

PRIVY COUNCIL.

RAO BAHADUR SINGH (PLAINTIFF) v. JOWAHIR KUAR AND
PHUL KUAR, WIDOWS OF BALWANT SINGH (DEFENDANTS).

P. C.*
1884
February 16.

[On appeal from the Court of the Commissioner of Ajmere.]

Claim by istemrardar to resume a subordinate tenure.

A custom was alleged, entitling a Patwi Thakur, or Chief, belonging to the Rathor Clan of Rajputs, who was the istemrardar of an ancient and impartible taluq in Ajmere, to resume land formerly part of it but granted some generations back, as a subordinate estate, to a collateral relation of the chief. The ground of the resumption claimed was that the last successor to the estate so granted had died without issue and without adopting. *Held*, that the Commissioner's judgment, which was that a right of resumption, exerciseable merely on the above ground, had not been established, was correct; being supported, to some extent certainly, by answers received by the Chief Commissioner on inquiry from the neighbouring durbars of Rajputana Chiefs; and, on the whole, by the balance of the evidence.

APPEAL from a decree (16th February 1884) of the Commissioner of Ajmere, reversing a decree (14th June 1877) of the Assistant Commissioner, Ajmere.

In the suit out of which this appeal arose, the appellant, styled in the proceedings, at times, the Rao, also, the Patwi, and the istemrardar, was the recorded proprietor of the impartible taluq of Masuda in the Ajmere district. The respondents were the childless widows of the appellant's collateral relation, Balwant Singh, who died in 1876.

The suit was for the purpose of having declared the right of the istemrardar to resume a mouzah, named Nandwara, which at one time formed part of taluq Masuda, and had been granted about a century ago to an ancestor of Balwant Singh. In the plaint was claimed a customary right, on the part of the istemrardar of Masuda, to resume at will, all grants made, as it was alleged that this had been made, for the maintenance of the younger branches of the family, on making other provision for their maintenance, which was offered. The widows at first

* *Present*: LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCE, and
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alleged, but afterwards failed to prove, an adoption. They also affirmed that Nandwara had been given to an ancestor of their husband on a partition of estates in the family of the chief.

The Courts concurred in finding that the grant of Nandwara was an ordinary grant, locally known as a "gras," or "hawála," tenure, by which was made an assignment of land to a junior member of the family of a Rajput chief.

An issue framed to raise the question of the right of the chief to resume was decided as follows by the Assistant Commissioner:—

"I feel bound to decide this issue in the affirmative, and to decide that the Thakur of Nandwara, having died without a legitimate heir of the body, the Chief of Masuda is entitled to resume the village, making proper provision for the maintenance of the widows, and if there be any daughters, then of the daughters also of the deceased. The evidence before the Court goes to show that confiscations have occurred frequently in former times, sometimes because the minor chief died childless, sometimes because he could not pay his revenue punctually, sometimes because he opposed his chief in the field. In the case of Lorri the minor chief is shown to have voluntarily resigned his position, and to have become a yeoman farmer instead of a Thakur, and a similar change in the status of the minor branches of the Masuda house has been, from different causes, of constant occurrence. They are still on the spot, these descendants of former chiefs, but they are now only zemindars, or in service, while all the actually existing Thakurs are scions or offshoots of quite a late date."

On the appeal to the Commissioner of Ajmere, a reference under rule 36 of the Ajmere Court rules, on 15th February 1878, was made to the Chief Commissioner, who referred to four dárbars, viz., those of Meywar, Marwar, Jaipur, and Kishengarh, a statement of the case with the question, among others, whether the resumption was in accordance with the custom of other Rathor Patwi Thakurs in the surrounding Native States. On receipt of replies, the Chief Commissioner, Colonel E. R. C. Bradford, gave the following opinion on the 23rd January 1879:—

"After a careful perusal of the file, I am of opinion that there

is only one point of those referred which is essential to the disposal of this particular case. I refer to the point whether the resumption of Nandwara is according to the custom of other Rathore Patwi Thakurs in the surrounding Native States?

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“In Rajputana no positive rule of law exists on the matter, but there is no doubt that the Patwi Thakur is not entitled to resume an estate held as Nandwara was held, merely because the holder died without adopting an heir. To lay down that he is so entitled would be to establish the doctrine of lapse by default of heirs, whenever an estate-holder dies without adopting, and this would not be a valid ruling for Rajputana, while the consequences might be as prejudicial to the superior as to the inferior Rajput landholders. Such a doctrine has never prevailed, and it would certainly be contrary to the feelings and traditions of Rajput clans in regard to the tenure of their lands.

“On the other hand, there can be no doubt whatever that the decease of a landholder, before he has adopted an heir, is universally held to give his superior a right to interfere in the succession, to superintend the devolution of the estate, sometimes even to dictate it, and to choose an heir, but he cannot annex the land to his own estate except under special circumstances.

“What these circumstances are I do not consider it necessary to define precisely, as they are absent in the present case, and are not therefore material to an adequate consideration of it.”

The Commissioner of Ajmere, Mr. L. Saunders, on the above answer to the reference being made, gave judgment as follows:—

“In this case the Chief Commissioner has, under a reference made to him under s. 36 of the Ajmere Courts Regulations, found that the Patwi Thakur is not, under the circumstances set forth in the reference made under date of 13th February 1878, entitled to annex the land to his own estate, merely because the holder died without adopting an heir, except under special circumstances, and that such special circumstances are in the present case absent; accordingly this Court, under s. 37 of Courts Regulation, must dispose of the case in conformity with the ruling of the Chief Commissioner, and consequently this Court accepts the appeal and reverses the order of the lower Court. The plain-

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tiff will pay the costs of the litigation from the commencement to the end."

On this appeal,—

Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyne* appeared for the appellant.

The respondent did not appear.

For the appellant it was contended that the Court of first instance had rightly decided that the grant of Nandwara was resumable, on provision being made by the grantor, or his representatives, for the maintenance of the successors of the grantees. The real issue was, whether the plaintiff had not established his right, by the custom of his family, as istemrardar of the ancient zemindari of Masuda, to resume, under the circumstances, a village found by the Courts below to have been assigned for maintenance. The reply given by the State of Jaipur was the one on which the appellant relied, it being to the effect, that in such a matter as this, of a disputed right to resume, the custom of the particular chiefship should be regarded.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This is an action by the Rao of Masuda, in the Rajputana district, for the purpose of recovering possession of a subordinate estate within the taluq of Masuda, consisting of the village of Nandwara with two or three hamlets appurtenant to it, against the widows of the last owner, Balwant Singh, who died without natural issue. The plaint avers that,—“The subject-matter of the claim is that the plaintiff is the proprietor of the taluq of Masuda, and by old-established custom, like his predecessors, enjoys the right to resume at any time any village assigned to any of his brethren for maintenance, and to provide for them in some other way.” His case is that this sub-taluq, as it may be called (though it is sometimes called a jaghir), had been granted, some hundred years ago, to an ancestor of Balwant, the last owner, for maintenance; and that he is entitled at any time to resume it upon providing pecuniary maintenance for the tenants for the time being. This contention has scarcely been attempted to be supported. The plaintiff, therefore, falls back upon the circumstances of this case and a more limited

right; namely, a right to resume upon the death of the tenant without issue. The question is, whether he has established this right.

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In the suit a question was raised as to whether the widows had adopted a son in pursuance of alleged directions of their husband; and further whether, assuming that no such directions had been proved, the Rao had by his conduct recognised the adoption. These questions have been found against the defendant by the lower Court; and that finding, though not in terms affirmed, appears in substance to have been adopted by the Court above, and it is in favour of the appellant.

The defendants denied that the grant was for the purpose of maintenance, alleging it to have been made in pursuance of some family arrangement or partition, and they denied the right claimed by the Rao and most of the allegations in the plaint. The case came, in the first instance, before the Assistant Commissioner of Ajmere, who gave an elaborate judgment upon a number of issues which have become immaterial. The material finding is upon issue 13, *viz.*, "whether the Rao of Masuda, as head of the family, has the right to confiscate the tenure of Nandwara—(a) in spite of a legal adoption?"—that may be put aside; "(b) in spite of the existence and presence of a natural heir?" Here it may be stated that there is no dispute that Ram Singh, who was alleged to be adopted, would be the next heir to Balwant in the ordinary course of descent. The finding of the Assistant Commissioner is in these terms: "I feel bound to decide this issue in the affirmative, and to decide that the Thakur of Nandwara, having died without a legitimate heir of the body, the chief of Masuda is entitled to resume the village, making proper provision for the maintenance of the widows, and if there be any daughters, then of the daughters also, of the deceased. The evidence before the Court goes to show that confiscations have occurred frequently in former times, sometimes because the minor chief died childless." The case went on appeal to the Commissioner of Ajmere. The Commissioner, not himself deciding the suit in the first instance, stated a case for the consideration of the Chief Commissioner. The Chief Commissioner directed various

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inquiries to be made of certain durbars of native princes. They reported to him; and, after considering their reports, he expressed his opinion that the judgment of the Assistant Commissioner should be reversed, and found that no such custom and no such right as that which the Rao claimed existed. The Commissioner, acting on this opinion, reversed the judgment of the Assistant Commissioner. This appeal is preferred from the judgment of the Commissioner.

Documentary and oral evidence have been given, to which it is unnecessary to refer at great length. The first important evidence consists of certain depositions which appear to have been taken before Mr. Cavendish in the year 1829, Mr. Cavendish being then Superintendent of Ajmere, and apparently charged with the duty of obtaining information with respect to tenures in Ajmere for the use of the Government. Various depositions have been put in, which were used before him. One or two of those depositions, which are very short, go the length of supporting the contention of the plaintiff; but that is by no means their uniform tenor. There are others which qualify his right. There are some which state that, although he has a right to resume an estate, it must be upon substituting for it another estate. It is to be observed that Bahadar Mal, who probably represented him on that occasion, because he speaks of him as his client, being asked, "What powers does your client (the istemrardar of Masuda) have with regard to the ejectment of the jaghirdars?" answers, "In case of disloyalty, insurrection, and impropriety of conduct on the part of any jaghirdar, my client can turn him out of the village; but if he show no disobedience he may be allowed to continue in possession of his village as usual, or at his request my client may exchange his village for another, or fix a cash allowance." So it appears that the person who represented the Rao on that occasion claimed no such right as that on which he bases his present suit, but simply a right of resumption for cause. Further, it would appear that all these depositions are given upon the hypothesis of its being shown that the grant originally made to the jaghirdar was a grant merely for maintenance; but that appears to their Lordships not to be established, the finding of the Assistant Commis-

sister on that subject being at least ambiguous, *viz.*, that the grant of Nandwara to the ancestors of the deceased Thakur was an ordinary grant in 'gras,' or 'hawala,' tenure: no evidence has been produced to rebut this natural presumption. The word 'bhai-bat' has not been exactly defined or interpreted by the defence, and is a term which is vague in its meaning." Such a finding does not appear to show that the grants were necessarily grants for maintenance, neither of these terms necessarily importing maintenance. If that be so, the evidence does not directly bear upon the question. However, assuming that the grant was made for maintenance, still these depositions do not, as a whole, amount to proof of the right claimed.

The next documentary evidence relates to a proceeding in 1853 before Colonel Dixon, which arose in this way: The tenant of Jamola, one of the dependent jaghirdars, had refused to pay road cess, and had in other ways offended the Rao. The Rao thereupon claimed to resume possession of Jamola; and, in order to establish his case, he applied to various other jaghirdars,—among others, he applied to the father of Balwant,—to give a deposition or statement in his favor. He wrote to them this letter: "You need not entertain any apprehension on account of the letter which I got you to write in the Jamola case. The signature formerly attached (to certain writings) by Bhopal Singh (the grand-father of the present Thakur of Shergarh), both at the time of the dispute regarding Ramgarh and the assessment made by the Honourable R. Cavendish, shall be respected. Moreover, you will be put to no inconvenience whatever; don't think it otherwise. I am at one with you. Should I act otherwise, God is between us, *i.e.*, between yourself and myself." The substance of this letter, which is spoken to by one of the witnesses, rather points to this, that the Rao asked these persons, who were to a certain extent dependent upon him, to sign a paper on the understanding that it would be of advantage to him and no detriment to themselves. Under those circumstances they did sign a paper, which is to this effect:—"After usual compliments. By the grace of God we are all well, and trust that, by the blessing of God, this will also find you in good health. You are (our) master. You ask for our opinion in the matter of the

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application filed by the Thakur of Jamola. We accordingly beg to state that we are all members of your family, and look to you for our support. We have no (adverse) intention as regards the villages which you may confiscate, if you intend to do so, as you are our master. What we ask is only bread; you may confiscate the villages if you like." This and the letter which has just been read are nearly contemporaneous. Their Lordships, under the circumstances, do not attach any great importance to this declaration.

A great deal of verbal evidence also has been adduced; but it is by no means of a uniform character, or all of it supporting the contention of the plaintiff. The first witness, a zemindar, who seems to be a man of position, aged 60 years, gives this view of the right claimed: "For fault shown; the Masuda Patwi has power to resume villages given as hawála. I cannot say what power the Patwi has to so resume in the absence of fault."

Without going through all this evidence, it appears to their Lordships that, although several cases of what is called confiscation or resumption are shown, they have been, in almost every instance, from some fault or other. There is one instance indeed in which a jaghir is resumed upon the owner dying without issue, but in that case it happened that the Rao was the nearest heir.

There appears to their Lordships no sufficient evidence to support the finding of the Assistant Commissioner that the Rao had the right in the first of the three cases which he puts, namely, in the case of the minor chief dying childless, to confiscate or resume the estate. The opinions of the durbars, which were taken by the Chief Commissioner, are, on the whole, adverse to any such right; two are distinctly adverse to it, and two are equivocal. Their Lordships, having regard to the opinion of the Chief Commissioner, who states that "in Rajputanna no positive rule of law exists on the matter, but there is no doubt that the Patwi Thakur is not entitled to resume an estate held as Nandwata was held merely because the holder died without adopting an heir,"—supported as that finding is, to some extent certainly, by the answers which were received from the neighbouring durbars, and, on the whole, by the balance of evidence in the case,—are

of opinion that the judgment of the Commissioner of Ajmere should be affirmed.

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They will therefore humbly advise Her Majesty that that judgment be affirmed, and that this appeal be dismissed.

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Appeal dismissed.

Solicitors for the appellant : Messrs. *W. & A. Ranken Ford.*

ALIMUDDI AND OTHERS (DEFENDANTS) v. KALI KRISHNA TAGORE
(PLAINTIFF.)

[On appeal from the High Court at Fort William in Bengal.]

P. C.*

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February 22.

Measurement of land subject to alluvion and diluvion according to agreement—Effect of error as distinguished from fraud.

A superior owner of chur land, and his tenants, who held it in "hawaladari" tenure, agreed, with reference to alluvion and diluvion, that the chur should be measured from time to time, on notice, and that unless the tenants should give a separate "daul kabuliyat" for the land found to be accreted, the superior owner should take possession of it.

A measurement by the superior owner was made on notice to the tenants, and *bond fide*; but it was incorrectly made, the tenants, however, raising no objection at the time. They, afterwards, when a suit was brought against them by the superior owner for possession of alleged accreted land, set up the defence that the measurement had been made in their absence, and was incorrect.

Held, that the tenants could not defeat the suit, merely on the ground of the incorrectness of the measurement, there being no fraud; but that they were entitled to ask the Court to decide what the amount of the property was which the plaintiff was entitled to recover.

APPEAL from a decree (2nd February 1881) of a Divisional Bench of the High Court, reversing a decree (16th June 1879) of the Second Subordinate Judge of Backergunj.

The question raised by this appeal was as to the right of the plaintiff to obtain khas possession of land that had accreted to a chur, of which the defendants were tenants as hawaladars (1),

* *Present*: LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) "Hawaladari," a local term for a tenure (hawala being literally "an entrusting") in the district, where zemindars and taluqdars, with a view to reclaiming land, made it over to tenants, giving them a permanent and transferable interest therein.—*Hunter's Statistical Account of Bengal*, Vol. V, p. 372.