
Lachuman Lal Pathak and Another Vs Kumar Kamakshya Narayan Singh

None

Court: Patna High Court

Date of Decision: Feb. 4, 1931

Acts Referred:

Bengal Tenancy Act, 1885 " Section 103B#Evidence Act, 1872 " Section 11, 32(5)

Citation: AIR 1931 Patna 224

Hon'ble Judges: Ross, J; Fazl Ali, J

Bench: Full Bench

Judgement

Ross, J.

This is an appeal by defendants 1 and 2 against the decree of the Subordinate Judge of Hazaribagh in a suit brought by the

plaintiff-respondent for the resumption of mauza Datam, one of the villages of the permanently settled estate of Ramgarh. The plaintiff alleged that

in the Ramgarh estate villages used to be given in jagir to various people and, when granted to Brahtmins, they were subsequently called khairats.

According to the well-known custom prevailing in the Ramgarh estate, all these tenures are resumable on the failure of the male heirs in the male

line of the original grantee. According to a duplicate copy of a sanad of 1775, mauza Datam was granted by Maharaja Paras Nath Singh, the then

proprietor of the estate to Madho Ram Tatak in ""khairats kusbrit"" that is, for service, namely, for offering tulsi leaves to Bishunpad at Gaya. The

grant was subsequently confirmed in favour of his male descendants in the direct line by an amalnama in 1841 in favour of Anant Ram Tatak by

Maharaja Lakshmi Nath Singh and, again in 1851, by Maharaja. Sambhu Nath Singh in favour of Baldeo Ram Tatak Gayawal. Anant Ram Tatak

and Baldeo Ram Tatak were the successors in the direct male line of the original grantee Madho Ram Tatak. Baldeo Ram Tatak died in June

1913, without leaving any male descendant in the direct line of descent; and, according to an amendment to the plaint made during the hearing of

the appeal and accepted by the appellants, no other male descendant of the original grantee Madho Ram Tatak is in existence. The plaintiff

therefore became entitled to resume mauza Datam on the death of Baldeo Ram Tatak and claimed a decree for possession with mesne profits from

1922, the suit being brought on 1st June 1925.

2. Two written statements were filed, one by defendants 1 and 2 Lachmal Lal Pathak and Baiju Lal Pathak, and the other by defendants 2 and 4

Bandhan Sahu for himself and as guardian of the minor defendant 4 Mathura Prasad Sahu. The defence did not admit that mauza Datam was a

portion of the Ramgarh estate. It was pleaded that grants to Brahmins are generally called ""khairats"" and are not resumable. The existence of the

custom alleged in the plain was denied and it was pleaded that the grantee had an absolute estate. The genuineness of the sanad and amalnamas

produced by the plaintiff was denied. It was further pleaded that Baldeo Ram Tatak died more than 12 years before the institution of the suit and

that the plaintiff's claim was barred by limitation. Defendants 1 and 2 are purchasers of mauza Datam at a sale in execution of a decree of the year

1886 and have been in adverse possession for more than 12 years. Defendants 3 and 4 of their predecessors were lessees of mauza Datam under

defendants 1 and 2; but the lease had long since expired and they were not liable. The other defendants did not appear.

3. The Subordinate Judge held that mauza Datam was part of the plaintiff's estate of Ramgarh. He also held that the duplicate sanad and

amalnamas produced by the plaintiff were genuine and that the khairat in question was originally granted in 1775 and was subsequently renewed in

1841 and 1851 by the plaintiff's predecessors. He further held that the plaintiff had established a custom in the Ramgarh estate by which the

proprietor was entitled to resume a khairat on the failure of the direct male line of the grantee unless the grant was proved upon its construction to

be permanent or limited to a fixed period of time. On the point of limitation he held that Baldeo Ram Tatak (who is also called Baldeo Lal Patak)

died in June 1913 sometime after the 12th day of that month and that therefore the suit was within time. Certain other points which were taken in

the pleadings and upon which findings were arrived at by the Subordinate Judge, are not material in the present appeal, as they are no longer

pressed. In the result the Subordinate Judge passed a decree for possession with mesne profits and costs against defendants 1 and 2.

4. Two points were argued in appeal (1) limitation and (2) resumability.

5. I shall deal first with the question of limitation, i.e., the question of fact relating to the date of the death of the last holder Baldeo Ram Tatak. The

precise date is not stated in the plaint where it is only said that Baldeo Ram Tatak died in the month of June 1913. In the written statements neither

the exact date nor even the year of death is stated, but it is simply pleaded that he died more than 12 years before the institution of the suit.

Evidence was given on behalf of the plaintiff by Pryag Das (P.W. 1), Radha Kishore. Chaudhuri (P.W. 4), Ram Kishun Lal (P.W. 6) and

Ramautar Ojha (P.W. 8); and the plaintiff also produced a copy of the application for probate of the will of Baldeo Ram Tatak (Ex. 11) in which it

was stated that he had died at Gaya on 25th Jeth 1320 Fs., that is, 14th June 1913. The evidence of (P.W. 1) is hearsay, and the learned

Subordinate Judge did not think fit to rely upon the evidence of (P. Ws. 6 and 7) as he was of opinion that it was unlikely that they could

remember accurately the date of death after so long a period. He was of opinion that the statement in the petition for probate was not admissible in

evidence; but he accepted the evidence of P.W. 4. On behalf of the defence, evidence was given by a number of witnesses that Baldeo Ram Tatak

had died in 1910 or 1911. The learned Subordinate Judge refused to act upon the evidence of most of these witnesses because they did not

appear to have a sufficient reason for remembering the date of death. But he dealt in detail with the evidence of Rai Bahadur Baldeo Lal

Nakphopha (D.W. 4) upon whose evidence learned Counsel for the appellants also strongly relied.

6. It is evident that if Ex. 11 is admissible in evidence, it is of great importance on this question. This petition was filed on 3rd May 1918 by Behari

Lal Tatak who claimed to be the adopted son of Baldeo Ram Tatak and was admittedly his sister's son and therefore in a position to know the

date of his death. It appears from the petition that it had originally been filed on 28th July 1914, that is, little over a year from the alleged date of

death. Learned Counsel for the appellants argued that this document was not admissible under any section of Evidence Act. But the respondent

relies upon Section 32(5), contending that the statement is a statement relating to the existence of a relationship by blood or adoption made by a

person with special means of knowledge. It was conceded by the appellants that if the date had been the date of birth and not of death it would

have been admissible; and this is clear from Illus. (1) to the section. But it is argued that as the date is the date of death, the statement is not one

relating to the existence of any relationship because the relationship of father and sons continues even after death whereas that relationship does not

exist until birth. The learned advocate for the respondent contends that this is to place an unduly narrow and technical construction upon the

language of the section and reference was made to the decision of the Judicial Committee in Mahomed Syedol Ariffin v. Yeoh Ool Gark AIR

1916 P.C. 242 and also to Ram Chandra Dutt v. Jogeswar Narain Deo [1893] 20 Cal. 758; Dhanmull v. Ram Chunder Ghose [1897] 24 Cal.

265; Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari [1902] 25 Mad. 183 and Sayeruddin Akonda Vs. Samiruddin

Akond and Another, . But of these only the last was a case of the date of death and reliance was placed on other sections of the Act also.

7. It is contended that the real question is whether the statement was made in circumstance which were free from suspicion and that there was

absolutely no reason for the petitioner for probate to mistake the date of death as there was no controversy then existing upon this matter, and

nothing turned upon the date. The statement was made shortly after the death by a person in a position to know the facts, without any motive for a

false allegation. The question is not free from difficulty; but in my opinion the statement is admissible, if not u/s 32(5), then u/s 11 of the Act.

8. The learned Subordinate Judge relied on the evidence of Radha Kishore Chaudhuri, a doctor, who deposed that he had treated Baldeo Ram

Tatak in 1913 up to 12th June. The Civil Surgeon had been called in and had operated on the patient who died of his illness. The witness

produced his diary showing an entry dated 12th June 1913 of fees paid by Tatakji, and his prescription-book showing prescriptions from 3rd to

11th June 1913 for Tatakji. The genuineness of these documents was not disputed, but it was argued for the appellants that as admittedly all the

members of this family were known as Tatak, the documents may refer to any member of the family. It was suggested in cross-examination that the

witness had treated Behari Lal Tatak and he admitted that he had done so, although he said that it was after 12th June; and he referred to him as

Behari Lal Mahto. It was admitted by D.W. 11 that Behari Lal Tatak was formerly known as Behari Lal Mahto and that he began to be called

Tatak when he succeeded to the properties of Baldeo Ram Tatak on the death of the latter's widow.

9. It appears from Ex. 11 that the widow died about 1914 and consequently these prescriptions cannot refer to Behari Lal Tatak; and the evidence

of the witness is definite that it was Baldeo Lal Tatak that he attended and that the "Tatakji" mentioned in the prescription was Baldeo Lal Tatak.

No reason was shown in cross-examination for distrusting the evidence of this witness and in my opinion the learned Subordinate Judge was right

in relying upon it. Nor can this evidence be held to be rebutted by the evidence of Nakphopha, because he is not a disinterested witness. He

admits that Lachman Lal Pathak defendant 1 is the brother of his brother's wife; and that this relationship has had some influence on the defence

evidence would appear further from the fact that evidence was given of the date of death of Baldeo Ram Tatak by one Baldeo Lal Thatwari (D.W.

8) who is married to Nakphopha's sister and is the uncle of Lachman Lal Pathak. Moreover Nakphopha admits that although Baldeo Ram lived

near him he had not visited him for a long time. There was therefore no special reason why he should remember the date of his death; and the

reason that he gives, namely, that he went to the Delhi Darbar in 1911 is no reason at all. In my opinion therefore the plaintiff has proved that

Baldeo Ram Tatak died in June 1913 and the suit is within time.

10. I now turn to the question of resumability; and the first question for decision is as to the burden of proof. The contention on behalf of the

appellants is that the Record-of-Rights being in their favour, it is for the plaintiff to prove that the record is incorrect. The Record-of-Rights (Ex.

18) shows mauza Datam as a village of the permanently settled estate of Ramgarh, being a khairat under the estate and not resumable. The

respondent relies upon the decision of the Judicial Committee in Jagdeo Narain Singh v. Baldeo Singh AIR 1922 P.C. 272. In that case the land in

dispute was recorded in the Record-of-Rights as malikana land within the plaintiff's zamindari. Their Lordships quoted Section 103-B, Ben. Ten.

Act, as declaring that

every entry in the Record-of-Rights so published shall be presumed to be correct until the contrary is proved,

and referring to this presumption said:

Once however the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or mahal, the onus

is shifted.

11. In the present case, the lands in dispute lie within the ambit of the estate, which admittedly belongs to the plaintiffs and the pro forma

defendants, and for which they pay the revenue assessed on the mauza. In these circumstances it lies upon those who claim to hold the land free of

the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant

recognized by Government. This rule was pronounced as long ago as 1869, in a judgment by Sir James Colville, in the appeal of Rajah Sahib

Pershad Sein v. Doorga Pershad Tewarree [1868] 12 M.I.A. 292, at p. 331:

The appellant is the zemindar; as such he has a prima facie title to the gross collection from all the mauzahs within the zamindari. It lay upon the

respondents to defeat that right by proving the grant of an intermediate enure.

12. The argument apparently is that there are two conflicting presumptions: the presumption of correctness attaching to the Record-of-Rights, and

the presumption that the zamindar has title to the gross collections from all the mauzas within his zamindari; and therefore it is for the person who

claims to hold rent free to prove his title. Now Section 103-B, Ben. Ten. Act, was amended by Section 22, Bengal Act 1 of 1907 as follows:

Every entry in the Record-of-Rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until

it is proved by evidence to be incorrect.

13. Section 84, Chota Nagpur Tenancy Act, which governs the present case is identical with the amended Section 103-B, Ben. Ten. Act The

addition of the words ""by evidence"" would seem to indicate that the correctness of the record is not rebutted by a mere presumption and that the

burden of proof consequently is on the plaintiff. In this connexion reference may be made to the decision of the Judicial Committee in AIR 1930 45

(Privy Council) . That was a suit for resumption by the Ramgarh Raj and the Record-of-Rights was against the plaintiff. Their Lordships observed:

The Record-of-Rights was drawn up in 1914 and it was open to the plaintiff u/s 87 of the Act to file a suit before the Revenue Officer within three

months to rectify the entry in the khewat. This not having been done, the entry stands and cannot be altered by the civil Court and u/s 84(3), it is to

be evidence of the matter referred to in such entry and is to be presumed to be correct until it has been proved by evidence to be incorrect.

14. It would appear therefore that the burden of proof was on the plaintiff to show that this khairat was resumable.

15. Learned Counsel for the appellants though not pressing the argument strongly because he admitted it to be uncertain, argued that as the

Settlement Register 1760-1790 (Exhibit A) shows that Datam was not assessed within the Ramgarh estate at the permanent settlement, it should

not be considered to be within the estate; and further that inasmuch as the patta of the decennial settlement (Ex. B) contains a clause that the

zamindar is not without the order of the Government to resume

debuttar, brahmottar, mahotter, aimas, madadmash of pirs and faqirs, orchard land, lakhraj etc.

16. This village, even if it were included within the estate, was not resumable, the reason for the restriction being that the village was not assessed

to revenue. It seems to me however that the patta (Ex. B) does not deal with the grants of this kind at all. It says nothing about khairats or jagirs

and there is nothing to show that in assessing the revenue the income of this village had not been taken into consideration. The patta shows that the

whole of Tappa Sardam was settled with the zamindar and therefore in the absence of evidence it must be presumed that every bit of land in the

estate had been assessed to revenue. All that Ex. A shows is that at that time no rent was payable to the zamindar, but that has in reality nothing to

do with the assessment of revenue on the zamindar. Moreover the sarshikan paper (Ex. 7-b) shows that there was a sadr jama of Datam in 1794

and the term ""sadr jama"" is used in the rubakar (Ex. 8) for that which is paid by the zamindar to the Government. Ex. 7 is a list of 1843 filed by

Maharaja Sambhu Nath Singh apparently under the rubakar (Ex. 8). This shows mauza Datam with its dependencies Nawada and Garhwatari in

Tappa Sardam as brit jagir of Anant Ram Tatak for offering tulsi leaves to Bishunpad at Gaya. Registers A and D of the Collectorate (Ex. 17)

show mauza Datam as part of the estate. The Record-of-Rights (Ex. 18) also shows mauza Datam as khairat of Lachhuman Lal Tatak under the

estate and it is recorded as not resumable. The sale certificate of the defendants describes mauza Datam as being in Tappa Sardam a lakhraj

village. After their purchase the defendants applied to the Maharaja for mutation of their names in respect of mauza Datam. In Ex. 3 it is stated that

the entire mauza Datam original with dependencies together with tolas Nawadin and Garhwa, Tappa Sardam, was granted as lakhraj jagir by the

Maharaja's grand-ancestor to the grand-ancestor of Baldeo Lal Tataak. Ex. 5 is the judgment in a title suit for the resumption of mauza Bala; and

it is worth noticing that Bela is one of the villages in Ex. A which also was without specification of jama. In my opinion, there is no substance in this

contention by the appellants and the Subordinate Judge rightly decided that mauza Datam was within the plaintiff's estate.

17. The Record-of-Rights shows that this village is a khairat, but the plaintiff has still to rebut the entry which shows it to be nonresumable. In

dealing with the question of how a Record-of-Rights can be rebutted, Mookerjee, J. in the case of Bagha Mower v. Ram Lakhan Misser [1918]

41 I. C 804 said that

If it is established that the only evidence whereon the entry was made by the Settlement Officer does not support his conclusion, that is the

strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof; he can prove aliunde, that the entry is in

fact incorrect, but there is no reason why he should not achieve the same result by proof that the material whereon the Settlement Officer based his

decision does not in law justify his conclusion as to the relative rights and obligations of the parties.

18. Exhibit D contains the grounds of the decision of the Assistant Settlement Officer for entering this khairat as nonresumable. The Raj had not

produced a copy of the sanad and no rent was shown to have been paid. Then comes the decision in the following term:

This at the same time is on the list of villages which have been granted as khairat. This makes me take it as a khairat village, Khairats are not

resumable generally unless it can be proved to be so. No evidence is adduced to show that khairat grants are resumable record as khairat not

resumable.

19. In treating the case in this way it seems to me that the Assistant Settlement Officer clearly threw the burden on the wrong shoulders. The village

was within the Ramgarh estate and whatever may be the position after the Record-of-Rights has been framed, there can be no doubt that at that

stage it was for the khairatdar to establish a nonresumable title. The judgment proceeds on a pure assumption that khairats are generally not

resumable. There is no such presumption in law and a large volume of evidence has been produced in this case to show that at all events some

khairats are resumable. On the other hand no case of nonresumable khairat has been shown by the appellants. The entry in fact is based on an

absence of evidence and in my opinion stands self-rebutted but in any case it has been rebutted by the evidence of actual cases of resumption

which has been produced at this trial.

20. The plaintiff has produced what purports to be a copy of the original sanad of 1775 (Ex. 1). The document runs as follows:

Whereas one village Datam in Ahori pargana. Hethghat, Tappa Rano, has been granted as rent-free kusbrit sankalp to Madho Ram Tatak. The

village includes all jups, kups and fisheries etc.

and it is described as a ""kaul-karar patta."" Two amainamas have also been produced by the plaintiff. Ex. 2 dated 1841 is an order to the tenants of

Nawadih one of the dependent villages of mauza Datam and runs as follows:

Whereas the said dependency of the said village which had been resumed is hereby released, you should carry out the orders of Anant Ram Tatak.

21. Similarly Ex. 2(a) is an amalnama of 1851 directing the tenants of mauza Datam to carry out the orders of Baldeo Ram Tatak to whom the

Maharaja had given the village in khairat for offering tulsi leaves to Bishnupad.

22. The appellants' argument on Ex. 1 is that it is not admissible in evidence as it is not a duplicate of the original, because it bears no seal and no

signature of the Maharaja and that it is not a copy which can be admitted under any of the provisions of the Evidence Act and moreover that it is

not to be treated as genuine, because it was not produced before the Settlement Officer. The two amalnamas are also objected to, because they

bear no seal. Now it appears from the record that these documents were admitted without objection and if that be so their admissibility cannot be

questioned now: see Padman v. Hanwanta AIR 1915 P.C. 111 and Shahazadi Begam v. Secretary of State [1907] 31 Cal. 1059. The appellants

contend that the documents were not properly received in evidence. It appears that this case was first tried ex parte and P.W. 1 the Assistant

Record Keeper produced these documents which were marked as exhibits on 12th July 1926, Then the case was tried as a contested suit and that

deposition of the witness was read out and adopted by the plaintiff's pleader as evidence and the witness was further examined on 5th June 1928.

It is argued on this that these documents were never tendered as evidence in the presence of the appellants so as to give them an opportunity to

object to them. But it is perfectly clear that the earlier deposition of the witness was read out at the second trial and the appellants had an

opportunity then to object to this evidence if they intended to do so but no objection was taken and the evidence went in without objection. In my

opinion these documents must be treated as admissible in evidence. Some guarantee of their genuineness is to be found in the fact that according to

the evidence of the Assistant Record Keeper they bear the initial of Col. Money who was manager of the estate up to 1873. I should hesitate to

hold on the strength of these documents alone that the nature of the tenure had been established but there are other documents which in my opinion

are not open to suspicion and which confirm these papers. Some of these documents have already been referred to. Ex. 14 is a list of khairats of

1782 which shows Datam as the khairat of Madho Gayawal. The khairat awarza of 1831 (Ex. 13) shows Datam as khairat of Anant Ram Tatak.

Ex. 7, a return of the year 1843 submitted to the Government by the Raj shows this village as brit jagir for offering tulsi leaves to Bishnupad at

Gaya, the jagirdar being Anant Ram Tatak. This is a strong corroboration of the terms of the amalnama (Ex. 2.a) of 1851 and is in consonance

with the word ""kusbrit"" in Ex. 1. Ex. 7-a sarshikan paper of 1859 shows Baldeo Ram Tatak as the jagirdar of this brit jagir on condition of

rendering good services, i.e., for offering tulsi leaves to Bishnupad. The documents therefore in my opinion establish that this tenure was a khairat

kusbrit, and that has been defined in Mr. Sifton's Settlement Report of Hazaribagh as a tenure given on the condition of the receiver maintaining

the worship at a particular temple and it is noted that this is resumable if the condition is not properly fulfilled. This definition must in my opinion

prevail against the general language used by Wilson in his Glossary as it represents the local meaning of the term.

23. Learned Counsel for the appellants then argued on Ex. 1 that it is either an out and out gift or a grant for life; that in the former case there can

be no question of resumption and in the latter case the suit is long out of time, because the right to resume arose on the death of the original

grantee. The first contention rests on the word ""sankalp"" which it is contended imports an absolute dedication. The word means only

determination"" and when it is in immediate conjunction with the word ""kusbrit"" which itself imports service, there can be no question of an out and

out gift. Moreover it is not the appellants' case that this is anything but a tenure, as the Record-of-Rights shows. As to the second ground,

limitation, this was no part of the defence. But in any case, it is sufficiently met by what Hunter in a passage to be referred to presently, says about

the nature of these grants. By the custom of the raj (if proved), the right to resume did not arise as long as there was a male descendant of the

original grantee in the male line. This question comes back to the question of custom. It is contended for the appellants that the reference to

resumption in Ex. 2 negatives this alleged custom and as there is no evidence of a regrant, the suit must be out of time, and that amalnamas issued

to tenants are not sufficient to deprive the khairatdar of any rights that he might acquire by adverse possession. But Ex. 2 itself shows that the

resumption was followed by a release and it seems to have been nothing but a formality, possibly gone through with some idea of preserving the

rights of the Raj. This view is borne out by the fact that Ex. 2 is of the year 1841 and that Anant Ram had been shown as khairatdar as far back as

1831 (Ex. 13). It is not that the Raj neglected to enforce its right to resume on the death of the original grantee, but the custom prevented any

effective right to resume from arising as long as a male descendant of the original grantee was in existence. Under the custom, the Raj had no

alternative but recognized the successor. There is no evidence that any fresh sanads were granted to the successors, whose continuance in the

estate must therefore be attributed to the strength of the custom.

24. The principal question in the case is whether it has been proved that there is a custom in the Ramgarh estate of resuming khairat grants on the

death of the male descendant in the male line of the original grantee. Hunter in his Statistical Account of Bengal, Hazaribagh District, has given a

history of the jagirs and khairats in the Ramgarh estate (Vol. 16, p 121). This has been quoted by the learned Subordinate Judge. The book is a

book of authority and has been referred to in reported cases e.g., Ram Narayan Singh v. Ram Saran Lal A. 1. Rule 1918 P.C. 203. From that

account it appears that these grants were originally grants at will; but in 1792 an arrangement was entered into by which the grantees should hold

for life on payment of 4-annas in the rupee of the ascertained assets. The power of resumption, however was never exercised but on the death of

the holder the grant was confirmed to his heirs and successors and the life tenures became permanent and liable to resumption only on failure of

heirs of the original grantees. The word "heirs" in this passage seems to mean "male heirs in the male line" because the author goes on to say:

In confirming these jagir grants, the Rajas only recognized the eldest son or the eldest branch of the original holder.

25. The custom that is now asserted is somewhat narrower, because it limits the right to resume to the failure of male heirs in the male line and not

to the failure of male heirs in the eldest line.

26. A large number of judgments have been produced in this case, as showing the recognition of this custom from before 1839. Ex. 16(c) is a

rubakar of the Court of the Agent to the Governor-General, dated 8th February 1839. That was a suit for resumption of "a birt jagir on condition

of receiving service" based on the custom in the Ramgarh estate to resume the land of the jagirdar's death without issue. The suit was brought

against the widow of the last holder who had died leaving a daughter's son. The defence was that the grant was a khairat grant "al aulad" and not

resumable. The decree was for resumption and the following passage occurs in the judgment:

For this reason u/s 3, Regn. 2 of 1805, the possession of the appellant after the death of Kharganand, over the jagir birt in lieu of service is totally

illegal and by way of trespass, without the consent of the zamindar and the same can never be treated as legal and proper; rather, similarly, it the

jagirdar dies issueless after the cases, his property does not remain in possession of the female but passes in the possession of the zamindar. Such

cases have already been decided by the Court,

and reference was made to a decree of the year 1834 in a suit for resumption against the widow of the grantee. Ex. 16(j) is a rubakar of the

criminal Court of the Agent to the Governor-General, dated 16th December 1843 in a case of resumption on the death of the heir of the original

grantee without heirs on the strength of the "zamindari custom and usage which had been then in vogue from before." The parties were the

Maharaja Sambhu Nath Singh and the widow of the last male holder. It was held that the Raja had a right to resume brahmottar lands in

accordance with the conditions of the sanad. Ex. 16(d) is a judgment of the civil Court of Hazaribagh of 2nd December 1862 in a suit brought by

the Maharaja to recover possession of certain villages that had been granted on condition of rendering service, the last holder having died childless;

and it was held that the Maharaja was entitled to resume, the interest being only a life-interest which was not transferable. This case is interesting,

because although the grant was held to be only a life-interest, it had in fact devolved upon the son of the original grantee and was resumed after his

death. Ex. 6 is a judgment dated 7th December 1863. That was also a suit for resumption of a grant of a tenure on condition of service and it was

observed:

It is an established rule in such cases (i.e., of death without heirs) even where a jagir may be hereditary that it reverts to the zemindar.

27. In that case the defendants were the descendants of an ancestor of the original grantee but were not in the grantee's own line. It was also

observed:

The decisions, copies of which have been filed by respondents go to prove that the right to resume on failure of direct heirs of a jagirdar has been

upheld by the Courts and indeed many precedents might have been quoted for such a proceeding.

28. Ex. 16(b) is the decision of the Judicial Committee of 3rd December 1918 in a suit brought by the Ramgarh Raj for resumption of a

putraputradi jagir reported in Ram Narain Singh v. Ram Saran Lal A. 1. Rule 1918 P.C. 203. The question was whether the word ""putraputradi

conveyed an estate of inheritance. It was held that the grant was ambiguous and reference was therefore made to the custom of the Raj. Ex. 16(1)

is a judgment of 5th August 1924 and there it was held on the evidence that khairat tenures are resumable in the Ramgarh Raj on failure of the male

issue in the male line of the original grantee. It was objected that this was an ex parte decision; but it may well be that after the decision of the

Judicial Committee it was not considered advisable to question the existence of the custom. The terms of the grant in that case are not stated. Ex.

16(f) is a judgment of 22nd January 1925 in a suit for resumption of a khairat ""for khair-khaki (well-wishing)."" In this case also it was found that

the grant was resumable when the direct male line of the grantee became extinct. The same objection was taken to this judgment that it was an ex

parte judgment; and the answer is the same. Ex. 5 is a judgment of 6th August 1925; but this case was not decided on the question of custom

although the question was raised and the Subordinate Judge held that the judgments produced by the plaintiff went to show that jagir and khairat

grants made by the Ramgarh Raj were by custom resumable on failure of the direct male line of the grantee and he observed that in the defence this

custom was not disputed. Ex. 16(a) is a judgment of 25th February 1928 in a suit of 1924. In that case there was no evidence of the contents of

the sanad and it was held that in the-absence of that evidence the jagir must be taken to be limited only to the death of the last direct male

descendant of the original grantee according to the custom. It is true in that case the Record-of-Rights showed the jagir to be resumable; but the

existence of the custom was definitely affirmed.

29. Besides this documentary evidence, there is oral evidence of custom. I shall refer only to two witnesses. Bholu Nath Tiwari (P.W. 2) has an 8-

annas share in a khairat jagir under the Ramgarh Raj, and he deposes against his interest that this estate is resumable on the failure of the direct

male line of the grantee and states that all jagirs in the Ramgarh Raj are so resumable on account of the custom Sheo Sahay Lal, D.W. 12, who

was formerly a record-keeper of the Ramgarh estate, says in cross-examination that all jagirs and khairats in the Ramgarh estate are resumable on

account of a custom on the failure of direct male line of the original grantee.

30. The general argument on behalf of the appellants on these judgments is that they only show that tenures granted on condition of service were

resumable on extinction of the male line and that this is only a special instance of the resumability of service tenures when the service ceases to be

performed. The service is to be rendered by the grantee or his descendants and when the line becomes extinct the service can no longer be offered

and consequently the true ground of resumption is the failure to offer service. Now the answer to this argument is twofold. In the first place the

documents already referred to bearing upon the present grant show that service was annexed to it. Secondly, the decisions, although generally on

cases where there was a condition of service, do not appear to have turned upon that condition. In none of these cases was resumption claimed

notwithstanding the fact that male issue was in existence and in the case reported in Ram Narayan Singh v. Ram Saran Lal A. 1. Rule 1918 P.C.

203 there was no question of service. That was a case of a grant of a jagir with a reserved rent and it cannot be argued that rent is service. The

patta contained the word ""putraputradi"" which is ambiguous. It appears from the judgment of the Subordinate Judge that the defendants in that

case relied upon the word ""putraputradi"" as distinguishing their grant from other jagirs containing other words such as khairat, khorposh etc. which

were conceded to be resumable on failure of the male descendants in the line of the original grantee. The conclusion come to was that the evidence

was that

all jagirs by whatever name they may be called, conditioner no condition attached, were primarily life-tenures arid which by efflux of time became

permanent and resumable and liable to resumption only on failure of male heirs of the original grantee.

31. That was the ground on which the Subordinate Judge construed the grant and his construction was adopted by the Judicial Committee who in

construing this ambiguous term ""putraputradi"" relied upon the evidence showing that in Ramgarh Raj those who have succeeded to jagirs have

always been males in the male line of the grantee. The grant was consequently limited in that sense and the decision rested on the custom alone

independent of any question of service.

32. In my opinion the result of the evidence is that the entry in the Record-of-Rights which shows this khairat to be not resumable, has been

rebutted and the respondent has established the custom of resumability on failure of male heirs in the male line of the original grantee asserted in the

plaint. It follows that the decision of the Subordinate Judge is right and the appeal must be dismissed with costs.

Fazl Ali, J.

33. I agree.