

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Gopal Lall Thakoor v. Tilluck Chunder Rai and others, from Bengal: delivered 29th March, 1865.*

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Present :

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

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SIR LAWRENCE PEEL.

SIR JAMES W. COLVILLE.

THE question on this Appeal, which has been heard *ex parte*, is upon the alleged right of the Appellant, as Zemindar of Tuppah Nazirpore, in the Zillah of Backergunge, and Province of Bengal, to reassess and increase the rents payable in respect of certain lands forming part of his Zemindary, which formerly constituted one, but were afterwards divided into five dependent Talooks.

The Appellant derives his title to the larger part of his Zemindary from a sale for arrears of Government revenue, which took place in 1819. Fourteen-sixteenths were thus purchased partly by the Appellant's father and a cousin jointly, and partly by one Petumber Mozumdar. All these have since, by descent or sub-purchase, become vested in the Appellant. The remaining two-sixteenths are stated to have been acquired in 1830 by private purchase from a Mr. John Panioty and others in whom they were then vested.

To enforce his claim to enhance the rents of the five Talooks it was necessary for the Appellant to institute five separate suits. The amount involved in each of them was below, whilst the aggregate

amount involved in the five exceeded the sum for which an Appeal to Her Majesty in Council lies as of right. The Order of the 22nd of February, 1860, giving special leave to appeal, provided that in case the parties in India should consent that the order to be made by Her Majesty in one suit should govern the others, there should be an Appeal in one suit only. This consent has, unfortunately, not been given; the proceedings in all the suits have been sent home and are now before their Lordships. The argument of the learned Counsel for the Appellant embraced all the suits, and this Judgment must be taken to be given in each of them.

The five suits were commenced in September 1855. Each was founded on the alleged right of the Zemindar claiming, in part at least, as purchaser at a sale for arrears of Government revenue, to enhance the rents of a Talook described as Tashkhisi Zimma, or a sub-tenure held upon payment of a rent variable according to the current rates of the district.

The title set up by the Respondents is to this effect. They allege that as early as 1704 A.D. (being the year 1111 of the Bengal era), one Mookondo Ram Chuckerbutty took in the name of his son Ram Chuckerbutty, an Amildari Pottah of the lands in question in the five suits from Syud Shumsuddeen Mahomed, the then Zemindar, and held them as one talook; that on his death, his three sons, the said Ram Chuckerbutty, Gungadhur Shedhanto, and Gopeenath Chuckerbutty, held the talook in thirds, making a separation by guess of part of the land, but holding the other part jointly; and that in 1755 A.D. (or 1162 B.) they made a settlement, witnessed by the seal of Syud Imamooddeen Mahomed, the descendant of Shumsuddeen, whereby the rent of the waste lands being postponed for future arrangement, they undertook to pay for the remaining and productive land a joint jumma of 1901 rupees. They further allege that afterwards a complete separation between the brothers took place; that Gungadhur took his share of the lands held jointly, as well as those cultivated by him separately, and formed thereout a separate talook called Sheeb-Kant (a name compounded of the first syllables of the names of his two sons); that Gopeenath made in the same way a separate talook out of his share, which he named "Lukhee-Kant"

after one of his sons; that the remaining share continued as a third talook in the possession of Ram Chuckerbutty, or of his two sons Beeshtodeb and Gobind Prosad; and that this division was sanctioned by the Zemindar, and the consequent mutation of names effected on the 26th of Bysack, 1164 (A.D. 1757), by a writing, under the seal of Syud Imamoodeen, which provided that the jumma or rent should be assessed according to the quantity of land held by each person as ascertained by subsequent measurement. They state, however, that before this measurement took place Ram Chuckerbutty's share was sub-divided between his two sons Beeshtodeb and Gobind Prosad, and a further mutation of names effected in 1762, one of these sub-divisions becoming Talook Ram Lukhun, the other Beeshtodeb. They further allege that after this, the contemplated measurement and survey took place; that the talook of Sheeb-Kant Chuckerbutty was then assessed at a fixed Mukarrari jumma of 691 rupees 9 annas and 2 cowries; that the Talook Lukhee-Kant Chuckerbutty was assessed at a like jumma of 643 rupees 15 annas and 13 gunda; that Talook Ram Lukhun Chuckerbutty was in like manner assessed at 335 rupees 6 annas and 9 gunda; and that of Beeshtodeb, existing under the name of Ram Chuckerbutty, at 337 rupees 6 gunda; and that accordingly on the 14th Joistee, 1174 (being some time in the year 1767), separate bundobusts, or settlement papers, under the seal and signature of the Zemindar Syud Imamoodeen Mahomed were granted to the holders of each talook, and contained in these words: "The above amount of jumma being paid in current coin year by year, no increase shall be made to it, nor shall you give any."

Thus far the title of the Defendants in each of the five suits is common to all. The subject of the first suit is the Talook Sheeb-Kant Chuckerbutty; that of the second, Ram-Lukhun Chuckerbutty; that of the third, Lukhee-Kant Chuckerbutty; that of the fourth, Radha-Madub Chuckerbutty; and that of the fifth, Ramchunder Chuckerbutty; the two last-named Talooks having, after the death of Beeshtodeb, been formed out of his talook on a partition and division between his two sons, Radha Khrishto and Radha Madub in or some time before A.D. 1807. The Defendants in the several suits

derive their title from the Talookdars with whom the settlements of 1767 were made, some by descent, others by purchase; but it is not necessary for the determination of the present Appeal to state these devolutions of title in detail.

From what has been said it is obvious that the principal question in each suit was whether the Talook that was the subject of it had been held from a period considerably anterior to the Decennial Settlement at a fixed or mukarrari jumma, or was held on a rent variable, and therefore subject to enhancement.

The other material issues in each suit were: -

1st. Whether the claim of the Plaintiff was barred by the Regulation of Limitation. And,

2ndly. Whether the notice required by law as a preliminary to a suit for enhancement of rent had been duly served.

The five suits were heard together by the Principal Sudder Ameen of Zillah Backergunge on the 20th of January, 1858. His decision, which is at page 188 of the Appendix, was in favour of the Appellant on all points. The Defendants in each suit appealed to the Zillah Judge (Mr. Kemp), who, on the 17th of July, 1858, reversed the decision of the Principal Sudder Ameen, and decided in favour of the Defendants. His Judgment, which is at page 215 of the record, proceeded on the ground that the Defendants had established by evidence that each Talook had paid a fixed and invariable rent for more than twelve years anterior to the perpetual settlement, and was consequently not liable to further assessment.

The Appellant then carried the five causes to the Sudder Dewanny Adawlut on special appeal, upon the grounds stated at page 218 of the Appendix.

These seemed to have resolved themselves into the objections,—1st, that the Judge, having determined that the suits were barred by the Regulation of Limitations, was in error in afterwards going into the merits of them; and 2ndly, that he was in error in holding that a suit for enhancement of rent must be brought within twelve years from the date at which the Plaintiff's title accrued.

The Judgment of the Sudder Court, which is at page 223 of the Appendix, dismissed the Special Appeals on the ground that the Judge had in fact

decided the suits not on the question of limitation, but upon their merits, and that his decision, being one of questions of fact, could not be reviewed by that Court on special appeal.

Their Lordships, in dealing with the present Appeal, will assume that the Appellant's claim is not barred by lapse of time, and that he has duly served the notices required by law. These points appear to have been decided below in his favour, and their Lordships see no ground to doubt the correctness of that decision. They propose, then, to confine their attention to the question whether it was sufficiently proved in the Courts below that the present talooks had been held at a fixed and invariable rent for more than twelve years antecedent to the perpetual settlement, it being admitted that, as the law stood in 1858, the burthen of proving this lay on the Defendants.

The principal documents on which the Defendants rely in support of their title are the settlement of the 21st of Srabun, 1162, at p. 177; the Kharijee Likhous or "mutation papers" of the 16th and 26th of Bysack, 1164, at pp. 51 and 125; the similar document of the 13th Joistee, 1169, at p. 97; the four Bandobusts or settlements of the 11th and 14th Joistee, 1174, at pp. 64, 96, 125, and 179; the Farud of 1198, at p. 49; the Petition of 1810 at p. 58; the Dakhilas or receipts for rent at pp. 65 to 68; those at pp. 96 to 105; those at pp. 126 to 132; those at pp. 150 to 158; and those at pp. 177 to 185 of the Appendix. The "mutation paper" of Choitro, 1214, at p. 149, bears only on the partition in 1807 between the sons of Beeshodeb, and the titles of the Defendants in the 4th and 5th suits.

What then is the effect of these documents if taken as genuine? The first establishes the existence of the dependent Talook Ram Chuckerbutty in the year 1755; the two next prove the division of that Talook into three in the year 1757, and the further subdivision of one of these into two in 1762. But all these fail to show that these Talooks were held at a fixed and invariable rent. The first is at least consistent with the hypothesis that the rent of the parent Talook might vary with the amount of land brought under cultivation; the others import that the rent of each of the four derivative Talooks

was not to be settled until after survey and measurement. On the other hand, the four Bundobusts or settlement papers of 1174, if genuine, prove that in 1767, A.D., the rent of each of the four Talooks became fixed and invariable; and the Dakhilas support the contention of the Defendants that they and their predecessors had ever since continued to hold their lands at these rents. The Furud shows that in 1792, and the Petition shows that in 1810, the Zemindar for the time being recognised the Bundobusts of 1174, and admitted the title of the Defendants. Unless, therefore, this evidence can be successfully impeached, it seems fully to warrant the conclusion of the Zillah Judge that the Defendants had relieved themselves of the heavy burthen which the law cast upon them, and established the immunity of their lands from further assessment.

Before, however, considering the objections taken to the genuineness or credibility of the Defendant's evidence their Lordships desire to notice the objection taken by the Attorney-General, to the effect that these documents, if genuine, contain no "words of inheritance" (to use the English phrase), *i.e.*, no expressions importing the hereditary character of the alleged tenures. Their Lordships conceive that this objection, which does not appear to have been taken in the Courts below, is not open to the Appellant in these suits. He is not suing for the recovery of the lands, or to disturb the possession of the Defendants, in which case he might have been successfully met, and no doubt would have been met, by a plea of the Regulation of Limitation. His suits are for the enhancement of rent. The pleadings consequently admit the existence of the tenures, and the lawful occupation of the Defendants. The only question between the parties is, whether the Talooks are Tashkhis or Mukarrari; *i.e.*, whether they are held at a variable or at a fixed and invariable rent. Moreover, if the objection were open to the Appellant it could hardly prevail against the evidence which the record affords, that for upwards of a century these Talooks have been treated as hereditary, and as such have both descended from father to son, and been the subject of purchase. It may further be observed that in the mutation papers of 1807, at

p. 149, the Talook of Beeshtodeb is expressly termed "hereditary."

What then are the objections to the proof offered by the Defendants? The first, and not the least formidable, is that based upon the fact, established, if not admitted, that Syud Imamoodeen died in 1192 B. or 1785 A.D. This applies directly only to the Furud, and to some of the Dakhilas. It affects the more material documents (the Bundobusts of 1174) in so far only as it tends to deprive them of the important corroboration which they derive from the Furud, if genuine, and to throw suspicion generally on the Defendant's case.

It is clear that the Furud bearing the seal and "Sri" signature of Imamoodeen has not been concocted recently, or for the purposes of these suits.

That it existed in 1806 and was filed with other documents in the suit before Mr. Winden (the proceedings in which are at p. 48 of the Appendix) is shown beyond reasonable doubt. It is very unlikely that it should have been fabricated for production in that suit, which was one between the Talookdars and their sub-tenants. On the other hand, it appears that the perpetual settlement of this Zemindary, the most important transaction in its history, was concluded several years after Imamoodeen's death in his name; though possibly without the use of his seal. This was six years later than the date of the Furud. There is abundant evidence of the appearance of his seal and of his "Sri" signature upon other Zemindary documents purporting to bear a date later than that of his death. If such documents have been rejected in some cases, they have been admitted and acted upon in others. Weighing the evidence on both sides, their Lordships are not disposed to dissent from the conclusion of Mr. Kemp, that the date of Imamoodeen's death is not a fatal objection to the genuineness of the Furud, and the Dakhilas impeached on the same ground; but that all may, nevertheless, be taken to have come from the Sharista or office of the Zemindar.

It is then objected, as a suspicious circumstance, that though the Furud was produced in 1806, the bundobusts or settlements of 1174, to which it refers, were not then produced. The answer to this is, that

their production was not necessary for the purposes of that suit. Documents are not produced in the Courts of India without some risk; and of all men the dependent Talookdar has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing Zemindar, he may at some future time have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

Another objection taken to the genuineness of the bundobusts of 1174 B. is that no mention of them is made in the copy of the Quinquennial Paper for 1227 B., corresponding with A.D. 1820, which is set forth at p. 20 of the Appendix. That there is some foundation for this objection their Lordships do not deny. But the document at p. 20 is not very well authenticated. Little, if any, weight seems to have been attached to it even by the Principal Sudder Ameen, whose Judgment was in favour of the Appellant. The inference founded on the omission to mention certain papers is not conclusive against their existence; and, indeed, there is in the last column of this Quinquennial Return a general reference to papers other than those mentioned in the preceding columns. Whatever may be the force of this inference, it seems too slight to outweigh the corroborative proof of the existence of the bundobusts long before 1820, which is afforded by the Furud, and by the Zemindar's Petition at p. 58 of the Appendix.

The evidence that has been given on either side to prove or to disprove that the enjoyment of the Talook has been consistent with the hypothesis that the tenures were Mukarrari, remains to be considered. The earlier Dakhilas produced (the objection to such of them as are subsequent in date to the death of Imamoodeen having already been disposed of) prove that for upwards of twelve years prior and up to the perpetual settlement the Talooks were held and enjoyed at the fixed rents specified in the several bundobusts. So far, then, the Defendants have given the proof which the Regulations require from them. But then it is objected that Jumma Wasil Bakee papers produced by the Appellant show that at a subsequent period the rents were variable. These papers are at pp. 90 to 95, and pp. 122 to 125



of the Appendix. They are for various years between the year 1203 and 1216, and purport to show the collections in these years made either by the Receiver appointed by the Court of Wards during the minority of the Zemindar, or by a lessee named Mozoomdar. They do not mention the Talook Sheeb-Kant Chuckerbutty, which is the subject of the first suit; and the title of the Defendants in that suit is therefore unaffected by them. It is perhaps for that reason that so little notice of them is taken by Mr. Kemp in his Judgment. On the other hand, if genuine, they do show that during these years rents higher than those which the Defendants contend to be fixed or invariable were demanded and realized in respect of the other Talooks, and that those rents were to some degree variable in amount. But all these accounts appear to be of a date earlier than 1810. In that year, it appears from the Zemindar's Petition at page 58, the Talookdars remonstrated against certain exactions to which they had been subjected, asserted the title which their successors now assert, and obtained a recognition of it from the then Zemindar. There is no evidence that since that time the rent paid in respect of any of the Talooks has varied, and it is shown that for fourteen years after he had full notice in the proceeding before Mr. Knott, at page 50 of the Appendix, that the Defendants relied on the alleged settlement of 1174, the Appellant continued to receive the rents so fixed without seeking to enhance them. The conclusion, therefore, to which their Lordships would come upon the evidence is, that between 1768 and the date of the perpetual settlement the enjoyment of these Talooks was consistent with the bundobusts of 1174, that it has been equally so since 1810, and that if higher and varying rents were exacted in respect of any of the Talooks during the period covered by the Jumma Wasil Bakee papers such exaction was wrongful, and was remedied in 1810, when the recognition of the Zemindar remitted the Talookdars to their original rights. This argument assumes the genuineness of the Jumma Wasil Bakee papers, as to which there may be some doubt. They are certainly inconsistent with the Dakhilas for those years produced by the Defendants.

On the whole, their Lordships, though labouring

under the disadvantage of having heard only the able, but at the same time candid, argument for the Appellant, have failed to find any sufficient grounds for disturbing the Judgment of the Court below upon a pure issue of fact. The order, therefore, which they must humbly recommend Her Majesty to make is that this Appeal be dismissed.

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