Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Dhunput Sing v. *Gooman Sing and others, from the High Court of Judicature at Calcutta; delivered 20th December*, 1867.

Present:

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
SIR RICHARD T. KINDERSLEY.

SIR LAWRENCE PEEL.

THIS is an Appeal against a Decree dismissing the suit brought by the Appellant under Act X of 1859, for the enhancement of the rent of lands within his zemindary. The argument before their Lordships raised various questions of some perplexity and of great public importance; but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the Defendants (the actual tenants), and of a right to raise the rent previously paid in the Plaintiff (the Zemindar). The Appellant's title is thus derived. He is the son and representative of Baboo Pertâb Singh, who, in 1851, purchased the zemindary in which the lands in question are situate, at an execution sale. The execution, though at the suit of Government, was one in a mere civil suit for monies, and, accordingly, the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment debtor, and therefore subject to whatever subsisting interests in the lands

had been effectually granted or created by any former Zemindar.

The following is the history of the Respondent's occupation :—

In 1792, shortly after the decennial settlement of this zemindary had been completed, but before that settlement had been declared perpetual, the then Zemindar granted the lands in question to one Aghum Singh, at an annual rent of 101 sicca rupees, under a pottah, of which the terms and effect will hereafter be considered. Aghum Singh continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the Zemindar's receipts or acquittances, which have been produced in evidence, he is described as Mokurrureedar. After his death his sons Pertâb Singh and Neerbhan Singh continued to hold the lands on the same terms, and some of the Zemindar's receipts accepting the same rent of 101 sicca rupees from Pertâb Singh, and describing him as Mokurrureedar, are also in evidence. Pertâb Singh died in or before 1838, for, in the proceeding at page 20 of the Record, his son Gooman Singh, one of the present Respondents, and Neerbhan Singh, are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands, which failed on proof that they were included in the zemindary of which the revenue had been permanently settled in 1793, and were therefore not subject to any claim on the part of Government. The Zemindar being no party to this proceeding, it is material only as showing that the title on which the Respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of 101 sicca rupees, was received from Gooman Singh; and in these also he is described as Mokurrureedar. It is not, however, clear that these last-mentioned receipts were granted by the then Zemindar or his officers. It seems more probable that they were granted by a receiver who, under the Court of Wards, during the minority or incapacity of the Zemindar, or under some other unexplained circumstances, was at that time in possession of the zemindary. It also appears that

although the rent was often taken from one member of the Singh family, as shown by the receipts, there were many persons of that family beneficially interested in the lands; Pertab Singh having left five sons besides Gooman Singh, and Neerbhan Singh having on his death left two sons, Dabee Singh and Akbur Singh. And from one of the documents in evidence in the cause it appears that fees were paid by the two last-named persons to and accepted by the receiver in 1845, on a mutation of names, as upon the devolution of a Mokurruree tenure.

The father also of the Appellant is shown to have brought in 1855 a summary suit for the recovery of one year's rent, at the rate of 101 Sicca rupees, alleging that the lands were held as a Mokurruree at that rent by the Defendants there named.

So far the tenure, whatever was its nature, remained in the Singh family, but it afterwards became the subject of transfer by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the Respondent, Muddun Lall Dass, had before the commencement of the present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of Gooman Singh and of one of his brothers; and it is stated in the Respondent's case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the Decree under appeal. The result, therefore, of what has been stated is that at the commencement of this suit the lands had been held as against the Zemindar at one unvarying rent since 1792, under a tenure originating in the Pottah of that year, but treated *de facto* as an hereditary tenure, and from time to time described by both the Zemindar and the tenants as a Mokurruree tenure; and that, as such, it has been made the subject of sale and transfer, to the knowledge and with the assent of the Zemindar, who on one occasion bid, through his manager, for a portion of it.

The first proceeding in the suit was necessarily the notice which the 13th section of the Act directs to be served on the under tenant or ryot whose rent is sought to be enhanced. That document stated that the taisdad, meaning probably the rent-roll, of the lands was extremely small; that the

Respondents had produced "no reliable document" showing on what special grounds they occupied them; that with a view to settle the rent the lands had been measured and were found to consist of 11,645 beegahs; and that the rent of them, according to the rate paid by other ryots cultivating the same kind of land, would amount to 24,842 rupees 10 annas 8 pie.

And the plaint founded on this notice accordingly claimed that sum with interest, amounting in all to 26,752 rupees 6 annas 9 pie, as due from the Respondent to the Appellant.

The learned Counsel for the Appellant have argued that the defence set up by the Respondents must be taken to be that they are the holders of a mokurruree istemraree tenure, *i. e.*, an hereditary tenure, at a fixed rent under the Pottah of 1792; and that they must stand or fall according as the terms of that instrument establish, or fail to establish such a title. Their Lordships cannot accede to that argument. It is to be observed that Act 10 of 1859 (see sec. 59) does not require the Defendants to put in any written pleading. And in their Lordships' opinion the fair construction of the written statement which, under the option given to him, the Respondent Muddun Lall Dass did put in is, that under all the circumstances stated above, he and those from whom he derives title must be taken to have held as hereditary mokurrureedars, which of itself would be an answer to the suit; and that if that contention could not be supported to its full extent, they were protected against an enhancement of rent by the provisions of Act 10 of 1859.

The Respondents have been successful in every stage of the suit in the Courts below; but the several decisions in their favour have proceeded on different grounds. The Collector (the Judge of first instance), in his Judgment of the 31st of March, seems to have held that though the Pottah neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the Defendants had proved that they had held for upwards of seventy years at one rate, and that the Plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an Appeal to the High Court. The Petition of Appeal treats the

Respondents as ryots; and on the first argument in that Court their Counsel argued their case on the assumption that they were properly described as ryots. On that occasion the Judges held that the Pottah did not in its terms confer any mokurruree title; and that the statement of the Appellant's father, and the receipts describing the tenants as Mokurrureedars, would not, in the absence of all mokurruree title in the original lease, confer such a title, or form an estoppel to the Appellant's suit. But they also held that the law, as declared by the 3rd and 4th sections of Act X of 1859, conferred in fact a mokurruree title on all ryots in the position of the Defendants, who held lands at fixed rents, which had not been changed since the date of the permanent settlement. The Appellant petitioned for a review of this decision, partly on the ground afterwards decided against him, and now abandoned, as to what in legal contemplation is the date of the permanent settlement; and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th sections of the Act, which were specifically applicable to ryots only, whereas it ought to have proceeded under the 15th and 16th sections, relating to persons possessing a transferable interest in the land intermediate between the proprietor of the estate and the ryots, such as the Defendants were; that between these last-mentioned sections, on the one hand, and the 3rd and 4th sections, on the other, the right may be dependent on the conditions of a lease, whereas under the latter it would be independent of the conditions of any lease; and finally, that the question was to be treated not as one of prescriptive right, but as one dependent on the terms of the Pottah. The High Court, on this final hearing, held that the Defendants were not ryots, but tenants intermediate between the proprietors and the ryots; that they did not hold under a terminable lease, nor under the Pottah, which did not in any way refer to them but only to the original lessee; but that inasmuch as they had been allowed by the proprietors to hold the tenure without any pottah for fifty years and ever since the death of the first lessee, and the proprietors had by their acts admitted the tenure to be transferable and mokurruree, *i.e.*, permanent, it was not for the Court,

sitting as a Revenue Court under Act X of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable; and that the Respondents holding a tenure at a fixed rent which had not been changed from the time of the perpetual settlement were protected by the 15th and 16th sections of the Act from enhancement.

It is now assumed on both sides that whatever was the interest of the Respondents in these lands, they were not ryots, but tenants intermediate between the proprietor and the ryots. And one of the points taken for the first time here was that that being so, they were not subject to the jurisdiction of the Collector under Act X of 1859; that this tenure, if it could be made the subject of enhancement of rent at all, could be made so only by suit in the Civil Court; and for examples of this we were referred to the cases of the Ranee Surnomoyee and that of Gopaul Lall Thakoor, which are both reported in the 10th volume of "Moore's Indian Appeals."

Their Lordships cannot entertain any doubt of the jurisdiction of the Courts below. Both the cases cited were tried before Act X of 1859 was passed. That Act throughout contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes. And their Lordships think that the 23rd section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, viz., "a suit for the determination of the rate of rent at which a pottah and kuboolyat should be given," or as what it is in form, a suit for "arrears of rent due on account of land."

This being so, the first question is, what is the nature of the Respondents' sub-tenure? If it can be shown to be Mokurruree-Istemraree, there is an end of the case. If this cannot be established, the question whether the Respondents are not protected by the 15th and 16th sections of the Act will arise.

The pottah is addressed to Aghum Singh as "Moostajir," which is translated "farmer" of Mouzah Cheloone, and other villages in forests of Sukhooa trees in the Zillah named; and the operative part of it, according to one version of it, is in these words: "Inasmuch as in accordance with your

application the lands of the villages in the said forests have been assessed with a rental of 101 rupees, everything being consolidated, and a pottah granted to you, it is required that you will in all confidence have the lands of the said forests occupied by Purbuttea and other ryots, and keep paying to the Sircar the rent year by year according to this pottah, and whenever you may be summoned for the purpose of hunting, you will attend accompanied by all the Purbutteas."

In the course of the arguments for the Appellant, a question was raised whether this Pottah was more than a lease of the village lands then in cultivation; and whether the greater part of the land now in the occupation of the Respondents had not been acquired by subsequent and gradual encroachment. Their Lordships, however, are of opinion that the Pottah covered, not only the lands then in cultivation, but also the forest lands which the grantee was to settle and reclaim by bringing Purbutted and other ryots upon them; and upon the pleadings and evidence in this cause, they must assume that it included all the lands which the Appellant now seeks to re-assess. The nature and extent of the interest in these lands which it conferred on Aghum Singh have now to be considered.

Upon these points their Lordships are not prepared to dissent from the Judgment of the High Court, in so far as it found that the Pottah, taken by itself, cannot be held to have granted a Mokurruree-Istemraree tenure. It does not contain the term Mokurruree, or any equivalent words from which an obligation on the part of the grantor never to raise the rent is fairly to be inferred; nor does it contain the expressions "from generation to generation," or other like words importing that the tenure, whether the rent was to be fixed or variable, was to be hereditary. Their Lordships cannot accede to the argument for the Respondents that a Pottah must *primâ facie* be assumed to give an hereditary interest, though it contains no words of inheritance. They do not think that the case cited from Morton's decisions, still less that that of Freeman *v.* Fairlie, is any authority for such a proposition. Pottah, as may be seen by referring only to Act X of 1859, is a generic term which embraces every kind of engagement between a Zemindar and his under tenants or

ryots. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favour of the hypothesis that the intention of the grantor was to create a perpetual tenure at a fixed rent. It may be conceded to the Respondents that the Zemindar in 1791 may have deemed himself capable of granting such a tenure. For, though according to the preamble of Regulation XLIV of 1791, Zemindars, before the perpetual settlement, had no power to enter into engagements for a period exceeding that of their own engagement with Government, and in 1792 the Decennial settlement, which had just been completed, had not been declared perpetual, yet, at that time, there was every reason to believe that the settlement would be declared perpetual; and the second section of the Regulation last referred to, which restricts the Zemindar's power of disposition, had not been enacted. The whole policy, however, of the Decennial Settlement, as appears by Regulation VIII of 1793, was adverse to Mokurrurree tenures. It made them all subject to re-assessment unless they fell within the protection of the 49th section of that Regulation. It is, therefore, not probable that the Zemindar would, immediately after the completion of the settlement, grant such a tenure except upon special grounds and adequate consideration; and of these there is no proof. Though the Pottah contains some reference to future services, as incidental to the tenure, the transaction on the face of it is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the grantee, of bringing the latter into cultivation.

If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands; it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of his lands. But passing from the Pottah, taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case.

The Appellant, as we have already remarked, is

not, as was the Plaintiff in the case of Gopaul Lall Thakoor (10 Moore's Indian Appeals), which was cited in the argument, an auction purchaser, who, under the revenue laws, can throw upon the tenant the burden of showing that his tenure would have been valid against a Zemindar, unfettered by any personal engagement, at the time of the perpetual settlement. He is bound by the engagements and acts of his predecessors in the Zemindary; and we must consider the evidence of these as it bears first upon the duration of the tenure, and next upon the question of fixed or variable rent. And, in doing this, we must recollect that, after the passing of Regulation V of 1812, there was no restriction upon the disposing power of the Zemindar.

The facts already stated afford incontestable proof that ever since the death of Aghum Singh the hereditary character of this sub-tenure has been recognised by the successive Zemindars. There is also evidence, which is not contradicted, that some of them have recognised its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the Pottah, or that, if the original grant were limited, as was suggested, to the life of Aghum Singh, his tenure has by some subsequent grant become hereditary and transferable. And upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the Zemindar in the Civil Court to disturb the possession of the Respondent could not be successfully resisted. The case of Joba Singh (4 S. D. A. R., 271) is an authority for the proposition that evidence of this kind will supply the want of the words "from generation to generation" in the Pottah, which is the foundation of such a title.

Upon this second point the evidence of the subsequent acts and conduct of the Zemindars is material only in so far as the receipts and proceedings above referred to show that both Aghum Singh and his successors were described as Mokurrureedars. Their Lordships are not prepared to say that, from this evidence, a court or jury might not legitimately infer, as against the first Zemindar and his successors, either that the rent had been

always fixed, or that by subsequent contract that which had been originally variable had been made invariable. It is not, however, necessary for the determination of this Appeal that they should so decide, and they are unwilling without necessity to draw, from the facts proved, conclusions which were not drawn by the Court below.

It is sufficient to say that if the tenure was or has become hereditary and transferable as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the perpetual settlement, the case, as ruled by the High Court, falls within the protection of the 15th section of Act X of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression "a terminable lease," it is clear that a tenure under which the tenant can no longer be dispossessed by his superior cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their Lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the Respondents were sued as occupying ryots, liable for the rent assessed upon them in that character; that the High Court held that considered as ryots they were protected by the 3rd and 4th sections of the Act, and that thereupon the Appellant shifting his ground and treating the Respondents not as ryots, but as tenants intermediate between him and the ryots, obtained an order for review.

But if the Respondents were tenants intermediate between the proprietor and the ryot, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not in that case accurately specify "the ground on which enhancement of rent was desired;" and the assessment on which the sum sued for was calculated was improperly made. Dyaram's Case (1 S. D. A. R., 139), and the note of Sir William McNaghten at the foot of it, show that where the suit is against an intermediate tenant, the enhancement ought to be made according to the perghunnah rate of the rents payable not by ryots but by the holders of similar tenures. To assess such an intermediate tenant according to the rents paid by ryots must

necessarily deprive him of all beneficial interest in his tenure.

Their Lordships, however, do not decide this case on this last ground. For the reasons above stated they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this Appeal with costs.