Privy Council Appeal No. 12 *of* 1927.

Bengal Appeal No. 37 *of* 1924.

Narendra Nath Dutta and another - - - - - *Appellants*

v.

Sheik Abdul Hakim and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1928.

Present at the Hearing:

VISCOUNT SUMNER.
LORD ATKIN.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* VISCOUNT SUMNER.]

On the 10th April, 1918, the Collector of the 24 Pargannas issued his certificate, that on the 18th December, 1917, Mahal Panchannagram had been sold to the first appellant, under Act XI of 1859, for Rs. 4700, the former proprietor, the second respondent, having fallen into arrear with his annual sadar jama of Rs. 4-7-6. The purchase took effect as from the 29th July, 1917, the formal proclamation, which was dated the 13th November, 1917, having announced that the mahal was to be sold for realisation of arrears of Government revenue "up to the talab of the 28th July, 1917, for the year 1323."

On the 17th February, 1919, the first respondent, in whom prior to the sale the whole tenure-holder's interest in the mahal had actually become vested, though his name had not been recorded, filed his plaint against the respondents 2 and 3 and against the appellants, praying for a declaration that the sale was invalid and for possession with mesne profits, the appellants, the auction purchasers, having gone into possession. Various

irregularities and illegalities were alleged, which need not now be detailed, as, after adverse decisions of both the Courts in India, they are not persisted in, but it was further alleged that there had been no arrears of revenue, for which the property could be sold, which, if established, would result in the sale being set aside and the certificate cancelled.

The present appellants did not defend this suit and on the 22nd August, 1919, the first respondent having testified that " no arrears of revenue were due, when the property was put to sale," and those defendants, who are now respondents 2 and 3, not opposing, the officiating Subordinate Judge at Alipur decreed the suit *ex parte*. So matters stood till August, 1920, when the present appellants applied to have this decree set aside, on the ground that they had never been served with process at any stage of the proceedings and had only become aware of them in the previous month. After hearing evidence the Court set the decree aside and restored the suit to the original number, holding that the summonses had been fraudulently suppressed. As the learned Judge observed :

> " It is impossible to think that the applicants should have remained silent, if they had any notice of the suit. The property in question, which fetched Rs. 38,000 on sale by the applicants, was purchased in revenue sale for Rs. 4,700 by the applicants. The plaintiff alleges that no arrears of revenue sale were actually due. If his allegations be taken to be true, he lost the valuable property for no fault on his part. After that revenue sale the plaintiff offered Rs. 10,000 to the defendants to get it back but the applicants were inexorable. It was, therefore, very natural for the plaintiff to take to any means to get back the property and to teach a lesson to the plaintiff."

These circumstances no doubt explain the absence from the judgments of the Courts in India of any reference to the evidence given by the first respondent himself, but it is not therefore to be assumed to be false and it at any rate removes any question as to the burden of proof, which has not indeed been raised at any stage.

The present appellants then put in extracts, relating to the mahal in question, taken from three successive sets of jama wasil bakis preserved among the documents of the Collectorate. The first ran from 1898–1899 to 1906–1907 ; the second from 1907–1908 to 1915–1916, and the third followed on the second and was brought up to date. After a careful examination of these extracts, with the general character of which they were obviously very familiar, both Courts, that of the Second Subordinate Judge of Alipur and the High Court of Bengal on appeal found that no revenue payment had been in arrear at the time when the mahal was sold, and accordingly they set the sale aside. Leave to appeal to His Majesty in Council was subsequently given, the members of the High Court observing respectively (*a*) that the judgment of the Trial Judge " depends upon the proper construction which is to be put upon the entries in the jama wasil baki, and that cannot be said to be entirely a question of fact,

but may be stated to be a question of law," and (*b*) that " the question whether it has correctly appreciated the meaning of the other entries " (that is, the prior entries in the jama wasil bakis) " is one of some difficulty and, therefore, there is a point of law involved on the construction of the document." Their Lordships' first task is therefore to enquire, in view of the concurrent findings arrived at in India, whether a question of law is involved, and, if so, what it is. Though, no doubt, the meaning of some of the entries, if it arises, is a matter of some difficulty, it does not follow from that alone that the case raises any point of law.

The question whether a certain sum was paid before a certain date, or then remained unpaid, is in itself a mere question of fact. The question what it was paid for, if it was paid at all, is *prima facie* a question of fact also. This is equally so whether an oral statement or a written record was made about it or whether an inference has to be drawn from the circumstances of the payment. It is only when the legal obligation as to the date of payment is brought into question, that the question becomes one of law at all. Again, the mere fact that a writing has to be read and understood in order to determine the answer to the question, does not of itself make the question one of law. Entries in books of account are in themselves only narratives of monetary transactions, expressed by arranging figures in a particular way for the purpose of showing the result of a series of payments and receipts or other similar transactions. Under the common law rules of evidence, the person who kept an account was entitled to refresh his memory by looking at it, and then to narrate as his testimony by word of mouth the transactions therein summarised and the result of them in money. Specific legislation has made certain books of account evidence in themselves but, so far as the distinction between questions of law and questions of fact goes, they remain written narratives of particular events that have happened, and in themselves they stand on the same footing as other narratives. Their meaning has to be got at just like the statement of any living witness by considering what is said and the manner of saying it, but no question of legal construction arises. So far, books kept in the ordinary course of business are all alike ; they raise questions of fact, whether they are diaries, call books, cash books or postage books, and they have to be weighed as other proved facts are.

The jama wasil bakis were not all kept in the same way. The extracts from the second and third sets were on forms printed and ruled on the same plan. First to the left came a column for dates ; then a column for the number of the corresponding chalan. It was common ground that the date to be entered was the date of a payment. It is, however, to be observed that no receipts were produced by the plaintiff nor any duplicates of such receipts by the defendants, nor was this omission remarked upon in

the Courts below. Then came three columns, headed respectively, Demand, Collection, and Balance, and each had three subdivisions headed " arrear," " current," and " total." The " collection " column had a further fourth subdivision headed " Advance collection of the previous year." After these three columns, Demand, Collection, and Balance, came another headed " Excess collection."

The Subordinate Judge, who was affirmed in this respect on appeal, points out that for the year 1907–1908, with which the second set of extracts begins, no sum is entered under the column " demand " and its subordinate column " arrear," and that, starting with this as marking a point at which all payments had been made within time and nothing was left unpaid, the jama wasil baki entries show, in the nine years, beginning 1907–1908 and ending with 1915–1916, ten payments of 4 R. 7 A. 6 P., of which the last is carried on from the " collection " column to the " Excess collection " column following, and, as a payment in advance, would prevent any claim for arrears arising, when, on the regular pay-day, no further sum was forthcoming. If so, ten times 4 R. 7 A. 6 P. had been paid and were available for the rents falling due in the ten years previous to the date and satisfied them. It is asked, " If that was the state of the case, how could the Collectorate officials have allowed a sale for non-existent arrears to take place ? " It may equally be asked in reply, " If he had not paid his last year's rent, how could the tenure-holder of a mahal, worth Rs. 38,000, let it go to a sale for default of 4 R. 7 A. 6 P. ? " Opinions may differ as to the balance of likelihood of error on one side or the other, but this at least is clear ; both questions are questions of fact.

There is, however, some further material on the face of the jama wasil bakis. At the end of the second set of extracts below the final entry for 1915–1916—" Excess collection 4 R. 7 A. 6 P."—there is added, but when, why, or by whom is not known, " Current for 1322 B.S. up to July, 1916," and then follows, " 4 R. 7 A. 6 P." under each of the three columns headed " Demand—current," " Demand —total," and " Collection—advance collection of the previous year." On turning, however, to the beginning of the third set of extracts there appears a new heading in substitution for the " 1915–1916," etc., entries of the previous set, namely, " Rent for 1323 B.S., of which latest date for payment of arrears is 28th July, 1917," and 4 R. 7 A. 6 P. is entered in the " Demand— current " column, 4 R. 7 A. 6 P. in the " Collection—arrear " column, nothing in the " Excess collection " column, and in the first column, which is for dates of payment, 26–3–18 is entered in a line with the 4 R. 7 A. 6 P. in the " Collection—arrear " column. It would appear that someone had been for some reason making entries, which would introduce into the third set of jama wasil baki entries a new element, namely, the Bengal style, and that somehow there was inserted at the end of the second set an entry,

which states an arrear for 1915–1916, although the completed entry for 1915–1916 states an " excess collection " for that year to be carried forward, while at the same time the opening entry of the third set fails to carry this " excess collection " forward and describes the payment made on 26.3.18 as a collection on account of an arrear. The Trial Judge, who had framed his eighth issue thus, " Was the revenue for the year 1323 in arrears ? " says on this :—

> " It appears from Ex. 5 that rent due up to 1321 (corresponding to 1914–15), which was due on the 28th June, 1915, had been paid up in the course of the year 1321, *i.e.*, on the 16th September, 1914. In the course of the year 1322, 1915–16, rent for two years was paid, but of this Rs. 4-7-6, for one year was credited to the rent of 1322, due on the 28th June, 1916, and the balance, Rs. 4-7-6, was kept, as excess, for the year 1323, which became due on the 28th June, 1917. This excess ought to have been credited to the revenue for the year 1323, and then there would have been no arrears due for the year 1323."

In the High Court the same view, namely, that a book-keeping error had occurred, was also taken :—

> " It appears from the jama wasil baki (Ex. 5) that the revenue due for 1321 (1914–15), due on the 28th June, 1915, was paid up on the 16th September, 1914 ; so there was no arrear for 1321. There were two payments made in 1322, one of which (Rs. 4-7-6) was credited to the demand for 1322 (due on the 28th June, 1916), and the other (Rs. 4-7-6) shown as excess collection. That being so, the excess collection should have been credited to 1323 and there would then be no arrear for 1323."

How, then, are these findings of fact got over ? The present appellants had put in the extracts and had relied on them at the trial as being presumptively correct, but they have sought in argument to read them in a manner different from that adopted in the Courts in India, as follows : Though the first two sets of extracts from the jama wasil bakis purport to be based on the years of the Christian calendar, the question still remains, " What is the year of which they speak ? Is it the year of demand by the Collector, or is it the year which, commencing with the 6th July, the commencement date of the kabuliyat, contains a 28th July, even though the tenure holder's year of occupation is then still current ? " This question might have been answered in a moment, either by calling a competent witness from the Collector's office or by producing the jama wasil baki entries from the date of the kabuliyat in 1872, instead of only from 1899. Probably the knowledge of the matter possessed by the Trial Judge was sufficient to make it idle to do either. At any rate, the matter is not dealt with by any special evidence, and the Trial Judge says :—

> " In order to ascertain whether there was any arrear due for the year 1323, it is necessary to see how the years in this particular case should be calculated. It appears very clear from the defendants' document (Ex. A2) that the rent for the Bengali year 1323 was due on the 28th June, and the last date of payment fixed by the Collector was the 28th July, 1917. This is quite in keeping with the kabuliyat (Ex. C), which is dated the 6th July, 1872. . . . In practice also the rent appears to have been realised according

> to the Bengali year, with this modification, that the rent for a Bengali year becomes due on the 28th June, *i.e.*, some day of Assar of the next Bengali year."

The judgment of the High Court in concurring with this conclusion says :—

> "The rent for 1872 could not possibly have been intended to be paid on the 28th June, 1872, when the kabuliyat was executed on the 6th July, 1872."

Accordingly, both Courts read the revenue extracts as regularly referring to a year, which, in view of the sums recorded as having been paid, was not consistent in fact with any arrears at the material date.

The appellants then contended that, if this was the effect of the revenue records, the records were wrong and cannot be used to deprive them of a legally established right (*Balkishen Das* v. *Simpson*, L.R. 25 I.A. pp. 158, 159). They further sought to meet the double finding as to the year referred to in the jama wasil bakis by drawing attention to the dates, at which payments were entered as having been made, and by submitting thereon, in substance, the following dilemma : "Either the year in the jama wasil bakis, headed 1915–1916, or whatever it might be, was the year of our Lord, in which a pay day on the 28th July fell after completion of a year's occupation, so that a payment then made would, in the example taken, be a payment for the year 1914–1915, and there would be an accrued arrear before the sale took place, or the respondent and his predecessors, all Bengali tenure-holders, had been in the habit of paying their revenue dues before, and sometimes considerably before, the date at which they first became due and exigible, *quod est absurdum*."

The entries on which this contention is founded were, of course, before the Courts in India, and presumably were taken into consideration by them. It may be admitted that a practice of payment in advance, generally though not always observed, is surprising, but it is surprising in fact, not as matter of law. Unless it could be shown to be so far *contra naturam* as to necessitate in law some specific inference governing the effect of the evidence, the question still remains one of fact. Is there, however, anything so incredible about it ? After all, the annual sum due was but small and the value of the mahal was such as might well make prepayment or post-payment a matter of indifference, depending on convenience and sometimes resulting in indisputable arrears. Their Lordships are unable to see here any question of law separable from the conclusion of fact drawn from the evidence in India, namely, that for the ten preceding years, whether by payments in advance or not, ten payments of the annual jama had been duly made. Until that finding is displaced, the construction of the kabuliyat, as to the date when

the obligation to pay arose, does not become material, and, indeed, as it only renews an older jama Rs. 4–7–6, which dated at any rate from 1846, a construction of these summary instruments without regard to the practice customarily observed, would be inconclusive and at most would raise only one of those questions of construction of private instruments, which, it has been said, does not truly raise a question of law.

The appellants finally cited as a relevant authority the case of *Chaudri Satgur Prashad* (L.R. 46, I.A. 197), and contended that, because the jama wasil bakis were documents and were somewhat obscure, their introduction in evidence raised a question of law, which took the appeal out of the general rule as to concurrent findings. In their Lordships' opinion that decision has no bearing upon the present case. Special documents, which were either themselves documents of title or were statements intended to have effect as claims, compromises, or surrenders of legal rights, were there the material, from which an inference had been drawn in the Indian Courts, and, in the opinion of their Lordships' Board, their special character assimilated the questions which they raised to questions intrinsically of law. There is no such feature here. The facts stated in the juma wasil bakis are materials from which, when their purport is gathered, the inference of fact is finally to be drawn, namely, whether or not certain and sufficient payments had been made and made in time. Errors in those accounts, and obscurity in the mode of keeping them and of posting the amounts mentioned, are no more than similar errors and obscurities would be in oral testimony, and present the same difficulties in drawing a conclusion, but that conclusion, when once it is arrived at, is one of fact and no question arises of legal problems turning on the construction of legal instruments. Nor does it avail to say that there is no error shown on the face of the accounts, and that the system on which they have been kept and the result which they show are quite plain, for that is not to state a question of law, but to disagree with the Indian Courts *in toto* on a matter of fact.

Their Lordships, being thus precluded from reviewing the concurrent findings of the Courts in India, need say no more with regard to the facts, except that they are not to be understood as expressing any doubt of their correctness. They will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

NARENDRA NATH DUTTA AND ANOTHER

v.

SHEIK ABDUL HAKIM AND OTHERS.

DELIVERED BY VISCOUNT SUMNER.

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