The Weekly Reporter,

APPELLATE HIGH COURT.

The 1st June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Sale for arrears of revenue--Rights of shikmee-lakherajdars — Clause 8 Section 10 Regulation VII of 1822.

Cases Nos. 2927 and 2928 of 1869.

Special Appeals from a decision passed by the Subordinate Judge of East Burdwan, dated the 20th September 1869, *affirming a decision of the Moonsiff of Selimabad, dated the 15th March* 1869.

Ram Gobind Roy (Plaintiff) *Appellant,*

versus

Syud Kushuffudoza and another (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter, Unnoda Pershad Banerjee, Tarucknath Sein, Mohendro Lall Mitter, and *Kalee Prosunno Dutt* for Appellant.

Baboo Ashootosh Dhur for Respondents.

Suit for ejectment and khas possession by an auction-purchaser under Act XI of 1859. The defendant's case was that after resumption of their lakheraj tenure, a settlemnet had been made under Regulation VII of 1822 with the principal proprietor, and by that settlement it was arranged that the Government revenue payable by all the proprietors, the defendants among them, was to be paid through the principal proprietor, and that the defendants were to hold perpetual possession as shikmeedars, and that their rights should be reserved intact

HELD that the possession of the defendants as lakherajdars could not be disturbed as long as they paid the revenue assessed upon them under the settlement.

HELD (Markby, J., *dissentiente*) that Clause 3 Section 10 Regulation VII of 1822 applies only to cases referred to in Clause 7, that is, of cultivating proprietors on putteedaree or byhacharee tenure, or the like, and not to a case of this kind.

Bayley, J.—IT is admitted that these two special appeals will be governed by one and the same decision by this Court. In both cases, Ram Gobind Roy is plaintiff. In the one case, he lays his suit at 994-10-10 to set aside a summary order and to recover khas possession and mesne profits, valuing his suit at 98-9-6.

Plaintiff alleges that he is an auction-purchaser at a sale for arrears of Government revenue of Mehal Bahadoorpoor, bearing No. 5537 on the Collector's Rent-roll, the recorded proprietor being one Akburnissa, and that by that purchase all other rights remaining in defendants have passed to him, plaintiff, the purchaser, and that he can eject and take khas possession, and is entitled to mesne profits of defendant's lands.

The sale and purchase were admittedly under Act XI of 1859.

The defendants' case is that a settlement was made with them by the Collector after resumption of the lands by Government under Regulation II of 1819, and that up to the time of settlement they had held the lands as rent-free proprietors, and that after the settlement they still held possession of them as proprietors, of resumed rent-free tenures with whom settlement was made and their proprietary rights recorded, and therefore could not be ejected by plaintiff so long as they paid the settlement jumma of their own proprietary lands. It is admitted and proved that this was a lakheraj tenure resumed under Regulation II of 1819 and settled under the provisions of Regulation VII of 1822, as extended to Bengal resumed and khas mehals by Regulation IX of 1825.

The arrangements of the settlements and the first Court's opinion on their legal effect are thus recorded by the first Court—

"On reference to the settlement proceedings, amulnamah, &c, filed with the record, it appears that as the lands previously held rent-free by the defendants and other parties were resumed, the Collector at *first entered into separate settlements with each of the holders;* that afterwards the Commissioner, in order that the rents might be more conveniently collected, directed that the whole of the lands be included in one towjee, the former holder Akburnissa be made the principal proprietor, and a settlement entered into with her; that, accordingly, the said mehal was settled with Akburnissa on these conditions, that the defendants and others should as shikmeedars hold perpetual possession of the lands occupied by them and pay the rent due by them to Government to the above named party obtaining the settlement; that out of rupees 394-14-5 due to Government, after deduction of the mâlikanah to which the said shikmee lakherajdars were entitled, the said party obtaining the settlement should receive rupees 39-6-10, the collection charges on the rents payable by the lakherajdars, the defendants and others, at 10 per cent., and that the residue, namely, rupees 355-7-7, and the rent due on the share of the said party obtaining the settlement, rupees 152-9-3, in all rupees 508-0-10, and rupees 5-0-2, the expense incurred in repairing the roads, making a gross total of rupees 513-1-0, should be paid to Government as sudder jumma.

"Therefore, this Court is of opinion that plaintiff is simply entitled to recover the equitable rent from the defendants, but has no power to dispossess them from the lands, houses, &c., settled with them and held from time immemorial."

Now, with the exception of the use of the first term *shikmeedars*, where the first Court should have said "*shikmee lakherajdars*," as it does alter, the first Court has correctly stated the details and legal effect of the settlement proceedings, and I concur with the first Court in holding that the plaintiff cannot eject the defendants and obtain khas possession. The settlement proceedings recorded their rights in express terms, namely, that although Akburnissa should be the party directly paying the revenue due to Government, still all other parties with whom the settlement was made (defendants being individually and by name scheduled as those parties) should have *rights as proprietors* reserved intact, "*malikker-suttyo*" being the words used.

It would have been well if the case had stopped here, but in appeal to the Lower Appellate Court the Subordinate Judge has made such a confusion of terms as has led to this special appeal. He states that the names of the defendants were included in the dowl as shikmeedars. It is no such thing. In the dowl they were included as *shikmee lakherajdars*. A shikmeedar might be a tenant, and as such, would have no dowl with a Collector at all. A mere shikmeedar is not a proprietor. The lakherajdar is not only a proprietor of land, though paying in this case through another, but actually recorded here to have all his rights as such reserved, though Government revenue for convenience is paid by Akburnissa as the largest proprietor. The Lower Appellate Court has also stated that the defendants were designated *mokurrureé semandars*. Now, such a designation has not been shewn to us by respondent's pleader in the settlement proceedings at all, and he at least does not contend that it exists there at all. The Lower Appellate Court also has misunderstood the position of parties completely in the following very inconsistent and incorrect passage:—

"Defendants do not admit that they were co-sharers of Akburnissa in the said settlement, and the grantor of the settlement declared the defendants to be the *inferior jotedars and co-sharers of Akburnissa*, when therefore the defendants were recorded as inferior jotedars at the time of the settlement."

Now, in the first place, there is not one word in the settlement proceeding terming the defendants *inferior jotedars*, and the pleader for the respondents admits that there is not. In the next place, a *jotedar* is *not* a proprietor of a rent-roll property. A co-parcener in this case is a proprietor as above pointed out; and especially when, as here, the rights of a proprietor were reserved in express terms to defendants in this case.

In the end, however, the Lower Appellate Court held that plaintiff cannot eject the defendants.

It is upon this that plaintiff appeals, urging—

Firstly.—That the Lower Appellate Court is wrong in holding the defendants were not co-proprietors; and *secondly*, that plaintiff, as auction-purchaser, can eject the defendants, inasmuch as he purchased all the rights and interests of the defaulting proprietors.

As before pointed out, the first of these grounds is correct, inasmuch as the Lower Appellate Court has confusedly considered the defendants to be inferior jotedars, when, in fact, they are each and all proprietors, *i. e.*, parties due provisions for securing the rights of whom have been made under Clause 1 Section X Regulation VII of 1822. Upon the second point, I consider the plea of the special appellant untenable, inasmuch as I quite concur in the view taken by the Moonsiff in the first Court, that the possession of the defendants as lakherajdars, though paying revenue through Akburnissa, is one that could not be disturbed by the plaintiff so long as defendants pay the revenue assessed upon them *under the settlement* and there recorded.

Some argument has been used with reference to the applicability of Clause 8 Section 10 Regulation VII of 1822 to this case. I regard Clause 8 as applying only to cases referred to in Clause 7, that is of *cultivating proprietors in putteedaree or byhacharee, or the like.*

Now, certainly in the District of East Burdwan, neither a putteedaree or byhacharee tenure, or the like, is known, nor is there such a thing as a cultivating proprietor, except in the instance of a zemindar's nij-jote, and the present is not for a moment contended to be an instance of that kind. Then we are told the words "*or the like*" will include this case. Regulation VII of 1822, however, was passed for the settlements of the ceded and conquered provinces, Cuttack and Puttespoor, in none of which was there ever a permanent settlement as there is in East Burdwan. Further, in East Burdwan, the present mehal, No. 5593, on the Collector's Rent-roll there has been *permanently* settled, and nothing like putteedaree or byacharee tenures exist in East Burdwan. I do not think, therefore, the words "*or the like*" can apply. This, in fact, is a case simply of badshahee grants of one large and a number of small rent-frees *proprietors*, who never had or pretended to have putteedaree or byacharee rights. Akburnissa was one proprietor, and defendants are others. The mode of paying revenue cannot make that man not a proprietor who is recorded in a settlement record as a proprietor, and he can only cease to be such when he does not pay the revenue assessed by that settlement. In this case defendants did pay the revenue, or at least it is not shewn they did not. They cannot lose their proprietory rights so secured and expressly received, because Akburnissa defaulted. To rule otherwise would render the reservation of proprietor's right in a settlement record a nullity.

In this view, I would dismiss these special appeals and the plaintiff's suits.

Markby, J.—In this case, as I gather from the facts found and the statement made by the vakeel for the appellant, in the year 1860 the village in question which had up to that time been held rent-free was resumed by Government under the provisions of Regulation II of 1819. The claim to hold the lands rent-free was found to be invalid, and the Collector in 1866 proceeded to make a settlement with all the persons (a very considerable number) who were the proprietors of the lands comprised within the village. The Commissioner, however, before the settlement concluded directed that all the lands should be included in one settlement with Akburnissa, one of the proprietors, which was accordingly done, upon condition that the other proprietors should as shikmeedars hold perpetual possession of the lands occupied by them and pay the revenue assessed upon them into the hands of Akburnissa, who was to pay the same together with her own share of the revenue to Government, deducting a certain percentage.

Akburnissa having made default in payment of the revenue, the estate was put up to sale and purchased by the plaintiff, and the question is whether the plaintiff is entitled to evict the defendants who are some of the persons described in the settlement as shikmeedars.

Both the lower Courts have decided this question in the negative and dismissed the plaintiff's suit. The plaintiff has appealed and has contended before us that all these parties are co-proprietors in an estate which is assessed singly, and that on the default of any one of them, in the absence of any apportionment, the whole estate is liable for sale, and that all their interests pass to the purchasers at the auction-sale.

The defendants, respondents, do not deny that the whole estate was put up for sale, but they contend that they and Akburnissa have been placed by the settlement in the relation of mâlgoozaree and subordinate proprietors as contemplated by Section 10 of Regulation VII of 1822, and that their holdings are protected by Clause 8 of that Section. This was one of the contentions of the defendants in the first Court, and the Moonsiff thought that it was right.

I also think that this contention is well founded. It is true that this Regulation was originally in force only in the ceded and conquered provinces, the district of Cuttack, and the pergunnah of Puttaspore; but by Section 2 of Regulation IX of 1825 the major portion of the provisions of the Regulation of 1822 are extended "to all lands "(including jagheers, mokurrurees, and other "tenures, held free of assessment, or at "a quit-rent under special grant) not in-"cluded within the limits of estates for "which a permanent settlement has been "concluded in the manner prescribed by "Regulation VIII of 1793, and Regulations "II and XXII of 1795 as far as the same "may be applicable."

It seems to me clear that the land now in dispute is land which falls within the description of that Section. It could not have been included within the limits of an estate for which a permanent settlement had been concluded, otherwise, if the land had been resumed at all, the settlement would have been made with the proprietor of that estate. I understand the settlement with the lakherajdar to proceed on the assumption that he is recognized as proprietor though liable to assessment (see Regulation XXXVII of 1793, Section 6.) And indeed, unless the land now in dispute fell within the description of Section 2 of Regulation IX of 1825, no such settlement as was made in this case would have been possible. The appellants admit that this settlement was in fact made under the provisions of Clause 3 of Section 10 Regulation VII of 1822.

The question, then, will be whether Clause 8 of Section 10 is one of the provisions which are applicable to this case. I see no reason why it should not be so. It is true that the Clause immediately preceding, Clause 7, applies to a mehal or a portion of a mehal held by cultivating proprietors "in puttedaree or byhacharee tenure, or the like;" and Clause 8 commences with the words "When it shall be determined to make a settlement of a mehal *of the above description* with one or more of the parcenars;" but even supposing that on the strength of these words we hold that Clause 8 is applicable only to such mehals as fall strictly within the description contained in Clause 7, still I am not prepared to hold that this mehal would be excluded. What the exact nature of the defendants' holding was prior to the resumption we are not informed, but I see no reason why their tenure should not fall under the very general words "or the like."

But I am not inclined to put so narrow a construction on Clause 8. I think it refers to any mehal settled under the provisions of Section 10 with one or more of the proprietors on behalf of the whole.

I think, therefore, that the decision of the Moonsiff was, in this respect, right, and that on that ground he was right in dismissing the suit. I think this appeal should be dismissed with costs.

It was admitted that this case (No. 2928) would be governed by the decision in special appeal No. 2927. I think therefore that it ought also to be dismissed with costs.

The 1st June 1870.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Enhancement of rent—Sections 13 and 17 Act X. 1859—Pleadings—Presumptions.

Case No. 2394 of 1869 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th June 1869, *affirming a decision of the Deputy Collector of that District, dated the 20th May* 1864.

Thakoor Dutt Singh and others (Defendants) *Appellants,*

versus

Gopal Singh and others (Plaintiffs) *Respondents.*

Mr. G. C. Sconce and *Baboo Kishen Succa Mookerjee* for Appellants.

Mr. G. C. Paul for Respondents.