Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Khajah Assanoollah v. *Obhoy Chunder Roy and others, from the High Court of Judicature at Fort William in Bengal; delivered* ~~22nd~~ 21st *February*, 1870.

Present:

LORD WESTBURY.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE Appellant is the present owner of the Zemindary right in that portion of an extensive estate situate in Zillah Tipperah, and called Buldakhal, which includes the lands and villages that form, or once formed, a Talook known as Talook Poorba Auttee. This Talook was created subsequently to the Perpetual Settlement, and in the year 1803, by Mirza Hosein Ali, the then Zemindar of that portion of the estate, in favour of Bishonath Roy, the father or ancestor of the Respondents.

It was an hereditary transferable Talook, to be held at a fixed perpetual rent of 1,550 rupees and 4½ annas. The estate of Buldakhal, at the date of the revenue sales afterwards mentioned, seems to have comprehended many other talooks, of which some had existed at the date of the Decennial Settlement; but the greater part had been created subsequently to the permanent settlement of the mehauls in which they were situated.

In January 1835 an 8-anna share, and in May 1836 a 2-anna share, of the Buldakhal estate (the latter being the portion which included the Talook in question), were sold for arrears of Government

revenue; and in both instances the Government itself became the purchaser, and thus acquired all those rights which the Sale Law then in force gave to a purchaser of a Zemindary sold for arrears of revenue.

In the exercise of those rights it proceeded to make a re-settlement of the estate, and proceedings, extending over a considerable period of time, were had against the Talookdars, including Bishonath Roy or his represeutatives. These will, hereafter, be more particularly considered. At present it is sufficient to state that several settlements were ultimately made with the Respondent, Obhoy Churn Roy, on behalf of himself and the other Respondents, in respect of the lands comprised in Talook Poorba Auttee, viz., a settlement for one year in August 1841; a settlement for twenty years in August 1842; and a second settlement for one year in April 1862. On the expiration of this third settlement the Government Collector gave notice to the ryots and cultivators of the lands comprised in the Talook not to pay their rents to any person except the Government; and on the 23rd of November, 1863, the zemindary rights of the Government in the lands were put up for sale, subject to the rights (if any) of the Talookdars, and were purchased by the Appellant.

In March 1864 the Respondents commenced the suit, out of which this Appeal arises, against the Appellant. It was founded on their alleged dispossession from their Talookdary rights in the lands, and was brought under the 6th clause of the 23rd section of Act X of 1859, before the Collector. That officer, by his Decree dated the 7th of June, 1864, dismissed the suit; but his decision was reversed by the High Court on the 23rd of March, 1865, and the Appeal is against the latter Decree, and a subsequent Order rejecting an application for review of judgment.

The contention between the parties is shortly this. The Respondents assert that their Talook is still a subsisting tenure, and that, although it is now, as they admit, subject to enhancement of rent by means of proceedings properly taken by the Zemindar for that purpose, it gives them a right of possession or occupancy which he is not entitled to disturb. The Appellant, on the other hand, insists

that the Government, after the sale for arrears of revenue, and in the exercise of its powers as purchaser, effectually cancelled and destroyed the tenure created in favour of Bishonath; that the settlements which it afterwards made with Obhoy Churn were in the nature of mere temporary Ijarahs, or farming leases; and that the last of these having expired, it was open to the Government, and is now open to him, the Appellant, to resume the possession of the lands, and either to make the collections from the ryots and actual cultivators himself, or to make a new lease or settlement with the highest bidder. He further contends that if the proceedings of Government have given to the Respondents any equity for a re-settlement, that equity is one which cannot be enforced in a suit brought under the special statutory jurisdiction given by Act X of 1859 to Collectors in cases of dispossession. It is admitted that the Appellant, as purchaser, can claim no higher rights than those possessed by the Government at the date of the sale to him; and that, if Government had then waived or lost the right which it may have had originally to cancel the tenure, he cannot now assert such a right.

The questions argued at their Lordships' bar were:—

1. Whether the Government, upon the true construction of Regulation XI of 1822 (the Sale Law under which it purchased), ever had the right to cancel or destroy this tenure.

2. Whether, assuming that right to have existed, it was ever in fact exercised, whilst it was capable of being exercised.

And lastly, whether the suit, whatever be the rights of the Respondents, has been properly brought under the 6th clause of the 23rd section of Act X of 1859.

Their Lordships will consider these questions in the order in which they have just been stated.

The general policy of the Revenue Sale Laws that have been passed since the Perpetual Settlement has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They therefore gave, or sought to give, to the purchaser, the power of abrogating all engage-

ments made by the defaulting Zemindar or his predecessors since the settlement, whereby the Zemindary rents and profits, which were the security to Government for the due payment of its revenue, were diminished. The Indian Legislature, however, has not uniformly tried to effect this general object by precisely the same means. The *various Statutes* which it has from time to time passed for the purpose differ in the language of their provisions, and in the stringency of the powers conferred by them. Those enactments, at least those that were passed before 1840, are reviewed in the very able paper signed by Mr. Colvin, which is printed in this Record. It was called forth by a difference of opinion between the Board of Revenue, of which he was then the Secretary, and Mr. Dampier, the Commissioner of the Division in which this estate was situate; Mr. Dampier taking the view now contended for by the Respondents, viz., that the Talookdars, whether their tenures were created before or after the Decennial Settlement, were entitled to retain possession of their lands, subject, save in certain exceptional cases, to the liability of enhancement of rent according to the Pergunnah rates. And this, as is shown by the Record at page 17, was the view of the law expressed by the Board of Revenue itself in May 1833. Mr. Colvin's letter was written in 1836 on behalf of the Board of Revenue to combat and overrule this construction of the law.

To some of Mr. Colvin's conclusions their Lordships give an unqualified assent. They concur with him in holding that, under the Sale Law, as it existed before 1822, a Talookdar could not be dispossessed of his lands at the will of the purchaser at the sale; that he was at most liable to pay the full pergunnah or district rate for them; and could only be ejected from them if he finally declined to hold them at the enhanced rent. They are also of opinion that Mr. Colvin is right in holding that under Regulation XI of 1822 the law respecting dependent Talooks created subsequently to the Settlement was, "that such Talooks were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of revenue," unless they fell within the class contemplated by the 32nd Section of that Regulation. The language of the 31st Section is very distinguishable

from that used in the earlier Regulations. It provides that "all tenures which may have originated with the defaulter or his predecessors shall be liable to be avoided and annulled." On the other hand, the 5th Section of Regulation XLIV of 1793 provides only that the *engagements* which the defaulting proprietor may have contracted with dependent Talookdars, as also all leases to under-farmers, shall stand cancelled; and that the purchaser shall collect *from the Talookdars* rent according to the full Pergunnah rates. The effect, therefore, of the earlier Statute was to cancel a farming lease, but to keep alive the Talookdar's tenure, though at a rent liable to enhancement.

Hence the question between the Commissioners and the Board of Revenue in 1836 was, as the question between the parties on this part of the case now is, whether Talookdars of the class of Bishonath Roy were within the protection of the 32nd Section. Mr. Colvin contends that "the Mofussil Talookdars" spoken of in that Section, being described as persons having an hereditary transferable *property* in the lands or in the rents thereof," must be taken to be such Talookdars as are described by Section 5 of Regulation VIII of 1793 who, at the time of the Decennial Settlement, might have engaged directly with Government for the payment of the public revenue assessed on their lands; and even after the Settlement, and until that right was taken away by Regulation I of 1801, might have claimed to be separated from the estate of the Zemindar. He argues that the term does not include dependent Talookdars whose tenures have been created since the Settlement, they being Talookdars who, under the the 7th Section of Regulation VIII of 1793, are declared not to have the *property* in the soil, but to be mere leaseholders.

Their Lordships are of opinion that there is considerable weight in the reasoning of Mr. Colvin, which receives some corroboration from that portion of the 14th section of Regulation I of 1801 which declares that the rules regarding separable Talooks contained in Regulation VIII of 1793 were never meant to apply to any new Talooks constituted since the Decennial Settlement. Considering, however, that they have been referred to no case in which the clause now under consideration has received a

judicial construction; that the question was not raised or considered in the Courts below; and that its determination is not absolutely essential to the disposal of this Appeal, they abstain from expressing any further or more decided opinion concerning it.

They will assume that an auction purchaser under Regulation XI of 1822, had the option of cancelling and avoiding such a Talookdary tenure as that of Bishonath Roy which Mr. Colvin claims for him. But granting this, they are of opinion that the power was one which he might or might not exercise; and that, in conformity with the principle of the decision in the Ranee Surnomoyee's case (10 Moore's I. A.), it was incumbent on the Government in this particular case to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure.

Their Lordships will, therefore, proceed to consider the second question raised on this Appeal; viz., whether the Government has, in fact, exercised its power of cancellation whilst it was capable of so doing.

Mr. Colvin's letter being the expression of the views of the Board of Revenue, is not merely an able exposition of the law; it is also the best evidence we can have of what the Government, in February 1836, intended to do in respect of the dependent Talooks forming part of this estate. Nor is it possible to read the last paragraphs of that letter, beginning with the 52nd, without coming to the conclusion that it was then the intention of Government, whatever might be their extreme rights, to make settlements with the Talookdars of all classes, putting them, or at least all who were not specially protected against enhancement of rent, in the position which they would have held of *right* before 1822, viz., that of under-tenants entitled to retain possession of their lands during the subsistence of their tenure, subject to the condition of having their rents enhanced, according to the Pergunnah rates. The letter, no doubt, contemplated the exercise of the extreme rights of Government if the Talookdars should not, within a certain time, enter into the new settlement. But the primary object of Government was to settle with the Talookdars; and if the settlement were made, the tenures would continue

to exist; though as Talooks held at variable instead of fixed rents. Nor is it improbable that, considering the power and influence which the hereditary possession of land seldom fails to give in India, especially in a remote district like that in which this estate is situate, the revenue officers felt that such an arrangement would be beneficial to Government, as well as to the Talookdars.

Do, then, the subsequent proceedings show that Government departed from this its original intention?

In considering these proceedings, it should be borne in mind that the position of Government in one respect differed from that of an ordinary purchaser at a sale for arrears of Government Revenue; inasmuch as the 36th Section of Regulation XI of 1822 expressly declares that an estate purchased by Government shall be subject to the rules applicable to the management of ordinary Malgoozary Mehals held Khas. By virtue of this enactment the Revenue officers had over this estate in 1833 all the powers conferred upon them by Regulation IX of 1825, and by the provisions of Regulation VII of 1822, which by the second Section of the former Regulation are extended to and made applicable to estates held Khas, and the other lands there mentioned. It follows that Government, though its rights either in respect of cancelling the under-tenures or of enhancing the rent were not higher than those of an ordinary auction purchaser, may have been at liberty to assert those rights by a procedure not open to a private individual.

Their first proceeding was, however, one which every Zemindar is bound to make, the foundation of a suit for enhancement of rent. It was the issue on the 7th of June, 1836 (Appendix, p. 31), of a notice under the 9th Section of Regulation V of 1812, claiming a rent raised at discretion to the sum of 5,000 rupees. This led to the proceeding of Mr. Allen of the 19th of June, 1837 (p. 104).

Great stress has in the argument for the Appellant been laid upon this proceeding. Their Lordships, however, feel that in considering its effect they should look to its nature, and not to expressions loosely used in it, such as "it be ordered that the Talook be set aside," or the like. And if this be done it will be found that it is nothing but an

ordinary proceeding for the enhancement of rent, against a person admitted to be in occupation of the lands. On such a proceeding it is open to the Defendant to contest either the right to enhance at all, or the reasonableness of the rent claimed, or both; without, however, admitting the reasonableness of the rent claimed if he expressly contests only the right to enhance. The Talookdar in this case adopted the former course by asserting that his Talook was one at a fixed rent, incapable of enhancement even by an auction purchaser. And the proceeding determined this point against him. It is in fact such a proceeding as Mr. Colvin in the 56th paragraph of his letter assumes to have been already taken.

Again, it appears that in July 1836, and therefore between the date of the notice and that of Mr. Allen's proceeding, the Government had given orders for the measurement and survey of the lands (page 153, line 50). This shows that the rent of 5,000 rupees was a mere arbitrary claim made in order to try the right to enhance: and that the proceeding of 1837 determined neither the rent to be fixed, nor the person with whom the settlement was to be made.

The measurement and survey were not completed until the Bengal year 1245; and on the 3rd of September, 1839, the Commissioner (page 153, line 53) wrote to the Collector that notice was to be issued to the Talookdars to appear within fifteen days, and make settlements for twenty years at the Pergunnah rates, and that if they did not appear Ijarah settlements would be made *after annulling their rights*. These directions clearly imply that up to that time the intention of Government was still not to destroy the Talookdary tenures, unless the Talookdars should finally refuse to engage at the Pergunnah rate.

Accordingly the notice at page 37 of the Record was issued to the heirs of Bishonath on the 5th of December, 1839. It invited them to come in and make a Talookdary settlement within fifteen days, in default of which they were to be held not to have any rights as Putnee Talookdars of the late Zemindar, or of possession.

From Mr. Money's proceeding (page 153) it appears that the Respondent Obhoy Churn did not

come in under this notice to accept the settlement; that he still struggled either for a settlement at the old rate, or for delay; and that Mr. Money accordingly as Collector granted an Ijarah for twenty years to a stranger, Sheikh Aeenoodeen. This arrangement, however, was subject to confirmation by higher authority, and from the recital at page 107 we learn that on the 24th of November, 1840, the Commissioner refused to confirm it *in integro*, and reduced the lease for twenty years to one for a single year. And at page 42 we have a further notice to the heirs of Bishonath dated the 23rd of February, 1841, calling upon them onee more, in anticipation of the expiration of the one year's lease to Aeenoodeen, to enter into a Talookdary settlement at the Pergunnah rate, under pain, in case of default, of losing all right to the Talook.

The Appellant relies much on the interruption, or assumed interruption, of the Respondent's possession by the grant of this lease to Aeenoodeen. And if the original lease for twenty years had been confirmed, and possession had followed thereon, the inference that the old Talookdary tenure had been cancelled would have been strong.

The Commissioner's letter of the 24th of November, 1840, was not, however, produced *in extenso*; and it is to be presumed that the Appellant, who derives title from the Government, would have found means to produce it, had it supported his case. Its effect, as stated on the Record, coupled with the fact of the subsequent notice to the heirs of Bishonath, which treats their Talookdary tenure as still subsisting, leads their Lordships to the conclusion that the lease for a year to Aeenoodeen was nothing but one of those temporary arrangements pending negotiations for a final settlement of the Revenue which the Revenue authorities were, under Regulation IX, of 1825, competent to make. Certain it is, that the result of this second notice was that, in 1841, the Respondent, Obhoy Churn, entered into the first engagement for one year; and in 1842 made the engagement for twenty years; and the Kuboolyats and other documents executed on both occasions support the conclusion that those settlements were Talookdary, and were made with him as representing the persons entitled to the hereditary possession of the lands under the old Talook granted

to Bishonath, although their continuing tenure may not be described with strict accuracy as a Putnee Talook.

It is further to be observed that, if the Government had not effectually annulled the tenure before 1842, it had then lost its statutory right to do so; since Regulation XI of 1822, upon which that right depended, was repealed by Act XII of 1841; and that it is therefore unnecessary to consider the subsequent proceedings. The conclusion, then, to which their Lordships have come upon this part of the case, is that the Government, whatever may have been its powers, did not, in fact, cancel or destroy the tenure, but left the Talookdars in the position in which they would have been, as of right, under the old law; reducing their tenure from a Talook at a fixed to one at a variable rent. And it follows from this that the Appellant, though he has the right to bring a suit properly framed for the further enhancement of the rent, is not entitled to disturb the possession of the Talookdars, or to let the land over their heads to the highest bidder.

Upon the last question their Lordships think it sufficient to say that the suit being one between under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their Zemindar who disputes their right of possession, has, in their Lordships' judgment, been properly brought under the 6th Clause of the 23rd Section of Act X of 1859.

Their Lordships, therefore, being of opinion that no ground for disturbing the Decree under Appeal has been established, will humbly advise Her Majesty to dismiss the Appeal with costs.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—22/2/70.