APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1895 *March* 27.

ASSANULLA KHAN BAHADUR (PLAINTIFF) *v.* TIRTHABASHINI AND OTHERS (DEFENDANTS).*

Chowkidari Tax—Village Chowkidars Act (Bengal Act VI of 1870)—Suit for arrears of chowkidari tax payable by putnidar under putni settlement—Abwab—Rent—Bengal Tenancy Act (Act VIII of 1885), sections 3, (5), 74—Regulation VIII of 1793, sections 54, 55—Regulation V of 1812, section 3—Act VIII of 1869, section 11—Second Appeal—Civil Procedure Code (Act XIV of 1882), section 586.

In a suit for arrears of chowkidari tax, payable by the *putnidar* under the *putni* settlement, the defence was that it was an illegal cess, and could not be legally recovered.

Held, that as the payment of the chowkidari tax was one of the terms of the *putni* settlement itself, which was entered into between parties competent to contract, and was made for valuable consideration, and the *putni* Regulation declares that *putni taluks* "shall be deemed to be valid tenures in perpetuity according to the terms of the engagements under which they are held," and, moreover, as the amount which the *putnidar* agrees to pay as chowkidari tax, is paid quite as much on account of the occupation of the property as that which is expressly called the rent, and is part of the ground rent quite as much as the latter, it is not an *abwab*, and is, therefore, recoverable.

Surnomoyee Dabee v. *Koomar Purresh Narain Roy* (1) followed.

Tilukdhari Singh v. *Chulton Mahton* (2), and *Radha Prosad Singh* v. *Balkowar Koeri* (3), distinguished.

Pudmanund Singh v. *Baij Nath Singh* (4), referred to.

Held, also (upon the objection of the respondents, that the suit being one of the nature cognizable by a Small Cause Court, and valued at less than Rs. 500, no second appeal would lie under section 586 of the Code of Civil Procedure) that as the consideration for the payment of the chowkidari tax is the occupation or the holding of the *putni* tenure, and as the payment is to

* Appeal from Appellate Decree No. 198 of 1894, against the decree of Babu Brojo Behari Shome, Officiating Subordinate Judge of Tipperah, reversing the decree of Babu Nikunjo Behari Roy, Munsif of Moorshidabad, dated the 8th of September 1892.

(1) I. L. R., 4 Calc., 576.
(2) I. L. R., 17 Calc., 131.
(3) I. L. R., 17 Calc., 726.
(4) I. L. R., 15 Calc., 828.

be made periodically to the zemindar by the *putnidar*, and the amount agreed to be paid is lawfully payable, it comes within the definition of rent in the Bengal Tenancy Act, and, therefore, a second appeal would lie.

Dheraj Mahtab Chund Bahadoor v. *Radha Binode Chowdhry* (1), *Erskine* v. *Trilochun Chatterjee* (2), *Watson & Co.* v. *Sreekristo Bhumick* (3), and *Rutnessur Biswas* v. *Hurish Chunder Bose* (4) referred to.

THIS appeal arose out of an action for recovery of chowkidari tax brought by the plaintiff against the defendant upon a registered contract. The plaintiff's allegation was that an eight-annas share of a certain zemindari was let out in *putni* lease to the defendant, and by the terms of the said lease he (the defendant) was bound to pay half of the salary of the village chowkidars, and that the amounts for the years 1294 to 1298 were paid by him (the plaintiff). The amount claimed was less than Rs. 500. The defence was that chowkidari tax was never paid by the defendant, that there was only one chowkidar in the *mouza*, and his pay was included in the rent, and that a portion of the claim, *i.e.*, with respect to 1294, was barred by limitation. The Court of first instance decreed the suit holding that under the registered lease the defendant was bound to pay the chowkidari tax. On appeal the Subordinate Judge dismissed the suit of the plaintiff, holding that the stipulation to pay the chowkidari tax payable by the zemindar was an agreement to pay an *abwab*, and consequently not recoverable under the law.

From this decision the plaintiff appealed to the High Court.

Babu *Sreenath Dass* and Babu *Bussunt Kumar Bose* for the appellant.

Babu *Akshoy Coomar Banerjee* for the respondents.

Babu *Akshoy Coomar Banerjee* took a preliminary objection, on the ground that as the amount claimed being the amount paid by the appellant, which was payable by the defendant under a contract, as alleged by the plaintiff, that the suit was one cognizable by a Small Cause Court, and being less than Rs. 500, no second appeal would lie. See *Dheraj Mahtab Chund Bahadoor* v. *Radha Binode Chowdhry* (1), *Erskine* v. *Trilochun Chatterjee* (2).

(1) 8 W. R., 517. (2) 9 W. R., 518.
(3) I. L. R., 21 Calc., 132. (4) I. L. R., 11 Calc., 221

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Babu *Sreenath Dass*.—This is not a suit of the nature cognizable by a Small Cause Court. It is a suit for rent. Contracts of the nature under consideration are excepted from the cognizance of a Small Cause Court by clause (10), Schedule II of the Provincial Small Cause Courts (Act IX of 1887). See *Watson & Co.* v. *Sreekristo Bhumick* (1).

Chowkidari tax is not an *abwab*, and can be recovered legally. The case of *Radha Prosad Singh* v. *Balkowar Koeri* (2), relied upon by the lower Appellate Court, does not apply. It is recoverable under Act VI of 1870, and it is with reference to this Act the zemindars enter into contracts with *putnidars* for payment of the chowkidari tax; therefore it is not illegal. For instance, *dâk* tax and road-cess, though they are not rent, still are recoverable, not being *abwabs*. The question is whether chowkidari tax is legally recoverable, there being consideration for the contract. I submit it is. The Full Bench case of *Radha Prosad Singh* v. *Balkowar Koeri* (2) does not cover a case of this nature. Here the party originally enters into a contract, and makes himself liable to pay the tax: he is bound to pay it. It cannot be regarded as not legally recoverable, as it is recoverable under the Chowkidars Act (VI of 1870). Anything added to the original contract cannot be called an *abwab*, and this was included in the original settlement. The *putni* rent is the aggregate of all the rents fixed at the time of the settlement, as well as other impositions payable by the landlord in future on account of the demand of Government.

Babu *Akshoy Coomar Banerjee* in reply.—The plaintiff cannot recover the chowkidari tax, as it is an *abwab*. An *abwab* means anything over and above a definite sum which is agreed to be paid as rent. Anything indefinite is an *abwab*. In this case the amount is most uncertain. What is an *abwab* and what is rent is very difficult to distinguish. Anything that is paid in addition to the fixed rent is an *abwab*. See *Radha Prosad Singh* v. *Balkowar Koeri* (2) at p. 759 of the report. An *abwab* is something other than rent; this is certainly not rent. Plaintiff's case is, that because the amount, which was payable by the defendant, was paid by

(1) I. L. R., 21 Calc., 132.
(2) I. L. R., 17 Calc., 726.

him, the cause of action arose in each instalment as it fell due. The plaintiff does not claim it as rent. If it is held that the amount claimed is not an *abwab*, the case must go back for determination, whether a portion of the claim is barred by limitation or not.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiff appellant, who is the zemindar of *mouza* Panch Pukhuria, to recover from the defendants respondents, *putnidars* under him of an eight-anna's share of the *mouza*, a sum of money payable to him under the terms of the *putni* settlement on account of a moiety of the chowkidari tax of the *mouza* for certain years.

The defence was that a part of the claim, namely, that for the year 1294, was barred by limitation ; that the amount claimed on account of the chowkidari tax is in excess of what is really payable annually, and has hitherto been paid to and received by the plaintiff ; and that he is not entitled to claim any interest.

The first Court overruled the plea of limitation, holding that the claim was not one for rent, but was one based on a registered contract ; and having found for the plaintiffs on the merits, it decreed the claim in full.

On appeal, the defendant for the first time raised the objection that the agreement to pay the chowkidari tax was void in law, as it was an agreement to pay an *abwab ;* and the lower Appellate Court has allowed the objection and dismissed the suit.

In second appeal it is contended for the plaintiff appellant, that the lower Appellate Court is wrong in law in holding that the amount claimed in this case is in the nature of an *abwab*, while the defendants respondents take a preliminary objection that the second appeal is barred by section 586 of the Code of Civil Procedure, the suit being of the Small Cause Court class and the amount claimed not exceeding Rs. 500.

It is necessary to consider the preliminary objection first.

In support of his objection the learned vakil for the respondents relies upon the cases of *Dheraj Mahtab Chund Bahadoor* v.

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Radha Binode Chowdhry (1) and *Erskine* v. *Trilochun Chatterjee* (2). On the other hand, Babu Sreenath Dass, for the appellant, contends, on the authority of the case of *Watson & Co.* v. *Sreekristo Bhumick* (3), that the claim is one for rent, and is, therefore, excepted from the cognizance of a Small Cause Court by clause 8 of the second Schedule of the Mofussil Small Cause Courts Act (IX of 1887).

The two cases cited for the respondents do not appear to us to be exactly similar to the present, and upon the facts of this case we think the claim must be regarded as one for rent. In the first of the two cases cited above for the respondents, the facts are not set out in the report; and in the other case we learn from the judgment that it was "a suit by the zemindar against his *putnidars* founded upon the contract between the parties for the recovery of a sum of money which had been expended by the zemindar in the way of zemindari *dâk* charges, which expenses, it was alleged, the *putnidar* was bound by his contract to bear." This would go to shew that the contract in that case was one by which the *putnidar* undertook to pay the *dâk* charges, and that he not having done so, the zemindar had to undergo the expense and to sue for the money. If that was so, and if the contract was not to pay the amount to the zemindar in the first instance, the claim could not have been regarded as one for rent, and was rightly treated as one for compensation for the breach of contract. See *Rutnessur Biswas* v. *Hurish Chunder Bose* (4), and the suit was properly held to be one of the Small Cause Court class. In the present case the contract between the parties, which is to be found in the *putni kabuliat* itself, is that the *putnidars* shall pay to the zemindar the chowkidari tax, which the latter has to pay. The consideration for the payment is the occupation of the land or the holding of the *putni* tenure; and the payment is to be made periodically to the zemindar by the *putnidar*. An amount so agreed to be paid comes, in our opinion, within the definition of rent in the Bengal Tenancy Act, provided it is lawfully payable, as was held in the case of *Watson & Co.* v. *Sreekristo Bhumick* (3).

(1) 8 W. R., 517.
(2) 9 W. R., 518.
(3) I. L. R., 21 Calc., 132.
(4) I. L. R., 11 Calc., 221

That it is lawfully payable will be seen later on. The suit was not, therefore, one of the Small Cause Court class, and the preliminary objection must consequently be overruled.

Coming now to the contention of the appellant that the amount claimed in this suit is not of the nature of an *abwab*, we must hold that it is well founded, and that the Court of Appeal below is wrong in dismissing the suit, on the ground of its being one for the recovery of an illegal cess.

The stipulation by the *putnidars* to pay to the zemindars the amount payable by him on account of the chowkidari tax of the *mouza* let out in *putni*, is one of the terms of the *putni* settlement itself; it is entered into between parties competent to contract, and is made for valuable consideration; and the *Putni* Regulation VIII of 1819, in section 3, distinctly declares that *putni taluks* "shall be deemed to be valid tenures in perpetuity according to the terms of the engagements under which they are held." That being so, let us see how far the provisions of the law prohibiting the imposition of *abwab* and other cesses, affects this otherwise valid stipulation. At the time when the stipulation was entered into, that is, in 1881, the law relating to *abwabs* was to be found in sections 54 and 55 of Regulation VIII of 1793, section 3 of Regulation V of 1812, and section 11 of Bengal Act VIII of 1869; and since the repeal of those enactments by the Bengal Tenancy Act, the same provisions have in substance been re-enacted in section 74 of the last-mentioned Act.

Section 54 of Regulation VIII of 1793 recommended the consolidation of existing *abwabs* with the rent proper or *asul jama*, within a certain time, and section 55 prohibited the imposition of any new *abwabs* on ryots. These provisions related to ryots only, and could not affect intermediate tenure-holders like *putnidars*. Section 3 of Regulation V of 1812, which was the provision applicable to the stipulation now under consideration, after authorising proprietors of land to grant leases to their dependent *talukdars*, under-farmers, and ryots in any form the contracting parties might think fit, prohibited the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathaut*, or any other denomination, and declared "all stipulations or reservations of that nature"

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to be null and void. And section 11 of Bengal Act VIII of 1869 made a landlord exacting any *abwab* liable in damages not exceeding double the amount exacted. Section 74 of the Bengal Tenancy Act, which now in effect takes the place of these provisions, enacts that "all impositions upon tenants under the denominations of *abwab*, *mathaut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

It seems to us to be clear from these provisions of the law, that what they are intended to prohibit is the imposition upon tenants of *abwabs* and other cesses of a like nature in addition to the actual rent fixed by custom or contract. And the reason why the law prohibits these impositions, notwithstanding that they may be voluntarily agreed to, is (as may be gathered from the earlier provisions on the subject, that is, Regulation VIII of 1793, sections 54, 55, and Regulation V of 1812, section 3) that they are of an arbitrary and vexatious character, and have an indirect and insidious effect in raising the rent to an oppressive extent. It is well known that in the case of an existing tenancy at a rent fixed by contract or by custom, if the landlord wishes to raise the rent, and the tenant objects, the parties very often come to an arrangement by which the tenant agrees to pay something which is apparently only occasional and temporary, in addition to the rent, being deluded by the notion that the rent, which is the permanent burden, remains unchanged, and the landlord agrees to accept the additional item, being encouraged by the hope that the increment once paid will be continued indefinitely. So also when a new tenancy is created, the landlord often finds it difficult to induce the tenant to accept a rate of rent higher than the customary rate, though he may be found willing to pay additional items as cesses. And it is matter of history, as we learn from the Revenue Records of the time of the Permanent Settlement, from which extracts are given in the judgment of Mr. Justice O'Kinealy in *Radha Prosad Singh* v. *Bulkowar Koeri* (1), that these arbitrary and indefinite impositions were found to have grown to

(1) I. L. R., 17 Calc., 726 at p. 740.

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such an oppressive extent as to call for the interference of the Legislature.

But neither the reasons nor the terms of these prohibitory rules, neither the spirit nor the letter of the law, can have any application to a case like the present, regard being had to the character of the tenancy and the nature of the so-called additional item of demand.

The tenancy here is a *putni* of a *mouza*, and from the very nature of the tenure and by the terms of the settlement, the tenant becomes entitled to all the future profits of the *mouza*, whether by enhancement of the rents of tenants, or by extension of cultivation by reclaiming waste lands, and the landlord practically turns himself into an annuitant upon his zemindari receiving a fixed sum from the *putnidar* as his annual income from the zemindari. This amount is called the fixed *jama* or rent in the *kabuliat* and it includes the Government revenue (which is itself a fixed sum) payable by the zemindar on account of his *mouza*. But besides the Government revenue, the zemindar has to pay other dues to the Government or to its officers, amongst which the chowkidari tax, the item in dispute, is one, and with a view to leave the zemindars clear profit from the *mouza* settled in *putni* unaffected by his liability to pay these dues, the arrangement is that the *putnidar* shall also pay to the zemindar the amount of this tax among others. And this amount is not consolidated with the fixed *jama* for this obviously harmless reason; that it is not itself fixed, being liable to variation, not by the will of the zemindar, but under the provisions of the law by which it is imposed [Bengal Act VI of 1870.] There is nothing unfair or improper in this arrangement, nothing that contravenes the policy of the law in prohibiting the imposition of *abwabs*. The zemindar, who transfers to the *putnidar* all his rights to future increase of profits from the *mouza*, may justly require the *putnidar* to pay him money enough to enable him to pay all taxes or cesses imposed upon him on account of his owning the zemindari, and the *putnidar* naturally agrees to this. The amount he agrees to pay to the zemindar on account of the chowkidari tax is paid quite as much on account of the occupation of the land of the *mouza* by him as that which is expressly called the rent, and is part of the

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ground rent quite as much as the latter. Though the one is kept separate from, it is no subsequent addition to, the other. They are both simultaneously fixed as parts of the return to be made by the tenant for holding the tenure, and the reason for their being kept separate, as stated above, is one that does not offend against the principle of the law upon which the prohibition of *abwabs* is based. A stipulation for the payment of such an amount cannot, we think, be regarded as one for the "imposition of an arbitrary or indefinite cess," within the meaning of section 3 of Regulation V of 1812, or for an imposition "under the denomination of *abwab*, *mathaut*, or other like appellation in addition to the actual rent," within the meaning of section 74 of the Bengal Tenancy Act, for this simple reason, that the imposition here depends primarily, not upon the will of the zemindar, but upon law of the land [Bengal Act VI of 1870]. It is this Act which imposes the liability on the zemindar, and the zemindar merely stipulates with the *putnidar* when granting the *putni* that the latter should, among other sums, regularly pay him the amount levied from him under the Act. Of course, if the Act contained any prohibition against such stipulations as the English Property Tax Act (5 and 6 Vict., c. 35, s. 103) does, they would have been void. But in the absence of any such prohibition, there can be no reason for saying that the stipulation is illegal. See *Surnomoyee Dabee* v. *Koomar Purresh Narain Roy* (1).

It was contended by the learned vakil for the respondents that the mere fact of the amount claimed on account of chowkidari tax not being consolidated with what is called the fixed *putni jama* or rent in the *kabuliat*, but being kept separate, was enough to render it an *abwab*, and therefore illegal and not recoverable; and in support of this broad proposition the cases of *Tilukdhari Singh* v. *Chultan Mahton* (2) and *Radha Prosad Singh* v. *Balkowar Koeri* (3) were relied upon. No doubt there are passages in some of the judgments delivered in these cases which, taken alone, might appear to lend support to the respondent's contention. But upon

(1) I. L. R., 4 Calc., 576.
(2) I. L. R., 17 Calc., 131.
(3) I. L. R., 17 Calc., 726.

a careful consideration of those cases, we think they are clearly distinguishable from the present, and do not touch the question now before us.

In the case of *Chultan Mahton* (1), the question referred to the Full Bench was whether certain items, which were admitted by the plaintiff himself to be *abwabs*, were legally recoverable by reason of their having been paid for a good many years, and both the Full Bench and the Privy Council, before which the case was taken up in appeal, answered that question in the negative. Mitter, J., in his judgment, which was concurred in by the majority of the Full Bench, no doubt says that the only thing recoverable under Regulation V of 1812 "is the amount which is by the contract fixed as the rent payable to the landlord." But in an earlier part of the judgment he has taken care to premise that the Regulations do not define an *abwab*; and that the question, whether any particular item is an *abwab*, is left to be determined by the Court in each case. The Privy Council affirmed the decision of the Full Bench, simply on the ground that the amounts claimed being old *abwabs*, and not having been consolidated, were not recoverable under Regulation VIII of 1793.

In *Radha Prosad Singh* v. *Balkowar Koeri* (2), the question referred to the Full Bench was whether certain portions of the claim denominated *sarak*, *neg* and *khuruch*, were illegal cesses or whether they were recoverable as rent by reason of their having been paid for a long time. The Full Bench answered the first part of the question in the affirmative, and the second in the negative; and the majority of the learned Judges took the same view of Regulation V of 1812 that the Full Bench in *Chultan Mahton's* case (1) did. The fact of the Full Bench having overruled the decision in the case of *Pudmanund Sing* v. *Baij Nath Singh* (3), which was in some, but not all, respects similar to the present case, no doubt furnishes an argument in favour of the respondent; but that argument is not conclusive, because the majority of the Full Bench base their conclusion that *Pudmanund Singh's* case (3) was wrongly decided, not upon the ground that the items there claimed

(1) I. L. R., 11 Calc., 175; I. L. R., 17 Calc., 131.
(2) I. L. R., 17 Calc., 726.
(3) I. L. R., 15 Calc., 828.

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and allowed, were kept separate from the amount styled the rent, and were therefore not recoverable, but upon the ground that they were from their very nature no part of the ground rent, the items being *salami* and *tehwari*. And Mr. Justice O'Kinealy, whose judgment appears to be the one that was concurred in by the majority of the Full Bench, adopts the following as the correct definition of the term *abwab*:—

"This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *asul* or original standard rent in the nature of addition thereto." Such a definition, as we have pointed out above, would be wholly inapplicable to the present claim. The learned Chief Justice, it is true, says in his judgment that, according to the decision of the Privy Council in *Chultan Mahton's* case (1) under the Regulations, nothing could be recovered for the occupation of land, except one sum, which must include everything which was payable for such occupation, arrived at, either by agreement or by some judicial determination between the parties; but this observation must, we think, be taken to be limited in its application to the class of cases which his Lordship and the Judicial Committee were then dealing with, which were cases in which the disputed items were either admittedly, or in their nature, *abwabs*, and could be legalized only on the ground of being consolidated with the *asul* or ground rent. That, however, is not the nature of the item now in dispute.

These cases do not, therefore, in any way decide the question now before us, which is whether an amount agreed to be paid by a *putnidar* to the zemindar on account of chowkidari tax is an *abwab*, though there are no doubt *dicta* laid down in the judgments of some of the learned Judges which might be construed to bear upon that question. We are not aware of any case in which a claim like the present has been considered illegal and untenable. On the contrary, a claim similar to the one now under consideration, was allowed as legal in the case of *Surnomoyee Dabee* v. *Koomar Purresh Narain Roy* (2) already

(1) I. L. R., 11 Calc., 175; I. L. R., 17 Calc., 131.
(2) I. L. R., 4 Calc., 576.

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referred to. That case seems to us to be quite in point and fully supports the view we have taken above.

In the above view of the case it becomes unnecessary to consider the effect of section 179 of the Bengal Tenancy Act, which enacts that "nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokurari* lease on any terms agreed on between him and his tenant." There is, no doubt, some repugnancy between this section and section 74 of the Act, but whether, following the principle enunciated by Lord Justice James in *Ebbs* v. *Boulnois* (1), we regard the latter, which is a special provision, as a qualification of the former, which is a general one, or, adopting the rules stated by Keating, J., in *Wood* v. *Riley* (2), that of two repugnant clauses in a Statute the last must prevail, give effect to the latter, there seems to be good reason for thinking that section 179 is not controlled by section 74. But, as we have said above, we need not discuss this point any further.

For the foregoing reasons, we think the decision of the lower Appellate Court that the amount claimed is in the nature of an *abwab*, and therefore not recoverable, is wrong in law. But as we hold that the claim is one for rent, part of it, namely, that for 1294, must be held to be barred by limitation. Moreover, as we gather from the plaint that there was a previous suit for rent, so much of the amount now claimed as had accrued due at the date of the institution of that suit, must be held to be barred by section 43 of the Code of Civil Procedure.

The result is that the decree of the lower Appellate Court must be set aside, and the case remanded to that Court to determine how much of the claim is barred for the two reasons indicated above, and to decide the other points raised in the appeal before it.

S. C. G. *Appeal allowed and case remanded.*

(1) L. R., 10 Ch. App., 479 (484.)
(2) L. R., 3 C. P., 26 (27.)