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as patnidars from the original owners of a twelve-anna share of a joint undivided estate. The remaining four-anna share was in the khas possession of the other shareholders.

The defendants admitted that the plaintiffs were entitled to a twelve-anna share in the lands in question, but contended that shareholders were not entitled to measure the lands comprised in their share. The Court of first instance held that the plaintiffs were entitled to measure the lands of the mouzah in suit, and the defendants were ordered to be present at the time of such measurement, and to point out the lands comprised within their respective holdings, and a decree was accordingly passed in favor of the plaintiffs with costs. From that decision the defendants appealed to the Judge of the district, and on appeal the Judge held that, as regards the question of a right to measurement, the case of *Moolook Chand Mundul* v. *Modhoosoodun Bachusputty* (1) decided that point in favor of the appellants, and allowed the appeal with costs.

(1) *Before Mr. Justice Loch and Mr. Justice Ainslie.*

MOOLOOK CHAND MUNDUL AND OTHERS (INTERVENORS) *v.* MODHOOSOODUN BACHUSPUTTY (PLAINTIFF).*

The 30th June 1871.

Beng. Act VI of 1862 *s.* 10—*Right of a Co-sharer to measurement—Act X of* 1859, *s.* 112—*Beng. Act VIII of* 1869 —*Right of a Co-sharer to distrain.*

Mr. *C. Gregory* and Baboo *Debendro Narain Bose* for the appellants.

Baboos *Unnoda Pershad Banerjee*, *Chunder Madhub Ghose*, and *Taruck Nath Dutt* for the respondent.

THE following judgments were delivered :—

LOCH, J.—This was a suit under the provisions of s. 10 of Beng. Act VI of 1862 for the measurement of an estate in which the plaintiff alleges he holds an undivided 8-annas share.

The ryots, whose land it was sought to measure and assess, denied that they were tenants of the plaintiff, and Prem Chand and another intervened claiming to be in receipt of rent.

The first Court laid down two issues: 1st, whether the plaintiff had been in receipt of rents; and, 2nd, whether Prem Chand had been in receipt of rent.

The Deputy Colletor found both issues against the plaintiff, but on appeal the Judge reversed the judgment holding that "the intervenor's plea that his ancestors and plaintiffs' ancestors made a division or a partition is not even proved, nor is the date of such partition even given. Such a plea cannot, therefore, be entertained. Plaintiff purchased the estate in 1269 (1862); and as all parties admit his proprietary right to 8-annas share of the estate weich is held ijmali, and that these

* Special Appeal, No. 126 of 1871, from a decree of the Additional Judge of Nuddea, dated the 21st November 1870, reversing a decree of the Deputy Collector of that district, dated the 11th March 1870.

From that decision the plaintiffs appealed to the High Court.

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Baboo *Bhoyrub Chunder Banerjee* for the appellants.—The case of *Moolook Chand Mundul* v. *Modoosoodun Bachusputty* (1)

lands form part of the estate and are situated within it, plaintiff has a right under s. 10 of Beng. Act VI of 1862 to measure these lands, and a decree is given to him accordingly."

A special appeal was preferred by the tenants, but before the Court entered into the case, it was brought to the notice of the Judges that a Judgment had been passed by a Division Bench of this Court, E. Jackson and Ainslie, JJ., dated 15th May 1871 (*a*), which contained a construction of s. 10 of Beng. Act VI of 1862, which, if followed in the present case, would necessarily dispose of this appeal. The Judges there held that the applicant under this (10th) section must be the proprietor of the estate, not a shareholder only in the proprietary lands: that it was not right that such shareholders should have separate measurements; that such proceedings would be productive of great annoyance and harassment to tenants on the estate, and that the law does not say that any shareholder of an estate may apply to the Collector, and that looking to the remarkable provisions of this section, it should not be extended beyond its plain terms.

A judgment of a Division Bench of this Court, in *Shumbhoo Chunder Sadhookhan* v. *Kala Chand Karr* (*b*), *per* Trevor and Campbell, JJ., has been referred to as declaring that a shareholder was entitled to measure the lands of an estate; but we find that the judgment in that case was passed with reference to the provisions of s. 26, Act X of 1859, which contemplated a different state of things from that provided for by s. 10 of Beng. Act VI of 1862. S. 26, Act X of 1859, is similar in its terms to s. 9 of Beng. Act VI of 1862 which declares the rights of a proprietor of an estate or tenure or other person in receipt of the rents of an estate or tenure to make a general survey and measurement of the lands comprised in such estate or tenure, and to invoke the assistance of the Collector should the tenant, when duly served with notice, fail to attend and point out his land; but s. 10 of Beng. Act VI of 1862 contains provisions not to be found in any section of Act X of 1859. It was enacted probably to assist auction-purchasers in discovering the lands they had purchased, and the tenants who occupy such lands. I cannot suppose that the law ever contemplated that the provisions of this section should be made used of, unless in very exceptional cases, by landholders who have been for any period in quiet possession of their estates receiving rents from the tenants.

S. 10 of Beng. Act VI of 1862 provides:—"If the proprietor of an estate or tenure or other person entitled to recover the rents of an estate or tenure is unable to measure the lands comprised in such estate or tenure or any part thereof by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands or any part of the lands comprised therein, he may petition the Collector, who shall proceed to measure the lands, and to ascertain and record the names of the person in occupation of the same; and on the special application of the proprietor or other person aforesaid, the Colloctor shall proceed to ascertain, determine, and record, the tenures and under-tenures, the rates of rent payable in respect of such land, and the persons by whom respectively the rents are payable." Then comes the penal clause, which is as follows:—"If after due enquiry the Collector shall be unable to measure the land, or to ascertain or record

(1) *Ante*, p. 398.

(*a*) *Post*, p. 401.

(*b*) 1 W. R., 53, 54.

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on which the judgment of the lower Court is based, and also the case of *Mahomed Bahadoor Mojoomdar* v. *Rajah Raj Kishen*

the names of the persons in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands or any part thereof, then and in any such case he may declare the same to have lapsed to the party on whose petition he has made the enquiry." Taking these words as they stand, it would follow that, if the party upon whose petition the enquiry was made was the proprietor of half an anna share in the estate, the whole of the property regarding which the enquiry took place would be handed over to him. It may be said that only so much as is in proportion to his share would be made over to him, but the law nowhere says so, nor does the law give the Collector any authority to enquire into and determine what is the share of the petitioner in the estate, but directs that in such case the Collector may declare the same *i. e.*, the property of which the measurement and assessment is sought, "to have lapsed to the party on whose petition he has made the enquiry," be the right of that party what it may.

Possibly, if a person's co-sharers refused to join in making an application to the Collector, they might be made parties to the case, and the measurement &c., proceed in the presence of all parties and so the tenants be preserved from the harassment arising from separate measurements being frequently made by the various shareholders. All parties must be before the Collector, and therefore I concur in the view taken by E. Jackson and Ainslie, JJ., that proceedings, under s. 10 of Beng. Act VI of 1862, cannot be taken on the application of one shareholder in a joint undivided estate. Under this view of the law, I think this special appeal should be decreed, and the judgment of the lower Appellate Court reversed, and that the suit should be dismissed with costs in all Courts.

AINSLIE, J.—The question is whether the words "if the proprietor of an estate or tenure" in s. 10 of Beng. Act VI of 1862 are to be read as if they were "if any sole proprietor or any one of several co-proprietors of an estate or tenure," or whether they simply a sole proprietor or entire body of joint proprietors owning an estate or tenure.

Loch, J., has pointed out how the tenants may be harassed if every shareholder of a minute fraction of the estate is allowed to have a separate measurement, and how inconsistent the provision in the section in question is with the theory that every shareholder can separately call on the Collector to measure. I would further refer to s. 112, Act X of 1859 (and the corresponding s. 68 of Beng. Act VIII of 1869) in which it is provided that "no sharer in a joint estate or other tenure in which a division of the lands has not been made amongst the sharers shall exercise the power of distraint otherwise than through a manager authorized to collect the rents of the whole estate or tenure on behalf of all the shares in the same." The words used in the earlier part of this section are:—"The zemindar, lakhirajdar, farmer, or other person entitled to receive rent immediately from such cultivator, may recover the same by distraint and sale of the produce of the land on account of which the arrear is due." The words used to describe the persons entitled to distrain are in the singular number, and are much the same in form as those in s. 10 of Beng. Act VI of 1862, but the proviso shows that they are to be taken as limited to the owner, farmer, &c., defined lands or to the whole of the co-owners of such lands acting as one body. And it is clear that, if this were not so, the ryot might be infinitely annoyed, and the co-sharers put at a great disadvantage. Reading Beng. Act VI of 1862 by the light of this section, and it must be remembered that it is, so far as these measure-

Singh (1) on which that Court also relied, are decisions on s. 10 of Beng. Act VI of 1862, which section corresponds with s. 38 of

ment sections are concerned, merely an extension of s. 26, Act X of 1859, and that by s. 21 (Beng. Act VI of 1862), it is to be read with and taken as part of the earlier Act. I entertain no doubt that the proper construction of "estate or tenure" in s. 10 is one that limits these terms to certain specific lands, the whole of the rents of which go to the person presenting the petition.

The provisions of s. 108 of Act X of 1859 (now s. 64 of Beng. Act VIII of 1869) also show clearly that a single shareholder's rights under the Act are by no means co-extensive with those of a sole proprietor or body of joint proprietors. He cannot sell the tenure on which the default accrued at all until he has proceeded against the moveable property of the defaulter and brought it to sale (if any be found), and when he does sell the tenure, he cannot sell it under s. 105 of Beng. Act VIII of 1865, but can only sell rights and interests of the defaulter under s. 110 of Act VIII of 1869.

I entertain no doubt that in the 10th section of Beng. Act VI of 1862, the word "proprietor" must be read as implying the sole proprietor or whole body of proprietors of the whole of the land for the measurement of which application is made.

(1) *Before Mr. Justice E. Jackson and Mr. Justice Ainslie.*

MAHOMED BAHADOOR MOJOOMDAR AND ANOTHER (DEFENDANTS) *v.* RAJAH RAJ KISHEN SINGH (PLAINTIFF).*

The 15th May 1871.

Beng. Act VI of 1862, s. 10—Right of a Co-sharer to Measurement.

Baboos *Romesh Chunder Mitter* and *Hem Chunder Banerjee* for the appellants.

Mr. *R. T. Allan* and Baboos *Unnodaprosad Banerjee* and *Shoshee Bhoosun Sein* for the respondent.

THE judgment of the Court was delivered by

JACKSON, J.—I do not agree with the Judge in the view he has taken of the law, s. 10 of Beng. Act VI of 1862. In the first place, I think it is most important that the applicant to the Collector under this section should prove that he "cannot ascertain who are the persons liable to pay rent in respect of the lands, or any portion of the lands comprised in his estate, and that on that account he is entitled to measure the lands comprised in his estate." These are the words of the law, and they show the state of facts upon which alone there can be an application to the Collector, and upon which alone the Collector can assist the applicant. The Judge admits that there was no enquiry made to ascertain whether any such state of facts existed. One of the tenants of the estate who objected to the application appeared and alleged that there was no truth in the averments made in the application, and that the applicant had long been in possession, and could not be in ignorance of the lands or tenures comprised in the estate, and that the application was only made to harass the tenants. But still no issue was fixed upon the point, and no enquiry made regarding it. The result is that the Collector had not jurisdiction to act in the matter, and that all the proceedings must be set aside as invalid. It is worthy of remark that some of the clauses of the section are penal, and

* Special Appeal, No. 2482 of 1870, from a decree of the Officiating Judge of Mymensingh, dated the 30th August 1870, affirming a decree of the Deputy Collector of that district, dated the 31st May 1870.