*The 14th January*, 1858.

PRESENT : B. J. COLVIN, A. SCONCE AND J. S. TORRENS, ESQRS., *Judges.*

CASE NO. 99 OF 1856.

Regular Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 20th December, 1855.

KORALEEPERSAUD DASS AND OTHERS (*Defendants*), *Appellants*
*v.*
NURSING CHURN SINGH AND OTHERS (*Plaintiffs*), *Respondents.*

[*Auction-purchaser—Sale for arrears of revenue—Suit by purchaser for possession—Malgoozaree lands—Assertion by person in possession that it is lakhiraj—Burden of proof on defendant—Reference to collector as to asserted lakhiraj title when necessary—Land found to be really malgoozaree—Option to defendant of engaging with purchaser as mere ryot.*]

*Held* that a suit by an auction-purchaser at a sale for arrears of revenue, which is brought against a party who has retained possession of some of the malgoozaree lands of the estate, to recover possession of the proprietary tenure of the same, is not liable to be thrown out on the assertion of the defendant, that the land was *lakhiraj*, and merely because the party suing had not laid his suit as one for resumption under Regulation II of 1819, when the result of the investigation proves that the lands were really malgoozaree.

*Held* also that there may be cases of the kind in which owing to the defence set up, a reference to the collector, as to the *lakhiraj* title asserted, may be necessary.

*Held* also under the circumstances of the case, that in such of the land in suit as the defendants were in possession as immediate ryots or cultivators they should have the option of engaging with the zemindars and holding possession merely as ryots.

*Vakeels of Appellants*—Baboos Onooocoolchunder Mookerjea and Ashootosh Chatterjea.

*Vakeels of Respondents*—Baboos Kishenkishore Ghose and Jugdanund Mookerjea.

SUIT laid at Company's rupees 4,591-13-0-6.

Messrs B. J. COLVIN and J. S. TORRENS.—Appellants are sued for possession, with wasilat, of 179-18-5 beegas of land, 100 beegas, of which they assert belong to their *lakhiraj* village of Mukoora, and the remainder to detached grants of *lakhiraj* in Eusufpore. Plaintiffs (respondents) purchased the Eusufpore zemindaree at a sale for arrears of revenue in 1837, on the default of the appellants who were the former proprietors, and the suit has been [35] brought, for possession on the ground that defendants had usurped the lands on pretext of their being *lakhiraj*, whilst they were really the malgoozaree lands of the estate, and that there was no separate village of Mukoora. The case was last before the court on an appeal from the plaintiffs on the 13th of August 1855, when orders, which the principal sudder ameen had passed dismissing the suit were reversed, such orders having been given only on the ground of defendant's long possession, and the case was remanded for re-trial with advertence to a decision before given on an appeal by defendants on the 14th of December 1852, *vide* page 1099 of the reports of the year. On that occasion, the principal sudder ameen had given a decree to the plaintiffs, as defendants could make good no *lakhiraj* title to the land as shown on a report called for from the collector. In appeal this court decided that the real issue had been overlooked in the court below ; that it did not rest on the *lakhiraj* title, but merely on the question of whether the lands in dispute were within the boundaries of plaintiff's zemindaree or defendant's *lakhiraj*. The principal sudder ameen having now deputed a moonsiff to the spot, has determined that 80 beegas of the land in suit are attached to a "ghurber", or enclosure of defendant's family residence in Makoora, and that 99-18-5 belong to the malgoozaree lands of Eusufpore.

Plaintiffs have preferred no appeal from the orders dismissing their claim as to the 80 beegas, and we have only to consider the objection put forward in respect to the lands declared to belong to Eusufpore. These objections as urged before us are, that the principal sudder ameen has not distinctly pronounced or considered whether the Eusufpore lands are *lakhiraj* or not; that plaintiffs should not properly have been admitted to sue for possession when they asserted the lands to be held as *lakhiraj* without first bringing a suit for resumption: that considering defendant's long possession there should have been no decree to oust them, nor could orders for wasilat properly be passed when plaintiffs had sued as they had without any resumption suit. Further, that even admitting the decree to be otherwise correct, it was ineffective on the point of wasilat, as there were numerous co-sharers in possession of different portions of the land claimed, and it was not defined what wasilat was recoverable from each. Respondent's pleader urges that the whole of the lands in Eusufpore for which a decree had now been given to his clients, were shown to be malgoozaree, and that even the Makoora lands had been properly liable to similar orders, as appellants had produced no good *lakhiraj* title to them; and that no appeal had been preferred merely from the inability of the plaintiffs to support further litigation. A *lakhiraj* title had been asserted to the whole and the report of the collector when the case was referred to the principal sudder ameen, would show that only one sunnud or grant had been produced covering 13 beegas and some cottas, none of which, according to [36] the entries on it lay within the Eusufpore lands. Respondents, it is insisted, have therefore title to be restored to their rights and possession in respect to the land now decreed as malgoozaree. Appellant's pleader objects to the reference to the reports of the collector, as the court in its decision on the appeal in 1852 before referred to, had determined that the case was not one which would have been sent to the collector, being simply a dispute respecting boundaries.

Under all the circumstances of this suit it would appear to us that there was a misdirection on the occasion of the remand in 1852, arising, it would seem, from the pleadings of the vakeel of the defendants in appeal, which represented the contest merely to relate to boundary. Such however is clearly shown not to have been the case. The (plaintiffs) appellants on purchase of the zamindaree, found that possession of the lands in suit was withheld from them on pretext that they were covered by *lakhiraj* grants, and that defendants had, under such grants, a proprietary title which barred the entry of the plaintiffs. Defendants met the claim by the assertion that the lands retained by them were covered by *lakhiraj* grants. Under such circumstances as the plaintiffs denied the applicability or validity of the asserted grants and maintained that the land was malgoozaree, the most conclusive and comprehensive method of bringing their claim to trial was to sue as they have done, of course at their own risk of defendant's being able to produce any grants or *lakhiraj* title which would show that there was such a tenure on their part of the lands as would render a regular resumption suit under Regulation II of 1819, necessary before they could be assessed or annexed to the *mal* lands of the estate. The necessity of a resumption suit or otherwise would thus depend on the result of that which had been brought at once for recovery of the so asserted malgoozaree lands, and if the defendants could produce a grant or grants to show that the lands had been held at settlement as *lakhiraj*, excluded from assessment, and that the question of their liability to the zemindar's claim rested only on the conditions or validity of the grants, undoubtedly then the suit for possession would be liable to dismissal. Neither does it appear in suits of this nature that any very general rule can be laid down which would bar a reference to the collectorate. The necessity of that reference is obvious

in all cases brought explicitly under section 30, Regulation II of 1819, but it seems that it may equally arise in action brought, as the present has been, when the defendants put forth, as they have done in this instance, certain grants which they allege apply to the lands in suit.

Under this view the most convenient course at this time, is to refer to the proceedings in this case, which took place before the collector, previous to the remand in 1852, as well as to the evidence, [37] documentary and otherwise, then and since brought forward. As it is not denied that the lands in Eusufpore, the subject alone of the present appeal, are within the confines of the zemindaree purchased by the appellants, it was unquestionably for defendants to show that they were, as *lakhiraj*, excluded from the settlement. As found by the collector in his report of 1850, and by the moonsiff who was deputed, on the last remand, to define the lands in Eusufpore, and those ascertained to belong to the separate village of Makoora, we do not find that any of the grants or documents put forward by the defendants cover, or at all apply to the Eusufpore lands, and it therefore must be concluded, that they belong to the malgoozaree of the estate. The court find therefore that defendants have no right to any proprietary tenure of the land, and that for the time they have remained in possession on the assertion of such tenure as opposed to that of the plaintiffs, zemindars, the latter are entitled to recover from them severally as sued, the proprietary rents due from the immediate ryots or cultivators. Defendants were in possession merely in that capacity, having the option for the future, of remaining as ryots, subject as such to the claim for rents payable immediately to the zemindar. Subject to these orders, the appeal is dismissed, appellants being liable to costs.

Mr. A. SCONCE.—I agree with my colleagues in the judgment made in this case in favour of (plaintiffs), respondents. I would merely add with respect to the orders of remand made in 1852, that in so far as 80 beegas out of the whole land sued for have been decided to belong to the separate village of Makoora, the contest between the parties may for that land not inaccurately, be described as a boundary dispute: and that the order for wasilat payable to plaintiff, should be considered to amount to the proprietary profitable interest enjoyed by the (defendants), appellants in the land or rents thereof; reserving at the same time to plaintiffs the power to follow what course they might think advisable for the purpose of determining the relative rights of the parties, in the land, as landlord and tenants.

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[38] *The 14th January*, 1858.

PRESENT: B. J. COLVIN, A. SCONCE AND J. S. TORRENS, ESQRS., *Judges*.

CASE NO. 279 OF 1856.

Regular Appeal from the decision of Nazirooddeen Mahomed, Principal Sudder Ameen of Hooghly, dated 3rd January, 1856.

NUBEENCHUNDER MOOSTUFFEE (*Defendant*), *Appellant* v. GREESHCHUNDER BOSE (*Plaintiff*), *Respondent*.

*[Res judicata—Question substantially in issue in previous suit and decided therein—Allegation of fraud and collusion—No fraud charged in plaint in subsequent suit—Decree binding until set aside—Fraud not allowed to be set up merely in argument—Subsequent suit barred.]*

The plaintiff's suit was considered by the court, in reversal of the judgment below, to be barred by section 16, Regulation III of 1793, in consequence of the same issue in