Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bamasoondery Dossee v. Radhika Chowdhrain and others, from Bengal, delivered December 13th, 1869.

Present:

Lord Chelmsford.
Sir James W. Colvile.
Sir Joseph Napier.
Sir Lawrence Peel.

THE only question upon this Appeal is whether the Respondent is entitled to enhance the rents of certain lands held by the Appellants within the zemindary of which the Respondent is the owner of a six-anna share. In the Courts below some questions were raised touching the Respondent's title to her share; the sufficiency of the notice, which is the statutory commencement of such a suit; and the justice of the particular assessment, supposing that the rents were liable to enhancement at all; but these are no longer in dispute.

A suit to enhance proceeds on the presumption that a zemindar holding under the perpetual settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his zemindary, according to the pergunnah or current rates, unless either he be precluded from the exercise of that right by a contract binding on him, or the lands in question can be brought within one of the exemptions recognized by Regulation VIII. of 1793; and it also assumes that the Defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit. Before the recent modification of the law (which, as Act X. of 1859 had not come into operation when this suit was commenced, does not affect the case), the effect

of this presumption in favour of the Zemindar was undoubtedly to relieve the Plaintiff in a suit for enhancement from much of the burden of proof, which would have lain upon him in an ordinary suit, and to shift it upon the Defendant. Regulation VIII. of 1793, however, does not apply an uniform rule to all tenures and rights of occupancy. It may be broadly said that it divides them into two great classes, viz. Talooks within the meaning of its 51st section; and Ryotty and other under-tenures for which provision is made by the 49th section. If it be conceded that the law casts upon those who claim the benefit of the latter section the whole burden of proving that their land has been held at a fixed rent for a period commencing at least twelve years before the date of the decennial settlement, it is clear that the 51st section is more favourable to the holders of talooks within its meaning, by imposing upon the Zemindar the burden of showing that he is entitled to raise the rent *either* by *special custom, or by contract, or* by reason of certain specified conduct on the part of the Talookdar. It follows that in every suit for enhancement of rent, the nature of the tenure is a material question, irrespectively of the question whether the rent is fixed or variable, since upon the former question depends the extent and nature of the proof which the Plaintiff is bound to give.

In the present suit the Respondent has come into Court treating the Defendants to the suit as ryots, having a right of occupancy in certain lands at a variable rent. The case set up by the Appellants was that they were Shikmy Talookdars; that they and their ancestors had become so many years before the decennial settlement; and that they held the talook at a fixed rent. In this state of things, it is obvious that the issue settled by the Principal Sudder Ameen, viz. "whether the "mehal in dispute is liable to enhancement or not" is not sufficiently pointed, because in order to determine not only that issue, but also the mode of trying it, it is necessary to determine the preliminary question whether the tenure of the Appellants was or was not a talook within the meaning of the 51st section of Regulation VIII. of 1793.

To the consideration of this question their Lordships will first address themselves, and they will assume that as the law stood before Act X. of 1859 came into operation, the burden of establishing the affirmative of it lay upon the Appellants.

The Appellants produced in the Courts below two kabalas and a settlement paper, all dated long before the decennial settlement, in order to prove and explain the creation of their tenure; and a number of Dakhilas, or receipts for rent, to show the payment of rent at an uniform and fixed rate. The Courts in India have rejected these documents as spurious, or at least untrustworthy; and their Lordships accept that finding, and propose to act upon it by leaving them out of consideration.

The fact, however, remains that the Appellants derive title from Roopram and Joykristo Ghose, who are admitted in the replication to have held the lands in question under one Ramchunder Bose, from whom the zemindary passed to Kissen Sing and Gungarain, through whom the Respondent derives her title, some time before the decennial settlement. The fact is therefore admitted that the tenure of the Appellants, whatever it be, existed before and at the time of the decennial settlement. The proceedings before the Collector at least prove that as early as 1797 the then holders of that tenure asserted that it was a talook capable of being separated under Regulation VIII. of 1793 from the zemindary, and entered in the Collector's books as a talook paying revenue directly to Government.

It appears from these proceedings that the Zemindar, although he did not at first appear, ultimately came in and resisted the demand, and that no final decision was come to. It does not appear what were the grounds of his defence, and it is quite consistent with the evidence that he admitted the existence of a talook, but contended either that it was held at a variable rent, or that, by reason of some beneficial interest reserved to the Zemindar, it ought not to be separated from the zemindary, but to continue a dependent talook. Again, by comparatively modern dakhilas, produced and proved in the cause, it appears not only that rent at the uniform rate of C. R. 168 : 4, being the equivalent of S. R. 158 : 4 : 15½, has been paid and received for

this holding from 1245 to 1264 B.S., or from 1838 to 1857; but that in those dakhilas the holding was described as "Talook Roopram Ghose and Joykris-"to Ghose." The notice which was the commencement of this litigation was served in the year 1264 B.S. The Jumma Wassil Bakee at p. 51 is, so far as it goes, corroborative evidence of the Appellants' case; inasmuch as it shows that by a document which, from its nature, would seem to have proceeded from the cutcherry of the Zemindar, and was filed in the Collectorate in the year 1810, the lands in question are described as Talook Rooprain and Joykristo Ghose, and as held in 1804 at a rent of S. R. 158 : 4 : 15 : 1. Their Lordships, however, do not lay much stress on this document, inasmuch as the Respondent disputes its binding force on her, and the evidence concerning it is scanty and not very satisfactory.

The evidence, however, above stated, seems to their Lordships sufficient to establish at least a *primâ facie* case that the holding of Rooprain Ghose and Joykristo Ghose, which existed before and at the date of the decennial settlement, was a talook, and is identical with the present holding of the Appellants. Such a case called for an answer from the Respondent, and no answer, in the way of evidence, has been given by her to it.

It may be added, that the Judgment of the High Court seems to treat the tenure as being in terms a talook, and even a talook in existence at the time of the decennial settlement, though afterwards it speaks of it as a talook created at some unknown period, but having a fluctuating rent. The judgment, too, of the Principal Sudder Ameen, which also allows the deduction of 10 per cent. for the expenses of collection, seems to treat the tenure as an intermediate tenure, *i.e.* something higher than a mere Ryot's hereditary right of occupancy.

It is said, however, that the tenure, if a talook, is not a talook within the meaning of the 51st section of Regulation VIII. of 1793, unless it is shown to have been registered under the 48th section of that Statute.

This proposition is undoubtedly supported by the cases decided on the 30th of June and 10th of August, 1847, and reported at pp. 292 and 413 of

the Bengal Sudder Dewanny Adawlut Reports for that year; by the case decided on the 29th of August, 1850, and reported at p. 451 of the reports for that year; and by the case decided on the 31st of May, 1859, and reported at p. 607 of the reports for that year. But it is not consistent with the case decided on the 30th of April, 1858, and reported at p. 902 of the volume of reports for 1858, in which two of the Judges, who afterwards decided the case of 1859, extended the benefit of the 51st section to the tenure of a Kudeemee ryot,—a tenure which their Lordships apprehend was not subject to be registered under the 48th section, and was certainly not shown to have been so registered in fact. And this doctrine of the necessity of registration has been questioned and overruled by the cases decided in the High Court on the 28th of February, 1863, and the 23rd of January, 1867, of which the first is reported at p. 220 of Hayes' Reports of the decisions of the High Court for 1863, and the other is reported at p. 63 of the 7th volume of the 'Weekly Reporter.'

The effect of the authorities in India seems to their Lordships to be that although for several years it was held by the late Sudder Dewanny Adâlut, that in order to bring a talook within the scope of the 51st section it must be shown to have been "registered" "recorded" or "recognized" (for all three terms are used in the cases) at the time of the decennial settlement, that construction is no longer recognized as law by the High Court; and that it is at all events sufficient to show that the tenure existed, and was capable of being registered at the date of the decennial settlement. It follows that their Lordships are not compelled by a long course of uniform decisions to put upon the clause in question a construction narrower than that which, in their judgment, its words warrant. And applying this view of the law to the evidence, which, though scanty, is uncontradicted, they must find as a fact that the tenure of the Appellant is a dependent Talook within the meaning of the 51st section of Regulation VIII. of 1793.

Whether such a finding ought not of itself to be an answer to the present suit is a question which is certainly open to argument; for it may well be said that a Plaintiff who brings a suit founded on his

rights against a Ryot in occupation of land, ought not to be allowed to convert that suit into one founded on a different right, and governed by a different rule. Their Lordships, however, without pressing that point, think it sufficient to say that the effect of such a finding is to cast upon the Respondent the burden of showing that the rent is variable, and that if there is no evidence of that fact in the cause her suit must fail.

It may be said, however, and that seems to have been the opinion of the High Court, that the evidence given by the Appellants itself affords proof that the lands were held at a variable rent. But that opinion seems to their Lordships to be founded on a misconception of the effect of the proceedings before the Collector between 1797 and 1801. The proceeding of the 2nd of September, 1800, at p. 49, shows that whatever inaccuracy there may have been in the petition stated at p. 48, (and the document appears on the face of it to be worm-eaten and imperfect,) the case really put forward at that date by the Appellants' ancestors, was that they were the holders of a talook at a rent of S. R. 158 : 4 : 15 : 1. Their Lordships are, therefore, of opinion that upon the evidence in the cause the Respondent must be taken to have failed to show that the Talook was held at a fluctuating rent; or that she is entitled to enhance the rent, which is proved to have been paid at a uniform rate for so many years.

Their Lordships have further to observe, that if the Respondent's case were a true one she would have had little difficulty in proving it. She does not come into Court as the purchaser at a sale for arrears of revenue, who rests upon a statutory title with no documents to support it. She derives title from the Zemindar with whom the decennial settlement was effected; and she has presumably a right of access to all the records of the Zemindary. Her determination in such circumstances to rest upon the supposed defects in the Appellant's proof, and to abstain from giving evidence of the truth of her own case, affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage.

Their Lordship's will humbly advise Her Majesty that the three Decrees under Appeal ought to be reversed, and that in lieu thereof a Decree should be made dismissing the Respondent's suit with costs And the costs of this Appeal must follow its result.