

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gouri Shunker v. The Maharajah of Bulrampore, from the Court of the Judicial Commissioner of Oudh ; delivered November 21st, 1878.

Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE broad question raised by this Appeal is whether the Plaintiff is entitled to any and what rights in four villages which must be taken to be parcel of the talook of Tulsipore, of which the Defendant, the Maharajah of Bulrampore, is now the proprietor as talookdar within the meaning of the Oudh Estates Act, No. 1, of 1869.

The estate of Tulsipore was formerly the property of one Dirgh Narain Singh, who, it is said, was at the time of the first capture of Lucknow during the mutiny a rebel, and imprisoned in the residency, and afterwards went, still in custody, to the Alumbagh, where he died. His heirs continued in rebellion, and the result was that in 1859 the estate of Tulsipore was created into a talook under the new system, in favour of the Maharajah of Bulrampore, who was allowed to engage for the revenue as talookdar at the summary settlement of that year. His title has since been confirmed in the fullest manner by the Oudh Estates Act, and therefore it must be taken for granted that he is talookdar of all the villages for which he then settled, as included in the talook of Tulsipore.

The title of the Plaintiff arose in this way: The former Rajah of Tulsipore, on the 4th of March 1856, a very few weeks after the first annexation of Oudh, borrowed from the Plaintiff a sum of Rs. 7,001, and, as a security for that sum, executed to him the instrument in the nature of a mortgage by way of conditional sale, which is found at page 3 of the Record. That instrument, after declaring that he had borrowed this money, and that in lieu of the same he had made a conditional sale to the Plaintiff of the four villages in question, with all the four boundaries, and birt zemindary rights for the period of four years, commencing from the 4th March 1856, and ending on the 4th March 1860, goes on to say, "The above-named creditor " is allowed to take possession of the aforesaid " villages, to pay the Government revenue, and " to appropriate the surplus profits to his use in " lieu of interest. Neither will I have any claim " to profits, nor will the creditor have any " claim to interest. I shall be entitled to get " back the deed when I pay the money at the " stipulated period."

At the summary settlement which the British Government proceeded to make upon the first annexation of the province, the Plaintiff, the mortgagee, applied to have the settlement of these four villages made directly with him. That settlement was not completed until the 4th of June 1857,—a period very shortly antecedent to that at which British rule ceased for a time in the province of Oudh; and, when made, was made to endure only for the time during which the Plaintiff would be in possession of the villages strictly in the character of mortgagee, that is, only up to the time fixed for the redemption of the mortgage. Then came the mutiny. After that came Lord Canning's proclamation of the 15th March 1858, the effect of which has been so

often discussed here, that it is not necessary more particularly to refer to it. Early in 1859 the Government, having apparently retained during the intermediate period this estate of Tulsipore under some kind of attachment, finally determined to grant it to the Respondent. The sunnud, if any, granted to him is not upon the Record, but it is established that he was admitted to engage for the revenue on the 21st January 1859, and that the settlement was completed on the 25th of the following May. The Plaintiff, who was in actual possession of the villages as mortgagee, was dispossessed on the 31st January 1859, when, in anticipation of the final settlement, the Maharajah of Bulrampore was put in possession. The Plaintiff subsequently made various attempts to assert his rights, and to recover possession, with which we have on the present occasion no concern; and on the 15th May 1866 he was referred to the regular settlement which was afterwards to be made, and told that he must prefer any claim which he could substantiate at that settlement. Accordingly in October 1870, when the settlement was in progress, he filed his plaint in the present suit.

The plaintiff in terms asserted proprietary right as mortgagee, and prayed that the regular settlement might be made with him. On the 3rd of March 1873 the claim was dismissed by the Assistant Settlement Officer, who treated it apparently as one for the direct settlement of a superior proprietary right, and held that, as such, it was barred by the Oudh Estates Act, and the rights which the talookdar had acquired. There was an appeal to the Commissioner of the district, Mr. Capper; and before him the suit assumed the character of one for a sub-settlement of a sub-proprietary right, which it has ever since retained. That it is competent to the

Courts to allow a Plaintiff so to modify his claim was ruled by their Lordships in the case of the widow of *Shunker Sahai v. Rajah Kashi Pershad*, L. R. 4 I. A. 198.

Mr. Capper in his judgment of the 10th of May 1873 ruled that the mortgagee, if his title were perfected by foreclosure, would be the legal owner of birt zemindari rights subordinate to the Talookdar; but that the mortgage was still redeemable. He thought, however, that the case was not ripe for decision, and remanded it for the trial of an issue whether the Plaintiff had got possession of all or any of these villages prior to Phagun 1267 Fusli. This issue was found in the affirmative; and the fact was not disputed by the Respondent when the case came back to Mr. Capper. Mr. Capper on the 28th August 1873 then made a decree in these terms: " The Court orders and decrees the appeal and " cancels the decree of the 3rd of March 1873. " Gouri Shanker, Plaintiff, and his co-sharers, " if any, are decreed an under-proprietary " zemindari title in Mouzah Bairwa, Mouzah " Bijwa Kalan, Mouzah Bindhwa, and Mouzah " Katya Bhari, and possession under the terms " of the deed of conditional sale dated Phagun, " Sudi 13th, 1263 Fusli, till such time as the " lien shall be redeemed, or till the title shall " be perfected by foreclosure." The Respondent then appealed from this decree to the Judicial Commissioner, Mr. Currie. That officer, on the hearing before him of the 31st of March 1874, seems to have objected to the decision of Mr. Capper on the ground that he had assumed what ought to have been proved. He said, " It is very " material, for a proper determination of this case, " that the exact nature of the title intended to be " conveyed under the deed should be decided. The " Defendant urges that the title intended to be " conveyed was the full proprietary title, and this

“ view of the case is supported by the fact that
“ this suit is laid for the full proprietary title.
“ On the other hand, the Plaintiff urges that
“ the deed never intended to convey to him more
“ than an under-proprietary title, that is, a title
“ as birtia, the wording of the deed being ‘with
“ ‘all the rights attaching to a birt zemindari.’ ”
He accordingly sent the case down to the Settlement Officer, that is, the Judge of First Instance, for the investigation and determination of two issues: the first was, “What is the meaning of
“ the term ‘with all the rights appertaining
“ ‘to a birt zemindari’ in the mortgage bond
“ on which the Plaintiff bases his claim.” The second was as to the date and circumstances of the seizure by the Government of the villages as part of the property of the rebel Rajah of Tulsipur. Nothing, however, ultimately turned upon the finding upon this issue, which was in accordance with the facts already stated.

On the first issue a number of witnesses were examined before the Lower Officer. He, upon that evidence, whilst professing that he knew very little himself about these tenures, came to the conclusion “that the deed pledged
“ the proprietary title in these four villages;
“ that it was intended that the mortgagee should
“ hold independently for the four years named;
“ and that at the end of that period, on failure to
“ redeem, the Plaintiff would have become the
“ independent proprietor of the property.” And he accordingly found on the first issue that the meaning of the words “with all the rights appertaining to a birt zemindari,” did in this case signify independent proprietary possession, and not a right of property to be held in subordination to the Talookdar.

The case, with these findings and the evidence on which they were based, went back to the Judicial Commissioner, who then made the decree

which is the subject of the present Appeal. He dismissed the suit upon the grounds stated in his judgment at page 52 of the Record.

Before considering those grounds in detail, it is desirable to observe, that the Judicial Commissioner seems to have agreed with the Commissioner Mr. Capper, that if the effect of the mortgage was to create a tenure subordinate to that of the talookdar, the claim of the Plaintiff to a sub-settlement would be valid. The question upon which the determination of the suit thus depended was that which was principally argued here, namely, what was the nature of the estate conveyed by way of conditional sale; that is, whether, supposing the mortgage deed to have become absolute, the Plaintiff would have held the villages from that time as an independent zemindar or as a zemindar, in some sense subordinate to the talookdar, the villages remaining in that way parcel of the Tulsipore estate.

It need hardly be said that if the Judges in Oudh had given a clear interpretation of the words "birt zemindari," their Lordships would have been very slow to question that interpretation, or even to draw from the evidence any inference other than that which those who are acquainted with the tenures of the province had already drawn. Mr. Capper, an experienced officer, assumed that the words "birt zemindari" import a subordinate tenure. From the first part of the final judgment of the Judicial Commissioner, it seems that he would have understood the words in the same sense if they had stood alone. He says, "The conclusion at which I arrive is that had this deed been executed prior to the annexation of the province, the introduction into it of the words 'birt zemindari' would have conveyed the meaning that the mortgagee agreed

“ to hold the property mortgaged in subordi-
“ nation to the mortgagor, or, in other words,
“ that he consented to the mortgaged villages
“ being retained in the mortgagor's Kabuliat,
“ instead of his entering into direct engage-
“ ments with the Government officials for the
“ revenue of such villages.” He then goes on
to consider how this construction of the words
ought to be affected by a consideration of the
surrounding circumstances under which the deed
was executed, and the probable intention of the
parties, and he proceeds, “ But as the deed was exe-
“ cuted subject to the annexation of the province
“ by the British Government, and at a time when
“ the policy was to do away with talookdars, and to
“ deal with village occupants as independent pro-
“ prietors, and considering also that immediately
“ after the execution of the mortgage the Plain-
“ tiff demanded and was admitted to direct
“ engagement with Government for the land
“ revenue due on the mortgaged villages. I can
“ but conclude that the nature of the title intended
“ to be conveyed under the deed was the full
“ proprietary title, and not merely the subordinate
“ and dependent title of ‘ Birtia.’” There are
therefore two reasons assigned for the conclusion
to which he came, and neither of them, in their
Lordships' judgment, appears to be satisfactory.
The deed, no doubt, was executed subsequent to
the annexation of the province, but there is no
reason to suppose that, at the time it was
executed, the parties were at all aware of what
the future policy of the Government, when it
came to change the fiscal arrangements of the
Nawabee, would be, for that policy at that time
had not even been declared; and therefore it is
unreasonable to suppose that the parties con-
tracted with reference to a system under which
the Government would make the new settle-
ment with the village occupants as independent

proprietors. Then again, their Lordships think that little, as to what the intention of the parties at the time may have been, can be inferred from the fact that after that policy had been declared, and the Government proceeded to make summary settlements with the immediate possessors of villages, and in fact adopted the policy of breaking up the great talookdari estates, the mortgagee did go in under that system to settle for the revenue of these villages. It was, after all, a mere fiscal arrangement; and the very terms of the settlement which he did make treated his interest as a defeasible interest, and confined the summary settlement made with him to the period which the mortgage had to run before it became redeemable. Their Lordships cannot attach much weight to the statement which he then made, and which is not in the terms of the mortgage deed, as to what his rights would be had not redemption taken place. The Judicial Commissioner, however, having for these insufficient reasons come to the conclusion above stated, held that the Plaintiff being in possession of the villages at the date of Lord Canning's proclamation under a title which would give him the full proprietary right in the soil, when and if his mortgage became absolute, fell within the scope of the proclamation; and that his title was by that proclamation swept away, and was not set up again by the subsequent explanation of the proclamation which is contained in the two letters annexed to Act I. of 1869. Everything in this decision, therefore, turns upon the correctness of the finding, that the intention of the parties was to pass the full proprietary title in the event of the mortgage not being redeemed at the proper time, and that there was therefore no sub-proprietary right in the villages as included in the talook

settled in 1859 which could be the subject of a sub-settlement. Their Lordships have already intimated that they are not satisfied with the reasons which the learned Judge gives for his construction of the instrument, or rather for the qualification of that which he would understand to be imported by the words "birt zemindari right," by reason of the particular circumstances of the case; and in their own opinion it is highly improbable that the intention of the parties when the contract was made was such as is imputed to them. They do not think it likely that the Maharajah (the mortgagor) at that time contemplated the impossibility of his redeeming the mortgage; or that, if he did, he intended in such an event to lose that influence and power and consideration which the great landowners of Oudh derived from the inclusion of subordinate zemindaries in their talooks; and if the words "birt zemindary," as seems to be admitted, may import the transfer of merely a sub-proprietary right, their Lordships conceive that to be in this case the more rational construction to be put on them. And it is in their opinion a strong argument in favour of this construction, that it makes all the subsequent acts of the Government and the parties which have led to the inclusion of these villages in the talook of Tulsipore consistent with reason and justice. It is clear that the Government did not intend to grant anything except that which was properly and legitimately part of the estate of the rebellious Rajah of Tulsipore. It is also clear that as Lord Canning's proclamation had then been explained and was understood, the Plaintiff, if he had acquired the absolute interest as zemindar in these villages, and if the villages were thus wholly severed from the talook, would have been allowed to engage for the revenue, not as

talookdar, but as independent zemindar. Nevertheless, the villages when the settlement was made were treated as part of Tulsipore; and were accepted by the Maharajah as part of his talook. He had no other title to them except the grant of the estate of Tulsipore; and it is more reasonable to conclude that they were properly so included, than to say that by mistake the Government took property which belonged to another man, put it into an estate to which it no longer belonged, and that by reason of the Estates Act and the other proceedings which have taken place a wrong has been done which is now irremediable.

Their Lordships will now deal with an argument which was much pressed, viz., that there can be no sub-proprietary right unless there be a substantial rent or service to be rendered by the sub-proprietor to the talookdar, and that in this case all that could be paid by the mortgagee after foreclosure would be the Government revenue assessed upon these villages, without giving the Rajah any beneficial interest in the collections of the villages. This objection does not appear to have occurred either to Mr. Capper or to Mr. Currie; nor was it treated as an objection in the case already referred to in the 4 Law Reports, Privy Council Indian Appeals, in which a sub-settlement was granted to a lady who does not appear to have paid anything to her former co-sharer in the estate (as he in fact was) in respect of the four villages of which she was found to be sole proprietor. Nor do their Lordships find, either in the letters of Lord Canning or in the rules annexed to Act 20 of 1866, anything which necessarily imports that it is essential to the enforcement of the rights of one who would otherwise be a subordinate zemindar, that the talookdar should have some pecuniary interest in the sub-tenure.

Those rules, and some expressions in the letters, no doubt, contemplate that in the ordinary case of a sub-tenant he would pay something to the superior lord. Their Lordships, however, do not find that those provisions are exhaustive, or that there are any negative words which say that there shall not be a sub-settlement of a subordinate zemindary included in a talook, unless the zemindar is bound to pay some substantial rent to his superior.

It might be open to consideration whether, if this were not in the strict sense of the term a sub-proprietary interest, the case in the 4th Law Reports, Indian Appeals, would not have justified a sub-settlement of it. It is not necessary however for their Lordships to go that length in the present case. It is sufficient for them to say that upon the whole they think this grant of the birt zemindary interest should be treated as the conveyance of a subordinate zemindary interest; that the villages were at the time of the settlement properly treated as still included in the talook of Tulsipore settled with the Respondent, and therefore that the judgment of Mr. Capper declaring the right of the Plaintiff is correct.

The only doubt their Lordships entertain is, whether that decision has fully and completely satisfied the terms of Act 20 of 1866 by giving to the Maharajah the right which that statute seemed to contemplate that the talookdar shall always have, viz., that of receiving a malikana of not less than 10 per cent. That malikana was given in the former case to which their Lordships have already referred. It is not very clear whether Mr. Capper assumed that the amount of this malikana would be afterwards fixed when the interest of the Plaintiff should cease to be a mortgage interest, and be perfected by foreclosure.

Their Lordships think that in recommending to Her Majesty (as they propose to do) to allow the Appeal and to confirm the decision of Mr. Capper, they should also recommend that the order should declare that it is without prejudice to the right, if any, of the Maharajah to malikana at a rate not less than 10 per cent., and that he is to be at liberty to apply to the Courts below for the settlement of such malikana as he may be advised. The costs of the Appeal must follow the result.