Moulvee Murhumut Hossein for Appellants.

Baboo Bipro Doss Mookerjee for Respondents.

The question was, for which party M had received rent. The High Court, on the former occasion, said it was not sufficient for M to say that he was plaintiff's agent, and directed the question to be determined upon the issue whether plaintiff was the landlord or not. HELD that what the Court meant was not to order the Revenue Court to go into the question of title between the parties and determine it, which the Revenue Court would have no power to do, but to find whether M had been acting as plaintiff's agent and receiving rent for him or not; and that as the Judge found that M was plaintiff's agent and received rent for him from defendant, this was sufficient to determine defendant's liability to pay his rent to plaintiff.

Couch, C. J.—THIS was a suit for rent brought in the Revenue Court, and there was no question but that the defendant paid rent to Mohadeb Mundal; the only question was whether Mohadeb Mundul had received the rent as the agent of the one party or the other, and for which party he had received it.

The High Court, when the case was before them on the former occasion, said, and very justly, that it was not sufficient for Mohadeb Mundul to say that he was the agent of Gour Chunder, and they directed the question to be determined upon the issue whether Gour Chunder was really the landlord or not. Now we must read this language of the Court with reference to the nature of the suit. What was meant was whether Mohadeb Mundul had been acting as the agent of Gour Chunder and receiving rent for him or not, because the Revenue Court would have no power to go into the question of title between these parties and determine it. We must certainly presume that the High Court meant to order the Revenue Court to do that which it had power to do and not that which it had no power to do: and that question having gone down to the Revenue Court to be tried, there is a very distinct finding of the Judge after a lengthy judgment, some portions of which might very well have been omitted. He says "What I now determine upon the "evidence before me is, that Mohadeb Mun-"dul was the plaintiff Gour Chunder's Go-"mastah and collected rents from Moheshpara "and from defendant appellant for him." Therefore, the result is, that the defendant is found to have been paying his rent to the agent of Gour Chunder and for Gour Chunder. That was sufficient to decide the question raised between the parties in this rent suit; and whatever other questions may exist between Gour Chunder and the other parties will have to be determined in some other suit. The defendant was bound as regards this matter to pay his rent to Gour Chunder, to whose agent he was found to have been hitherto paying it.

The decision of the Judge will be affirmed, and this appeal dismissed with costs.

The 13th December 1871.

Present:

The Hon'ble R. A. Glover and Dwarkanath Mitter, *Judges.*

Onus probandi—Ousut Talook—Sale—Bonâ fide purchaser — Estoppel — Attachment — Execution — Benamee holder—Priority.

Case No. 586 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 6th March 1871, *reversing a decision of the Subordinate Judge of that District, dated the 6th August* 1870.

Jugobundhoo Sein and others (Plaintiffs) *Appellants,*

versus

Bhugwan Chunder Doss and others (Defendants) *Respondents.*

Baboos *Doorga Mohun Doss* and *Chunder Madhub Ghose* for Appellants.

Baboo *Sreenath Doss* for Respondents.

Defendants having pleaded that the *ousut talook* (the subject-matter of this suit) which they had hitherto claimed as a real *ousut talook* purchased by them for valuable consideration was a mere fiction, the *onus* of proof lay on them, and not on plaintiff.

It being proved that M purchased the rights of the I. defendants not only in the *ousut talook* but also in the two superior *talooks* within which it was situated, if the validity of his purchase of these two *talooks* could not be impugned, it followed as a matter of course that he had succeeded to all the rights which the I. defendants had in the disputed lands, whether as *talookdars* only or as *talookdars* and *ousut talookdars*. M's title to the two *talooks* could not be affected by a former decision in a suit to which he was not a party.

Defendants' alleged purchase was null and void, because made at a time when the properties covered by it were under attachment in execution of M's decree against the I. defendants. Whether M knew or not that the order striking off the execution case contained a provision to the effect that the attachment should continue in force, the mere fact of an execution case being struck off the record does not put an end to the attachment.

The Judge having found that defendants were mere *benamee* holders for the I. defendants, M's purchase must prevail over defendants' pretended purchase, notwthstanding the alleged priority of the latter

in point of time. M then being the rightful owner of the superior *talooks*, it was immaterial whether the *ousut talook* claimed by plaintiff as purchaser for valuable consideration from M was real or fictitious.

Mitter, J.—THE subject-matter of this suit is an *ousut talook* called by the name of Annund Chunder Goho Oghyran. This *ousut talook*, together with the two superior *talooks* within which it is situated, and which have been designated in these proceedings as *talooks* B. and C., were put up to sale in execution of a decree obtained by one Manick Chunder Doss against the Indu defendants.

The defendants Shumboo Chunder Ghose and Bhugwan Chunder Doss intervened under the provisions of Section 246 of the Code of Civil Procedure, and claimed all the three properties above referred to on the strength of two bills of sale alleged to have been executed in their favor by the Indu defendants, on the 23rd of Aghran and 1st of Pous 1270, respectively.

This claim was rejected by the Court as unfounded, and the properties were ultimately sold by auction to Manick Chunder Doss on the 5th of December 1864.

Manick Chunder Doss subsequently sold his rights and interests in the *ousut talook* to the plaintiff in the present case, and this suit has been brought by the latter to recover possession of that *ousut talook*, on the allegation that he was prevented from taking possession thereof by the Indu defendants, who, in collusion with the defendants Shumboo Chunder Ghose and Bhugwan Chunder Doss, set up the two bills of sale above referred to.

The defendants Shumboo Chunder and Bhugwan Chunder pleaded that the *ousut talook* in question was a mere fictitious tenure, and that although they had nominally purchased it from the Indu defendants on the 1st of Pous 1270, they had done so merely for the purpose of preventing disputes, the two superior *talooks* B. and C. having been previously purchased by them on the 23rd of Aghran of that year.

The Moonsiff, after going carefully into the evidence, gave a decree to the plaintiff, holding that the plea set up by the defendants was false and fraudulent, and that both the purchases relied upon by them were null and void, inasmuch as they were made at a time when the properties covered by them were under attachment in execution of Manick Chunder's decree.

Against this decision, the defendants Shumboo Chunder and Manick Chunder appealed to the Judge, and that officer has dismissed the plaintiff's suit upon the ground that the disputed *ousut talook* was a fictitious tenure fraudulently created by the Indu defendants with a view to defeat the claims of their creditors. The Judge has further found as a fact that the defendants Shumboo Chunder and Bhugwan Chunder are mere *benamdars* for the Indu defendants, who are in actual possession of the lands in question.

We are of opinion that the decision of the Judge must be set aside as erroneous in law.

In the first place, it is clear that the onus of proof has been thrown upon the wrong party. The plaintiff had sufficiently started his case by producing the repeated admissions made by the defendants regarding the existence of the *ousut talook* as well as by the order passed in his favour under Section 246. Under such circumstances, it was clearly incumbent upon the defendants to prove the plea now set up by them, namely, that the *ousut talook* which they had hitherto claimed as a real *ousut talook*, purchased by them for a valuable consideration was a mere fiction. As far as we can judge from the evidence on the record, we think we are fairly entitled to say that this plea ought not to have been accepted so easily as the Judge appears to have done.

But be this as it may, it is clear that Manick Chunder Doss purchased the right, title, and interests of the Indu defendants, not only in the *ousut talook* which forms the subject-matter of this litigation, but also in the two superior *talooks* B. and C. within which it is situated; and if the validity of his purchase of these two *talooks* is not liable to be impugned, it must be held as a matter of course that he has succeeded to all the rights which the Indu defendants had in the disputed lands whether as *talookdars* only or in the double capacity of *talookdars* and *ousut talookdars*. The Judge seems to have thought that Manick Chunder's title to the two superior *talooks* B. and C. have been finally set aside by a decision of his predecessor, Mr. Lounces. But in this he is completely mistaken. Manick Chunder was not a party to the suit in which that decision was passed, and it is therefore beyond all question that his interests cannot be affected by it in any manner whatever.

The only other ground upon which Manick Chunder's title as purchaser of the two superior *talooks* B. and C. can be impugned, is the prior purchase of the 23rd of Aghran 1270, set up by the defendants Shumboo Chunder and Bhugwan Chunder. But here too the defendant's case fails most miserably.

In the first place it is clear that this pretended purchase of the 23rd of Aghran is absolutely null and void, inasmuch as it was made at a time when the properties covered by it were under attachment in execution of Manick Chunder's decree. This was distinctly found by the Moonsiff, and the defendants Bhugwan Chunder and Shumboo Chunder could not in their memorandum of appeal to the Judge venture to deny the *factum* of the attachment, though they attempted to get rid of it upon a ground to which we shall presently refer. The Judge also admits it in one part of his decision, though in another part he says that it was not necessary for him to enquire into the validity of the defendant's purchase, with reference to that point. It has been urged however that a certain petition of Manick Chunder Doss shows that the attachment had come to an end in consequence of the execution case having been struck off the record. We are of opinion that this plea is of no weight whatever. It has been repeatedly held by this Court, as well as by the Privy Council, that the mere fact of an execution case being struck off the record does not put an end to the attachment. But without entering into any further discussion on this point, it is sufficient for us to say that the very order by which Manick Chunder's execution case was struck off contains a distinct provision to the effect that the attachment should continue in force. Manick Chunder might have misunderstood this order and asked for a renewal of the attachment, but that circumstance cannot destroy its legal effect in any manner whatever.

In the next place, the Judge has clearly found that the defendants Shumbhoo Chunder and Bhugwan Chunder are mere *benamee* holders for the Indu defendants. It has been said that this finding is not supported by any legal evidence. We have looked into the record, and we find that this plea is altogether unfounded. There is ample evidence to support the finding of the Judge, and we feel no hesitation in saying, after looking into that evidence and the surrounding circumstances of the case, that it is the only reasonable finding which could have been arrived at. This being so, it is clear that Manick Chunder's purchase must prevail over the pretended purchase set up by the defendants Shumbhoo Chunder and Bhugwan Chunder, notwithstanding the alleged priority of the latter in point of date.

But if Manick Chunder is admitted to be the rightful owner of the superior *talooks* B. and C., the question whether the *ousut talook* claimed by the plaintiff was real or fictitious becomes of no importance whatever. The plaintiff is a purchaser from Manick Chunder for a valuable consideration, and if the latter chose to carve out a new *ousut talook* from the two superior *talooks* which undoubtedly belong to him, or to deal with a fictitious *ousut talook* previously set up by his predecessors in title as a real *ousut talook*, and then to sell it to the plaintiff for a proper consideration, the plaintiff's claim for the recovery of that *ousut talook* cannot be possibly resisted upon any ground of law or of justice, either by the Indu defendants who have no rights whatever in the property, or by the pretended purchasers from them, namely, the defendants Shumbhoo Chunder and Bhugwan Chunder.

For the above reasons, we set aside the decision of the Judge and restore that of the Moonsiff. The whole costs of this litigation must be paid by the Indu defendants and the defendants Shumbhoo Chunder and Bhugwan Chunder who are jointly and severally responsible for the same.

The 15th December 1871.

Present:

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

Case No. 823 of 1871.

Rent—Sharers—Misdescription—Assignment.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 20th April 1871, *reversing a decision of the Moonsiff of Belmarhia, dated the 17th September* 1871.

Bhoobun Moye Dossee (Plaintiff) *Appellant,*

versus

Ruffick Mundul and others (Defendants) *Respondents.*

Baboo Kaleekishen Sein for Appellant.

Baboos Bhugobutty Churn Ghose and *Shushee Bhoosun Sein* for Respondents.

Plaintiff sued for rent describing herself as ho *dur mourosee jote*, and the Lower Appellate Court treated that description of her *jote* as a misdescription, because