

1894
 GOPENDRO
 CHANDER
 MITTER
 v.
 MOKADDAM
 HOSSAIN.

aside, and the case will be sent back to that Court for the trial of the other questions raised in appeal.

The appellants are entitled to the costs of this appeal.

Appeal allowed and case remanded.

H. T. H.

mokurari lease which the defendant and his ancestors had held at fixed rates from the Permanent Settlement, and which they have similarly held at the same fixed rate from the date of the *pottah* to the present day. We have examined the terms of the *pottah*, and we find that the statement of the defendant is correct. The *pottah* is not a new lease created by the *putnidar* who gave it. The *pottah* bears evidence that the lease had been then in existence for at least one generation; that it was in 1217 an ancestral perpetual lease at a fixed rate of rent; and that the former *putnidar* did not create it, but merely confirmed it. The plaintiff cannot void his lease under Regulation VIII of 1819, unless it is shown to have been created by a former *putnidar*. In the absence of any proof to that effect the provisions of Act X of 1859 will apply, and the *pottah* is itself convincing evidence that for more than fifty years the defendant and his ancestors have held this land at a fixed rate of rent. The plaintiff's claim to enhance rent cannot therefore be admitted. The Judge was right in dismissing the appeal made to him. We also dismiss the plaintiff's appeal with all costs and interest.

(Sd.) W. S. SETON KARR.

(Sd.) E. JACKSON.

31st August 1861.

Before Sir W. Comer Petheram, Knight, Chief Justice, and
 Mr. Justice Ghose.

1894
 April 2.

NOBIN CHAND NUSKAR (PLAINTIFF) v. BANSENATH PARAMANICK
 (DEFENDANT).*

Bengal Tenancy Act, 1885, sections 3 clause 5, 65, 161—Sale of tenure for arrears of road cess under decree—"Rent"—Road Cess—Cesses—Incumbance by defaulting tenant, Effect of sale in execution of decree for road cess on.

The word "rent" in section 65 of the Bengal Tenancy Act, 1885, includes road cess payable by the landlord.

A tenure-holder granted a usufructuary mortgage of certain lands within his tenure to A, and directed the tenants to pay their rents to him. Subsequently the superior landlord brought a suit for road cess against the tenure-holder, and in execution of his decree sold the tenure under section

* Appeal under section 15 of the Letters Patent No. 29 of 1893 against the decree of the Hon'ble Robert Fulton Rampini, one of the Judges of this Court, dated 31st July 1893, in appeal from Appellate Decree No. 1701 of 1892.

65 of the Bengal Tenancy Act. *A* then brought a suit against one of the tenants for arrears of rent, and contended that all that passed under the auction sale was the right, title and interest of the tenure-holder, and that his rights under the mortgage were unaffected by the sale, and that he was still entitled to the rent.

Held that Chap. XIV of the Bengal Tenancy Act must be read with section 65 of the Act, and that, having regard to the definition in clause 5 of section 3, "rent," as used in that section, includes road cess payable by the tenant, and that the sale was a sale of the tenure, the purchaser acquiring the property free from the incumbrance created by the tenure-holder in favor of *A*, it not being a registered and notified incumbrance within the meaning of section 161 of the Act.

THIS was an appeal under section 15 of the Letters Patent against a decree of Mr. Justice Rampini, dismissing an appeal from a decree of the additional Subordinate Judge of the 24-Pergunnas, which modified the original decree passed in the suit by the additional Munsif of Diamond Harbour.

The suit was instituted by the plaintiff to recover arrears of rent in respect of certain lands, of which, along with others, he alleged that he had taken a usufructuary mortgage from one Tripura Sundary Dabi, who admittedly held a tenure of the lands. It appeared from the pleadings and evidence in the suit that the defendant had executed a *kabuliat* in favor of Tripura Sundary on the 24th Magh 1290 (6th February 1884), in respect of 3 *bighas* 19 *cottahs* and 15 *chittacks* of land at an annual *jama* of Rs. 17; that on the same day Tripura Sundary executed a mortgage in favour of the plaintiff for these lands and others amounting in all to some 14 *bighas* and odd, and directed the tenants to pay rent to the plaintiff; that the plaintiff had realized rent from the defendant up to 1294 (April 1888), but the latter had not paid him any since. The plaintiff sued for rent at the above-mentioned rate for the period from 1295 to Pous 1297 with cesses and damages aggregating the sum of Rs. 60.

The defendant admitted the execution of the *kabuliat* in favor of Tripura Sundary, but stated that out of the lands held by him the portion situate in *mouzah* Kalikar, consisting of 2 *bighas* 12 *cottahs* and 7 *chittacks*, had been sold in execution of a decree for rent obtained by the zemindar against Tripura Sundary and purchased by one Noyan Chand Halidar, who had since been realizing the rent in respect thereof from him, and that as regarded the

1894

NOBIN
CHAND
NUSKAR2.
BANNENATH
PARAMANICK.

1894

NOBIN
CHAND
NUSKAR
v.

BANSENATH
PARAMANICK.

remaining 1 *bigha* 17 *cottahs* and 8 *chittacks* which was situate in other villages he still held possession thereof under Tripura Sundary and was paying her rent, for he had no notice of the alleged mortgage.

The evidence in the case showed that Tripura Sundary held a tenure in Kalika including the 2 *bighas* 12 *cottahs* 7 *chittacks* under the zemindar Peary Mohun Roy, who obtained a decree for road cess against her, and in execution of that decree caused the tenure to be sold at auction in 1888. Noyan Chand Haldar became the purchaser, and having obtained the sale certificate got possession of the land, including the 2 *bighas* 12 *cottahs* and 7 *chittacks*, covered by the defendant's *kabuliat*, through the Court, and after having obtained such possession he took a *kabuliat* from the defendant in respect of that portion. Evidence was given in the suit that the defendant had paid rent to the auction-purchaser for the period in suit, in respect of the land purchased by him, and had paid rent to Tripura Sundary after the date of the mortgage in respect of all the land he held down to the date of the auction purchase, and after that date in respect of the balance of the land covered by the *kabuliat*, but the evidence as to the payment to Tripura Sundary was disbelieved by the Munsif, who also did not consider that the payment to Noyan Chand Haldar was satisfactorily proved.

The Munsif held that the auction-purchaser, by virtue of his purchase, only acquired the right, title and interest of the judgment-debtor, or, in other words, the equity of redemption of Tripura Sundary, and that the defendant was bound to pay rent for the whole of the land held by him to the plaintiff, at any rate until the auction-purchaser established his claim against the plaintiff by regular suit. He accordingly decreed the claim in full.

The Subordinate Judge found that the payment of rent by the defendant to the auction-purchaser was proved, and that the decree for road cess had the same effect as a decree for rent; and that, therefore, the defendant was absolved from paying any further rent to the plaintiff in respect of those lands after the auction sale. He accordingly varied the decree of the lower Court, holding the defendant only liable to the plaintiff in respect of the 1 *bigha* 7½ *cottahs* and dismissing the plaintiff's suit in respect of the remainder of his claim.

The plaintiff then appealed to the High Court, and the appeal was heard by Mr. Justice RAMPINI who delivered the following judgment :—

“ This is a suit for arrears of rent.

“ A preliminary objection has been urged that, under the provisions of section 153 of the Bengal Tenancy Act, no second appeal lies in this case, inasmuch as the amount claimed in suit does not exceed Rs. 100. It appears to me, however, that a second appeal does lie in this case, inasmuch as the question of the amount of rent annually payable by the tenant has been decided in it. The plaintiff claimed under a usufructuary mortgage to be entitled to the full rent of the tenure, namely, Rs. 17 per annum. The Subordinate Judge has held that he is not entitled to this amount, but to a less amount, inasmuch as a part of the tenure has been sold in execution of a decree for road cess, and has passed into the hands of a third party, named Noyan Chand Haldar. Therefore it would appear that in accordance with the ruling in *Aubhoy Churn Maji v. Shoshi Bhusan Bose* (1), approved of by a Full Bench decision in *Narain Mahton v. Manofi Pattuk* (2), a second appeal will lie, because the question of the amount of rent annually payable by the tenant has been decided.

“ Now, the learned pleader for the appellant contends that the decision of the Subordinate Judge is wrong on this ground, that he has held that the tenure has been sold in execution of a decree for arrears of road cess ; and it has been contended on the strength of the ruling in *Shekaat Hosain v. Sasi Kar* (3) that a decree for road cess is a personal decree, and that in execution of such a decree only the right, title and interest of the judgment debtor can be sold, and that the whole tenure will not pass in execution of such a decree. The learned pleader for the respondent, however, refers to the definition of rent in section 3, clause 5, of the Bengal Tenancy Act, and points out that, according to this definition, the word ‘ rent ’ includes road cess in sections 53 to 63 ; and he says that the tenure of the defendant in this case has been sold under the provisions of section 65 of the Bengal Tenancy Act,

1894

 NOBIN
CHAND
NUSKAR

v.

 BANSENATH
PARAMANICK.

(1) I. L. R., 16 Calc., 155.

(2) I. L. R., 17 Calc., 489.

(3) I. L. R., 19 Calc., 783.

1894
 NOBIN
 CHAND
 NUSKAR
 v.
 BANSENATH
 PARAMANICK.

and that therefore the tenure passed in execution of that decree ; and further he refers to the sale certificate given to the purchaser at that sale, which certifies that the tenure passed, and not the right, title and interest of the judgment-debtor only.

“ I think that this contention of the learned pleader for the respondent is correct, and that the sale in this case took place under the provisions of section 65 of the Bengal Tenancy Act ; and there can be no doubt that under the provisions of that section and section 3, clause 5 of the Act, road cess is included within the definition of ‘ rent,’ and that the sale having taken place in execution of a decree for road cess or rent, the whole tenure must be held to have passed.

“ I therefore see no reason for disturbing the finding of the lower Appellate Court, and I dismiss the appeal with costs.”

The plaintiff preferred this appeal under the Letters Patent.

Baboo *Nilmadhub Bose* and Baboo *Jadub Chunder Seal* for the appellant.

Baboo *Ashutosh Mookerjee* for the respondent.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows :—

GHOSE, J. (PETHERAM, C. J., concurring).—We are of opinion that Mr. Justice Rampini is right in the conclusion which he has arrived at.

Chapter XIV of the Bengal Tenancy Act must, we think, be read with section 65 of the Act ; and the word “rent” as used in that section includes, by reason of the definition given in clause 5 of section 3, road cess payable to the landlord by the tenant. That being so, the sale in execution of the decree obtained by the landlord for cess was a sale of the tenure under Chapter XIV, and the purchaser at that sale acquired the property free from the incumbrance created by the former tenant in favour of the plaintiff, it not being a registered and notified incumbrance within the meaning of section 161 of the Act.

As regards the question discussed before us, that no notice was served upon the plaintiff so as to avoid the incumbrance in question, it was not raised in either of the lower Courts. We

cannot assume, in the absence of facts, that no notice was given to the plaintiff. If the question had been raised, the defendant might have been able to show that such a notice was served on the plaintiff.

The appeal will be dismissed with costs.

Appeal dismissed.

1894

NOBIN
CHAND
NUSKAR

v.

BANSENATH
PARAMANICK.

H. T. H.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BATUOO LAL AND ANOTHER (PETITIONERS) v. DOMI LAL AND ANOTHER
(OPPOSITE PARTY.)^{*}

1894

June 5.

Criminal Procedure Code (Act X of 1882), section 147—Disputes concerning Easement—Procedure to be observed by Magistrate when dispute exists regarding an Easement—Parties entitled to notice.

The enquiry contemplated under section 147 of the Code of Criminal Procedure is a judicial enquiry, and the opinion formed by a Magistrate must be a judicial one based on evidence legally recorded by him in the manner provided by section 356, and on due notice to the persons who respectively claim or deny the right, the subject of the dispute. Notice to servants of such persons is not equivalent to notice to them, and in such cases actual notice should be given to all the persons claiming or denying the right and interested in the subject-matter of the enquiry.

Magistrates should not institute proceedings under section 147 unless they are satisfied that a real danger of the evil, for the prevention of which the procedure was devised, does in fact exist. Such enquiries may lead to injustice being done from defective procedure, and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated enquiry and the presence of a large number of people, when the remedy of binding down a few persons to keep the peace, is ready to his hand.

THIS was an application to have an order passed by the Deputy Magistrate of Monghyr set aside. The order was passed under section 147 of the Code of Criminal Procedure, and directed that the Durbangha Raj, as represented by the petitioner Domi Lal, should repair a certain road or track which was alleged to exist through the lands belonging to the Baneli Raj and delineated on a plan exhibited in the proceedings, and that the carts belonging to the Durbangha Raj and others should be allowed to pass along the track when made.

^{*} Criminal Revision No. 213 of 1894, against the order passed by Abdus Salam, Deputy Magistrate of Monghyr, dated the 17th of April 1894.