur-mokurari lease of part of his holding, which was afterwards surrendered for good consideration, ikrarnamas to this effect were executed, but not being registered were not receivable in evidence.

Held, that to prove a formal deed of re-conveyance was not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what had become of the dur-mokurari interest.

The mokurari lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid: *Held*, that this condition should have been omitted, the amount of rent being determinable by a future proceeding, if necessary.

* *Present*: LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK AND SIR R. COUCH.