Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Maharanee Shibessouree Debia v. Mothooranath Acharjo, from Bengal; delivered 18th December, 1869.

Present:

LORD CHELMSFORD.
SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
LORD JUSTICE GIFFARD.

SIR LAWRENCE PEEL.

THIS appeal was heard before their Lordships, *ex parte*.

The Suit out of which it arose was brought in the Civil Court of Jessore, by Mothooranath Acharjo, the sole Plaintiff, against Maharanee Kestomonee Debia, described as Sebait of a Talook, dedicated to the service of the Deity, and against certain other persons named in the plaint. It was brought to establish a title to certain jummas and to recover possession of certain lands connected with them, which the Plaintiff claimed by purchase from four of the Defendants, Mahometan ladies, who descended from one Gouromohun Biswas, a Hindoo, on whom, as the Plaintiff avers, the right to the jummas transferred to him was originally conferred.

The present Appellant represents the interests as guardian of her infant, which, at the commencement of the litigation, were represented by the Maharanee Kestomonee Debia, since deceased, his grandmother, appointed his guardian under the direction of his deceased father. The tenure, whatever its strict character, whether ryotwary or of a higher degree, is one held under the infant's title, as superior owner of the lands.

The jummas were claimed by the Plaintiff as mourusue (hereditary), and also as held at a fixed invariable rent.

The Appellant, the Sebait, denies the hereditary character of the tenure, the invariable quality of the rent, and the purchase itself. She stated that the tenants of the jummas, from whom the Plaintiff asserted that he had purchased, had not any hereditary tenure, and that they had surrendered such interest as they possessed to the Appellant, before the time of the alleged sale to the Plaintiff.

Of the four Defendants, the alleged vendors, three denied the sale, and affirmed the surrender; whilst the fourth affirmed the sale and denied the surrender, agreeing, three of them with the Appellant, and one with the Plaintiff. They all, however, insisted on the hereditary character of their tenure.

The talook itself, with which these jummas were connected by tenure, was dedicated to the religious services of the Idol. The rents constituted, therefore, in legal contemplation, its property. The Sebait had not the legal property, but only the title of manager of a religious endowment.

In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.

The sale under which the Plaintiff claimed was established by the decree of Mr. Seton Kerr, the Judge of the Civil Court of Jessore, who tried the cause.

On appeal from his decision, it was affirmed by the High Court.

Two Courts, therefore, have established the sale to the Plaintiff, and have decided against the validity of the alleged surrender.

Into the sufficiency of the evidence to support those several findings, their Lordships do not propose to inquire; their Judgment on this Appeal will be confined to the question, whether a tenure held at a fixed invariable rent has been established by the evidence.

The Appellant insisted on the authority of Prosoonnocoomars' case, which she quoted in her

Answer, and which was relied on in agreement at the bar that a transfer of such a tenure as that set up in his case, which she termed a ryotwary tenure, could not be effected without the consent of the Zemindar, or Talookdar, as the case might be, the immediate successor in estate. The judges in both Courts decided that this tenure was one at a fixed rent; and that the case in question did not apply. On the question of its vendible character without the condition of the superior's consent, they pronounced no opinion. A question of this latter character is likely to be one so much affected by modern and local usage that it would be unsafe for an ultimate Court of Appeal to express an opinion upon it as a mere dry, legal question turning on the incidents of hereditary tenure. Their Lordships would be most reluctant to decide on an *ex parte* Appeal any question of general consequence, not absolutely necessary to the decision of the particular case.

If the Decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the Judgments, be viewed as *res judicata* binding on the parties and those claiming under them.

Their Lordships think that there is no satisfactory proof in the cause that these jummas were ever held at a fixed invariable rent. One important element in this inquiry has been wholly lost sight of, viz., the nature of the Sebait title, and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a Sebait, and is not therefore presumable. Where variableness of jumma is the normal condition, the mere naming a sum certain in connexion with the grant of a descendible tenure does not impart of itself fixity to that sum, in the absence of positive words, or of other evidence to show that such was the original design. In this case we start with a double presumption against the rent having been fixed, viz., that founded on the ordinary character of rents, and that derivable from the special character of the tenure. Another presumption arises in this case,

that the rent was variable, from the circumstance that the only instrument which asserts positively that the jumma is to be at a fixed rent, is one of the three documents on which the signature of Mr. Skinner, the magistrate, was fabricated. This fraud in tampering with evidence throws additional doubt upon this part of the case.

The terms of the surrender relied on by the High Court do not state that the rent is fixed and invariable; that document, on which the High Court laid great stress, appears to their Lordships to afford but a slight presumption that the Sebait adopted and admitted that description of the tenure on which the surrenderer relied, though by accepting the surrender she acquiesced in the use of that description by them; and as the instrument does not say that the rent was fixed as well as the tenure hereditary, the implied recognition of the right can be raised no higher than the actual language warrants. The tenure therefore at a fixed rent was, in the opinion of their Lordships, not proved. The acts of the Plaintiff cannot be ascribed to a valid title to possession under the circumstances of this dispute, since the only title insisted on, in the contest between him and the superior, viz., the right to hold at a fixed rent, is not established, and the general right of the Zemindar or Talookdar to receive the collections, subject to account, till a valid claim to an intermediate tenure be established must prevail, *ad interim* at least, until the Plaintiff, if he think it for his interest to rely on the mourusue title at a variable rent, establish it by a Suit founded on that title, in which Suit the true nature of the tenure, and its freedom from the conditions of the superior's assent to the transfer of the tenure, may be ascertained. Their Lordships will therefore humbly advise Her Majesty that this Appeal be allowed, and the decision appealed against reversed, and in lieu thereof the Respondent's Suit be dismissed with costs, and their Lordships think that the Appellant should have the costs of the Appeal.

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