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an error in directing six houses out of the nine to be given to the plaintiff without specifying which six houses should be given. In other words, he should have proceeded under the provisions of s. 396 of the Code of Civil Procedure, and we direct that having determined what portion of the property ought to be given to the plaintiff as representing the two-thirds which he obtained by purchase, the Munsiff do proceed to embody in his final decree the result of the Commissioner's investigation and report.

We do not think that this is a case in which we ought to give costs.

Case remanded.

Before Mr. Justice Tottenham and Mr. Justice Norris.

ANUNDO RAI AND OTHERS (DEFENDANTS) *v.* KALI PROSAD SINGH AND ANOTHER (PLAINTIFFS.) *

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Ghatwali Tenures of Kharukpore—Transferability of Ghatwali tenures—Mitakshara law inapplicable to ghatwali tenure—Family custom inapplicable to ghatwali tenure.

A ghatwali tenure in Kharukpore is transferable if the zemindar assents and accepts the transfer.

Such assent and acceptance may be presumed from the fact of the zemindar having made no objections to a transfer for a period of over twelve years, and when such a fact has been found a Court ought to recognize such a transfer.

In a suit, brought to recover possession of a ghatwali tenure situated in Kharukpore which had been brought to sale in execution of a decree against the previous ghatwali and purchased by the defendants, the plaintiffs sought to rely on the Mitakshara law and certain family custom for the purpose of establishing their right. The lower Court applying such law and custom found that the tenure was transferable, and that it was joint ancestral property and gave the plaintiffs a decree for two-thirds of the property and the defendants a decree for the remaining one-third, holding that to be the extent of the previous ghatwali interest which had been purchased by the defendants.

* Appeal from Original Decree No. 114 of 1882, against the decree of Hafiz Abdool Kurreem, Khan Bahadoor, Second Subordinate Judge of Bhagulpore, dated the 13th of February 1882.

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Held, on appeal, that the decision of the lower Court was erroneous. That in dealing with a ghatwali tenure 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 the customs of any particular family, and that a ghatwali being created for a specific purpose, has its own particular incidents and cannot be subject to any system of law affecting only a particular class or family.

IN this case the plaintiffs sought to recover possession of a ghatwali mehal named Kharna, appertaining to the mehals of Kharukpore in the district of Bhagulpore.

The plaintiffs alleged that the family of plaintiff No. 1 was governed by the Mitakshara law, and by a special family custom that the eldest son became the malik of the estate, the other members of the family being entitled to maintenance. That in accordance with such custom Tekait Meghraj Singh, the father of plaintiff No. 1, held possession of the ghatwali mehal in question till the 13th July, 1868, on which date he was nominally, though not actually, ousted by the ancestors of the defendants who purchased the mehal at a sale in execution of a decree obtained against him on the 18th July 1862. The plaintiffs further alleged that the purchasers, although they got the writ for possession, issued and gave a receipt in the usual way purporting to have obtained possession on the 19th Bysack 1276 Fuslee (15th April 1869) in reality did not take actual possession till the month of Assin 1287 Fuslee (September and October 1879); that Tekait Meghraj Singh died in Bhador 1278 Fuslee (August and September 1871); and that after his death the plaintiff No. 1, in conformity with the family usage, acquired the right to take exclusive possession of the mehal now claimed.

The plaintiffs also alleged that there was no legal necessity for the debt incurred by Meghraj Singh in respect of which the mehal was brought to sale, and that it was incurred without the consent of plaintiff No. 1. The alienation to the predecessors of the defendants was bad and invalid as against plaintiff No. 1; and that by their purchase at the execution sale they got only the right and share of Meghraj Singh in the mehal.

Previous to the suit being brought, plaintiff No. 1 sold a 10-anna share in the mehal to plaintiff No. 2, and the suit was

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accordingly brought by them both, and they contended that the defendants acquired no right to possession of the mehal as against them by virtue of their predecessors' purchase at the sale in execution of the decree against Meghraj Singh. The defendants opposed the plaintiffs claim on the following amongst other grounds, *viz.*:—

That they and their predecessors had held possession of the mehal since the date of the auction purchase; and that the suit being one for the purpose of setting aside that sale it was barred as having been brought more than one year after the date of the sale; and that even if it were held that it was not barred on that account it was still barred by the fact that they had held possession for more than twelve years. That although the mehal Kharna was formerly a ghatwali tenure that tenure was abolished previous to the date of the sale. That according to the practice of the ghatwali tenures situated in the mehal of Kharukpore the holder had a full proprietary right, and could sell or transfer the tenure; and that the son acquired no right of partnership with his father during the father's lifetime. They also denied that plaintiff No. 1 alone was entitled to succeed by inheritance and pleaded that other similar ghatwali mehals belonging to Meghraj Singh had been sold in execution of decrees against him, and that plaintiff No. 1 had remained silent and made no claim with respect to them; and that in respect of the mehal in suit he had been perfectly well aware of the proceeding in the suit in which the sale took place, and had not made any objection thereto.

The lower Court held that the suit was not barred by limitation, and that the ghatwali tenure had not been abolished as pleaded by the defendant; that the practice alleged by the plaintiffs, that the eldest son succeeded the father as ghatwal, was proved; and that the tenure in suit was not divisible, but was transferable. The Court also found that the mehal was joint ancestral property subject to the Mitakshara law, and gave the plaintiff a decree for two-thirds of the mehal, and the defendants the remaining one-third, holding that to be the extent of Meghraj Singh's interest in the tenure.

During the course of a very lengthy judgment, in which the

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Court went very fully into the evidence and the authorities on the subject (the following case) were referred to: *Deendyal Lal* v. *Jugdeep Narain Singh* (1); *Rajah Lelanund Singh Bahadoor* v. *The Government of Bengal* (2); *Rajah Lelanund Singh* v. *The Government* (3); *Munrunjun Singh* v. *Rajah Lelanund Singh* (4) *Rajah Lelanund Singh Bahadoor* v. *Thakoor Munrunjun Singh* (5); *Leelanund Singh Bahadoor* v. *Thakor Munrunjun Singh* (6); *Hurlal Singh* v. *Jorawun Singh* (7); *Thakoor Kopilnath Sahi Deo* v. *The Government* (8); *Rajah Ram Narain Singh* v. *Pertum Singh* (9); *Chintamun Singh* v. *Nowlukho Konwari* (10); *Doorga Pershad Singh* v. *Doorga Konwari* (11); *Maharani Hiranath Koar* v. *Baboo Ram Narain Singh* (12); *Rajah Leelanund Singh* v. *Doorgabutty* (13); *Lalla Gooman Singh* v. *Grant* (14); *Grant* v. *Bangshi Deo* (15); *Jogeswar Sirkar* v. *Nimai Karmakar* (16).

The defendants being dissatisfied with that decision now appealed to the High Court and the plaintiff preferred a cross-appeal.

Mr. *Pugh* and Baboo *Rash Behary Ghose* and Moonshi *Mahomed Yusoof* for the appellants.

The *Advocate General* (Mr. *Paul*), Mr. *Evans* and Baboo *Nil Madhub Sen* for the respondents.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

TOTTENHAM, J.—This is an appeal from a decree of the Subordinate Judge of Bhagulpore made in a suit brought by the plaintiffs, respondents, to recover possession of a ghatwali mehal named Kharna from the defendants, appellants, who, or their predecessors, purchased it in 1868 at a sale held in execution of a decree against

(1) I. L. R., 3 Calc., 198.; L. R. 4 I. A., 247.
(2) 6 Moore's I. A., 101.
(3) S. D. A., 1860, 219.
(4) 3 W. R., 84.
(5) 13 B. L. R., 124.
(6) I. L. R., 3 Calc., 251
(7) 6 Sel. Rep., 169.
(8) 22 W. R., 17.
(9) 20 W. R., 189; 11 B. L. R. 397
(10) I. L. R., 1 Calc., 153.
(11) I. L. R., 4 Calc., 19 .; L. R. 6 I. A., 190.
(12) 9 B. L. R., 274.
(13) W. R., 1864, 249.
(14) 11 W. R., 292.
(15) 15 W. R., 38.; 6 B. L. R. 652.
(16) 1 B. L. R., (short notes) 7.

the then ghatwal, Tekait Meghraj Singh, father of the plaintiff No. 1.

The plaintiffs' case was that from the nature of the tenure in question, and under the principles of the Mitakshara law governing the Tekait's family, the alienation was invalid, and that plaintiff No. 1 as eldest son of Meghraj Singh was entitled to hold the estate on the death of his father, plaintiff No. 2 joined in the suit as purchaser from plaintiff No. 1 of five-eighths of the latter's interest.

The case is in many respects a peculiar one, and the decision of the lower Court partakes also of that character. Both sides have objected to it by way of appeal and cross-appeal.

In a case of this kind it might have been expected that the plaintiffs would have relied simply on the inalienable character of a ghatwali tenure, the purpose for which it was created necessitating its being protected from seizure and sale for debt, as well as its impartibility.

But the plaint shows that the plaintiffs rely chiefly on the Mitakshara law modified by a family custom that the eldest son alone succeeds to possession. It is alleged that the late holder, though by family usage sole possessor, was precluded by the Mitakshara law from encumbering or alienating the tenure, except for family necessity, without the consent of his son, the plaintiff, who was adult at the time the debt was incurred which formed the basis of the decree under which the sale took place.

The plaintiffs, therefore, evidently rely chiefly on the Mitakshara law, but further appeal to the nature of the tenure as rendering the sale invalid.

The peculiarity of the defence is that while it denies that plaintiff No. 1 acquired any right in the property under the Mitakshara law by his birth, and contends that the father was sole proprietor fully competent to deal with it, still it raises the plea of limitation on the ground that the right to sue accrued on the date of sale, whereas the suit was not instituted until more than twelve years afterwards.

And to get over the difficulty in regard to the seizure and sale of a ghatwali tenure, the defence alleges that the ghatwali tenure

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was long ago abolished, and so the property became Meghraj Singh's absolutely.

The somewhat mixed character of the pleadings may be accounted for thus. Plaintiffs must have felt some diffidence in trusting simply or chiefly to the nature of the ghatwali tenure as being indivisible and inalienable, for upon their own showing one of them had sold, and the other had bought five-eighths of it just before the plaint was filed; and they were doubtless fully aware that in fact numerous similar ghatwalis of Kharukpore, to which class the one in question belongs, had actually been sold. It was convenient, therefore, to put forward the Mitakshara law which does allow alienations for necessity, and moreover the chief inducement to bring the suit was probably the success of other suitors in recent years in recovering property sold for their father debts by the application of Mitakshara law. It was necessary, however, to fall back upon the nature of the tenure as a ghatwali in order to allow the plaintiffs to count the period of limitation from the time of Meghraj Singh's death, rather than from the date of sale, in the event of plaintiffs being unable to establish their allegation that plaintiff No. 1 was dispossessed only in 1287=(1879.)

The defendants would naturally wish to eliminate the Mitakshara law, except in so far as it might help their plea of limitation, and to contend that plaintiff No. 1 had no interest whatever in his father's lifetime, and could not object to any alienation effected during that period.

The lower Court evidently took infinite pains with the case, and recorded an extremely long and elaborate judgment. It found that the ghatwali had not been abolished: yet that it was transferable; also that it was a joint ancestral property subject to the Mitakshara law, modified only by the custom which operated in this case to make the period of limitation run from the death of Meghraj Singh, and not from the date of sale or of the adverse possession of the defendants, and finally that it was indivisible, and upon these findings it proceeded to give the plaintiffs two-thirds of the property, and the defendant one-third, which the Subordinate Judge held was the extent of Meghraj Singh's interest in the ghatwali tenure.

It appears to us that both parties are justified in objecting to

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the manner in which the case has been decided, for it seems clear either that the plaintiffs should have recovered the whole tenure, or that the suit should have been dismissed altogether. 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.

For we concur with the learned 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 Musulman 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, has its own particular incidents, and cannot be subject to any system of law affecting only a particular class or family.

We think, therefore, that the lower Court was misled in its recourse to authorities bearing upon the effect of the Mitakshara law on ancestral joint property whether partible or impartible; and as to the obligation of sons to pay the debts of their fathers, and the authorities cited on these points seem, therefore, to us to afford no assistance in disposing of this case.

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, *secondly*, if the alienation was bad, are the present plaintiffs entitled to recover the property? The second question also involves one of limitation.

As to the first question there is doubtless authority for holding that ghatwali lands are not alienable either at the pleasure of the ghatwal for the time being, or for the payment of his debts at the pleasure of his creditors. For the nature of the tenure and the reason of its existence, render it necessary that the holder of the office of ghatwal be secured in his enjoyment of the tenure.

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The principal case cited to us by the learned Advocate General for the plaintiffs, respondents, is that of *Rajah Nilmoni Singh* v. *Bakranath Singh* (1). But in that case the particular point decided by the Judicial Committee, Privy Council was that ghatwali lands could not be seized in execution of a decree for the debts of a former Ghatwal as assets by descent in the hands of his successor. Their Lordships, however, expressed an opinion that the same considerations on which the ghatwali should be held to be indivisible would make it inalienable. That case related to a jagir in West Burdwan to which police services were attached, and it was considered to be analogous to one of the Beerbhoom ghatwalis governed by Regulation XXIX of 1814. Another case was cited to us in which a Division Bench of this Court held in a Second Appeal No. 2451 of 1880 that a shikmi ghatwali could not be seized in execution of a decree for debt. That too was a Beerbhoom ghatwali, and the objection was taken by the shikmi ghatwal before any decree was obtained.

The Ghatwali in the present case is one of the Kharukpore ghatwalis, and as regards them the Judicial Committee noted, without expressing dissent, that transfers have taken place and have been recognized if made with the assent of the zemindar, while without that consent the Court has not recognized them. Precedents for these propositions are to be found in two cases mentioned by the lower Court. *Rajah Lelanund Singh* v. *Doorgabutty* (2) and *Lalla Gooman Singh* v. *Grant* (3).

These decisions have not been overruled, but the Judicial Committee point out this distinction between the ghatwals of Beerbhoom and of Kharukpore, that the former are appointed by Government and the latter by the zemindar.

As to the Beerbhoom ghatwals Regulation XXIX of 1814 expressly provides that they and their descendants in perpetuity shall be maintained in possession of the lands so long as they pay their revenue, and fulfil the other obligations of their tenure.

It has been argued that the Kharukpore ghatwals are on the same footing as those of Beerbhoom, but this does not appear

(1) L. R., 9 I. A., 104. (2) W. R., 1864, 249. (3) 11 W. R., 292.

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to be the case; for besides there being no statutory provision in their favour, it appears from a description given of their status in the judgment of the Privy Council in the case of *Raja Lelanund Singh Bahadoor* v. *The Government of Bengal* (4) that the zemindar retained in his hands the power of appointing and dismissing the ghatwals in case of their not performing the duties. This seems to negative a right to hold from generation to generation on payment of the rent reserved. Be that as it may, we think that 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 considerations of the long silence of the present plaintiff No. 1, and the silence too of his father while he lived, that a Kharukpore ghatwali is transferable, if the zemindar assents and accepts the transferee; and in the present case we think the lower Court was justified in holding that the zemindar by making no objection within twelve years of the sale acquiesced in it, and that the transfer was, therefore, one which the Court ought to recognize, and looking to the fact that the purpose for which the Kharukpore ghatwalis were created no longer exist, we should greatly regret being compelled to come to a contrary conclusion. We accordingly decide the first question in favor of the defendants, appellants, and hold that the sale was not invalid by reason of the inalienability of the ghatwali tenure.

And upon the second point, too, we think the plaintiffs must fail.

For only as ghatwals duly appointed by the zemindar could they establish any claim to possession of the tenure, and they nowhere allege that they have been appointed ghatwals. Their case was that plaintiffs had a vested interest by his birth in the ghatwali, but this we have shown to be untenable.

The result is that we decree the appeal of the defendants, and dismiss the plaintiffs' suit with costs of both Courts.

Appeal allowed.

(4) 6 Moore's I. A., 101.