

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Juggomohun Bukhshee v. Roy Mothoornath Chowdry and others, from Bengal; delivered 28th February, 1867.*

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Present :

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD T. KINDERSLEY.

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SIR LAWRENCE PEEL.

THE lands which are the subject of this suit are described as three separate holdings forming part of the Government Khas Mehals, in the Twenty-four Pergunnahs. In 1855 they had been granted by the Government of Bengal to one Roy Bycauntnath Chowdry, as the sole registered tenant thereof. His tenure is said to have been in the nature of a perpetual lease ; but the instrument or instruments creating it are not before us. He may be taken, however, to have been what is termed in the Regulation, which will be afterwards considered, " a Sudder farmer paying revenue directly to Government." Some time in 1855, being charged with an offence, he absconded in order to avoid the process of the Criminal Courts ; whereupon his estate was confiscated, and these lands, as part of it, were ordered by Government to be sold under the provisions of Regulation XI of 1796. They were put up for sale on the 27th of April, 1855, and were purchased by one Thakoordoss Bonnerjea, who on the 7th of July, 1856, transferred the interest thereby acquired to the Appellant. Under this title the Appellant claims the entire interest in the tenures under Government of these lands.

The Respondents insist that Bycauntnath was a member of a joint and undivided Hindoo family, of which they are the other members; that these tenures, though taken in the sole name of Bycauntnath as the managing member, were acquired with the funds and for the benefit of the joint family; and that accordingly it was not competent to Government to confiscate or sell more than the fractional share and interest of Bycauntnath in this portion of the family estate. They urged this objection ineffectually before the Collector some days before the sale took place; they afterwards repeated it before the Commissioner and Sudder Board of Revenue; but they are said to have made no representations to that Department of Government from which, under the Regulation, the order for the sale emanated. Certain it is that their objections were overruled, and that what was put up for sale and purchased by Thakoordoss Bonnerjea was the whole interest in the lands under the tenures created in favour of Bycauntnath. And the Collector put, as he thought, the purchaser into possession.

Before, however, the assignment to the Appellant, a dispute touching the possession of the lands arose between Thakoordoss Bonnerjea, and one Gopeemohun Mitter, who claimed to be tenant thereof under a lease granted to him by Roy Bycauntnath Chowdry, and the Respondents jointly. There was the usual Appeal to the Magistrate under Act IV of 1840. He held that Gopeemohun Mitter was in fact in possession, and his order was confirmed on appeal by the Zillah Judge. The result was that the Appellant having acquired the title of Thakoordoss Bonnerjea, was driven to assert his right to the possession of the lands in the regular civil suit out of which this Appeal has arisen.

The suit was originally against Gopeemohun Mitter alone. By supplemental Pleint the Respondents were made parties to it. The material issues settled by the Judge, were 1st, whether the lease set up by the Defendant Gopeemohun was a *bonâ fide* lease, or merely colourable and in fraud of law? and 2ndly, whether the estate being joint, the Plaintiff could have any claim over and above the particular share of Bycauntnath.

The Zillah Judge, by whom the cause was tried in the first instance, held that the lease was merely

colourable and fraudulent, and that the Appellant, as between him and the lessee, was entitled to the possession of the lands. He further held that the question of title between the Appellant and the Respondents could not be properly tried in this suit; and that the proper course for the Respondents, if they had a good title, was to sue to set aside the sale to the extent of that title, making the Government a party to the suit.

Both the lessee and the Respondents appealed against this decision, but the former died pending his Appeal, which not having been revived was struck off. The Respondents prosecuted their Appeal, and the Sudder Court overruling the objection that the suit had come to an end with the lessee's interest, on the ground that there was a distinct issue of title joined between the Appellant and the Respondents, made a Decree in their favour, and reduced the interest of the Appellant in the lands to the fractional share of Bycauntnath. The present Appeal is against the last Decree.

It has been candidly conceded by the learned Counsel for the Respondents that the evidence in the cause may be taken as sufficient to establish that as between Roy Bycauntnath Chowdry and the Respondents the lands in question formed part of their joint estate.

This being so, we have only to determine whether the Decree of the Sudder Court is erroneous either because, upon the true construction of the Regulations and the admitted facts of the case, the sale by order of Government has given to the Appellant a good title against the Respondents; or because that question cannot be properly litigated and determined in the present suit.

The Regulation is a highly penal statute, and should be construed strictly. That portion of it which relates to the present case is contained in the 4th, 5th, and 6th sections. The 4th section provides that after taking certain specified proceedings the Magistrate is to order the attachment of any land or other real property held by the absentee in his jurisdiction; by requiring the Collector, if the absentee be a proprietor of land or Sudder farmer, paying revenue immediately to Government, to hold the land or farm in attachment until further notice; and prescribes the measures to be taken by the Collector on receiving such a requisition. The 5th

section provides for the removal of the attachment on the attendance of the party ; and the 6th section enacts, "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

In the absence of clear words indicating such an intention it cannot be assumed that the legislature intended to authorize the confiscation of the property of any person other than the delinquent. The Regulation makes no express provision for the case of joint proprietors of land, or persons jointly holding a Sudder farm of land. Let it be assumed that such a joint proprietorship or joint holding is ostensible as well as real, and that it appears on the Collector's books. Can it be doubted that in such a case the words "land or other real property held by the absentee" would be limited to his undivided share in the actual lands or farm ? Again, suppose that the absentee is one of a joint family possessed of a zemindary, of which one member only is registered as owner. Their Lordships cannot think that upon the true construction of this Regulation the fact of such registration would either justify the confiscation of the whole zemindary if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor. No analogy can be drawn from the doctrine of forfeiture in this country, where the doctrine is founded on tenure, and where there was a broad and marked distinction between law and equity, the Courts of Common Law taking no cognizance of equitable estates. And if what is above stated be true of a zemindary or other real property of which the absolute interest belongs to a joint family, it is difficult to see why it should not be true of a farm enjoyed by a joint family as part of the joint estate, though taken in the name of one of its members. For the Regulation, at least in the part of it now under consideration, does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure ; and the course pursued in the particular case confirms this construction.

Again, there is no pretence for saying that a sale

under this Regulation can carry with it the consequences of a sale for arrears of public revenue ; that it sweeps away all subtenures or incumbrances created by the delinquent, or those through whom he claims. The tenure in question, so far as appears on these proceedings, was alienable. It was open therefore to Bycauntnath to put his co-sharers in the estate into the full enjoyment of this farm, and to execute jointly with them, if they were so minded, snb-leases of the lands. No actual conveyance would, under the Hindoo law, be required for the former purpose. Their Lordships, therefore, are unable to affirm the broad proposition that under the Regulation it was competent to Government to confiscate and sell this farm, so as to give to the purchaser a good title against the Respondents. The Zillah Judge, though he declined to deal with the question in this suit, has not so decided. The Sudder Court has decided the contrary.

It remains to be considered whether the Sudder Court was right in determining the question of title between the Appellant and the Respondents in this suit. The Appellant had by supplemental plaint made the Respondents parties to the suit, though under a kind of protest that it was unnecessary to do so ; and this issue of title had been raised and joined between them. The only difficulty in the case is, that the lease of Gopeemohun who was put forward as the tenant in possession, has been pronounced by the Zillah Judge to be simply colourable, and that the Sudder Court has not dealt with his finding on that point. Considering, however, that as between Gopeemohun and the Respondents the lease constituted the relation of landlords and tenant, and that the intervention of the landlord to defend rested on privity of title ; and, further, that the effect of the proceedings in the Foujdary Courts of the 31st December, 1855, and the 29th of March, 1856 (at pp. 41 and 30 of the Appendix), was to determine that the Appellaut was out of possession, and to cast upon him the burden of recovering possession by proof of a good title, and that he has failed to do so except to the extent admitted by the Sudder Court, their Lordships think that the Decree under Appeal is correct. They must, therefore, humbly recommend Her Majesty to dismiss this Appeal.

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