It is contended in appeal that this calculation is made on a wrong principle.

If the plaintiff had been at the time of her purchase liable for the two Government kists of June and July, there would have been perhaps some show of reason in her contention, but the fact is that she was not so liable. When the plaintiff bought the estate on the 18th of May, there was no revenue due. It had been already paid in advance for the entire year by the *Surburakar*, and the plaintiff entered into possession free of all demands for that year. But putting aside this for the moment, the plaintiff as auction-purchaser at a sale in execution of decree brought the rights and interests of the judgment-debtor, defendant, as they stood on the 18th of May 1868. What were those rights? It seems to me that they consisted of the right to hold the estate revenue free for the remainder of the year, and to collect from the ryots the balance of the Rs. 26,830-5-4 still outstanding. It is alleged, and not denied, that the plaintiff has since entering on possession collected these moneys, amounting to Rs. 11,323-2-11.

It appears to me, therefore, that the plaintiff has, by the decree of the Subordinate Judge, got more than she had any right to ask, and that, for this reason alone, her appeal should be dismissed with costs. I think it right to add that, if there were any necessity to go into the question of assets as the Subordinate Judge has done, I should have held that his decision apportioning the receipts and payments according to the number of days each party was in possession of the estate, was a very fine and proper one, and indeed the only one that could have been come to under the circumstances.

Kemp, J.—I also think that this appeal must be dismissed. I am of opinon that the principle upon which the Lower Court has distributed the rent collected by the *Surburakar* is proper and certainly fair to the parties. The whole of the Government revenue which is payable in three kists of nearly equal amounts was paid by the *Surburakar* out of the collections before the plaintiff purchased the rights and interests of the former proprietor. The plaintiff is, therefore, entitled not to two-thirds of the collections made by the *Surburakar*, but to a share of those rents in proportion to the actual term of her proprietorship in the estate; and as it is clear that the defendant has not received more than what he is entitled to upon the above principle of division, the plaintiff's suit has been properly dismissed.

The 27th March 1872.

Present:

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

Witness—Refusal of Defendant to give Evidence—Benamee.

Case No. 46 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 30th November 1870.

Kalee Chunder Chowdhry (one of the Defendants), *Appellant,*

versus

Ranee Surut Soonduree Debia (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Gopal Lall Mitter* for Respondent.

In a suit to recover possession brought by the zemindar against one who claimed to be the *dur-putneedar*, the defendant, though allowed an opportunity to give his evidence and displace the finding of the Lower Court that his *dur-putnee* lease was not a real but a nominal transaction, refused to do so and notwithstanding that the *putneedar* and his alleged vendee who were called as witnesses for another purpose, had in some respects given evidence in support of the defendant's case, the Court nevertheless confirmed the finding of the Lower Court.

Markby, J.—In this case it appears that the plaintiff, Ranee Surut Soonduree, was the zemindar of 10 annas of Pergunnah Pookhoria, and that some time prior to the 30th November 1849, a putnee talook was granted to Anund Chunder Roy and others, which was nominally sold to one Brojonath Chuckerbutty on that date, *viz.*, the 30th November 1849.

On the 26th December 1855, a *dur-putnee* tenure of the same 10 annas share was said to have been created by the Roy *putneedars* in favor of one Nitaye Soondur. On the 16th September 1862, Nitaye Soondur executed a bond for Rs. 3,000 in favor of the defendant Kalee Chunder Chowdhry, who is also a zemindar of a 4-anna share of the zemindaree, by which bond the *dur-putnee* tenure was made security for the re-payment of the loan.

On the 22nd September 1863, Kalee Chunder obtained a decree on his bond, but it was a money decree only.

On the 24th June 1864, the plaintiff obtained a decree for certain *putnee* rents against Anund Chunder, and on the 22nd September 1864 there was a sale by the plaintiff in execution of her decree of the rights and interests of the Roy *putneedars*, at which sale she herself became the purchaser.

On the 6th March 1865, there was a sale at the instance of the defendant Kalee Chunder, and in execution of his decree of the rights and interests of Nitaye Soondur, at which sale he himself became the purchaser, and under this purchase he eventually got into possession of the land now in dispute; and the question to be determined in this suit is whether the plaintiff can recover possession as against the defendant Kalee Chunder, who holds under the above title.

One of the pleas raised by the defendant Kalee Chunder, in the first Court was that, at the time when the suit was brought against the Roy *putneedars*, and a decree for rent recovered against them, the property had long ago passed out of that family into the hands of Brojo Nath, and that therefore any title which the plaintiff based on the proceedings in that suit, and the sale in execution of the decree in that suit was worthless. But the Lower Court has found upon the evidence that the transfer to Brojo Nath was merely a *benamee* one, and that no interest really passed under it; the real owners of the *putnee* still continuing to be Anund Chunder Roy and his brothers.

On the other hand, the plaintiff made a somewhat similar allegation as regards the *dur-putnee* tenure and the proceedings by which that *dur-putnee* tenure was transferred to the defendant. It was alleged that the *dur-putnee* tenure in favor of Nitaye Soondur was a collusive transaction, or, at any rate, not a real transaction, that nothing passed under it, and that the decree obtained by Kalee Chunder was only a collusive and sham decree.

On this point, the Court below has found that the *dur-putnee* tenure at any rate was not a real transaction, and it also seems to intimate, although not quite so clearly, that the proceedings on the part of Kalee Chunder were sham proceedings. But the Court below has further expressed as its own opinion that even if the *dur-putnee* tenure were a real transaction, and it had been really transferred to the defendant Kalee Chunder Chowdhry by the proceedings in the suit on the bond, the sale to the plaintiff in execution of a decree for arrears of rent in respect of the *putnee* talook, although it was under Act X. of 1859, would not necessarily get rid of the incumbrances created by the *putneedar*, and therefore not of the *dur-putnee* tenure.

The defendant Kalee Chunder Chowdhry alone has appealed to this Court; and in this appeal he contends that the sale to Brojo Nath by the Roy defendants was a real transaction, and that the creation of the *dur-putnee* in favor of Nitaye Soondur was also a real transaction. He supports the finding of the Court below that the sale for arrears of rent would not necessarily get rid of the incumbrances created upon it by the *putneedar*; and, lastly, contends that even if the sale to Brojo Nath and the *dur-putnee* to Nitaye Soondur are not real transactions, still there is some equity as between the plaintiff and the defendant which would prevent the former from denying the validity of the *dur-putnee* tenure.

As regards the first point, *viz.*, whether or no the transfer to Brojo Nath was a real transaction, or, what is commonly called, only a *benamee* transfer for the benefit of the Roy defendants, as also as regards certain other points, we thought it desirable that persons should be examined who are more likely to know the real facts between the parties than the witnesses who have been examined in the Court below; especially we thought that Brojo Nath and Anund Chunder were persons whose evidence ought to be taken. They were accordingly called before us and examined. Anund Chunder, however, does not appear to have had so intimate a knowledge of the affairs of his family as we were led to suppose. So far as he is acquainted with them, he distinctly denies that Brojo Nath took any interest whatever under the nominal sale to him, and his evidence is certainly of weight, because, as the case stands, he is, apparently at any rate, in no way interested in this suit, he having accepted as final the decree against himself.

Brojo Nath, who must have known the truth, has also distinctly denied that he took any interest whatever under the sale. On this point, therefore, there can be hardly any doubt that we must affirm the decision of the Court below.

Another important question of fact is as to the *dur-putnee*. The Court below has, as I have already said, found that the *dur-putnee* created in favor of Nitaye Soondur like the sale to Brojo Nath was not a real but a *benamee* transaction. It is not upon this point alone, but more particularly upon this point, that we thought we ought to have the

evidence of the defendant, Kalee Chunder Chowdhry. He is not, as it was suggested, in the situation of a mere auction-purchaser as a stranger to the property. He held a 4-anna share in the zemindaree, and he advanced Rs. 3,000 on the security of the *dur-putnee* tenure. It might there be presumed that he had some general acquaintance with the affairs of the zemindaree, and may be presumed to have made some enquiry when he advanced the money; if he did so at all into the validity of the title of Nitaye Soondur, who offered the *dur-putnee* as security, and probably also, as suggested by Mr. Justice Bayley, into the title of his ostensible grantor Brojo Nath. For these reasons, we thought that the defendant himself who made the written statement ought to be examined, and we directed a summons to issue in his name to come here and give evidence.

Now, there is no doubt that of the witnesses who did appear, two, *viz.*, Anund Chunder and Brojo Nath, have given very material evidence in support of the *dur-putnee* tenure; and had their evidence been supported by that of the defendant himself, it would have been a question requiring very careful consideration as to whether the finding of the Lower Court could be supported. I must not be understood as expressing any opinion that this would have been so. I merely point out what possibly might be the effect of Kalee Chunder's evidence. But it is obvious that neither Anund Chunder who himself admits that he was for a considerable period absent from home, and was not the person who managed the affairs of the family, nor Brojo Nath who was merely a name, and who, although very intimate with the family, was not necessarily acquainted with all their affairs—it is obvious, I say, that neither of these persons, however conscientiously they may have believed their statements to be true, must necessarily be supposed to know the whole history of the transaction; and under the circumstances it seems to me impossible to attribute the absence of the defendant to any other cause than to a conviction in his mind that his evidence when given will go against the case which he wishes to establish. It must be remembered that this case has been already submitted to one Court, and that Court has come to a conclusion unfavorable to the defendant, Kalee Chunder; and I think the best that the defendant could do when he asks us to reverse the finding of the Lower Court, and to substitute for it a conclusion of fact favorable to himself, was, when an opportunity was given him which was really an act of grace on the part of the Court shown towards himself, to come here and support his case by his own evidence, he being the appellant in the cause.

It was suggested to us, and no doubt the suggestion was perfectly candid, that, being a Hindoo of rank, he would be unwilling to give evidence in a Court of Justice, but it must have been well-considered by the Legislative when they framed section 170 of the Code of Civil Procedure, what was the value of such an objection. Besides, this objection altogether falls to the ground when it is seen, as has been pointed out to us by the respondent, that, in a recent case which was taken up to the Privy Council, and the printed book of which has been produced before us, this very defendant Kalee Chunder did appear and did give his evidence in a Court of Justice. It does not, therefore, appear that there is any reason whatever that in this particular case the same defendant should decline to appear and give evidence in support of his own case, or to obey the order of the Court in which Court he seeks redress against an order passed by the Lower Court against him. We do not, however, in this case go so far as section 170, empowers us. We prefer to adopt the course taken in the case of Rajah Nursingh Deb, Marshall's Reports, page 176, which in many respects is very similar to this. We have heard all that the appellant has to say, and we only treat the refusal of the defendant as one of the incidents in the case when we consider whether we ought to reverse the finding of the Court below. The case to which I am referring was heard by Sir Barnes Peacock, C.J., and Bayley and Kemp, JJ. There Rajah Nursingh Deb was summoned into Court but he declined to come in person, making certain suggestions of prejudices as in this case. The Chief Justice, thereupon, says:—"It was the Rajah's "own case, and therefore we did not think it "necessary to order his attendance, nor is it "necessary to compel it. We simply gave "him the opportuuity of giving his own "evidence if he wished to do so, and the "defendants were allowed to give their evi-"dence if they should find it necessary. We "are told that persons of the Rajah's station "in life in this country have a prejudice "against appearing and deposing in a Court "of Justice., If prejudice is the cause "of the Rajah's non-attendance, the Court "can only regret it for his own sake and "for the cause of justice, if his case is a "true one. But he must not expect the Court

"to find that his charge against the defendants "of forgery and conspiracy is a true one "upon the evidence of menials, when he "refuses to give his own evidence upon a "matter within his own knowledge. It is not "the wish of the Court to disregard honest "prejudices, however erroneous. But they "cannot allow such prejudices to interfere "with the due administration of justice. If "parties will not come forward and give "their own evidence in cases in which such "evidence is most important, and the best "that can be obtained, they must not com-"plain if their written statement, verified by "their mookhtear, and not by themselves, and "supported by the evidence of menials and a "class of witnesses of whom any number "can be obtained to prove any fact that is "wanted, are not believed. The Court will "require the best evidence to be given, and "will not be satisfied with the evidence of "inferior witnesses put forward by the "parties themselves, while they remain in the "back ground, and plead their prejudices as "an excuse for their absence. As this rule "comes to be more generally acted upon, "fewer false causes will be put forward, and "the occupation of hired witnesses be "gone."

Looking to the great experience and knowledge of the country possessed by the Judges who delivered judgment in that case, all that I need say for my own part is that I entirely agree in that view. I think that applying the principles of that decision to this case, looking to the fact that the Court below which originally heard the case has found that the *dur-putnee* lease was not a real transaction, looking to the fact that we gave the defendant an opportunity to give his own evidence, and displace that finding if he could, and that he has refused to do so, I think that, notwithstanding the two witnesses called here have in some respects, as I have said before, given evidence in support of the defendant's case, we ought nevertheless to confirm the finding of the Court below that this *dur-putnee* tenure was merely a nominal and not real transaction. That being so, and affirming the finding of the Court below upon the two questions of fact, *viz.*, that the sale to Brojo Nath was a *benamee*, and no real transaction, and the *dur-putnee* tenure in favor of Nitaye Soondur was also a *benamee*, and unreal transaction, it is unnecessary to consider the next question raised, *viz.*, whether the sale in execution of decree of the *putnee* tenure had the effect of getting rid of the incumbrances created upon it before the sale.

The only other question is whether there is any equity which prevents the plaintiff from asserting the non-validity of the *dur-putnee* tenure. I had some little difficulty in ascertaining on what ground that equity is put; but whatever it may be, this question is determined by a passage in the judgment of the Lower Court, and we see no reason to differ from it. The Lower Court says:—"There is no proof that the plaintiff was "aware of the above transfers before the "sale for arrears of rent. The *putneedar* "Anund Chunder Roy and others did not "try to protect their rights by paying their "arrears, and hence the plaintiff purchased "the *putnee* rights at a sale held in execu-"tion of a decree for arrears of rent, in "perfect good faith, by paying down an "adequate consideration, and without being "aware of any fraud or other objectionable "circumstances." This finding, which we see no reason to disturb, entirely disposes of this last question, and the result is that this appeal should be dismissed, and the decision of the Lower Court affirmed with this modification that the plaintiff will recover mesne profits from the 1st Assin 1273, which is a date subsequent to the 31st August 1866, on which date the defendant admittedly took possession of the property.

The appellant must pay the costs of this appeal.

Bayley, J.—I quite concur in this judgment.

The 15th April 1872.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Hindoo Law—Mitakshara Family—Alienation of undivided Share—Right of Action.

Case No. 11 of 1871.

*Application for Review of Judgment passed by the Hon'ble Justices Kemp and Markby on the 18th November 1870, in Regular Appeals Nos. 170, 234, 240, 245, 238, 235, 239, 243, 244, 224 and 237 of 1866.**

Mussst. Phoolbas Kooer and another (Plaintiffs), *Petitioners,*

versus

Lalla Juggessur Sahoy and others (Defendants), *Opposite Party.*

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* 14 W. R., 339.