TILUKHDARI SINGH AND OTHERS (PLAINTIFFS) *v.* CHULHAN MAHTON (DEFENDANT).

*P. C.** 1889 *April* 10.

[On appeal from the High Court at Calcutta.]

Abwabs, Meaning of—Long period of payment of abwabs—Effect of ss. 54 55 and 61 of Regulation VIII of 1793.

Payments over and above rent, and described as abwabs in the zemindar accounts, for which, as abwabs, the tenant was sued, were held to be rightly treated as abwabs, and not as forming part of the rent fixed. They were held not to be recoverable from the tenant, although they had been paid for a period of unknown length and according to a long standing practice, not having been, if payable at the time of the permanent settlement, consolidated with the rent, as they should have been if then payable, under s. 54 of Regulation VIII of 1793. Not having been so consolidated, they could not be recovered under s. 61. If not payable at the time of the permanent settlement, they came under the term of new abwabs, and in that case were illegal under s. 55.

APPEAL from a decree (19th January 1885) (1) of the High Court, reversing on second appeal a decree (21st March 1883) of the Judge of the Gaya District, and restoring a decree (30th June 1882) of the Subordinate Judge of that District.

The question raised on this appeal was whether the appellants were entitled to recover, as landlords, from the respondents as tenants, sums entered in the zemindari papers, as customary abwabs, and paid for a long period. The suit out of which this appeal arose was brought by the appellants, thikadars of mouzas in the Gaya District, to recover from a ryot holding under them, Rs. 1,105, arrears of rent, both *nakdi* (or cash) and *bhaoli* (in kind), for the years 1286 to 1288 (Bengali), together with customary abwabs alleged to have been paid from time immemorial. The defendant admitted holding land under the plaintiffs, some at *nakdi*, other at *bhaoli*, rent; and also admitted that one anna, "*hajjatana*," and three pice for "batta company" were payable by him. It was also found by both the Courts in the district that a sum was payable for road-cess. Other items claimed as abwabs, other than the *assul* rent, were denied by the defendant. They are set forth in a list printed in the report of

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(1) I. L. R., 11 Calc., 175.

1889

TILUKHDARI SINGH v. CHULHAN MAHTON.

the reference of this case by a Division Bench to a Full Bench at p. 176, I. L. R., 11 Calc., amounting to fourteen items in all; comprising, among other things, contributions for the pay of watchmen and other village servants; also dâk-cess, &c.

The Subordinate Judge of the Gaya District, Babu Dwarkanath Mitter, held that these items could not be decreed under the law. He referred to s. 11 of the Rent Law (Bengal Act VIII of 1869) and to s. 54 of Regulation VIII of 1793 (1). For the rent both as regards the cash and the quantity of produce, he found the claim proved, and decreed it, together with the items of abwabs admitted. He stated in his judgment: "The expediency of the law is fully demonstrated by the facts of this case. Here the plaintiffs claim several kinds of abwabs, *bandhwara*, *purohi*, *nocha*, *sidha*, *khurcha* and *mangan*. The evidence is discrepant as to the rate of each kind of impost, and even the plaintiffs' gomashta, whose business it is to realize them, cannot state all the rates. Add to these the abwabs claimed in respect of the *nakdi* jote, and the number becomes very large indeed. These abwabs are fees payable to the village watchman, the putwari, the gomashta, the barahil, the weighman, the purohit, and the landlord. These fees, which are exacted over and above the rent, have been repeatedly held by the High Court to be illegal and unrecoverable through the Court, unless the ryot has distinctly agreed to pay them."

The Subordinate Judge added: "I think it right to add here that the plaintiffs have attempted to show that, in lieu of the abwabs claimed, the ryots enjoy certain corresponding advantages: an allowance of two seers per maund of grain is made them, and

(1) Section 54 of that Regulation enacts: "The impositions upon the ryots under the denomination of abwab, mahtoot and other appellations, from their number and uncertainty having become intricate to adjust, and a source of oppression to the ryots, all proprietors of land and dependent talukdars shall raise the same in concert with the ryots, and consolidate the whole with the *assul* into one specific sum." The end of the Fasli year 1198 is then fixed as the time within which the consolidation was in the Behar Districts to be effected.

Section 55 provides that "No actual proprietor of land or dependent talukdar of whatever description shall impose any new abwab, or mahtoot upon the ryots under any pretence whatsoever."

they get all the straw and chaff. The plaintiffs' Pleader offered to give up the claim for the abwabs if the defendant agreed to give half of the straw and chaff. This was, to my mind, a fair offer, but the defendant refused to accept it. The total of the abwabs, I am told, would, on calculation, come up to two seers two chittaks per maund. The landlord, besides, has to maintain an irrigation scheme, peculiar to this part of the country, at his own cost."

Both parties appealed to the District Judge, who reversed the decision as to the abwabs. Regarding the *bhaoli* rents, he said: "I may notice a few of the salient features of this system. In the first place, the landlord does not get a full half share. The straw, chaff, &c., is appropriated entirely by the cultivator. It will be noticed that the lower Court offered the defendant to divide the whole produce equally between him and the landlord, but this offer was refused; and why? because it has always been the custom for the ryot to take the straw, &c. If so, the landlord should surely be allowed to plead that he is entitled to the dues he claims, because the ryot has always been in the habit of paying them. Again, the expenses connected with the maintenance of irrigation works, on which depend the crop, fall on the landlords; they also have to defray the costs of any litigation connected therewith. The very existence of the crop in this district depends on an artificial system of irrigation, which has to be kept up at the landlords' expense." He also found that such cesses had, without doubt, been, from time immemorial, prevalent in the district.

The District Judge concluded his judgment as follows:—"In the present case the evidence adduced establishes two facts, *first*, that these dues have been collected and paid from time immemorial; *second*, that having regard to the peculiarities of the *bhaoli* system, they are not excessive. In the case of *Budhua Oraiwan Mathoon* v. *Juggessur Doyal Singh* (1), it was held by the High Court that certain payments, which were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform, and had been paid by the ryot from the beginning according to local custom, were not illegal cesses;

(1) 24 W. R., 5.

1889

TILUKHDARI SINGH v. CHULHAN MAHTON.

and so in this case I find that these so-called abwabs are not illegal cesses, and I may here notice that in many cases which have been tried by the Collector, the putwari has succeeded in establishing as against the zemindar his right to these dues; and I hold, therefore, where the custom is proved, that the zemindar is entitled to levy a half share thereof from his tenants. For the above reasons I set aside that portion of the decision of the lower Court which disallows the dues claimed both on the *nakdi* as well as on the *bhaoli* tenure."

The defendant then preferred a second appeal to the High Court. A Division Bench (Sir R. Garth, C.J., and Beverley, J.) doubting whether, under the present Rent Law, this claim for abwabs could be enforced, and pointing out that the authorities upon the point were apparently conflicting, referred to a Full Bench the question whether, assuming that the abwabs had, by the custom of the estate of which the lands formed part, been paid by the defendant and his ancestors for a good many years, they were legally recoverable by the plaintiffs, although they were not actually proved to have been paid, or to have been payable, before, or at the time of, the permanent settlement.

A Full Bench (Sir R. Garth, C.J., with Mitter, Prinsep, Tottenham and Pigot, J.J.) answered the question in the negative. Their judgments are printed at length in the report of the appeal at p. 175 of I. L. R., 11 Calc.

The judgment of the District Judge was accordingly reversed, and that of the Subordinate Judge restored.

The plaintiffs appealed to Her Majesty in Council.

Mr. *C. W. Arathoon*, for the appellants, contended that the ruling was erroneous. The liability of the tenant for the abwabs in question was the result of the incidents and circumstances of the tenancy; and, though not expressed in the contract between the parties, was plainly deducible from the usage or custom with reference to which the contract was made. The evidence established that abwabs were prevalent in the district, and were paid according to custom established from time immemorial. A distinction must be drawn between legal and illegal cesses. Those which had been collected for a long period, extending back, presumably, to the permanent settlement,

were not illegal, nor had any enactment prohibited their recovery by the landlord. On the contrary, under Regulation V of 1812, s. 3, such cesses might be enforced in certain cases; also s. 9 of Regulation IX of 1825, saved certain cesses, levied according to ancient custom. Abwabs existing at the time of the permanent settlement could be recovered, notwithstanding the provisions of Regulations VIII of 1793, IV of 1794, or anything in Act X of 1859, the Bengal Rent Law, or in the Bengal Act VIII of 1869. Section 54 of Regulation VIII of 1793 contained merely a direction for the consolidation of abwabs with the *assul* rent; but no penalty for the omission was enacted. He referred to *Lachman Rai* v. *Akbar Khan* (1) regarding the question of each cess as a separate issue; and he contended that the items claimed were in effect, in themselves, part and parcel of the rent, referring to *Bholanath Mookerji* v. *Brijomohun Ghose* (2). In *Budhua Orawan Mahtoon* v. *Juggessur Doyal Singh* (3) the High Court said: "With respect to what are called the cesses in this case, we think they are not so much in the nature of cesses as of rent in kind; and it is not describing them correctly to say of them that they are uncertain and indefinite," and a decree was given.

Reference was also made to *Serajgunge Jute Company* v. *Sorabdee Akoond* (4).

No writing, nor any other formality was required by law in regard to such items; and s. 61 of Regulation VIII of 1793 in providing that persons suing on engagements in which the *assul* and abwabs shall appear to have been consolidated, shall be non-suited, does not prohibit or render illegal the collection of payments such as those now in dispute. The latter were lawful at the time of the permanent settlement, and nothing had, since then, rendered them illegal. Although they had been described in the plaint as "old usual abwabs," yet they were part of the rent, and a definite and certain addition to it; this, in itself, excluding them from being rendered illegal by the operation of Regulation VIII of 1793, s. 55, or in any other manner.

(1) I. L. R., 1 All., 440.
(2) 14 W. R., 351.
(3) 24 W. R., 5.
(4) 25 W. R., 253.

1889

TILUKHDARI SINGH v. CHULHAN MAHTON.

On the question of the intention of the Legislature, he referred to Harington's Analysis, Vol. II, p. 19, Regulation XXX of 1803, Regulation VII of 1822, where, in reference to the North-West Provinces, the rules as to the formation of the record of rights contained a provision for the recording of cesses. Regulation XII of 1817, also, in connection with the payment of putwaris, treated such a payment as legal. The edition of the Regulations of the Bengal Code by Mr. Justice Field, at p. 61, was also referred to and Mr. A. Phillips' work on 'Tenures.' In regard to the finding of both Courts, that these were abwabs payable under old custom, the landlord receiving an equivalent, they were not, within the meaning of the sections of Regulation VIII of 1793 on the subject, illegal from any cause.

Reference was made to *Dhalee Puramanick* v. *Anand Chunder Tolaputtur* (1), *Sonnum Sookul* v. *Elahee Buksh* (2), *Juggodish Chunder Biwsas* v. *Turrikoollah Sircar* (3), *Kamalakanta Ghose* v. *Kalu Mahomed Mundul* (4), *Bholanath Mookerjee* v. *Brijomohan Ghose* (5) and *Yeeatoolah Paramanick* v. *Jugodindro Narain Roy* (6).

The respondents did not appear.

Their Lordships' judgment was delivered by

LORD MACNAGHTEN.—Their Lordships are of opinion that this appeal ought to be dismissed. The first question seems to be this: Are these payments, over and above rent, properly so called, abwabs, within the meaning of the word as used in Regulation VIII of 1793? They are described in the plaint as "old usual abwabs;" and they are also described as abwabs in the zemindari accounts. It appears to their Lordships that the High Court was perfectly right in treating them as abwabs, and not as part of the rent. Unquestionably they have been paid for a long period; how long does not appear. They are said to have been paid according to long standing custom. Whether that means that they were payable at the time of the permanent settlement or not is not plain. If they were payable at the time of the permanent settlement, they ought to

(1) 5 W. R., Act. X Rul., 86.
(2) 7 W. R., 453.
(3) 24 W. R., 90.
(4) 3 B. L. R., A. C., 44; 11 W. R., 395.
(5) 14 W. R. 351.
(6) 22 W. R., 12.

have been consolidated with the rent under s. 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered under s. 61 of that Regulation. If they were not payable at the time of the permanent settlement, they would come under the description of new abwabs in s. 55; and they would be in that case illegal.

Under these circumstances it appears to their Lordships that the High Court was right in treating them as payments or cesses which could not be recovered.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson and Co.*

C. B.

MAHAMMUD AMANULLA KHAN (PLAINTIFF) *v.* BADAN SINGH AND OTHERS (DEFENDANTS).

*P. C.** 1889 *April* 10.

[On appeal from the Chief Court of the Punjab.]

Limitation Act (XV of 1877), Sched. ii, Arts. 142, 144—Proprietors having refused at the first regular settlement to engage, and others having been admitted as malguzars of the land, effect of lapse of time—Discontinuance of possession.

Article 144 of sched. ii of Act XV of 1877, as to adverse possession, only gives the rule of limitation where there is no other article in the schedule specially providing for the case.

The proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished; but if a claim comes within the terms of Art. 142 (enacting that when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued possession, limitation shall run from the date of the dispossession or discontinuance), in such a case, by the law of Act XV of 1887, and previously of Act IX of 1871, adverse possession is not required to be proved in order to maintain a defence.

At the regular settlement in the Delhi District (1843) the plaintiffs' ancestors, *ex-mafidars* of a plot on which the rent-free tenure had been resumed in 1838, declined to engage for the revenue; and the plot was assessed along with the village in which it was; the village-proprietors through the *lambardars* engaging for and obtaining the land.

At the revision of settlement, more than thirty years after, the plaintiffs

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.