Before Mr. Justice Loch and Mr. Justice Glover

MATHURANATH DUTT (DEFENDANT) *v.* KEDAR NATH MOOKERJEE (PLAINTIFF.)*

1868 Dec. 16.

Minor—Relinquishment of Jote by Guardian.

A sued B to recover possession of an hereditary jote, of which he alleged that he had been dispossessed by B, during his minority. B. raised the defence of relinquishment by A's grandmother and guardian. The lower Court decided, on the merits, against A, but on special appeal, the High Court held, that it was not shown that the relinquishment was for the benefit of the minor, and, therefore, the decree of the Court below must be reversed. On review, LOCH, J., *held*, that the judgment of

* Application for Review, No. 1295 of 1868, against the judgment of the Hon'ble G. LOCH and the Hon'ble F. A. B. GLOVER, Judges of this Court, passed on the 15th of June 1868 in Special Appeal, No. 2809 of 1867.

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tom." A small quit-rent is stated, and the holders confirmed in the remaining proceeds, their duty of guarding against murderers and robbers being at the same time recited.

We have not then here the express words "mokurrari istamrari" used in regard to some of these tenures in previous sanads, but the question still simply is—Are these tenures of the same character as that which has been already found to be "mokurrari istamrari" and as those of Beerbhoom described in the preamble of Regulation XXIX of 1814, or are they of a different character.

We are of opinion, that these tenures are of a character precisely similar to that disposed of in No. 299, and all our remarks in the judgment in that case, (1) with the exception of those based on Captain Brown's similarly apply to the present cases. Sanads of Raja Kader Ali abundantly show that the tenures were no new or recent creations, but were handed down from former times, and show, we think, that although the word istamrari is not used, the tenures have in fact been handed down from generation to generation, and that, whatever their inceptions, they have become hereditary; also that the burdens in money and service were not arbitrarily fixed at the will of the zemindar, but were regulated by old custom. These also are considerable talooks comprising many villages, and not mere pieces of service land. They are, we think, exactly analogous to the tenure already upheld, and that ghatwals must be considered to be such that in the language of Regulation XXIX of 1814; "Every ground exists to believe that according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, in perpetuity, subject nevertheless to the payment of a fixed and established rent, and to the performance of certain duties." We need not repeat all that has been said in the former judgment. We consider that neither the mere will of the zemindar nor the arrangements with Government to pay Rupees 10,000 per annum for the performance of the service due from all these tenures, is any ground whatever, for the present suits. We think that the defendants cannot be dismissed or dispossessed, except for some default of theirs, and we decree these appeals with costs.

(1) 3 W. R., 84.

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the High Court on special appeal must be reversed as being *ultra vires*, for that the question of injury to the minor was not urged in the High Court below, no issue was raised on that point, and even if the relinquishment of the jote by the guardian did turn out to the disadvantage of the minor, that was not sufficient ground for setting aside the act of the guardian as invalid, provided that at the time it was done, it appeared to be for the interest of the minor, and was done in good faith.—GLOVER, J., *held*, that the conclusion of the High Court on special appeal, was justified, but was willing to remand the case to the Judge below to find the fact, whether or no the relinquishment by the guardian was made in good faith for the interest of the minor.

THIS was an application for review of the judgment of the High Court (1).

The grounds of the application were :

1st.—That the objection of limitation had been raised in the Court of first instance, and was, therefore, properly put forward in special appeal.

2nd.—That the case should have been remanded to try the issue of limitation raised.

3rd.—That when the Judge below found, as a fact, that the guardian had relinquished the jote, the Court ought to have remanded the case, for a further finding as to whether this relinquishment was for the benefit of the minor, and ought not to have decided the fact itself on special appeal.

Mr. *Paul* (with him Baboo *Khettra Mohan Mookerjee*) for the respondent (petitioner.)

Baboo *Krishna Sakha Mookerjee, contra.*

LOCH, J.—On hearing the arguments of both parties, I am inclined to think, that our judgment, of which a review is now sought, went beyond the record, when it determined that as the resignation of the jote, by the grandmother of the minor, was not for his benefit, such resignation was of no force. Two good reasons have been urged against the judgment : 1*st*.—That the question of injury was never urged in the Court below, and no issue was raised on the point. The plaintiff's case was, that his grandmother had let the lands to Chandra Sekhar, and that indi-

(1) 1 B. L. R. (A. C.) 17.

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vidual has been ejected by the defendant. The defendant pleaded resignation of the lands by plaintiff's grandmother. The Judge disbelieved the evidence of the plaintiffs, and held that the defendant had proved the fact of resignation, and dismissed the case. There was no other question before him. 2*nd*. The mere fact of an act done by a guardian for a minor turning out to the disadvantage of the minor, is not a sufficient reason for declaring such act to be null and void. If the act were one which at the time it was done appeared to be for the interest of the minor and was done in good faith, but the result was injurious to the minor, such result would not be a sufficient ground for setting aside the act of the guardian as invalid. Under this view of the case, I think our judgment should be set aside, and that of the judge restored. I think the plea of limitation, as it was not taken before, must be rejected.

GLOVER, J.—I am against this application, at least as it was argued before us by the learned counsel Mr. Paul.

It appears to me that the petitioner should be kept to the grounds detailed in his application for review, and that the only ground for argument is, that we sitting in special appeal were not justified in finding a fact not found by the Court below, namely, that the relinquishment was against the minor's interests.

Now I am very much disposed to think, that the Judge did substantially find this fact. He held, that the land, an hereditary jote, had been allowed to pass into the defendants's possession through the carelessness and neglect of the minor's guardian, and it seems to follow that such neglect must, in the nature of things have been prejudicial to the minor's interests; and that under the circumstances we were justified in drawing such a conclusion ourselves, and in thinking that the Judge had done the same. And the only ground of review, as it appears to me, would have been, that, as a matter of law, there was no obligation on the part of the defendant to show that the abandonment by the guardian was for the minor's interests, but that the minor was bound in either case.

But had that ground been taken, I would have held that there was such an obligation on the defendant. I take it to be a sound

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legal proposition, that alienations or abandonments by a guardian must not be wantonly done, but must be for the manifest interest and convenience of the infant, or at least must be made in good faith to those ends.

It was not denied in this case, that the land was the minor's hereditary jote, *prima facie* a desirable property to retain; and it, therefore, seems to me, that if he did fail to prove Chandra Sekhar's dispossession (he being a minor at the time), he was still entitled to call upon the defendants to show how they became possessed of the land. Indeed, the Judge below seems to have admitted his right so far, by going into the defendant's title, and by making the abandonment by the grandmother fatal to the rights of the grandson.

I am willing, if it be thought worth while, to remand the case to the Judge to find the fact, whether or no the relinquishment by the guardian was made in good faith for the interests of the minor, but I would not go beyond the grounds of review as stated in the petition.

LOCH, J.—(Whose opinion as that of the senior Judge prevailed).—"Review is hereby granted, and the decree in special appeal No. 2809 of 1869 is set aside, and the lower Court's judgment restored."

Before Mr. Justice Loch and Mr. Justice Glover.

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IN THE MATTER OF RANI RAISUNNISSA BEGUM *

Certificate—Acts XL. of 1858 *and* XXVII. *of* 1860.

A, as widow of B and guardian, under a will, of his minor son, obtained a certificate of administration under section 3 of Act XL. of 1858. C, another widow of B, subsequently applied for a certificate under section 3 of Act XXVII. of 1860. The Judge summarily rejected C's application, on the ground that the grant of a certificate to her would lead to confusion. *Held*, on appeal, that the Judge ought to have issued notices and proceeded under section 3 of Act XXVII. of 1860.

Rani Khajurunnisa (1), as widow of Raja Syud Enaet Hossein and guardian, under a will, of his minor son, obtained a certificate

* Miscellaneous Regular Appeal, No. 414 of 1868, from a decree of the Officiating Judge of Purneah.

(1) 9 W. R., 459.