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any disputed rights, but merely in investigating under the order of the Court what had been the expenses already incurred. It appeared in this case that the master had had the question of the attendance of this defendant before him, and had exercised his discretion upon it. It appeared that this defendant had actually attended for his complaint was that he had not been allowed the costs of that attendance out of the fund common to himself and others; and even if upon the merits of this application he differed from the view taken by the taxing master—which he did not—he should decline to interfere with his discretion in the matter. The motion must be refused; the applicant to pay the parties served with notice of the motion the sum of £10 between them for their costs." These words are singularly applicable to the facts of the present case.

The point where in my judgment the taxing officer failed to give full effect to the principle he adopted, was in the matter of summoning the parties before him. He ought not to have issued separate summonses to the different parties who appeared by the same solicitor: he should have included them all in one summons. This, however, is not complained of now.

I think the objections made must be disallowed.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

MAHOMED GAZI CHOWDHRY (ONE OF THE DEFENDANTS) *v.* J. G. LEICESTER AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

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April 19.

Sale for Arrears of Government Revenue—Re-purchase by a Co-proprietor—Rights of Under-tenants—Act XI of 1859, s. 53.

Under section 53 of Act XI of 1859, a co-proprietor who purchases an estate at a sale for arrears of Government revenue, takes it subject to the incumbrances created by the defaulting proprietor.

THE facts of this case and the arguments urged are fully noticed in the judgments delivered by the Court.

Baboos *Kali Mohan Das* and *Rasbehari Ghose* for the appellant.

Baboos *Annada Prasad Banerjee* and *Chandra Madhab Ghose* for the respondents.

JACKSON, J.—The plaintiff in this case sued to recover possession of certain talooki rights in certain mauzas in Pergunna Hoomnabad, which had formerly been in the possession of his vendors, Ashraff and Ukramuddin, but from which they had been dispossessed in consequence of a sale for arrears of Government revenue, at which it was alleged that the defendant Mahomed Gazi, one of the former co-proprietors of the estate, re-purchased the whole

* Special Appeals, No. 2214 and 2215 of 1870, from the decrees of the Judge of Tipperah, dated the 27th June 1870, affirming the decrees of the Subordinate Judge of that district, dated the 18th November 1869.

estate in *benami*. It was alleged that, under these circumstances, these talooki rights, though they were obtained from one of the co-proprietors, and not from the defendant Mahomed Gazi, were not invalidated by the sale, and that the plaintiff was accordingly entitled to recover those rights.

There was in the first place an allegation on the part of the defendant that the purchase, which was in the name of Mr. Delauny, was not made *benami* for him, and there has been an argument in this Court that the grounds upon which both the Courts have come to the conclusion that such purchase had been *benami*, are not sufficient in law. But it is unnecessary to look to these grounds, because under section 53, Act XI of 1859, the very fact that Mahomed Gazi was formerly a co-proprietor, and had subsequently re-purchased this property, is sufficient to bring him within the purview of that law under which it is declared that such purchase is made subject to all the incumbrances existing at the time of sale.

Another answer on the part of the defendant was that the vendors of the present plaintiff had surrendered their talooki rights by taking an izardari lease subsequent to the sale. And another point has been argued before us, viz., that under section 53, Act XI of 1859, only the incumbrances of the purchasing proprietor are to be respected, and not the incumbrances made by the defaulting proprietor. Both the lower Courts have gone into the question on the fact of the izardari lease subsequently taken by the plaintiff's vendors, and have come to the conclusion that the plaintiff's rights now claimed will not be affected by any such lease. Looking to all the facts of the case, it is extremely probable, as the lower Court has found,—nay, we may say that it is evident, that those subsequent arrangements were entered into, because it was supposed that a sale for arrears of revenue had taken place, and that Mr. Delauny was the real purchaser at that sale. There seems to be no ground whatever for believing that, if the plaintiff's vendors had known that this was a *benami* purchase for one of the defaulting proprietors, they would have surrendered their talooki rights for rights of a lower class. It is said that the Judge has decided this point, although it was not distinctly urged, the allegation of the plaintiff being the denial of the execution of this izardari lease, and it was the business of the Judge to have sent down this point as to whether the lease, had been executed or not, for trial by the lower Court, or the Judge should have himself tried the point, and allowed evidence to be adduced by the parties. If it had been necessary to try that point, the Judge would have been bound to fix an issue. But it is clear that the Judge was of opinion that, even admitting the izara lease to have been executed, still the plaintiff's rights had not been injured thereby: that the talooki lease which existed before the sale still existed after the sale, looking to the circumstances under which the sale took place.

Then we come to the last and final point,—namely, whether, looking to the terms of section 53, Act XI of 1859, this talooki lease even if it be the case that it was a lease granted by some of the defaulting proprietors, can

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under those circumstances, stand. The words of section 53 are very distinct: they do not say that where, of three co-proprietors of an estate, two default, and one pays up his share, that if the non-defaulting proprietor purchases the estate, he purchases it free from all incumbrances made by the non-defaulting proprietor. On the contrary, the words are very distinct, and lay down that any co-proprietor purchasing an estate, re-purchases it subject to all the incumbrances. In this case, therefore, the re-purchase by Mahomed Gazi was subject to the subordinate talooki rights of Ashraff and Ikramuddin, which the present plaintiffs now claim.

No ground, therefore, in our opinion, has been shown for interfering with the decision of the lower Appellate Court, and we dismiss the appeal with costs.

MOOKERJEE, J.—I am also of the same opinion. The contention raised in this Court that the lower Courts were wrong in holding that the appellant Mahomed Gazi purchased the zemindari *benami*, using the name of Delauny, becomes immaterial when it is admitted by the appellant that he had purchased from Mr. Delauny the property afterwards. It is also admitted that Mahomed Gazi was one of the proprietors of this zemindari before it was sold for arrears of Government revenue. The question as to whether the original purchase of Delauny was *benami* or not becomes of no importance when it is admitted that, by a purchase from Delauny, the defendant is now the owner of the entire zemindari, of which he was a co-partner at the time of the revenue sale. Section 53, Act XI of 1859, is strictly and entirely applicable to this case. Whether Mahomed Gazi originally purchased in the name of Delauny for his own benefit, or whether he (Delauny) purchased for himself, and then sold to Mahomed Gazi, the rights of that individual would in either case be the same, —namely, that he would by his "purchase acquire the estate subject to all its "incumbrances existing at the time of sale, and not acquire any rights in "respect to under-tenants or ryots which were not possessed by the previous "proprietor at the time of the sale of the said estate." This contention, therefore, even if correct is wholly unavailing.

It is next contended by Baboo Kali Mohan Das that the incumbrance in question having been made by a co-sharer of this zemindari, and not by his client the appellant, he is not bound to respect the same, but can annul it at his pleasure. This argument is, I think, unsound. The law distinctly lays down that any "recorded or unrecorded proprietor or "co-partner who may purchase the estate of which he is proprietor or "co-partner, or who by re-purchase or otherwise may recover possession "of the said estate after it had been sold for arrears under this Act." shall acquire the estate subject to all its incumbrances existing at the time of the sale. It does not say, subject only to all incumbrances created or imposed by the re-purchasing co-partner, but all incumbrances existing on the estate at the time of sale. The rights of purchassrs under this section appear to me to be very nearly of the same nature as the rights conferred on purchasers

at a sale in execution of decrees of Civil Courts. Purchasers at sales held in execution of decrees of Civil Courts, as well as purchasers in the position of Mahomed Gazi are both bound to respect encumbrances created by the previous owner and existing at the time of the sale. This section appears to me to have been intended for the security of under-tenants and ryots, &c., in cases where a co-partner purchases the zemindary at the sale, or re-purchases it, or otherwise recovers possession of it from another person who purchased it at the revenue sale. It is not denied that the plaintiffs had a talooki right in the mauz claimed, and as that right existed at the time of the sale, the defendant Mahomed Gazi, is bound by law to respect it.

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It is lastly contended that the plaintiffs had given up their talooki right by accepting an izara lease of the mauz for one year, and that consequently they have no right to maintain this action for recovery of the talook. The Courts below have, however, found that there is no proof of this surrender, and the lower Appellate Court holds also that, even if it be conceded that the plaintiffs accepted an izara lease of the mauza, and that that acceptance amounts to a relinquishment of their talooki right, still that the lease was executed not to the defendant Mohomed Gazi, but to Mr. Delauny, who was at the time believed to be an actual and *bonâ fide* purchaser of this zemindari. The plaintiffs subsequently found that Mahomed Gazi was the real purchaser in the name of Delauny, and, therefore, the plaintiffs have every right to sue him, the defendant, for the recovery of their talook. If Delauny was the real purchaser, the rights of the plaintiffs to the talook had gone; and whether the plaintiffs relinquished or not, Delauny was by law armed with powers to set aside and hold at nought the talooki rights of the plaintiffs. But I do not think that the surrender of the rights to Delauny, on the belief that he was the real purchaser at the revenue sale, can avail the defendant. When the defendant re-purchased, he was bound by the encumbrances which existed at the time of the sale. I would also dismiss this appeal with all costs.

Before Mr. Justice Bayley and Mr. Justice Paul.

THE QUEEN *v.* KALI CHARAN MISSER AND OTHERS*

Investigation of Complaint—Theft—Defence—Dismissal.

1871
July 17.

A Magistrate ought to hear evidence in support of a charge before dismissing the complaint. A bare assertion by an accused, charged with committing theft, of a proprietary right in the alleged stolen property, is no reason for a Magistrate to refuse to entertain the charge of theft.

IN this case Rannu Singh complained against Kali Charan Misser and others that they had plundered his crops. The complainant said that he was a

*Reference under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore.