(1866) 09 CAL CK 0009

Calcutta High Court

Case No: Regular Appeal No. 290 of 1865

Baboo Kooldeep Narain Singh		APPELLANT
	Vs	
Mohadeo Singh and Others		RESPONDENT

Date of Decision: Sept. 8, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.
It appears to me that the Principal Sudder Ameen was right in dismissing the case, first, upon the ground that the defendants had a right in this tenure which it was not in the power of the zamindar to destroy; and, secondly, that the plaintiff acquired no right to cancel the tenure by reason of his purchase under the auction sale for arrears of revenue, and that he stood in no better position than the zamindar with whom the permanent settlement was entered into. From the deed, which we have before us, it appears that as far back as 1150 F., which corresponds with 1743, about twenty-two years before the East India. Company obtained the Dewanny, a grant was made to Mohadeo of this tenure as a ghatwali tenure. It appears, further, that before the permanent settlement Mohadeo died, and his son succeeded to the ghatwali tenure; for we find that a suit was brought in 1796, not against Mohadeo, but against his son, for the rent for four years from 1792, which was prior to the date of the permanent settlement. In that suit it was held that the plaintiff could not recover more than Rs. 61 a year, the rate at which rent had been paid up to that time. Thus we find that the estate was, in point of fact, in the possession of Mohadeo''s heir-at-law before the date of the permanent settlement. (His Lordship read the sunnud, and remarked that it "was a confirmation, not the first grant of the ghatwali tenure," and proceeded). I have had the sunnud translated (reads). It is said that the sunnud contains no words of inheritance, and that the sunnud contains merely a life-grant to Mohadeo. It is unnecessary to say what would have been the construction of this sunnud in the absence of usage, for it appears clear, from long uninterrupted usage, that these lands have passed from ancestor to heir, i.e., from father to son, for two or three generations, and that it had passed, without objection on the part of the British Government, before the date of the permanent

settlement, to the heir of Mohadeo. In Mahomedan grants it seems that words of inheritance are not necessary. See Baillie on Land Tax of India (Introduction, page 47), in which a distinction is drawn between such grants and jaghirs, or mere orders for payments out of the kheraj or revenue to a particular person. But, however this may he, I apprehend that, if there is no clear authority to show that a grant in lieu of services, authorizing the grantee to bring the lands into cultivation, and to enjoy the produce thereof, season after season, and year after year, would not create a hereditary right, such a grant coupled with long usage, such as that which has prevailed in the present case in which the tenure has passed from ancestor to heir without objection for several generations, would he sufficient to show that the grant was a grant of inheritance. But even if that were not so, speaking for myself alone, I should say that, when I find that there has been a grant which is not forthcoming, and the grantee has been confirmed in that grant with words such as those used in the sunnud of 1150F. (1743), long usage may be given in evidence for the purpose of explaining what would be the effect of the original grant if it had been produced, taken in conjunction with the grant of confirmation. The sunnud of 1150F. (1743) refers to something which had taken place before; what that was is not precisely stated, but it is clear that it was intended to confirm Mohadeo in that which had been granted before. Surely, when he was confirmed in what had been granted before by a very old grant and the former grant is not forthcoming, usage is admissible for the purpose of explaining what that former grant was, and of showing that, whether under the sunnud by itself the party would or would not have been entitled to a tenure of inheritance, still he might be entitled to a heritable right by virtue of the sunnud, coupled with the former grant in which he was confirmed, as explained by the usage. There is no express law that a ghatwali tenure is not inheritable, and that it is a mere life-grant, nor is it even unreasonable to suppose that a ghatwali tenure may have been granted to a man and his heirs, because we have it expressly stated in the Bengal Regulation XXIX of 1814, with regard to the Beerbhoom ghatwals, that there is reason to believe that they held tenures from generation to generation. That is a distinct recognition on the part of the legislature that a ghatwali tenure may be an inheritable tenure. A case in the Privy Council, Rajah Lelanund Sing vs. The Government of Bengal, , was referred to in course of argument, in which it was held that ghatwali tenure was a tenure of inheritance, not by the general heirs according to the Hindu law, but by the eldest son alone. The marginal note of the case says, that "upon, the death of the ghatwal, last seized, the lands descend entire to a male heir as ghatwal," but I do not find that the note is borne out to the full extent by the judgment. The right of the eldest son to inherit was laid down with reference only to the particular case under consideration, but it was not the intention, as I understand the judgment, to lay down that the rule of primogeniture was applicable to all ghatwali tenures. The case was one of the Beerbhoom ghatwali, but the present case relates to a tenure in Bhaugulpore. What Lord Kingsdown said was this:-- "With respect to the ghatwali tenures in Beerbhoom, it is stated in a Regulation passed, with respect to them, in 1814

(Regulation XXIX of that year), that the class of persons called ghatwals in the district of Beerbhoom form a peculiar tenure, and that every ground exists to believe that, according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, in perpetuity, subject nevertheless to the payment of a fixed and established rent to the zamindar of Beerbhoom, and to the performance of certain duties for the maintenance of the public peace and support of the Police. This description is confined in terms to the district of Beerbhoom; but in the case of Hur Lall Singh v. Jorawun Singh 6 S.D.A. Rep., 1837, 169, which occurred in 1837, a question arose as to the nature of these tenures generally, the point for decision being whether they were divisible on the death of a ghatwal or descended to his eldest son. One of the Judges states that these tenures are very common in the Nerbudda territory for the protection of the ghats. Another of the Judges seems to consider them as chakeran lands; and the Court was of opinion that 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." The principle was there recognized that lauds of this description were held by tenures created long before the East India Company acquired any dominion over the country, and that the nature and extent of the rights of ghatwals probably differed in different districts and in different families, that the services were not merely for the maintenance of thannah or Police establishment; and that although they would include the performance of duties of Police, they were quite as much in their origin of a military as of a civil character (pp. 124, 125). Even if the tenure created by the sunnud of 1150F. (1743) terminated on the death of Mohadeo, we still find that Monorath Singh, his sou, was in possession before the time of the permanent settlement, and if necessary, it might be presumed from the subsequent usage of more than half a century, that the tenure of Monorath Singh has a legal origin, and may have been created by grant, made since 1150F. (1743), which has been lost by time and accident, and is not forthcoming, but which from the fact of Monorath''s having held from a time prior to the permanent settlement, as shown by the suit for the rent of 1792 and three following years, must have existed before the permanent settlement. If a new tenure was created by the zamindar subsequently to the permanent settlement, it would not be binding upon a purchaser for arrears of revenue; but if Monorath Singh came in under a new tenure, and not under the sunnud of 1150F. (1743), it could not have been under a grant since the date of the permanent settlement, but must have been created anterior to it, inasmuch as Monorath was in possession of the tenure in 1792. It may be remarked here that the sunnud of 1150F. (1743) was not merely a grant by the zamindar for the time being, but it appears to have been a grant by the Government of the time. We find that the tenure was created as far back as 1150F. (1743), and that that was merely a confirmation of a still earlier grant; that it was never disputed by the British Government, and that the heir of Mohadeo, who was the person holding the ghatwali tenure in 1150F. (1743) was never objected to by the British Government, or by the zamindar with whom the

permanent settlement was made. In point of fact, this ghatwali tenure existed long prior to the time of the grant of the Dewanny to the East India Company, and even if the sunnud of 1150F. (1743) did not create an inheritable tenure, Mohadeo''s heirs have in fact been holding from a period prior to the time of the permanent settlement to the present time. I think therefore that the evidence is sufficient to prove that the defendants have been holding under a valid tenure of inheritance upon ghatwali service and a quit-rent of Rs. 61 a year.

2. It was contended that the lands comprised in this tenure were assessed at the time of permanent settlement. There is no doubt that they were so assessed, and were included in the mal lands of the zamindari. Previously to the permanent settlement there had been a quit-rent of Rs. 61 a year paid for these lands in addition to the ghatwali services. This rent has continued to be paid from the time of the permanent settlement, and no other rent has been paid for the lauds from that date to the present time. In assessing the amount of revenue to be paid by the zamindar to the Government the amount in respect of these lands was fixed at the same amount as that which was payable by the holders of the tenure, viz., Rs. 61 a year. If, at the time of the permanent settlement, the lands were held at Rs. 61 a year in addition to the ghatwali services, and it was considered that the ghatwali services might be dispensed with, and the lands resumed by the zamindar whenever he might think proper to do so, it is not very likely that, in fixing the assessment for the zamindari, the value of the lands in question should have been taken at only Rs. 61 a, year. In estimating the lands at Rs. 61 a year in fixing the total assessment for the zamindari, the Government must have considered that the tenure was a permanent one descendible to heirs, and that the holders of the ghatwali tenure would continue bound to perform the services. If the tenure was a valid hereditary tenure at the time of the permanent settlement, and if the British Government could not have ousted the ghatwali tenants from the tenure which had been created by the Native Government, the zamindar had no right, notwithstanding the lands were permanently settled with him by the Government, to do more than the Government themselves could have done.

3. It is stated on behalf of the plaintiff, that if he recover possession of these lands and be allowed to turn the defendants out of possession, he will perform the ghatwali services if the Government requires the performance. But what security have the Government that the plaintiff will perform the services? If the lands are held subject to the services why should the plaintiff be allowed to resume them, and turn out those who hold by the ghatwali service. The lauds are subject to the service, the defendants are entitled to the tenure; the plaintiff is entitled to the quit-rent, and the Government to the revenue; the services are public and for the benefit of the public, and not private for the benefit of the plaintiff alone. The plaintiff''s offer shows that he does not look upon the services as mere private services. But it is contended on his behalf that the whole zamindari of the plaintiff of which these lands form part is a ghatwali zamindari. I confess that I do not perceive any force in

the argument. If the whole of this zamindari, when it was assessed at the time of the permanent settlement, had been rendered subject to the performance of ghatwali services, then it might he called a ghatwali zamindari, but it is not because some lauds in a zamindari are held upon a ghatwali tenure, and are subject to ghatwali services, that the whole zamindari is ghatwali. But if the zamindari was subject to ghatwali service, I should expect to find it distinctly recorded in the settlement that the zamindari was granted not merely subject to certain revenue, but also subject to the performance by the zamindar of those services. The Government would certainly not have left out of the records of the settlement such an important provision as that the zamindari was settled upon condition of the zamindars performing certain ghatwali services in addition to the payment of the revenue assessed. I am not aware that any such revenue settlement was ever made, but even if it was, it could not destroy the rights of those to whom valid tenure had been previously granted, either by the British Government or by the Native Government which preceded it.

4. Some cases are cited to show that, even assuming these lauds to be subject to a ghatwali tenure, the zamindar has a right whenever he pleases to dispense with the ghatwali services, and to take back the lands. Now I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held, whenever he pleases, and take back the estate Alexander John Forbes vs. Mir Mahomed Taki and Others . It is not because the services are released or dispensed with or become unnecessary that the estate can be resumed. If a grantor release the services or a portion of the services, upon which lands are holden, the tenant may hold the land free of the services; but the landlord cannot put an end to the tenure, and resume the lands. Many services upon which very valuable estates are held are of little value now. The estates may be very valuable, and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates ore liable to be resumed. It might as well be contended that, if lands were granted at a small quit-rent, the landlord might relinquish or dispense with the payment of the rent and take back the lands. It is said in the plaintiff''s written statement that the sunnud was granted upon condition of rendering services. Cut even if it were so, the person to whom the condition is to be performed cannot, by dispensing with the performance of the condition, put an end to the grant. If lands were granted upon condition of paying a certain rent, the grantor or his representatives would have no right to say, when the lands are very valuable, "I will dispense with the performance of the condition. I will exempt you from the payment of the rent, and I will take back the estate." If he could not do so in the case of rent, why should he be able to do so in the case of services? But even if the plaintiff could dispense with the services, how is it possible for him to treat the defendants as trespassers, and turn them out of possession when the rent of Rs. 61 a year has been paid for them for a period commencing prior to the permanent

settlement? It appears to me that the defendants have as good a right and title to the lauds, subject to the rent and service, as the Government itself has to the revenue; and the plaintiff, as an auction-purchaser, cannot he in a better position than the Government was at the time when the zamindari of which the lands are held was permanently settled. The case of Tekayet Jugmohon Sing v. Netanund Sing 13 S.D.A.D. for 1857, 1812 was cited in support of the doctrine that the grantor of ghatwali services could relinquish the services whenever he pleased, and take back the estate. In that case, it appears that the estate "was forfeited, because the ghatwali holders refused to attend on the auction-purchaser. It is true that the late Sudder Court went further. They said:-- "But admitting for argument''s sake that the defendants were in possession from 1185F. (1778), this fact would not entitle them to hold the lands at a fixed jumma, or retain possession of them after they had ceased to perform the duties for which those lands were assigned to them." They say, further:-- "The condition on which the ghatwals held their lands is the performance of certain services, the rent paid by them is fixed with the object of preserving the connection between the ghatwali tenure and the parent estate, to show that the former is part and parcel of the assessed lands of the latter, let out to certain parties at a nominal rent, on condition of the performance of certain services in lieu of the full rent." And again, further:-- "As the ghatwali lands are given as remuneration for services, when that service ceases or is no longer required to be performed, the title of the ghatwal ceases also, and the zamindar who has never given up his right to the lands has the right to resume possession of them." All this, however, was a mere dictum of the Court; and in a late case, Munrunjun Singh v. Rajah Lelanund Singh 3 W.R., 84, Trevor, J. (who was one of the Judges in the case decided by the late Sudder Court in 1857, which I have just read) said:-- "As to the case decided by the late Sadder Court on the 11th December 1857(1) that was one in which the ground of resumption was the default of the ghatwal. That being proved, the resumption was valid. To that extent the case is an authority, hut all the remarks beyond that point are obiter, and consequently not binding upon us in the present case;" and the Court held that the ghatwals of Kurruckpore held a perpetual hereditary tenure at a fixed jumma, in money and service, and that, except for misconduct on their part, they could not be evicted. In Rajah Lelanund Sing vs. The Government of Bengal, , it was held that the Government was not entitled to resume the ghatwali tenure, therefore that decision is not one which bears on the present case. It is clear that in this case the Government are not suing to resume the lands. The zamindar is asking to recover possession of the lands on the ground that he no longer requires the services, though the Government, through the Collector, refuses to dispense with them. The case of Rajah Lelanund Singh v. Surwan Sing 5 W.R., 292 was cited. The marginal note says that, "in the absence of express words to the contrary, ghatwali lands, held under a lease "which neither confirms nor recognizes the preexisting status of the ghatwals, nor confers on them any right other than that of holding the lands at a fixed rate as long as ghatwal service is required for them, are returnable by the zamindar when that service is no longer required." In

that case, the Government no longer required the services to be performed, and therefore it differs very materially from the present. But Kemp, J., does say in delivering his judgment:-- "The contract was clearly one for service. Lands wore given in lieu of wages, the jumma was fixed, and was payable as long as service was rendered; and in the absence of distinct "words to the contrary, the employer, the zamindar, is, we think, at liberty to determine the tenure, the services of the employee no longer being required." I cannot agree in that view of the case if, as stated in that case, the lands were granted to be held at a fixed rent so long as ghatwal services should be required the rent might possibly be enhanced when the services were not required. But in this case, the sunnud expressly recites that a ghatwali tenure of the mouzahs in question had been conferred upon Mohadeo before, and that tenure has according to long usage descended from father to son without objection. Therefore, even if the Government had dispensed with the services, I should hold that the lands were not liable to be resumed, and the tenants turned out of possession. Clearly the zamindar had no right to dispense with those services which had been reserved by the former Government for the public benefit. Suppose the former Government had granted land for services of a religious nature to be performed, the British Government would not require those services, but that would be no reason for determining the tenure of the person who held the lands upon those services as long as he is willing to perform them. The tenure is not to be determined merely at the will or caprice of the landlord, when the land has become valuable probably by the exertions and the expenditure of capital by the tenant, But whatever may be the case as regards the ghatwal services, it appears to me that the plaintiff, as auction-purchaser, is not entitled to avoid the tenure altogether and to eject the defendants.

5. The rent of Rs. 61 has been paid for a period commencing prior to the permanent settlement. The case falls within s. 37, Act XI of 1859, which is as follows:-- "The purchaser of an entire estate in the permanently settled districts of Bengal, Behar, and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement." The tenure, from what has been shown, is not an encumbrance imposed upon the estate after the time of settlement, but it is an encumbrance arising out of a grant made even before the East India Company acquired the Dewanny, The section goes on:-- "And shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with the following exceptions:--

First, istemuraree or mokuraree tenures which have been held at a fixed rent from the time of the permanent settlement." Now it is clear that, as regards rent, the holders of these lands have never paid any higher rent, since the time of the permanent settlement, than Rs. 61. They have therefore been holding at a fixed rent, though subject also to the performance of ghatwali services. It never could have been, intended that, if a man held at a fixed rent and ghatwali services under a

tenure created before the time of the permanent settlement, and long before the East India Company came to the Dewanny, that he could be turned out of possession merely because the auction-purchaser thinks fit to dispense with the performance of the services. It is contended for the plaintiff that, because the land was held at a fixed rent and subject to the performance of certain services, the holder of the tenure might be ousted by an auction-purchaser. I should say that a holding at a fixed rent and other services would fall within the clause to which I have referred, and that if the other services are performed, or the holder of the tenure is willing to perform them, an auction-purchaser could not treat the tenure as an encumbrance which he is at liberty to set aside, notwithstanding that the previous holder of the zamindari could not have set it aside. The object of the Sale Law was to protect the Government revenue. It was to take care that zamindars should not create encumbrances which would make the estate not worth the revenue assessed upon it. If a zamindar creates encumbrances after the date of the permanent settlement, as against an auction-purchaser, those encumbrances, with certain exceptions, are void. The next exception in the section is:-- "Secondly, tenures existing at the time of settlement which have not been held at a fixed rent." It is said that, in the present case, the tenure has been held at a fixed rent and something more. Still it is a tenure existing at the time of the permanent settlement. The case clearly falls within the first or second exception, and is one of those intended to be protected. The section says that an auction-purchaser shall acquire the estate free from encumbrances which have been imposed upon it after the time of settlement. The section then goes on:-- "And shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with the following exceptions." If the case falls within either of the two exceptions, the tenants are not liable to be ejected.

6. This suit, as already pointed out, is for possession and mesne profits. It is not necessary to consider the question whether, if the Government chose to dispense with the ghatwali services, and to exempt the tenants from the performance of those services, the rent of the land might be enhanced to the extent of the value of the services dispensed with. The only question now before us is whether the zamindar has a right to treat the owner of this tenure as a trespasser and to say that he has been a trespasser and liable to mesne profits from the date of the auction-sale. It appears to me that he has no such right, and consequently that this action cannot be maintained, and that the judgment of the lower Court must be affirmed with costs.

Trevor, J.

7. I entirely concur with the conclusion at which the learned Chief Justice has arrived. (After stating the nature of the suit and the allegations of the parties, His Lordship continued.) It seems that the original grantee died before the decennial settlement, and at that time his son Monorath was in possession. Since then the grandson and

great-grandson of Mohadeo have succeeded, and these direct successions have taken place, notwithstanding the estate has been sold three times for arrears of revenue, and the plaintiff is the fourth purchaser.

8. On these statements the question before us is, whether or not the plaintiff has the right to treat the defendant, the ghatwal, as a trespasser, and to eject him from his tenure, simply on the ground that the performance of the ghatwali services has been dispensed with for a long time, and that in his, plaintiff''s opinion, there was no necessity for the service.

9. In order to make good his claim, the argument of the learned Counsel, Mr. Doyne, on the plaintiff''s behalf, was some what to the following effect:-- That the relationship which existed between the grantor of the defendant''s grant in 1150F. (1743), and the ghatwal was simply that of master and servant under a contract, the latter receiving laud instead of money for his services; that such as the relation was then, such it remains now; that as there are no words in the grant of a hereditary nature, and nothing fixing the grant even to the grantee''s life, it remains competent to the grantor to determine the services whenever he thinks fit to dispense with them; that he is the zamindar under the decennial settlement who has succeeded to the rights of the original grantor, and that consequently he can act as that party could have done; that the responsibility to Government to keep up the ghatwals was in old time with the zamindar, and that the notion of any particular lands were set aside for that purpose, which purpose must be respected at the present day, is erroneous; that that responsibility of zamindars was continued at the decennial settlement, and the zamindari estate became security for the performance of the duties; that consequently, whether Government requires the services of the ghatwals or not, the plaintiff is at liberty to eject the defendant from his land at pleasure as being a more tenant-at-will, holding himself responsible for the due performance of the duties of the ghatwal to Government.

10. The contention of the learned Counsel seems to be altogether opposed to the view which the Privy Council took as to the nature of the Kurruckpore ghatwali tenures in the case of Rajah Lelanund Singh v. The Bengal Government 6 Moo. I.A., 101. And as the ghatwali villages in suit are situated in a pergunnah adjoining to Kurruckpore, in the same tract of country, and within the same zillah, the reasoning which applies to the latter will apply legitimately to the former, especially as it has not been suggested to us that any difference exists between the tenures in the two pergunnahs. Their Lordships, in the course of that judgment, after entering into the mode in which these provinces were administered in 1765 and subsequent years anterior to the decennial settlement, and after remarking that many of the greater zamindars within their respective zamindaris were entrusted with rights and charged with duties which properly belonged to the Government, and describing what arrangements were made for the payment of public officers of the zamindari for the police and for the chowkeedars and others, proceed as follows:-- "Besides

the disorder which prevailed generally through the provinces, particular districts were exposed to ravages of a different description. The mountain or bill districts of India were at this time inhabited by lawless tribes asserting a wild independence, often of a different race and different religions from the inhabitants of the plains who were frequently subject to marauding expeditions by their more warlike neighbours, To prevent these incursions it was necessary to guard and watch the ghats or mountain passes, through which these hostile descents were made, and the Mahomedan rulers established a tenure called ghatwali tenure by which lands were granted to individuals often of high rank at a low rent, or without rent, on condition of their performing those duties, and protecting and preserving order in the neighbouring districts." And again in another part of their judgment alluding to land held by ghatwals, their Lordships observe:-- "That they were held by a tenure created long before the East India Company acquired dominion over the country, and though the nature and extent, of the right of the ghatwal in the ghatwali villages may be doubtful and probably different in different districts and in different families, there clearly was some ancient law or usage by which these lands were appropriated to reward the services of ghatwals; services which although they would include the performance of duties of Police were quite as much in their origin of a military as of a civil character, and which required the appointment of a very different class of persons from ordinary Police officers."

11. Such being the general nature of a ghatwali tenure in Bhaugulpore, as laid down by the Privy Council in a judgment in which an examination of the nature of the tenure was necessary to enable their Lordships to determine the immediate point before them, namely, whether these tenures were included in or excluded from the zamindaris of the zamindar at the time of the decennial settlement and liable or not liable to resumption by Government. What do we find in the sunnud filed by the defendant, and dated 1150F. (1743), the genuineness of which is not questioned (reads). Now some of the duties mentioned in this sunnud are of a semi-military nature, and this sunnud was, it seems clear, granted by the zamindar acting as an officer of Government and with the consent of higher authority; it consequently takes the nature of a grant by the State to the grantee, on the condition of the performance of certain public services. It is a grant in its express terms, personal to Mohadeo Singh, a life-grant, in fact; and though it recites that the office of ghatwal and the lands had been assigned to Mohadeo before, it does not appear to me that, even by the light of the subsequent usage as to the grant, that the original grant can be presumed to have been hereditary in terms; but it is in my opinion, one of those grants which were 30 common in Mahomedan times, in terms limited to the life of the grantee, but which by usage were considered to convey an hereditary right, with or without the payment of a fine. Moreover the original grantee died, it seems, before the decennial settlement and at that time his son Monorath was in possession. Since then the grandson and great-grandson of Mohadeo have succeeded and as far as the evidence goes, as a matter of right. Thus the course of

actual succession under it confirms the opinion expressed by me as to the nature of the original grant, and these direct successions have taken place notwithstanding the estate had been sold three times for arrears of revenue, and the plaintiff is the fourth purchaser. Under the grant propounded by them, the grantees therefore show uninterrupted possession in direct succession of more than 100 years, going back to a period before the East India Company acquired the Dewanny.

12. Turning then to the title of the plaintiff, it seems to Test on the presumed nature of the contract between the defendants'' ancestor and the zamindar in 1743, and the fact that the plaintiff is an auction-purchaser is brought forward, rather it would seem to meet an objection which might have been taken by the defendants on the score of sixty years'' uninterrupted possession by them, than to fortify the plaintiff''s which would be equally good on the reasoning of the learned Counsel, whether he was an auction-purchaser or not. Be that as it may, it seems to me that the claim of the plaintiff as put forward by Mr. Doyne, has no foundation either in reason or in fact. The zamindar in 1743 was a Government servant, and in that character, as before observed, the grant was made and whatever character the zamindar may have filled from 1763 to 1790, he only in the last year became the owner, in a strict sense of the term, of the estate of which these lands form a part. There can be no doubt that before that date the grantee had paid, as he has paid up to the present time Rs. 61 as rent, though under what circumstances that Rs. 61 was originally assessed on his tenure, which originally bore no zamindari rasoom or rent, does not appear, but bearing that jumma at the decennial settlement, the land was included in the plaintiff''s zamindari, and it became a dependent tenure therein, burdened with and appropriated to the ghatwali service, and bearing the money rent which it bore.

13. The contention of the learned Counsel as to the effect of the decennial settlement on the parties seems to me as erroneous as his contention regarding the original contract between them. The settlement did not make the zamindar directly liable for anything, nor did it make his zamindari generally liable for the retention by him of the ghatwals it simply gave him the appointment, and, though this is more doubtful, the dismissal for misconduct, of those parties occupying his lands which had been devoted, before his rights accrued, to a particular object and which were still to be devoted to that object as long as the Government required it,--a requirement which as far as regards the defendants'' land, exists up to the present day.

14. As to any argument to be drawn against the plaintiff from s. 37 of Act XI of 1859, it appears to me that that law looks solely to tenures paying money rents alone, and is altogether inapplicable to the case of tenures burthened with a condition of service. I therefore forbear to make any further remarks upon it.

15. Altogether restricting myself to the question which is alone before the Court, and looking to the title of the defendant and to the claim set up by the plaintiff, I

have no hesitation in holding that the plaintiff is not entitled to eject the defendant on his own mere motion, and I would dismiss the plaintiff''s claim with costs.

Loch, J.

16. There is a difference between this case and Tekayet Jugmohon Sing v. Rajah Lelanund Singh 13 S.D.A.D. for 1857, 1812 which must be noticed. In that case, the ghatwal had been dismissed for misconduct, and the zamindar then sought to take possession of the lands, in attempting to do which he was opposed by the ghatwal. In that case, no opposition was offered by the Government to the proceedings of the zamindar. The expressions made use of in that judgment, though applicable to that particular case, are perhaps too general, and cannot properly be made to apply to other cases arising under a different set of circumstances. In that judgment also, no reference was made to the right of Government to insist on the performance of Police duties. But in a subsequent judgment of 1858, Tekayet Jugomohon Sing v. Rajah Lelanund Singh 14 S.D.A.D. for 1858, 1471, it was held that so long as the Government claimed the right to have Police duties performed by the ghatwals, the zamindar could not resume the lauds. In the present case, the zamindar seeks to evict the ghatwals and to take possession of their tenures. The ghatwals have not committed any act of misconduct, and have expressed no unwillingness to perform their Police duties, and the Government have expressed their intention to preserve their right to the services of the ghatwals, Even if the Government were to give up that right and declare that Police duties were no longer required from the ghatwals, I think that the utmost compensation the zamindar could claim in lien of the loss of service would be an enhancement of the rent now paid by the ghatwal. He could not oust the ghatwal as a trespasser, and take possession of his land. I agree with the Chief Justice in thinking that this case should be dismissed "with coats.
Jackson, J.

17. I was one of the Judges who referred this case for the consideration of a Full Bench, and I think it right to state my opinion separately, especially as, though I concur in the conclusion at which the Chief Justice has arrived in this particular case, I cannot concur in all the reasons which have led His Lordship to that conclusion. I need not say that if I differ from him in any respect, it is with great deference and with extreme reluctance.

18. It is said that the Principal Sudder Ameen has decided this case upon two points, 1st, on the ground that the defendants holding these lands under a tenure which commenced as far back as the year 1150F. (1743), cannot now be ejected; 2ndly, because they are protected under the clauses of s. 37, Act XI of 1859; and that in both points he was right.

19. Taking the latter portion of the case first, I must say it appears to me that s. 37 of the present Sale Law does not apply to the case. It cannot be said that these ghatwali tenures are "incumbrances which have been imposed upon the estate after

the time of settlement." In respect to the present tenure, it was one created undeniably before the date of the settlement, and it was the remuneration set aside, apparently by a person having authority in that behalf, for the performance of specific duties. As to the word "under-tenures," which the auction-purchaser is entitled to "avoid and annul," those, I think, must be rent-paying tenures where the rent is reserved as a consideration, more or less sufficient, for the use of the land; and this deduction from the zamindari assets was undoubtedly considered at the time of settlement. I think, therefore, that neither the power of the auction-purchaser to avoid tenures, nor the protection given by the 1st and 2nd clauses annexed to that section, will apply to this case. It appears to me that the power of the original zamindar to assess or enter upon these lands would have been just as extensive and valid as the power of the auction-purchaser.

20. The question, then, is as to the tenure itself. Now I may at once say that, when this case was referred for the consideration of a Full Bench, that order was made by myself and Mark by, J., almost at the out-set of the argument. The facts of the case had not been fully gone into, and it was because this case appeared to raise precisely the point decided by the 2nd Bench in the case cited, Munrunjun Singh v. Rajah Lelanund Singh 3 W.R., 84, and because we desired to give an opportunity for considering the correctness of that decision, we thought it advisable to refer the case to a Full Bench But when we come to examine it more minutely, the present case appears to differ very materially both from the case decided by myself and Kemp, J., Rajah Lelanund Singh v. Surwan Singh 5 W.R., 292, and from the former case; and in fact, it is in holding this case to be on all fours with Munrunjun Singh v. Rajah Lelanund Singh 3 W.R., 84 that one principal error of the Court below appears to me to consist.

21. The present suit has for its object to oust from possession, and recover mesne profits from, the defendants who are holding under title which commenced admittedly in 1743, that is to say, more than twenty years before the East India Company was invested with the Dewanny of the Provinces. The grunt, moreover, under which the defendants hold was not the mere grant of the zamindar, but it appears very distinctly, both from the wording of the sunnud, and from the successive endorsements of various departments which it bears, that it was the act of some person who, for that particular purpose at least, exercised the powers of the existing Government. In considering this sunnud I feel myself bound to depart a little from the views taken by the Chief Justice. And in the first place it seems to me desirable to reject all analogies from feudal or other tenures in England. Institutions, tenures, Government, and laws in the two cases are widely different, and we shall only, I think, embarrass ourselves if we make use of arguments drawn from one system for the purpose of inferences as to the other. It appears to me that there is a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office the performance of whose duties are remunerated by the use of certain hinds. The sunnud before us appears to me moat unmistakenably to

belong to the latter class. It confers on Mohadeo the khidmut-i-ghatwali, i.e., the service in office of ghatwal, with the mouzahs annexed, as remuneration, exhorts him to diligence in the performance of his duties, and enjoins the cultivation of the lands. Now, it is said, that this is a confirmation of a previous grant. I do not understand that it is, in the sense of the recognition and renewal of a full grant, previously conferred. On the contrary, there is no reference to any previous grant, and as far as I can judge, this was the first sunnud to Mohadeo or any of his family. I understand that Mohadeo, prior to the granting of this sunnud, was provisionally in the performance of this service, and I understand this confirmation (bahal dashtan) in a sense familiar enough in Indian practice, that is, to confer in permanence the office at first held temporarily. A person is placed on probation in charge of duties which demand the exercise of particular qualities in order to their efficient discharge; he is found to possess those qualifications, and to perform those duties with efficiency. Upon that he has the khidmut formally conferred upon him with the tenure with which he is to support it, that is to say, he is confirmed in the office and declared entitled to hold the land.

22. Then is the grantee entitled to hold for ever for himself and his heirs, or was the grant for his life? Was it subject to be divested and under what circumstances?

23. Now there is a considerable distinction between the positions and the rights of ghatwals in different parts of the country. It appears from the public documents referred to in the decision of Rajah Lelanund Singh v. Surwan Singh 5 W.R., 292 and from the accounts given in Harrington''s Analysis, Vol. II, p. 236, and Vol. III, p. 511, that ghatwali tenures in Bishenpore, Beerbhoom, Burdwan, and Bhaugulpore, vary in a great degree, both as to the extent and importance and as to the conditions under which they are held; some being expressly declared hereditary, others not so. It may be worth while to mention that the case referred to by the Chief Justice in his judgment, Hur Lall Singh v. Joramun Singh 6 Sel. Rep., 169, was a Beerbhoom case. In Beerbhoom we know that ghatwali tenures are hereditary; and in that case it was held that they descend to the eldest son, and not to sons generally. I do not find that it has been established either in this case or elsewhere that Bhaugulpore ghatwalis were ordinarily descendible. But certainly in this case we cannot but see that lands originally granted to Mohadeo us remuneration for his performing the duties of ghatwal by the sunnud of 1150F. (1743), have been held in succession by himself, his son, grandson, and descendants to the present day. It appears also that some portion of the rights and interests of his descendants has been sold in execution of a decree, and was purchased by some of the present defendants. This is a circumstance which has not been insisted upon by the plaintiff, but it seems quite opposed to the nature of ghatwali holdings. I accept this state of facts as explaining the nature of the sunnud, for it appears to me that the terms of the sunuud are plain in themselves and require no explanation. I cannot say either, without fuller evidence of the facts that the course of events or usage has made that descendible which was not of itself descendible. I should prefer to accept the

explanation which we find in the report cited in 3 Harrington''s Analysis, p. 511, which states that, "although the grant is not expressly hereditary, and the ghatwal is removable from his office, and the lands attached to it for misconduct, it is the general usage, on the death of a ghatwal, who has faithfully executed the trust committed to him, to appoint his son, if competent, or some other fit person in his family to succeed to the office." Still I think it would be a great deal too much to say that, when these defendants are holding as representatives of a former ghatwal, or by right of a person "whose tenure commenced under a valid grant of ghatwali more than 100 years ago, and where it has been allowed since then to change hands by descent or purchase without question the zamindar should be competent of his mere motion without the assent and against the will of the Government, to put an end to the ghatwali to deprive the ghatwal and to treat him as a common trespasser.

24. I am anxious in this case, as in the case of which Kemp, J., and myself decided, to avoid entering into larger questions than the case requires. In this present case, it appears to me, that the plaintiff cannot be entitled to possession of the land. Whether he can sue for the purpose of enhancing or assessing the rent, is another question. In the case decided by the late Sudder Court in 1857, Tekayet Jugmohon Singh v. Rajah Lelanund Singh S.D.A.D. for 1857, 1812, there was an alleged misconduct on the part of the ghatwal, and he was consequently dismissed from his office. Here there is no allegation of misconduct. The plaintiff simply says:-- "I, the zamindar, have no further occasion for ghatwali service, and I dispense with your services accordingly." Whether the Government is itself competent to abolish the office which in the necessity of the times it created, and resume, or sanction the resumption of, the land which it assigned as a remuneration for that service, is a question which has once been considered, but which I am quite willing and ready to re-consider if the occasion should arise.

25. Thus, while I fully concur in the dismissal of the plaintiff''s suit, I do so for reasons which belong strictly to the particular case, and not upon the wider grounds stated by the Chief Justice, and adopted by the majority of the Court.

Pundit, J.

26. The plaintiff, appellant, has not shown that he has any right to terminate the service with the condition of which the ghatwali tenure in dispute was originally given to the ancestors of the defendants long before the Dewanny, and which has since been held by them and their heirs according to the usage of the country, from generation to generation. Government is entitled to the service and has the superintendence of it. It does not say that it has dispensed with that service, nor does the appellant plead that Government has terminated the said service. On the contrary, we have got Government before us urging their right to claim the service of ghatwali from the defendants. In such a state of things it is sufficient to say that the plaintiff has failed to prove the very ground upon which he is suing to

dispossess the defendants.

27. I have no hesitation in declaring that, even if the termination of the ghatwali service had been proved, I would not have held that, owing to this determination, the plaintiff is entitled to dispossess the defendants of the lands in dispute.

28. The fact of his being an auction-purchaser gives to the plaintiff no additional rights. It is unnecessary to decide in this case what could have been the proper order if a case for enhancement had been brought by the plaintiff, appellant. I entirely agree in dismissing the claim, and the appeal of the plaintiff with costs.