1891

GUNGA PERSHAD v. JAWAHIR SINGH.

In dealing with the previous issue, I ought to have mentioned the form of the petition for leave to bid. It will be found at pages 79 and 80 of the paper-book, and it asked leave "to buy the property for the amount of the petitioner's decree if no one else made a higher bid," and the leave seems to have been given in the terms of the petition. Having regard to that, it may be that, upon a thorough enquiry, it will be found that the bid which was in fact made of Rs. 40,000 was made upon the basis of this petition, and then, as between all the parties, although a bid of Rs. 40,000 was recorded, it must be taken to be a bid for the amount of the decree-holder's decree. If that should turn out to be so, then probably the Subordinate Judge will consider that this defendant No. 7 was in fact paid off by what had taken place. These are questions which will have to be decided by the learned Subordinate Judge upon the trial of these two issues, and with these remarks we remand these two cases for the trial of those issues, retaining the case upon the files of this Court. We reserve the question of cost till the final decision of these appeals.

T. A. P. *Appeal allowed and case remanded.*

Before Mr. Justice O'Kinealy and Mr. Justice Ghose.

1891 *March* 11.

SURENDRO PROSAD BHUTTACHARJI (ONE OF THE DEFENDANTS) *v.* KEDAR NATH BHUTTACHARJI (PLAINTIFF).*

Jurisdiction—Sayer compensation—Malikana—Civil Procedure Code (Act XIV of 1882), *s.* 16.

A mortgaged at Calcutta to *B* his sayer compensation, payable at the General Treasury at Calcutta in respect of a certain hât within the Diamond Harbour subdivision. In a suit to enforce the mortgage bond in the Court of the Munsiff of Diamond Harbour, *held*, that sayer compensation did not partake of the nature of malikana, that it was not immoveable property or any interest in immoveable property within the meaning of section 16 of the Code of Civil Procedure, and that therefore the Munsiff had no jurisdiction to entertain the suit.

Bungsho Dhur Biswas v. *Mudhoo Mohuldar* (1) distinguished.

* Appeal from Appellate Decree No. 1054 of 1890, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 5th of May 1890, affirming the decree of Baboo Rebati Churn Banerjee, Munsiff of Diamond Harbour, dated the 21st of November 1889.

(1) 21 W. R., 383.

1891

SURENDRO PROSAD BHUTTACHARJI v. KEDAR NATH BHUTTACHARJI.

THIS was a suit to enforce a mortgage bond, whereby one Upendro Mohun Bhuttacharji, the husband and father of the defendants, Kamini Debi and Surendro Prosad Bhuttacharji, mortgaged to the plaintiff, Kedar Nath Bhuttacharji, his sayer compensation payable at the General Treasury at Calcutta in respect of Harir Hât in the Diamond Harbour subdivision. The mortgagor and mortgagee were residents of Calcutta, and the bond was executed in Calcutta. The suit was instituted in the Munsiff's Court at Diamond Harbour, and was dismissed by the District Judge on the ground of want of jurisdiction. On appeal, a Division Bench of the High Court remanded it to the Court of First Instance for the determination of an issue as to jurisdiction, that is, the issue whether the suit related to immoveable property situated within the jurisdiction of the Court, and if not, whether the Court had jurisdiction to entertain it.

Upon the evidence adduced by the plaintiff, the Munsiff came to the conclusion that, since the grant of the sayer compensation, the Courts of the 24-Pergunnahs and the Collector of the District had all along been exercising jurisdiction respecting all matters connected with it. He was of opinion that the sayer compensation, granted under Regulation XXVII of 1793 was a grant of money in respect of a right within the meaning of section 3 of the Pensions Act (Act XXIII of 1871), and by section 6 the suit was barred for want of a certificate from the Collector. Accordingly, the Munsiff dismissed the suit.

The defendants appealed to the District Judge of the 24-Pergunnahs, who held that the Munsiff had jurisdiction to try the suit on the grounds that sayer compensation was not a pension and the Pensions Act had no application to it; that there was no difference between a suit for sayer compensation and one for malikana; that in both cases the owner had lost the land, and both sayer and malikana were equally profits arising out of land; that if the defendants had not been proprietors of the market, they could not have levied sayer or obtained compensation for its withdrawal, and the money paid to them by Government was an interest in land, a profit owing to them as proprietors; and that the plaintiff had shown that in a previous suit the Courts of the 24-Pergunnahs had exercised jurisdiction with respect to this sayer, and that the

1891

SURENDRO PROSAD BHUTTACHARJI v. KEDAR NATH BHUTTACHARJI.

Collector had assessed road cess on the defendants in respect thereof. The District Judge accordingly decreed the appeal.

The defendant, Surendro Prosad Bhuttacharji, appealed to the High Court.

Baboos *Bhowani Churn Dutt* and *Abul Krishna Ghose* for the appellant.

Mr. *Douglas White* and Baboo *Gopi Nath Mukerji* for the respondent.

The judgment of the Court (O'KINEALY and GHOSE, JJ.) was as follows:—

This was a suit to enforce a mortgage bond. It was executed in the town of Calcutta, and what was hypothecated to the plaintiff was a certain *sayer* compensation payable at the General Treasury at Calcutta. Both the plaintiff and the defendants are residents of Calcutta, and the main question that arises in this appeal is whether the suit was cognizable by the Munsiff's Court at Diamond Harbour.

The ground upon which it is alleged that the suit would lie in the Munsiff's Court at Diamond Harbour is that the *sayer* compensation, which was hypothecated by the bond, was compensation in the nature of *malikana*, which the Government allowed in lieu of *sayer* collections from a *hât* within the jurisdiction of that Court: and in regard to this ground the question that we have to consider is whether the said sayer compensation is immoveable property, or any interest in immoveable property, within the meaning of section 16 of the Civil Procedure Code.

Now, it will be found on a reference to Regulation XXVII of 1793, and its preamble, that the duties which the owners of *gunges*, *bazaars*, *hâts*, &c., used to levy on commodities sold in those places, were designated *sayer* collections, and these duties, it was declared by the said Regulation, to be "internal duties," which it was the exclusive privilege of Government to impose and collect—a privilege not exercisable, according to "a well-known law of the country," by any subject without their express sanction. These duties, it will be observed, were in no sense rent or profits which the owner of a *hât* or *bazaar* was entitled to receive for the use of land, or for houses, shops, or other buildings erected

thereupon. And by the Rules published on the 11th June 1790, the landholders were prohibited from collecting such duties; it being declared at the same time that they should thereafter be levied by Government, the Government paying to the landholders one-tenth of the collections after defraying the establishment charges (see section II). Subsequently, on the 28th July 1790, it was resolved to abolish these duties altogether, and to allow the owners of the *hâts*, *gunges* and *bazaars* certain compensations in lieu of the share of the collections which they used to receive (section IV); and by a rule passed on the 6th August 1790 it was declared that "the proprietary right in the ground on which *hâts* and *bazaars* are held is to continue vested in the landholders, but the public are to have the free use of it," and that "the ground on which *hâts* and *bazaars* are now held is accordingly to be continued to be appropriated to this purpose (*i.e.*, exposing goods for sale) free of all charges to the vendors." (See section V.) Then, by the Rules passed on the 8th April 1791, the principle upon which the compensation was to be fixed, and the mode in which, and the parties to whom, it was to be allowed, were laid down (section VI).

This was the state of the law under which sayer compensations were allowed by Government; and we think that the examination of the preamble and the several sections of Regulation XXVII of 1793, we have referred to, shows that the said compensation had no reference whatever to any rent or profit arising out of the land, but to the internal duties on commodities which were levied when such commodities were exposed for sale—duties which, as was distinctly declared, the owners of the *hâts* and *gunges* were not entitled to levy *as landholders*. The compensation that was allowed to them was not because they were, by reason of the abolition of the *sayer* duties, deprived of any portion of the *profit arising out of the land*, but because, as we can gather, they were in the habit of levying such duties for a long time; and the Government thought proper in the first instance to allow them one-tenth of the collections, and eventually, when they abolished the duties altogether, they determined to allow the landholders some compensation, year after year, for the loss they suffered by being deprived of a share of the collections. In this view of the matter, it seems

1891

SURENDRO PROSAD BHUTTACHARJI v. KEDAR NATH BHUTTACHARJI.

to be obvious that *sayer* compensation does not in any sense partake of the nature of "malikana," which, as it is well understood, is a right to receive a portion of the profits of an estate, for which Government may make a settlement with another person, when the real proprietor neglects to take a settlement. In that case, the proprietor loses the land: here the landholder does not lose the land or any portion of the profit *arising out of the land.*

The learned Judge of the Court below refers in his judgment to the fact that the Collector has assessed on the defendants road cess on account of the *sayer* compensation. Whether the Collector was right in doing so or not, it is not necessary for us to express any opinion. All that we need say is that this fact cannot give to the *sayer* compensation a character which, under the Regulation and the orders of Government we have referred to, it does not possess.

The learned Counsel for the plaintiff, in the course of his argument, relied upon the observations made by a Division Bench of this Court in the case of *Bungsho Dhur Biswas* v. *Mudhoo Mohuldar* (1). But those observations do not help him. The question that the Court had then to consider was indeed very different from that which we have now to determine; and the *hât* with which we are concerned is a *hât* which (unlike the *hât* in that case), it must be taken, existed at the time of the passing of Regulation XXVII of 1793.

A question was raised before us on behalf of the defendants whether the *sayer* compensation is not in the nature of a pension contemplated by the Pensions Act (XXIII of 1871); but in the view we have already expressed it is not necessary to determine this question.

The result is that the suit must be dismissed upon the ground that the Munsiff's Court at Diamond Harbour had no jurisdiction to entertain it; and that this appeal will therefore be decreed with costs.

Appeal decreed.

C. D. P.

(1) 21 W. R., 383.