Before Mr Justice Jackson and Mr. Justice Tottenham.

MOHESH CHUNDER BANERJEE AND OTHERS (PLAINTIFFS) *v.* RAM PURSONO CHOWDRY AND OTHERS (DEFENDANTS).* 1878 *June* 15.

Co-Sharers of Patni Taluk, Liability of—Voluntary Payment—Right of Mortgagee to prevent Sale of Mortgaged Property for Arrears of Zemindari Rent.

Two out of certain co-sharers in a patni taluk executed a mortgage bond with the object of paying off a quota of the rent due on the estate. In a suit brought on the bond, to which all the co-sharers were defendants,—*held*, that the liability under the bond only extended to the co-sharers who actually signed the document, and to such of the other co-sharers as, by their presence at the time when the bond was executed, might impliedly be considered to have acquiesced in such execution.

The mortgagee of a patni taluk paid certain moneys to prevent the sale of such taluk for arrears of zemindari rent. *Held*, that this was not a voluntary payment, and could not be so considered even in the case where the mortgagee by a covenant in his mortgage-deed had insured himself against loss by such sale.

Nugender Chunder Ghose v. *Kaminee Dossee* (1) followed.

THE facts of this case appear sufficiently from the judgment of the Court.

Baboo *Rash Behary Ghose* and Baboo *Bungshi Dhur Sen* for the appellants.

Baboo *Bama Churn Banerjee* and Mr. *Adkin* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—The plaintiffs have brought the present suit to recover from the defendants Nos. 1 to 40, to whom were afterwards added certain persons passing under the name of Gisborne and Co., the sum of Rs. 6,901, due under two distinct accounts.

* Regular Appeal, No. 121 of 1877, against the decree of W. Cornell, Esq., District Judge of West Burdwan, dated the 19th of February 1877.

(1) 11 Moore's I. A., 241.

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The first part, or the sum of Rs. 1,290, is made up of the principal due upon a bond, dated 11th Aughran 1281 (26th November 1874), *viz.*, Rs. 645, and interest of a like amount due upon the same bond. The rest of the claim consisted of two amounts deposited in the Collectorate, respectively on the 13th May and 16th November 1875, to stay the sale of a patni taluk, of which the bond previously mentioned purported to give the plaintiff a mortgage, and the interest upon those two payments. The bond, out of which the rest of this claim directly or indirectly arose, appears to have been executed by the defendants 1 and 17. These two persons are said to be the direct descendants or representatives of the persons originally registered in the zemindar's sherista as owners of the patni, and in fact all the defendants who are co-sharers in the patni may be said to fall under the category of Chowdrys or Roys descended from these two houses. The occasion of bringing in Messrs. Gisborne and Co. arises from the fact that that firm has acquired, either by purchase or by lease, the rights and interests of the defendants Nos. 3, 12, 13, 14, and 16, whom accordingly they claim to represent.

The judgment of the Court below after hearing the evidence was to this effect, that, as to the principal and interest due upon the bond, the persons liable to the plaintiffs were those who signed and made the bond, and those who, being coparceners in the property mortgaged, by their presence and acquiescence, were held to have taken part in the transaction,—that is to say, the defendants Nos. 1, 2, 4, 17, 18, 19, and 22. Against these defendants the Judge made a decree for the amount due on the bond, principal and interest. As to the monies paid into the Collectorate, which formed the rest of the claim, the Judge held that those payments were voluntary, and that the plaintiffs had no charge upon the patni taluk in respect of those sums.

The plaintiffs appeal both as to the dismissal of the latter part of their claim, and also as to that part of the decision which exempts the greater number of defendants from liability under their claim. It appears to us clear that, in the circumstances under which this bond was executed, it would be impossible to hold all the defendants, owners of this taluk, liable to the plaintiffs. There does not appear to have been any authority,

either express or implied, on the part of any of the co-sharers, under which the defendants 1 and 17 could bind those persons, and therefore, we think that the Judge is quite right in limiting the liability under the bond to the actual signatures and other defendants who were present and might be taken to have acquiesced in the execution of the bond and in the contracting of the loan, and for whose benefit in fact the loan was taken. It was suggested that even in this view of the case the number of defendants against whom the decree could be passed might have been extended. But it seems to us that the Judge has gone quite as far as he could as to the number of such defendants. So far, we think the decision of the Judge was correct.

The other and somewhat less simple part of the case is as to the character of the payments made by the plaintiffs on account of the zemindar's rent. It was contended on the part of two sets of respondents, and in particular on behalf of those defendants who are called Messrs. Gisborne and Co., that although it could not be denied, regard being had to the strong opinion expressed by the Judicial Committee of the Privy Council in the case of *Nugender Chunder Ghose v. Kaminee Dossee* (1), that the payment of revenue due to the Government upon a taluk by the mortgagee, being a person having such an interest in the taluk as entitled him to pay the revenue due, entitles such mortgagee to a charge on the taluk as against all persons interested therein for the amount so paid; and further that a like principle or like considerations would apply to a case of payment of zemindar's rent by a person having an interest in the patni, the old Sale Law, Act I of 1845, and Reg. VIII of 1819, being alike silent as regards any specific provision to this effect, yet that such principle would not apply to a case where the mortgagee was already protected in any manner so that in fact the omission to pay the Government revenue or the patni-rent would not involve a loss of his advance; and it was suggested that in the present case such protection was in fact provided for the mortgagee by a stipulation in the bond that, in the event of a sale for arrears of the zemindar's rent, the lender, mortgagee, should be entitled to a first charge upon the surplus

(1) 11 Moore's I. A., 258.

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proceeds of the sale. Mr. Adkin, who laid this argument before us with much ability, was unable to refer to any authority on this question of principle; and in point of fact it does not appear to us that the circumstance of a mortgagee having provided or attempted to provide some protection to himself of the kind referred to in the suit would deprive him of the benefit of those equitable considerations for which authority is derived from the decision in the case of *Nugender Chunder Ghose* v. *Kaminee Dossee* (1).

But further it appears pretty plainly on an examination of the case that in fact the so-called protection contained in this bond was really no protection at all, and placed the plaintiffs in no better position than they would have been in, if no such condition had been inserted. It only purports to say, "if the aforesaid lot be sold at auction for arrears of rent, then you shall realize the amount with interest from the surplus sale proceeds of the aforesaid lot, and we shall have no objection against it." Whether or not such words could be considered as constituting a charge upon the property, it seems clear that, in the event of a sale, the surplus could only be dealt with in accordance with the terms of cl. 4, s. 17 of Regulation VIII of 1819, that is to say, "held in deposit to answer the claims of the talukdars of the second degree, or of others who, by assignment of the defaulter, may be at the time in possession of a valuable interest in the land composing the taluk sold or any part of it. We think, therefore, that the plaintiffs in this case had an interest to protect. They had not merely a right to recover the amount of their advance, but they held a mortgage to a certain extent over this property which, in the event of nonpayment of the sum advanced, might have been sold for it. It appears to us, therefore, that the payments made by the plaintiffs to prevent the sale of this taluk, under the Putni Sale Law, were not voluntary payments, but constituted a good charge on this property; and it makes no difference for this purpose whether the suit upon the bond is followed by a decree as against all the defendants sued or against a part of them. In the latter case, the plaintiffs will stand in the same position as if they had a mortgage of an

(1) 11 Moore's I. A., 258.

undefined share of the property and that interest would authorize them to make the payment which they did. That part of the judgment, therefore, must be set aside. (Ultimately the case was remanded for trial of an issue irrelevant to the report.)

Appeal allowed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

KHUGGENDER NARAIN CHOWDHRY AND OTHERS (DEFENDANTS) *v.* SHARUPGIR OGHORENATH (PLAINTIFF).*

1878 *Dec.* 12.

Hindu Law—Succession to the Property of Ascetics.

The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely upon fellowship and personal association with that other, and a stranger, though of the same order, is excluded.

THIS was a suit to establish a claim to possession of about 310 bigas of land, and for a declaration of the right of the plaintiff to manage the worship of the idol Mahadeb, as successor and heir of certain shebaits who had purchased the land for the purpose of maintaining the worship of the said idol. The plaint stated that Jograjgir was shebait until the year 1268 (1861), when he disappeared taking the deed of endowment with him; that the defendants then took the land into their own hands, and assisted in the management of the worship of the Mahadeb for five years; that, since the month of Falgoon 1278 (February 12th to March 18th, 1872) the plaintiff had performed the worship and had been employed as shebait; and that, by duly performing the work, he had been in possession of the idol and his dwelling-house; and that the defendants had consented thereto. The plaintiff contended that, according to the Hindu shastras, in the absence of the former shebait, as his heir and as the person performing the worship of the Mahadeb, he was entitled to obtain possession of the disputed land as shebait.

* Appeal from Appellate Decree, No. 207 of 1878, against the decree of W. E. Ward, Esq., Judge of the Assam Valley District, dated the 12th of November 1877, affirming the decree of A. C. Campbell, Esq., Officiating Deputy Commissioner of Goalparah, dated 21st of March 1877.