

1885 the parties were bound by the former decision; but that
 MADAN s. 43 barred the suit, so far as it related to damages, which,
 MOHAN LAL having been already sustained at the time when the prior suit
 v. was brought, might have been included therein. The judgment
 LALA SHRO- was brought, might have been included therein. The judgment
 SANKER of the Court is reported in *I. L. R., 9 Calc., 145.*
 SAHAI.

From this decree the plaintiff, Hridi Narain Sahu, obtaining special leave, appealed.

On his death, the present appellants, as heirs of their father, obtained substitution of their names for his on the record.

On this appeal,—

Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon*, appeared for the appellants.

Mr. *J. Graham, Q.C.*, and Mr. *H. Cowell*, for the respondent.

For the appellants it was argued that the claim for damages, as measured by the profits of the years 1284 and 1285 F. was not, as regards so much of the damages as had been incurred in that period, barred by the provisions of the Code.

Their Lordships, however, without calling on counsel for the respondents, intimated that the judgment of the High Court was correct as regarded the matters in question.

C. B. *Appeal dismissed with costs.*

Solicitor for appellants: Mr. *T. L. Wilson*.

Solicitors for the respondent: Messrs. *Barrow and Rogers*.

P. C. * RAM CHUNDER SINGH (PLAINTIFF) vs. MADHO KUMARI AND OTHERS
 1885 (BY THE COURT OF WARDS) (DEFENDANTS.)
 June 19, 20, [On appeal from the High Court at Calcutta.]
 28.
 July 11.

Res-judicata—Civil Procedure Code Act X of 1877, s. 13—Matters directly and substantially in issue in a suit—Limitation—Adverse possession.

Where a decree, awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties: *Held*, that the contest of title was conclusive between them under s. 13 of Act X of 1877.

* *Present*: LORD MONKSWELL, LORD HOBHOUSE, SIR B. PEACOCK and SIR R. COUCH.

In a suit brought by a ghatwal to resume, as determinable at will, an under-tenure granted by one of his ancestors of land, part of the ghatwali mehal, it was alleged for the defence that the under-tenure was permanent.

A prior judgment upon conflicting claims made by the ghatwal and the under-tenure holders to receive the abovementioned compensation money, which had been paid in respect of lands in part comprised in the under-tenure, determined that the ghatwal was entitled to the money, being founded on the under-tenure-holders having been in possession of it by the mere sufferance of the ghatwal, who could put an end to it at any time: *Held*, that the question whether the latter had a permanent tenure, having been directly and substantially in issue in the former suit, could not be contested in another.

Limitation having been set up in bar of the suit, *Held* that, after the creation of the under-tenure, as long as there was no dispute or conflicting claim, the possession of it was not adverse to the ghatwal; and proceedings, either between the ghatwal or between under-tenure-holders on the one side and creditors on the other, could not be taken to show an assertion of right by either of the parties now in litigation, as against one another.

There being nothing else to render the possession adverse, limitation only commenced at the date of the abovementioned claim to the compensation money which was made less than twelve years before the present suit was brought; and accordingly the suit was not barred.

APPEAL from a decree (27th July 1882) of the High Court (1), reversing a decree (26th November 1880) of the Subordinate Judge of Deogurh.

The questions now raised were whether the claim was barred by limitation, as it had been held to be by the High Court and also whether the appellant's right had been conclusively determined between the parties by a prior judgment, within s. 13 of Act X of 1877. The first question was decided in the negative, the judgment of the High Court (1) being reversed; and the second question in the affirmative.

The suit out of which this appeal arose was brought by the ghatwal of a mehal, named Pathrole, to resume a grant of a mouzah, named Taraf Lalghur, within the limits of the mehal; the grant having been made by one of the ghatwal's predecessors in estate in favor of the father of the last male possessor of Taraf Lalghur. The ghatwali estate was a mehal of Surat Deoghur in the zamindari of the Raja of Nagore, and having been originally

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(1) *Moiho Koeri v. Thekai Ramchunder Singh*, I. L. R., 9 Calc., 411.

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comprised in the decennial and permanent settlement of Birbhum zillah, though now in the Sonthal Pergunnahs, came under Regulation XXIX of 1814 (1). Taraf Lalghur, the disputed mouzah (as to which no sanad was forthcoming) was granted about A.D. 1800 by Thekait Dighbijai Singh, the great-great-grandfather of the present ghatwal, to his second son Thakur Kanhaya Lal Singh, by way of a mokurari kharposh lease, or fixed lease for maintenance, at the rent of Rs. 103 per annum. This grantee was succeeded by his son Bunwari Lal Singh, who died in 1865 leaving the widows who were respondents on this appeal, now represented by the Court of Wards.

The present ghatwal (whose father, Thekait Kharagdari Singh, son of Thekait Bharut Chunder Singh, and grandson of the said Dighbijai, died in 1865) obtained the management of the ghatwali in 1873; the estate having been during his minority also under the management of the Court of Wards. The following are the principal proceedings relating to Taraf Lalghur, referred to in their Lordships' judgment.

First, the decision of 1853 in which Taraf Lalghur was, on the petition of the above named Thekait Bharut Chunder, declared to be incapable of being attached for debts due by the ghatwal. Reported as *Santuk Chunder Dey v. Bhagat Bharut Chunder Singh* (2).

Secondly, the decision of the Commissioner of the Sonthal Pergunnahs (Mr. Yule), dated 23rd October 1857, to the effect that Lalghur being within the ghatwali mehal of Pathrole could not be sold in execution of a decree against the abovenamed Kanhaya Lal Singh, inasmuch as it was not lawful for a ghatwal to alienate permanently lands in his mehal.

Thirdly, a suit to establish the ghatwal's right to receive Rs. 15,125, the compensation money deposited by the East Indian Railway Company in the Deogurh Treasury for 1,765 bighas of land (Act X of 1870, s. 39), within the limits of the

(1) Entitled "A Regulation for the settlement of certain mehals in the District of Birbhum usually denominated the ghatwali mehals." It determined certain rights of the ghatwals, the zemindars and the Government, respectively, as to these mehals.

(2) S. D. A., 1853, p. 900.

ghatwali mehal, part of such land, viz., 832 bighas, being not only within Pathrole but also within Lalghur, of which the then holder, Bunwari Lal, claimed a proportionate part of the compensation money; another claimant being the zemindar as to the whole. Apportionment was decreed in 1875 by the Subordinate Judge of Deogurh, but on appeal this decision was reversed by the High Court. See *Ram Chunder Singh v. Mahomed Johur Juma Khan* (1) in March 1875.

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The present suit was brought on the 25th June 1879, for khas possession of Taraf Lalghur, with a declaration that the mokurari kharposh lease granted by Digbijai to Kanhaya Lal was not binding on the present ghatwal, also for mesne profits from 1282 to 1285 (A.D. 1876 to 1879.) The defendants, besides alleging limitation, set up that the grant of Taraf Lalghur to Kanhaya Lal, through whom they claimed, was a "shikmi ghatwal" tenure, or dependent estate of the same nature as the ghatwali, the grantee being bound to perform services in subordination to the ghatwali, and that it had, since that grant in 1800, been held by the defendants and their predecessors at the same rent; thus indicating that the grant was permanent.

Issues having been fixed as to limitation, and as to whether the decision of 1875 did not conclude the defendants under s. 13 of Act X of 1877, the Subordinate Judge of Deogurh decided that, whether the defendants were mokuraridars or not, limitation did not bar this suit; time having only commenced to run against the plaintiff from the date when he first had notice that the defendants, or those through whom they claimed, insisted that the under-tenure was permanent. This was not before 1875, when the litigation as to the compensation money took place. He referred to *Mukuribhanoo Deo v. Kostoora Koorwaree* (2), which case, however, related to grants prior to the decennial settlement, the present grant having been made after the permanent settlement; also to *Grant v. Bangsi Deo* (3), deciding that a ghatwal is not competent to grant in perpetuity, and that his successors need not recognize such an act; and to Regulation XXIX of 1814; and the Subordinate Judge held that the grant of

(1) 23 W. R., 376.

(2) 5 W. R., 215.

(3) 6 B L. R., 652; 15 W. R., 38.

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Taraf Lalghur, whatever it had been, was not binding on the present ghatwal. He, therefore, decreed in the plaintiff's favor.

On the defendants' appeal, this decision was reversed by the High Court (TOTTENHAM and BOSE, JJ.) on the ground of limitation. They held that the possession of the defendants had become adverse to the plaintiff on the death of his father in 1865, until fourteen years after which date the present suit was not brought, and was therefore barred. The judgment is reported in I. L. R., 9 Calc., 413.

On this appeal,—

Mr. C. W. Arathoon, for the appellant, argued that the suit was not barred by limitation. He referred to *Shaik Moddeen Hossein v. Lloyd* (1) in which limitation was held to run from the time when a mukurari lease had been set up against the claimant, and to *Tekaetri Goura Coomaree v. Saroo Coomaree* (2), showing that limitation does not begin to run until notice of the setting up of such mukurari. Here, on the contrary, there was no date, before 1875, from which limitation could be reckoned; no reason existing why the High Court should have fixed upon the date of the death of the plaintiff's father as the commencement of the twelve years' bar. In fact, until the proceedings relating to the compensation money in 1875, the possession of the under-tenure was not treated by either party as other than permissive. Not being barred by limitation, the plaintiff could insist that a judgment given on the point in 1875 prevented the defence being set up that the under-tenure was perpetual. In *Ram Chunder Singh v. Mahomed Jokur Juma* (3) (the suit relating to the compensation money), it had been decided that the tenant through whom the defendants now claimed was in possession by the mere sufferance of the ghatwal. This was a bar to the defence under s. 13 of Act X of 1877. Also, on this point, if the question could be re-opened it would be found that the so-called mukurari kharposh tenure was no permanent tenure, the ghatwal not having been able to alienate the ghatwali lands in perpetuity, and on this point the judgment of the Subordinate Judge was correct.

(1) 15 W. R., 232.

(2) 2 Suth. P. O. Judgments, 806.

(3) 23 W. R., 376.

He referred to *Grant v. Bangsi Deo* (1); *Rungololl Deo v. The Deputy Commissioner of Birbhūm* (2); *Binode Ram Sein v. The Deputy Commissioner of the Sonthal Pergunnahs*, (3); *Ram Chunder Singh v. Mukomed Johur Juma* (4).

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Mr. J. Graham, Q.C., and Mr. J. T. Woodroffe, for the respondents, argued that the suit was barred by limitation as decided by the High Court. Reference was made to *Babaji v. Nana*, (5) and *Pitamber Babu v. Nilmoni Singh Deo* (6).

If the suit was not barred, then the tenure was not resumable as it was claimed that it was. It had been granted for the maintenance of a junior branch of the family as a kharposh tenure and was a division of the ghatwali interest. It was an under-tenure in the sense that performance of ghatwali services was required in subordination to the ghatwal of the parent estate.

The nature of the tenure was not *res-judicata* between the parties, either in consequence of the judgment of 1875 or any other proceeding. The respondents had not been duly represented when that judgment was given, and were not bound by it—Bengal Act IV of 1870.

They referred to *Nilmoni Singh v. Bakranath Singh* (7); *Rao Bahadur Singh v. Mussumat Jowahir Kuar* (8); *Hurlal Sing v. Jorawun Sing* (9).

Mr. C. W. Arathoon replied.

On a subsequent day, July 11th, their Lordships' judgment was delivered by

LORD MONKS WELL.—Thekait Ram Chunder Singh, ghatwal of a large estate named Pathrole, brings this action to eject from Lalghur, a subordinate tenure within its ambit, the defendants, who are widows of the last holder of it, Bunwari Singh, and are under the protection of the Court of Wards. He claims the right to resume that tenure at will, and further asserts that his right to this resumption has been conclusively decided in a

- (1) 6 B. L. R., 652; 15 W. R., 38. (4) 23 W. R., 376.
 (2) 1 Marsh., 117. (5) I. L. R., 1 Bom., 535.
 (3) 7 W. R., 178. (6) I. L. R., 3 Calc., 793.
 (7) I. L. R., 9 Calc., 187; L. R., 9 I. A., 104.
 (8) I. L. R., 10 Calc., 887; L. R., 11 I. A., 75.
 (9) 6 Sel. Rep., 169.

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previous suit between the same parties. The defendants claim to hold a ghatwali tenure, from which they could not be dispossessed, on the payment of a fixed rent ; they deny that the question had been decided as alleged, and set up the plea of limitation. The Subordinate Judge found for the defendants on the plea of *res-judicata* and for the plaintiff on the plea of limitation, and gave the plaintiff a decree on the ground that the tenure was resumable at will.

The High Court reversed this judgment, finding for the defendants on the plea of limitation only. From that judgment the present appeal is preferred.

The following facts appertain to the history of the tenure :—

One Digbijai Singh was the ghatwal of Pathrole about the beginning of this century.

The property held by the defendants called Taraf Lalgur was granted by him to one of his younger sons, Kanhaya Singh, for maintenance in or before 1804 ; for receipts of rent are put in, one in 1805 for rent due in 1804.

In 1800 or 1801 a settlement for ten years seems to have been made with Digbijai, another settlement at the expiration of that for three years, and another in 1813-14 for ten years, which became permanent by the operation of Regulation XXIX of 1814. We hear little or nothing more about it till 1853, when a proceeding took place before the Judge of Birbhumi, which arose in this way. Some creditors who had obtained decrees sought to execute them against the owners of ghatwalis, among them Bharut Chunder Singh, grandfather of the plaintiff, ghatwal of Pathrole, and Kanhaya Singh, ghatwal (as he described himself) of taluk Lalgur. The ghatwals contested the right of the judgment-creditors to seize their estates in execution, whereupon an order was made for the release of the estates from attachment, which was confirmed on appeal to the Sudder Dewani Adalat in May 1853. The Court gave judgment in these terms :—

“The Court are of opinion that, under the law, the ghatwali tenures of Birbhumi being not the private property of the ghatwals, but lands assigned by the State in remuneration for specific police services, are not alienable, nor attachable for personal debts.”

In a similar proceeding in 1857 a decision to the same effect was arrived at, and a notice was sent to Bharut Singh that the grant to Kanhaya had not given Kanhaya any right in mouzah Lalghur, but as far as we know Bharut took no action on this, nor does any assertion or counter-assertion of rights appear to have taken place between the holders of Pathrole and the owners of Lalghur, till the time which will be hereafter referred to. It further appears that the owners of Lalghur have been treated as bound to perform, and, indeed, have performed, the police duties incident to their tenure; this is recognized by a perwana from Bharut to Bunwari in 1855, and by a further perwana from the Assistant Commissioner of the Sonthal Pergunnahs in 1873.

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The first question in the case to be determined is whether the contest of title between the parties is *res judicata* under Act X of 1877, s. 13, which is in these terms:—

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties or between parties under whom they or any of them claim, litigating on the same title.”

The plaintiff's father died in 1865, leaving him a minor. During his minority, which ended in 1873, the rent of Lalghur was paid by Bunwari to the Court of Wards on his behalf, and no question of title or conflicting right arose. On his attaining majority some time in 1873 he brought a suit against Bunwari, claiming against him the whole of the compensation money which had been paid into Court by the East Indian Railway Company in respect of land in Lalghur, which had been taken by the Company, Bunwari claiming a share in that money.

Pending the suit Bunwari died; his widows were substituted for him, and the Subordinate Judge decided in their favour, giving them a considerable part of the compensation money.

On appeal to the High Court this judgment was reversed.

The contention of the respective parties and the ground of the judgment, are so clearly stated by Mr. Justice Romesh Chunder Mitter, that their Lordships think it well to give the following extracts from his judgment:—

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"This suit was instituted on behalf of Ram Chunder Singh, minor, who has now attained his majority, for obtaining Rs. 15,125-11-6 deposited in the Government Treasury of Deoghur, being the compensation money for 1,765b. 9c. 14ch. of land appertaining to the ghatwali taluk Pathrole, taken for the construction of a railway. The allegation of the plaintiff is that he is entitled to the whole of this compensation money, and the defendants having unjustly claimed the same, it has been detained in the Treasury, leaving the contending parties to have their respective rights settled by a competent Civil Court.

"The defendant Bunwari Lal alleged in his written statement that he holds a sub-tenure in the plaintiff's ghatwali mehal, charged with a fixed annual rent of Rs. 104; that a portion of the lands taken falls within his sub-tenure, the compensation money in respect of which was therefore due exclusively to him."

Then, after disposing of certain claims by other parties, the learned Judge continued :—

"Then we come to the claim put forward by Bunwari Lal. It is evident that he held a subordinate tenure within the plaintiff's ghatwali mehal, and the said tenure is still in the possession of his widows. It has also been established upon the evidence that his tenure was created by an ancestor of the plaintiff to provide for the maintenance of a junior branch of the ghatwal's family. It has been contended on behalf of the plaintiff that it is not sufficient to show that Bunwari Lal during his lifetime was in possession, and his legal representatives are still in possession, of this subordinate tenure, but that it must be established that Bunwari Lal was, and the widows are still, in rightful possession of it, and that it is of a permanent nature, so that the superior ghatwal cannot at his will determine it. I think that this contention is valid. These defendants, it appears to me, are not entitled to any share in the compensation money, if it can be shown that they are allowed to remain in possession of the subordinate tenure by mere sufferance of the superior holder, who can at any moment put an end to their possession. From the nature of the tenure held by the plaintiff, it follows that the arrangement made by his ancestor to provide for the maintenance of a junior branch of

the family is not binding upon him. He is fully competent to resume possession of these lands (*vide* 6 B. L. R., p. 652).

"Bunwari Lal, therefore, not having during his lifetime any valid right to any portion of the lands taken, his representatives are therefore not entitled to receive any share in the compensation money, the whole of which, therefore, should be paid to the plaintiff.

"But the plaintiff is a ghatwal. His title is not that of an absolute owner. He is only entitled to enjoy the profits of the ghatwali mehal during his life, without power of alienation. The compensation money in deposit is only a money equivalent to a portion of that mehal."

From this judgment there was no appeal. Their Lordships are of opinion that the very question in this cause, *viz.*, whether the defendants held a permanent tenure, or whether the plaintiff was entitled to resume it at pleasure, was directly and substantially in issue between the parties, and has been finally decided between them.

Their Lordships are relieved, therefore, from deciding what the rights of the respective parties really were, a question which, if it had been open, might have been attended with difficulty.

The question of limitation remains. The provision in Art. 144 of the second schedule of Act XV of 1877, which gives twelve years as the period of limitation from the time "when the possession of the defendant becomes adverse to the plaintiff," appears the only provision applicable to the case.

Their Lordships understand the judgment of the High Court to be, in effect, based on these considerations.

The tenure set up by the defendants being of a permanent character, was adverse for a long period of time to the claim of the plaintiff and his ancestors, which was to resume the tenure at will; that it was not the less adverse on account of the payment of rent, which was an incident of the tenure; that the statute began to run against the plaintiff on the death of his father in 1865, when his title accrued, although he was not recognized by the Government as ghatwal till his majority; that as he did not bring this suit till five or six years after he became

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of age, he was barred by the statute. Their Lordships are unable to assent to this view.

It can scarcely be contended that immediately on the creation of the sub-tenure the possession of it became adverse when there was no dispute or conflicting claim. If not so, when did the possession become adverse? It has been contended that it became adverse in 1853, when notice was given by the Court to Bharut Chunder that the grant to Bunwari conferred no title against him, and that he could eject Bunwari at pleasure. But the proceeding was wholly between creditors and ghatwals holding tenures or under-tenures. There were no proceedings hostile or otherwise between the ghatwals and the sub-tenure-holders, each of whom was content to go on as before without any definition or assertion of right by either party. The same state of things continued after the death of Kharagdhari Singh, the plaintiff's father, when the rent was paid to the Court of Wards on behalf of the plaintiff during his minority.

In their Lordships' opinion no adverse possession, within the meaning of the statute, is proved to have existed until the institution of the suit in 1873, when the claims of both parties were undoubtedly adverse, and the statute began to run only from that time. If so, the plaintiff is not barred by limitation.

On these grounds their Lordships are of opinion that the judgment of the High Court must be reversed, and judgment given for the plaintiff, and they will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

C., B.

Appeal allowed.

Solicitor for the appellant : Mr. T. L. Wilson.

Solicitor for the Court of Wards, respondent : Mr. H. Treasure.