Privy Council Appeal No. 37 *of* 1914.

Bengal Appeal No. 54 *of* 1910.

Maharaja Sri Ram Chandra Bhani Deo, since deceased (now represented by Maharaja Purna Chandra Bhanj Deo) - - - *Appellant,*

v.

The Secretary of State for India in Council and Others - - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1916.

Present at the Hearing:

LORD ATKINSON.
LORD PARKER OF WADDINGTON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PARKER OF WADDINGTON.]

This was an action in which the appellant, as plaintiff, sought to recover possession from the first and second defendants of a jaghir containing about 26 bighas of land situate within the territorial limits of the Pergunnah Nayabasan in the district of Midnapur, of which the appellant was the proprietor. The Secretary of State, who alone has appeared as a respondent in this appeal, and is hereafter referred to as the respondent, was added as a third defendant because the Government of India disputed the right which the appellant was asserting in the action. The appellant's case was that in 1898 one Suba Naek was in his personal service and held the jaghir on service tenure determinable when his employment ceased; that he had duly determined the employment of Suba Naek and given him notice to quit his jaghir; that Suba Naek had refused to deliver up possession of the jaghir, and had obtained from the magistrate an order which precluded the appellant from obtaining possession thereof without civil suit; that Suba Naek had since died, and that the first and second defendants wrongfully claimed to retain possession as his heirs.

The Pergunnah Nayabasan was settled in 1801 with Rani Sumitra Bhanj (the appellant's predecessor in title), who in

January of that year executed a *kabulyat* in favour of the Government. Under this *kabulyat* the proprietor of the Pergunnah was bound to maintain and keep the same "Sardars and Paiks" who had all along existed in the Pergunnah, and to carry out whatever order might be passed by the magistrate on the Paiks. He was also precluded from dismissing the Sardars or Paiks, and bound to depute the Paiks to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere.

The appellant has throughout contended that the Sardars and Paiks referred to in this *kabulyat* are Sardars and Paiks employed on police duty, and that the document has no reference to Paiks who hold on tenure services personal to himself, and having no connection with the local police. This contention has been upheld, and in their Lordships' opinion rightly upheld, by all the Courts below. On the other hand, it has been throughout contended by the respondent that the provisions of the *kabulyat* preclude the appellant not only from dismissing Paiks whose tenure services include the performance of police duties, but from resuming their jaghir lands, even though he might provide for their remuneration in some other way. The appellant having accepted this contention, their Lordships will assume, as was assumed in all the Courts below, that it is correct.

On reference to the written statement of the respondent by way of defence to the action, it will be found that, so far as material for the purposes of the present appeal, he relied entirely on the provisions of the *kabulyat*. In order to succeed, he had, therefore, to prove that Suba Naek held by service tenure involving the performance of police duties. Curiously enough, the first two defendants put in a statement, by way of defence, repudiating this. Their case was that they were in possession by hereditary right on a service tenure which did not involve the performance of any police duty, but that the appellant had no right to dismiss them if they were ready and willing, as they in fact were, to perform their proper services. They subsequently applied for leave to withdraw this statement and substitute another. This application was refused, but they appear to have given evidence at the trial in support of the respondent's case.

The Subordinate Judge found first that there had always been two classes of Paiks within the Pergunnah: (1) Paiks who hold their jaghirs in consideration of the performance of police duties, and (2) Paiks whose tenure services were personal to the Zemindar. He also found that Suba Naek belonged to the latter class. On these findings of fact he held, and in their Lordships' opinion rightly held, that the defence of the respondent failed, and gave judgment in favour of the appellant.

The first and second defendants were content with this decision, but the respondent appealed to the District Judge, who came to the same conclusions both of fact and law as had

been come to by the Subordinate Judge, and dismissed the appeal with costs.

The respondent thereupon presented an appeal to the High Court. By section 504 of the Civil Procedure Code then in force the High Court as second Court of Appeal was bound by the findings of fact of the District Judge. In their Lordships' opinion the High Court was not at liberty to disregard the finding that Suba Naek belonged to the class of Paiks having no police duties, on the ground that the District Judge gave no reasons for coming to this finding. The reasons of the District Judge are clear. He had considered the evidence and saw no reason for differing from the conclusions at which the Subordinate Judge had arrived. The High Court therefore could only allow the appeal on grounds of law, and as they agreed with the Court below on the construction of the *kabulyat*, it is not obvious what other questions of law arose. The respondent, however, urged upon the High Court that the Courts below had entirely misconceived the issue they had to try. This issue was, he contended, whether the lands comprised in the jaghir in question were Chowkidari Chakran lands, that is, lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the Zemindari assessment. It is in their Lordships' opinion quite clear that no such issue was raised by the pleadings. Had this been the issue raised by the pleadings the question whether Suba Naek was a Paik with police duties would have been of little importance if not quite immaterial. The appellant would be precluded by Regulations I of 1793, and XIII of 1805 from utilising Chowkidari Chakran lands for remunerating persons who were his personal servants and performed no police duties, but as appears from the case of *The Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (42 I.A. 30), the onus of proving that the lands in question were so appropriated or assigned would lie on the respondent. The *kabulyat* contains no reference whatever to any such lands.

It was admitted before their Lordships that this contention was put forward for the first time before the High Court. Such admission could hardly be avoided. The real question upon the pleadings was whether the appellant could rightly terminate Suba Naek's tenancy. The new issue suggested raises the question not whether Suba Naek's tenancy could be determined, but whether it ought not to be determined and the jaghir utilised for maintaining some police officer appointed by the Government. Nevertheless, the High Court held that this was the real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for rehearing. It not only did this, but it ordered all the costs already incurred to abide the result of the rehearing. In other words, if the appellant failed on a new case set up for the first time on the second appeal, he would

have to pay whole costs of the issues on which he had succeeded in the two Courts below.

In their Lordships' opinion, even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. In the present case the respondent showed no ground whatever for the indulgence he claimed. He did not suggest that he had been in any way taken by surprise or had discovered fresh facts of which he was unaware when the case was before the lower Courts. The possibility of the lands in question being Chowkidari Chakran lands, which could not, according to the Regulations, be resumed, must have been present to the minds of his advisers when his statement by way of defence was filed. It had been suggested by the magistrate whose order necessitated the action. The action of the respondent's advisers in not raising the point must have been deliberate. With knowledge of it, he elected to fight the action on the question whether Suba Naek could rightfully be dispossessed of his jaghir rather than on the question whether he ought not to be dispossessed and the jaghir utilised for police purposes. The record contains little or no evidence pointing to there being any Chowkidari Chakran lands which could not be resumed within the Pergunnah. On the contrary, the *Rubokari* in Persian, the genuineness of which was accepted by the District Judge, points the other way. The respondent does not suggest that he has any further evidence.

Their Lordships are therefore of opinion that this appeal should be allowed with costs here and below, and that the order of the District Judge should be restored, and they will humbly advise His Majesty accordingly.

In the Privy Council.

MAHARAJA SRI RAM CHANDRA BHANJ DEO, SINCE DECEASED (NOW REPRESENTED BY MAHARAJA PURNA CHANDRA BHANJ DEO)

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL and OTHERS.

DELIVERED BY

LORD PARKER OF WADDINGTON.

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1916.