Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ram Chunder Dutt v. *Jughesh Chunder Dutt, heir of Romesh Chunder Dutt, from the High Court of Judicature at Fort William in Bengal; delivered 25th March* 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was a suit brought by Romesh Chunder Dutt, who claimed to be the zemindar of a zemindary called Lot Porooe, his title resting upon a purchase at a sale by a master of the late Supreme Court, under a decree by which the zemindary was ordered to be sold in a suit by the mortgagee. The present suit was brought to enhance the rent of the Appellant, treating his tenure as one in which the rent was enhanceable. Romesh Chunder Dutt, as purchaser at the sale to which reference has been made, can have no higher title to enhance the rent than he would have had if he had been a purchaser from the former zemindar. The sale was not for Government revenue, and the title of the purchaser under it was no higher or better than it would have been under a conveyance direct from the zemindar. Therefore, the question comes to this, whether the Respondent, as zemindar, had as against the Defendant in the suit the right to enhance the rent.

The defence made to the suit is, first, that there was no notice to enhance, upon which

some observations will hereafter be made, but the principal defence is that there was no right to enhance, based upon the contention that the lands of the Defendant were held on kudeemee ryotty tenure. It was further alleged that that tenure had been confirmed by a former zemindar by the grant of a pottah which, as it was said on the part of the Defendant, was confirmatory only, and not a new grant. But the foundation of the case which has been put forward to exempt this land from an enhanced rent is that it was held on a kudeemee tenure which had existed more than 12 years before the decennial settlement.

The first question which arises is upon whom the onus of proof lies? Mr. Cowie contended that upon the general principle running through the relations of landlord and tenant in Bengal, the liability to enhancement was the rule, and that those who sought to escape enhancement must prove their exemption. On the other hand, it was said by Mr. Leith that this case fell within section 51 of Act VIII. of 1793, and that it lay upon the zemindar to bring the case within some of the conditions mentioned in that section. Their Lordships are disposed to think that this claim to exemption being rested upon the ground that the tenure was ryotty kudeemee tenure does not fall within the 51st section, which relates to dependent talookdars, properly so called; and they are not prepared to affirm what was said by the Judges in the case to which reference has been made, *Rajkishen Roy* v. *Bydonath Nundee*, in the Sudder Dewancy Adawlut Reports for the year 1858, p. 908. It is there stated, "We think the analogy of the "law, section 51, extends to kudeemee ryots, "which the Defendants are." Now, arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a statute, reasons founded upon analogies are scarcely applicable. However, assuming in

this case that it lay upon the Defendant in the suit to establish his claim to exemption, their Lordships have come to the conclusion that he has sustained the burden of proof cast upon him, and established a case which entitles him to be exempted from enhancement.

The earliest evidence which has been given is the proof of certain receipts for rent, of a date as long ago as the year 1771. There are receipts of that year which show that some of these lands were held by ryots at that date, paying the identical rent which has ever since been paid; that is, upwards of a century. These receipts, however, cover a part only of the lands in question, viz., the lands in Bashoodebpore; and there are lands in three other mouzahs which are not included within them. With regard, however, to these lands they are all included in a jummabundee made as early as the year 1783; apparently for the purposes of the decennial settlement, which took place about 1790. That jummabundee made seven years only before the decennial settlement, may not be sufficient in itself; it does not afford direct evidence in itself to satisfy the requirements of the law, that to escape enhancement there should have been a fixed rent for more than twelve years before the decennial settlement. But at the distance of time at which we are now arrived from the date of that settlement, it becomes absolutely necessary, for the purposes of justice and equity, that presumptions should be made. It may be that the jummabundee alone would be insufficient to found a presumption that these tenures were ancient tenures, and that this rent had existed for twelve years before the decennial settlement. But this case does not rest upon the jummabundee alone; the subsequent evidence which has been given in the cause, supports very strongly the presumption that these tenures were ancient at the time of the settlement; how ancient, it is impossible to say. It seems that the lands now held by the Defendant

had been divided into small jotes or holdings, and had been held by numerous tenants, whose names are found in the old receipts and the jummabundee to which reference has been made, and the rents there appearing are the same which have ever since been paid. These tenants from time to time sold their jotes, and they were purchased by a gentleman of the name of Tara Chand Bundhopadhya, to the extent of 236 beegahs. Tara Chand having thus acquired the property sold it to those under whom the present Defendant claims, and at the time of that sale some transactions took place between Tara Chand and the purchaser, to which the zemindar was a party. Their Lordships are of opinion that those transactions in the strongest way confirm the presumption that the lands at that time were held under an old tenure.

It appears that Eshan Chunder Chuttopadhya, who was then the zemindar, had become surety for Tara Chand, and that in order to relieve himself from the consequences, and also to obtain payment of a thousand rupees which Tara Chand owed to him, he became "the medium," as he himself says in his ikrar, of the sale from Tara Chand to Ram Chunder Dutt. But before that sale took place, there were some disputes respecting the property and the rent; and it was to show his acquiescence in the sale and to prove that all those disputes were at an end that Eshan Chunder, the zemindar, gave an ikrar or agreement to Ram Chunder Dutt, the purchaser.

This ikrar bears date the 27th Maugh 1238; it was registered on the 25th November, A.D. 1832, and its terms are most important. The zemindar refers to his having given security, and that Ram Chunder Dutt had become the purchaser of the tenures by ten deeds of sale for a consideration of Rs. 10,078; that he had himself obtained a thousand rupees in satisfaction of the money due to him, and had been relieved from

the liability which he was under as surety of Tara Chand. Then the most important part follows. The ikrar says: "But a dispute about "mutation of names having arisen between you "and ourselves, you filed a petition against us "in the Civil Court of Zillah, 'Howalee Shahur,' "(suburbs of the town of) Calcutta, and a "perwana was issued calling for an answer "from us. Thereupon we gave a pottah to you, "after settling the rents according to the jum-"mabundee, by mutation of names." When the zemindar refers to settling the rent according to the jummabundee he was aware of the conveyances which had been made by Tara Chand to Ram Chunder; conveyances which describe not an ordinary holding of a ryot, but something much more,—a tenure which was of value, and hereditary.

The deeds of sale are set out, and are all substantially to the same effect. In the part which relates to the sale there are these words: "I sell to you the said lands for "a consideration of Rupees 2,255, which have "been received by me in full and in cash. "You taking possession of these lands in "the manner held by me, and causing your "name to be entered in the zemindar's sherista "by expunging my name, and paying the rents "according to the jummabundee, continue to "enjoy them happily, heir after heir. The power "to sell those lands, or give away in gift, rests "with you." These were deeds to which the zemindar was privy. He was, therefore, aware that the sale was of a tenure which was to be held by the purchaser and his heirs, heir after heir, at rents according to the jummabundee; not any new rents, but rents according to the jummabundee of 1783, under which the decennial settlement had been made. Now, with the knowledge of those conveyances the zemindar, in his ikrar, says this: "Thereupon "we gave a pottah to you, after settling the "rents according to the jummabundee, by muta-

" tion of names." Why should he have acceded, in the year A.D. 1831, to a settlement of rents according to the old jummabundee of 1783 if there had been at that time a power on his part to enhance? A very long time had elapsed since the settlement, and it can hardly be supposed that the value of the lands had remained the same. There is also the strong fact, which was brought to his knowledge, that the large sum of upwards of 10,000 rupees had been given for these very lands, which, upon the hypothesis of the Respondent, must have been immediately afterwards enhanceable by the zemindar himself.

Their Lordships think the above transaction, evidenced by the ikrar and the deeds of sale, affords very strong evidence of an acknowledgment on the part of the zemindar that the lands were held as ancient tenures. Reference is made by this ikrar to a pottah, and there can be no doubt that a pottah of some kind was executed at that time by the zemindar. Well, the Appellant has produced a pottah which, he says, is that which was granted, and on the face of it, it certainly accords with the ikrar, and with the rest of the evidence in the case; and if this be an old tenure, this pottah is entirely consistent with it. Confirmatory pottahs are common in India; and this pottah, if it really was made in the terms of that produced by the Appellant, must be taken to be confirmatory of the tenure which then existed.

But it was said that this pottah is not genuine, and undoubtedly the Courts below, the Principal Sudder Ameen, and the Zillah Judge have so found. It is not usual, and certainly it is not the desire of their Lordships to interfere with the concurrent findings of the Courts below upon a question of fact where the case depends entirely upon such a question; but where it becomes necessary in the course of an Appeal involving other questions for their Lordships to consider all the evidence, it may be essential that they should decide for themselves whether a particular docu-

ment is a genuine one, or a particular fact exists one way or the other, for the purpose of satisfactorily disposing of the Appeal. Their Lordships desire to say with regard to this pottah that they are not fully satisfied with the reasons on which it was rejected by the Courts below. They cannot but think that great weight is due to the evidence of the zemindar, Eshan Chunder; for although he was unable from his blindness to see the document, yet when it was read over to him, he gave, without hesitation, his opinion that it was the pottah he had granted. It was an important pottah, not likely to have escaped his recollection; and whether he recollected all the terms of it or not is immaterial, when he had the impression on his mind, if he is speaking the truth, that he had granted a confirmatory pottah of the mourosee rights of the tenants. However, their Lordships are of opinion that, even without the pottah, the evidence is sufficient to support the contention on the part of the Appellant, namely, that these were old tenures in the nature of kudeemee tenures existing more than 12 years before the decennial settlement, and therefore not liable to enhancement on the part of the zemindar.

With regard to the 26 beegahs not included in the deeds of sale from Tara Chand, their Lordships think that the evidence proves, without the aid of these deeds, that they were kudeemee tenures of the same nature as those on which the larger quantity was held.

With regard to the Judgment on the Special Appeal, their Lordships find that the High Court did not go into the evidence to ascertain whether there was an ancient tenure, which might establish freedom from enhancement, although the pottah, which the Courts below had declared not to be proved, had never existed. No doubt the High Court was limited on the the Special Appeal to the consideration of the law; they were obliged to assume that the pottah, which had been found not to be genuine, was a docu-

ment which could confer no title. But they appear to have founded their Judgment upon the assumption either that the case had been put upon the pottah, and that no other case had been made, or that Ram Chunder Dutt by accepting a pottah had, as it were, attorned to the zemindar under that pottah, and acknowledged that he had no older title. Their Lordships think that is not the correct view. They have already said that in their opinion a pottah may be a confirmatory grant only, and that there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed. It seems to have scarcely been a sufficient reason for not going into the early title that Ram Chunder Dutt had taken a pottah, the terms of which the High Court were unable to ascertain.

Upon these grounds their Lordships think that the Judgments of the Courts below must be reversed.

The conclusion at which their Lordships have arrived upon the right to enhance, renders it unnecessary to determine whether the notice was properly served or not. It appears that the Principal Sudder Ameen and Zillah Judge differed upon that point, the first Judge finding that the notice was not well served, the second that it was. Their Lordships desire to say that they have great doubt whether the evidence sufficiently shows that the notice was properly served. If it had been necessary to determine that point, the evidence must have been narrowly looked at to see if any presumption could have been raised that Ram Chunder Dutt was keeping out of the way at the time that it was attached to his door. Their Lordships are of opinion that in cases of substituted service, that is, service substituted for the personal service which the statute requires wherever it is practicable, the Courts should take care to be satisfied that the condition, on which alone substituted service is good, exists,

namely, that the person who ought to be served personally is keeping out of the way. It will not be sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good has been first established to the satisfaction of the Court.

In the result, their Lordships will humbly advise Her Majesty to reverse the Decrees of the Courts below, and to direct that the suit should be dismissed, and that the Appellant should have his costs in the Courts in India, and of this Appeal.