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to recover the money. But they will sue upon a liability arising from the loan, and not on any liablity to pay over the share of the property of the deceased person, or to pay any thing as a legacy. It appears to us that this is a case in which the defendant had a right to have joined in the suit against him all the persons who claim to be entitled to receive the debt, which debt may, after the death of Mongala Debi, be said to be due to the heirs of her deceased husband. On that ground we think that the judgment should be for the defendant. It is not necessary for us to answer the other question which has been submitted to us. The judgment will be for the defendant with costs of the suit in the Small Cause Court and the ordinary costs allowed of reserving the question, and otherwise arising thereout or connected therewith.

Attorney for the plaintiff: Baboo *Brojonath Mitter.*

Attorney for the defendant: Baboo *Gunesh Chunder Chunder.*

PRIVY COUNCIL.

P. C.* 1873 *June* 16, '17, *&* 18, *&* *July* 17.

LUCKHINARAIN MITTER AND ANOTHER (DEFENDANTS) *v.* KHETTRO PAL SINGH ROY AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Reg. VIII of 1819—*Deposit by unregistered Assignees of a darpantni Talook*—*Res judicata*—*Limitation.*

L and R, the holders of a patni estate, granted in 1856 a darpatni lease to S at an annual rent, the lease stipulating that S should have full power of sale and gift, but should not sub-let without the patnidar's consent. The lease contained no st ipulation for the registration of any vendee or donee. In 1860 S sold the darpatni lease to K, the deed of sale which was duly registered providing for mutation of names in the patnidar'r books. No such mutation was ever effected by K, who was never recognized as their tenant by L and R, the rent of the darpatni being paid in the name of S. In 1864, the rent due from the patnidars being in arrear, the zemindar proceeded to sell the patni under Regulation VIII of 1819. Thereupon K, in order to protect

*Present: SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

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his under-tenure, deposited in the Collectorate on 17th November 1864 a sum of money, on which the sale was stayed. K, being then in arrear in the payment of his darpatni rent, claimed to set off the amount deposited in the Collectorate against the rent due to L and R. This L and R refused tto allow, and they brought a suit in the Collector's Court against S and his sureties to recover the arrears of rent. In that suit K intervened claiming the benefit of the set-off, to which however the High Court on 26th June 1866 on appeal held that he was not entitled, the deposit being merely a voluntary payment by K. On 30th October 1867 K brought a regular suit against S and L and R to recover the amount of the deposit and obtained a decree, but the decision was reversed on appeal, and the suit dismissed for want of jurisdiction. On 6th June 1869 K filed his plaint in the proper Court. *Held* that he was entitled to recover the amount deposited by him in the Collectorate (1), and that the suit was not barred as being *res judicata*, by the decision of 26th June 1866.

Held also that whether the period of three years under s. 1, cl. 9 of Act XIV of 1859, or of six years as provided by cl. 16, s. 1 of that Act, be the limitation applicable to such a suit, the suit was not barred, inasmuch as K was entitled to deduct the time during which he was *bonâ fide* prosecuting with due diligence a suit for the same purpose in a Court not having jurisdiction.

APPEAL from a decree of the High Court (Kemp amd Glover , JJ.), dated the 10th February 1871, reversing the decision of the Judge of Burdwan, dated 23rd July 1870, and affirming the decision of the Subordinate Judge of Burdwan, dated the 31st March 1870.

The following were the facts of the case:—The defendants Lukhinarain and Rajnarain Mitter, who were patnidars of a talook named Mauza Astara, granted in September 1856 a darpatni lease of the mauza to one Seetanath Ghose at an annual rent of Rs. 5,496 the lease stipulating that Seetanath Ghose should have full power of sale and gift, but should not sub-let in sepatni without the defendants' consent. The lease contained no stipulation for the registration of the name of any vendee or donee. In September 1860 Seetanath Ghose sold the darpatni lease to the plaintiffs for Rs. 2,925. The deed of sale which was duly registered provided for mutation of names in the patnidar's books. The plaintiffs however never effected such mutation, and were never recognized by the defendants as their tenants, the rent of the darpantni being paid in the name of Seetanath Ghose.

(1) See *Ambika Debi* v. *Pranhari Das*, 4 B. L. R., F. B., 77.

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In 1864, the defendants having for six months failed to pay their patni rent to the zemindar, the latter proceeded to sell the patni under Regulation VIII of 1819; whereupon the plaintiffs, in order to save their under-tenure, deposited Rs. 2,053-7-9 in the Collectorate on the 17th Noveber 1864. At that time the plaintiffs were in arrear with their darpatni rent, and they accordingly applied to the defendants to set-off the amout deposited against such rent. The defendants refused and brought a suit against Seetanath Ghose and his sureties to recover the darpatni rent then due. The plaintiffs intervened in that suit claiming to be entitled to set-off the sum deposited against the rent, but the High Court (Trevor and Campbell, JJ.) on the 26th June 1866 ruled that Seetanath Ghose was not entitled to the benefit of that set-off, because until the plaintiffs established their interest in the estate and obtained registration, their payment was that of volunteers, made at their own risk (1).

On 30th October 1867 the plaintiffs brought a regular suit against Seetanath Ghose and the defendants in the Court of the Principal Sudder Ameen of Zilla Hooghly, to recover from the defendants the sum of Rs. 2,053-7-9 with interest and costs. The plaintiffs obtained a decree in their favor, but the Zilla Judge reversed that decision and dismissed the suit for want of jurisdiction, which judgment was affirmed on appeal by the High Court on the 26th May 1869.

On 31st May 1869 the plaintiffs, under s. 3, Act XXIII of 1861, obtained the return of their plaint from the Hooghly Court, and on the 8th June 1869 filed the same in the Court of the Subordinate Judge of Burdwan, who, on 31st March 1870, decreed in their favor, holding that "it was inconceivable for what offence the plaintiffs should be suffered to lose the money which they deposited for the protection of their own rights, as well as of both the defendants." In appeal, however, the Judge of Burdwan on the 23rd July 1870 dismissed the suit, holding as the High Court in special appeal had previously

(1) *Luckhinarain Mitter* v. *Seetanath Ghose*, 1 I. J., N S., 317; S. C., 6 W. R., Act X Rul., 8.

done, that the deposit had been made by volunteers. On the 10th February 1871, a Division Bench of the High Court reversed the Judge's decision, and restored the decree of the first Court. Their judgment was to the following effect:—

"There can be no doubt that, under Regulation VIII of 1819, all patnidars or darpatnidars have the right to alienate or otherwise transfer their property without the consent of the zemindar. 'It shall not be competent,' says s. 5 of the said Regulation, 'to the zemindar or other superior to refuse to register and otherwise to give effect to such alienations.' The status of the plaintiff as darpatnidar does not therefore depend upon registration or the consent of the zemindar. But it is contended in this case that the special appellant has not conformed to the requirements of s. 5 of the Regulation, that is to say, that he has not furnished security, or paid a fee, or obtained registration of his name according to the forms laid down in that section, and, therefore, that not being a darpatnidar, he is not entitled to claim any refund. We think that this contention is wrong. Under the Regulation the zemindar or other superior holder in certain cases is empowered to attach the property, if the subordinate holder neglects to register his name, and to hold it in trust for the subordinate holder; and in all cases until the transfer is registered, the old tenant and the tenure itself are liable for the rent due. There may be cases in which a party may become the purchaser of a darpatni, and the superior estate may be put up for sale and sold before he could possibly have time to effect the registration of his darpatni rights. Can it be said in cases of this description that, if the darpatnidar paid a sum of money on account of the rent due by the superior holder and saved the patni from sale, he would not be entitled to a refund of the sum so paid? The subordinate holder has an interest of his own to protect which would be altogether sacrificed, if he were not able to save the superior tenure from the hammer; for with the superior tenure all subordinate tenures fall in the event of a sale: and after all, the duties of the subordinate holder, as prescribed in the Regulation, are formalities; their primary object is to give the superior holder information of who is his tenant, and until they are conformed to, the superior holder is justified in looking to the registered tenant for his rent."

From this decision the defendants now appealed to Her Majesty in Council.

Mr. *Lindsay Reed* and Mr. *Hunter* for the appellants

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contended that the payment into the Collectorate by the respondents was voluntary and established no claim on the patnidars. They cited *Annundchunder Banerjea* v. *Soobulchunder Dey* (1), *Sonaoollah* v. *Ranee Rajeshurree* (2), *Thakoorchand Banerjea* v. *Shurmunissa Khatoon* (3), *Luckhinarain Mitter* v. *Seetanath Ghose* (4), *Poorno Chunder Doss Chowdhry* v. *Sreenath Goopto* (5), *Bissomoyee Dossee* v. *Mackintosh* (6), *Nityanund Paul* v. *Ram Doollub Buttobyal* (7), and *Mrityunjaya Sircar* v. *Gopal Chandra Sirkar* (8). Independently of Regulation VIII of 1819, the respondents had no right to make the payment. It is submitted that the respondents are not "talookdars of the second degree" within the meaning of cl. 2, s. 13 of that Regulation, and that the payment was not *bonâ fide*, but was made for the purpose of obtaining an undue advantage by paying in their own names instead of in Seetanath's, they not being registered darpatnidars. The following authorities were also cited:—*Bhobo Tarinee Dossee* v. *Prosonno Moyee Dossee* (9),

(1) S. D. A., 1857, 1195.
(2) *Id.*, 464.
(3) *Id.*, 808.
(4) 1 I. J., N. S., 317; S. C., 6 W. R., Act X Rul., 8.
(5) 6 W. R., 173.
(6) 2 Hay's Rep., 14.
(7) 2 W. R., 282.
(8) 2 B. L. R., A. C., 131.
(9) *Before Mr. Justice Bayley and Mr. Justice Macpherson.*

The 25th August 1868.

BHOBO TARINEE DOSSEE (WIDOW OF DEFENDANT) *v.* PROSONNO MOYEE DOSSEE (PLAINTIFF).*

Unregistered Purchaser of Tenure—Decree for Arrears of Rent.

THIS was a suit for a declaration of the plaintiff's right to, and for possession of, a certain tenure which stood in the name of one Chundee Churn Mundal. The plaintiff alleged that the right, title, and interest of the latter in the tenure were sold on the 7th Asar 1270 (20th June 1863) in execution of a decree held by the talookdar Keylas Nath Chunder, and that her husband had then become the purchaser. The talookdar subsequently brought a suit against Chundee Churn for rent and to eject him, and on the 23rd Chaitra (4th April) obtained an *ex parte* decree in execution of which he ousted the plaintiff's husband. The latter having died, the plaintiff brought the present suit which was decreed in her favor by the two lower Courts, and the defendant's widow then preferred this appeal to the High Court.

* Special Appeal No. 2550, preferred on the 24th September 1867, against the decree of the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 26th July 1867, affirming a decree of the Munsif of that district, dated the 26th June 1866.