Privy Council Appeals Nos. 90 *and* 91 *of* 1913.
Bengal Appeals Nos. 58 *and* 59 *of* 1910.

The Secretary of State for India in Council - *Appellant,*

v.

Sri Raja Kirtibas Bhupati Harichandan Mahapatra - - - - - - *Respondent,*

and

The Secretary of State for India in Council - *Appellant,*

v.

Sri Birbar Narayan Chandra Dhir Narendra *Respondent.*

(Consolidated Appeals.)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

REASONS FOR THE REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 21ST OCTOBER 1914.

Present at the Hearing:

LORD DUNEDIN.
LORD ATKINSON.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

The Plaintiffs in the two actions which have given rise to the present Appeals are respectively the Zemindars of Sukinda and Madhupur in the Province of Orissa, and the question for determination relates to certain lands included in their estates in respect of which the Defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the

provisions of Act VI of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the Judgments of the High Court of Bengal, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances which have culminated in the present litigation.

It appears that the predecessors of the two Plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rule is intimately connected with the political history of the Province. Orissa consists of three well-defined tracts; in the middle lies a level open country inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the *Mogulbandi*, which is defined in Regulation XII of 1805 as "being that part of the District of the Zillah "of Cuttack in which, according to established "usage, as in Bengal, the land itself is "responsible for the payment of the public "revenue, and in which every landholder holds "his land subject to the conditions of that "usage."

The wild and hilly tract on the west, and the low marshy lands along the sea-shore to the east were held by a number of chiefs who, under the designation of *rajas*, *zemindars*, and *khandaits*, were allowed to exercise a feudal sway in their respective *jagirs* on payment of a fixed tribute to the Imperial Government. These outlying parts of the Province were usually called the *Rajwara*.

The *zemindaris* of Sukinda and Madhupur lay within the *Rajwara* and outside the *Mogulbandi* territories.

Shortly before the acquisition of the Dewanny by the East India Company, the Mahrattas had obtained possession of a large tract to the south of the Suvarnarekha river, including the *Rajwara*, and thus, when the Company obtained the virtual government of Bengal, Behar, and Orissa, under Shah Allam's grant, the *de facto* British possession of the latter Province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803 the Mahratta Raghoji Bhonslay, who held southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha river was occupied by British forces. The settlement of the newly-acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this settlement were included the Zemindars of Sukinda and Madhupur, to whom sanads were granted entitling them to hold their estates at a fixed *jama* in perpetuity. These two *Zemindaris* were then brought within the *Mogulbandi* and subjected to the general regulations in force in Bengal.

Later in the year came the Treaty of Deogaun, by which Bhonslay ceded a considerable tract of country belonging to the hill chiefs. With these, agreements or *kaulnamas* were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The Zemindar of Sukinda alleged in his suit that he also held under a *kaulnama*,

but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a settlement was made with, and a *sanad* granted to, him by the Commissioners, the terms of which will be referred to in the course of this Judgment.

By Section XXXIII of Regulation XII of 1805 statutory confirmation was given to the *sanads* of the two Plaintiffs' ancestors.

The lands in dispute admittedly form part of the estates settled with the Plaintiff's ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The Plaintiffs accordingly urge that the Collector representing the Defendant has no right to exercise in respect of these lands the powers he claims under Act VI of 1870, B.C. The basis of his contentions will appear clearly when the course of legislation which led up to this enactment has been shortly explained.

From time immemorial it has been customary in India to remunerate officers charged with certain public or quasi-public duties by grants of lands to be held either rent-free or at a reduced rent.

One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas, and is commonly known as *Chowkidari Chakeran* lands, from the word *Chowkidar* which means "a watchman" and *Chakeran* "service."

The history of these *Chowkidari* grants is set out with considerable lucidity in Lord Kingsdown's Judgment in the case of *Joy Kishen Mookerjee* v. *The Collector of East*

Burdwan [1]. The following passage explains the origin of the system and the shape it assumed after the Decennial Settlement of 1789 and the Permanent Settlement of 1793.

"It appears that these *Zemindars* were entrusted, "previously to the British possession of *India*, as well "with the defence of the territory against foreign enemies "as with the administration of law and the maintenance "of peace and order within their district; that for this "purpose they were accustomed to employ not only armed "retainers to guard against hostile inroads, but also a "large force of *Tannahdars*, or a general Police force, "and other officers in great numbers, under the name of "*Chowkeedars*, *Pykes*, and other descriptions, as well for "the maintenance of order in particular villages and "districts as for the protection of the property of the "*Zemindar*, the collection of his revenue and other services "personal to the *Zemindar*.

"All these different officers were at that time the "servants of the *Zemindar*, appointed by him and "removerable by him, and they were remunerated in many "cases by the enjoyment of land rent-free or at a low "rent in consideration of their services.

"The lands so enjoyed were called *Chakeran* or "service lands. These lands were of great extent in "*Bengal* at the time of the Decennial Settlement, and "the effect of that Settlement was to divide them into "two classes:—

"First. *Tannahdary* lands, which, by *Ben.* Reg. I. "of 1793, sec. 8, cl. 4, were made resumable by the "Government; the Government taking upon itself the "maintenance of the general Police force and relieving the "*Zemindar* from that expense.

"Second. All other *Chakeran* lands, which by *Ben.* "Reg. VIII. of 1793, sec. 41, were, whether held by "public officers or private servants, in lieu of wages, to "be annexed to the *Malguzary* lands and declared "responsible for the public revenue assessed on the "*Zemindars*' independent *Talooks* or other estates, in "which they were included in common with all other "*Malguzary* lands therein."

Later on Lord Kingsdown explains the nature of the lands that were held by

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[1] 10 Moore's, I. A., p. 16.

Chowkidars in lieu of wages. Paraphrasing Clause 4, Section VIII., of Regulation I. of 1793, and Section XLI. of Regulation VIII. of 1793, he says :—

" They were not to be included in the *Malguzary* " lands for the purpose of increasing the *jumma*, because " the *Zemindars* had not the full benefit of them, but " they were to be included in the *Malguzary* lands for " the purpose of securing the assessment, because in " the event of a sale upon default of payment of the " assessment, it would be important that they should be " transferred to the purchasers under the Government, " with whom the appointment of the person whose duty " would in part be to attend to public interests would vest."

It is clear from the language of Clause 4, Section VIII. of Regulation I. of 1793, and of Section XLI. of Regulation VIII. of the same year, that the power or " option " of resumption was reserved in respect of those lands that had been appropriated by the zemindar with the permission or under the authority of Government for the purpose of remunerating the *Chowkidars* for their services, lands which, although included in the mahal and " annexed " to the *Malguzari* lands, were not taken into consideration for the assessment of revenue because in reality they formed no part of his assets.

Here it becomes necessary to notice the *sanad* that was granted to the Zamindar of Sukinda in 1804, an attested copy of which is in the record. A *sanad* was also granted to the Zamindar of Madhupur ; it apparently has been lost, but it may be assumed that it was to the same effect as the Zamindar of Sukinda's sanad, the attested copy of which is, so far as is material, as follows :—

"As the duties of the zamindar of the said Killa have " from before been entrusted to Dhrubjoy Bhupati " Harichandan, the zamindar, the zamindari of the said Killa

"has been bestowed upon and given to the said zamindar "by the Government of the East India Company; you "shall regard the said person as the permanent zamindar "of the said Killa, and shall not act against his orders, "instructions, and advice, and shall not conceal and keep "secret any matter whatsoever from him. The said "zamindar shall discharge the duties attached to the said "zamindari in proper manner, and collect rent from the "said zamindari in the best way according to the laws of "the Government, and he shall without any objection pay "into the Government Treasury 5,500 kahan cowris, the "fixed annual amount payable to the Government, in proper "time and according to proper instalments. He shall keep "the tenants and the people in general satisfied and pleased "by good treatment, and shall make such exertions and "attempts as to make the zamindari improve and prosper, "and he shall be so careful and vigilant that swords, guns, "and other war weapons and ammunition may not be manu-"factured in the said zamindari, and that theft, robberies at "night, and highway robberies may not be committed at any "place; and in case such occurrence takes place, he shall "arrest the thieves with stolen property and send them up "to the Huzur (Government officers) for trial."

It will be observed that the *sanad* imposes on the zemindar the duty of preventing the commission of theft, robberies at night, and highway robberies, "and in case of any such "occurrence," of arresting the offenders and "sending them for trial." But it makes no provision regarding the machinery he was to employ for the purpose. The evident inference is that the Government was content with leaving to the zemindar the manner in which he was to discharge the duty of maintaining peace and order in his *zemindari*. The Government obviously made no provision therefor. Regulation XIII. of 1805, which was enacted "for "the maintenance of the peace and for the "support and administration of the police in "the zillah of Cuttack," did not, as appears to be clear from the preamble and from the provisions of Section V., relate to the *zemindaris* of

Sukinda and Madhupur, the settlement of which, as already stated, had been made by special sanads.

The subsequent enactments before the Act of 1870 passed with the object of regularising or improving the rural police are not material to this Judgment. It is sufficient to say that the system under which the village *Chowkidars* as a part of the police machinery, held parcels of land as remuneration for their services, wherever in vogue, remained practically untouched until 1870. It was then that the necessity was felt of bringing the rural police or village *Chowkidars* under the direct control of the State.

The preamble to the Act states the object with which it was enacted.

Section I, defines *chowkidari chakran lands.* It says:—

"The words 'chowkeedaree chakran lands' shall mean " lands which may have been assigned, otherwise than under " a temporary settlement, for the mainteuance of the officer " who may have been bound to keep watch in any village " and report crime to the police, and in respect to which " such officer may be at the time of the passing of this " Act liable to reuder service to a zemindar."

The Act then lays down rules for the constitution of village *punchayets* or committees whose powers and duties are defined in considerable detail. In Part II. it proceeds to deal with the *chowkidari chakran lands.*

Ss. 48, 49 and 50, form the most material provisions of the Statute for the purposes of the present discussion.

They run as follows:—

"XLVIII. All chowkeedaree chakran lands before the " passing of this Act assigned for the benefit of any village " in which a punchayet shall be appointed, shall be trans- " ferred in manner and subject as herein-after mentioned to " the zamiudar of the estate or tenure within which may " be situate such lands.

"XLIX. All lands so transferred shall be subject to an
" assessment which shall be fixed at one-half of the annual
" value of such land according to the average rates of letting,
" land similar in quality in the neighbourhood of such land,
" and such assessment shall be made by the punchayet of
" the village.

" L. Such assessment when made by the punchayet shall
" be submitted to the collector of the district, and he or
" any other officer exercising the powers of a collector by
" him thereunto appointed may approve or revise and
" approve the same (provided that it shall be lawful for
" the zemindar to contest the assessment before it is so
" approved), and after such approval the collector of the
" district shall, by an order under his hand in the form in
" Schedule (C), transfer to such zemindar such land subject
" to the assessment so approved."

Section 51 declares that the order of transfer made under section 50 shall operate to transfer the land to such zemindar subject to the assessment and subject to the rights of third parties.

Section 52 declares that the amount of the assessment shall be a permanent charge on the land; and the subsequent sections provide how it is to be realised in case of default of payment.

Section 58 empowers the Lieutenant-Governor to appoint commissions "to ascertain and determine"—

" the chowkeedaree chakran lands and other lands before
" the passing of this Act assigned for the maintenance of
" of an officer to keep watch in any village and to report
" crime to the police in such district."

But for the contentions, to which their Lordships will advert later, that have been advanced on behalf of the Appellant, the Secretary of State for India, it would not have been necessary to give in extenso the above sections.

Act VI. of 1870 (B.C.) was, when enacted, not introduced into Orissa; its operation was confined to Bengal where the category of lands referred to in Lord Kingsdown's Judgment largely existed.

In 1899, the Act was, by a resolution of the Government of Bengal, dated the 9th of February 1897, extended to Orissa.

It appears that the Plaintiffs, the zemindars of Sukinda and Mudhupur respectively, in discharge of the duties imposed on them by their *sanads* to maintain peace and order within their estates, retained in their service a large number of *chowkidars* whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these *chowkidars* was kept in the *zemindari* office, and it would appear that in the appointment of the *chowkidars* in more than one instance the Government police officer had a voice. But the records show that the zemindar often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Such was the condition of affairs in these two *zemindaris* when the Act was made applicable to Orissa.

Shortly after its extension the Collector of the Cuttack District proceeded to apply its provisions to the lands held by the *chowkidars* of Sukindah and Mudhupur respectively, on the ground that they were *Chowkidari chakran lands* within the meaning of the Act. The Plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the *chowkidars* who were to be appointed under the new system, they took exceptions to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up

to sale under the provisions of ss. 54 & 55 of the Act.

The Plaintiffs thereupon brought these actions in the court of the Subordinate Judge of Cuttack, in substance, for a declaration that the Act did not apply to the lands in suit, and for an injunction restraining the Defendant Appellant from interfering with them.

The two suits were tried by two different Subordinate Judges, who affirming the contention of the Collector that the lands in dispute were *Chowkidari chakran lands*, dismissed the actions. On appeal, the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the Plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned Judges of the High Court were in error in referring to the previous legislation in order to construe Act VI. of 1870 (B.C.); that the Act was applicable to all lands whether "assigned" by Government or by the zemindar for the maintenance of *chowkidars*; and that the onus was on the Plaintiffs to show that they were not *Chowkidari chakran lands*.

Their Lordships think that this argument proceeds on a manifest fallacy. The lands in dispute admittedly lie within the ambit of the estates settled with the Plaintiffs' ancestors.

The appellants are the zemindars and "as such they have the *primâ facie* title," to use the language of this Board in the well known Case of *Rajah Sahib Perhlad Sein*, (1) to the full enjoyment of every parcel of land within their *zemindaris* for which they pay revenue to Government.

(1) 12 Moore's, I.A., p. 292, *see* p. 331.

It rests on the Defendant to show that when the *zemindaris* were confirmed to the Plaintiffs' ancestors it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it. That onus the Defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was, as already remarked, reserved by Government by the old Regulations in respect of lands which had been set apart by the zemindars with its permission or under its authority.

In Regulation I. of 1793 the word used is "appropriated"; in Regulation XIII. of 1805, the expression "assigned" is employed; but in both statutes the characteristics of the grants under which the lands were held depend on the implied authorisation of the Government which excluded them from consideration in the adjustment of the *jama* of the Mahal. In the present case the Defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the Plaintiffs, nor that there was any obligation on the part of the Plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their *zemindaris*. They entertained the services of *Chowkidars* for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Act VI. of 1870 (B.C.) means lands "assigned" by Government or appropriated under its authority or with its permission. Not only does the form

of the "Transferring Order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government, as explained above, for the maintenance of the *Chowkidars* and in respect of which they reserved the right to resume and transfer to the zemindar subject to an additional assessment; but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships' do not propose to burden their Judgment with long quotations from this interesting document; they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says:—

"As already remarked, the Chowkidari Jagirs are State " grants. They are excluded in the temporarily-settled " estates from the settlements made with the zamindars, " while in the permanently-settled estates they cannot be " legally interfered with by the zamindars. The latter " have thus in both classes of estates no connection with " the Jagir lands, and the Lieutenant-Governor accepts " the view that they are under no obligation to furnish " lands or otherwise specially provide for the maintenance " of the Chowkidars. Their liability is to contribute to " any funds raised in the same manner as other residents " of the villages. Nor is it binding on the Government " to continue the Jagir grants for all time."

In the orders that are passed, a distinction is made with regard to the *Chowkidari* holdings in the temporarily settled tracts, and those situated in "permanently settled estates."

With regard to these it is declared that on resumption "the holdings should be included " in the estates within which they lie, and form " part of its assets in the future."

Nothing can be clearer in their Lordships' view that the Act was designed to deal with lands which, although lying within a Mahal, did

not form a part of its assets, which is not the case with the *zemindaris* of Sukinda and Madhupur.

Their Lordships are of opinion that the Judgments and Decrees of the High Court should be affirmed and these Appeals dismissed with costs. And they will humbly advise His Majesty accordingly.

In the Privy Council.

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