Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Tekait Kali Pershad and another v. *Anund Roy and others from the High Court of Judicature at Fort William in Bengal; delivered 7th December* 1887.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THE Appellant, Tekait Kali Pershad Singh, son of Tekait Meghraj Singh, deceased, instituted this suit on the 7th of April 1881 against Dhanraj Roy, son of Alam Roy, deceased, and several others, to recover possession of the ghatwali mehal Kharna, comprising 22 mouzahs out of the mehals Kharagpore, which he alleges to be his ancestral ghatwali right.

The plaint, *inter alia*, alleged that the family of the plaintiff was governed by the Mitakshara law, but subject to a family custom that the eldest son became the malik without dividing with the other brothers, who are entitled to maintenance only; that the Tekait Meghraj was in possession, and that Plaintiff No. 1, his eldest son, was born in Aughran 1241, and thereupon acquired a right with his father in the mehal; that Tekait Meghraj, without the consent of the Plaintiff No. 1, who had then attained his majority, under the bond dated the 26th Cheyt 1265, borrowed the sum of Rs. 1,300 from Alam Roy, ancestor of the Defendants Nos. 1, 2, and 3; that the aforesaid Alam Roy, on the basis of that bond, obtained a money decree against Meghraj without making the Plaintiff No. 1 a Defendant on the

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18th July 1862; that on the sale in execution of that decree, he got only the right and share of the said Tekait in the ghatwali mehal of mouzah Kharna sold by auction, and he purchased them himself at a reduced price, that is, for the sum of Rs. 3,525 on the 13th July 1868; that Tekait Meghraj died in the month of Bhadon 1278 Fusli (that is August 1871); that the Plaintiff, agreeably to the usage of the family, governed by the Mitakshara law, acquired the right of direct possession in respect of the whole of mehal Kharna aforesaid, since the death of the said Tekait. The Defendants in their written statement, denying most of the allegations in the plaint, specially contended that the Plaintiff had not any joint estate with his father, who was the sole proprietor; that the restrictions on the Mitakshara law did not affect the estate or the sale in question, and that the particular nature of the ghatwali tenure which was based on actual service is contrary to the joint right of the sons according to the Mitakshara law. The Defendants further relied on their title under the execution sale, and as to the allegation of the Plaintiff that the property was sold for a trifling sum, they pointed out that it was sold subject to a zurpeshgi lease, which is in effect a mortgage for Rs. 4,923, which the purchasers had to redeem; that incumbrance had been created by Meghraj.

There were thirteen issues, but for the purposes of the present appeal it is only necessary to refer to one question, viz.: What did the Defendants purchase, and what right did they obtain in mehal Kharna as purchasers under the sale in execution of the decree?

The decision of the Subordinate Judge of Bhagulpore was given on the 13th February 1882. It occupies 23 large and closely printed pages of the Record. It exhibits great care and research, and is very full and very learned, but

as it has been read at full length in the discussion at the bar, it is not necessary to observe upon its reasoning. The decision of the Subordinate Judge is: That the claim of the Plaintiffs in respect of two-thirds share of mehal Kharna be decreed; that the Plaintiffs do get possession of the aforesaid two-thirds share on payment of two-thirds of the amount covered by the previous mortgage, amounting to Rs. 3,282, and it is peculiar in this respect, that it is inconsistent with the case of the Plaintiff, and equally so with the defence. If the Plaintiff was entitled to relief on the case he has made, it was by a decree for the possession of the whole of the mehal Kharna.

Both parties were dissatisfied, and both parties appealed to the High Court. The decision of the High Court was given on the appeal of the Defendants on the 21st of April 1884, and was, that the Plaintiffs' suit be dismissed with costs.

The High Court justly criticises the inconsistencies of the cases of both parties on the pleadings, and the peculiarity of the decision of the Subordinate Judge, and adds: "The "tenure being undoubtedly a ghatwali, the "Lower Court, we think, made a mistake in "attempting to apply to the case the rules of "the Mitakshara law." Their Lordships read this observation as confined to the Mitakshara rule by which a son when born takes a share equally with his father. The High Court then proceeds: "We concur with the counsel for the "Appellants in his contention, that in dealing "with a ghatwali, the court must have regard to "the nature of the tenure itself, and to the rules "of law laid down in regard to such tenures, and "not to any particular school of law, or to the "customs of particular families. The incidents "of a ghatwali tenure are the same whether the

" ghatwal be a Hindu or a Mussulman, or a
" follower of any other system of religion; and
" the same ghatwali might be held successively
" by persons governed as to other property by
" totally different rules of law. A ghatwali is
" created for a specific purpose, and has its own
" particular incidents." The High Court, con-
" tinuing its reasons, adds:—" The real and
" only material questions for us to decide are,
" first, whether the sale of this ghatwali in
" execution of a decree against the ghatwal was
" invalid and liable to be set aside by reason of
" the tenure being in its nature inalienable, and,
" second, if the alienation was bad, are the
" present Plaintiffs entitled to recover the
" property? The second question also involves
" one of limitation." Their Lordships will deal
with the first question alone.

The High Court, after considering the authorities which it deemed to be applicable, and pointing out the difference between the two classes of cases where the ghatwal is appointed by and holds direct under the Government and protected by Ordinances as in the Birbhoom cases, and where he is appointed by and holds under the zemindar who retained in his hands the power of appointing, and the power of dismissing the ghatwal in case of non-performance of his duties, goes on to say: "We think we must
" hold upon the authority of the cases, and
" upon the evidence of many such transfers
" having been effected and unquestioned, as well
" as in consideration of the long silence of the
" present Plaintiff No. 1, and the silence, too,
" of his father while he lived, that a Kharagpore
" ghatwali is transferable if the zemindar assents
" and accepts the transference; and in the
" present case, we think the Lower Court was
" justified in holding that the zemindar in
" making no objection within twelve years of

" the sale, acquiesced in it, and that the transfer
" was therefore one which the court ought to
" recognise. And looking to the fact that the
" purpose for which the Kharagpore ghatwalis
" were created, no longer exists, we should
" greatly regret being compelled to come to the
" contrary conclusion. We accordingly decide
" the first question in favour of the Defendants,
" Appellants, and hold that the sale was not
" invalid by reason of the inalienability of the
" ghatwali tenure." The Plaintiffs appeal against that decision.

Their Lordships are of opinion that the doctrines of the Mitakshara, which govern in some districts the Hindu law of inheritance, are not to their full extent applicable to a ghatwali tenure. By the general Hindu law of inheritance where the Mitakshara does not prevail, the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitakshara governs, each son immediately on his birth takes a share equal to his father in the ancestral immoveable estate. Having regard to the origin and nature of ghatwali tenures and their purposes and incidents as established by decided cases, most of which have been referred to in the course of the argument, it is admitted that such a tenure is in some particulars distinct from and cannot be governed by either the general objects of Hindu inheritance as above stated, or by the before-quoted rule of the Mitakshara.

It is admitted that a ghatwali estate is impartible, that is to say, not subject to partition; that the eldest son succeeds to the whole to the exclusion of his brothers. These are propositions that seem to exclude the application of the Mitakshara rule, that the sons on birth each take an equal estate with the father, and are entitled to partition. The allegation, too, that

the estate is not in the whole or in part alienable, or, if alienable, is only so, for the life of the alienor must largely depend on local and family custom, and such custom, if proved to exist, may supersede the general law, though in other respects the general law may govern the relations of parties outside that custom. Thus the rules of the Mitakshara yield to a well established custom, though only to the extent of that custom.

The question then which their Lordships have to consider and decide is whether the sale and transfer of a zemindari ghatwali in Kharagpore under a decree is invalid by reason of the tenure being in its nature inalienable?

The evidence establishes a number of instances in which there have been unquestioned transfers and sales applicable to mehals in Kharagpore, and some to portions of the same estate which the Plaintiff describes as part of his ancestral, inalienable, ghatwali right. This custom of alienation has been proved in fact by oral and documentary evidence to the satisfaction of the Subordinate Judge and of the High Court, and their Lordships see no reason to doubt the correctness of the conclusion in that respect of the two courts.

It seems to their Lordships that the true view to take is that such a tenure in Kharagpore is not inalienable, and may be transferred by the ghatwal or sold in execution of a decree against him if such transfer or sale is assented to by the zemindar.

The Plaintiff was of full age at the time of the sale. He does not appear to have made any objection to the sale or transfer, or to have taken any action during the period of 12 years that intervened between the sale and the institution of this suit, or during the period of 10 years that elapsed between the death of Meghraj in 1871, and the 12th April 1881, when the suit was

instituted. The zemindar made no objection, expressed no disapproval, was not asked to interfere, and did not interfere. It may reasonably be inferred that the zemindar and the officers of his zemindari were brought constantly into intercourse with the purchasers during their possession of 12 years after the sale, and could not have been in ignorance of the sale.

Their Lordships are of opinion that the Subordinate Court was justified in assuming under the circumstances the acquiescence of the zemindar in the sale and transfer under the decree, and that conclusion in fact has been approved and adopted by the High Court, Their Lordships do not deem it to be necessary to criticise the various decisions which have been brought so fully under their notice, and are of opinion that the High Court was correct in its conclusion that a Kharagpore ghatwali is transferable if the zemindar assents and accepts the transference.

There remains only to be noticed the argument that though the ghatwal might alien, it could only be for the life of the alienor. It seems to their Lordships that there is no foundation for this argument. When once it is established that the ghatwal had the power of alienation as before stated, that power forms an integral portion of his right and interest in the ghatwali, and there is no evidence whatever to limit it to an alienation for his own life and no longer. In this respect the present case so far differs from Dindyal's case, and some other decisions of this Board that followed, as to render them wholly inapplicable.

Their Lordships are of opinion that the judgement of the High Court should be affirmed and this appeal dismissed, and will so humbly advise Her Majesty. The Appellants must pay to the Respondents the costs of this appeal.