Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Collector of Trichinopoly v. *Lekhamani and the Zemindar of Marungapuri, from the High Court of Judicature at Madras: delivered 14th March*, 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE nature and object of the suit in which these appeals were preferred are clearly stated in the judgment pronounced by the High Court at Madras (Record 190).

To make the case intelligible it may be shortly stated that the suit was brought in the Civil Court of Trichinopoly by Lukkamani, the first widow of Terumalia Puchaya Naiker, the late zemindar of Marungapuri, to recover, as his heiress, amongst other things, the villages attached to the zemindary. The suit was brought against the Collector of Trichinopoly as the agent of the Court of Wards in charge of the Zemindary, on behalf, and as the guardian, of Rangakristna Mutha Veera Puchaya Naiker, a minor, who was the half-brother of the deceased zemindar, and who, after his death, had been recognized by the Government as the zemindar. At the time of the late zemindar's death, he and his half-brother the minor were members of an undivided family, and, consequently, if the estate was hereditary, and the

minor was legitimate, he was the heir of the deceased zemindar (9 Moore's Indian Appeals, 66).

The principal defences set up by the collector were—

1. That no istimrari sunnud had been granted for the zemindary, and that it was an unsettled polliam; that after the death of the late zemindar the right to nominate a successor to him was vested in the Government; that the Government had granted the zemindary to the minor, Rangakristna; and that this, being an Act of State, could not be questioned by any Municipal Court.

2. That, even if an istimrari sunnud had been granted, and the polliam had been settled, the minor, as the undivided half-brother of the deceased zemindar, would be the rightful heir thereto.

The widow disputed the legitimacy of the minor, and the following were the principal issues laid down for trial:—

1. Whether the Court was competent to entertain the suit.

2. Whether the half-brother of the deceased zemindar was his legal heir, or whether the plaintiff herself was entitled to succeed to the zemindary.

3. Whether the minor was the half-brother of the deceased zemindar.

Subsequently, the minor, having attained his full age, was admitted as a supplemental defendant in the suit; but the first defendant, the collector, was also allowed to be heard in defence. Whereupon the first defendant, the collector, having been examined as a witness, the Judge, held that it was conclusively proved that the zemindary was an unsettled polliam, and that the right of succession having been declared by the highest authority to be vested in Government and not in the line of lineal succession, it followed that that right could not be called in question in that Court. He, therefore, found the first issue in favour of the first defendant, and dismissed the plaintiff's suit with costs.

The Plaintiff appealed to the High Court and made only the second or supplemental Defendant, the half brother, Respondent. Whereupon the Collector presented a petition to the High Court stating that it was contended on the part of the Appellant that the zemindary was not an unsettled one and consequently that the Government had no

right to interfere with the succession thereto on the death of he zemindar, and that the Government was interested in the decision of that question; he therefore prayed that he might be made a party to the suit and allowed on behalf of Government to defend the appeal.

On the 17th June, 1870, the petition of the Collector was dismissed (p. 187).

Another petition to the same effect was subsequently presented by the Collector (p. 188), the Government offering to forego all claim to costs. Whereupon it was ordered that the application should be admitted on condition that, in the event of the appeal being dismissed with costs, no more than the costs of one Respondent should be allowed against the Appellant.

Thus it appears that the Collector who was originally a Defendant, merely as Agent of the Court of Wards and as guardian of the minor zemindar Rangakristna, became substantially a party to the suit on behalf of and as representing the interests of Government. The appeal came on to be heard before the High Court who, at the close of the arguments on the first day of the hearing, were of opinion, for the reasons specified in their judgment, that upon the case presented by the record returned to the Court the decree of the Zillah Court could not stand, and they adjourned the further hearing of the appeal (Record p. 191, l. 42); afterwards, having obtained all the evidence which the parties were able to adduce with respect to the proprietary right of the late zemindar, and having heard the case fully argued, they delivered judgment (p. 192).

In the first place, they held that the Government proceedings admitting the minor to the succession did not amount to an act of State, which debarred the cognizance of the suit by a Municipal Court.

The correctness of their decision upon that point has not been disputed in the present appeal.

They then (p. 192, l. 16) proceeded to consider the question whether the estate of the late zemindar was hereditary or whether he had merely an estate for life. Upon that point they delivered a very able and elaborate judgment in which they held that the Polliam was an ancestral hereditary estate. (Record, p. 205, l. 10.)

They said (p. 205).

"With respect to the proprietary right possessed by the late Zemindar, there is now before the Court the whole of the evidence which the parties have been able to adduce, and we have had the advantage of hearing the case ably argued. The question for determination is, whether he had vested in him an hereditary estate, which passed on his death to his heir in the order of legal succession, as the plaintiff contends, or an estate for life, on the termination of which the right to dispose of the property reverted to the Government as the defendants contend. The villages and lands mentioned in the plaint form one of the Manapuri polliems, but the estate and the holder of it have been commonly given the designations used in the plaint, of zemindary and Zemindar; it is, however, a conceded fact that no istimrari sunnud granting the estate under Regulation 25 of 1802 has ever existed; and the positions advanced on both sides, stated summarily, are on behalf of the Plaintiff, that there is sufficient evidence from which to draw the inference that the property had been permanently assessed; but, if not, that the tenure by which the polliems not permanently assessed are held had not attached to it as an essential incident the limit of the life of the holder, but that, both historically and by judicial authority, the tenure is rather shown to be in its nature hereditary; that it may be either hereditary or for life, according to the nature of the grant creating it, and that in the present case the evidence proved the polliem to have been held as an hereditary estate."

Then, after reviewing the authorities, the evidence, and the arguments of Counsel, they proceeded—

"Upon the whole, we are of opinion that it has been established, as strongly as a claim of this nature can be expected to be proved, that the polliem in dispute is an ancestral hereditary estate which has devolved through several generations in the ordinary course of legal succession. Almost everything tending to this conclusion that could reasonably be looked for, it seems to us, exists, save the grant of a sunnud under Regulation 25 of 1802; and that is not, in our judgment, made by law indispensable, except to render the revenue assessment permanent. It follows that the right of succession contested in the present suit depends upon the question raised by the second issue in the suit, whether the second Defendant is the legitimate brother of the late Polligar, Tirumalai Puchaya Naiker. If so, he is the rightful heir to all the property claimed in the plaint, no division having taken place between him and his deceased brother. But if illegitimate, he has no right to any portion of it. No additional issue is necessary."

An issue was then directed to try whether the half-brother was legitimate or not.

It is admitted that the villages and lands mentioned in the plaint are, as pointed out by the High Court, one of the Manapuri polliems, and that no istimrari sunnud, granting the estate under regulation 25 of 1802 of the Madras Code, has ever been issued.

The case has been very elaborately and ably argued on both sides, and their Lordships having carefully considered all the regulations and authorities which have been cited, are clearly of opinion that the decision of the High Court is correct.

It was contended by the learned Counsel for the Collector Appellant that in the Presidency of Madras the Government had reserved to itself and had, by legislative enactments, asserted its right to all lands of every description and Regulations 25 and 31 of 1802 of the Madras Code were referred to as having that effect.

It was recited in the preamble of the former of those two Regulations, that the assessment of land revenue had never been fixed, and that the zemindars and others had no security for the continuance of a moderate land tax; *that for the attainment of an increased revenue it had been usual for Government to deprive the zemindars and to appoint persons on its own behalf to the management of the zemindaries, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever;* that it was obvious that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population, and wealth, and diminishing the security of personal freedom and of *private property,* and that the British Government, impressed with a deep sense of the injuries arising to the "State and to its subjects, from the operation of such principles, had resolved to remove from its administration so fruitful a source of uncertainty and disquietude, to grant to zemindars and other landholders, their heirs and successors, a *permanent property* in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances."

It was then enacted by Section 2 that, in conformity with these principles, *an assessment should be fixed on all lands liable to pay revenue to Government: and in consequence of such assessment the proprietary right of the soil should become vested in the Zemindars or other proprietors of land and in their heirs and lawful successors for ever;* and it was further

enacted by Section 3, that when the conditions of the permanent settlement of the revenue should have been adjusted, a sunnud-i-milkeut istimrar or deed of *permanent property* should be granted on the part of the British Government to all persons being or constituted to be zemindars or proprietors of land.

Laying out of consideration for the present the words of the preamble, which form no part of the enactment of the regulation (see Dwarris on Statutes, p. 655), it is clear that the affirmative words of the 2nd Section "That, in consequence of the assessment the *proprietary right* of the soil shall become vested in the zemindars, &c.," did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away an existing right (see Coke's 2 "Institute," p. 200; "Dwarris on Statutes," p. 637). There are no words declaring that no proprietary right then existed, or should thereafter be deemed to exist, except in government in any lands not permanently settled; and in their Lordships' opinion it was not the intention of the Legislature to pass such an enactment.

The words "proprietors of land," as used both in the Bengal Code of 1793, and in the Madras Code of 1802, have a technical signification (see the definition in Bengal Regulation 8 of 1793, sections 5, 6, and 7; and Regulation 27 of 1802, Madras Code, section 2). They refer to "zemindars, independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government;" and the words "proprietary possession," as used in the recital of Regulation 25 of 1802, must also be read in a similar sense as meaning the possession and rights of a proprietor in the technical sense in which that word is used, viz., the person who pays the revenue immediately to Government. (See Regulation 1 of the Madras Code, sections 14 and 16.)

There are frequently many valuable tenures existing between the zemindar and the ryots, or

actual cultivators of the land. If the Regulations 25 and 31 of 1802 were to be read in the sense contended for on the part of the Collector Appellant they would have the effect of vesting in Government, not only all hereditary estates, but all sub-tenures, whether for life or otherwise, and whether created by the native Governments before the territories came under the Government of the East India Company or not.

The words of the recital "the *implied* right and the *actual* exercise of the *proprietary possession* are, to say the least of them, very ambiguous. But whatever may be the real meaning of those words, the recital clearly was not intended to amount to more than a declaration that it had been usual for Government, in order to enforce an increased revenue to deprive or dispossess the zemindars, and to take the management of the zemindaries into the hands of their own officers; or, in other words, that they were in the habit of taking khas possession of the zemindaries of those zemindars who neglected to pay any increased amount of revenue assessed upon them.

A similar course seems to have been adopted in Bengal up to the time of the permanent settlement (see Regulation 1 of 1793), and to have been continued at the time of that settlement, with respect to every zemindar who might decline to engage for the jumma proposed to be permanently settled upon his Estate. (See Regulation 8 of 1793, s. 43, Bengal Code.)

Further, the usage recited was limited to the purpose of obtaining an increased revenue; and it was by means of the usage that the Government was said to have reserved to itself the implied right, &c. The words are "*thereby* reserving to the ruling power the implied right, &c." The preamble recognized the right of private property when it stated that the then existing mode of administration was injurious "*by diminishing the security of private property.*" It did not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of *transferring* their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The language of the recital applied as much to zemindars in their lifetime as it did to the heirs of zemindars upon their deaths. If the words were to have the unlimited construction and effect contended for, the Regulation would have justified Government in depriving or dispossessing the deceased Polygar in his lifetime, and in transferring the zemindary to a new holder, to the same extent as it would have justified them in dispossessing his heirs after his death. Such a construction would go far beyond the claim set up by the Collector in the suit, viz., that the deceased zemindar had only a life estate which reverted to Government and was at their absolute disposal after his death; nay, it would do more, it would render every land owner in the Presidency, except those who claimed under a permanent settlement, liable to be dispossessed or deprived of his estate, and to have it transferred to a new holder at the will of Government.

The preamble to Regulation 31 of 1802, which, as before observed, was not an enactment, is as follows:—Whereas the ruling power of the Provinces now subject to Fort St. George has, in conformity to the ancient usage of the country, reserved to itself and has exercised *the actual proprietary right of lands* of every description, and whereas consistently with principle all alienations of land, except by the consent of the ruling power, are violations of that right; and whereas considerable portions of land have been alienated by the unauthorized encroachment of the present possessors, by the clandestine collusion of local officers, and by other fraudulent means: and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description, it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being badshai or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose.

The Act, section 2, then proceeds to render valid all grants for holding lands exempt from the payment of public revenue which had been made before certain dates, and to leave to the determi-

nation of Government all doubts respecting the validity of other grants of that nature.

The words "has reserved to itself and has exercised the actual proprietary right of lands of every description," used in the above preamble, are not precisely the same as those used in the preamble of Regulation 25, but they evidently have reference to the same usage, viz., the custom of dispossessing zemindars, and taking their zemindaries into the khas possession of Government, for the purpose of realizing the public revenue from time to time assessed upon them. The object of the Regulation 31 of 1802 was merely the protection of the revenue from invalid lakiraj grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which did not then exist. The words "alienations of land" referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. It is clear that the Regulation never intended to assert that, *according* to the usages of the country there was no private right to lands, for in rendering valid all lakiraj grants made prior to a certain date, and declaring that the holders should continue to enjoy the same free from the payment of revenue, there was this proviso, that the lands had not *escheated* to the State since those dates.

It was urged, in support of the Collector's appeal, that there was a long course of judicial decisions, from 1813 to the present time, showing that Polygars had merely a life interest in their polliams.

The first case cited was No. 13 of 1813, 1st Madras Select Decrees, p. 78. In that case the plaintiff had never had the possession of the zemindaree. His claim had been repeatedly brought to the notice of Government, and had been rejected. The permanent settlement had been entered into with the defendant, and a sunnud-i-molkeut-i-istimrar granted to him by Government, under the provisions of Regulation 25 of 1802. This case was not decided upon the mere words of the recital of Regulation 25 of 1802, but upon the enactment in section 2, and it was held that the Government

having *permanently* settled with the Defendant, *and granted him a sunnud,* he had acquired a title under that Regulation, and that the Plaintiff could not recover the estate. The decision, however, whether right or wrong (probably right under the law as it then stood), was decided before the passing of Regulation 4 of 1822, by which it was enacted that Regulations 25, 28, and 30 of 1802 were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and left them to recover in the established Courts of Justice *their rights* if infringed (an enactment similar in effect to that contained in the Bengal Regulations relating to the permanent settlement in that Presidency). (See No. 8 of 1793 Bengal Code, section 30.)

Regulation 4 of 1822 expressly recognized the fact that landholders had actual rights which they might recover if infringed.

In the case cited (No. 13 of 1813), a case was referred to (Appeal No. 9 of 1813), in which a talookdar's rights were asserted and enforced against a zemindar, which is quite at variance with the contention that the property in lands of every description belonged to and was vested in Government. It is true it was stated by the Court, in No. 13 of 1813, that it was plainly deducible from Regulation 25 of 1802 that, previously to the fixing of the permanent assessment, succession to zemindary tenures was not governed *exclusively* by the law of inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures in such manner as might be considered most expedient for the purpose of realizing the public revenue due from the lands, and that it was clear therefore that, in rejecting the claims of the Plaintiff, whatever might be the specific grounds of such rejection, and in granting the zemindary to the original Defendant, the British Government exercised a right which, according to the declared usages of the country, was vested in the ruling power. It was to correct opinions such as those that Regulation 4 of 1822 was passed

The next case was No. 11 of 1846, p. 141. In that case there had not been any permanent settlement or any sunnud granted by Government.

The zemindary had been made over to the father of the Plaintiff and Defendant after the district came into the possession of the East India Company, and it continued in his possession to the year 1811, when, upon his death, it was made over to his eldest son. The Court said that the Respondent held under a title which the Government, in the exercise of the right vested in them by the usage of the country, had conferred upon him.

One of the Judges who decided the last case was also one of those who decided No. 13 of 1813, evidently putting the same construction upon Regulation 25 of 1802 as he had done in No. 13 of 1813.

Case No. 14 of 1817 is subject to similar remarks. The Court, of which two of the Judges were the same as those who decided the former case, acted upon similar deductions from Regulation 25 of 1802.

All those cases were decided prior to Regulation 4 of 1822, and were probably some of the decisions which induced the Legislature to pass the Regulation.

Their Lordships do not consider that the cases cited from the Madras Select Decrees are binding authorities in support of the contention that Government has a right to deal with the polliem in the present case, or any other polliem, according to arbitrary will independently of the rights of the parties, or in support of the position that the absolute right to every polliem not permanently settled is vested in Government, or that the tenure is for life only, and that upon the death of the Polygar the estate reverts to Government.

Many of the cases cited in argument are of no greater weight or authority than that which is the subject of the present appeal. They are modern authorities, and there is no long uniform current of decisions sufficient to show that every polliem not permanently settled is necessarily only a tenure for life, or at the will of Government.

In the case of Naragunty Lutchmeedavamah *v.* Vengama Naidoo (9 Moore's Indian Appeals, 67; and in that of the Collector of Madura *v.* Veeracamoo Ummal *id.* 446) the polliems were treated as hereditary, the question in each being as to the person entitled to succeed as heir. In the latter case, the Government of Madras

claimed to be entitled by escheat for want of male heirs, thereby admitting that the estate was hereditary ; but it was held that females were not precluded from inheriting a polliem, thereby deciding that it was hereditary. It did not appear in any of those cases that the polliem had been permanently settled or that a sunnud had been granted in respect of it under Regulation 22 of 1802. They show that a polliem may be hereditary though not permanently settled under Regulation 25 of 1802.

Their Lordships are of opinion that each case must depend upon its own particular circumstances ; that a polliem may be hereditary, and that the position laid down by the High Court (page 200, line 30) is correct. They there say :—

> " The existence of a proprietary estate in polliems or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property."

Their Lordships are also of opinion that the finding of the High Court upon the evidence adduced that the polliem in dispute is an ancestral hereditary estate is also correct.

It does not at all follow from the application made to Government for the recognition of the minor that he had not an hereditary estate. It was extremely common in Bengal before the acquisition of the Dewanny where a tenure was in fact hereditary from father to son to take out a new sunnud upon each descent (14 Moore's Indian Appeals 256 ; Kooldeep Narain Singh *v.* the Government and others). So also it appears that upon a transfer of title to lands in Calcutta, either by alienation or descent a fresh pottah was given to the new holder ; but that was merely a fiscal regulation and the pottah formed no part of the holder's title (Freeman *v.* Fairlie, 1 Moore's Indian Appeals, 346).

The Collector in his written statement alleged that the polliem was unsettled and that after the death of the late zemindar the right to appoint a successor was vested in the Government and that accordingly the Government had granted the said zemindary to the minor Defendant. No grant from the Government was produced. That which is called a sunnud was not a grant creating a new right but a mere recognition or acknowledgment of

an existing title. See the proceedings of the Madras Government (No. 17A, Record p. 23).

From this document it appears that, upon the death of the late Polygar, the Collector sent a report to the Court of Wards stating among other things as follows :—

"The deceased Zemindar, on the day previous to his death, addressed to me a petition, requesting me *to recognize* his brother as his successor to the estate, and to appoint his cousin to manage the affairs of his estate during the minority of his brother.

"The Tahsildar was deputed to ascertain the wishes of the widows of the deceased on this point, and to afford information regarding the property left by the Zemindar. The Tahsildar submitted a statement obtained from the widows, from which it appears that they earnestly request a compliance with the request contained in the petition addressed to me by their husband, but with this modification, that the cousin should conduct the affairs of the estate under the direct control of the first-mentioned widow. The widows admit the genuineness of the petition.

"The deceased left no Will. The estate consists of the Marungapuri zemindary and certain mirasi lands, the assessment of which amounts to rupees 2,528 : 8 : 10."

The above report was submitted by the Court of Wards to Government with a recommendation that the Collector *be authorized to recognize* the brother of the deceased (the Defendant in the suit), as zemindar of Morungapury, and to take charge of the estate. They added—assuming that the family is undivided, as is probably the case, *the brother of the deceased would be the legal heir to the zemindary, irrespective of the petition or consent of the widows.* Upon that report the Government passed an order, dated September 17, 1864, that the Court's proposal is approved.

It also appears that after the death of the father of the late Polygar, Terumalai, the Collector reported that the deceased left one son Taroomalai, *the heir to the estate*, and one son, the present defendant, a little boy by his fifth wife, then three years of age, and he recommended that Teroomalai should be recognized and invested as Polygar in the room of his father (Record 32). Upon which the Government ordered that Teroomalai should be recognized and placed in charge of the estate.

In England, proof of the possession of land or of the receipt of rent from the person in possession is *primâ facie* evidence of a seisin in fee.

In India the proof of possession or receipt of

rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindary. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions from ancestor to heir. (See 14 Moore's Indian Appeals, 256) .There is no difference in this respect between a polliem and an ordinary zemindary. The only difference between a polliem or zemindary which is permanently settled and one that is not is that, in the former, the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power.

The history of the polliems of southern India is well known. It is to be found in the fifth Report from the Select Committee from the House of Commons on the affairs of the East India Company, presented in 1812, a work of great research, and in the Madura Manual, compiled by Mr. Nelson of the Madras Civil Service, by order of the Government of Madras.

The account given in the fifth Report, was adopted in the judgment pronounced by Lord Kingsdown in the case above quoted in which it was held that a polliem was an ancestral estate in the nature of a Raj.

Looking at the evidence in the cause with reference to the tenure of the polliem in question, their Lordships have no doubt that the High Court arrived at a correct conclusion, and that the polliem is an ancestral hereditary estate.

The question as to the legitimacy of the minor Defendant, and his right to inherit, if the estate of his brother was an estate of inheritance, was found by the High Court in his favour, and that decision has already been upheld by their Lordships in the widow's appeal. The legitimacy of the minor having been upheld, the suit of the widow was properly dismissed, for whether the estate was one of inheritance or one merely for the life of her deceased husband, with a right on the part of the Government, on his death, to appoint a successor, the widow could have no right to succeed. The decree of the High Court was correct, and even if the point raised by the Collector on the part of the Government were decided in his favour, the decree

dismissing the widow's suit must still be upheld. Their Lordships have already stated that they will humbly recommend Her Majesty that the decree of the High Court be affirmed with costs.

As the point raised by the Collector was one of importance, and necessary to be decided with reference to the costs of the Collector's appeal, their Lordships have heard that question argued; and having fully considered the very able and elaborate arguments of the learned Counsel on both sides, they have arrived at the conclusion that beyond all doubt the decision of the High Court was correct, and they will therefore humbly recommend Her Majesty, with reference to the Collector's appeal, that the decree be affirmed and the appeal dismissed with costs.

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