1869

HARI RAM v. JITAN RAM.

the lower Appellate Court expresses it, by the plaintiffs' own admission, the defendants had, from the very first creation of the lease, that is from the year 1861, been in possession of the property. Then what was the right, title, and interest that the judgment-debtor, Radeswar Patak, had in this property so encumbered by this lease? He had, it seems to me, a right of two kinds: first of all a right to re-enter on the property on the expiry of the lease; and, secondly, a right of suit to set aside that lease. Now it cannot be doubted that the plaintiffs have bought the right to re-enter on the expiry of the lease, but I think that, under the decisions to which Mr. Justice Markby has referred, the plaintiffs cannot be held to have bought the right of suit to set aside the lease; and this being so, I think the lower Appellate Court was perfectly right in dismissing the plaintiffs' suit.

Before Mr. Justice Markby and Mr. Justice Glover.

MADHUSUDAN KUNDU (DEFENDANT.) v. RAMDHAN GANGULI (PLAINTIFF.)*

1869 Sept. 8.

Regulation VIII. of 1819—*Sale of Patni—Incumbrances by Defaulting Tenant—Purchaser at a Patni Sale.*

A sale under Reg. VIII. of 1819 does not, *ipso facto*, annul all tenures created by the defaulting patnidar, but the purchaser, if he thinks proper can avoid them.

Baboo *Purna Chandra Shome* for appellant.

Baboos *Krishna Sakha Mookerjee* and *Nilmadhab Sein* for respondent.

MARKBY, J.—I think that the special appellant in this case has made out a good ground of special appeal. The case originally came before the Deputy Collector, upon a suit by the plaintiff for arrears of rent at an enhanced rate. The plaintiff is a darpatnidar under a person who purchased the patni when it was sold for arrears of rent under Regulation VIII of 1819. The defendant, in answer to this suit, denied that his tenure

* Special Appeal, No. 1412 of 1869, from a decree of the Judge of East Burdwan, dated the 17th February 1869, affirming a decree of the Deputy Collector of that district, dated the 31st October 1868.

1869

MADHUSUDAN KUNDU v. GAMBHAN RANGULI.

was liable to enhancement, alleging that he held under an istemrari tenure created by the defaulting patnidar, and that he had paid at a uniform rate for twenty years. Upon that the Deputy Collector raised an issue, which concerned the right of the plaintiff to enhance the rent—namely, whether the jumma held by the defendant was istemrari or not; that is, was the defendant's tenure liable to enhancement of rent or not, clearly putting the liability of the defendant to enhancement upon the question whether the jumma—which I understand to be admitted actually did exist—was or was not an istemrari one. The other issues were entirely upon the question of what the proper amount of rent would be, supposing the tenure liable for enhancement. Upon the issue whether or not the defendants's tenure was istemrari, the Deputy Collector relied entirely upon a decision between the defendant and the defaulting patnidar, given by the Moonsiff in the year 1841, in which he considered that it was raised in issue and decided that that tenure was istemrari. He considered that that finding was conclusive upon the question raised on this issue; and relying entirely upon that decision, he decided that that tenure was not liable to enhancement at the suit of the plaintiff. The plaintiff then appealed to the Judge, and the Judge reversed the decision of the Deputy Collector upon this point. He considered that the effect of the sale for arrears of rent under Regulation VIII. of 1819 was at once to cancel all engagements made by the defaulting patnidar, and that the decision on which the Deputy Collector relied in no way affected the question as between the present parties. He thereupon remanded the case to the Deputy Collector generally. A great many decisions and appeals have taken place since that order in remand, but the case now comes before this Court for the first time on special appeal, and the first point which arises in this case is whether or no it is now open to argument that the decision between the defaulting patnidar and defendant that the tenure was an istemrari one is conclusive.

It seems to me that, according to the decisions of this Court, it was quite competent for the defendant either to have appealed at once to this Court from the first order of remand of the Judge upon this question, or to reserve his appeal to this

Court upon that point until all other questions should have been disposed of in the lower Courts. This principle has hardly been contested, but it is said that this point has been abandoned in the course of the argument before the lower Court; but after reading its decision I do not think that that is the case, because that point could not have been raised then, inasmuch as the order passed by the Judge, on the occasion of the first remand, was conclusive until appealed to this Court; and therefore I do not think, when it is said that only one point was intended to be brought before the lower Appellate Court, that it could be inferred that there had been a waiver by the defendant of points which were not open to him in the lower Court. Then if the point is open, it seems to me that the decision of the Judge to which I have referred above was wrong; and I think it of the last importance in this case to see how the question arose. It was perfectly open for the plaintiff in this suit to allege that by the sale for arrears of rent this tenure was liable to be and had been cancelled. It was also open to him to allege, as he has now alleged, that whether or no this tenure was cancelled, the decree passed by the Moonsiff in 1841 was no bar to enhancement as between the present patnidar and the defendant, in consequence of certain changes made in the law. But it appears to me quite clear that he raised neither of these questions, and the only one which he raised was, is the tenure which the defendant holds an istemrari one or not? I think that upon that question the Deputy Collector was perfectly right in treating the decision of 1841 as conclusive. I think the Judge is wrong in saying that by the sale for arrears of rent all the previous tenures created by the defaulting patnidar were cancelled. That appears to me contrary to the ruling of the Privy Council in their decision in *Ranee Surnomoyee* v. *Maharajah Suttees Chunder Roy* (1) that of the same Court in *Rajah Satyasaran Gosal* v. *Mahesh Chandra Mitter* (2), and also to the decision of BAYLEY and MITTER, JJ., in *Gobind Chunder Bose* v. *Alimooddeen* (3). It is true that these decisions turned upon words of the law not precisely similar to those of Regulation VIII. of 1819, section 11, clause 1; but it is clear to my mind that it would be impossible to put a construction upon that Regulation different from that put in those

(1) 10 Moore's I. A. 123. (2) 2 B. L. R., P. C., 23. (3) 11 W. R., 160.

1869

MADHU SUDAN KUNDU v. RAMDHAN GANGULI.

decisions on the Regulations of 1793, of 1822, and Act VI. of 1862, B. C., which are all in *pari materia*; and I think it must now be taken as an established principle of law that no sales for arrears of rent have *ipso facto* the effect of cancelling tenures created by defaulting owners, but merely to give to the purchaser the power to do so if he thinks proper, which has not been done in this case. It is clear therefore that the ground upon which the Judge bases his decision is wrong in law, and that the proper view of the law in this case is that taken by the Deputy Collector, namely that the purchaser not having exercised the power which the law gave him to annul that tenure, if he thought proper, when purchasing the rights of the patnidar, he takes his purchase with this tenure as it was left by the defaulting patnidar; and therefore also subject to the decision made between the defaulting patnidar and the defendant, by the Moonsiff's Court in 1841. It seems to me, upon these grounds, that the first decision of the Judge remanding the case was wrong; that the Judge ought not to have remanded the case; and that the original decision of the Deputy Collector is right, and ought now to be restored. The result is that the plaintiff's suit will be dismissed, and the plaintiff will pay the costs of this special appeal and all costs in the Courts below.

It is suggested now by the vakeel for the special respondent that the decision of the Moonsiff of 1841 does not declare the tenure of the defendant to be an istemrari one. It was so treated in the Court of the Deputy Collector, and as I understand the judgment now before us, it was so treated by the Judge; and the ground of appeal relied on with regard to this point is directed not to the question whether or no the decision of the Moonsiff was that the tenure was istemrari, but to the question whether that finding of the Moonsiff was or was not binding.

Under these circumstances, it may, I think be presumed that this point was not raised before the Deputy Collector or before the Judge, and it cannot be taken now. I think, therefore, as I have said before, that the decision of the first Court must be restored, and the plaintiff's suit dismissed with costs in all the Courts including those of this special appeal.

GLOVER, J.—I am of the same opinion.