

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Official Trustee of Bengal and Trustee for the Creditors of the late N. P. Pogose v. Krishna Chunder Mozoomdar and others, from the High Court of Judicature at Fort William, in Bengal ; delivered 27th June 1885.

Present :

SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Appellant brought a suit in the Court of the Subordinate Judge of Pubna against the Defendants, alleging that the whole of 15 mouzahs named in the schedule to the plaint was the zemindary right of the late N. P. Pogose, and having obtained possession with the aid of the High Court, the Appellant, as the official trustee appointed under the orders of the High Court, was entitled to and possessed of the same. And he prayed the Court to set aside an order of the Deputy Collector of Pubna, dated the 31st December 1878, and a subsequent order of the Collector, dated the 27th of March 1879, for registration of the Defendants' names with reference to the mouzahs, and to pass a decree for registration of his name, after cancelling the registration of the Defendants' names, in zemindari right. He also asked the Court to set aside, as fabricated and fraudulent, two false kobalas, which purported to have been executed on the 8th and 15th Cheyt 1207.

The suit was occasioned by the proceedings of the Defendants under Act VII. of 1876, who applied for the registration of their names as proprietors of certain specific portions of the estate composed of these mouzahs, and produced in support of the application the kobalas referred to. The Appellant objected, and asserted that they were dependent talookdars, and consequently were not entitled to have their names registered, but the Deputy Collector overruled the objections, and ordered the names to be registered as applied for. This order was on an appeal affirmed by the Officiating Collector of Pubna. The Defendants in their written statements relied upon the kobalas, and claimed to be co-sharers in the zemindari. Issues were framed, of which it is now necessary to notice only three. They were:—“ 8th. Whether the Defendants’ kobala
 “ deeds are genuine or collusive; if so, whether
 “ they are liable to be set aside. 9th. Whether
 “ the Plaintiff is in possession of the disputed
 “ mehals as zemindar or not. 10th. Whether
 “ the Defendants are jimmadar under-tenure
 “ holders or zemindars of the disputed mehals.”

The last issue seems to have been put in this form in consequence of a statement in the plaint that the Defendants had acquired from the Plaintiff’s predecessor ordinary subordinate jimmadari rights, but the question raised by it was whether the Defendants were zemindars. The Subordinate Judge decided that both the kobalas were forged, and said that they seemed to him to have been forged by the Defendants for the purpose of establishing their zemindari rights over the disputed mehals, which they held as under-tenure holders under the Plaintiff and his predecessors. He made a decree in these terms:—“That this suit be decreed, with costs,
 “ after establishment of the Plaintiff’s zemindari
 “ right to the disputed mehals; that the Defen-

“dants be declared to be the Plaintiff’s under-
 “tenure holders of the said mehals; that the
 “false kobalas and the Collector’s order for
 “registration of name be set aside; that the
 “Plaintiff is entitled to register his name to the
 “disputed mehal in place of the names of the
 “Defendants in the collectorate register.”

The Defendants appealed to the High Court, and, among other grounds of appeal, said the Court below ought to have held on the evidence that the Defendants were part owners of the zemindari, and not mere under-tenure holders, and that, at any rate, it ought not to have made a decree in favour of the Plaintiff, leaving the status and rights of the Defendants wholly undefined. The High Court agreed with the Subordinate Court, that the kobalas were not genuine, and that the Plaintiff was entitled to be registered as zemindar; but they went on to say, “The learned Advocate General wishes us
 “simply to declare that the Plaintiff is entitled
 “to be registered as zemindar of the property in
 “question, to the exclusion of the Defendants,
 “and invites us to say nothing as to the status
 “of the latter. But we are certainly not dis-
 “posed, in any view of the Plaintiff’s case, to
 “leave the Defendants at his mercy, or to leave
 “him the power of treating them in any future
 “suit as the holders of ordinary subordinate
 “jimmadari rights in these mouzahs, as he has
 “described them in his plaint, or as undefined
 “under-tenure holders, as the Lower Court has
 “pronounced them to be. On the contrary, we
 “are of opinion that, even should we feel bound
 “to hold that the Defendants’ rights in these
 “mouzahs fall short of absolute proprietorship,
 “as to which technical proof seems alone to be
 “wanting, their status is shown, even by the
 “evidence adduced by the Plaintiff, to be at the
 “very least as high as that of putnidars, and

“ one which cannot now be disturbed.” The decree was, “ It is ordered and decreed that the “ decree of the Lower Court be set aside, and in “ lieu thereof it is ordered and decreed that the “ Plaintiff is entitled to have his name registered “ as zemindar in lieu of the names of the De- “ fendants, under Act VII. (B. C.) of 1876, in “ the collectorate of the district of Pubna, in “ respect of the mouzahs mentioned below, and “ that the Defendants are putnidars of the same “ mouzahs.” And each party was ordered to pay his own costs in that Court and in the Court below.

The Plaintiff has appealed to Her Majesty in Council against the declaration that the Defendants are putnidars. The High Court founded this declaration upon certain statements in the documentary evidence which had been put in by the Plaintiff. Their Lordships do not think it necessary to consider whether they were right in their conclusion that the Defendants were putnidars, because they are of opinion that upon the case which had been set up in the defence, and the issues which had been framed and tried by the Lower Court, the High Court could not properly make such a declaration. The Defendants had not claimed to be putnidars, but had set up a false claim to be zemindars, and had attempted to prove it by forged deeds, and they ought certainly not to be in a better position than they would have been in if they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title would have been framed and tried by the Lower Court. The proceedings in this suit were regulated by Act X. of 1877, and their Lordships do not find any provision there which would authorize the Appellate Court to do what has been done in this case. Section 566, which enables the Appellate Court in some cases to

determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the Lower Court. Their Lordships are therefore of opinion that the decree of the High Court should be varied by striking out the declaration that the Defendants are putnidars of the mouzals and the order as to costs, and ordering that the Defendants do bear the costs of the suit in the High Court and the Lower Court. They will humbly advise Her Majesty accordingly, and the Respondents will pay the costs of this appeal.

