Judgment of the Lords of the Judicial Committee of the Privy Council on the two Appeals of Nobokisto Mookerjee v. *Koylashchunder Bluttacharjee and others, and Hurryhur Mookhopadya* v. *Madubchunder Baboo, from the High Court of Judicature at Calcutta; delivered 18th July*, 1871.

Present:

SIR JAMES W. COLVILE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

SIR LAWRENCE PEEL.

THIS Appeal, and that of Hurryhur Mookhopadya, Appellant, and Madubchunder Baboo and another, Respondents, were lately argued *ex parte* before this Committee. The principal question involved in them is common to both, but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the Appeal of Nobokisto, though the last argued, because that record contains a judgment pronounced on the 27th of March, 1865, in a third case, No. 268, of 1864, wherein the High Court stated fully the grounds upon which the ruling impugned by both these Appeals is founded.

This suit was instituted by the Appellant as a Durputneedar. Its object was to obtain a declaration that certain lands which the Respondents claimed to hold as Lakhiraj land were so held by them under an invalid title; that they were the mál lands of the Appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but,

under the provisions of an Act of the Bengal Council (7 of 1862), was afterwards transferred to the Court of the Principal Sudder Ameen of Zillah Hooghly. The Plaint expressly stated that the suit was brought under the 1st Clause of Section 30 of Regulation II of 1819. Their Lordships need not consider particularly the provisions of that enactment. It is only material to observe that in suits brought under it by a zemindar, or one to whom the zemindar's rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the Defendant, the Lakhirajdar, whom the Plaintiff, who disputes the validity of the tenure, might compel to produce the sumuds and other ancient documents upon which such title rested. The sole proof of title which the Defendant could require in the first instance from the Plaintiff was that the lands in question were within the ambit of his zemindary or putnee, as the case might be. This issue the Respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was whether it was the Respondent's valid rent-free land or not, the whole burthen of proof on this issue being cast on them.

The Principal Sudder Ameen, the Judge of First Instance, found that of the land in suit 2 beegahs and 1 cottah, were not within the Appellant's putnee; that as to 12 beegahs and $14\frac{3}{4}$ cottahs, other part of that land, the Respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st December, 1790, and that, consequently, the claim to assess them was bound by limitation. The residue, being 3 beegahs $17\frac{3}{4}$ cottahs, he held liable to assessment. Both parties appealed against this decision to the Zillah Judge, who, on the 21st June, 1864, confirmed the Decree of the Principal Sudder Ameen so far as it related to the 2 beegahs and 1 cottah, but reversed it as to the rest of the land, making as to that a Decree in favour of the Appellant's claim. The grounds of his decision were that the documents produced by the Respondents were untrustworthy, and therefore that they had failed to prove either a valid title to hold the land rent-free, or that the land, having

been held rent-free for a period commencing before the 1st December, 1790, the Appellant's right to assess them was bound by limitation.

The Respondent then preferred a special Appeal to the High Court. Of the grounds stated for this, it is only necessary to notice the third and the fourth. The third is that the suit being brought, though improperly, under Section 30, Regulation II of 1819, was admittedly barred by limitation. The fourth, that the *onus probandi* had been improperly thrown upon the Defendants. On the 13th April, 1865, the High Court remanded this cause, with five others, which it treated as being in the same category, to the Court of First Instance, stating only that "the onus having been misplaced, these cases must go back to the First Court with reference to the principles laid down in case No. 268 of 1864."

Before considering the propriety of this remand, which is the principal question raised by the Appeal, it will be convenient to complete the history of this particular case. The Appellant went again before the Principal Sudder Ameen, amending his Plaint pursuant to the order of remand, by striking out all reference to the Regulation II of 1819, and making it a Plaint for the resumption of land fraudulently made lakheraj after the 1st December, 1790, and therefore falling within the 10th Section of Regulation XIX of 1793. The Principal Sudder Ameen thereupon framed fresh issues, the first of them being whether the land in dispute ever formed a portion of mâl land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th September, 1865, dismissed the suit upon the ground that the Plaintiff, the Appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burthen of proof which this issue cast upon him. The Appellant afterwards, in August 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the Appeal, or at

least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed, and the burthen of proof to some extent cast on the Plaintiff in suits of this nature.

In order to do this, it is necessary shortly to review the law relating to Lakhiraj tenures within the provinces embraced by the perpetual settlement; and some recent decisions of the High Court of Calcutta concerning it.

The foundation of that law is well known to be Regulation XIX of 1793. That Statute, after affirming in the strongest terms the *primâ facie* or, so to speak, common law, right of the ruling power to a certain proportion of the produce of every beegah; after declaring all Lakhiraj tenures to be exceptional and in contravention of that right; that many of the existing tenures of that kind were invalid; but that all, whether valid or invalid, had been excluded from the decennial settlement; and that the Jumma assessed upon the estates of individuals under that settlement was to be considered as exclusive and independent of all Lakhiraj lands whether exempted from the Khiraj or public revenue, with or without due authority; proceeded thus to deal with the then subsisting Lakhiraj tenures. It divided them into two classes, viz.: those created by grants made previous to the 12th of August, 1765, the date of the grant of the Dewanny to the East India Company, and those created by grants made between that date and the 1st of December, 1790. The former by the second section were, subject to certain conditions, declared to be valid. The latter, with certain exceptions, and subject to certain conditions were, by the third section declared to be invalid; and, as such, to be resumable and subject to future assessment. The Regulation then went on to subdivide the invalid and resumable tenures into two classes, viz., those which comprised lands not exceeding 100 beegahs, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the Zemindar or Talookdar within whose estate the lands were situate. The revenue which might thereafter be assessed on lands falling within the latter class was declared to belong to the Government. And thus the power of

bringing a resumption suit to impeach a Lakhiraj tenure existing at the date of the decennial settlement, and to have revenue or rent assessed thereon came to belong to the Government, or to private proprietors according to the quantity of land comprised in such tenure. Having thus dealt with all the Lakhiraj tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the decennial settlement into rent-free lands. This was done by the 10th section, which is in these terms :—

[Their Lordships read the 10th Section of Regulation XIX of 1793.]

It is obvious that this enactment relates solely to lands which, on the 1st of December, 1790, were mâl or rent-paying lands; that it treats the grant of a rent-free tenure in such lands not as voidable but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held khas; and that it positively declared that no length of possession should give validity to any such grant. It further expressly authorized the landowner to dispossess the grantee by the high hand without having recourse to the machinery provided by other sections of the Regulation for the resumption or assessment of resumable Lakhiraj tenures; or to any other legal proceeding.

The machinery provided for resumption suits by this Regulation of 1793 was modified by several subsequent Regulations, and in particular by the Regulation II of 1819, which has been already mentioned. And in process of time landowners seeking to enforce their rights under the 10th Section seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by the latter clause of that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim under this 10th Section; and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier sections of the Regulation. Whatever doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the Maharajah of Burdwan (4 Moore,

I. A. 466), that the right of the Government to resume a voidable Lakhiraj tenure comprising more than 100 beegahs was subject to the 60 years' limitation; and that by parity of reasoning the right of a zemindar to resume a voidable Lakhiraj tenure comprising less than 100 beegahs was subject to the 12 years' limitation. On the other hand the Courts construing the Regulation of Limitation in connection with that part of Section 10 of Regulation XIX of 1793, which says that no length of possession shall give validity to such a grant, came (whether on sound principles or not it is immaterial here to consider) to the conclusion that the claim of a landowner under this section was subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up under which landowners claiming the right to assess lands held and enjoyed rent-free, brought their suits generally under Regulation II of 1819, without specifying whether they were seeking to enforce the right given to them by the 7th and 9th Sections of Regulation XIX of 1793, or that given to them by the 10th Section. The result was that the stringent provisions of Regulation II of 1819, and of the other Regulations *in pari materiâ*, were indiscrimininately applied; and that in all cases the burthen was cast upon the Defendant of proving by the production of ancient documents that his tenure existed before the 1st December, 1790. If he established this he would probably succeed, whether his ancient Lakhiraj tenure was voidable or not, the suit, unless the Plaintiff happened to be an auction purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act X of 1859 was passed. The 28th Section of that Statute repealed so much of the 10th Section of Regulation XIX of 1793 as authorized the landowner summarily to dispossess the grantee of a rent-free tenure; it provided that every landowner who should desire to assess any such land, or to dispossess the grantee, should take proceedings before the Collector, which were to be dealt with as a suit under that Act; and it fixed a period within which all such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865 the Courts of Bengal seem to have been somewhat divided upon several questions touching the proper mode of enforcing the claims of zemindars and other landowners, under the 10th Section of Regulation XIX of 1793; and some, at least, of such questions were finally referred for adjudication by a full Bench, consisting of seven Judges of the High Court, in an appeal of Sonatun Ghose and others *v.* Moulvie Abdool Furer. This case, which was numbered No. 869, of 1864, was decided on the 25th January, 1865, and is reported in 2 "Weekly Reporter," p. 21. The Judges were divided in opinion, each delivering a separate judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held that before the passing of Regulation II, of 1819, the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by zemindars for the declaration of their right to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles, which had their origin subsequently to the 1st December in that year. Four of the Judges against three held that such suits were unaffected by the passing of Regulation II, of 1819, Section 30, of which the proper operation was limited to suits for the resumption of Lakhiraj, existing prior to the 1st December, 1790. And four of the Judges against three held that the jurisdiction of the ordinary Civil Court to try the suit was not taken away or affected by the 28th Section of Act X, of 1859.

The second of these rulings is that which is most material to the decision of the present appeal; the necessary consequence of it being that a suit to enforce a claim arising under the 10th Section of Regulation XIX, of 1793, if brought under the 30th Section of Regulation II, of 1819, in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a full Bench of seven Judges, somewhat differently composed, on the 22nd February, 1865. They unanimously held that they were bound by the decision of the 25th January, 1865, so far as it went. But they further

decided that the regular suit which, notwithstanding the 28th Section of Act X, of 1859, might still be brought to assess or resume invalid Lakhiraj, created since the 1st of December, 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the Plaintiff to prove that the case was one falling within the 10th Section of Regulation XIX of 1793. And the Court added, "He must prove his allegation that the land held by the Defendant, and which he claims to be Lakhiraj, is part of the mâl land of the Plaintiff. If he prove that fact, and show that it was assessed to the public revenue at the time of the decennial settlement, it may be presumed that the right under which the Defendant claims to hold as Lakhiraj commenced subsequently to the 1st of December, 1790, "unless the Defendant gives satisfactory evidence to the contrary." In another case decided the same day by the same Judges (2, Weekly Reporter, p. 207), they adhered to the ruling in No. 869 of 1864, to the effect that Section 30 of Regulation 2 of 1819 related only to suits for resumption of Lakhiraj created prior to the 1st of December, 1790, and held that, as a consequence of that ruling, every suit alleged to be brought under Section 30 was necessarily not one to which the rule created by Section 10, Regulation 19, of 1793, of exemption from limitation applies. They further decided that the Plaintiff, having erred in stating that the suit was brought under Section 30, should, if he wished to do so, be allowed to amend his Plaint, and that, in such case, the cause should be remanded for retrial; but that if the Plaintiff did amend his Plaint he must show on the face of it, as required by the Law of Procedure, when his cause of action accrued, and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption from the law was claimed.

There has been, so far as their Lordships are aware, no Appeal from these decisions of a full Bench of the High Court. They have since given the law to the Division Benches of that Court; and the Order of Remand, of which the present Appeal complains, is one of many which have been made in accordance with them. The Judgment in the case, No. 268 of 1864, which is set forth at page 77 of the Appendix, is, in fact, only a

recapitulation of what had been decided and laid down in one or other of the above-mentioned decisions of the full Bench.

No attempt was made at the Bar to impugn the correctness of the first decision in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of the 30th Section of Regulation 11 of 1819, do not apply to such a suit as the Appellant's; and the only questions which the Appeal raises are whether, this being so, the High Court has been right in remanding this and other causes similarly circumstanced for retrial; whether on such a retrial the burthen of proof should be cast in the degree in which the High Court would cast it on the Plaintiff; and lastly, whether there is anything in the particular case which renders such an Order of Remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion that the remand for retrial upon an amended Plaint was not only correct, but an indulgence to the Plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of the 30th Section of Regulation II of 1819, is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materid* greatly to the advantage of the Plaintiff, and, consequently, to the prejudice of the Defendant. It follows that, if the procedure was not applicable to the case, there had been a mis-trial.

Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the Plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the Plaintiff to prove a *primâ facie* case. His case is that his mâl land has, since 1790, been converted into Lakhiraj. He is surely bound to give some evidence that his land was once mâl. The High Court, in the Judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the mâl assets of the decennial

settlement of the estate. His *primâ facie* case once proved, the burthen of proof is shifted on the Defendant, who must make out that his tenure existed before December 1790.

It may be objected that the result of this ruling may be that Plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the Plaintiff to give *primâ facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the Defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if in such cases effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations which have now been decided to be inapplicable to suits of this nature, and by relieving Defendants from a burthen which every year made it more difficult to support.

The only other point to be decided on this Appeal is whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion that there is not. M. Leith argued that the Defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the Appellants' estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the Plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been mâl lands. In fact the Defendants strenuously asserted the contrary. The Appellant, therefore, having failed to give any evidence on the second trial in support of his amended Plaint, the Decree dismissing his suit was right.

In the other Appeal, that of Hurryhur Muhhapadya the suit was also, on the face of it, brought under Section 30 of Regulation II of 1819, though to enforce a claim under Section 10 of Regulation XIX of 1793. In fact, in this case there was a preliminary proceeding under the 28th Section of Act X of 1859. The Defendants (the

Respondents) undertook to prove that their tenures existed before December 1790. The Principal Sudder Ameen decided, on the 9th of April, 1863, that they had failed to do so, and decreed in favour of the Appellant. That Decree was affirmed on Appeal by a division branch of the High Court on the 14th of March, 1864. An application for a review of Judgment was made on the 10th of June, 1864, on the ground, amongst others, that the Appellant having stated that the lands were his mâl lands, the Court had erred in throwing the onus of proof on the Defendants. The review was admitted on this ground; and on the 24th of August, 1865, the Court made an Order in these terms:—"A notice will issue to the other side, when the case will be argued, whether or not our decision, which has been overruled by a subsequent ruling of the full Bench, should not be altered." And on the 6th of September, 1867, the Court made the second Order for a remand, saying, "the onus being on the zemindar, he will be permitted to amend his plaint; and he will have to prove that the land is mâl, by showing that he has received rent for the same."

Their Lordships conceive that, subject to the point which will be subsequently noticed, the question whether this remand was correct, must be governed by their decision on the other Appeal. They do not think that the Order is vitiated by the specification of one amongst the various methods by which the Plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof. It was, however, argued by Sir Roundell Palmer, that the remand of this particular case was improper, because the cause had already been finally decided in the Appellant's favour; and ought not to have been admitted to a review, in order to give the Defendants the benefit of what had been decided in other cases after such final Judgment had passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within ninety days of the date of the Decree sought to be reviewed, pursuant to Article 377 of the Code of Procedure; and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application

until the law, on which so much doubt existed, had been settled by the Judgments of the full Bench of the High Court, which have been already noticed. Therefore, in this case also, their Lordships think that the final Order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both Appeals. As the Respondents have not appeared on either, it is unnecessary to say anything about costs.

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