

Privy Council Appeals Nos. 132 and 133 of 1924.

Bengal Appeals Nos. 46 of 1922 and 104 and 105 of 1923.

Prafulla Nath Tagore	-	-	-	-	-	-	<i>Appellant</i>
						<i>v.</i>	
Satya Bhusan Das and others	-	-	-	-	-	-	<i>Respondents</i>
Satya Bhusan Das	-	-	-	-	-	-	<i>Appellant</i>
						<i>v.</i>	
Prafulla Nath Tagore and others	-	-	-	-	-	-	<i>Respondents</i>
Same	-	-	-	-	-	-	<i>Appellant</i>
						<i>v.</i>	
Prafulla Nath Tagore and others	-	-	-	-	-	-	<i>Respondents</i>

(*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 19TH MARCH, 1929.

Present at the Hearing :

LORD SHAW.

LORD CARSON.

LORD ATKIN.

SIR JOHN WALLIS.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from the High Court at Fort William in Bengal in a suit brought by the plaintiff to establish his right to certain undertenures of land in the village of Dashmina against the *zemindar* of Nasirpur in whose *zemindari* the village lies. The rights of the parties involve an examination of the creation of tenures and subtenures from before 1799 and of the complicated devolution of title in the respective holders since that date. It is also necessary to consider the provisions of the Bengal

Tenancy Act 1885 relating to the power of an auction purchaser to annul incumbrances, powers which the *zemindar* says that he has exercised so as to defeat any claim by the plaintiff. Their Lordships have the assistance of careful and accurate judgments in the Courts below in which the facts are fully surveyed, and it will be sufficient for the purpose of presenting the issues that arise before the Board to state shortly the principal landmarks in the history of the title. Before 1799 the defendants' predecessor the then *zemindar* of Nasirpur had created a *jumba* tenure, which included the village in question, known as the Taluk Shib Deb Sen. By the time of the permanent settlement the Sen family held the property in five branches in five equal shares of 3 annas 4 gundas each, and one-fifth of the rent was paid separately by each shareholder. Other sub-divisions of the shares followed which it is unnecessary here to specify. Before 1835 the *zemindar* had reacquired a 4 anna share in the whole tenure. In 1852 the *zemindar* created in favour of two persons Kader and Saker a *putni* tenure superior to the *jumba* tenure over the whole property and put them into possession of the 4 anna share. They thus held the 4 anna share in possession and were superior landlords under the *zemindar* of the remaining 12 anna share still outstanding in the Sen family. In 1861 Kader and Saker the *putnidars* enforced their right to rent against the holders of the 12 anna share, put the property up to sale and bought it, thus acquiring the interest in the whole. In 1862, however, the *zemindar* on his part enforcing his right to rent against Kader and Saker, put the whole *putni* tenure up to sale, and bought it. The 4 anna share thus reverted to him in possession, the 12 anna share of the *jumba* tenure being still outstanding. In 1871 the *zemindar* leased by *pottah* the 4 anna share to Kader and Saker. Meantime in natural course numerous sub-tenures had been created. In 1892 the son and successor of Kader granted to the father of the plaintiff a mortgage of 11 such sub-tenures in the 12 anna share. In 1901 the plaintiff's father obtained a mortgage decree against the mortgagor, and in 1905, under the decree the plaintiff, his father's successor in title, had the sub-tenures sold and purchased them. Having thus established the plaintiff as the owner of 11 sub-tenures we now return to the main title. In 1905 the *zemindar* sued Kader and Saker for arrears of rent, both on the 12 anna share under the *jumba taluk*, and on the 4 anna share under the *pottah taluk*. He obtained decrees, had the property put up for sale in 1906 and himself purchased. He gave notices to annul incumbrances in pursuance of the powers given by the Bengal Tenancy Act. He therefore claims now to hold the whole property free of all sub-tenures, and if he is right he has succeeded in eliminating the plaintiff and his 11 sub-tenures. The plaintiff, on the other hand, claims that not only his 11 sub-tenures are still in existence, but also further sub-tenures which he acquired after the *zemindar's* purchase in 1906. For in 1908 the plaintiff sued for the balance of the before-mentioned

mortgage ; and obtained a personal decree against the mortgagor. In execution of that decree he procured the sale of certain other sub-tenures as the property of the judgment debtor, and bought them in 1910 and 1912. The Subordinate Judge found in favour of the plaintiff substantially on the whole of his claim. The High Court found in favour of the plaintiff in respect of the 11 sub-tenures bought in 1905 ; but decided against him in respect of the sub-tenures bought in 1908 and 1910 except in respect of 2 or 3 in which it was held that the plaintiff could rely on the rights of superior sub-tenure holders to him acquired before the *zemindar's* purchase in 1906. We are thus brought to the issues before the Board. The plaintiff contends that before 1905 the original *jumba* tenure Shib Deb Sen had been divided into separate tenures with the consent of the *zemindar*. The *zemindar*, however, as is contended, in his suits in 1905 sued as for one single tenure and obtained annulment of incumbrances as though the sub-tenures were under one single tenure. In this way the sub-tenures holders lost the right to redeem the separate divided tenure under which they held and were exposed to the much heavier liability of redeeming the whole. This, it is said, is contrary to the provisions of the Bengal Tenancy Act. The *zemindar*, on the other hand, says that the original tenure never was divided. If this is so, there is no ground for complaint ; the plaintiff fails. The *zemindar* further contends that even if the tenure had been divided his proceedings were in order, and the sub-tenure holders could have exercised their rights under the Bengal Tenancy Act to redeem the separate divided tenures. The Courts below have decided against the *zemindar* on both his contentions.

The first question, therefore, is whether the original *jumba* tenure was ever divided into separate tenures as between the *zemindar* and the tenant. As to this it has to be remembered that by the course of legislation ever since the Bengal Regulations of 1799 such division can only validly take place with the consent of the superior landlord in writing. Whether a tenure has been divided or not is a question mainly of fact in each case. In view of the prevailing joint ownership of property by both landlord and tenant, and the prevailing system of partition, it is obvious that either party may accept the partition made by the others without necessarily intending to alter their legal relations *inter se*. Thus the separate shareholders in the landlord family may collect a separate share of the rent without either party intending to divide the tenure : and similarly the landlord may collect separate shares of the rent from separate shareholders in the tenant family without the legal position being altered. The question whether a subdivision has been made is really the question whether the parties have come to a fresh agreement, and must be determined by the familiar considerations which attach to such a problem. In the present case a series of facts extending over a century were laid before the Court, some pointing in one direction, some in the other. The effect of the evidence is thus summarised by the

learned Subordinate Judge in a passage adopted by the High Court :—

“ Thus we find that rents for the several interests were separately realised both amicably and by suits for over a century, that separate rent receipts were granted for the separate parts, that the several interests were treated all along except indirectly in the last suit No. 48, as specific tenures in the names of the respective holders with specific *sadar jumma* or annual liabilities for rent and that for purposes of mowzahwar returns, cess. returns execution of degrees record of rights and transfers they were also treated as separate tenures. We have also the fact that the lands of the respective tenures are not entirely joint, and that there are several under-tenures, including some owned by the Tagores themselves which are exclusively held under one or other of the said interests.”

Their Lordships are of opinion that there is evidence to support these findings and they see no reason to doubt that in substance they are correct, and that they justify the view expressed in both Courts that the original tenure had been at a very early time divided into separate tenures. At what time, it appears to their Lordships unnecessary to determine. If before 1799 the consent of the landlord in writing was unnecessary : if after 1799 there is ample evidence to support the finding of the Subordinate Judge that there was a written consent. The finding therefore of the High Court affirming the finding of the Subordinate Judge on this matter must stand. In coming to this conclusion their Lordships must not be thought to express assent to the view taken in the High Court as to the admissibility of the judgment of Mr. Kemp, the District Judge in 1859, in a suit between Kader and Saker, the then *putnidars* against a sub-tenure holder on the ground that it tended to show the probability of a statement made by a witness called at the trial. It is sufficient to indicate their Lordships' opinion that this reasoning is at least open to doubt, for the judgment in question is only a small feature of the evidence and does not appear materially to have affected the findings for which there is ample other support.

On the footing therefore that there were in existence several tenures in place of the original single tenure the question arises whether the *zemindar* took appropriate steps to annul the sub-tenures. This depends upon the construction of Chapter XIV of the Bengal Tenancy Act, 1885, entitled Sale for Arrears under Decree and comprising ss. 159-177 inclusive of the Act. Summarising the sections the chapter provides in s. 162 that “ when a decree has been passed for an arrear of rent due for a tenure or holding ” the decree-holder may apply for sale producing a statement showing the village in which the land comprised in the tenure or holding is situate and the yearly rent payable from the same : the land may then be proclaimed and attached, s. 163 ; the tenure or holding shall first be put up to auction subject to incumbrances which by s. 161 include sub-tenures ; and if the bidding does not reach a sum equivalent to the amount of the decree and costs then at the request of the decree holder the land

shall be put up for sale with power to the purchaser to avoid incumbrances, s. 165. The purchaser at such a sale may within a year from the sale avoid incumbrances by presenting an application to the collector requesting him to serve on the incumbrancer a notice of annulment: and from the date of such service the incumbrance is annulled, s. 167. By the provisions of s. 170, when an order for a sale of a tenure or holding in execution of a decree for arrears due thereon has been made, the tenure shall not be released from attachment unless before it is knocked down to the auction purchaser the amount of the decree and costs is paid into Court: and any person having in the tenure any interest voidable on the sale may pay money into Court. It seems to their Lordships clear that the provisions of the Act are devised for the purpose of protecting the persons interested in each separate tenure put up for sale. A sub-tenure holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the objects of the Act if several tenures could be lumped together in one order for sale so that a sub-tenure holder to get protection would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connection. This construction of the Act has been adopted in numerous decisions of the Courts in India and their Lordships consider it to be correct. It follows that the defendant must fail in resisting the plaintiff's claim unless he can show that his proceedings were taken in respect of separate tenures and gave the sub-tenure holders the protection to which their Lordships have already held they were entitled. There can be no doubt that the Code of Civil Procedure permits a plaintiff to join in one suit claims against a defendant in respect of more than one tenure. It appears to have been the view of the High Court following other decisions in India to the like effect that such a suit can never result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure. Their Lordships are inclined to think that this goes too far. If the original suit can be brought against a holder in respect of all his separate holdings, there appears to be nothing in the Code of Civil Procedure or in the Bengal Tenancy Act to prevent the consequent decrees and orders from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought. It would be a misfortune to find a system of procedure so rigid as to lead to an illogical and inconvenient result: and their Lordships are not prepared to hold that this defect exists. But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately, so that each may be redeemed separately by the incumbrancers of such separate part pursuant to s. 170. In the present case while there is sufficient in the *zemindar's* plaints in 1905 to support a claim in respect of several tenures their

Lordships have not been provided with the documents which record the subsequent proceedings for sale and annulment so as to enable them to conclude that the subsequent proceedings maintained the distribution into several tenures. Such documents as are before them rather lead to the opposite conclusion. Their Lordships are therefore unable to disagree with the view of the Courts below that the proceedings taken by the *zemindar* in 1905 and the following years were ineffective to annul the 11 incumbrances of which the plaintiff was then the holder. As to the sub-tenures acquired by the plaintiff after the *zemindar* had recourse to his rights their Lordships are in agreement with the reasons given by the High Court on review for holding that the plaintiff cannot now make a claim to these, and they confirm the decision given against the plaintiff on this point. They also see no reason to differ from the conclusion of the High Court in respect of the (two) tenures excepted in favour of the plaintiff. For these reasons their Lordships are of opinion that the appeal and cross appeal should be dismissed with costs, and they will humbly advise his Majesty accordingly.

In the City of Cambridge

In the Privy Council.

PRAFULLA NATH TAGORE

^{v.}

SATYA BHUSAN DAS AND OTHERS

SATYA BHUSAN DAS

^{v.}

PRAFULLA NATH TAGORE AND OTHERS

SAME

^{v.}

PRAFULLA NATH TAGORE AND OTHERS.

(*Consolidated Appeals.*)

DELIVERED BY LORD ATKIN.

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