

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Doolar Chand Sahoo and others v. Lalla Chabeel Chand, and Doolar Chand Sahoo and others v. Lalla Biseshur Dyal and others (two Appeals consolidated), from the High Court of Judicature at Fort William in Bengal; delivered Friday, December 6th, 1878.

Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

IN these two cases the property in respect of which the actions were brought was the mouzah called Mouzah "Inglis" in the district of Shahabad. That mouzah many years ago was granted to Gooran Khan, an invalided havildar, under the provisions of the 33rd section of Regulation 43 of 1793. By virtue of that section Gooran Khan held the property free of revenue and free of rent during his life as a jageer, but upon his death the property became liable to be assessed, and by virtue of the section, to which allusion has been made, the assessment would be in the nature of rent payable to the zemindar of the estate in which the mouzah was situate. The zemindar in question was the Maharajah of Domraon. Upon the death of Gooran Khan, Bachoo Khan, his son and heir, came in as his representative, and the property then being liable to assessment, he entered into a settlement with the Maharajah in September 1827, upon which a rent was reserved to the Maharajah in respect of the tenure. Bachoo Khan died in October 1860, a

period within 12 years before the commencement of the suit. He left a widow, Nazirun, and a son, Gooder Khan, and three daughters, Nazeerun, Saheebun, and Peerzadi. The son was entitled to a share of 5 annas 7 pies and 4 krants, and the three daughters were entitled to shares amounting together to 8 annas 4 pies and 16 krants of the mouzah. The widow appears to have given up her share altogether, and it may be assumed for the purpose of this decision that the son took the widow's share, which together with his own share of 5 annas 7 pies and 4 krants gave him an interest to the extent of 7 annas 7 pies and 4 krants. That interest added to that of the daughters' makes up the whole amount of the 16 annas of the mouzah.

After the death of Bachoo Khan, his son, Gooder Khan, was sued in respect of a loan which had been made to Bachoo Khan. Proceedings went on, and a decree was ultimately obtained under arbitration against Gooder Khan. Gooder Khan, in order to raise money to satisfy that decree, borrowed a sum of money from Ram Jeawan Singh. Gooder Khan was sued by Ram Jeawan Singh in respect of the money so borrowed; and although Gooder Khan had mortgaged a 12 annas share of the mouzah to Ram Jeawan as a security for the loan, the action against Gooder Khan was treated merely as one for an ordinary debt, and Ram Jeawan obtained a decree against him for the money due, and interest. Upon that an execution was issued. Bisheshur purchased under that decree not the 12 annas share, which had been mortgaged, but merely the right and interest of Gooder Khan, which, as already stated, amounted to 7 annas 7 pies and 4 krants. The Maharajah also brought a suit against Gooder Khan for three years' rent, which was due under the settlement made with him. That suit was brought under the provisions

of Act 8 of 1869 of the Government of Bengal. In that suit it was ordered that an ex parte decree be passed in favour of the Plaintiff, that the Plaintiff do recover the amount claimed, with costs, and interest at the rate of 6 per cent. per annum up to the day of realization from the Defendant. The Maharajah proceeded to execute that decree against Gooder Khan. On the 31st March 1872 he applied to have it executed. He gave the names of the parties, and then he stated what redress he sought from the Court. He stated under that head, "The attachment and sale of the property belonging to the judgment-debtor."—that is, the property belonging to Gooder Khan. The petition ran in this way: "The decretal money due to your petitioner is payable by the judgment-debtor under a decree mentioned above. Your petitioner therefore begs to file this petition along with an inventory of the property belonging to the judgment-debtor, and prays that by attachment and sale of the judgment-debtor's property the decretal amount, together with costs and future interest up to the day of realization, be ordered to be recovered from the judgment-debtor." An inventory was attached to that petition in the following words: "Inventory of the invalid lands, being the kasht (cultivation) of the judgment-debtor, situated in Mouzah Rampore Pergunnah Bhojepore, for the recovery of the arrears of rent whereof the present decree is passed, amounting to 120 beegahs." It therefore appears clear that that application was merely that by attachment and sale of the judgment-debtor's property the decretal amount might be realized. By virtue of the 59th section of the said Act 8 of 1869, the Maharajah, if he had pleased, was authorised to apply for the sale of the tenure. By that section it is enacted

that, "Whenever a decree shall be passed 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,
" and the judgment-creditor shall make applica-
" tion for the attachment and sale of such under-
" tenure, the Court shall, so soon as such under-
" tenure shall have been ordered to be sold,
" cause to be hung up in some conspicuous
" part of the building in which such Court sits,
" and of the buildings in which the Collector
" and Judge of the district within which the
" land comprised in such under-tenure is situate,
" and to be fixed on some conspicuous place
" on such land, and on some conspicuous place
" in the town or village in or nearest to which
" such land is situated, a notice for the sale of
" such under-tenure on some fixed date, not
" less than 20 days from the hanging up of
" such notice in such Court." By section 34
of the same Act it is enacted that, "Save as
" in this Act is otherwise provided, suits of
" every description brought for any cause of
" action arising under this Act, and all pro-
" ceedings therein, shall be regulated by the
" Code of Civil Procedure passed by the Go-
" vernor-General in Council, being Act No. 8 of
" 1859, and by such further and other enactments
" of the Governor-General in Council in relation
" to civil procedure as now are or from time to
" time may be in force; and all the provisions of
" the said Act and of such other enactments shall
" apply to such suits." It appears therefore that
although the Maharajah might, if he had pleased,
have applied to sell the tenure in execution of his
decree, he had also a power to proceed against
the property of the Defendant. It has already
been shown what the application of the Maha-
rajah was. He asked that the decree might be
realised by the sale of the property of the

judgment-debtor. Upon that application the Moonsiff issued a perwannah described as a "Perwannah for execution of decree under "section 233 to section 238, Act 8 of 1859." If he had considered that the application was an application to sell the tenure under section 59 of Act 8 of 1869, it would have been described as a procedure under that section, and not under the sections of the Civil Procedure Code to which the Moonsiff refers in his perwannah. The perwannah issued to the officer was as follows: "Pursuant to an order " of this day, you are required to attach the " under-mentioned properties under the pro- " visions of Act 8 of 1859 as they may be " pointed out by the decree-holder, and submit " the inventory of the property attached, with " your report, within a week." Then he describes the property "Invalid land held in cultivation," and he gives the boundaries of the land. So that the perwannah was merely to attach that property under the provisions of Act 8 of 1859. Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in an ordinary leasehold interest, under Act 8 of 1859, you can only attach and sell the right, title, and interest of the judgment-debtor; but if you proceed to sell a tenure under section 59 of Act 8 of 1869, then you sell the tenure; and by virtue of section 66 of the same Act, the purchaser, under the provisions of sections 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement. So that if this tenure had been sold under the provisions of section 59, the sale would

have got rid of all under-tenures, and the purchaser would have been entitled to the whole interest in the tenure, free from all incumbrances, in the same way as if the tenure had been sold under the provisions of the law for the sale of an estate for the arrears of government revenue. Having issued that perwannah to the officer to execute the decree, notice of the intended sale was given. That will be found at page 71 of the Record. It is headed "Sale notification," not under section 59 of Act 8 of 1869, but "A sale notification under section 246 of Act 8 of 1859;" and it proceeds: "Auction sale of the rights and interests in the under-mentioned properties for the realization of the amount covered by the decree." And then it states: "Notice is hereby given to the public that Sahib Ram filed, on the 31st March 1872, an inventory of the under-mentioned property, praying for their auction sale for the realization of the decretal money; therefore this proclamation is issued for the information of the public, to the effect that on Friday, July 19th, 1872, A.D., corresponding with 28th Assar 1279 Fusli, the auction sale of whatever rights and interests Gooder Khan, the judgment-debtor, has in the property detailed below will be commenced at noon in the place where the property is situated in Pergunnah Bhojepore, Zillah Shahabad. If any one wishes to purchase the said rights, he ought to appear at the aforesaid time and place, either personally or through his mokhtar, and purchase it. The rights and interests of other persons in the said property will not be sold by auction besides that of the judgment-debtor." So there was an express notice that under the sale in execution of the decree only the rights and interests of the debtor were to be sold; and it was also expressly pointed out that

the rights and interests of other persons in the said property, other than those of the judgment-debtor, would not be sold. Under that notification Doolar Chand and others, the Defendants in the two suits out of which this Appeal arises, purchased. The sale to them was confirmed, and they were put into possession and obtained a certificate of sale. The certificate which they obtained was as follows: "On a petition having been filed for execution of a decree of the Civil Court passed by the Moonsiff of Buxar Zillah Shahabad, dated the 2nd December 1871, A.D., in suit No. 16, against the judgment-debtor, and for the sale of his property, a sale notification was, under the order of this Court, issued, and the property sold at auction on the 25th July 1872. Whatever rights and interests the judgment-debtor had in the said property were purchased by Doolar Chand," and so on. Those are the Defendants. "Hence, this certificate being made over to Doolar Chand Baijnath and Ram Saran Sahoo, &c. the auction purchasers, it is proclaimed that whatever rights and interests the said judgment-debtors have in the property aforesaid have ceased to exist from the 25th July 1872, the date of the auction sale, and become vested in the auction purchasers, Doolar Chand Baijnath Sahoo and Ram Saran Sahoo." Nothing then can be clearer than that both the perwannah and the notice of sale, as well as the certificate, gave express notice to the purchasers that nothing would be sold, and that nothing was sold to them, save and except the rights and interests of the judgment-debtor.

Here it may be observed that if the notice of sale had stated that the tenure was to be sold under the provisions of Act 8 of 1869, the three sisters of Goodur Khan might have protected the

tenure from sale, by satisfying, in accordance with the provisions of that Act, the decree of the Maharajah. The purchasers having been let into possession, Chabeel Chand, one of the Plaintiffs, purchased the interests of the three sisters. They were entitled to 8 annas 4 pies and 16 krants in this tenure, and the Plaintiff, Chabeel Chand, purchased that right, and he contended that under his purchase he was entitled to recover from the auction purchasers, under the Maharajah's decree, the 8 annas 4 pies and 16 krants which he had purchased from the sisters. Lalla Bisheshur Dyal, who had purchased under the decree of Ram Jeawan Singh, also claimed that he was entitled to recover possession of what he had purchased under Ram Jeawan Singh's decree, and that he had purchased under Ram Jeawan Singh's decree the right, title, and interest of Goodur Khan previously to the sale under the Maharajah's decree. The Judges of the Lower Courts dismissed the claims both of Bisheshur and of Chabeel Chand. But the High Court reversed those decisions, upon the ground that Dooli Chand and others had purchased under the Maharajah's decree only the right, title, and interest of Gooder Khan. If they purchased the tenure they would have been entitled to retain possession, and the Plaintiffs would have failed in their suit. On the other hand, if they purchased merely the right, title, and interest of Gooder Khan, then in the one case Chabeel Chand was entitled to recover the 8 annas 4 pies and 16 krants share of the mouzah which he had purchased from the sisters, and Bisheshur was entitled to recover the other portion of the estate which he had purchased as the right, title, and interest of Gooder Khan. It has already been shown what the nature of the sale in execution of the Maharajah's decree was, and their Lordships think

that the High Court were right in the conclusion at which they arrived, that Doolar Chand and others, the Defendants in the suits, had purchased merely the right, title, and interest of Gooder Khan, and not the whole tenure free from all encumbrances and the rights of others who were interested therein.

Under these circumstances they are of opinion that the High Court was right in holding that Chabeel Chand was entitled to recover the 8 annas 4 pies and 16 krants, and that Bisheshur Dyal was entitled to recover the interest which he purchased under the sale in execution of Ram Jeawan Singh's decree. The High Court however appear to have made a mistake. They appear to have been under the impression that Gooder Khan, instead of being entitled only to a 7 annas 7 pies and 4 krants share, was entitled to a 12 annas share in the property, and they accordingly gave Bisheshur a decree for a 12 annas share, as well as a decree to the other Plaintiff for an 8 annas 4 pies and 16 krants share. It is impossible that those two decrees can stand, because that would give a right to the two Plaintiffs to recover against the Defendant 20 annas 4 pies and 16 krants out of 16 annas.

* It is clearly an oversight, and Mr. Doyme, the learned counsel for Bisheshur, has admitted that the decree in Bisheshur's case was erroneous, and that instead of a 12 annas share it ought to have been a 7 annas 7 pies and 4 krants share.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court in Chabeel Chand's suit be affirmed, and that in Bisheshur's case the decree be amended by ordering that he shall recover a 7 annas 7 pies and 4 krants share of the estate from the Defendants.

Their Lordships are also of opinion that the Respondents in both Appeals are entitled to their costs.

