Privy Council Appeal No. 33 *of* 1938

Bengal Appeal No. 7 and 41 *of* 1936

Raja Profulla Nath Tagore, since deceased (now represented by Kumar Purnendu Nath Tagore and others)

v.

Santosh Kumar Das and another

and

Santosh Kumar Das and another

v.

Raja Profulla Nath Tagore, since deceased (now represented by Kumar Purnendu Nath Tagore and others)

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JULY, 1940

Present at the Hearing:
VISCOUNT MAUGHAM
LORD WRIGHT
SIR GEORGE RANKIN
[*Delivered by* SIR GEORGE RANKIN]

In this case two appeals from a decision given on the 27th June, 1935, by the High Court at Fort William in Bengal have been consolidated. They may be described with substantial though not with literal accuracy as brought one by the plaintiff and the other by the defendant, and as arising out of proceedings taken to ascertain mesne profits in a suit to recover possession of a number of tenures in lands lying in the village of Dashmina in the district of Bakarganj in Bengal. Strictly speaking there were two suits tried together and not one suit only, parties have on their death or for other reasons been succeeded by their representatives, there were a number of *pro forma* defendants in addition to the main defendant Raja Profulla Nath Tagore (now deceased but herein called the defendant); and at first his father's executors were impleaded and not himself. But such details may be waived aside and the suit sufficiently described as having been brought on 4th April, 1916, in the Subordinate Judge's Court at Bakarganj by one Satya Bhusan Das against Raja Profulla Nath Tagore. The plaintiff sought to recover possession of 54 tenures described in three schedules marked *ka*, *kha* and *ga* attached to

the plaint. The case went on appeal to His Majesty in Council and by an Order in Council dated 21st March, 1929, affirming the decision of the High Court it was finally determined that the plaintiff should recover possession of a 6-annas share in 22 tenures—these tenures falling into two classes comprising 11 tenures each. Under this decision the plaintiff obtained possession on 12th September, 1929, of what had been decreed to him and on 15th February, 1930, proceedings were begun to assess what was due to him from the defendant in respect of mesne profits for the period 4th April, 1913, to 12th September, 1929. The date—4th April, 1913—is determined by the fact that it is three years before the institution of the suit: the wrongful possession of the defendant had begun in or about 1907. An investigation having been made by a commissioner, the learned Subordinate Judge on 11th May, 1931, passed judgment on the matters in dispute, and the case went back to the commissioner who assessed the mesne profits at Rs.68,405. On appeal to the High Court, Mukerji and S. K. Ghose JJ. on 27th June, 1935, gave the directions which are now challenged before the Board and assessed the mesne profits at Rs.60,152 with certain interest and costs. Their decision was embodied in two decrees—one dismissing the plaintiff's appeal to the High Court and the other allowing on certain points the appeal of the defendant.

To ascertain the mesne profits from 1913 to 1929 it is necessary to have regard to the tenure history (if it may so be called) of the village of Dashmina, but their Lordships in referring to the history will endeavour, as far as may be, to omit irrelevant detail. The village lay within the zemindary of the defendant, a permanently settled estate named Nasirpur bearing Touzi No. 2,694 in the Bakarganj Collectorate. It was held by a Mahomedan family (who may be referred to as the Dashmina family) in what has been justifiably described as a complex or mesh of tenures and sub-tenures. Immediately under the zemindar they held 12 annas of the village in six separate "Jimba Taluks" and they also held a "Pattai Taluk" in two subdivisions under the other 4 annas. Under these interests they held numerous sub-tenures. One of the members of this family was Abdul Wahed who owned a 6-annas share in the various interests of which the family were possessed. He had mortgaged his 6-annas share in some of the items to the plaintiff's father who in 1901 obtained a mortgage decree and in 1905 bought his mortgagor's share in 11 tenures at a sale in execution of the decree. The plaintiff or his father likewise in 1905 and 1911 obtained money decrees against Abdul Wahed and his heirs under section 90 of the Transfer of Property Act and in 1910 and 1912 bought the judgment debtor's 6-annas interest in 43 other tenures belonging to the family.

Meanwhile the family had not been paying the rent due to the zemindar for the interests which they held directly from him, viz., the Jimba Taluks (12 annas) and the Pattai Taluk (4 annas). The zemindar in 1905 brought two rent

suits against them treating the Jimba Taluks as one tenure and the Pattai Taluk as another tenure. He obtained a decree in each case, put the tenure up to sale in execution thereof and purchased it himself. In 1907 he took the steps prescribed by section 167 of the Bengal Tenancy Act to annul all incumbrances on the properties purchased by him. The Dashmina family failed to resist these proceedings and the Court of Wards was put in charge of 10 annas of their interests—that is, excluding Abdul Wahed's 6 annas. The zemindar obtained possession through Court of all the interests of the 10 annas co-sharers and got *kabulyats* from their tenants, but in 1908 he came to terms with them and gave to the Court of Wards as representing the members of the family other than Abdul Wahed or his sons a fresh settlement of 10 annas of the village on payment of arrears and salami at an annual rental of Rs.2,259. The *kabulyat* (exhibit F) of 22nd June, 1908, is in evidence and shows this settlement to have been permanent and at a fixed rate and that the 10-annas share was to remain joint with the lands of the remaining 6 annas. Under this arrangement which was clearly made upon the footing that all tenures standing between the zemindar and the cultivating tenants had been annulled, the Court of Wards proceeded to realise 10 annas of the rents due from the *karsha* tenants and the defendant to realise 6 annas, as he fully admits.

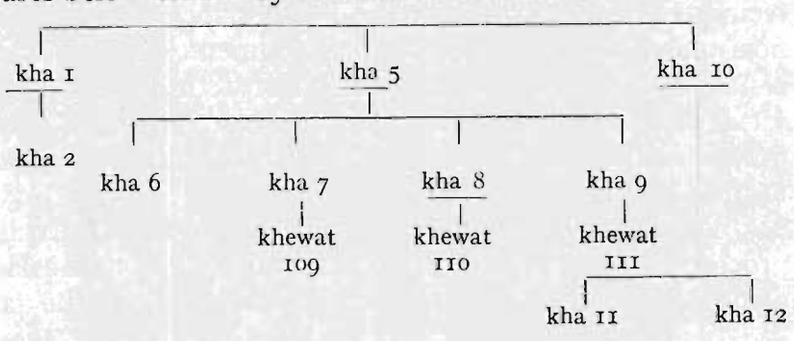
By his present suit, filed in 1916, the plaintiff sought to recover from the defendant possession of the 6 annas interest derived from Abdul Wahed in 54 tenures—in 11 purchased in 1905 at the mortgage sale and 43 purchased in 1910 and 1912 at the sales under the money decrees. He succeeded as to the former but only as to 11 of the latter. He succeeded in showing that the Jimba Taluks were not one tenure but six. Hence the zemindar's rent-decrees against the Dashmina family were not true rent decrees and did not under Chapter XIV of the Bengal Tenancy Act ground a right to annul incumbrances. The plaintiff and his predecessors being no parties to these rent suits were not bound by the form of the decrees and the interests purchased by them in 1905 were unaffected by the zemindar's proceedings of 1907. But the purchases of 1910 and 1912 gave to the plaintiff only such right, title and interest as the representatives of Abdul Wahed then had, and as they had been parties to the rent suits, they were bound by the decrees; and the plaintiff was held to have taken nothing by his purchase, except as to 11 tenures which being "protected interests" or interests held under such interests, were not, under the Act, subject to annulment. This was the result of the High Court's decision of 18th July, 1923, reviewing their previous judgment of 28th August, 1922. Their final decision was confirmed by Order in Council in general terms.

Two observations may be made before their Lordships proceed to the particular objections now taken to the High Court's directions as to mesne profits. First, as the facts

of this case well show, the process of creating derivative tenures is carried to great lengths in the district of Bakarganj but the relation between the holder of a tenure and the holder of a subtenure immediately subordinate to it is that of landlord and tenant. It is not correctly represented as that of a person entitled to receive rent from another by reason of an assignment from a person previously entitled to receive such rent. The subinfeudation proceeds upon the basis that each interest is a right to hold land. The definition of "tenure-holder" in section 5 of the Bengal Tenancy Act makes this plain, and it is true even in the case of an *ijaradar* whose interest is often interposed between a tenure and its sub-tenure. Thus section 22 (3) of the Act speaks of "a person holding land as an *ijaradar* or farmer of rents" though naturally the interposition of a tenure cannot in any way diminish the rights of the holder of the subtenure. If therefore for any reason an inferior tenure or holding ceases to exist whether by lapse of time (as in the case of a tenure which is not permanent) or by annulment, or by abandonment or otherwise howsoever, this necessarily operates as bringing to an end a qualification imposed upon the superior interest in the land.

The second observation is that as is well recognised in Bengal (cf. *Mafizuddin Sardar* v. *Asutosh Chuckerbutty*, 1909, 14 Calcutta Weekly Notes 352) the whole object of the reservation by sections 159 and 161 of the Bengal Tenancy Act of a power in the auction purchaser to annul incumbrances is to enable him to get rid of a subordinate interest the holder whereof may intercept the rent which would otherwise be legitimately payable to him. There is no intelligible principle on which he can be allowed to leave untouched an interest subordinate to the purchased interest and at the same time annul as incumbrances interests of an inferior grade. Nevertheless, by the negligence of the Dashmina family and the diligence of the plaintiff in the matter of objecting to the annulment proceedings taken by the defendant, this result has (according to the previous decisions in the present suit) been brought about in the present case.

On the defendant's appeal three questions arise. The first raises the question of the basis upon which mesne profits are to be assessed against the defendant in respect of the 6 annas interest of the plaintiff in tenures numbered 1, 5, 8 and 10 of schedule *kha* to the plaint, which has been decreed to the plaintiff as a result of the present suit. The position of these tenures in relation to each other and to tenures below them may be exhibited as under:—



The *kha* numbers underlined are tenures in respect of which the plaintiff succeeded in the suit. The other *kha* numbers are tenures in respect of which his claim failed because Abdul Wahed or his heirs had been judgment debtors in the rent suit and the plaintiff took nothing by the purchase of his interest in 1910 or 1912. The tenures shown by *khewat* numbers were not mentioned in the plaint but were tenures in which Abdul Wahed or his sons (Abdul Gaffar and Abdul Sattar) were alone interested and which go by the name *miras ijara Fateh Ali.*

The plaintiff contended that on its being shown that the defendant received 6 annas of the rents paid by the cultivating tenants he should be charged with this figure, because *kha* numbers 2, 6, 7, 9, 11 and 12 represent tenures which had no existence in 1913 or afterwards (as is shown by the decision that the plaintiff took nothing by his purchases in 1910-12) and because the *khewat* numbers are on the same footing in fact and law. The defendant maintained that these tenures were in existence though the judgment debtors in the rent suit were estopped from asserting their right, and that the only sums with which he was chargeable in respect of *kha* numbers 1, 5, 8 and 10 were the rents payable from the tenure immediately under each. The Subordinate Judge and the High Court accepted the plaintiff's contention so far as regards the *kha* numbers 2, 6, 7, 9, 11 and 12 which the plaintiff failed to recover, but accepted the defendant's contention so far as regards the *khewat* numbers 109-111 which had never been claimed by the plaintiff. The defendant's first ground of appeal is that the Courts in India should have assessed mesne profits in respect of *kha* numbers 1, 5 and 10 on the basis of the rent payable by the *kha* numbers immediately below them. On this point their Lordships are in agreement with the Courts in India and do not accept as correct the proposition that *kha* numbers 2, 6, 7, 9, 11 and 12 are still in existence. The fact that the tenure-holders as judgment debtors were bound by the decree was held by the High Court and by this Board to have brought these tenures to an end in such sense that a sale of the tenure-holder's right passed nothing. They do not persist as ownerless interests which any trespasser may seize still less as interests vested in the zemindar as such. The language used by the High Court in its judgment of the 18th July, 1923, bears no such interpretation. "They (the judgment debtors) submitted to the decree and the sale and the notices served under section 167 and thereupon the undertenures held by them were annulled in 1907. There was, therefore, no interest left in them which could be sold in 1910 or 1912 by the plaintiff in execution of his decree under section 90 of the Transfer of Property Act." This is the ground upon which the defendant succeeded in resisting the plaintiff's claim to 6 annas of these interests and had any of them been held to remain outstanding the plaintiff must have become entitled to them by his purchases.

By his second objection the defendant contends that the High Court ought to have accepted his suggestion that

cesses should not be taken into account at all in the computation of mesne profits. In their Lordships' view there is no substance in this objection. The cesses payable in respect of a tenure may ordinarily be more than the tenure-holder collects from the interests below him, but this is not always so; and there is no right on the part of the defendant to insist upon an inaccurate method being adopted by way of a short cut.

The defendant by his third objection contends that no mesne profits should have been awarded for *khas* lands and *barga* lands in the tenures *kha* 4 and 10 and *ga* 5 of the schedules to the plaint. The Courts in India have awarded mesne profits at the lowest possible rate for the *khas* lands and at the only possible rate for the *barga* lands —not on the footing that the defendant realised anything, but on the ground that with ordinary diligence he might have received these amounts. The defendant maintains that the meaning of the Subordinate Judge is that the defendant was not in possession of these lands at all but their Lordships agree with the High Court in thinking this to be a misapprehension of the learned Judge's meaning. They think it clear that the defendant was in possession of a 6 annas interest in these lands jointly with the Court of Wards who were in possession of an interest of 10 annas under the fresh settlement of 1908 made by the defendant with the Dashmina family other than Abdul Wahed and his heirs. The plaintiff could not without taking the law into his own hands have interfered in any way with these lands and steps under the Criminal Procedure Code would have been taken against him by the defendant very promptly had he attempted to interfere. On the other hand the defendant was not prevented by anyone from getting 6 annas of what these lands would yield to a tenure-holder. Their Lordships can discern no grievance arising to the defendant on this part of the claim.

The defendant's appeal does not in their Lordships' view succeed.

Turning to the plaintiff's appeal their Lordships will refer again to the "tenure table" given above and to the tenures therein described by the *khewat* numbers 109, 110 and 111. These were collectively known as *miras ijara Fateh Ali* and belonged entirely to Abdul Wahed or his sons, judgment debtors in the defendant's rent suit. It is not suggested that they are "protected interests". The defendant has been collecting 6 annas of the rents paid by the *karsha* tenants under them but the Courts in India have made him liable to the plaintiff in respect of *kha* 5 and *kha* 8 on the basis of the rent payable by these *khewat* numbers and no more. The plaintiff's first objection is to this decision. Their Lordships are unable to find that there is any difference in the principle to be applied to these *khewat* numbers and the principle which the Courts in India have rightly applied to such tenures as *kha* 2, or *kha* 7. If as against the defendant the plaintiff can take nothing by his

purchase of *kha* 2 or *kha* 7, which are subordinate respectively to *kha* 1 and *kha* 5 awarded to the plaintiff, it is difficult to see that the defendant can require him to recognise *khewat* 109 as an interest still existing, though only *sub modo* —that is, as an interest which its owners or any purchaser from them could not assert against the defendant. The rent decree and the sale thereunder being binding upon Abdul Wahed and his sons notice to annul was (*prima facie* at least) effective to annul any interest which was solely theirs not being a protected interest or an interest held under a protected interest. They or their representatives cannot require the plaintiff to object to the annulment of an interest of theirs. The fact that the plaintiff claimed and was refused *kha* 7 while he had and laid no claim to *khewat* 109 does not seem to affect the parties' rights. A question might perhaps have arisen whether the defendant can require the plaintiff, if the plaintiff disputes the annulment of *kha* 5 or *kha* 8, to recognise as subsisting all the inferior interests. But that the defendant has never insisted on; he has successfully disputed it in such cases as *kha* numbers 2, 6, 7, 9, 11 and 12. In this suit the same principle should in their Lordships' opinion be applied to *khewat* numbers 109, 110 and 111. Had the plaintiff bought these interests—say in 1910—it must be held that he would have acquired nothing: it cannot therefore be held that in 1913 and thereafter they subsisted to qualify the plaintiff's interest in the tenure superior to them. The Courts in India observe that the plaintiff not having bought the *khewat* numbers no estoppel arises upon which he can rely; apparently referring to some estoppel of which the judgment debtors but not the plaintiff could claim the benefit against the defendant. But even if the question were one merely of estoppel, it is not whether the plaintiff has acquired by purchase the right of Abdul Wahed and his sons to object to the defendant being permitted to assert that the *khewat* numbers are existing tenures. Buying the *khewat* numbers, the plaintiff would have been estopped equally with his vendors from asserting that these tenures existed. That is a burden and not a benefit. Can the defendant because the plaintiff did not buy them assert against the plaintiff that they exist, though he could not do so against Abdul Wahed and his sons, in spite of the fact that as regards the tenure between it and the plaintiff's tenure he has succeeded on the ground that the plaintiff bought nothing when he bought from Abdul Wahed? Their Lordships think that so to hold would be inconsistent and as the relevant facts are not in dispute they are of opinion that effect must be given to the plaintiff's objection.

The second objection of the plaintiff has reference to the mesne profits payable in respect of the *kha* numbers 16, 17, 18 and 37 recovered by the plaintiff as to 6 annas. Under them certain interests (*khewat* numbers 85, 104, 112 and 113) were held by one Sarban Bibi under an *ijaradari patta* dated 6th December, 1871, and entered into between her and her stepsons Abdul Wahed and Abdul Latif, members of the Dashmina family. The deed is in evidence and shows that

these were granted to her for her life at a rental of Rs.22 per annum. Sarban Bibi died in 1910. From 1913 onwards the defendant collected rents from the cultivating tenants but the High Court noticing that in the record of rights her interest was entered as permanent have held that the defendant is not accountable on the basis of what he collected. They regarded him as having committed an independent act of trespass against a third party. Their Lordships do not read the judgments of either Court in India as holding that Sarban Bibi's interest was permanent, and they think that the entry in the record of rights has been rebutted. The interest of Sarban Bibi having ceased and rents to which the plaintiff was entitled having been collected by the defendant he must be charged accordingly. On this point the plaintiff's appeal succeeds. Their Lordships do not disturb the findings of the Courts in India that the defendant is not liable for mesne profits in respect of the *khas* and *barga* lands formerly possessed by Sarban Bibi, as the defendant did not obtain possession of them.

The third ground taken by the plaintiff is that the High Court should not have allowed the defendant credit for the whole of the rents and cesses payable by the 6 annas interest in the tenures recovered by the plaintiff. Before the Subordinate Judge the defendant's claim to this deduction was not properly taken but in the High Court the matter was fully dealt with. It is not now disputed that in so far as these rents and cesses were payable to the defendant himself he must be allowed credit for them. Nor is it any longer suggested that any other party's claim need be considered save that of the members of the Dashmina family under their new settlement of 10 annas in 1908. The old *osat taluk Charu Meah* is not put forward for this purpose. The sole question is: seeing that defendant has not paid any part of these rents and cesses to the grantees of the 10 annas—that is, to the Court of Wards—can he have credit for the whole of them? Their Lordships think for the reasons now to be given that on this point the High Court's conclusion is right. The new settlement was on the footing that all interests between zemindar and cultivator had been annulled; and it is shown abundantly that the Court of Wards has been collecting from the cultivators on the lands of the tenures in suit a 10-annas share of their rents—not 10 annas of 10 annas of their rents or of the rent due from the tenure as a unit. The Court of Wards has never realised and has never claimed in these circumstances any part of the rents or cesses payable by the plaintiff in respect of his 6-annas interest in the tenures in suit. The Court of Wards as representing the 10 annas is a party to the suit. It is quite clear that having collected 10 annas of the rents payable to the tenures in suit they cannot also get 10 annas of the rent payable by the 6 annas interest. No such claim can be made by them whether against the plaintiff or the defendant. They have got all they are entitled to in respect of the years 1913-29 under their *talukdari pottah* of 31st March, 1908.

By his fourth ground of appeal the plaintiff seeks that their Lordships should revise the rates at which both Courts in India have thought it right that the defendant should be charged in respect of *khas* lands from which he did not in fact realise anything, but as to which it has been held against him that with ordinary diligence he might have recovered rents. Their Lordships see no reason to interfere with the rates which have been arrived at by learned judges of great experience in Bengal. Nor do they see any reason to be dissatisfied with the decision that it would not be right to charge the defendant with anything in respect of *khas* lands of the tenure *kha* 2 which the defendant had some justification for treating as *cheragi*—that is, as lands of which the profits had been dedicated for the purposes of lighting a mosque.

Their Lordships have been much assisted by the arguments of learned counsel on either side and in particular by the clearness and conciseness with which the various matters in issue have been presented in the Cases lodged by the parties. They think that the order to be made in the appeal should provide (1) that the appeal of the plaintiff's representatives be allowed to the extent hereinafter mentioned; (2) that the appeal of the first defendant's representatives be dismissed; (3) that the decree of the High Court dated 27th June, 1935, dismissing with certain costs the appeal No. 243 of 1931 brought to that Court by the plaintiff, be set aside, and that instead thereof two directions be given as follows; (*a*) that in the assessment of mesne profits in respect of the tenures *kha* 5 and *kha* 8 the defendant should be charged on the basis of the rents collected by him from the cultivating tenants and not on the basis of the rents payable by the tenures of the *miras ijara Fateh Ali* (*khewat* numbers 109, 110 and 111); (*b*) that in the assessment of the mesne profits in respect of the tenures *kha* 16, *kha* 17, *kha* 18 and *kha* 37 the defendant should be charged on the basis of the rents collected by him from cultivating tenants of holdings formerly held under the interest of Sarban Bibi and now directly under the plaintiff's said tenures; (4) that the decree of the High Court dated 27th June, 1935, in appeal No. 234 of 1931, brought to that Court by the defendant, be varied by altering the sum of Rs.60,152-6-3 therein mentioned so as to give effect to the foregoing directions.

Their Lordships will humbly advise His Majesty accordingly. Costs of both appeals to the High Court will be in proportion to success as now determined on the same principle as was applied by the High Court. The defendant will pay five-eighths of the plaintiff's costs of this consolidated appeal.

(25029) Wt. 8017—49 180 7/40 P. St. G. 338

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DELIVERED BY

SIR GEORGE RANKIN

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