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shall lie from all decisions passed in regular appeal," &c. An *ex parte* decree is none the less a "decision passed in regular appeal," because *ex parte*, and it is nowhere provided by any law that there shall be no appeal from a decree because *ex parte*.

I am, therefore, of opinion that a special appeal does lie from an *ex parte* decision passed by an Appellate Court in regular appeal.

The present appeal arises out of an order made in execution of a decree, but, under sections 11 and 38 of Act XXIII. of 1861, the ordinary rule of procedure applicable to civil suits before final judgment will apply.

I think this appeal will lie, and that the decision of the lower Appellate Court ought to be reversed with costs, and that the original order of the Subordinate Judge declaring that these decrees cannot be set off under section 209 ought to be affirmed.

Before Mr. Justice Loch, and Mr. Justice Glover.

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Dec. 16.

RAJA LILANAND SING BAHADUR, v. THE GOVERNMENT AND THAKUR MANORANJAN SING AND TEKAIT LOKNATH SING.*

Ghatwali Tenure—Resumption—Compensation.

In the Kuruckpore ghatwali mahals, the profits of the lands, minus the the quit-rent paid to the zemindar, were the remuneration given to the ghatwals for police services. Government illegally resumed those lands, dispensing with the services of the ghatwals, and settled the tenures with the ghatwals, at half the rates current in that part of the country. The resumption proceedings having been set aside, it remained to determine to whom, and in what proportions, Government should refund the half jumma taken by it as rent from the ghatwals, during the period of settlement. *Held* that, inasmuch as the ghatwals rendered no service during the period of settlement, the moiety of the jumma retained by them was ample compensation for any loss they might have sustained; and the zemindar was entitled to receive the whole of the moiety taken by Government partly as quit-rent due to him, and partly as compensation for loss of the ghatwals' services during the continuance of the settlement.

THIS was an application to the High Court for review of a decision of the late Sudder Court, sitting as Special Commissioners, on the 17th April, 1852, and is supplemental to the class of

* Application for Review, No. 2529 of 1856, of the judgment of the late Sudder Court, exercising the powers of Special Commissioners, passed in Special Commission Appeal, No. 2529, on the 17th of April, 1852.

ghatwal cases from Bhagulpore, arising out of the resumption suit which terminated in the appeal of Raja Lilanand Sing to Her Majesty in Council (1).

The question of mesne profits was remanded by Her Majesty's Privy Council on 4th February, 1864, (2), who directed an enquiry as to the title and distribution of the fund held in deposit by the Bengal Government as the accumulated jumma received by Government from the ghatwals during the period that the settlement with them, which was afterwards cancelled, took effect. These collections were claimed both by the zemindar and by the ghatwals.

From the decision of the Special Commissioner in the resumption cases, dated 17th April, 1852, it appeared that Manoranjan Sing and other ghatwals were subjected to resumption and settlement, "with the exception of Rupees 215-11, the amount of *zar-i-mal*, or rent specified in the sanad," as the quit-rent of the zemindar. The Counsel and Vakeels of the ghatwals offered, on this hearing, to submit, upon refund, to a deduction from the collections under the settlement and the title which were the subject of this enquiry on account of any *sirhee*, or quit-rent that might be shown to be due to the zemindar.

On behalf of some of the ghatwals—those, *viz.*, who held under a zemindari sanad only—an office copy was filed of the judgment delivered by Trevor and Campbell, JJ., in that class of cases, which, as it is certainly important, and has not before been printed, is given in a note at the end of this report.

Mr. *Paul* (with him Mr. *R. E. Twidale*) for the petitioner, Raja Lilanand Sing contended that the whole of the fund should be ordered to be made over to the Raja. The Privy Council, in the order directing an enquiry as to the distribution and apportionment of the fund, observe as follows :—

"That a portion of the fund belongs to the zemindar, their Lordships think highly probable, if on account of his quit-rent or quit-rents fallen into arrear ; but possibly also he may have a just claim on more than this portion, or even the whole fund, in respect of services the ghatwals were, or had been, under an

(1) 6 Moore, I. A., 101. (2) 9 Moore, I. A., 479.

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obligation to perform, and have from any cause whatever not performed."

After the resumption by Government, the ghatwals attorned to Government, and entered into settlements on the principle of half jumma, dividing the profits (which originally represented the amount of wages) between Government and themselves. By this arrangement the ghatwal services were put an end to, and the ghatwals became either maliks or independent talookdars. This status the ghatwals had at no time previous held (3). The profits, originally appropriated by the ghatwal represented the wages of himself and servants (1).

In these cases the funds in the hands of the Government represented half the profits of the land, and it was difficult to see on what principle any portion of the fund belonged to the ghatwal. The zemindar, throughout the long period of time Government remained in possession under the resumption proceedings, had lost the services of the ghatwals, who, in their turn, had given up service, and had not disbursed anything in respect of retainers they were bound to have kept up. Under these circumstances, the zemindar was clearly entitled to the fund. It was also shewn that, in several instances, the wages of watchmen far exceeded the amount of half jumma paid to Government. Further, the ghatwals had taken part with Government against the Raja. They had voluntarily entered into settlements with Government. The Raja had thrown on him the whole burden of the litigation, which led to the reversal of the resumption proceedings. It was conceded, Government had no title to the fund. It was, accordingly, contended that the ghatwals having voluntarily paid the half jumma, and having entered into settlements highly beneficial to themselves, and having done nothing to get rid of their settlements, had not a shadow of title to the fund in question.

Mr. *Montriou* (with him Baboos *Lakhi Charan Bose* and *Chandra Madhab Ghose*) for Tekait Manoranjan Sing, Ghatwal.—The Lords of the Judicial Committee have carefully avoided prejudging the title to the fund now held by the Govern-

(1) 6 Moore, I. A.. 124.

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ment as stake-holder; and there is no need to search for any leaning or suggestion in the expressions accompanying the direction of this reference: the ghatwals could be no losers, if the views of the Judicial Committee be sought in their judgment. The zemindar of Kuruckpore successfully contested the claim of Government to collect revenue from Manoranjan Sing and the other ghatwals, upon the ground that the Government revenue of the ghatwal estates was included in, and covered by, the zemindari jumma of the permanent settlement; and that, therefore, the Government could have no direct dealings with the tenants of those estates, within the zemindar's *ilaka*. The second and remaining question of the resumption suits,—*viz.*, whether the ghatwal lands were at all resumable—was, necessarily, left open. That question has been (directly or indirectly) since tried by the zemindar, with various success. The status of Manoranjan Sing was determined on the 17th June, 1865, as being of an independent character, and not subject to the caprice of the zemindar or the executive arrangements of Government (1). The zemindar was, for a series of years, wrongfully deprived of his superiority, and he is entitled to recover, as damages or mesne profits, from the Government who usurped his rights, whatever the Government, during that interval, collected, *i. e.* rightly collected, from the zemindar's subjects and tenants in virtue of the usurped power. But the argument for the zemindar proceeds on the fallacious assumption that the fund now in dispute, *i. e.* the rents paid by the ghatwals under the compulsory and void settlement, might have been collected by the zemindar himself, had he not been ousted of his superiority. The position of the ghatwal, at the date of the wrongful resumption, is shown by the rubakary and order of the Special Commissioner, *viz.*, of 17th April 1852. So that, even irrespective of the judgment in my client's favor in the zemindar's suit against him, there is nothing to show —there is everything to disprove—that the zemindar could have claimed a pice other than what has been his admitted due all along, and with which the Government did not meddle, *viz.*, his quit-rent. If the zemindar has any arrears of quit-rent due, let him receive

(1) 3 W. R., 84.

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them out of our fund, the debt due to us from Government, the rent or revenue collected under a usurped title.

No question arises on that score, but he claims the whole—surely without a shadow of title or just pretension! The Government treats the ghatwal, virtually, as a lakhirajdar, and thereupon imposes khiraj. It is finally decided that the ghatwal lands are already assessed *viz.*, in the jumma of the Kuruckpore zemindari. The khiraj, or assessed revenue, has, therefore, been wrongfully taken, *i. e.*, a second time, without lawful ground or excuse.

To whom can such wrongful cess be returned but to the payer? Why is the ghatwal to pay the zemindar, because the Government has mistakenly ignored the zemandari right? The ghatwal is no trespasser, no wrong-doer; and it is altogether an error to treat the assessment of half-jumma imposed upon him as a voluntary payment, or as a voluntary change of his status. The entire argument for the zemindars is a fallacy.

Baboos *Krishna Kishore Ghose* and *Jagadanand Mookerjee* for Government submitted to the decision of the Court, Government being a mere stakeholder.

The judgment of the Court was delivered on the 25th August 1868, by

LOCH, J.—This case arises out of the proceedings of Government to resume the ghatwali lands in Mahal Kuruckpore. On the appeal of Raja Lilanand Sing, the Privy Council, on 25th July, 1855, held that the ghatwali lands in the zemindari of Kuruckpore were not liable to resumption and re-assessment under the provisions of clause 4, section 8, Regulation I. of 1793, which related to simple police establishments; and they set aside the resumption and gave a decree for mesne profits in favor of the Raja appellant. The mesne profits which Government had to refund consisted of the rent or revenue paid by the ghatwals whose lands were resumed, and with whom a settlement had been made at half jumma, which settlement was in force so long as the resumption decrees were not set aside. On the strength of the

decree he had obtained in the Privy Council in July, 1855, Raja Lilanand Sing applied for a review of judgment in all the other cases in which ghatwali lands, in the zemindari of Kuruckpore, had been resumed; and the review was admitted, and a decree passed in 1860 by three Judges of the late Sudder Court, sitting as Special Commissioners, who reversed the order for resumption, but declined to determine the question as to mesne profits which had been realised by Government. On that occasion the Court said: "As to the wasilat which has "been taken by the Government from the parties in possession, "if the contest before us was confined to the simple question "whether the Government was liable or not to the zemindar fort "the amount, we should have no hesitation in declaring tha "as the Government officers are held to have had no valid "ground for the proceedings under which they resumed and "assessed the lands, dispensing with the services previously "rendered by the ghatwals, and not showing that any expendi- "ture was made for the employment of others in their place "and vocation, so they cannot be allowed to appropriate these "collections for the benefit of the State, on the grounds and "assignments set up by the Government pleader in this case. "But the contest is not confined to this question, but involves "the rights of the applicant and others, the ghatwals, not "now before the Court, whose rights are altogether denied by "the zemindar to receive the refund. Now, *primâ facie*, the "right to receive the sums collected, with deductions for quit- "rent due to the zemindar, is with the ghatwals, and with "the applicant before us. But be that as it may, it is not "within the competency of this Court, acting as Special Com- "missioners, under Regulation III. of 1828, summarily to "determine a question of disputed private right of this nature, "the more especially when one of the parties interested has "not appeared before us, and is probably ignorant that such a "question would be mooted in these proceedings. Such questions "must be left to be decided by the regular Civil Courts of the "country. It is only necessary to add, that as the resumption "proceedings have been determined to be contrary to law, we "award to the zemindar the entire costs of these proceedings in

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"the resumption Courts, with interest thereon, from the date on "which he filed his application for review of their judgment."

From this judgment Raja Lilanand Sing again appealed to the Privy Council, who, on 4th February 1864, expressed themselves on the question of mesne profits as follows (1): "The "Judges, therefore, who made the decree of 1860 should, in their "Lordships' view of the matter, not have been silent as to the "title to the money, but have declared and acted on it, if able, "from the materials and parties before them, to do so, or, if not "so able, have directed an enquiry to ascertain the person or "persons entitled. Now the ghatwals were not represented, or "were imperfectly represented, before the Courts when the "decree of 1860 was made, and their Lordships, from the "materials before them, are not satisfied that a portion at least "of the fund does not belong to the ghatwals from whom "it was received, or their representatives. In using these "expressions their Lordships treat the controversy as extending "to all the sums received by the Government, under the "resumption or re-assessment, though their conclusion would "be substantially the same if it were treated as confined to the "fund strictly subject specially to the particular proceeding "in which the order of 1855 or the decree of 1860 was made. "That a portion of the fund belongs to the zemindar, their "Lordships think highly probable, if on account of his quit-"rent or quit-rents fallen into arrear, but possibly also he "may have a just claim on more than this portion, or even "the whole fund, in respect of services which the ghatwals were, "or had been, under an obligation to perform, and have, from "any cause whatever, not performed. Subject to that deduc-"tion, or those deductions, as the case may be, in favour of the "zemindar, there appears to their Lordships a title fit to be "considered to the whole fund in the ghatwals, who were in the "actual enjoyment of the lands, or their representatives. But "their Lordships are of opinion that they have not, and that "in 1860 the Judges of the Sudder Dewanny Adawlut (the "Special Commissioners) had not before them sufficient mate-"rials to enable them to direct safely, or without hazard to

(1) 9 Moore, I. A. 49.

"justice, the payment, apportionment, or distribution of the "fund or any part of it; and that, accordingly, the decree of 1860, "should be added to, and that it should be declared that Special "Commissioners, the Judges of the Sudder Dewanny Adawlut, "had and have jurisdiction to decide upon the true title to "the funds in question upon this appeal, and to direct the "payment and disposition of those funds with interests accord-"ingly; but that at the hearing on which the decree under "appeal was made, it did not sufficiently appear who was or were "the person or persons justly entitled to the money, and that "an enquiry ought to have been directed by the Court on that "subject; and that with this declaration the cause should be "remitted to India in order to be further dealt with by the "Special Commissioners on that footing. We conceive that "the Government ought to pay the costs of this appeal. Their "Lordships will humbly advise Her Majesty accordingly."

Since the order passed by the Privy Council in 1864, these cases have more than once been before the Court, and the parties desire that they may, if possible, be disposed of from the materials now before the Court. We think that it is quite possible for the Court to lay down the principle upon which the refund should be made, leaving it to the Court executing the decree to carry out such details as may be necessary. We may observe here, that the settlement made with the ghatwals, for the lands found in their possession, was at half rates; the Government took half the sum assessed as the revenue, and left the other half in the hands of the ghatwals to cover costs of collection and profits. No provision appears to have been made for the payment of the quit-rent to the zemindar. We are informed that the ghatwals who claim right to the mesne profits, are divided into four classes: 1*st*, those who are in possession of their ghatwali lands, as the respondent in this case; 2*nd*, those who have lost possession since the settlement, the estate having been sold for arrears of Government revenue; 3*rd*, those who have compromised with the zemindar; 4*th*, those who have lost possession under sales for arrears of revenue, and the purchasers have compromised with the zemindar. We think that one principle will be applicable to all cases. In those cases which come under class 3, the ghatwals can get

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nothing; in those which come under class 4, the purchaser's compromise will not effect any right the ghatwal may have had prior to the transfer of the lands to the purchasers.

Now, what is the theory of the ghatwali lands? They are assigned to the ghatwals for maintenance in return for, and in payment of, police duties performed by them, and this remuneration they receive in lieu of wages in money. The profits of the ghatwali lands, therefore, may be said to represent the wages which, if paid in money, would have been paid to the ghatwals for their services. Till the resumption took place, these profits (and ex-profits I mean, after the usual deductions for expenses of cultivation) were subject to a small demand on the part of the zemindar in the shape of a quit-rent, so that it may be said the remuneration of the ghatwals was then represented by the profits of their lands, minus so much as represented the quit-rent. When the settlement was made after the lands had been resumed, they were assessed at rates supposed to be current in the neighbourhood, and the assessment so made may fairly be said to represent the value of, or the wages due for, the services which the ghatwals, as such, were bound to render, but which on the occurrence of the resumption they had ceased to perform. It may be here remarked in passing, that the rates fixed at settlement are those which the tenants are considered capable of paying after deducting the expenses of cultivation and profit to the cultivator. By the terms of the settlement, half of the sum so assessed went into the pockets of the ghatwal, and half was paid as revenue to Government, so that during the period the settlement lasted, the ghatwals were enjoying half salary for doing no service, and the Government received the other half in lieu of services which it had dispensed with It appears to me, therefore, that the ghatwals have, in the half rates which they protected during the existence of the settlement, been amply compensated for any loss they may have sustained (though they do not appear to have sustained any) during the period when, owing to particular circumstances, they did not, and could not, perform their police duties. It has been suggested to us that the value of the services of the ghatwals might be computed by ascertaining the numerical strength of each post, and

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assigning to the sirdar and each of the ghatwals, a salary suitable to their position; but on the view we have taken above, such computation appears to be unnecessary, for, if we are correct in looking upon the whole profits of the ghatwali lands as equivalent to the wages which the ghatwals would otherwise have received, it is apparent that when they did no service and retained a half of the profits for their own benefit, they cannot claim the other half paid by them to Government in the shape of revenue. I think, therefore, the whole of the money paid by the ghatwals to the Government, in the shape of revenue, should be paid over to the zemindar, Raja Lilanand Sing, partly as the quit-rent due to him, and the remainder as compensation for the loss of the services of the ghatwals during the period the settlement with the ghatwals continued in force. The sums to be refunded will, as provided for by the decree of the Privy Council, carry interest to the date of liquidation.

This judgment is applicable to all the cases before the Court.

THE Ghatwals subsequently asked the Court to review its judgment on the following grounds:

1. "This Hon'ble Court have (in their judgment of 25th August last) defined the mesne profits referred to in the decision of the Privy Council of 4th February 1864, to be the rent or revenue paid by the ghatwals (including your petitioner) to Government. Whereas, your petitioner submits,—that the mesne profits in that suit or complaint, *viz.*, of the zemindar, were and are the damages sustained by him from the wrongful act and holding of Government; that the compulsory revenue assessed and levied upon your petitioner was not and never could have been a due or profit of the zemindar; that the Government settlement (confirmed, 17th April 1852) left untouched the rent and due of the zemindar, for it was made "with the exception of Rs. 215-11, the amount of *zur-i-mal*, or rent specified in the sanad."

2. "This Hon'ble Court base their adjudication of the revenue-fund, illegally (though not wrongly, because by judicial decree) taken by the Government from your petitioner, to the zemindar, as his right (for 'quit-rent' and for 'compensation'), upon a definition of the status of ghatwal. Whereas, your petitioner

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submits, that the terms and purport of the judgment of the High Court of 17th June 1865, in the suit of the zemindar against your petitioner, contradicted that definition, as to your petitioner, and make it wholly inapplicable. Moreover, as your petitioner humbly submits, the tenor and reasoning of the judgments (certainly of the majority of the judgments) in the Full Bench case of *Kuladwip Narayan Sing* (1), is quite opposed to the limited and servile character attributed to all ghatwali holdings by the judgment of which a review is now sought. The interest of the ghatwal in the Full-Bench case is precisely similar to that of your petitioner as judicially found, and is in proof before this Hon'ble Court. Your petitioner, therefore, humbly submits, that it is not within the judicial competence of this Hon'ble Court, upon a miscellaneous enquiry (as it were in execution), to test your petitioner's claim to a return of his monies paid under an illegal assessment by a new definition of his status."

3. At the hearing of this case, your petitioner's claim to a refund from Government of what he had paid, was based on these premises, *viz.*, (here a summary is given of the Ghatwal's argument above reported.) Your petitioner humbly submits, that the judgment of this Hon'ble Court no otherwise meets the above argument, than by the declaration (virtually) that your petitioner's tenure is merely *chakeran* and on sufferance, which declaration certainly does confer a new right and claim upon the zemindar; but which, your petitioner submits, is not supported by, nor consistent with, the record, nor with the weight of precedent."

4. "This Hon'ble Court consider, that the ghatwals, during the period when the Government settlement was in force, 'could not perform their police duties.' It is apparent, that the zemindar could not have been prejudiced by the non-performance of those duties; and yet, this Hon'ble Court give over a portion of the revenue taken from your petitioner 'as compensation for the loss of the services of the Ghatwals.' As to quit-rents, whatever claim for arrears might exist, no part of the fund in the hands of Government consists of those rents."

(1) Case No. 290 of 1865, 8th Sept., 1866. Sup. Vol. 559.

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The judgment of the Court was delivered by

LOCH, J.—After hearing Counsel for the petitioner, we are of opinion that there are no valid grounds for admitting a review. It is quite unnecessary to submit the question as to the status of a ghatwal to the decision of a Full Bench as we have been asked to do. An objection somewhat hypercritical has been taken to the use of the word "mesne profits" by the Court, but we may observe that the word has been used throughout the proceedings and in judgments previously passed, and even if the word be a "misnomer," the petitioner cannot, from its use by the Court, be considered to have made out a ground for review· The application is rejected with costs. The order passed in this case is applicable to the other applications for review from the same judgment.

Before Mr. Justice Trevor and Mr. Justice Campbell.

TEKAIT MANORAJ SING & OTHERS (DEFENDANTS) v. RAJA LILANAND SING (PLAINTIFF) and cases Nos. 301, 353, and 359 of 1864.

See also 13 B. L. R. 128.

The following judgment was delivered in these cases, on the 29th June, 1865:

These cases are nearly allied to No. 299, which has been already decided (1). They are suits by the same zemindar of Kurukpore, to resume similar ghatwall tenures, and dispossess the ghatwals There is this difference, that in this case the ghatwals do not produce any such sanads as that of Captain Brown's filed in the former case, and in which occur the words "mokurra i istamrari" quoted by us in that case.

In one of the present cases, the circumstances are so far different, that plaintiffs had some years ago dispossessed the present defendants on the pretended authority of a decree against some other persons, a step which was reversed in appeal, and he now sues on the double ground that the service was abolished, and Tufani Sing, father of the defendant dismissed by the petitioner's father, in consequence of which the service, &c., fell into disuse, and (as in the first case) that he has arranged with Government regarding the service. But as no default on the part of Tufani Sing is alleged, and the act of dismissal and stoppage of the service is that of the plaintiff (or his father) and not of the defendant, the question in either case is exactly the same, viz., whether plaintiff has power, without the fault of the ghatwals, to determine their tenure and eject them from their lands.

Although the defendants in the cases now before us, have no sanad of Capt. Brown, they have sanads of Raja Kader Ali (the original zemindar at the time of the permanent settlement) similar to that produced in the former case, and in which the zemindar recites that the talook as have been held as ghatwali jaghirs from former time, and confirms them to be held "according to the cus-

(1) 3 W. R., 84.