1869.

JAGINI CHARAN GANGULI v. JOHN WATSON.

In this view of the case, it is unnecessary to enter into the other questions raised on behalf of the respondent, namely, whether the zemindars could be properly made parties to this suit which was for possession, they having transferred all their rights of possession to Lachmipat. Secondly, whether the suit ought to be dismissed on the ground of champerty or maintenance. Thirdly, whether the suit could be maintained in the Civil Court. Fourthly, whether, apart from the construction of the documents, the zemindars had so dealt with the patnidars as to show that the patni talook was or at any rate had become an hereditary one. We consider, for the reasons we have stated, that the Court below was right in holding that the interest of a patni talook in both zemindaries is well vested in the defendants, and that this appeal ought to be dismissed with costs.

Before Mr. Justice Kemp and Mr. Justice Markby.

KASINATH KOOWAR (PLAINTIFF) *v.* BANKUBEHARI CHOWDHRY AND OTHERS (DEFENDANTS)*

1869 Sept. 24.

Act XI. of 1859, *ss.* 11, 13, 54—*Regulation II. of* 1805, *s.* 3—*Sale of share of a Zemindari—Purchaser at Auction of share of Zemindari—Limitation—Lakhiraj—Adverse Possession.*

A in exchange for his lakhiraj land obtained in 1791 from his zemindar 441 bigas of mal land, which the zemindar thereupon created rent free. The zemindar fell into arrears, and the zemindari was sold. Subsequently three persons, who had become owners of the zemindari, applied to the Collector, under section 11, Act XI. of 1859, and the Collector opened separate accounts with each of them for the revenue of their respective shares. The revenue due from one of them fell into arrears, and his share which included the 441 bigas was sold under section 13, and purchased by the plaintiff, who now sued the descendants of A to recover possession.

Held, that a sale of a share of a zemindari, under section 13, Act XI. of 1859, does not convey to the purchaser the share free from all incumbrances created by the former zemindar, but he acquires the share, as laid down in section 54, subject to all incumbrances.

Held, that under section 3, Regulation II. of 1805, possession of land for a period upwards of 60 years since the passing of Regulation XIX. of 1793, without payment of rent, bars the remedy of the zemindar to dispossess the holder or to resume the land as mal.

* Regular Appeal, No. 44 of 1869, from a decree of the Subordinate Judge of Hooghly, dated 29th December 1863.

1869

KASINATH KOOWAR v. BANEUBEHARI CHOWDHRY.

The *Advocate-General* (with him Baboos *Hem Candra Banerjee* and *Ambika Charan Banerjee*) for appellant.

Baboos *Romesh Chandra Mitter* and *Bepin Behari Dutt* for respondents.

The facts are fully stated in the judgment of

MARKBY, J.—In this case it appears that on the 6th of Baisakh 1198, B. S. (1791) an arrangement was made between the Maharaja of Burdwan and one Ramnarayan Chowdhry, through whom the defendants claim, for an exchange of two pieces of land, one comprising 175 bigas held as dewatar lakhiraj in Mauza Kinduli; the other comprising 441 bigas of mal lands in Mauza Gurbari. What was intended by this transaction I take to be this, that the 175 bigas which were formerly lakhiraj of Kinduli should cease to be so, and the 441 bigas which were formerly mal of Gurbari should became lakhiraj, the result as regards the revenue being the same, inasmuch as the collections of the two plots were the same, namely, rupees 500.

Subsequently the Maharaja fell into arrears of revenue in respect of the Taraff Manteswar and a portion thereof, the Huda of Mukondpore, comprising the Mauza Gurbari in which 441 bigas are situate, was sold by the Government to one Gattinath Roy, who on the 26th Magh, 201 sold to Ramnarayan Chowdhry 10 of the mauzas situate in this Huda, including Gurbari.

In the year 1834 the Government, at the instance of an informer, took proceedings to resume 550 bigas of land, including the 441 bigas now in dispute. The Collector of Hooghly dismissed the claim of the Government, being of opinion that though the exchange having been made subsequently to 1st December 1790 was invalid so far as it attempted to create a lakhiraj by reasons of the provisions of section 10 Regulation XIX. of 1793, yet that under those provisions only the zemindar, and not the Government, was entitled to resume.

How, or at what date, the zemindari rights in respect of Gurbari passed out of the hands of the ancestors of the defendants

1869

KASINATH KOOWAR v. BANKUBEHARI CHOWDHRY.

does not appear; but it appears that at some time prior to 1867, three persons, namely Mangobind, Gopikrishna Ghose, and Iswar Chandra Ghose, had been recorded in the Collector's books as proprietors of Gurbari. These persons being owners of specific portions of Gurbari, applied to the Collector, under section 11 of Act XI. of 1859, and the Collector opened separate accounts with each of them for the revenue of their respective shares.

The revenue payable in respect of the share recorded in the name of Iswar Chandra Ghose having fallen into arrear, that share was put up for sale under section 13, and purchased by the plaintiff. The plaintiff claimed as part of the share, which he had purchased, the 441 bigas given in exchange by the Maharaja of Burdwan to the predecessors of the defendants, and which, after the zemindari rights passed out of their hands, had still remained in their possession. In the sale certificate the share of Iswar Chandra is described as consisting of 1,475 bigas, and I assume, for the purposes of the argument, that the 441 bigas are comprised within the 1,475 bigas which constituted Iswar Chandra's recorded share.

The defendants refused to give up possession of these 441 bigas to the plaintiff, and he accordingly brought this suit to recover possession. Other property is also claimed in this suit, but the question now under consideration relates to 441 bigas only.

The Subordinate Judge held, that as the plaintiff was the purchaser of a share, and not of the entire estate under the provisions of section 11 and section 54, he stood in the position of Iswar Chandra only; and that as Iswar Chandra had not chosen to call into question defendants' rights, and more than twelve years had elapsed since Iswar Chandra's title to resume or assess had accrued, the plaintiff was barred under clause 14 of section 1 of Act XIV. of 1859.

The respondent, besides supporting the judgment of the Court below, has also called in aid the proviso of this clause which declares that no suits shall be maintained even within 12 years from the time when the title of the plaintiff or the person through whom he claims first accrued, if it be shown that the land has been held lakhiraj from the time of the permanent settlement, and he has further relied on Regulation II. of 1805.

It appears to me that in this case it is not necessary to go beyond the last of these several provisions of the Legislature for the protection of persons in possession. Had Iswar Chandra himself brought this suit, he would have been undoubtedly barred under the first branch of the third article of section 3 of Regulation II. of 1805. The cause of action, which is in this case founded on the right to dispossess, undoubtedly arose immediately on the passing of Regulation XIX. of 1793, which by section 10 authorized and required the proprietor responsible for the revenue to dispossess the grantee of lakhiraj lands, if the grant were subsequent to the 1st of December 1790. Had Iswar Chandra been the plaintiff in this case, this cause of action would have been transmitted to him, but no suit could be maintained upon it by Iswar Chandra at any rate after the 1st May 1853, that is, 60 years after the date when it first arose. This view is I think fully supported by the case of *Mussamut Chundra Bullee Debia* v. *Luckhea Debia Chowdhrain* (1) which was relied upon by the respondent.

The question therefore is whether the purchaser of Iswar Chandra's share stands in any better position than Iswar Chandra himself. If so it must be by reason of the circumstances under which this sale took place. It was a sale by the Collector for arrears of revenue under Act XI. of 1859. Now there is here no question of the operation of section 37 which is expressly limited to the case of the sale of the entire estate. The plaintiff therefore cannot claim the benefit of the provision in that section, that the purchaser shall acquire the estate free of all encumbrances and may avoid and annul all under-tenures. The plaintiff purchased at most that share of the estate in respect of which arrears of revenue were due. That is all the Collector had power to sell or professed to sell under section 13. Now assuming that Iswar Chandra, though he must have been already barred under section 3 of Regulation XIX. of 1793 from recovering possession or rent in respect of these 441 bigas, could, as recorded proprietor of the share in which they were comprised or otherwise, enter into a valid arrangement with the Government for the apportionment of the revenue under section 11 of Act XI.

(1) 10 Moore I. A., 214.

1869

KASINATH KOOWAR v. BANKUBIHARI CHOWDARY.

of 1859; and assuming also, as was so much insisted on by the Advocate-General, that what has been sold and conveyed to the plaintiff is not Iswar Chandra's right and interest in the share, but the share itself in respect of which the revenue was separately assessed, still I should come clearly to the conclusion that the plaintiff did not acquire that share free of encumbrances or with the right to avoid under-tenures. That right is only conferred on purchasers of an entire estate. It is a right which could not exist except by express provision of the Legislature. The principle of the revenue laws appears to me to be that the person responsible to the Government for the revenue is the owner of the land, though that ownership and all rights created out of it are liable to extinction. But that extinction is not an absolute one, following simply upon a default in payment of revenue even when that default is followed by a sale. The Government has clearly laid down when and to what extent that extinction takes place. It takes place upon the sale of an entire estate under the provisions of section 37, and then only subject to certain reservations. Upon the sale of a portion of an estate under section 13 it does not take place at all. If it did so by virtue of the sale itself, it would be without the reservations contained in section 37, and the sale of a portion would be more destructive than the sale of the whole. Upon the wording of Act XI. I can come to no other conclusion than that the purchaser of a share, though he may not be said strictly to claim through the defaulting owner, nevertheless acquires the share recorded in the name of defaulting owner, subject to all rights created by or gained against him or his predecessors.

I should have come to this conclusion upon the general provisions of the Act and the principles upon which it appears to me to be founded. But if there could possibly be any doubt upon this subject, I think it is made quite clear by section 54 which provides that when a share is sold, the purchaser shall acquire the share subject to all encumbrances, and shall not acquire any rights not possessed by the previous owner.

The result is, in my opinion, that assuming the 441 bigas now under consideration to be comprised within the 1,475 bigas which formed the recorded share of Iswar Chandra, the plaintiff cannot

maintain this suit to recover them, and that to that extent it ought to be dismissed.

I have said what appears to me sufficient to dispose off this case. I have taken a somewhat different view from the Subordinate Judge, because I think that is a simpler mode of arriving at a conclusion, but I do not wish it to be thereby inferred that I differ from the view taken by the Subordinate Judge. Upon the points of law on which he dismissed the suit, I express no opinion. The regular appeal is dismissed with costs.

KEMP, J.—I concur in this judgment.

Before Mr. Justice Kemp and Mr. Justice Markby.

SHIB PRASAD DAS (PLAINTIFF) *v.* ANNA PURNA DAYI (DEFENDANT.)*

1869 *Sept.* 24.

Act XX. of 1866, *ss.* 17 *and* 49—*Registration—Unregistered Deed of sale—Admissibility in Evidence as a Receipt.*

An unregistered deed of sale, so far as it is a receipt or acknowledgement of money paid or an acknowledgement for old debts, is admissible in evidence notwithstanding section 49, Act XX. of 1866.

A portion of an unregistered document requiring registration is admissible in evidence when such portion does not relate to immoveable property.

Baboo *Rajendra Missry* for appellant.

Mr. *R. T. Allan* and Baboo *Banshidhar Sen* for respondent.

The facts are fully stated in the judgment delivered by

MARKBY, J.—It seems to me in this case that the Courts below were wrong. The suit was brought to recover the sum of rupees 2,650, upon the ground that the defendants had executed a bill of sale to the plaintiff, of certain immoveable property in consideration of that sum, and that after having executed the bill of sale they refused to register the deed, sold the property to some one else, and allowed the deed in favor of the second purchaser to be registered, and that thereby the plaintiff in this case

* Special Appeal, No. 1131 of 1869, from a decree of the Judge of Midnapore, dated the 25th February 1869, affirming a decree of the Subordinate Judge of that District, dated the 18th December 1868.