APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Mitter.

BHAGO BIBEE AND OTHERS (DEFENDANTS) *v.* RAM KANT ROY CHOWDHRY AND OTHERS (PLAINTIFFS).* 1877 *August* 9.

Sale for arrears of Revenue—Undertenure, Suit to avoid—Permanent Settlement—Structures and Improvements within the meaning of excep. 4 *to s.* 37 *of Act XI of* 1859*—Decree for ejectment.*

In a suit to avoid an undertenure by the purchasers at an auction-sale for arrears of Government revenue, the defendants contended that the tenure was created prior to the Permanent Settlement, and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that, accordingly, it was protected under exceptions 1 and 4 to s. 37 of Act XI of 1859: but the lower Court gave a decree to the plaintiffs and annulled the undertenure. *Held* by WHITE, J., that, notwithstanding a party may fail to show that his tenure was created prior to the Permanent Settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding.

Brojo Soondur Biswas v. *Gouri Persaud Roy* (1) followed.

Moonshi *Serajal Islam* for the appellants.

Baboo *Aukhil Chunder Sen* for the respondent.

The facts and arguments in this case are fully set forth in the judgment of

WHITE, J.—This was a suit brought by the special respondents against the special appellants (who are grouped together as first party defendants in the first Court) to avoid an undertenure in certain villages, part of an entire mehal, which the respondents had jointly with second party defendant purchased at a Government revenue sale, and which villages, on partition, fell to the

* Special Appeal, No. 1892 of 1876, against the decree of Baboo Nobin Chunder Pal, Second Subordinate Judge of Chittagong, dated the 29th May 1876, modifying the decree of Moulvi Ali Ahmud, Munsif of Sitakoond, dated the 30th April 1875.

(1) S. D. A., Dec. 1852, p. 645.

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share of the respondents. The written statement of the added defendants, Sohina Bibi and Nowa Bibi and Korban Ali, which embodies the case of the special appellants, after stating that a certain portion of the lands claimed are not in their possession or belong to their undertenure, as regards the rest of the disputed lands (comprising 6 kanees 5 gandas), claims in effect the benefit of the exceptions in s. 37 of Act XI of 1859. It is alleged, first, that the undertenure comes within the first exception, as it is a mokurari taluk held at a fixed rent from the time of the Permanent Settlement; and, secondly, that there are permanent holdings and other improvements on the disputed lands, which are further protected by the 4th exception of s. 37 of Act XI of 1859.

In proof of the antiquity and nature of the undertenure, the defendants produced an old talukdari potta of the 15th Jait 1155 M., and certain dakhilas.

The first Court did not pronounce any decided opinion as to the genuineness or otherwise of these documents, but was of opinion that the potta, if proved, was not of sufficient antiquity to establish the defendants' claim to exemption under the first exception. Being, however, of opinion that the defendants were at all events entitled to a right of occupancy in the lands comprised in the potta, the first Court held that the plaintiffs could not recover khas possession, and were only entitled to rent, and decreed accordingly.

The lower Appellate Court has reversed the decree, and awarded to the plaintiffs possession of the lands, and thus in effect annulled the undertenure.

Two objections are taken by the defendant No. 1 in special appeal: one is, that the Judge has defectively investigated their claim to exemption under the first exception in s. 37, inasmuch as he has not found whether their potta and dakhilas are genuine or the reverse, and inasmuch as it mainly depends upon the result of that enquiry whether their claim to exemption is made out or not. The judgment of the lower Appellate Court on this point runs thus:—"The defendants' taluk does not come under the exceptions mentioned in s. 37, Act XI of 1859. Whatever right they had having been sold at auction for

arrears of rent, all the incumbrances formerly imposed have ceased to exist. Hence, whatever may be the length of their possession, it cannot be maintained."

We think the objection taken by the special appellants is well founded. The first Court came to no positive finding as to the proof of the potta and dakhilas; but decreed in favor of the defendants on other grounds. We are unable to gather from the decree of the lower Appellate Court how it has dealt with the documentary evidence adduced by the defendants, or whether it considered it at all; or if it held the potta to be proved, what weight it gave to it in its decision, or whether it gave it any weight. If the potta is found to be genuine, it is certainly a document of the utmost importance in the case, for it appears to be confirmatory of a previous potta, and although its date falls short of the date of the Permanent Settlement by a short period of time, the document, if genuine, furnishes ample evidence from which the Court may presume that the undertenure existed at the time of the Permanent Settlement.

As the potta purports to be more than thirty years old, its mere production constitutes *primâ facie* proof of its execution, if it is produced from the proper custody; and if the potta is produced by the special appellants and relates to the undertenure, of which they are, and their predecessors have been, in possession, the custody is proper. The law on the subject, which is similar to the English law, is to be found in s. 9 of the Indian Evidence Act, 1872. We draw attention to the above matters, because the first Court appears to have fallen into errors on both these points.

We may add also that the first Court was mistaken in supposing that the defendants in this case had a right of occupancy irrespective of their undertenure. No such right was claimed or proved by the defendants, and such a right cannot be presumed to exist merely because the defendants have occupied for a long period of time under a *talukí* potta.

The second objection taken is, that assuming the undertenure not to fall within the first exception of s. 37, yet that, as regards so much of the lands comprised in it as is covered with permanent buildings and other improvements, the defendants are

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entitled to exemption from ejectment under the 4th exception of that section.

It has been decided by this Court in the case of *Shaik Tofail Ally* v. *Ram Kanto Roy Chowdhry* (1) and three other appeals of the same year, that, notwithstanding a party may fail to show that his tenure comes within any of the first three exceptions of s. 37, yet that he is entitled to the benefit of the 4th exception in respect of any dwelling-houses or other permanent structures that may be upon his holding. These decisions are based upon an old decision of the Sudder Dewany Adawlut in the case of *Brojo Soondur Biswas* v. *Gouri Persaud Roy* (2).

If this matter had not been the subject of previous decision by this Court and of the late Sudder Court, I should not, speaking for myself, be prepared to accede to this interpretation of s. 37 without much further argument on the point. But as there appears to be no conflicting decisions on the point, and the rulings of this Court have unquestionably a tendency to encourage improvements on the land, and to mitigate the severity of the Revenue Sale Law, I am willing to acquiesce in their application to the present case.

The claim of the special appellants under the 4th exception of s. 37 is to be found in the 4th paragraph of the defendants' written statement to which I have above referred. It mentions, amongst other things, land for *nij* cultivation, but that item does not come under the exception. As regards the remaining items contained in that paragraph, the lower Appellate Court must enquire into their existence, and in the event of its finding that in consequence of non-proof of the existence of the undertenure at the time of the Permanent Settlement, the plaintiffs are entitled to annul the undertenure, the Court will limit the recovery of possession by the plaintiffs to such lands comprised in the tenure as are applied to agricultural purposes; but as regards the remaining land on which any structures are erected or improvements made of the character mentioned in the 4th exception of s. 37, the Court will declare the first party defendants entitled to retain the same, they paying rent for the same.

(1) Special Appeal, No. 1796 of 1876, unreported. (2) S. D. A., Dec., 1852, p. 645.

The result is, that the decree of the lower Appellate Court will be set aside, and the suit remanded in order to pass a fresh decision in accordance with the above directions, after finding upon the following issues :—

1. Whether the potta and dakhilas of the defendant No. 1, or any of them, are proved, and, if proved, are genuine?

2. If the potta be genuine, whether the undertenure of the defendants existed at the time of the Permanent Settlement?

3. If the undertenure did not exist at the time of the Permanent Settlement, whether any and what structures and improvements within the meaning of the 4th exception to s. 37 of Act XI of 1859 have been erected or made upon any of the lands comprised in the tenure?

4. If so, how much of the lands are applied or appropriated to agricultural purposes, and how much to the structures and improvements above mentioned?

5. What rent shall be paid by the defendants for the lands appropriated to such structures and improvements?

Costs will abide the result.

MITTER, J.—I concur in this order of remand, and only desire to add as to the second point that if the lower Appellate Court finds any portion of the tenure used for the purposes mentioned in the 4th exception to s. 37, he is to except that portion from the decree of ejectment which the plaintiff may recover on the defendants' failure to prove that the tenure existed before the Permanent Settlement.

Case remanded.