Privy Council Appeal No. 133 *of* 1917.

Bengal Appeal No. 7 *of* 1915.

Raja Durga Prashad Singh, since deceased (now represented by Siva Prashad Singh) - *Appellant,*

v.

Tribeni Singh 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 26TH JULY, 1918.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

The suit to which this appeal relates is brought to recover certain lands formerly held under ghatwali tenure, in the zemindary of Kharakpur in Bengal.

These lands were originally held by the zemindar under the ruling power upon terms that the zemindar should perform by himself or his tenants the duty of guarding the ghats or passes against marauders, and preserve the peace of the district, and discharge other police services.

In the year 1838 the Government, being of opinion that these duties could be, and indeed were being, better performed by their own officers, and that the Government was entitled to resume these lands, as the services for the performance of which they were originally held were no longer needed, claimed to resume them accordingly.

Litigation ensued, and the Government was successful in the Courts in India, but the decision was reversed on appeal to the Privy Council, and the Raja zemindar was quieted in his possession.

The case was decided in 1855, and is reported as *Raja Lelanund Singh Bahadoor* v. *The Government of Bengal* (6 Moore's Indian Appeals, p. 101).

As it was still possible that the Government might insist upon the zemindar performing certain of the original duties, a compromise was entered into, and a settlement was arrived at by which the zemindar paid a jumma of 10,000 rupees per annum, and was released from further performance of these duties.

Thereupon he in turn endeavoured to resume their tenures from the several ghatwals on the ground that their services were no longer required. This led to much litigation with varied fortune. In two cases reported together in the supplemental volume of Indian Appeals, p. 181, the first being *Rajah Lelanund Singh Bahadoor* v. *Thakoor Manoorunjun Singh*, the ghatwals were successful both in India and before the Privy Council. In a third case heard at the same time the ghatwal got better success before the Privy Council than he had in India. These cases were decided in 1873. Further, it appears from the judgment of the Subordinate Judge that there were some other cases, apparently not reported, in which the judgments in India were in favour of the zemindar, but the decisions in the Privy Council in favour of the ghatwals.

In the case of the particular lands now in dispute, they were held by four ghatwals, and the decision went against them and in favour of the zemindar in the High Court at Calcutta, and they appear to have neglected to appeal in time; but on learning that other ghatwals in a similar position had been successful before the Privy Council, they became much dissatisfied, and were endeavouring to see if they could not by some means reopen the question, when a compromise was arrived at, and the zemindar gave a pottah to the four ghatwals granting the lands in perpetuity at an annual uniform jumma of 1,031 rupees.

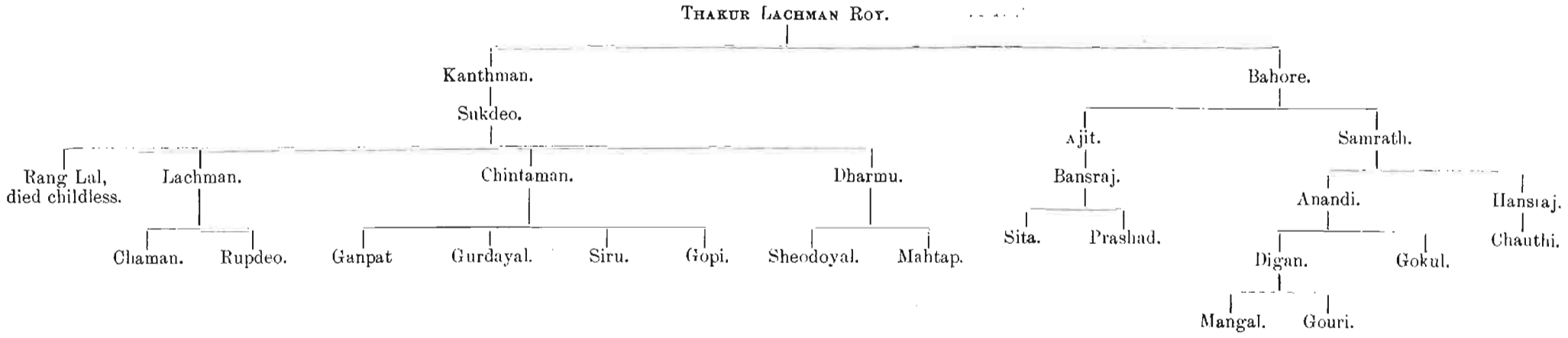
This pottah is dated the 6th July, 1873. The grantees Dharmu Roy, Chaman Roy, Gokul Roy, and Mangal Roy are described in it as former ghatwals of the mouzahs named in the pottah, and it is recited that "the said mouzahs, original with dependency, had from the time of the former Rajas been in the possession and occupation of you and your ancestors by virtue of ghatwali right." The litigation and the agreement of the parties to come to an amicable settlement are then recited, and the Raja proceeds to make the grant in the following words: "Therefore I have made in favour of you the permanent istamrari mokurari settlement in perpetuity, descendible to progeny and generation after generation in respect of Mouza Khadawa, &c., original with dependencies in existence from before . . . . at an annual uniform jumma of 1,031 rupees."

The four grantees thereafter dealt with the property as their own, as property held by each severally, in respect of his 4-anna share as a member of a Hindu family, holding jointly with his sons and grandsons.

The four grantees, as managers or Kartas of a Hindu family, jointly made mortgages and leases, and, in particular,

in the year 1884 they, with their sons and other descendants, executed two mortgages in favour of Shitabi Singh. Upon these mortgages decrees were ultimately obtained, and the villages were sold in execution to the first party defendants, whose representatives are the respondents appearing before the Board to support the judgments under appeal. Delivery of possession was made on the 6th March, 1897. It should be added that since the date of delivery the first party defendants or their predecessors have been in possession.

The case made for the plaintiff appellant accepts a large part of that of the defendants respondents. The pottah is admitted, as also are the apparent title thereby created in favour of the four grantees, Dharmu, Chaman, Gokul, and Mangal, the title deduced from them to the first party defendants, and the possession by the latter from the date of delivery upon the sale. The case made is that the pottah was granted to the four grantees as representatives of one great family descended from a common ancestor, and that all the male descendants have beneficiary interests in the several mouzahs according to their respective shares per stirpes, and that the plaintiff is the assignee of interests of several of these descendants in respect of shares amounting to 7 annas and a fraction, or nearly half. A short pedigree will show the origin and nature of the several interests which he claims to have bought :—


Thakur Lachman Roy.
Kanthman.
Sukdeo.
Rang Lal, died childless.
Lachman.
Chaman.
Rupdeo.
Chintaman.
Ganpat
Gurdayal.
Siru.
Gopi.
Dharmu.
Sheodoyal.
Mahtap.
Bahore.
Ajit.
Bansraj.
Sita.
Prashad.
Samrath.
Anandi.
Digan.
Mangal.
Gouri.
Gokul.
Hansraj.
Chauthi.

On the assumption made on behalf of the plaintiff Rupdeo, a brother of Chaman and his descendants have a claim to some beneficiary share, presumably a 1-anna share, Chintaman, brother of Dharmu and uncle of Chaman and his descendants would have a 2-anna share; in the other line, Ajit and his descendants would have a 4-anna share, and Chauthi and his descendants a 2-anna share. The plaintiff has bought up all these shares, except those of some of the descendants of Chauthi.

Lachman Roy, the common ancestor, flourished about 1750. He was probably in his day the ghatwal. His son Bahore was ghatwal; so was Bahore's son Ajit. Sukdeo, the grandson by the other line, was ghatwal apparently with Bahore, and later on with the latter's grandson Anandi. In 1854 Digan, father of Mangal, was ghatwal in conjunction with some member of the other line, probably Dharmu; and then in 1864, when the zemindar sought to eject them, the four grantees were the ghatwals.

The plaintiff suggests that they were chosen as the representatives of the several branch families, and held their shares of the family estate on behalf of all the male members. This case is rested upon three grounds: the nature of the ghatwali tenure as determined by the several decisions of the Privy Council, the alleged enjoyment by the beneficiaries of their respective shares from the grant of the pottah to the sale by the Court, and upon an ekrarnama executed on the 22nd September, 1873, that is between two and three months after the pottah.

As regards the first ground there are several decisions of the High Court and of this Board on the nature of this tenure.

Some have already been cited, and in addition special reference may be made to *Raja Nilmoni Singh* v. *Bakranath Singh* (L. R., 9 Ind. App. p. 104), decided in 1882, a case not so much in point as the ghatwali lands were in another zemindary, and to *Tekait Kali Pershad Singh* v. *Anund Roy* (L. R., 15 Ind. App. p. 18), decided in 1887, concerning other lands in the zemindary of Kharakpore.

The result of the decisions is that the ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the zemindar approves as competent, and that it is the right of the family so long as they have male members competent to perform the duties to have one or more of them appointed ghatwals. It was certainly an advantage to the whole family that one of their members should hold the office and the tenure. He could put other members of the family into minor offices and grant them subordinate interests commonly called Jotes, and he could and would generally provide for the family in the manner expected of its head. But this is a long way off making him a trustee for the family or treating the ghatwali estate as possessed by the family and reducing the ghatwal to the position of karta or managing head of the family. Their Lordships do not find that the incidents of ghatwali tenure are such as to give the family any rights

over the property while it is in the hands of the ghatwal, and they find themselves upon this point in full agreement with the Courts in India. So far, therefore, if the assumprion were to be made that the scheme of the pottah was to preserve family rights, there would still be no reason for holding that they extended so as to give any beneficiary interest in the mouzahs to the male members of the family other than the actual grantees.

The plaintiff, however, relied upon an asserted actual possession and the receipt of their share of the rents and profits by his vendors or their predecessors in title, and he called several witnesses to depose to this. He laboured under an initial difficulty in stating what those shares were, as they had been variously stated in his plaint and in a previous plaint in a suit brought by his vendors in March 1898 and discontinued by them, it was said, on account of poverty, and again differently stated in other proceedings. But it is unnecessary to discuss this matter at length. The Subordinate Judge who saw and heard the witnesses for the plaintiff did not accept their testimony, and the High Court saw no reason for differing from him. It was contended on behalf of the plaintiff that the Judges of the High Court made no independent examination of this evidence, and that their Lordships are therefore not bound to treat the case as one of concurrent findings of fact, and their Lordships permitted the counsel for the plaintiff to read and comment upon this evidence. But the result is that their Lordships see no reason for differing from the judgment of the Subordinate Judge upon this point; and it must be taken that the plaintiff did not succeed in proving that his vendors or their predecessors in title were ever in possession or in the enjoyment of shares in the rents and profits since the grant of the pottah.

There remains for consideration the argument for the plaintiff founded upon the ekrarnama. This argument was rejected by the Subordinate Judge and by the High Court, and their Lordships as it will be seen have come to the same conclusion in the end. But the point is not altogether easy to decide, for there is *primâ facie* some weight in the contentions founded upon this document.

The grantor is one of the four grantees under the pottah, Dharmu Roy. He describes himself as son and heir of Sukhdeo Roy and recites that the four mouzahs form an ancestral ghatwali mahal which have "since olden time been in our possession and occupation." He then recites that the Rajah had taken possession of them and done away with the ghatwali tenure and that thereafter by amicable settlement the mouzahs were obtained "under a mokurari pottah, at an annual jumma of Company's 1,031 rupees, in the name of the four grantees."

The document proceeds as follows :—

"As this mahal is our old ancestral Ghatwali, and although our names are recorded in the Government office, &c., yet all the heirs who

are the heirs of the common ancestor, have been in equal possession thereof in the moffusil, and all the heirs have been and are supported and maintained thereby in the moffusil, and whereas one set of these moffusil co-sharers, namely, Ganpat Roy, Gurdayal Roy, Gopi Roy, and Sri Roy, the four brothers and the own nephews of me, Dharmu Roy, is not satisfied unless their names are recorded or they obtain a deed, therefore, of my own accord and free-will, with a view to put a stop to disputes in future, I do hereby make a valid declaration and give out in writing that, after paying the rent mentioned in the said mokurari pottah and the village and Court expenses, Ganpat Roy, Gurdayal Roy, Gopi Roy, and Sri Roy shall get 1-anna share out of the share of me, Dharmu Roy, and the said four brothers will divide equally amongst themselves the said 1-anna share; that although the names of us, the said mokuraridars, are recorded in the suddar serishta of the said Raja Saheb, still the said Ganpat Roy and others, the four brothers, shall always continue to hold possession in the moffusil to the extent of 1-anna share, and that all the co-sharers and co-partners shall have to pay all expenses which have been incurred in obtaining the mokurari pottah of the aforesaid mouzahs, as also the expenses which may be incurred in future in connection therewith, in proportion to their respective shares."

The other three grantees were witness to the execution.

It appears that when the document was presented for registration Dharmu opposed the registration stating that he had not executed the deed and that he did not know how to write, but that eventually it was registered under an order of the District Judge. Dharmu, however, was illiterate and had signed by the pen of a scribe.

It could not be disputed that this document constituted an admissible and relevant piece of evidence, and that both the recitals and the operative part have to be considered. But the two do not stand upon the same footing. The recital that all the heirs of the common ancestor have been in equal possession of the mouzahs is larger than is necessary for the operative part of the deed; and it may be that whereas Dharmu was content to settle a 1-anna share for the benefit of the sons of his deceased brother, and the deed in its operative part was therefore a true expression of his will and rightly registered, yet that he being illiterate had not understood or intended the terms of the recital, or that his co-grantees did not approve of them, and that this was the explanation of the opposition to the registration.

The draughtsman may have thought it expedient to insert something in the nature of a consideration so as to take the deed out of the category of voluntary settlements, and he may have been carelessly or wrongly instructed.

The learned Subordinate Judge endeavoured to cut the knot by inferring that some other members of the family fraudulently introduced this recital. But there is no warranty in the evidence for inferring fraud and no suggestion of it appears to have been made to any of the plaintiff's witnesses. All that can be said is that it is possible that such was the case.

There is, however, a stronger comment which was also made by the Subordinate Judge and that is that the recital is

not only larger than the operative part, but inconsistent with it. On any theory of descent per stirpes the descendants of Sukhdeo would have an 8-anna share and each of the four sons a 2-anna share. The four sons of Chintaman in whose favour the deed is made would have their father's 2 annas and Dharmu would have 2 annas and no more. But he is parting with 1 anna share only and keeping 3, on the theory, for himself.

The suggestion made on behalf of the plaintiff to meet this difficulty was that it was intended that the other grantee of the Sukhdeo line, Chaman, son of Lachman, should give out of his 4 annas a second anna to the sons of Chintaman, and apparently that Dharmu and Chaman should further contribute 1-anna share each for their brother Rang Lal who was then living and ultimately died childless.

On this theory Chaman would further have to denude himself of another anna share to his brother Rupdeo whose descendants are some of the vendors to the plaintiff.

Ingenious as these suggestions are they are without warrant in the evidence or the documents and wholly fanciful.

This being so, the recital in the ekrarnama, though not without weight and not to be wholly put aside as a piece of evidence cannot, in their Lordships' opinion, as it did not in the opinion of the Subordinate Judge, or in that of the High Court, outweigh the mass of evidence, which makes against the very difficult legal title which the plaintiff seeks to establish.

It remains, however, to consider the operative part of the document, which is in terms a grant of a 1-anna share to the sons of Chintaman, through whom among others the plaintiff claims, and to see whether, though the plaintiff fails in his claim to the larger share (7 annas and a fraction) of the estate, he yet could succeed in respect of a 1-anna share. Many answers have been made to this claim. It is not that put forward by the plaintiff in his plaint. He did not rely upon the ekrarnama as a conveyance of this 1-anna share, but as a declaration against interest, or one by an occupier qualifying his estate, establishing the general claim of the family. The document was conditional only. If, as is probably the right construction, the pottah is a grant to the four grantees, each taking in respect of their separate shares as members of a joint Hindu family with their sons and grandsons, Dharmu could not convey away a part of his estate to the prejudice of the other members of his joint family, and the deed could only operate *quoad* his life interest, which has expired.

It was suggested as an answer to this last argument that it would be within the authority of the karta or head of a family to make compromises.

But the one conclusive answer to any case in respect of this 1-anna share is the Statute of Limitations. The learned Subordinate Judge in his very careful judgment, considered this plea, but upon the whole rejected it on the ground that the suit

was instituted on the 16th March, 1908, and the date from which the twelve years began to run was when the auction purchasers took delivery of possession, that is the 6th March, 1897. And the High Court in the view which it took of the case found it unnecessary to express any opinion upon this plea.

Inasmuch, however, as none of the vendors to the plaintiff or their predecessors in title have been in possession of any shares in the property, including therein this 1-anna share, it must be taken that the statute began to run at least from the time when the sons of Chintaman did not receive the benefits which the ekrarnama purported to give them, that is, from the year 1873.

Upon the whole, therefore, the plaintiff has failed to prove title to any portion of the property in suit, and the decrees of the Subordinate Judge and the High Court dismissing his suit were right, and their Lordships will humbly recommend His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

RAJA DURGA PRASHAD SINGH, SINCE DECEASED (NOW REPRESENTED BY SIVA PRASHAD SINGH)

v.

TRIBENI SINGH AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1918.