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ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

See Also 13 B. L. R. 130

Sale for Arrears of Revenue—Enhancement—Reg. XLIV. of 1793, *s.* 5—*Reg. VIII. of* 1793, *s.* 51.

Where, by an old potta, lands forming part of a zemindari had been leased at a specified rent, but there were no words in the potta importing the hereditary and istemari character of the tenure, *held*, that the absence of such words was supplied by evidence of long and uninterrupted enjoyment, and of the descent of tenure from father to son, whence that hereditary and istemrari character might be legally presumed.

The zemindari was sold for arrears of Government revenue under Reg. XI. of 1822. The purchaser's representatives sued to enhance the rent of the under-tenure. *Held*, that they had no right to enhance. The rights of the purchaser were defined by ss. 30—33 of Reg. XI. of 1822, which were repealed by Act XII. of 1841, and that Act, with the exception of the 1st and 2nd sections, was again repealed by Act I. of 1845. Neither of the two last mentioned Statutes contains any saving of rights acquired under the Statutes which it repealed, but expressly limited the enlarged powers which it gave to purchasers at sales for revenue arrears to purchasers at future sales.

A sale for arrears of revenue cannot of itself merely, and without any act, proceeding, or demonstration of will on the part of the purchaser, alter the character of an under-tenure.

Semble—Sec. 5, Reg. XLIV. of 1793, is now of no force for any purpose, but that of declaring the general principles upon which all the subsequent legislation has proceeded, *viz.*, that of putting a purchaser at a sale for arrears of revenue in the position of a party with whom the perpetual settlement of the estate was made. Where an under-tenure existed at the time of the decennial settlement, the only right which the zemindar could exercise over it was that conferred by section 51 of Reg. VIII. of 1793.

* *Present* :—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, LORD CHIEF BARON KELLY, AND SIR LAWRENCE PEEL.

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A suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it.

The decision in the case of *Ranee Surnomoyee* v. *Maharaja Suttees Chunder Roy Bahadoor* (1) commented on, explained, and reiterated.

Mahesh Chandra Mitter and Digambar Mitter, as separate co-sharers in a divided zemindari, brought two distinct suits to enhance the rent of certain lands held by Raja Satyasaran Ghosal in that zemindari. Mahesh Chandra claimed title to his share in the zemindari as the relative and representative of a purchaser at a Government sale for arrears of revenue held in 1839. Digambar claimed through several successive alienations from a similar auction-purchaser, who bought in 1837. These auction-sales had taken place under Reg. XI. of 1822, and the plaintiffs claimed to enhance in virtue of the powers conferred on purchasers at such sales. The defence was, that part of the land in question had been held by defendant at a fixed rent under a grant by the Collector in 1786, which, apart from specifications of lands, &c., simply ran thus :—

"For 67 bigas and three katas of land, you will pay the rent of sicca rupees 136-13-10 agreeably to instalments: by letting out or personally holding the land, enjoy the same with great felicity. There is no other liability."

It was also stated that, of the rest of the lands, part was lakhiraj, and part belonged to a different talook. It was further urged that the suits were barred, more than 12 years having passed since the auction-sale ; that Digambar Mitter, at any rate, as a private purchaser, had no right to the privileges of an auction-purchaser ; and that the suits should have been brought in the Collector's, and not in the Civil Court.

The first Court, the Sudder Ameen of the 24-Pergunnas, held that the potta filed by defendant was genuine, and that it was proved that, as regards the lands covered by it, defendant had paid a uniform rent from before the decennial settlement, and hence his rent could not be enhanced. The Court also found that part of the land held by defendant was rent-free. Excluding this

(1) 10 Moore, I. A., 123.

and the land covered by the lease, the Sudder Ameen gave a decree for enhancement on the remaining lands.

The Principal Sudder Ameen, on appeal, held, that defendant had not proved that any portion of the land was lakhiraj; that the potta did not profess to fix the rent for ever; and that as the land covered by it was not shown to have been held at the same rent from 12 years before the decennial settlement, it was not exempt from enhancement. The Principal Sudder Ameen decreed in favor of the plaintiffs.

On special appeal, the High Court (KEMP and SETON-KARR, JJ.) held, that the forms of the potta admittedly did not amount to an hereditary and fixed grant, even if the Collector had had power to make such; and overruled the contention of the defendant that he was protected from enhancement by his having held from a period antecedent to the permanent settlement. The learned Judge said:—

"It is said that the defendant is shewn to have been paying at the same rate for a period antecedent to the decennial settlement, though not perhaps for 12 years previous to that date; and that he ought to be protected under the late ruling of the Privy Council, the case of *Ranee Surnomoyee* v. *Maharaj Suttees Chunder Roy* (1). It is also much pressed upon us that the predecessors of the plaintiff and also the original auction-purchaser had waived their admitted rights of enhancement, and that it is not competent for the plaintiff to revive and put those rights in force now.

"We observe that this case differs from that of Ranee Surnomoyee. That was a sale under Regulation XLIV. of 1793; the present case refers to a sale under Regulation XI. of 1822. In Ranee Surnomoyee's case, their Lordships appear to have been guided by the principle that the same rent had been paid for 60 years, and that there was no evidence that, when first imposed, or even when the purchase was made, it was not a perfectly adequate rent for the property. No such plea is or can be advanced in this case. There is no proof or plea that the rent is a proper rent, or a rent adjusted according to the rate of the Pergunna and the locality. The sale law under which the plaintiff became a pro-

(1) 10 Moore, I. A., 123.

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prietor, was more stringent than the sale law of 1793, and the purchaser had rights of eviction, as well as of annulment and enhancement. It is true that no right of eviction and settlement with other parties was ever put in force. But the right to demand rent is an ever-recurring cause of action as has been held ever since the case of Digambar Mitter in 1856, and the right to have rent at a proper and consequently at an enhanced rate is one which resides in the zemindar, unless the tenant can bar the action by some effective deed, or can otherwise bind the zemindar, Now it is proved in this case that the potta is not istemrari or mourasi in its terms, and this is a case in which the presumption arising out of 20 years' payment at the same rate by the nature of the action is not pleaded, and does not arise. The suit we observe, was brought before Act X. of 1859 came into operation. Neither is the defendant a khudkasht ryot, who might be protected under section 32 of the sale law Regulation XI. of 1822, under which the lands came in the plaintiff's zemindari rights.

" On the whole we do not find any thing in the decision, or in the arguments advanced by the defendant's pleader, to make us think that the defendant has any legal right to resist enhancement. The decision on the law, as applied to the facts found appears to us correct.

" As regards the second point of the rent-free lands, the ruling of the full Bench of the 1st of June 1863, in *Gumani Kazi v. Harihar Mookerjee* (1) might be in point but for one important circumstance. It is found as a fact in all these cases that the defendants would not point out to the Ameen, who went to the spot, the exact situation of these alleged rent-free lands, so that the plaintiff could not distinguish them from the rest, and could have had no opportunity of proving that he had ever received rent on account of them."

Their Lordships' judgment was as follows :—

The question raised on these appeals is whether the respondents (being plaintiffs in two different suits) have established, as against the appellant, their right to enhance the rent payable by him in respect of 134 bigas and 2½ katas of land situate in the 24-Pergunnas.

(1) Case No. 2463 of 1862 ; 1st June 1863. Sup. Vol. 15.

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This parcel of land is alleged in both uits to form part of a zemindari, of which somewhat more than ten undivided sixteenths belong to Mahesh Chandra Mitter, the respondent on the first appeal; and the remainder being somewhat less than six-sixteenths belong to the respondent in the second appeal, or rather his master, Digambar Mitter.

Mahesh Chandra Mitter claims title to his portion of the zemindari as the nephew *ex parte materna*, and representative in estate of one Ganganarayan Ghosal, who purchased it at a sale for arrears of Government revenue in 1839, and died in 1851. Digambar Mitter's title to his portion is derived through several successive alienations from some person who purchased that portion at a similar sale in 1837. From the fact that these undivided portions of the zemindari were thus sold at different Government sales, it is to be inferred that, before those sales, they were held by different parties, each of whom was separately liable for his share of Government revenue.

In these circumstances, the two Mitters have brought separate suits for the enhancement of the rent of the lands in questions; and for the purposes of these appeals, their Lordships will assume that, in the Courts below, they have been properly held entitled so to do, though there certainly appears to have been a well grounded objection to the form in which the plaints were originally framed.

In each case the plaintiff rests his claim to enhance on the statutory rights of a purchaser at an auction-sale, meaning thereby a sale for arrears of Government revenue; and the Statute under which each of the sales in question took place was Regulation XI. of 1822.

The defence in the two suits was very much the same. The appellant insisted that, of the land in question, 67 bigas and 3 katas had been held by him and his ancestors under a potta dated in 1786, at a fixed rent of sicca rupees 163-13-10; that, of the rest of the lands, 42 bigas and 14 katas were lakhiraj; and the remainder, either including, or perhaps with the exception of a very small portion which had been resumed by Government as a towing-path, was held by him as part of a different talook, under one Ramtanu Dutt. He further insisted that the suits

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were barred by lapse of time, twelve years having, in each case elapsed since the date of the purchase at the auction-sales; and in Digambar Mitter's suit, he further questioned the right of one, who was a mere purchaser by private contract from one who had bought at a Government sale, to institute such a suit. He also raised the question whether the suit ought not, under the 23rd section of Act X. of 1859, to have been brought in the Collector's, instead of the Zilla Court.

Their Lordships think it will be convenient, in the first instance, to consider the respondent's claim to enhance, as if all the lands in question were covered by the potta of 1786.

Both the Courts below, which dealt with the questions of fact have affirmed the genuineness of that potta, and their Lordships see no reason for impeaching it.

Again, though the document is not in the form of the ordinary instruments which create an istemrari tenure, it is in terms a grant of the lands on a fixed rent, for it specifies the sum. And upon the principle laid down by this Committee, in the case of *Baboo Gopal Lall Thakoor* v. *Teluck Chunder Rai* (1), the absence of words importing the hereditary character of the tenure is here, as in that case, supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, whence that hereditary character may be legally presumed.

Upon the evidence their Lordships have no doubt that, at the date of the earliest of the Government sales, those whom the present appellant represents were, by virtue of the potta, in possession of the land, which it covers at a fixed rent, under a sub-tenure binding upon the then zemindars.

It follows that the respondent's right to enhance the rent, which implies a right to vary the terms of the sub-tenure, and to set it aside if that title to enhance be disputed on grounds inconsistent with the obligations of such a dependent tenure, must, if it exists at all, depend upon the peculiar and statutory powers acquired by a purchaser at a sale for arrears of revenue. And, accordingly, both in the plaints and in the notices given in pursuance of Regulation V. of 1812, section 9, those powers are put forward as the foundation of the right.

(1) 10 Moore, I. A., 191.

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The first question then is—are the respondents, or is either of them, entitled to exercise those powers? That neither is so entitled has been strongly argued by the learned Counsel for the appellant, upon the following among other grounds: The sales took place under Regulation XI. of 1822, and the rights of the purchasers through whom the respondents claim were defined by the 30th and three following sections of that Regulation. Those enactments were repealed by the 1st section of Act XII. of 1841; and all the provisions of that Act, with the exception of the first and second sections, were again repealed by Act I. of 1845, which, as modified by some subsequent Acts, is the existing Sale Law. Neither of the two last mentioned Statutes contains any saving of rights acquired under the Statutes which it repealed; and though each gave to purchasers at sales for arrears of Government revenue powers equal to or even larger than those given by the repealed Statutes, it expressly limited those powers to, purchasers at future sales, *i. e.* "sales under this Act." The respondents, therefore, cannot invoke Regulation XI. of 1822, as the foundation of their alleged rights, because that has been absolutely repealed; and they cannot call in aid the subsequent Statutes, because they have given no power to purchasers at sales which took place before they were passed.

This point, though it seems to have been overlooked in many cases in India, is not now adjudged here for the first time. It was fully considered and determined by this Committee in the case of *Ranee Surnomoyee* v. *Maharaja Suttees Chunder Roy* (1). The Judges of the High Court have attempted to distinguish that case from the present, on the ground that, in the former, the sale relied upon was made under Regulation XLIV. of 1793. But that statement proceeds upon a misapprehension of the facts of the earlier case. In that, as in these, the sale on which the power to enhance depended had taken place under Regulation XI. of 1822; and it was not until they found that they could not support their case, either on that repealed Regulation, or on the subsequent Acts, that the learned

(1) 10 Moore, I. A., 123.

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Counsel for the respondent, the Maharaja, fell back upon the 5th section of Regulation XLIV. of 1793, which, though suspended by the subsequent legislation on the subject, had never been expressly repealed.

Their Lordships must also observe that, in the judgment delivered in that case, it was carefully considered whether a sale for arrears of revenue of itself merely, and without any act, proceeding, or demonstration of will on the part of the purchaser, altered the character of the tenure; and it was decided that the sale law had not "that hard and rigid character." It is true that the judgment, assuming that the powers given by Regulation XI. of 1822 had been swept away by the repeal of that Statute, dealt only with the effect of a sale under Regulation XLIV. of 1793. But what it laid down concerning such a sale may even, *à fortiori*, be predicated of a sale under any of the subsequent sale laws, and, in particular, of one under Regulation XI. of 1822. For the words of the Regulation of 1793 (sec. 5) are that all engagements of the former proprietor, and all under-tenures granted by him, shall "stand cancelled from the day of sale;" whereas the Regulation of 1822 (sec. 30) enacts that "all tenures which may have been created by the defaulter or his predecessors, being representatives or assignees of the original engager, as well as all tenures which the first engager was competent to set aside, alter, or renew, shall be *liable* to be avoided and annulled by the purchaser," &c., expressions which, far more strongly than those of the earlier Regulation, import that the estate is not, upon a sale for arrears of revenue, necessarily and *ipso facto*, changed in its nature and incidents. And if this be so, the repeal of the Regulation which destroys the power to change the estate, must leave its freedom from change, independent of mutual will, unimpaired.

Their Lordships then being clearly of opinion both upon the principle and the authority of the decision in *Ranee Surnomoyee* v. *Maharaja Suttees Chunder Roy Bahadoor* (1) that the respondents cannot now for the first time exercise powers which, if they ever existed, existed only by virtue of the repealed sections

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of Regulation XI. of 1822, do not deem it necessary to consider whether the stringent powers given by those enactments to purchasers, *eo nomine*, could, in any case, be exercised by the heirs or assignees of such purchasers. Justice and sound policy alike require that, inasmuch as the law has given them, for the particular purpose only of enabling the purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to under-tenants, and insecurity to property, they should be exercised within a reasonable time; and their Lordships believe that that object has now been in some measure secured by Acts X. and XIV. of 1859.

Their Lordships have further to remark that, the case of *Ranee Surnomoyee* v. *Maharaja Suttees Chunder Roy* (1) to which they have already referred, this Committee, whilst it carefully abstained from determining whether, upon the true construction of all the regulations taken together, the 5th section of Regulation XLIV. of 1793 ought to be taken to have been repealed, nevertheless proceeded to consider whether that enactment, if assumed to be still in force, would support the respondent's case. And after putting upon the clause the construction stated at page 147 of the report, the judgment ruled that the purchaser had an option to confirm the existing rate of rent, and must, upon the evidence in the particular case, be taken to have exercised that option in favor of the dependent talookdar.

Their Lordships must reiterate the doubts expressed by those who decided the case of *Ranee Surnomoyee* v. *Maharaja Suttees Chunder Roy* (1) whether the clause in question can be held to be in force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, *viz.*, that of putting a purchaser at a sale for arrears of revenue in the position of the party with whom the perpetual settlement of the estate was made. They do not think that a party who has lost the particular rights which were given to him, or to the purchaser whom he represents, by any of the subsequent Statutes, can fall back upon the old law which has been so repeatedly modified.

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It is to be observed, however, that, even if the section be in force, the tenure here in question is not one which, upon the strictest interpretation of that clause, could stand cancelled. It existed at the time of the decennial settlement, and their Lordships apprehend that the only right which the zemindar with whom that settlement was made could have exercised over it, was that conferred by section 51 of Regulation VIII. of 1793. No attempt has been made to bring the present cases within that section, which seems to cast upon the zemindar the burthen of proving particular grounds for enhancement of rent.

Upon the whole, then, their Lordships are of opinion that the Court of the Principal Sudder Ameen and the High Court of Calcutta were in error in holding that the respondents had established their right to enhance the rent of the lands covered by the potta of 1786.

It may be said that this does not dispose of the question as to the other parcels of land. But the foundation of the suits is that the respondents have the powers of purchasers at sales for arrears of revenue; and if that foundation fails, the failure is fatal to the whole suit. Their Lordships, however, are of opinion that there are further objections to the maintenance of the present suits in respect of these parcels of land. There is no evidence that the appellant has ever paid to the respondents any rent, except the sum of sicca rupees 136-13-10, being the rent reserved by the potta in respect of the 67 bigas and 3 katas. He disputes the title to rent in respect of the other parcels, treating one parcel as lakhiraj, the other has held of a different landlord. A suit for enhancement implies such a privity of title or tenure existing between the parties that a claim to some rent is legally inferrible from it, and there is here proof that that relation is denied to have existed at any time between the parties in respect of these two parcels of land. As to the latter portion, where the respondent's title is denied, and the right of another zemindar set up, the proper remedy seems to be by a suit in the nature of an ejectment. Again, if the lands alleged to be lakhiraj lie within the respondent's zemindari, the law has given them an appropriate remedy in a suit for resumption and re-assessment.

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The present decision will not deprive them of either remedy if sought by them in the character of ordinary zemindars. But it is to be observed that a suit of either kind is now subject to a particular law of limitation, and that consideration is a strong ground for not allowing such rights to be irregularly litigated in a suit like the present, which is subject to a different, if it is subject to any, rule of limitation. Upon the whole, therefore, their Lordships have come to the conclusion that they must recommend to Her Majesty to allow these appeals to reverse the decrees of the Court below, and in lieu thereof to order that both suits be dismissed with costs. The appellant will be entitled to the costs of these appeals, but it will be for the Registrar, in taxing those costs, to consider whether the costs of more than one case should be allowed.

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RAJA BARADAKANT ROY *v.* THE COMMISSIONER OF THE SUNDERBUNS.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Sunderbuns Boundary—Reg III. of 1828, *s* 13.

Sec. 13, Reg. III. of 1828, was intended to make provision for the immediate settlement of the limits of the Sunderbuns; hence it fixed peremptorily a period after which the demarcation of those limits, made by the Special Commissioner to that end appointed, should be final. No person can come in after that period (namely, three months from the date of the Commissioner's proceeding fixing the boundary) pleading infancy or other ground for re-opening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Even within the period of limitation allowed, no one could be heard to object to the line, unless he declared and offered proof that at the time of the survey he was in the occupation of a definite quantity of land cleared and under cultivation within the line. After the line had once become final, no party could be heard to say that even cultivated lands within it were part of his settled zemindari.

THE facts of this case are fully set out in the following judgment delivered by their Lordships:

The appellant in this case (the plaintiff in the suit) is the Raja of Jessore. The respondent is the Commissioner of the Sunderbuns, representing the Government of Bengal. The

* *Present:* LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, LORD CHIEF BARON KELLY, AND SIR LAWRENCE PEEL.