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[901] PRIVY COUNCIL.*

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FAKIR CHUNDER DUTT *v.* RAM KUMAR CHATTERJEE.

[13th May and 3rd June, 1904.]

[*On appeal from the High Court Fort William in Bengal.*]

Previous holder—Bengal Rent Act (Bengal Act VIII of 1869) *s.* 66—*Rent, arrears of—Purchase—Sale—Unregistered tenant—Defaulter.*

The expression "the previous holder" in s. 66 of Bengal Act VIII of 1869 includes a person beneficially interested in a tenure, who is in a position to protect his interest by paying the rent into Court and yet omits to do so with the result that the tenure is brought to sale by the superior landlord.

That he is not a registered tenant, or is only interested in a portion of the tenure, or that he is not liable directly to the zemindar, is not sufficient to prevent the last clause of the section from applying to him.

"Default" which deprives a person of the benefit of the section does not necessarily imply moral obliquity, or breach of contractual obligation: it simply means non-payment, failure or omission to pay.

APPEAL from a decree (19th January 1899) of the High Court at Calcutta affirming a decree (27th January 1897) of the District Judge of Bankura, which had reversed a decree (30th June 1896) of the Subordinate Judge of Bankura made in the appellants' favour.

The plaintiffs appealed to His Majesty in Council.

The appeal arose out of a suit brought on 25th January 1895 by Chintamoni Dutt (since deceased and now represented in the appeal by Fakir Chunder Dutt) and the other appellants against the *mokurraridars*, *dar-mokurraridars*, *se-mokurraridars* and *rayats* claiming interests in a *mouzah* called Makarkandi which was owned, as *zemindar*, by the Rani of Chatna The plaintiffs claimed to be purchasers at a sale in execution of a rent-decree dated 30th January 1884 of the *mokurrari* tenure, [902] of which two of the defendants Babulal Roy and Akhoy Roy were the registered tenants, and they claimed to be entitled by virtue of such purchase and of the relinquishment by other defendants of their tenures to set aside all subordinate tenures created by the *mokurraridars* and to receive rent direct from the *rayats* and other immediate occupiers of the land of *mouzah* Makarkandi.

That *mouzah* was by a *pottah* dated 8th January 1866 granted in *mokurrari* by the *zemindar* to Babulal Roy and Akhoy Roy, who with their co-sharers were the defendants Nos. 1 to 9 and described as the Roy defendants. On 8th February 1866 the Roys granted a *dur-mokurrari* lease of the *mouzah* to Srichurn Ghose (since deceased and now represented by his three sons Notobur Ghose, Behari Ghose and Gobind Ghose, defendants Nos. 10, 11 and 12). Srichurn had a brother Srimunt, who was a co-sharer in the *dur-mokurrari* with him. Against Srichurn and Srimunt a mortgage decree was passed in favour of one Brojolal Dutt a nephew of the plaintiff Chintamoni Dutt, and in execution of that decree their *dur-mokurrari* rights were sold, and purchased by Chintamoni's Gomasta, Nil Madhub Banerji, defendant No. 16, on 16th August 1879. In April 1880 Nil Madhub Banerji executed two *pottahs* subletting the rights he had purchased. One of these leases covered 9½ annas of the *mouzah* and was in favour of Notobur Ghose, and the second covered the remaining 6½ annas and was in favour of

* *Present*:—Lord Macnaghten, Lord Lindley, and Sir Arthur Wilson.

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Srimunt Ghose, defendant No. 13. On 11th January 1893 Srimunt Ghose sold his interest in the *dur-mokurrari* to Ram Kumar Chatterji and Mohun Lal Sukul, defendants 14 and 15, and on 7th March 1895 Notobur Ghose, Behari Ghose and Gobind Chunder Ghose sold their interest in the *dur-mokurrari* to Godai Lal, defendant No. 32.

Meanwhile the plaintiff Chintamoni had acquired either privately or by public auction various shares in the *mokurrari* rights in the *mouzah*, until in November 1884 the extent of the rights so purchased by him amounted to 11½ annas of the *mouzah*. On 7th of that month a sale was held in execution of a decree for arrears of the *mokurrari* rent: the *mokurrari* lease was sold, and was purchased by the plaintiff Chintamoni, who thus claimed to be *mokurraridar* of the whole *mouzah*. He alleged [903] that Nil Madhab Banerji relinquished in his favour the rights he had purchased in August 1879, and that Srimunt Ghose and Notobur Ghose, sub-lessees of Nil Madhub, also gave up their sub-leases. In this way he claimed that all intermediate tenures had been extinguished, and that he was entitled to receive rent from the *rayats* direct. His cause of action was that in attempting to collect rent from the *rayats* he met with opposition, and had to bring suits for rent or khas possession against them, in which he had not always been successful. Accordingly his object in this suit was to have it decided that his claim was well founded.

The main pleas raised in defence to the suit were that the plaintiffs' purchase of the *mokurrari* interest was fraudulent, that it did not pass the interest in the whole tenure, and did not extinguish the *dur-mokurrari* rights; that the purchase by Nil Madhub Banerji was *benami* for the *dur-mokurraridars*, who remained the beneficial owners, and that the *dur-mokurrari* had never been extinguished by surrender or otherwise. Such of the cultivators as filed written statements expressed their willingness to pay rent to whichever party the Court decided was entitled to receive it. Notobur Ghose did not appear or plead to the suit. Nil Madhab Banerjee supported the plaintiffs' case.

The material points raised by the issues were.

2. Whether the plaintiff was entitled to the entire *mokurrari*?

4. Whether defendant No. 16 was *benamidar* for defendants No. 10 to No. 13?

5. Whether defendants Nos. 10, 11, 12, 13 and 16 gave up their rights to the plaintiff?

9. Whether the sale at which the plaintiff purchased was brought about by the default of the plaintiff himself? If so, how will his suit be affected thereby?

As to the alleged relinquishment (issue 5) an attested copy of a kabuliat executed by Notobur Ghose, Behari Lal Ghose and Gobind Chunder Ghose in favour of Chintamoni Dutt dated 6th November 1890 was put in; and a written statement of Notobur Ghose in a suit brought against him and others by Chintamoni Dutt, in which he stated that "the plaintiff having purchased the said *mouzah* at a rent sale gave a notice asking me either to come in and take a fresh settlement or to give up possession on receipt [904] of the notice. I voluntarily gave up possession in favour of the plaintiff. Subsequently I took a fresh settlement from the plaintiff in respect of a certain quantity of land of the said *mouzah* under a registered *pottah* and *kabuliat* on 21st Kartick 1297" (6th November 1890) "and am now in possession thereof."

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Godai Pal (defendant No. 32) claimed in his written statement to have purchased Notobur Ghose's interest, and also the interests of Behari Ghose and Gobind Chunder Ghose under the deed of 7th March 1895 and to be in possession thereof.

The Subordinate Judge held that the plaintiffs had, by their purchase, become the owners of the entire *mokurrari* right; that the purchase of 11th August 1879 by Nil Madhub Banerji was originally *benami* for Srichurn Ghose and Srimunt Ghose, but afterwards for the plaintiff; that the relinquishments alleged had never been made, but that Notobur Ghose had taken a fresh lease on 6th November 1890; and that the rent of the *mokurrari* was not paid because of default by the *dur-mokurraridars*, and the arrears were not due in consequence of the laches of the plaintiff. In the result he passed a decree that the plaintiffs were the owners of the *mokurrari* right and also of the *dur-mokurrari* right by virtue of Nil Madhub Banerji's purchase; that the defendants Nos. 14, 15 and 32, Ram Kumar Chatterjee, Mohun Lal Sukul, and Godai Pal, and the Ghoses (except Notobur) were owners of a *se-mokurrari* right under the leases of 15th April 1880 to the extent of their shares, and that the plaintiffs were entitled to Notobur Ghose's share in the *se-mokurrari* right; and that they were not entitled to collect rents from the cultivators direct, except as to Notobur Ghose's share.

From that decree four separate appeals were filed in the Court of the District Judge, but the decisions in three of them only are material to the present appeal, namely, that by the plaintiffs, that by the defendants Nos. 14, 15 and 32, and that by the Roys, *mokurraridars*, defendants Nos. 1 to 9. In the last-named appeal the District Judge agreed with the Subordinate Judge that the plaintiffs were the owners of the entire *mokurrari* right.

On the other appeals the District Judge decided that the purchase by Nil Madhab Banerji was *benami* for the Ghoses [905] that in 1884 the plaintiffs were in possession of an 11½ annas share in the *mokurrari*; that they had defaulted in payment of rent and were therefore under no circumstances entitled to the benefit of s. 66, Bengal Act VIII of 1869. He was also of opinion that there had been no relinquishment of the *dur-mokurrari* as alleged, and that Notobur Ghose's action did not bind his co-sharers, or even transfer his share to the plaintiffs. The decree of the District Judge decreed the suit against the *mokurraridars*, and dismissed it against the *dur-mokurraridars*, and it was declared that the plaintiff was not entitled to receive rents from the *rayats* direct, but from the *dur-mokurraridars*, whoever they might be.

The plaintiffs appealed to the High Court, and the appeal was heard by a Division Bench of the Court (MACPHERSON AND AMEER ALI, JJ.) and dismissed with costs. The material portion of their judgment was as follows:—

"The plaintiffs are the purchasers of a *mokurrari* tenure which was sold in execution of a decree obtained by the zemindar for arrears due in respect of the tenure; and as auction-purchasers they bring this suit practically for the purpose of having it declared that they are entitled to annul all intermediate tenures created by the *mokurraridars*, and to collect rent directly from the *rayats*. One of the intermediate tenures said to have been created by the former *mokurraridars* is a *dur-mokurrari*. The Subordinate Judge held, with reference to this, that it had, as a matter of fact, ceased to exist, and that, if it was in existence, the plaintiffs, as auction-purchasers, were entitled to annul it. The District Judge reversed the decision of the Subordinate Judge on the first point, and held that the *dur-mokurrari* tenure was still in existence, and he further held that s. 66 of Bengal Act VIII of 1869 did not apply to the plaintiffs' purchase, and that they

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were not entitled to take the benefit of it or to annul the under-tenure. The contention before us is that, assuming the *dur-mokurrari* to be in existence, as the District Judge has found, he was wrong in holding that the plaintiffs were not entitled to the benefit of s. 66, and consequently to annul the *dur-mokurrari*. The facts found by the District Judge are these.—that at the time when the *mokurrari* tenure was sold in November 1884, the purchaser Chintamoni, who is one of the plaintiffs in the present case, had an 11½ annas share of the *mokurrari*; that he was in possession of his share, and that there was at that time some arrangement in force by which the holders of the *dur-mokurrari* tenure were to pay the *mokurrari* rents due to the zemindar. It is argued that it cannot be said that the tenure was brought to sale through the default of the purchaser Chintamoni, as the default was really that of the *dur-mokurraridars* who, under the arrangement to which I have referred, were bound to pay the rent to the zemindar. We think there is no force in this contention, and that the District Judge [906] was quite right in holding that s. 66 of Bengal Act VIII of 1869 did not apply to the case. That section enacts that nothing in it "shall be held to apply to the purchase of a tenure by the previous holders thereof, through whose default the tenure was brought to sale." Now we think that, on the finding of the Subordinate Judge, Chintamoni was, within the meaning of the section, the previous holder. He was at all events, one of the previous holders, and the default of one was the default of all. The mere fact that the holders of the subordinate tenure were, by the arrangement with the *mokurraridars*, bound to pay the rent due to the zemindar, did not relieve Chintamoni or his co-sharers from the responsibility of paying the rent. The words "through whose default" in s. 66 do not, we think, mean that it should be through the actual fault of the previous holder, as opposed to the fault of any one else that the rent was not paid. If the persons who, under the arrangement referred to, should have paid the rent, did not pay it, the holders of the *mokurrari* tenure were bound to pay it; and if they did not pay, the default was theirs within the meaning of the section. They might, of course, have paid it at any time previous to the sale and so prevented the sale. But they did not do so.

"Then it was also said that the *dur-mokurraridars*, who were the persons actually in fault for non-payment of the rent, cannot be allowed to plead, as against the purchaser Cintamoni, that he was the person in default. It seems to us that there is no force in this contention. All that has to be shown to prevent the application of the section, is that the purchase was made by the previous holder through whose default the sale became necessary; and once those facts are proved, it does not make any difference who the person raising the objection is; those facts being proved, the section becomes inoperative.

"It was also argued that the Judge was wrong in holding that the entire *dur-mokurrari* tenure continued to be in existence, as one of the Ghoses, the holders of it, had relinquished his interest in the tenure to the zemindar. Now, the *dur-mokurrari* was an entire tenure held, so far as it appears, without any specification of shares, and the relinquishment of his share by any one of the co-sharers would not operate as a transfer of his right to the zemindar, to whom the reliquishment was made. The zemindar might or might not recognize the relinquishment by relieving the person relinquishing from any further liability for rent. But the relinquishment would not, it seems to us, have any greater force than that, nor would it affect the entirety of the tenure held by the other co-sharers."

C. W. Arathoon for the appellants contended that Chintamoni Dutt was not a "defaulter" under s. 66 of Bengal Act VIII of 1869. Being an unregistered tenant he was not liable for the payment of the rent, and did not come within the words of the section "previous holder through whose default the tenure was brought to sale." The expression "previous holder" in that section meant "registered previous holder." Unless a tenant be registered, he is not recognized by the landlord as being directly liable for rent. He had also only a share in the tenure and was not liable for the [907] whole rent. Reference was made to *Anundlal Mookerjee* v. *Bhugwan Chunder Mookerjee* (1); the Bengal Rent Act (X of 1859) s. 106; Bengal Act VIII of 1869, ss. 62, 63, 66; the Revenue Sale Law (Act XI of 1859) s. 53: and *Doolar Chand Sahoo* v. *Lalla Chabeel Chand* (2). On the evidence it was also contended that

(1) (1873) 12 B. L. R. 489 note, 491. (2) (1878) L. R. 6 I. A. 47.

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the Ghose defendants had recognized the right of the plaintiff Chintamoni as *mokurraridar* and had relinquished their rights as *dur-mokurraridars* in his favour.

L. DeGruyther for the respondents (who was called upon only on the point as to whether there had been a valid transfer of Notobur Ghose's interest to Chintamoni Dutt) contended that there had been no such transfer. The only evidence of it was in a written statement of Notobur in another suit, which was not evidence admissible against the respondents (the assignees of the *dur-mokurraridars*).

Arathoon in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In November 1884 one Chintamoni Dutt (who is now dead and represented by the appellant Fakir Chunder Dutt) purchased at a sale in execution of a rent decree the *mokurrari* lease of *mouzah* Makarkandi. This lease had been granted in 1867 by the zemindar, the Rani of Chatna, to a family called "the Roys," two of whom only—Lal Roy and Akhoy Roy—were the registered tenants. The rent suit was brought against them.

After his purchase Chintamoni claimed to be *mokurraridar* of the whole *mouzah* and entitled to receive rent direct from the *rayats*. He took proceedings under s. 66 of Bengal Act VIII of 1869 with the view of avoiding all intermediate tenures. He failed, because it appeared that although he was not registered as a tenant, he was himself interested to the extent of 11½ annas in the *mokurrari* lease to the Roys. The High Court affirming the First Appellate Court held that he was excluded from the benefit of s. 66 by the last clause of the section, which declares that "nothing in this section shall be held to apply to the purchase [908] of a tenure by the previous holder thereof through whose default the tenure was brought to sale.".

It was contended by the Learned Counsel for the appellants that Chintamoni was not a "previous holder" because he was not registered as tenant, that at any rate he was not "the previous holder" because he was not interested in the entirety of the property in lease, and that he was not a defaulter or in default because he was not directly liable to the zemindar and injured no one, but himself, by non-payment. It seems to their Lordships that there is no substance in any of these objections. They think that the expression which Mr. Arathoon criticised in detail must include a person beneficially interested in a tenure, who is in a position to protect his interest by paying the rent into Court and yet omits to do so with the result that the tenure is brought to sale by the superior landlord. "Default" which prevents the section from applying does not necessarily imply any moral obliquity or any breach of contractual obligation. It simply means non-payment, failure or omission to pay.

Another point was made on behalf of the appellants. It is dealt with in the judgment of the High Court, but not very satisfactorily explained. It was contended by Mr. Arathoon that the appellants were at least entitled to a decree against one of the *dur-mokurraridars*—one Notobur Ghose, defendant No. 10, because it was said that on being served with notice of Chintamoni's purchase he relinquished his interest in Chintamoni's favour. There is no proof of any transfer by him to Chintamoni. In fact, nothing is offered in proof of the appellant's contention as to Notobur's interest except a written statement by Notobur in another suit, in which he says that on receipt of the notice of

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Chintamoni's purchase he voluntarily gave up possession to Chintamoni. On the other hand, another defendant, Godai Pal, defendant No. 32, alleges in his written statement in the present suit that he purchased Notobur's *dur-mokurrari* rights on the 7th of March 1895 by a registered deed of private sale and that he has been holding the same, since that time, as the rightful owner and possessor thereof. The question, if there is a question, seems to be one between co-defendants, which cannot properly be dealt with in the present suit.

[909] Their Lodships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the first three respondents: *Watkins & Lempriere.*

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[910] CRIMINAL REFERENCE.

Before Mr. Justice Ghose.

DURGA PRASAD KALWAR *v.* EMPEROR.*

[19th February 1904.]

Gambling—Public place—Osara or verandah—Gambling Act, II (B.C.) of 1867, *s.* 11.

The accused were convicted under s. 11 of the Gambling Act, II (*B. C.*) of 1867, of gambling in a public place. The place where the gambling was held was an *osara* or verandah, which was enclosed on all sides, but having doors opening towards the road and having a platform between the *osara* and the road.

It was a part of a building which was the private property of certain individuals, and was used during the day as a shop; but not so in the night. The gambling in question took place after midnight.

Held, setting aside the convictions, that the *osara* was not a public place within the meaning of s. 11 of the Gambling Act.

[Ref. 10 Cr. L. J. 16, 30. Bom. 348.]

RULE granted to the petitioners, Durga Prasad Kalwar and others.

This was a Rule calling upon the District Magistrate of Saran to show cause why the conviction and sentence in the case should not be set aside upon the ground that the shop in which the gambling took place was not a public place within the meaning of s. 11 of the Gambling Act.

The petitioners were arrested at the shop of one Mohavir Sah, where it was alleged they had been gambling. The place where the gambling was held was an *osara* or verandah, enclosed on all sides, but having doors opening towards the road, and a platform between it and the road. The *osara* was a part of a building, which was the private property of certain persons. It was used [911] during the day as a shop, but not so at night. The gambling took place after midnight. Some of the petitioners were standing on the roadside looking at the game that was going on inside, while others were among those who were standing inside the *osara*. The petitioners were convicted on the 19th December 1903, by the Joint-Magistrate of Saran under s. 11 of the Gambling Act and fined.

* Criminal Revision No. 63 of 1904 made against the order passed by J. F. Graham, Joint-Magistrate of Saran, dated the 19th of December 1903.