

BENGAL LAW REPORTS.

APPELLATE CIVIL.

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

MEAH JAN MÜNSHI (ONE OF THE DEFENDANTS) v. KURRUNA-
MAYI DEBI (PLAINTIFF.)*

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July 5

Jurisdiction of Civil Court—Suit to set aside a Sale under s. 105 Act X of 1859—Fraud—Non-registration—Acknowledgment of Tenant by the Zemindar.

A Civil Court has jurisdiction to entertain a suit by a tenant to recover possession of a tenure from an auction purchaser at a sale for arrears of rent under section 105 of Act X of 1859, although there is no allegation of fraud, the tenant not having been a party to the decree for arrears of rent⁽¹⁾.

In a sale under section 105 of Act X of 1859, only the judgment-debtors's property can pass. A zemindar is bound to sue the actual tenant, when known to him, though the tenant's name has not been registered in his sherista. There can be a legal and valid recognition by a landlord of the vendee of a saleable undertenure as tenant, notwithstanding that no mutation of names has taken place in his books.

THE plaintiff brought this suit to recover possession of an 8-anna share of a talook from the defendant, Meahjan Munshi, who had dispossessed her from it on the ground that he had purchased the talook at an auction sale, held in execution of a decree obtained against one Braja Mohan Deb, for arrears of rent due to the zemindar defendant on account of this very tenure. She alleged that the tenure did once belong to Braja Mohan Deb, who had sold it to her mother; that her mother, and subsequently herself, had for a period of

* Special Appeal, No. 195 of 1871, from a decree of the Judge of Tipperah, dated the 22nd December 1870, reversing the decree of the Subordinate Judge of that District, dated the 7th May 1870.

(1) See *Ramsundar Poramanik v. Prasanna Kumar Bose*, Case No. 2138 of 1865 February 5th, 1866.

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upwards of 13 years been in quiet possession of it, paying the rent to the zemindar; that the zemindar, though he and his agent perfectly well knew that she was the tenant in possession for a series of years and paid rent for it, brought a suit for arrears of rent, for the year 1277, Tippera Era, (1867), against Braja Mohan Deb, the old tenant, whose name had been negligently allowed to stand in the zemindar's books, and obtained an *ex parte* decree, in execution of which he caused the tenure to be sold; that she was wholly ignorant of these proceedings held behind her back till actual possession had been taken by the purchaser, and therefore she now sued to recover possession. The defence of the purchaser was, that the Civil Court had no jurisdiction to try such a case; that the alleged private purchase of the plaintiff's mother was a fraud; that the talook belonged to Braja Mohan Deb, who had become a defaulter; and that the talook was therefore legally sold and purchased by him the defendant.

Two issues were fixed by the Subordinate Judge.

1. "Can the Civil Court take cognizance of this case?"

and

2. "Who was in actual proprietary possession of the property; if the plaintiff's mother and plaintiff consecutively, is that sufficient to vitiate the sale by the zemindar?"

On the first issue the Subordinate Judge held that, as both parties alleged fraud, the defendant directly and the plaintiff impliedly, the Civil Court had jurisdiction.

On the second issue he found that the plaintiff's allegation that her mother had purchased the tenure, and that her mother and herself had been in possession for upwards of 13 years was proved; that the tenure had been in arrears for the rent of the year 1277, Tippera Era, (1867); but that the plaintiff had neglected to have her or her mother's name registered in the zemindar's sherista (office) as tenant in the place of Braja Mohan whose name was already recorded. He was of opinion, that the zemindar had acted in a strictly legal manner in suing the old registered tenant for the arrear due, and that the sale was perfectly valid and good. He therefore dismissed the suit.

The plaintiff appealed to the District Judge against this decision.

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On the merits the Judge found upon the evidence that the zemindar, before he instituted the suit for arrears, knew perfectly well that the plaintiff was the tenant and had for some years been paying the rent, in addition to the finding of the first Court as to the purchase of plaintiff's mother, and consecutive possession for upwards of 13 years.

On the question of jurisdiction, he was of opinion that it was not necessary to allege fraud in order to empower the Civil Courts to entertain a suit of this nature, as the plaintiff was not a party to the decree obtained by the zemindar.

The Judge further held that in sales under Act X of 1859 the property only of the judgment-debtor in the rent suit could be sold, and not that of a third person. He also found that the plaintiff was wholly ignorant of the *ex parte* decree against the old tenant, and of the subsequent proceedings in execution; that the plaintiff was the zemindar's niece (sister's daughter); and that the price for which it was sold, was by no means a fair one compared with the annual profits of the tenure, proved by the plaintiff. He was therefore of opinion that the plaintiff was entitled to recover possession of her estate, and accordingly decreed her suit:

Against this decree the purchaser, Meahjan Munshi, preferred a special appeal to the High Court.

Baboo *Mahesh Chandra Chowdhry* (with him Mr. *C. Gregory*, and Baboo *Chandra Madhab Ghose*) contended for the appellant, that the Civil Court had no jurisdiction to entertain the present suit. The tenure was sold for its own arrears by the Revenue Court under Act X of 1859. The sale therefore could not be set aside by a Civil Court except on the ground of fraud. In this case no fraud had been alleged nor proved. He cited *Rutton Monee Dasee v. Kaleekissen Chuckerbutty* (1), and *Jan Ali v. Jan Ali Chowdhry* (2). The sale was of the tenure, and not of the right, title, and interest of the judgment-debtor as in execution of a decree of a Civil Court under Act VIII of 1859.

(1) W. R., Sp. Vol., 147.

(2) 1 B. L. R., A. C., 56.

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A sale under Act X of 1859, section 105, for arrears of rent passed the tenure, which view was supported by Act VIII of 1865, B. C., which gives a purchaser in a sale under section 105 of Act X the right of avoiding all under-tenures created by the defaulting holder of the estate; *Fatima Khatun v. The Collector of Tipperah* (1). The case of *Pran Bandhu Sirkar v. Sarba*

(1) Before Mr. Justice E. Jackson and
Mr. Justice Miller.

The 4th May 1870.

FATIMA KHATUN AND ANOTHER (DE-
FENDANTS) v. THE COLLECTOR OF
TIPPERAH, REPRESENTING THE COURT
OF WARDS ON BEHALF OF SYUD BHIA-
RAT ALI, MINOR (PLAINTIFF).*

Mr. C. Gregory and Baboo Kashi
Kant Sein for the appellants.

Baboo Anukul Chandra Mookerjee for
the respondent.

MITTER, J.—This was a suit instituted
by the plaintiff for the declaration of his
right in a certain shikmi tenure by the re-
versal of a sale of that tenure held in
execution of a decree for arrears of rent.

It appears that the plaintiff purchased
the right, title, and interest of one Har
Kumar in the tenure in question on the
28th of September 1866.

Previous to that date the zemindar
defendant had brought a suit against one
Gaur Mani, whose name was registered
in his book as tenant, for arrears of rent
due on account of that tenure, and a decree
was passed in his favour in April 1866.
In execution of this decree, the tenure in
question was sold to the defendant, spe-
cial appellant, on the 29th of April 1867,
and the plaintiff contends that inasmuch
as the tenure in question was the pro-
perty of Har Kumar, and not of Gaur
Mani, he the plaintiff is entitled to obtain
the declaration which he has asked for
in this suit.

The first Court dismissed his suit on
the ground that he had failed to prove

that the disputed tenure belonged to Har
Kumar whose rights and interests he
had purchased in execution of a decree.

On appeal that decision has been re-
versed by the Subordinate Judge for
the reasons given in his judgment. I
am of opinion that the decision of
the Subordinate Judge must be re-
versed as the reasons upon which it is
based are not such as can be supported.
He says:—"It is not denied that the
" Shikmi talook originally belonged to
" Har Kumar's father, the late Bango
" Chandra; therefore according to Hin-
" du law it belonged to Har Kumar on
" the death of his father, and not to Har
" Kumar's mother Gaur Mani, and the
" shikmi talook being a transferable
" tenure was sold on the 28th September
" 1866 to plaintiff in satisfaction of a
" decree against Har Kumar." There is
nothing on the record to show that the
defendants did at any time during the
trial of this suit admit that the property
in dispute was the property of Har
Kumar's father; and in the absence
of such admission by the defendants,
it was the duty of the plaintiff to prove
his case. The Subordinate Judge was
therefore wrong in assuming that the
property belonged to Har Kumar's father
and his conclusion that it was the pro-
perty of Har Kumar must necessarily fall
to the ground.

Irrespective of this point, however, it
appears to me that the judgment of the
Subordinate Judge cannot be supported.
He has found as a fact that the arrears
sued for by the zemindar defendant were
actually due to him; and he has also

* Special Appeal, No. 133 of 1870, from a decree of the Judge of Tipperah, dated the 30th September 1869 reversing a decree of the Moonsiff of that district, dated the 23rd December 1868.