

favour, and to dispute the arbitration if the decision was against him.

We shall humbly advise Her Majesty that the award of the 23rd of August, 1834, is valid, and ought to be sustained, and that the decree of the Sudder Dewanny Adawlut, of the 3rd of May, 1841, ought to be reversed, together with all other decrees that may be inconsistent with the maintenance of the award. And we shall further advise Her Majesty that the Respondent should be condemned in all the costs incurred in this litigation.

7th December, 1859.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Lord Cranworth, the Right Hon. Lord Kingsdown, the Right Hon. Lord Chelmsford, and the Right Hon. Dr. Lushington.

*Assessor*,—The Right Hon. Sir Lawrence Peel.

*On Petition from the Sudder Dewanny Adawlut at Calcutta.*

PRANNATH ROY CHOWDRY,\* *Appellant,*  
*versus*

RANEE SURNOMOYEE, ... *Respondent.*

The value of the original suit being more than Rupees 10,000, notwithstanding there was a modified decree in the District Court, followed by a full decree of the *Sudder Court*, on cross appeals of both the parties, liberty to appeal allowed.

THIS was a petition for leave to appeal, which had been refused by the *Sudder Court* at Calcutta, as the amount in suit was under Rs. 10,000, the appealable value prescribed by the Order of the Council of the 10th of April, 1836.

The suit was instituted in the *Zillah Court* of the Twenty-four Pergunnahs by the Petitioner, Prannath Roy Chowdry, the owner of lands held under a *Putnee* tenure against the Respondent, for the remission of *Putnee* rents, on account of certain lands resumed by the Government, and paid by him to Government, amounting as alleged in the plaint, with arrears

\* 7, Moore's I. A., p. 553.

and interest, to Rs. 11,692 4 as. 13<sup>ap</sup>. The Judge of the Twenty-four Pergunnahs by his decree of the 6th of August, 1855, declared the Petitioner entitled to the deductions claimed by him as to the *jumma* on thirty-five beegahs and ten cottahs, and, as a matter of calculation reduced the claim of the Petitioner to Rs. 5,767 for principal, and Rs. 3,133 for interest, and then upon the merits allowed the claim for that principal sum, disallowing the Petitioner's claim to interest. Cross appeals were presented by both parties to the *Sudder Dewanny Adawlut*, and that Court, on the 13th of April, 1858, dismissed the appeal of the Petitioner, and allowed the appeal of the Defendant. Application was made for leave to appeal to England, which the Court refused. The Petitioner now presented a petition for leave to appeal from the *Sudder Court's* decree and the Order refusing leave to appeal.

Mr. *Rolt*, Q. C., for the Petitioner.

Mr. *Leith*, opposed.

THE RIGHT HON. LORD CRANWORTH :

We think, in the circumstances, liberty to appeal ought to be allowed.

29th and 30th November, 1859.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Lord Chelmsford, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

*Assessor*,—The Right Hon. Sir Lawrence Peel.

*On Appeal from the Supreme Court at Calcutta.*

SREEMUTTY ANUNDOMOHEY } *Appellants,*  
DOSSEE and others,\* ... }  
*versus*

JOHN DOE, on the demise }  
of the EAST INDIA COM- } *Respondent.*  
PANY, ... }

Held that under the agreement Muttu Loll Seal (if he could take any thing) took a freehold interest

\* 8, Moore's I. A., p. 43.

in the property in suit, and such freehold would not end with M.'s life, because, as he was a Hindoo, no words of inheritance were requisite to continue his interest to his heirs (Appellants).

That a Hindoo could by the Hindoo Law pass land without writing but the East India Company could not create a freehold interest by parol or even by a writing such as the agreement of the 11th October, 1852.

That under the circumstances M. (and the Appellants after him) were in only as tenants-at-will, who were not entitled to any notice of ejection, and had no defence in law against the ejection suit.

Judgment of the Supreme Court at Calcutta affirmed with costs without prejudice to such relief as a Court of Equity might grant to the Appellants.

8th December, 1859.

THE RIGHT HON. LORD CHELMSFORD :

THIS is an appeal upon a verdict and judgment of the Supreme Court at Calcutta in an action of ejection by the lessors of the Respondent against the Appellants, and also from an Order of that Court discharging a rule *nisi* subsequently obtained, to set aside the verdict and for a new trial.

This ejection was brought to recover two pieces of land lying between the *Strand* road and the river *Hooghly*, in the town of Calcutta. This land had been gained from the river *Hooghly* by accretion, and, at the time of the transactions out of which the ejection arose, was in the possession of Muttyloll Seal, since deceased, as the ostensible owner. His claim was, however, disputed by the East India Company; and Muttyloll Seal, in the year 1841, appears to have been willing to have admitted their right to the land, for in two letters of the dates respectively of the 25th of August and the 4th November, 1841, he proposed to take it on a lease, "or, if Government were not agreeable to that, he wished them to give him a written assurance that he was to keep possession so long as they did not require the said plots for some other purposes themselves." Whether anything took place upon these letters nowhere appears; but Muttyloll Seal continued in the undisturbed possession of the two pieces of land from that time down to the year 1851. The Government, for many years before 1851, had it in contemplation to construct a new road in lieu of

the old *Strand* road; and in that year the protect seems to have been seriously taken up, and application was made to Muttyloll Seal to give up the land in question for this purpose. These two pieces of land were immediately in front of other land the undoubted property of Muttyloll Seal, from which they were only separated by the public highway called the *Strand* road, so that by the possession of them he and his tenants had immediate and uninterrupted access to the river. Muttyloll Seal had also built a *Ghaut*, with steps leading down to the river upon other alluvial land abutting on one of the two pieces of land in question.

There can be no doubt that when application was first made to Muttyloll Seal to surrender the land, he believed that the project of the Government was to make a new *Strand* road, and, also, that this was the improvement originally contemplated by them. His expectation appears clearly from the first letter upon the subject, written by him to Mr. Smoult, the Solicitor of the East India Company, on the 31st of March, 1851, in which one of the conditions for which he stipulates is, that "he shall not be required to surrender the land until the Government are prepared, and do actually begin to carry out the proposed improvement on the *Strand* road." It is true that in his subsequent letter, written to Mr. Archibald Grant, the new Solicitor to the East India Company, on the 10th of May, 1851, he does not insist upon this condition; but he states explicitly—"I make this surrender in the full belief that it is the intention of the Government to reconstruct the *Strand* road; and that to obtain this most desirable purpose it is necessary that they should be put in immediate possession of the land which I now hold; at the same time I have to request that if any delay should take place, that the land which I now surrender may not, in the mean time, be let to other parties, or applied to any other purposes than that of a road, as it might, in such case, become a serious injury to my property immediately abutting on it to the eastward."

What was the improvement which was

contemplated by the Government at this time is shown by the answer of Mr. Archibald Grant to Muttyloll Seal of the 13th of June, 1851, after a communication from the Secretary to the Government, in which, treating the letter of Muttyloll Seal as an unconditional surrender of his interest in the newly-formed land on the *Strand* bank of the river, he adds:—"I am directed by the Deputy-Governor of Bengal to communicate to you, in reply to your letter, that his Honour is gratified by the course adopted by you. I am directed to say you may be assured that, pending the execution of the project of a new *Strand* road, which has been for several years in the contemplation of Government, the land now surrendered by you will not be let to any other party."

It has been observed in argument, that Muttyloll Seal imposes no condition upon the Government that they shall "reconstruct" the *Strand* road, but merely makes the surrender "in the full belief" that this is their intention: that although he requests that, if any delay takes place, the land shall not be applied to any other purposes than a road, as well as that it shall not be let to other parties, the letter accepting the surrender is confined to an assurance that, pending the execution of the project, the land will not be let to any other party, and that the surrender of his interest is, to his own knowledge, treated as having been made unconditionally; from all which it is inferred that Muttyloll Seal must have known, or at least have had strong grounds for believing, that the plan of the Government was not necessarily confined to the formation of a new *Strand* road.

Down to this period of the correspondence, however, there does not appear to have been any other improvement in contemplation; nor was there anything to lead Muttyloll Seal to believe that the land in question was wanted for any other purpose than for a road.

But before the actual surrender took place, some intimation was given, which might have been sufficient to lead him (in some degree at least) to expect some alteration of the original Government

scheme of improvement. In his letter to Mr. Archibald Grant, containing his offer to surrender the land, he says:—"I have also to request that the Government should erect and build a *Ghaut* at their own expense, on the banks of the river, precisely similar to that which is now erected and built at my own expense (only extending the *Ghaut* steps to the south side), as will appear by the inclosed plan. The columns, roof and ornamental parts of the *Ghaut* I am to be allowed to build at my own cost and expense, should the Government be pleased to approve of the above proposals. I beg to be favoured with the honour of an answer."

And, in answer, he had been told:—"Respecting your request for the building of a *Ghaut* on the banks of the river, the columns, roof and ornamental parts of which building you liberally offer to construct at your own expense, the Deputy-Governor desires me to say that the erection of a proper number of *Ghauts* at suitable places is a part of the proposed plan of improvement, and the Government will gladly avail itself of your public-spirited offer when the time comes."

Mr. Longueville Clarke, who was the adviser of Muttyloll Seal, on the 26th of July, 1851, wrote for an explanation to the then Advocate-General, as follows:—"My dear Jackson,—In Mr. Secretary Grant's letter to Baboo Muttyloll Seal, of the 19th of June last, it is not distinctly stated that the *Ghaut* which the Government undertake to construct in place of that which he built, and now surrenders, will be erected on the present site. I have explained to you why this is of consequence to Muttyloll, and you tell me that such is the intention of the present arrangement. Will you get a few lines from Mr. Grant to this effect, to remedy any misconception, should there be another incumbent in his office when the new *Ghaut* may be built?"

To which the Secretary of the Government returned this answer on the 4th of August, 1851:—"Sir,—With reference to the communication from Mr. Longueville Clarke of the 26th instant, made to you on the part of Baboo Muttyloll Seal,

which you showed to me a few days ago, and which I have laid before the Honourable the Deputy-Governor of Bengal, I am directed by his Honour to say, that you can assure the Baboo that if the bank of the river and the *Strand* road remain as at present, the *Ghaut* whereof he has announced his desire of erecting the columns, roof and ornamental part alluded to in my letter to the Company's Solicitor, No. 1235, dated the 13th ult., will be erected when the *Ghaut* upon the land of which the Baboo now gives up possession at present stands; but if, as is anticipated, a new road be made, running in a line nearer to the river than the present line, the *Ghaut* will be erected on the river bank, immediately opposite the existing *Ghaut* aforesaid. I have, &c., J. P. Grant, Secretary to the Government of Bengal."

This letter was not only communicated to Muttyloll Seal, but it is referred to expressly in the agreement of the 11th of October, 1852, which was signed by him after his actual surrender of the land, and which agreement was prepared by Mr. Clarke on his behalf.

It certainly does appear extraordinary, if it was intended that the land should be surrendered only upon condition that a new *Strand* road should be made, that they did not at once reject the idea of there being the least uncertainty upon that subject, and insist upon a literal compliance with this condition, as the price of the surrender of the land.

It is to be observed, that this letter was written nearly three months before the actual surrender, which took place on the 27th of October, 1851. Before this event Muttyloll Seal had conversations with Mr. Elliot; but although he states that in one of them "the Baboo said he would give up the land only for a public road;" and Mr. Elliot insisted upon the alteration of the terms to any "public improvement," yet as he cannot fix the time of this particular conversation, but can only say it was "before signing the agreement B" (the agreement of the 11th of October, 1852,) it cannot fairly be taken to have occurred before the delivery of possession.

However, on the 27th of October, 1851, Mr. Elliot says:—"I proceeded to the premises with Muttyloll Seal after the verbal agreement; possession was formally made over to me on behalf of Government, as proprietor of the soil on the 27th of October, 1851, by Baboo Muttyloll Seal in person, in presence of numerous witnesses, and restored to the Baboo as a tenant removeable at the pleasure of Government on one month's notice, as per separate agreement; a previous day had been fixed, and it was postponed to Monday, the 27th of October, 1851."

Some little difficulty has arisen as to the meaning of the words used by Mr. Elliot, "as per separate agreement." Upon turning, however, to the evidence of Mr. Clarke, who was present at the delivery of possession, after speaking of the *Bengalee Kaboolat* signed at the time, he says, "There was also an agreement to be signed;" so that Mr. Elliot, by the words "as per separate agreement," must be understood to refer to an agreement to be afterwards made, which was to contain the terms upon which Muttyloll Seal was to be allowed to remain in possession. It can hardly be contended, that before this agreement was entered into, Muttyloll Seal had any interest in the land which could have been available against an ejection brought by the East India Company upon the legal title acquired by his formal delivery to them.

Then, did the agreement of the 11th of October, 1852, place him in a better situation for resisting the enforcement of their rights in a Court of law? The Appellants contend that the proper construction of this agreement is, that they are entitled to hold possession until a month's notice has been given, after the new *Strand* road should have progressed so far as to render it necessary, for its further extension and continuation, that they should vacate the land; and that although there is no express mention of the road in the agreement, yet that the words "public improvements" and "projected improvements" hereinbefore, alluded to, must be interpreted by reference to the correspondence with Mr. Secretary Grant,

to mean nothing else but the new *Strand* road.

But against this construction must be set the reference to the letter to Mr. Secretary Grant of the 4th of August, 1851, showing that the alteration of the *Strand* road was not definitively decided upon, and the conversation with Mr. Elliot before this agreement was signed, in which he insisted upon the general words "public improvements" being inserted, for the very purpose of preventing its being alleged that Muttyloll Seal had given up his land only for a public road. Now, construing the agreement by the aid which these circumstances afford, it would rather appear that whatever interest Muttyloll Seal had in the possession, was contingent, not upon the formation of the new *Strand* road, but upon the public improvements, of whatever nature the Government might ultimately determine to execute in this direction.

Of course, if this is the correct construction, then, even if Muttyloll Seal's interest under the agreement was a legal one, it was determined by the notice given on behalf of the East India Company. But the real question upon the agreement is, whether it created any legal interest of any description. For the purpose of this consideration, let it be assumed that the "public improvements" intended by the agreement, were the formation of a new *Strand* road, and that, consequently, Muttyloll Seal's possession was contingent upon the progress of that road. The lessors of the Plaintiff had become the absolute owners of the land, and, upon the proposed assumption, they would have let Muttyloll Seal into possession under an agreement that they would not disturb him until after a month from a contingent uncertain event. What was the nature of this interest? Did it create any tenancy between the parties? If so, of what description? It certainly was not a tenancy for years; nor from year to year; nor for a year certain; nor for a month; nor for any other certain time. In the course of the argument for the Appellants, it was suggested that the agreement passed a freehold interest, and,

certainly, from the indefinite character of the interest given, it seems best to answer this description. If the agreement could have created such an interest, there being no measure assigned by years or by any portion of time, although the stipulated rent was to be payable yearly, it could be nothing less than a freehold, and a freehold which would not end with Muttyloll Seal's life, because, as he was a Hindoo, no words of inheritance were requisite to continue his interest to his heirs. The consequence would be, that his death not determining it, it would enure to their benefit, and have an indefinite duration till determined by a notice on the occurrence of the event contemplated. Now, an interest of this nature could not be created by parol, or by a mere writing, such as the instrument of the 11th of October, 1852, which, therefore, could operate only as an agreement. Muttyloll Seal having been admitted, or holding, under this agreement, and the same sort of possession being continued by the Appellants, he and they after him could not be treated as trespassers, but were in as tenants-at will; of course, such a tenancy was determinable by the mere bringing of an ejectment.

This appears to be the correct construction of the agreement, so far as the legal rights of the parties flowing out of it are concerned. It passed no legal interest out of the East India Company to Muttyloll Seal. The Company did not grant, nor did they intend to grant, as Hindoos; if they had so intended, they must have failed in their intention, for they could only grant according to law. Yet the instrument was binding upon them as an agreement, and a Court of equity would have protected the Appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have been instantly restrained from proceeding by a Court of equity.

Their Lordships, in determining this

case, have confined themselves strictly to the legal rights of the parties, and have purposely abstained from expressing any opinion upon the equitable considerations which may be involved in it. They decide only that the ejection was maintainable, and that the Appellants had no defence to it at law; and this decision is made without prejudice to any equitable rights of the Appellants, which must be understood to be fully reserved to them.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Supreme Court of Judicature be affirmed, and this appeal dismissed, with costs.

13th, 16th, 19th and 20th July, 1859.

PRESENT :

Members of the *Judicial Committee*.—The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

*Assessor*.—The Right Hon. Sir Lawrence Peel.

*On Appeal from the Sudder Dewanny Adawlut at Bombay.*

SUMBHOOLALL GIRDHURLALL,\* *Appellant,*

*versus*

THE COLLECTOR OF SURAT }  
AND NUSSERWANJEE PESTONJEE, ... } *Respondents.*

In a suit against Government and a judgment-creditor N. P. by S. G. an execution-purchaser of *Tora garas huk* (a fixed payment made to military and predatory chiefs in Guzerat and Malwa, especially in lieu of lands held by them, or in purchase of their refraining from plunder) the *Sudder Court* held—that the Plaintiff S. G. was not entitled to any relief against the Government, as the tenure was in its nature inalienable and the sale illegal, and equally disentitled to equitable relief as against the judgment-creditor N. P., on the basis of the maxim '*caveat emptor*' ;

*Held* by the Privy Council in appeal (which was entertained under special leave owing to the importance of the point in dispute.)—

That as the Government, having through its officers, abundant notice of the intended sale in execution and ample opportunity to object on the ground of inalienability, never raised such objection, but allowed the sale to be completed on payment of valuable consideration, their Lordships

doubted whether it would be just to permit the Government to raise the defence of inalienability as against the Appellant.

That independently of such objection, the *onus* lay upon the Government to prove that this particular description of property was in its very nature incapable of alienation; and that such *onus* had not been discharged. On the contrary, the alienability of such tenures was proved by the evidence adduced by Plaintiff, and the conduct of the Government in not producing certain records called for by Plaintiff.

That in case the Government had failed to carry out its undertaking to pay the annual instalments of the *Tora garas huk* into Court, the Plaintiff would be entitled also to receive simple interest at the usual rate on the arrears due when the suit was instituted and on each subsequent payment as it accrued due.

8th February, 1860.

THE RIGHT HON. LORD KINGSDOWN :

THIS is an appeal from a decree of the *Sudder Dewanny Adawlut* of Bombay, by which it has been decided that a certain annual payment called a *Tora garas huk*, is not by law capable of alienation, and that the purchaser of this interest at a judicial sale is not entitled either to have the sale enforced, or to have his purchase-money refunded to him by the individual who has received it.

The case is one, in many respects, of a remarkable character, and it appears to their Lordships to be advisable to state the circumstances in some detail.

*Tora garas haks* whatever may have been their origin, are payments which, for many years before the period of the transactions which have given rise to the present suit, had been made by the Bombay Government through their Collectors in the different *Zillahs* of Guzerat. The names of the persons receiving such payments, with the amount to be paid to them, were entered in the books of the Collector, and the payments were made according to the entries in such books out of the moneys received by the Collectors.

Amongst other such entries in the books of the Collector of Surat, was a sum of Rs. 347 13 as., payable out of the *Pergunnah* of Orpad, and which in the year 1839, was payable, and had for some years been paid to a person named *Bharmulsungjee*. This annual sum is the subject of the present suit; *Bharmulsungjee* was

\* 8, Moore's I. A., p. 1.