Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Hurronath Roy and others v. *Gobind Chunder Dutt, from the High Court of Judicature at Fort William, in Bengal; delivered February 12th*, 1875.

Present:

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

THIS was a suit brought to recover rent at an enhanced rate after notice of enhancement for Turuf Oomedpore, a dependent talook comprised within the Plaintiff's three annas four gundas share of the zemindary Pergunnah Mahomedshahee in Zillah Jessore. The suit was brought in the Revenue Court under Act X. of 1859. The Collector who tried the case thought that the rent ought to be enhanced, and he decreed accordingly. He says:—"The case "has been pending since 1862, when the issues "were first fixed after hearing the pleadings on "both sides. I come to the conclusion that the "only issue on which there is any dispute "between the parties is that first laid down, viz., "whether the provisions of sections 15 and 16, "Act X. of 1859, do not apply to the talook "regarding the rents of which the present suit "is brought, and whether the rent under these "circumstances can be enhanced. Defendant's "mooktear admits the fairness of the Pergunnah "rates assessed, but bases all his resistance to the "paying of the enhanced rent on the principle

" above mentioned. I do not think there can be " any doubt that the rent can be enhanced under " the power conveyed in the two decisions above " quoted " (referring to two decisions of the Sudder Court of the 30th April 1821 and of the 11th December 1860 respectively, which will be considered presently). The Collector proceeds,— " It is distinctly laid down there that the rents " of Talook Oomedpore may be enhanced by the " Plaintiff after issuing the notices required by " law at the Pergunnah rates, and in the face of " these decisions of the highest judicial autho- " rities I cannot see that the plea of Defendant " can for a moment be entertained, I accordingly " reject it."

The case came on appeal before the High Court who thought that the main question was whether, under the circumstances, the rent admittedly never having varied, the talookdar was not now protected by section 15, Act X. of 1859, and desired that the argument might be confined to this point, and having heard both parties upon it, were of opinion that, under the provisions of the 15th section of Act X. of 1859, the Defendant was protected from enhancement, and they decreed accordingly.

The present appeal is against that decision, and the question is whether the Plaintiffs are entitled to enhance the rent in the manner in which they claim to enhance it. The notice of enhancement is this :—" Be it known that in the " 3 annas and 4 gundahs share of Pergunnah " Mahomedshahee, our Zemindary, the 37 mou- " zahs with Hoodos Julkur, &c., of Turuf " Oomedpore, on a jumma of Rs. 8,346. 14. 4. " without settlement, and liable to increase or " decrease, used to be recorded in the name of " the late Baboo Nil Comul Pal Chowdhry. On " a survey of the lands of the said jumma, the " same has been shewn to comprise 26,236

" beegahs and 8 cottahs of land, and after " deduction of 1,041 beegahs and 3 cottahs on " account of ghur-lack (unculturable), khal " khonduck (ditches, &c.,) a net area of 25,196 " beegahs and 5 cottahs at the prevailing Per- " gunnah rate was assessed at Rs. 36,001. 11. 8., " and a notice having been served accordingly, " and a suit No. 63 of 1855 brought for assess- " ment of the said jumma in the Court of the " Principal Sudder Ameen of this zillah. On an " appeal preferred by us, the judges of the Sudder " Court, on the 11th of December 1860 (referring " to the decree in the former suit), declared that " the said mehal was liable to assessment, in " accordance with the decision of the zillah " Court, after service of notice, therefore, as " there is in your possession an excess of land on " a deficient jumma, and the productive powers " of that land have increased, we consequently " serve you with this notice, under the provisions " of section 13 of Act X. of 1859, for the pur- " pose of getting from you from the year 1269 " the rents of 25,196 beegahs and 5 cottahs out " of 26,237 beegahs and 8 cottahs of land, less " 1,041 beegahs and 3 cottahs of unculturable " ditch, waste land, &c., comprised within the " 37 mouzahs and Hoodahs, with Julkurs of the " aforesaid Turuf Oomedpore, by assessment " thereof at the prevailing Pergunnah rates." Therefore, the ground upon which the Plaintiff seeks to enhance the rent is, that there is in the Defendant's possession an excess of land on a deficient jumma, and that the productive powers of that land have increased.

Those are grounds, though not accurately expressed, upon which the rents of ryots having rights of occupancy are liable to enhancement under section 17, Act X. of 1859, but they are not applicable to a dependent talook like the present, which was created before the decennial

settlement. Talooks of that description are protected by section 51, Regulation VIII. of 1793, from enhancement, except under the circumstances therein mentioned. See also Regulation 44 of 1793, s. 7. The decree of the Collector, therefore, could not be supported even if the rent of the talook were liable to enhancement under the provisions of section 51 of Regulation VIII. of 1793.

It may, however, be well to consider whether the High Court was right in holding that the Defendant was by section 15 of Act X. of 1859 protected from enhancement in any case and upon any grounds. Section 15 says,—"No dependent talookdar, or other person "possessing a permanent transferable interest in "land intermediate between the proprietor of an "estate and the ryots, who, in the provinces of "Bengal, Behar, Orissa, and Benares, holds his "talook or tenure (otherwise than under a "terminable lease) at a fixed rent which has not "been changed from the time of the permanent "settlement, shall be liable to any enhancement "of such rent, anything in section 51, Regula-"tion VIII., 1793, or in any law to the contrary "notwithstanding." To bring the case within that section, he must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the permanent settlement. It should be remarked that section 15 does not render liable to enhancement dependent talook-dars who were exempted by section 51, Regulation VIII. of 1793, but exempts from enhance-ment, amongst others, dependent talookdars who, under the provisions of that section, might otherwise be liable to enhancement.

Now the first question is, did the Defendant in this case hold at a fixed rent? Proceedings which have been taken from time to time between

parties who were represented by the parties in the present suit, the zemindar on the one side, and the owner of the talook on the other, have been put in evidence. The first decision to which it is important to refer is that of the 30th May 1811. That was a suit brought by Rajender Deb Roy, the then talookdar, against, amongst other Defendants, Kishen Mohun Bannerjee, who derived his title to the zemindary through a purchase at a sale in execution of a decree of the Supreme Court of Calcutta in the month of Srabun 1207, and who also claimed Turuf Oomedpore under the same purchase. The Plaintiff claimed the talook under a gift from his father, the former zemindar, dated the 27 Bysack 1195, before the date of the sale in execution. The Zillah Judge, acting upon the bill of sale of the Supreme Court, dismissed the Plaintiff's suit. The Plaintiff thereupon appealed to the Provincial Court of Calcutta, and filed the deed of gift from his father dated the 27th Bysack 1195. The case was heard in the first instance by the second judge, who held that although Kishen Mohun Bannerjee purchased the zemindary rights of the former zemindar, yet the talookdaree rights of the Appellant could not be destroyed, and under those circumstances it was his opinion that the decision of the Zillah Judge was wrong and should be reversed, and that the Appellant should pay to the Respondent the rents of the talook as he did to the former zemindar at the rates of the tahoot of the decennial settlement. The case afterwards came up in the Court of the first judge, who agreed with the second judge, and a decree was accordingly passed as follows :—

" The first and second judges, having agreed in
" their judgment that the decision of the Zillah
" Court should be reversed, and that talook
" Turuf Oomedpore be declared as the right of
" the Appellant in the manner of a mofussil

" talook, therefore it was ordered that the " decision of Mr. James Devienne Thourne, " acting judge of the Civil Court of the above " zillah, dated the 21st of March of the year " 1808, be reversed and set aside; and that the " Appellant having been put and maintained in " possession of the turuf aforesaid, do pay the " rents thereof to the Respondent Kishen " Mohun Bannerjee, in accordance with the " amount laid down in the tahoot of the decen- " nial settlement, which the Appellant used to " pay to the former zemindar." See Record pp. 32 to 35. Now the rent is there treated as a fixed rent, which the Defendant talookdar used to pay to the zemindar.

That decree having been passed in the year 1811, a suit was commenced on the 17th September 1812 by the then zemindars, Petumber Ghose and Kishen Mohun Bannerjee, against Mohesh Chunder Deb Roy, minor son of Rajender Deb Roy, and against Ramender Deb Roy, guardian of the above minor in the Court of Zillah Jessore, for the recovery of Rs. 1443. 3. 12, alleged to be due for arrears of rent, upon the following allegation, viz., that having purchased the 3 annas 4 gundas share of Pergunnah Mahomedshahee, &c., the zemindary of Gobind Deb Roy, they went on paying year by year the sum of 9,268 rupees 8 annas 1 gunda and 1 cowree sicca, the jumma of the above. That on the 30th of the month of May of the year 1811, A.D., by a decision of the judges of the Provincial Court, the talooks aforesaid were decreed as the right of Rajender Deb Roy as his mofussil talook. After the death of the aforesaid, the Defendants had possession, and when we called for from them the sum aforesaid, being the jumma as per tahoot, which was the proper rental, they, out of the jumma of the decennial settlement, acknowledged only the sum of

Rs. 7,825. 4. 8. 1. Sa. But as out of the total of jumma claimed after deduction of the amount of jumma acknowledged by the Defendants a sum of 1,443 rupees 3 annas and 13 gundas remains due, we therefore institute a miscellaneous suit in the Zillah Court for the recovery of the rent at the rates of the decennial settlement. This appears from the decree of the Sudder Court of the 30th April 1821. It also appears from the said decree that on the 23rd of December 1813 the acting judge of the Zillah Court, on all the grounds stated in his decision, and in accordance with the decision of the Provincial Court, dated the 30th of May 1811, already referred to,—"ordered that the said suit "be decreed, and that the Defendants were to "pay to the Plaintiffs year by year the sum of "9,268 rupees and 8 annas as the rents of the said "talook." The Defendants preferred an appeal to the Provincial Court, and that Court, in accordance with a judgment of an appointed judge of the Court that the former owner of the zemindary had before the decennial settlement made over the talook at a yearly jumma of Rs. 7825. 4. 8. 1., ordered,—"That the decision "of the acting judge of Zillah Jessore, dated the "23rd of December 1813, be reversed and "quashed, and that the costs of both Courts be "borne by the Respondents."

The case came before the Sudder Court on special appeal from the Provincial Court. In their decree dated the 30th April 1821 they state that, amongst other documents, "two "papers were put in, viz., on the part of "the Plaintiffs, a dhol of the decennial settle- "ment for the year 1197, showing the jumma "of Turuf Oomedpore at the sum mentioned in "the Plaintiff's plaint; and, on the part of the "Defendants, a hustobood paper of the year "1197 B., showing a decrease of the jumma

" recorded in the Heba, and fixing it, after " deduction of improper abwabs, at the sum of " 7631 rupees." They then proceed,—" In the " opinion of this Court, after examination of " those two documents, they are held to be " unworthy of credit or reliance, because the " document filed by the Plaintiff being alleged " to be a document from the Collector's office, " does not bear the signature or initials of " any Government officer, and although on the " second document there appears to be the " initials of the Collector's name, yet his name " is not even mentioned in the said hustabood, " and therefore none of those documents appear " sufficient to determine the amount of jumma " on the tahoots of the settlement of that year. " In short, the amount of jumma of the disputed " talooks, as alleged by both parties, has not " been proved by them before this Court; " and the decision of the Provincial Court as " to the amount it maintains for those talooks by " rejecting the claim of the Plaintiffs should be " confirmed, as the parties do not agree as to the " amount of jumma of those talooks between " them; under those circumstances, for the pur- " pose of putting an end to quarrels and disputes " between the parties, suits have been instituted " for a very long time, that is, from the time of " institution of the old suit and of the new one, " about the jumma of the disputed talooks in the " Zillah and in this Court. The order of the Court " is that the jumma of talook Oomedpore be " fixed according to pergunnah rates, and in " accordance with the rules laid down in Section " 8, Reg. V. of 1812." Not that the jumma shall be enhanced, but that there being a dispute between the parties as to what was the amount of the jumma, it shall be fixed according to pergunnah rates, &c. They thought that it ought to be paid according to pergunnah rates,

because they could not ascertain what was the actual amount of the rent; but they did not assess the rent or fix by their decree the amount to be paid for arrears; nor did they order the rent to be enhanced. The suit was not for the purpose of enhancing the rent, but a miscellaneous suit for recovering arrears. This Committee has already pointed out in a former case of Gopal Lall, which was cited in argument, that there is a great distinction between a suit to enhance and a suit to recover arrears. They there say,—"Their Lordships are of opinion that "a suit to enhance is very different from a suit "to recover arrears of rent at the rate originally "fixed, and that it is founded entirely upon "different principles. To a suit for enhance-"ment it will be no bar to plead that all arrears "according to the original rate have been paid."

The zemindar acting upon that decision of the Sudder Court, subsequently brought a suit to enhance the rent. We have not the decree of the Court, but we have a reference to it in the 22nd volume of the printed decisions of the Sudder Court, of the 11th of December 1860. The Court says,—"This suit was brought to "enhance the rents of talook Oomedpore, upon a "given measurement and pergunnah rates, on the "averment that the said talook constituted an "under-tenure, comprised in the Plaintiff's "3 annas 4 gundas share of Turuff Mahomedshye, "purchased by him at an auction sale, held by "order of the Master in Equity of the Supreme "Court." It is to be observed that it was purchased, not under a sale for arrears of revenue, but in execution of a decree. Then they proceed to state what the different contentions were, and they finally come to this conclusion :—"As then "it is evident that Govind Chunder Dutt, who "purchased the right of Issarchunder, the mort-"gagee proprietor, is entitled to be regarded as

" talookdar of the entire turuff of Oomedpore, and " as it is nowhere pleaded that notice of enhance- " ment has been served upon him, the decree in " Plaintiff's favour giving him the authority to " assess must be subject to Plaintiff's serving " the notice required by the law. The present " order, therefore, will, under the peculiar " circumstances of the case, merely be to the " recognition of Plaintiff's right to assess after " proper service of notice on the proper parties." Probably they used the word "assess" instead of "enhance," and intended to declare that the Plaintiff had a right to enhance upon service of the proper notice. After that decision had been pronounced, an application was made to the Court to review their judgment. The Court say :—"Now " it is urged through the present petition, and it " is objected in Court, that if the decree of the " year 1821 confers on the Plaintiff the " power to assess, the contention now arises, " What rates is the Plaintiff entitled to obtain " on such re-assessment of the rental. It has " been urged that in the case decided in the " Sudder Court in the year 1821, the former " owner in that case had merely based his right " for assessment at an increased rental on the " following grounds: That the rents of the said " lands should be of an amount equal to the " amount of sudder jumma of the zemindaries, " that is, that it should be Rs. 9,400, and the " talookdar had pleaded in reference thereto " that he could remain in possession on the " mokurraree (fixed) rental of Rs. 7,400; con- " sequently, in the above suit the only point at " issue was whether the *owner* of the property " could enhance the rent to Rs. 9,400, or " whether the talookdar was entitled to remain " in possession on the jumma of Rs. 7,400." Then they say :—" Mr. Peterson now asks that " an enhancement be decreed in our decision, in

" accordance with the increase granted in the " old suit. Our judgment is, that as the Court " had merely decided that the Plaintiff could " enhance after service of the necessary notices " on the tenants, and therefore the present con- " tention as to the amount of enhancement " which will have to be fixed in accordance with " other rates as above mentioned, belong to " another subject. And after service of the " notices above mentioned upon the tenant, it " will then be time to decide that question." Therefore the Court proceeding on the decree of 1821 declared that the Plaintiff was entitled to enhance, but refused to decide to what extent the enhancement could be made, and left that question, involving the construction of the decree of 1821, open for decision after notice of enhancement should have been served.

Now, it does not appear that either after the decree of the 30th April 1821, or after that of the 11th December 1860, the Defendant or those under whom he claims ever paid a higher rent than sicca rupees 7,825 odd, or 8,346 odd the corresponding amount in Company's rupees, or that the Plaintiffs or the zemindars under whom they claim ever obtained a decree for arrears assessed at a higher rate; on the contrary, it appears that after the decree of 1821 and before that of December 1860, viz., on the 22nd March 1827, a farmer of the zemindaree sued for and obtained a decree against the talookdar for arrears of rent at the rate of sicca rupees 7,825 odd, the jumma which he stated was acknowledged by the talookdar (Record, p. 47). In his plaint in that suit he says the talook was the talook of Rajender Deb Roy; that after his death Mohesh Chunder Roy, having come into possession by right of inheritance without any settlement as to the jumma, used to pay me the sum of

Rs. 7,825. 4. $8\frac{1}{2}$ as the yearly rental acknowledged by him (p. 46).

On the 19th August 1847 a similar decree for arrears was obtained, the jumma of the talook being stated to be 8,346 odd Company's rupees (p. 63).

On the 31st March 1848 there was a similar decree for arrears recovered by the zemindar, who, in his plaint, stated that the talook was recorded in the name of the Defendants, liable to increase or decrease, at the rent of 8,346 odd Company's rupees (p. 65).

Numerous other decrees were obtained by the zemindars against the talookdars for arrears of rent between 1826 and 1860, either at the rate of 7,825 odd sicca rupees, or at the corresponding rate of 8,346 Company's rupees (see Record, pages 45 to 74).

It appears, therefore, to their Lordships that there was ample evidence, independently of any presumption arising under Act X. of 1859, section 16, to prove that the talook was held at a fixed rent, and that such rent had not been changed from the time of the permanent settlement. The rent was not changed by the decree of 1821, for, whether right or wrong, it at most amounted to a declaratory decree that the jumma should be fixed at pergunnah rates; or, according to the construction put upon it by the decree of 1860, that the Plaintiff was entitled to enhance. The rent never was assessed at pergunnah rates, and never was enhanced. Besides, there is the statement in the judgment of the High Court that the rent had admittedly never varied.

We have been referred to the case of Nuffer Chunder Paul Chowdry and another *v.* Poulson, decided by this Committee on the 24th January 1873. It appears to their Lordships that that is quite a different case from the present. That was the case of a mokurruree tenure, and it was proved

that it was created as late as 1824. Their Lordships say :—"It should be stated that this suit was " decided before Act X., to which reference has " been made, came into operation. The state of " the law then was that he could defend himself " by showing an ancient tenure going back " 12 years before the decennial settlement; " but he made no case of the kind. He made " a case of mokurruree tenure established by " pottahs in 1824." The fact that those pottahs were created in 1824, long since the time of the permanent settlement, rebutted the presumption that the tenure had been held from the time of the permanent settlement.

Our attention has been called by the learned Counsel for the Appellant to the following paragraph in the judgment in that case : — " In their Lordships' opinion the " Defendant did establish that the rent " at which the talook was held had not " been changed for a period of twenty years " before the commencement of this suit, and " that he thereby cast upon the Plaintiff the " burden of showing 'the contrary' (in the " words of the Act) or that the rent had been " fixed at some later period; and their Lord- " ships are of opinion that the Plaintiff has " succeeded in proving that which was cast " upon him to prove." But that opinion merely goes to the effect that proof that the pottahs were created subsequently to the permanent settlement rebutted the presumption created by the 16th section of Act X. of 1859, that the tenure had been held at a uniform rent from the time of the permanent settlement.

It should be remarked that a rent may be a fixed rent though liable under certain conditions to be enhanced. That position is fully borne out by section 15, Act X. of 1859. The section does not merely say that the tenures therein

described shall not be liable to enhancement "if held at a fixed rent," but "if held at a fixed rent which has not been changed from the time of the permanent settlement." If the mere fact of holding at a fixed rent was a bar to enhancement, the section would have been unnecessary. The term "fixed rent" in that section cannot mean a rent so permanently fixed that it cannot be enhanced under any circumstances.

It is unnecessary to determine what would have been the effect of the decrees of 1821 and 1860, so long as they were unreversed, if Act X. of 1859 had not been passed. Their Lordships concur entirely with the High Court that the effect of those decrees did not put the Plaintiffs in a better possession than other landlords who, previously to the passing of Act X., had a good right to enhance, but whose right, if not exercised from the time of the permanent settlement, was taken away by the 15th section of that Act.

Upon the whole, their Lordships are of opinion that the High Court came to a correct conclusion in holding that the rent was not liable to enhancement, and they will humbly recommend Her Majesty that the decree of the High Court be affirmed, and the Appeal dismissed with costs.

There is another Appeal which was consolidated with this. The recommendation to Her Majesty will be the same in both cases.

The Appellants will pay the costs of both Appeals.