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MITTER, J.—I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover, both upon the ground that she paid a debt due from Mr. Tayler to Rani Asmedh Koer, when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

KAILASH CHANDRA ROY AND OTHERS (PLAINTIFFS) *v.* HIRALAL SEAL AND OTHERS (DEFENDANTS.)*

1868
Nov. 25.

Enhancement of Rent—Mokurruri.

Land had been let under different pottas to a man for building and horticultural purposes, to be enjoyed by him, his sons, and his sons' sons for ever, at a rent mentioned in the pottas. *Held*, the rent was not liable to enhancement.

Baboos *Hem Chandra Banerjee* and *Ambika Charan Bhose* for appellants.

Mr. *Mackenzie* (with him Mr. *Allan* and Baboo *Ashutosh Dhur*) for respondent.

The facts of these cases (which were heard together) and the arguments raised in special appeal, sufficiently appear in the judgment, which was delivered by

KEMP, J.—These two cases were taken up together, and were very fully and ably argued on both sides. As very important points arise in the case, we have taken time to consider the judgment, which we now proceed to deliver.

The plaintiffs sue to obtain from the defendants a kabuliat at an enhanced rate. The defendants pleaded that the lands were protected from enhancement by their pottas. Both Courts have dismissed the plaintiffs' suits. The Judge's decision is entirely based upon two decisions passed in the years 1842 and 1844, which the Judge holds to have decided finally that these pottas protect the tenure of the defendants from further enhance-

* Special Appeals, Nos. 789 and 902 of 1868, from decrees of the Judge of Hooghly, affirming decrees of the Deputy Collector of that District.

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ment. The Judge, therefore, treating the question as *res-adjudicata*, has confirmed the decision of the first Court, dismissing the plaintiff's suit. Mr *Allan* for the respondents took a preliminary objection that the present suit was not cognizable in a Revenue Court, and in support of his argument he referred us to two decisions: *Rani Swarnamayi* v. *Rev. C. Blumhardt* (1) and *Kali Krishna Biswas* v. *Srimati Janki* (2). This plea was not taken below, and as it is one that will lead, if allowed, to further litigation between the parties, and put them to further expense, it behoves the Court to consider very carefully whether the cognizance of the Revenue Courts is really barred or not.

In the case of *Rani Swarnamayi* v. *Blumhardt*, the land was taken for the specific purpose of building a Church. In the other case, the land was taken for the specific purpose of constructing a "basa-bari" or lodging house. The quantity of land granted in the latter case was very small; and the learned Judges in that case decided that the main object of taking the lease was to construct a dwelling house on the land; and that the cultivation of the soil, if any, was entirely subordinate to that purpose. In the first decision quoted, the Judges laid great stress upon the acknowledged purpose for which the land was leased, namely, the building of a Church and a School in the Church compound. In the present case, the original purpose for which the lands were taken differ materially from the purposes for which the lands were taken in the cases just referred to. It appears that these lands were originally taken by Mr. Brightman under four pottas, dated respectively the 6th of Sraban 1221, the 22nd of Bhadra 1222, the 2nd of Paush 1226, and 9th of Aghran 1223. The first potta was for a very small piece of land, and was taken for the purpose of making a garden. In the next year, or in Bhadra, a further piece of land was taken for the purpose of building a house, and for a garden also; and the two latter pottas of 1223 and 1226 were taken, we infer, for the same purpose, that is, for a garden. Although the potta themselves do not specially state for what purpose the land was taken, we say we infer that these two latter pottas were taken for a garden, because there is

(1) 9 W. R., 552. (2) 8 W. R., 250.

a stipulation in the pottas that the lessee was to pay the Chowkidar's wages to watch the garden, and not the lessor.

The total area covered by these pottas is 60 bigas, 15 cottas. Now, it can hardly be said that this land, which was originally taken for horticultural cultivation, is entirely subordinate to the house which was erected on it. We, therefore, think, that on the question of jurisdiction, taking into consideration that this point was not raised below, and that to open it now would be to bring upon the parties further litigation and expense; and, lastly, taking into consideration that the facts disclosed in those decisions do not in all respects tally with the facts disclosed in the present case, and have not hitherto been followed by other Benches, we overrule the preliminary objection, and proceed to try the appeal on the other points raised.

The first point raised by Baboo *Hem Chandra Banerjee* for the appellants was, that the Judge has based his decision entirely upon the two decisions of 1842 and 1844, taking these decisions as *res-adjudicata*; and as the Judge has, as alleged by the Baboo not taken any evidence as to the *bona fides* of these four pottas, the pleader has pressed us to remand the case in order that the appellants may have an opportunity of adducing evidence to show that these pottas are not genuine. We are of opinion that the judge was wrong in treating these decisions as *res-adjudicata*. In one case Madhusudan was the plaintiff, and Livingstone, the original lessee under the pottas, was the defendant. In the other suit, Livingstone was the plaintiff, and a ryot subordinate to him was the defendant.

In the first suit, in which Madhusudan was plaintiff, he alleged that he held 8 bigas under a potta from the predecessors of the plaintiffs in this case, and that Livingstone, in collusion with the zemindar, had dispossessed him, Madusudhan of 4 bigas out of these 8 bigas. The defence of Livingstone was that the lands claimed formed part of the land leased to him under the 4 pottas which are now under consideration. The predecessor of the present plaintiffs supported the claim of Madhusudan. Livingstone, in support of his defence, filed these very 4 pottas, and the suit of Madhusudan was dismissed on the ground that he failed to prove that Livingstone had dis-

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possessed him of the 4 bigas, and that the land formed part of the holding of Livingstone. In that case no issue was raised as to the *bona fides* of the 4 pottas, the subject of the present suit, and there was no decision as between Livingstone and the present plaintiffs on the question of the *bona fides* of these pottas. In the other suit, in which Livingstone was plaintiff, the suit was to eject a ryot, on the ground, that on the terms of that ryot's kabuliat, he was liable to ejectment. The decision in that suit turned entirely upon the question whether, under the terms of the kabuliat, the ryot was liable to ejectment or not. In that suit, Mr. Livingstone obtained a decree, but no issue was raised, nor was any decision come to with reference to the *bona fides* of these 4 pottas. We think that the Judge was wrong in law in holding that the question of the *bona fides* of these pottas was finally determined by these decisions.

We now come to the question whether we ought to remand this case to enable the appellants to adduce evidence to show that these pottas are not *bona fide*. On this point, after due consideration, we think we should be wrong in remanding this suit, for although the two decisions of 1842 and 1844 are not *res-adjudicata*, we think that the conduct of the predecessors of the plaintiffs in those suits was such as to amount to an admission or acquiescence on their part, in the *bona fides* of these pottas. One of the plaintiffs in this suit, or the Banerjee plaintiff, was represented in the suit of Madhusudan and the father of the present Banerjee plaintiff, or Umacharan Banerjee, who was then a servant of Mr. Livingstone, took back these very pottas from the file of the Civil Court, and gave a receipt for the same. This fact is clear on the endorsement on the back of the pottas. Further, in the suit of Madhusudan, the answer of the Banerjee defendant was to the effect, not that Mr. Livingstone was not holding under these pottas; but, on the admission that though he did hold under these pottas, the lands claimed by Madhusudan did not form portion of the lands covered by the pottas of Mr. Livingstone.

Two of these pottas more than half a century old, and the remaining two very nearly half a century; and in two suits of a quarter of a century, these pottas were

filed and the answer of the Banerjee defendant in the suit of Madhusudan was filed subsequent to the date upon which these pottas were filed. It cannot, therefore, be said that he had not an opportunity of questioning then and there the *bona fides* of these pottas. These pottas have passed, first from Mr. Brightman to Dinanath Mullik by a formal deed of sale, drawn up in the English form; *secondly*, from Dinanath Mullik to Livingstone and Co., and lastly, from Livingstone and Co. to the present defendants. The plaintiffs or their predecessors have stood by and allowed valuable buildings and dockyards to be constructed on these lands, and now, after the lapse of half a century, when it is impossible to expect that the defendants, can be able to bring witnesses to attest these pottas, the plaintiffs question the *bona fides* of these pottas.

In special appeal it is not very distinctly stated that the Judge refused to take evidence; nor do we think that if such evidence had been pressed upon the Judge, he would have refused to receive it. At all events, there is nothing on the record which has been shown to us to prove that the Judge did refuse to receive this evidence. We, therefore, do not think it necessary to remand this case for further evidence. We now come to the last point taken in appeal, namely the terms of the pottas. The question raised in special appeal was, whether, under the terms of the pottas, the lands covered by them are liable to enhancement or not.

It is contended for the special appellants that these pottas are not mokurruri pottas, and that there is nothing in the terms of the pottas which fixes the rate of rent to be paid. On the other hand, it has been urged for the defendants, special respondents, that although the word "mokurruri" does not occur in the pottas, it was not absolutely necessary that any formal words should be used in conveying a right to hold at a fixed rate; and in support of this contention, *Annada Prasad Banerjee* v. *Chunder Sekhar Deb* (1), decided by Justices Seton-Karr and Glover, has been quoted. Now it is clear from the terms of these pottas that they were not ordinary pottas, such as are

(1) 7 W. R., 395.

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taken by ryots for cultivating purposes. They were taken for building and horticultural purposes, and the lands were to be enjoyed by the lessee and his sons and their sons' son for ever (1). Under these pottas the original lessee and the various parties who have derived title from him have held for half a century, paying the rent stated in the pottas. They have been allowed, on the faith of these pottas, to expend large sums of money in constructing buildings and dockyards; and, therefore, taking into consideration the nature of the leases, the position of the parties, and the circumstances under which the contract was originally made, we cannot, sitting in special appeal, say that the Judge has placed on the pottas a construction which they

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

ANAND LAL DAS (PLAINTIFF) *v.* MUSHUN ALI (DEFENDANT).

1868 Dec. 12.

Plaintiff sued defendant for a kabuliat at enhanced rates. The defence was that it had been found in a former suit that the defendant held a mokurruri tenure which was not liable to enhancement. It appeared that in that suit the zemindars had conspired with a party to oust defendant from the lands held by him, producing a forged kabuliat to support their claim, and suppressing a potta which defendant alleged would have shown this title to be in perpetuity. The Courts found that the legal presumption arising from the factious acts of the zemindar was that defendant "had a 'mokurruri' title," and could be ejected. The present plaintiff was auction purchaser of the rights and interests of the zemindar above-mentioned. The Lower Courts held, that he was barred from enhancing defendant's rent by the decision above referred to. The High Court on special appeal (LOCH and BAYLEY, JJ.,) found that the only point determined in the former suit was the perpetuity of the tenure; that the fixity of its rent had not been in issue; and that the word 'mokurruri,' implying fixity of rent, was erroneously now in the judgment for mourasi, denoting perpetuity of tenure. The case was remanded.

On remand the Judge held, that the suppression of the potta by the zemindar in the former suit being a fact, found the same legal presumption as to fixity of defendant's rent, arose, as arose in regard to the perpetuity of his tenure. The Judge further remarked that he had never heard of a mourasi tenure which was not also mokurruri, though there might be mokurruri tenures not mourasi.

Plaintiff appealed specially against this finding.

Baboo *Hem Chandra Banerjee* for appellant.

Mr. *C. Gregory* for respondent.

The judgment of the Court was delivered by

LOCH, J.—A mourasi tenure does not necessarily carry with it fixity of rent. It generally does, but that is a matter of evidence. The presumption which the Judge considers to arise in this case against the zemindar by reason of the non-production of the original kabuliat, does not arise against the plaintiffs in this suit, because though he now represents the former zemindar, he is a purchaser at auction; and having no privity with the former zemindar, he does not stand in a higher position than the former zemindar as to any right he may claim, but being a stranger no presumption can arise against him from the tortious acts of his predecessor. The respondent in this case has given no proof whatever as to the fixity of his rent, and under such circumstances he can claim no higher position than a right of occupancy. We would, therefore, set aside the order of the Judge, and decree this appeal with costs.

cannot legally bear. For the above reasons we confirm the decision of the Judge, and dismiss these special appeals with costs and interests.

JACKSON, J.—I quite concur in the orders which my learned colleague would pass in these appeals, and also in the grounds upon which he would pass these orders. There is one point, however, upon which I would go somewhat further than he does—that is, on the question as to whether the Judge decided these points solely as *res-adjudicata*, or whether he did not also look to the conduct of the parties. My impression is that he wrongly used the words *res-adjudicata*. There can be no doubt that no issue was raised as regards these pottas in former litigations, and adjudication was made regarding them; and, therefore, the question of their genuineness was not a *res-adjudicata*. The Judge, however, seems to consider them *res-adjudicata*, because they were put forward in suits to which both the representatives of the present parties were parties, and because no objection was then raised by the representatives of the present plaintiffs, and because from that time to this no objection has ever been raised by them. This of course is not *res-adjudicata*, but it is, in my opinion, final and conclusive evidence of the genuineness of these pottas. The plaintiffs' ancestors at that time, knew of these pottas, saw these pottas, and made no objections to these pottas. They had a far better opportunity of knowing whether these pottas were genuine than their descendants a quarter of a century afterwards.

Under these circumstances, I think that it was quite right of the Judge to decide that these acts, and the silence and acquiescence of the plaintiffs and their representatives, for half a century in the possession of the defendants under these pottas, was conduct of that description which precludes them from now making and raising any objections to the pottas. They have stood by and have allowed the defendants to purchase the grounds, and to erect valuable buildings on these grounds on the faith of the pottas; and it appears to me that it would be allowing the plaintiffs to act fraudulently to permit them now to come forward and impugn their genuineness.