

(1868) 07 CAL CK 0018

Calcutta High Court

Case No: Regular Appeal No. 857 of 1867

Mahbub Hossein

APPELLANT

Vs

Patasu Kumari

RESPONDENT

Date of Decision: July 18, 1868

Judgement

Loch, J.

On the first point, we think that the appellant should be allowed to file the documents which he requests the Court's permission to put in, for the proceeding drawing up the issues fixed no time for the production of the documentary evidence, and we are not shown that at the first hearing of the case, the Principal Sudder Ameen called for the documents. The law, Section 128 of Act VIII of 1859, is clear upon this point. The parties are required to bring with them and have in readiness, at the first hearing of the suit, to be produced, when called upon by the Court, all their documentary evidence of every description, &c. It is not necessary for the parties to file this evidence, unless it be called for; and, in this case, we do not find that it was failed for, but it was offered the day after the issues were fixed, and was rejected. The second ground taken is not pressed. On the third ground, we think that though plaintiff has failed in the Lower Court to prove that she was in possession, and ousted by the defendant, she is entitled to go into the question of title, and to recover possession, if she be able to establish her right to succeed.

2. On the fourth ground, we think that the mere fact of the plaintiff having submitted to the resumption and settlement proceedings, is not a sufficient reason for holding that she has no cause of action, or that any right she might have had to succeed to the Ghatwali tenure has been extinguished by her submission to those proceedings; nor if the sale for arrears has been annulled, will the fact of such sale deprive the plaintiff of any right. The effect of the Privy Council decree was to set aside the resumption and settlement, and to restore the Ghatwali tenure to its former position.

3. It remains to be seen whether the sale of the tenure for arrears of revenue, while the property was held by plaintiff as a permanently settled estate, deprives her of the right to bring the present suit, the sale not having been distinctly cancelled by any express order or decree, whether the right to sue does not rest in the auction-purchaser to whom the rights and interests of the plaintiff, as proprietor, were transferred at the time of sale.

4. It is very clear that Patasu, the mother and guardian of the minor, plaintiff, took no steps to set aside the sale, and acquiesced in it for, notwithstanding the decree obtained by the defendant, Raja Lilanand Singh, before the Privy Council, by which the Ghatwali tenures of Kurukpore were declared not to be liable to resumption by Government, yet she applied for the surplus proceeds of sale in February 1860. There is nothing to show that she received any part of the money, but her application for it is sufficient to show her acquiescence in the state of matters then existing. A suit was brought by the defendant, Raja Lilanand Singh, to recover the mesne profits which had been collected by Government, in the shape of revenue, under the settlement, and which was directed to be refunded. Plaintiff was a party to that suit, as well as the auction-purchaser, but though the Raja's claim to this money was rejected, on 26th March 1862, it does not appear that the plaintiff was put back into her former position. There are words, however, in another proceeding of 24th November 1862, which are to the effect, that the auction-purchaser had no right, and that matters had reverted to their former position. This judgment was confirmed in appeal by the High Court, on 10th October 1863. The proceeding of 24th November 1862, appears to us sufficient to show that the sale, as well as all other proceedings, had been virtually, if not in express terms, cancelled, and this being the case, the auction-purchaser does not stand in the way of the plaintiff to prevent her establishing her son's rights to the Ghatwali tenure.

5. But in support of the fifth ground taken in appeal, it is argued: 1st, that the minor never was a Ghatwal, he never was appointed to the office, the tenure was resumed in the lifetime of his father, and the settlement was made, during his minority, with his mother, in his name; 2nd, that it has been ruled by this Court, according to the decisions cited, that the zamindar has the right to appoint and remove Ghatwals, and that the Ghatwali tenures may be resumed when the Government do not require their services.

6. We do not think the fact that the minor never was appointed as Ghatwal can deprive him of any right he may have. The peculiar circumstances of the case prevented his asserting his rights, whatever they be, at an earlier stage, and as the resumption and settlement proceedings have been cancelled, we must look upon him as holding the position of the son of a Ghatwal, who has died while holding that office--an office which by custom has become hereditary, subject to the confirmation of the zamindar. It is necessary to explain what appears to be contradictory in the previous sentence. The fact is that the office has descended

from father to son so unbrokenly, that the office has at length been considered hereditary, for the zamindar never appears, till of late years, to have attempted to exercise his undoubted rights of appointing a person other than the heir of the deceased Ghatwal to a vacant appointment, or of refusing his sanction to the succession of the heir. Now it cannot be doubted that in the inception of this office, when the zamindars were entrusted with Police powers, as was found to be the case, when the late East India Company assumed the Dewany, that the Ghatwals held their lands from the zamindars, and were appointed by them, and were liable to removal by the same authority. They received lands out of the zamindary, and appear never to have been interfered with by the Mohammedan Government, though Jagirdars, who held service lands direct from the State, to protect the country from the inroads of various lawless tribes, required to have the grant renewed on the occasion of the death of each incumbent. The Ghatwals appear to have been looked upon as a kind of rural Police, whose services, like those of chowkidars and other village Police or servants, were paid by grants of land; and the importance which the Ghatwals of Kurukpore have attained, arises from the circumstance of the country in which they were located, being hilly and jungly and so thinly populated that they were able to take possession, without opposition, of vast tracts of land much in excess of the area originally granted to them; and because the zamindars of Kurukpore were, for several generations, more inclined to spend money than to look after their own affairs, so that when the East India Company's Government, during the time of Warren Hastings, commenced to make inquiries, it was found that the Ghatwals were in possession of considerable estates, instead of limited areas, as entered in their sunnuds of appointment. In their judgment of the 25th July 1855, their Lordships of the Privy Council accepted the reports of the Collector of Bhagalpur, as showing the position held by the Ghatwals, and their relationship to the zamindar. The Ghatwals, according to the Collector, had no right of inheritance, nor proprietary interest in their lands, but held right of possession, so long as they performed the terms and conditions of their sunnuds. In a Report of 1816, the Collector says, "that the Ghatwals pay a fixed rent to the zamindars of Kurukpore and continue under his control, direction, and subjection." It was held by the Court of Sudder Dewany Adawlut, Bar Lal Singh appellant, (6 Sudder Rep., 170), that the lands being held conditionally on the performance of certain defined duties, they were not divisible on the death of the Ghatwal, but descended to the eldest son. In 1783, the Governor-General in Council addressed a letter to the zamindar of Kurukpore to the effect, that as the office of Ghatwal was in his gift, he would, should he deem it necessary and proper, appoint a person to the office of Ghatwal, adding, that if the zamindar thought it advisable, he might retain it (the ghat) under his own control, informing the Government of the circumstance. In a letter from the Collector of Bhagalpur to the Raja of Kurukpore, he says, that the settlement of the rent between the watchmen (Ghatwals) and the zamindar rested with the zamindar, so did the dismissal and transfers of the Ghatwals; and the Privy Council say, "In the reports of the Collector to" which we have already

referred, it is stated that it is the province of the Raja "to appoint and dismiss the Ghatwals attached to the Kurukpore estates; that "he usually, but not always, makes a report to the Government, when he does "so; that the settlement rests with him, and he raises or depresses the rent," and the conclusion come to by the Privy Council with regard to these Ghatwali tenures, was "that they went a part of the zamindary of Kurukpore, and "were included in the settlement of that zamindary, and covered by the jumma "assessed upon it;" and that, consequently, the Government had no right to resume any of these tenures as lands excluded from the permanent settlement. It will be observed from the above review of the judgment of the Privy Council, that the power of appointing and dismissing and transferring the Ghatwals, is admitted to belong to the zamindar; that the Government of Warren Hastings considered that it rested with the zamindar to appoint another Ghatwal in the room of Ramsarbeswar, dismissed from office, should he think it advisable, or he might retain the ghat under his own control. It appears also that the settlement of the land rested with the zamindar, who might raise or depress the rent. We have it also clearly laid down that the Ghatwali tenure was not hereditary, at least not in the beginning, and that the lands were not divisible among the several heirs of a deceased Ghatwal. The Privy Council does not go so far as to say that the zamindar had a right to dismiss the Ghatwal, and resume the lands of the tenure, that was a question not before their Lordships, nor is it a question that we need enter upon in the present case. We think it also unnecessary to note all the judgments of the late Sudder Court and of the High Court, in regard to these Ghatwali tenures, as the question in the present case is different from that which arose in other cases, but we will refer to the judgment of the late Sudder Court in Jagamohan Singh v. Lilanand Singh, (8. D. A. Rep., 1857, p. 1812), also in Raja Ananda Lal Deo v. Government, (S.D.A. Rep., 1858, p. 1669). The principle laid down in these two judgments was to this effect: that the zamindar could resume the Ghatwali tenure, if the services of the Ghatwal were not required, but that if the Government required the services of the Ghatwals, the zamindar could not resume so long as Government demanded such service. In the case before us, the office has become vacant, by the death of the Ghatwal. It is the inherent right of the zamindar of Kurukpore to appoint another. No one can interfere with this right. He is responsible for putting in a suitable person, should Government require the services of a Ghatwal But the Government has considered this rural Police to be useless. It has established a new Police, upon whom the responsibility, which formerly rested on the Ghatwals, now rests. The services of the Ghatwals are no longer required. Why should the Raja appoint another Ghatwal under these circumstances? Certainly not to perform Police duties, for that is no longer required of the Ghatwals in Kurukpore. Then what right has the plaintiff to take possession? His only right would be that he has obtained the office of Ghatwal from the zamindar, but the zamindar was not bound to appoint him. He might have appointed any body else who would have been entitled to all the profits of the lands appertaining to the office, without any interference from the plaintiff. Had the plaintiff been weak in body or mind, and

so incapable of performing the duties of the office, the zamindar was not bound to appoint him, or any of his relations as a substitute for him. He might have selected any stranger whom he thought fittest for the appointment. It is true, as observed above, that in this office of Ghatwal, son has succeeded father continually, and the zamindar does not appear to have interfered, though the succession was not legal or valid till confirmed by the zamindar, and reported by him to the Government authorities. It appears to us, therefore, that as the appointment of a person to the vacant office of Ghatwal rests with the zamindar, that he may, if necessary, appoint a suitable person; that, as in this case, no necessity exists, as Government have given up their right to insist on the appointment of persons to that office, and no longer require the services of Ghatwals in Kurukpore; and that as the plaintiff is not entitled to succeed to the property by hereditary right, but only on appointment by the zamindar,--the plaintiff is not entitled to recover possession on the grounds he claims; and we, therefore, reverse the order of the Lower Court, and dismiss the plaintiff's suit with costs.

¹[Sec. 128:--If the parties or their pleaders bring with them, and have in readiness at the first hearing of the suit to be produced when called upon by the Court, all their documentary evidence of every description which may not already have been filed in Court, and all documents, writings, or other things which may have been specified in any notice which may have been served on them respectively within a reasonable time before the hearing of the suit; and no documentary evidence of any kind, which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at the first hearing.]

Documentary evidence to be produced at first hearing.