Privy Council Appeal No. 68 *of* 1937.
Bengal Appeals Nos. 32 *and* 33 *of* 1936.

Kumar Kamalaranjan Roy - - - - *Appellant*

v.

The Secretary of State - - - - - *Respondent*

Same - - - - - - - *Appellant*

v.

Same - - - - - - - *Respondent*

(*Consolidated Appeals*)

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 17TH OCTOBER, 1938.

Present at the Hearing:

LORD WRIGHT.
LORD ROMER.
LORD PORTER.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* LORD WRIGHT.]

The appellant in these consolidated appeals is the purchaser of a zemindari estate sold under the provisions of Act XI of 1859 for the recovery of arrears of land revenue. The question is whether he is liable, after he annulled as he was entitled to do under section 37 of Act XI of 1859, the under-tenures, for the unpaid balance of the costs of the preparation of a record of rights of the estate, which had been duly apportioned on the patnidars of the estate before the purchase by the appellant of the estate and the annulment of the under-tenures. The appellant was plaintiff in the action; he had paid under protest the amount demanded from him by the Government and was claiming repayment.

The facts are short and not in dispute. The estate in question is in the District of Murshidabad. In 1923 settlement operations were commenced and these were completed in November, 1928. Thereupon the provisions of section 114 of the Bengal Tenancy Act, 1885, came into effect. These provisions so far as revelant are as follows:—

> "SECTION 114 (1).—When the preparation of a record-of-rights has been directed or undertaken under this Chapter, in any case except where a settlement of land-revenue is being or is about to be

made, the expenses incurred in carrying out the provisions of this Chapter in any local area, estate, tenure or part thereof (including expenses that may be incurred at any time, whether before or after the preparation of the record-of-rights, in the maintenance, repair or restoration of boundary marks and other survey marks erected for the purpose of carrying out the provisions of this Chapter), or such part of those expenses as the Local Government may direct, shall be defrayed by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments (if any), as the Local Government, having regard to all the circumstances, may determine."

* * * *

"(3) The portion of the aforesaid expenses which any person is liable to pay shall be recoverable by the Government as if it were an arrear of land-revenue due in respect of the said local area, estate, tenure or part."

* * * *

The settlement having been completed the costs which in the first instance were borne by the Government, were apportioned in accordance with an order of the Governor in Council dated the 12th June, 1928, as between landlords and raiyats and in particular permanent tenure-holders whose rent was fixed in perpetuity were to pay their own share of the costs and that of the landlords superior to them. The patnidars were accordingly liable to pay the whole of the 15 annas per acre share which was apportioned as the liability of the landlords in respect of the total cost of Rs.1-8 per acre. The raiyats share was thus 9 annas per acre.

On the 28th March, 1930, the appellant purchased the estate in question, which was No. 7 in the Murshidabad Collectorate, and lay within the limits covered by the record of rights, in a revenue sale held under the provisions of Bengal Act XI of 1859. At that time the patnidars had paid some part of the amounts apportioned on them, but some balances were still unpaid. In respect of these unpaid balances, the certificate procedure under the Bengal Public Demands Recovery Act, 1913, came into force, in particular section 8, which provides that on the service of notice of a certificate under section 7 of the Act, the certificate debtor is debarred from transferring or delivering any of his immoveable property in the district in which the certificate is filed or any interest in that property, and that the amount due from time to time should be a charge on the immoveable property of the certificate debtor wherever situate, to which any subsequent charge was postponed. It appears and is not contested that certificates complying with the Act were duly signed and filed by the certificate officer in respect of the arrears of the apportioned costs and notices duly served on the defaulters. The zemindars duly paid such amounts as were apportioned against them.

Thereafter in 1930 the appellant purchased the estate under section 37 of the Act XI of 1859 which is in the following terms:—

"SECTION 37.—The purchaser of an entire estate in the permanently-settled Districts of Bengal, Behar and Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may

> have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions:—"

It has been held by this Board in the case of *Turner Morrison & Co.* v. *Monmohan Choudhury,* 58 I.A. 440, that the section distinguishes between incumbrances and under-tenures. Encumbrances are wiped out by the sale; in the case of under-tenures the purchaser is entitled to avoid and annul and it is only on his doing so that he can eject all under-tenants. In the present case the appellant immediately after the purchase annulled all the under-tenures, that is the patnis or estates of the patnidars in question, the rights of the raiyats being preserved by the proviso to section 37. It is not contested that the appellant duly annulled the patnidars' estates, which thereupon became void and ceased to exist.

Thereupon the certificate officer purported to transfer the certificates in regard to the patnidars who were still in default into the name of the appellant and caused notices and copies of the certificates to be served on the appellant and demanded payment of the amounts from him. He paid under protest and brought the present actions for cancellation of the certificates filed against him and for the recovery of the amount so paid.

The Subordinate Judge decided in favour of the respondent. His judgment, which was quite short, proceeded on the footing that because the appellant was in possession of the lands of the patnidars in respect of which the costs were assessed, he was liable for the costs. In particular he proceeded on rule 414 of the Bengal Survey and Settlement Manual, which is in the following terms:—

> "RULE 414.—If before the amounts are collected a landlord or tenant dies or transfers or abandons his estate or tenancy or any part thereof, recovery may be made from the person in possession of the former holder's interest."

On appeal the District Judge reversed that decision. He held that the terms of rule 414 did not apply to a case of the annulment of the patnidars' estates, the appellant not being in possession as successor in interest of the patnidars but of the zemindar, and also that the assessment was not made on a possession in the land, but upon a person's interest in the land. He held that the appellant was entitled to recover with costs and with interest at 6 per cent. on the decretal amount.

On appeal, that decision was reversed by the High Court, and the suits were dismissed with costs. Their judgment seems to have been based substantially, if not entirely, on the terms of rule 414 of the Manual above referred to; they said, "the conclusion is irresistible that the plaintiff in the case before us having obtained possession of the lands appertaining to the patnis which were annulled by his purchase at a sale for arrears of revenue, was the person from whom the costs of the settlement operations were recoverable."

On the hearing of the appeal before their Lordships, the respondent's Counsel have not sought seriously or perhaps

at all to uphold the reasons given for deciding in their favour by the Courts below. They have based their right to uphold the judgment below on two grounds which do not appear to have been taken below and which certainly are not discussed by the Subordinate Judge or by the Judges of the High Court. Counsel are unquestionably entitled to uphold a judgment on any proper ground of law, but their Lordships regret that they have to decide on these new submissions without any help from the Judges in India.

As to rule 414 of the Manual which was relied on in the Courts below, it is enough to say on the construction of that rule that it does not purport to deal with a case of the annulment of under-tenures but only with death transfer or abandonment. Abandonment cannot in their Lordships' judgment be construed as including annulment. If, however, it were so construed, then no statutory authority to justify that provision of the rule has been produced to their Lordships, which accordingly would be invalid.

The appeal before their Lordships has been argued on two main alternative bases. One is that the apportionment is a charge on the land or more accurately on the patnidars estate or interest in the land. The other is that the liability imposed under section 114 is not upon those who are landlords' tenants or occupiers at any specified time but upon those who are landlords, tenants and occupiers from time to time so long as any part of the apportionment is outstanding.

As to the first contention, their Lordships do not think it necessary to decide whether the apportionment constitutes a charge on the patni estate or whether it is an impost on the patnidar in respect of his estate, as has been held by the Indian Courts. They will assume for purposes of this argument, without deciding that it is a charge on the estate. But when the purchaser, under section 37, of the entire estate elects to avoid and annul under-tenures, they cease to exist. The power under the section is in the most absolute terms, subject only to the express exceptions set out in the section but these are not material in this case. It seems incontestable in principle that when an interest charged is avoided and determined the charge upon it must also cease and determine. There cannot be a charge upon nothing. The charge depends on the existence of the interest charged, just as an under-lease depends on the head lease and falls when the latter falls or is forfeited. On this ground, the respondent's first contention must fail.

His second contention depends on the construction of section 114 (1) and (3) of Bengal Tenancy Act. It involves among other difficulties reading into the section words which are not expressed, namely, from time to time. Subsection (1) provides for the defrayment of the expenses by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments, if any, as the local government, having regard to all the circumstances may determine. The machinery

for carrying this provision into effect has already been described. That machinery includes the issue of a certificate addressed to a particular person, which, whatever else it does, enables execution to be levied against all his immoveables wherever situated and establishes a prior charge on these immoveables in the relevant district. It also provides for devolution of the liability on his death. Subsection (3) of section 114 provides for recovery by the certificate proceeding as if the debt were an arrear of land revenue. The proceedings so provided for point, in their Lordships' judgment, to the certificate creating a debt as against the specific person against whom the certificate is filed; the debt is to be executed against his estate, with stringent safeguards against his parting with that estate and is to pass on his death. All these provisions seem quite inconsistent with a shifting liability passing from the certificate debtor to any new landlord to whom the estate may pass. The fact seems to be that the various Acts have provided for all contingencies as to transmission and devolution of the estate, but have not provided for the special case in which the patni estate is not transmitted or devolved, but annulled and determined. It may be that there is here a *casus omissus,* but if so that omission can only be supplied by statute or statutory action. The Court cannot put into the Act words which are not expressed, and which cannot reasonably be implied on any recognised principles of construction. That would be a work of legislation, not of construction, and outside the province of the Court. It is said that it is reasonable that the holder of the estate from time to time who gets the benefit of the survey should have to bear the cost till it is entirely discharged and also that in practice this principle has been assumed and acted upon. That may well be so. But the question having been raised must be decided on legal principles and on the relevant statutes. If these do not give any such powers as the respondent claims, the difficulty can only be remedied by a change in the law.

Their Lordships are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside and the decree of the District Judge restored, and that it should be ordered that the respondent pay the appellants' costs of this appeal and in the Courts below.

They will humbly so advise His Majesty.

(11054—3A) Wt. 8168—30 190 11/38 P. St. G. 338

In the Privy Council

KUMAR KAMALARANJAN ROY

v.

THE SECRETARY OF STATE

SAME

v.

SAME

(*Consolidated Appeals*)

DELIVERED BY LORD WRIGHT

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