1903
JUNE 12, 17.

ORIGINAL CIVIL.

30 C. 999=7 C. W. N. 784.

tive merits of Hinduism and Brahmoism as systems of faith and morals, and any such inquiry would be outside the Court's jurisdiction.

Although the adoption in question has in the course of the argument been confidently challenged as illegal and invalid, it is a singular fact that until the present litigation arose the adoption was, as I must assume on the pleadings, never questioned, and the adopted son has been throughout recognized and treated as a member of an orthodox Hindu family.

The conclusion I arrive at is that the plaintiff has failed to impugn the validity of the adoption of the defendant Basanta Kumar Das, and I must declare that the defendant Basanta Kumar Das is the validly adopted son of the testator.

The plaintiff must pay the costs of the hearing of this issue.

[The further hearing of the case, for the determination of the remaining issues, if any, was adjourned.]

Attorney for the plaintiff : *H. N. Dutt.*

Attorneys for the defendants : *Ghose & Kar, N. C. Dutt, B. N. Bose* and *S. C. Ghose.*

---

30 C. 1011 (=7 C. W. N. 535).

[1011] APPELLATE CIVIL.

NAGENDRABALA DASSI *v.* GURU DOYAL MUKERJI.*

[1st May, 1903.]

Principal and Agent—Illegal cess—Kurcha—Liability of Agent to account for sums realized, not legally recoverable by Principal.

An agent is liable to account to his principal for the sums realized by him from tenants although the said sums are not legally recoverable by the landlord as being illegal cesses.

Nobin Chandra Roy Chowdhry v. *Gooroo Gobind Mojoomdar* (1) doubted. *Gobind Soonder Singh* v. *Chandi Charan Bhattacharjee* (2) followed.

[Ref. 14 C. L. J. 507=11 I. C. 713=16 C. W. N. 137 ; 44 Mad. 334=39 M. L. J. 692=29 M. L. T. 59=1920 M. W. N. 776=60 I. C. 127.]

SECOND APPEAL by the plaintiff, Nagendrabala Dassi.

This appeal arose out of an action for accounts. On the 9th August 1897, a preliminary decree was passed for accounts against the defendant who was the *gomasta* (agent) of the plaintiff. The defendant on the 30th September 1897 submitted an account to the Court. The plaintiff questioned the correctness of the account submitted by the defendant, and the matter was referred to a commissioner for enquiry. Babu Ishwar Chandra Das, a pleader practising in the Munsif's Court at Phulbari, was appointed commissioner. The commissioner went to the mehal and prepared a list of the sums collected by the defendant. The list showed realization of rents, cesses, interest, and of another item called *khurcha.*

The Court of First Instance having held that *khurcha* being an *abwab* or illegal exaction such exactions should not be taken into account, gave the plaintiff a modified decree. On appeal by the plaintiff, the District Judge of Dinajpore affirmed the decision of the First Court.

Babu *Nilmadhab Bose* (Babu *Hara Chandra Chuckerbutty* with him), for the appellant. The Court below is wrong in holding [1012] that the

* Appeal from Appellate Decree No. 1586 of 1900 against the decree of J. Phillimore, District Judge of Dinajpur, dated May 16, 1900.

(1) (1875) 25 W. R. 8. (2) (1890) Unreported.

1903
MAY 1.

APPELLATE CIVIL.

30 C. 1011=
7 C. W. N. 535.

agent was not liable to account for the amounts realized by him from the tenants, which were illegal cesses. The case of *Nobin Chunder Roy Chowdhry* v. *Gooroo Gobind Mojoomdar* (1) relied upon does not apply to the facts and circumstances of the present case. The unreported decision of Petheram, C. J. in second appeal No. 428 of 1899 is in my favour. Sections 217 and 218 of the Contract Act also lend support to my contention. An agent is bound to pay to his principal all sums received on his account.

Babu *Mohini Mohan Chuckerbutty*, for the respondent, could not support the judgment of the Lower Court, so far as the point of law was concerned, but he argued upon the merits of the case.

RAMPINI AND HANDLEY, JJ. The suit out of which this appeal arises was brought for an account and for the balance due on accounts being taken from the defendant, who was the plaintiff's agent in collecting rent. When the accounts were taken, it was found that the defendant had collected *khurcha* from the tenants. It is admitted that *khurcha* is an illegal cess. The question, however, is, seeing that the defendant has collected *khurcha* from the tenants, can the plaintiffs recover sums paid on this account to the defendant by the tenants or is the defendant to be allowed to pocket them?

The District Judge has held that the plaintiff cannot recover them from the defendant. The plaintiff appeals and contends that the District Judge is wrong.

The District Judge relies on the ruling in the case of *Nobin Chunder Roy Chowdhry* v. *Gooroo Gobind Mojoomdar* (1), in which it has been laid down that a *tehsildar* is bound to account to the landlord for payments made to him by the tenants in excess of rents due from them, if made voluntarily. But sums exacted by the *tehsildar* within the meaning of Act X of 1859, s. 10, cannot be recovered by the landlord in a civil suit. The learned Judge says:—"This ruling clearly shows that, notwithstanding section 218 of the Act, IX of 1872, in certain circumstances a *tehsildar* cannot be sued by the landlord for money received on his behalf; and also it shows that cesses which were illegal under **[1013]** Act X of 1859 could not be recovered from a *tehsildar* by a landlord, but that if they were not illegal under that Act they could be recovered. I think that I am bound by that ruling to hold that cesses which are illegal under the rent law cannot be recovered from the agent by the zemindar."

It may appear at first sight as if the Judge has not rightly read the judgment, but on further consideration we are disposed to think that the Judges who decided the case meant to lay down that sums which were illegal cesses under Act X of 1859 could not be recovered by a landlord from his agent. But this case was decided under Act X of 1859, and it may be doubted if it was justified by anything to be found in that Act However that may be, the law has been laid down differently under Act VIII of 1885, in the case of *Gobind Soonder Singh* v. *Chandi Charan Bhattacharjee* (2), No. 428 of 1889, decided on the 15th April 1890 by Petheram, C. J. and Banerjee, J. The facts of that case were similar to those of the present. As the case is unreported and the point an important one, we quote the judgment in that case *in extenso*:—

"This is a suit brought by a zemindar against his *gomasta* for an account of the moneys collected by the *gomasta* and to compel him to

(1) (1875) 25 W. R. 8. (2) (1890) Unreported.

1903
MAY 1.

APPELLATE CIVIL.

30 C. 1011=
7 C. W. N. 835.

pay over the balance in his hands. The account has been taken ; and the present appeal relates to one item of it only. That item amounts to Rs. 96-5-6½ ; and the accounts furnished by the *gomasta* show that this money has been received by him from the *ryats*. But he states that he did not receive this money as rent at all, but as *mhatoot*. It is contended that this *mhatoot* is not a sum legally recoverable by a zemindar, and should his agent, or the person acting as his agent, collect money from the *ryats* under the name of *mhatoot*, he can keep the money himself and is not bound to pay it to his master in whose name he received it, because he, the master, could not have recovered it by law. This view was adopted by the Munsif and the District Judge ; but in that view we cannot agree. True, there is the case of *Nobin Chunder Roy Chowdhry* v. *Gooroo Gobind Surmah Mojoomdar* (1), which contains an expression which favours **[1014]** that view ; but that case has been explained by the case of *Nobin Chunder Roy Chowdhry* v. *Gooroo Gobind Mojoomdar* (2). By that case the operation of the first is limited to the point actually decided there ; and the only point decided there is, that in Revenue Courts nothing can be recovered except rent from any person. So the *dictum* in that case with reference to this point is *obiter* only. In our opinion, if a *gomasta*, or any person acting in the character of an agent, gets money into his hands, professing to receive it for his master, he is liable to account for it to his master. The fact that his master could not have enforced payment does not enable the agent to keep it for his own use. To hold such an opinion would be to encourage dishonesty. If a person goes into the service of another to collect money and is entrusted with money while in that service, he is bound to pay his employer, whether he could have enforced its payment by a suit or not. If that were not so, he could keep the money given to him to hand over to his master as a present from the persons from whom he received it. Such a contention cannot prevail. We think, therefore, the view taken by the District Judge is wrong ; and that his decision should be reversed with costs. The plaintiff will get a decree for the money,—Rs. 96 and odd annas—in addition to the amount already obtained by him. The respondents will pay the costs of this appeal."

We see no reason to dissent from the view of the law taken in this Court by the learned Judges who decided this case, and we must accordingly follow it.

The provisions of the section 74 of Bengal Tenancy Act make all *abwabs* illegal, and stipulations for their payment void. Under section 75 a tenant can recover double the amount of any *abwab* exacted from him, together with a penalty not exceeding Rs. 200. But no provision in the Act allows an agent to retain the amounts of *abwab* he may have collected or prevents a landlord from recovering them from him. As the District Judge himself has said : " The respective rights and liabilities of the appellant and respondent are fixed by law in Chapter X of Act IX of 1872." Section 218 of that Act lays down that, subject to the provisions of section 217 of that Act, " the agent is bound to **[1015]** pay to his principal all sums received on his account ;" in the Act there is no exception given to this rule ; it would, therefore, at first sight appear from that section that in Indian as in English law an agent is not discharged from accounting to his principal by reason of unlawful acts of the principal in the matter of the agency, and that an

(1) (1870) 14 W. R. 447. (2) (1875) 25 W. R. 8.

1903 MAY 1.

APPELLATE CIVIL.

30 C. 1011= 7 C. W. N. 535.

agent cannot plead that by reason of the money having been collected under an unlawful agreement which had been made between the principal and the person from whom the money was collected, he is not liable to account for the money to the principal.

We must therefore set aside the judgment of the Lower Appellate Court and hold that the defendant is liable to pay to the plaintiff any sums collected by the defendant as *khurcha*.

It has been pointed out to us that in these circumstances the case must go back to the First Court, for the Munsif disallowed certain sums for which the defendant produced receipts (A and B) and which he claimed to have paid to the plaintiff's *naib* as *khurcha*. The Munsif held that *khurcha* could not be taken into account at all. If, however, the defendant is liable for *khurcha*, he is entitled to credit for sums paid by him on this account.

We accordingly set aside the decree of the Lower Appellate Court and remand the case to him. The account must now be gone into again, taking *khurcha* into account, on both sides.

The appellant is entitled to his costs in this appeal.

Appeal allowed. Case remanded.

---

30 C. 1016 (=13 M L J 323=30 I. A. 230=7 C. W. N. 861=5 Bom. L. R. 975=8 Sar. 551.)

[1016] PRIVY COUNCIL.

MAUNG PO HTI *v.* MAHOMED CASSIM.*

[24th June, 1903.]

[*On Appeal from the Chief Court of Lower Burma.*]

Partnership—Deed of partnership—Registration Act (III of 1877), s. 17, cls. (b) and (h)—Clause giving one partner only a right of redemption of mortgaged property—Document giving right to obtain another document—Evidence.

A deed of partnership which contained a clause stating that the partnership property was mortgaged, and giving one only of the partners a right of redemption for and during a future period of limited duration, was held to declare a right in immoveable property and therefore to need registration under clause (*b*) of s. 17 of the Registration Act (III of 1877) to make it admissible in evidence.

[**Ref.** 89 P. R. 1908=145 P. W. R. 1908.]

APPEAL from a judgment and decree (12th August 1901) of the Chief Court of Lower Burma, reversing the decree (18th February 1901) of the District Court of Amherst and dismissing the appellant's suit.

The plaintiff, Maung Po Hti, appealed to His Majesty in Council.

The suit was one for redemption. The 1st and 2nd defendants were the mortgagees members of a Moulmein money-lending firm. The 3rd and 4th defendants were the present respondents, Mahomed Cassim and Adjim Mahomed Nacoda. The facts were that in 1889, at Moulmein, the plaintiff had conveyed, for Rs. 15,000, to another firm, certain immoveable property consisting of a saw-mill and appurtenances, on the verbal understanding that it should be reconveyed to him on repayment of the above sum ; that, in June 1897, the plaintiff wished to have the

* *Present* : Lord Macnaghten, Lord Davey, Lord Robertson, Sir Andrew Scoble and Sir Arthur Wilson.