Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brindabun Chunder Sircar Chowdhry and another v. *Brindabun Chunder Dey Chowdhry and others, from the High Court of Judicature at Fort William in Bengal; delivered 5th March* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGU E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is a suit for possession and mesne profits of a durputnee mehal brought against the zemindar. The charge is that the zemindar in collusion with the heirs of Rutnessur Roy, who was said to be merely a benamee holder of the putnee talook, obtained a decree against them for rupees 5,156 as arrears of rent of the said putnee, and that under that decree he sold the putnee, and having purchased it in his own name entered upon the estate of the durputneedar, treating the durputnee as having ceased to exist upon the sale of the putnee.

With regard to the fraud their Lordships are of opinion that there is no sufficient evidence to satisfy a court of justice that there was any fraud or collusion between the zemindar and the heirs of Rutnessur, to allow the zemindar to obtain a decree against Rutnessur for arrears of rent which were not actually due. A strong fact against the supposition of fraud was this,

that the zemindar originally sued the durputneedars for these arrears of rent. The durputneedars in that suit set up as a defence that Rutnessur was the putneedar and that they were merely the durputneedars of the mouzah, hence they said, the Plaintiffs' claim can be made against Rutnessur or his heirs, and not against us. Now if the durputneedars at that time thought that the action ought to have been brought against the Maharajah of Kishnaghur, for whom they said Rutnessur held the estate benamee, why did they not say so in their defence? They said, Rutnessur is the person liable for these arrears and you must sue him. Upon that the case went to trial in the collector's court; and the judge who tried the case held that Rutnessur was the putneedar, and therefore that the Plaintiffs could not sue the durputneedars, and he dismissed the suit with costs, whereupon the zemindar brought an action against the heirs of Rutnessur for the arrears of rent, and it is that suit which is now charged as having been brought by collusion between the zemindar and Rutnessur for the purpose of injuring the durputneedars by fraudulently obtaining a decree for rent which was not due, and then selling the putnee and avoiding the incumbrance of the durputnee.

There being, then, no fraud in the case, the question arises, whether, upon the sale of the putnee, under the decree for rent, it was sold free from the incumbrances which had been created by the putneedar, or, in other words, whether it was sold free from the durputnee. That depends upon the construction of section 105 of Act X. of 1859. That section enacts "If the decree be for "an arrear of rent due in respect of an under "tenure which by the title deeds or the custom "of the country is transferable by sale, the "judgment creditor may make application for

" the sale of the tenure, and the tenure may " thereupon be brought to sale in execution of " the decree, according to the rules for the sale " of under tenures for the recovery of arrears of " rent due in respect thereof, contained in any " law for the time being in force." It has been held, upon the construction of those words, " according to the rules for the sale of under tenures," that the effect of Regulation VIII. of 1819, and I. of 1820, is applicable to cases of sales under decrees of rent made under this section 105; and then the question arises whether this was a sale for an arrear of rent " due in respect of an under tenure which by " the title deeds or the custom of the country is " transferable by sale."

The Plaintiff in his plaint describes the tenure as a putnee talook, and his own tenure as a durputnee, and the point is, whether, under the description of " putnee and durputnee," it is to be presumed that the putnee tenure was one such as is described as the tenure denominated a putnee by Regulation VIII. of 1819. In the preamble of that regulation—which, as contended for by the learned counsel, it must be admitted is not an enactment but merely a recital, it is said, " By the terms of the engagements interchanged " it is, amongst other stipulations, provided, that " in case of an arrear occurring, the tenure may " be brought to sale by the zemindar, and " if the sale do not yield a sufficient amount to " make good the balance of rent at the time due, " the remaining property of the defaulter shall " be answerable for the demand. These tenures " have usually been denominated putnee " talooks."

Their Lordships are of opinion that under the description " putnee talook " and " durputnee talook " it must be *primâ facie* intended that the tenure called a putnee tenure

was a tenure transferrable by sale and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale. If so according to the terms of Regulation VIII. of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances. By section 8 of Regulation VIII. it is enacted, "Proprietors under direct engagements "with the Government shall be entitled to apply "in the manner following for periodical sales of any "tenures upon which the right of selling or bring- "ing to sale"—not the right of selling or bringing to sale free from incumbrances but—"upon "which the right of selling or bringing to sale for "an arrear of rent may have been specially re- "served by stipulation in the engagements inter- "changed on the creation of the tenure." Then, by section 11, the effect of such a sale is stated as follows,—"It is hereby declared that any talook "or saleable tenure that may be disposed of at a "public sale under the rules of this Regulation for "arrears of rent due on account of it, is sold free "from all incumbrances that may have accrued "upon it by act of the defaulting proprietor, "his representatives or assignees, unless the "right of making such incumbrances shall "have been expressly vested in the holder by "a stipulation to that effect in the written en- "gagements under which the said talook may "have been held."

It appears therefore to their Lordships that this was the sale of a talook transferrable by sale and upon which the right to sell for arrears of rent was reserved in the engagements entered into by the parties. Consequently, according to the effect of section 105 of Act X. of 1859 and sections 8 and 11 of Regulation VIII. of 1819, and probably also of Act I of 1820, the effect of the sale of the putnee talook was

to destroy all incumbrances which had been created by the putneedar, and consequently to destroy the particular incumbrance which is mentioned in the plaint in this suit, namely, the durputnee of the Plaintiff.

Their Lordships, therefore, think that the suit was not maintainable, and that the learned Judges of the High Court did not probably give sufficient effect to the recital of the preamble of Regulation VIII. of 1819 and the enactments of that Regulation, in holding that it did not appear that the putnee was a tenure upon which the right to sell for arrears of rent had been reserved by the contract of the parties.

Under these circumstances it appears to their Lordships that the decision of the High Court was not correct, and they will therefore humbly recommend Her Majesty to reverse that decision and to affirm the decision of the Principal Sudder Ameen, with the costs of this Appeal.