

Privy Council Appeal No. 128 of 1918.

Oudh Appeal No. 7 of 1915.

Raja Mohammad Abul Hasan Khan, since deceased (now represented by the Deputy-Commissioner of Gonda) - - - - *Appellant*

v.

Lachmi Narain and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1921.

Present at the Hearing :

LORD DUNEDIN.

LORD PHILLIMORE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[*Delivered by Mr. AMEER ALI.*]

The suit, which has given rise to this appeal, was brought by the plaintiffs in the Court of the Subordinate Judge of Gonda, in Oude, on the 1st May, 1913, and relates to a village called Kunderwa, lying within the Taluqa Birwa Mahnon, in the Gonda district, in which the first plaintiff owns a half share; the second plaintiff, a resident of Lucknow, appears to have purchased at a sale in execution of a decree a part of the village in dispute. Why he has been joined in the suit as plaintiff does not clearly appear. The other half of the Taluqa is owned by the Taluqdar of Balrampur. The defendants hold the village Kunderwa under a *birt* grant created so long ago as 1802 by one Maharaj Kumar Madho Sing, who owned the property in those days. Later the Taluqa came into the possession of a lady named Rani Sarfaraz Kunwar; on her death it devolved on her daughter, Birjraj Kunwar. On Birjraj Kunwar's death somewhere in 1879 it passed into the hands of her husband, Achcha Ram. In 1888 half of the estate was purchased by the first plaintiff's father, Raja Kazim Hossain, whose title as purchaser was affirmed finally only in 1899; whilst the other half was acquired at or about the same time by the Taluqdar of Balrampur.

The *Pottah* under which the *birt*-holders obtained the village of Kunderwa is in the following terms :—

“ I have given the land of village Kunderwa to Pathak Guni Ram by way of *birt*. He is free to settle himself and others (therein) and to cultivate it himself or get it cultivated, year after year : that is to say, he is free to have it cultivated and populated. He should pay the revenue to the Sarkar at the rate prevalent in the Taluka and take the *dasaundh* at the rate prevalent in the Taluka. I have written this ; none should act against this.”

For the first year, the rent is fixed at Rs. 4 rising in the course of five years to Rs. 36. And then follows the clause relating to future rent :—

“ He [meaning the grantee] is to enjoy it free for five or six years. Thereafter at the rate for *Bankati* prevalent in the Taluka.”

The character and incidents of these *birt* grants will be referred to more particularly in the course of this judgment. It is enough to say at this stage that the Circular issued by the Chief Commissioner of Oude in 1861 shows that so late as the early part of the nineteenth century large tracts of land in the Province were lying unreclaimed and uncultivated, and the usual method for large proprietors was to let out the waste lands on favourable terms and security of tenure to tenants to bring them under cultivation. These grants were usually called *birt bankati* (as in the present case) or *bantarashi*, the names indicating the purpose for which they were made. The *birtia*, or *birt*-holder, had to cut down the forest, clear the land, build tanks and induct raiyats.

The predecessors in title of the defendants remained admittedly in unmolested possession of the village for nearly 73 years.

In 1869, in the course of what is called the first Regular Settlement in Oude, they applied for a direct settlement with them of the revenue assessed on their village. Their application was opposed on behalf of Sarfaraz Kunwar, who then held the Taluqa. The case came for final disposal before the Extra Assistant Commissioner of Gonda on the 30th January, 1871 ; the *birt*-holder was arrayed as plaintiff and the Taluqdar as defendant. The Taluqdar charged the documents produced by the *birt*-holders to be forgeries. This was found to be untrue ; and the actual decision relative to the respective rights of the parties is in the following terms :—

“ Now the question whether the *Bankati birt* is tantamount to the *birt* right or not remains to be dealt with. It is evident that when the *birtdari dahyak* dues are being deducted all through, no extinction of the *birt* rights can take place on account of the decrease or increase in the amount of rental. In mortgage and sale *birt*¹ the owners of villages generally enjoyed the power to assess rents, to make amendments in them, and to grant periodical leases in their districts : and the *dahyak* dues have been estimated at 10 per cent. only. The plaintiff has all these qualities in him.

“ For the above reasons it is ordered that a decree upholding possession and occupation as an under-proprietor be passed in favour of the plaintiff under the provisions of Circular No. 11 of 1862 in respect of village Kun-

¹ For the meaning of this class of *birt* see Sykes.

darwa No. 590, Prägana Gonda, subject to the condition that the Talukdar shall always have the power to renew the *patta* and to amend and to assess the *jama* according to the practice observed during the *Shahi* times: that the plaintiff having deducted only 10 per cent. *dahyak* dues, shall pay the balance of the *jama* proposed to the Talukdar: that in case of refusal to take up the lease and the village being held under direct management, the plaintiff shall be deemed entitled to *dahyak* dues at 10 per cent. from the amount of gross rental, and that, having deducted his *dahyak* dues in both the seasons, he shall have the accounts adjusted at the end of the year."

It is clear from this decree that the Extra Assistant Commissioner found that the plaintiff in that case possessed all the powers ordinarily enjoyed by *birt*-holders of his class: and he accordingly upheld the plaintiff's "possession and occupation as an under-proprietor," subject to the conditions set forth above.

It is alleged by the plaintiffs in the present suit that there was a discontinuance in "the possession and occupation" of the *birt*-holders between 1875 and 1879, when they declined to take a *Pottah* on the rent assessed by the Taluqdar. During this period, it is alleged, the village was let to some other people, the defendants receiving only the tenth of the rent received by the Taluqdar, and that in 1880 the *birt*-holders again got possession under a new arrangement. These allegations are not admitted by the defendants: they deny that they ever lost possession. No *Pottah* or *Kabuliat* appears to have been produced to show what the new arrangement was. Anyhow, whatever its character, it has lasted a considerable time.

In 1898 Achcha Ram, who had come into the possession of the Taluqa on the death of his wife, Birjraj Kunwar, brought a suit against the defendants for ejection and enhancement of rent. That suit failed: the Judicial Commissioner dismissed the action on the ground that both reliefs were exclusively for the Revenue Courts to determine.

In 1901 Raja Kazim Hossain Khan, the father of the first plaintiff, who had by that time become the owner by purchase of a half share of the Taluqa, brought a suit against the defendants in the Court of the Deputy Collector of Gonda for arrears of rent for the Fasli years 1307 and 1308 (1900 and 1901), on the allegation that they held Kunderwa on a rental of Rs. 503.14.6 and that he was entitled to receive a moiety thereof. The defendants contended that the rent was payable as a whole and they could not be made separately liable for a share of the rent. They also alleged that their rent was Rs. 500, which they had been always willing to pay less their *dahyak*, the tenth, which they were entitled to deduct, and that Rs. 3.14.6 claimed by the plaintiff was an overcharge for rates.

The Deputy Collector of Gonda, before whom the case came for trial, dealing first with the plea that the defendants were not liable to pay the rent in halves, stated his view as to the status of the defendants in the following terms:—"They are not tenants: nor are they ordinary *thekadars*; rather they hold the land as under-proprietors, or inferior proprietors." In this

view he overruled the *birtias'* objection to being made liable to pay rent in halves. On the question of the rent he held as follows :—

“ The defendants admit the *jama* to be Rs. 500, and on adding to it Rs. 3.14.6 on account of rate, we get the amount of Rs. 503.14.6, as claimed by the plaintiff. But the suit has not been brought in respect of rate, nor was any issue framed as to whether the plaintiff was entitled to get the same. The defendants are not tenants nor are they responsible for profits and loss : they are in possession (on payment of *jama* minus a fixed percentage *i.e.*, 10 per cent.). Till the rate is sued for I cannot include it in the claim from my own side. I take the amount of *jama* to be Rs. 500 and thus the plaintiff's share comes to Rs. 250 per year. The defendants have stated that from the *jama* fixed, 10 per cent., that is to say Rs. 50 per year, used to be deducted as *dahyak* dues. The plaintiff is silent as regards this objection. From the copy of the order dated the 30th January, 1871, passed in the previous settlement it appears that a decree for *dahyak* (10 per cent.) was passed in favour of Sheo Ratan, the ancestor of the defendants, and it was settled that the proposed rent should be paid to the Talukdar after deducting therefrom the *dahyak* right, that is 10 per cent. From the copy of the judgment, dated the 29th October, 1898, passed by the Court of the Judicial Commissioner (of Oudh) in *re* Sheo Ratan *versus* Acheha Ram, it appears that up to that time the *dahyak* right prevailed, and there appears to be no reason why it should have ceased thereafter. From the proposed rent Rs. 50 per year should be deducted : and after deducting this amount Rs. 450 are due, out of which the plaintiff is entitled to get Rs. 225.”

The decree of the Deputy Collector is dated the 23rd December, 1901. The North-western Provinces and Oude Land Revenue Act (III of 1901) was enacted about this time, and under its provisions the revenue assessment of the Gonda District was taken in hand. In the course of the settlement proceedings relating to the Birwa Mahnon Taluqa a claim was preferred for the assessment of rent in respect of the village of Kundarwa. Before the Settlement Officer the Balrampur Estate, as the owner of the half-share of the Taluqa, was arrayed as plaintiff, whilst the *birt*-holders appeared as defendants. The Assistant Settlement Officer, after stating in his judgment that “ the case was instituted in his Court simply to determine whether or not the *daswanddar*-holders of the village Kundarwa should be assessed with rent by him,” sets out the contentions of the parties. The Taluqdar's Mookhtcar urged again that the defendants were holding at a rental of Rs. 503.14.6 under a lease executed by them, and that therefore the Settlement Court should not assess the rent on the village ; whilst the defendants contended they had never been disturbed in their possession of the village, and that for the last 30 years they had been paying a rent of Rs. 500 less Rs. 50, their *dahyak* dues, which they were entitled to deduct. Dealing with the Kundurwa village, he held as follows :—

“ When the Settlement Court allowed the *daswand*-holders to retain possession over the hamlet of Kundarwa, and they were not dispossessed by the Civil Court, the rent thereof should certainly be assessed by this Court. Now there only remains to be seen what would be the amount of rent. The revenue fixed formerly in respect of the village has been allowed to stand, therefore I allow the rent of Kundarwa to be the same as before for the following reasons ;”

After giving his reasons for the conclusion at which he had arrived, he went on to say that whilst there was a possibility of improvement in one of the hamlets in dispute, "there was very little chance of improvement in Kunderwa." In other words, in his opinion there was little room for enhancement in the case of Kunderwa. And accordingly he made the following order in regard to the hamlet and the village respectively :—

"For these reasons I think it advisable to let the former Revenue, Rs. 50 of Pura Sanwant Ban, stand as good, and Rs. 250 of Pura Kunderwa. The (net) profit thus comes to Rs. 500, and after deducting the *dahyak* dues, the rent of the hamlet Kunderwa amounts to Rs. 450; and this is the rent which I fix."

The effect of the Assistant Settlement Officer's order was simply to recognise and affirm the rent the defendants were paying. The Taluqdar preferred an appeal from this order to the Settlement Officer; and his order in respect of Kunderwa is in these terms :—

"This is one of those unfortunate decrees of the last settlement which gave and took away rights in the same breath. The respondents were decreed possession of mauza Kunderwa and intermediate rights, *i.e.* under-proprietary, but the Talukdar was given power to fix the rent, and if the under-proprietors were not prepared to pay it they could resign possession and receive 10 per cent. of assets instead. Such conflicting appeals are merely provocative of further litigation in order to define the status of the subordinate party. The appellant urges that as no rent was fixed at last settlement the Settlement Court has no power to fix rents now. I find that whatever else the Settlement Court at last settlement gave, it certainly conferred under-proprietary rights to land, and I am therefore empowered to fix rents under Section 79 of the Revenue Act."

The Settlement Officer's order was made on the 1st December, 1902. From that date to November, 1912, the Taluqdars remained quiescent. By that time the first plaintiff in this action had succeeded to his father's estate; and he, on the 19th of that month, issued to the several defendants the following notices couched in identical terms offering a three years' lease. After setting out the decree of the Extra Settlement Officer made on the 30th January, 1871, the plaintiff says :—

"I, the sender of this notice and the possessor of the Estate of Biwa Mahnon, of which the aforesaid village forms a part, assess and fix the lease money of the aforesaid village at Rs. 580, as detailed below, from 1320 F. to 1322 F. After deducting therefrom Rs. 58, the *dahyak* (10 per cent.) dues at the rate mentioned in the settlement decree, you shall be liable to pay every year the remaining amount of Rs. 522, as detailed below, in the instalments noted below. If you accept the rental, mentioned above, you can attend the estate office of the sender of this notice and get the *putta* and the *Kabuliat* completed; but if you fail to get the same completed within fifteen days from this date or refuse to take up the lease (*Sheka*) of the aforesaid village at the above rental, you shall cease to have the right of possession over the village and it shall be taken under direct management. If you fail to make a reply to this notice within seven days from this date, it shall be deemed that you do not agree to take up the lease of the village on the rental assessed by me."

The defendants do not seem to have given any reply to this demand—at least there is nothing on the record to show that there was a reply—and accordingly the first plaintiff, in conjunction with Lachmi Narain, brought this suit as already stated in the Court of the Subordinate Judge of Gonda on the 1st May, 1913, for the following reliefs :—

“(a) That a declaration be made to the effect that the defendants 1 to 5 have no zamindari right superior or inferior, in the entire village Kandarwa owned by the plaintiffs.

“(b) That it may be declared that according to the old settlement decree, dated the 30th January, 1871, the plaintiff alone is entitled to assess and alter the amount of rent to be paid by the defendants 1 to 5.

“(c) That a decree for possession of the entire village Kandarwa be given.”

He also claimed mesne profits.

The defendants in their written statement denied the right of the plaintiff to eject them ; they admitted that under the decree of the 30th January, 1871, the plaintiff No. 1 was the superior proprietor of the village, and they claimed that under the same decree they were entitled to under-proprietary rights. And in paragraphs 24 and 25 they said as follows :—

“Thakurain Sarfaraz Kunwar obtained a decree for the superior proprietary right in respect of this village on the 24th March, 1869, and in the said suit a direction had been given that the ancestor of the defendants 1 to 5, Sheo Ratan, should bring a separate suit for under-proprietary rights. Accordingly the said Sheo Ratan Pathak, having brought a claim for the pukhtadari rights, obtained a decree on the 30th January, 1871. Now the plaintiff is the representative of Thakurain Sarfaraz Kunwar : therefore he is the superior proprietor of the said village.

“In the recent settlement Rs. 500 was determined to be the amount of rent, and after deducting Rs. 50 on account of *dahyak* dues, the defendants pay Rs. 450 annually to the superior proprietor. In view of the quality of land in this village, the amount of rent cannot exceed Rs. 500. If the Court determines that the plaintiffs and the defendant No. 6 are entitled to a rent exceeding the amount assessed during the recent settlement, *the undersigned defendants do not object to the payment of an enhanced amount of rent. The plaintiffs should seek redress in the Revenue Court.*

The issues raised by the Subordinate Judge were wider than the prayers in the plaint : the first was whether the defendants were under-proprietors ; and the second whether the relation of landlord and tenant existed between the parties.

He decided both issues against the defendants, and accordingly made a decree in favour of the plaintiffs in respect of all the reliefs asked for. He treated the defendants as trespassers and awarded to the plaintiffs possession of the village with mesne profits. On appeal the claim for ejectment and mesne profits was abandoned ; the Judicial Commissioners therefore dealt only with the question of the defendants' status. They were of opinion that the decree of the 30th January, 1871, conferred on the *birt*-holder “more than a mere right of *dahyak*.” In their view it affirmed his right as under-proprietor, and that therefore the decree for ejectment made by the Subordinate Judge was bad. They accordingly dismissed the plaintiffs' suit.

On the present appeal before this Board, it has been conceded that the claim for the ejection of the defendants and for possession is not maintainable. It is admitted that such a claim arising between landlord and tenant (even assuming that the defendants' position is no more than that of an ordinary tenant) is exclusively cognizable by the Revenue Courts. The decision of the Board is thus confined to the first two prayers in the plaint, which relate to the status of the defendants and the effect of the Extra Assistant Settlement Commissioner's order made on the 30th January, 1871.

It seems clear that the rights of the *birt*-holders must be adjudged on the basis of the document which created their interest. It is called a *Pottah*; but the term *Pottah*, like the word *jote* in Bengal, is a general expression and comprehends all tenures and subordinate interests, from a permanent *mokurrari* tenure to a yearly lease. It has to be observed that in Oude, as pointed out in the Chief Commissioner's Circular already referred to, there exist various kinds of *birts*, the incidents of each of which differ from those of others. Some are acquired by purchase, and are accordingly called *bai birts*; some are given from motives of piety to Brahmins, and are designated *bishunpriti birts*. Sykes, in his valuable work, at p. 178, states their character thus:—

“*Bishunpriti birts* were cessions similar in almost every respect to the *bai* or purchased *birts*, save that these were given to Brahmins for the honour and glory of God (if not for that of the giver) and no consideration was taken.”

Such was the nature of the grant in the case reported in 14 Oudh Law Reports, p. 336, on which the plaintiff's counsel relies in support of his contention that the defendants have no right in the land beyond the receipt of the *dahyak*. The dispute there related to a *bishunpriti birt* (see p. 339). As the Judges dealing with that case pointed out, a *bishunpriti khushast* is not a grant for “valuable consideration,” but a mere “grant by favour.” Again, the settlement decree there appears to be quite different from the decree in the present case; it had simply confirmed the *bishunpriti*-holder's “existing possession” coupled with the Taluqdar's power to fix the rent and renew the lease. There is little or no analogy except in the common use of the word *birt* between a gratuitous grant like the *bishunpriti birt* and a jungle-clearing grant where the grantee has to incur considerable outlay before he can obtain any return from the land.

There is a reference to “jungle-clearing *birts*” in pp. 176–77 of Mr. Sykes' work. And on p. 191 a fuller explanation is given, thus:—

“Chahárum and Daswant (also known in the neighbouring district of Benares as *Bunkuttee*) is an under-proprietary right obtained by clearing jungle land under a lease granted for the purpose (*bunkuttee*) and bringing it under cultivation and in other cases granted to all proprietors and influential residents of the village to keep them contented and loyal. The terms Chahárum and Daswant are in use chiefly in the districts of Gonda and

Balraich, and mean respectively one-fourth and one-tenth, thus giving a clue to the original extent of these subordinate tenures: the *daswant* being very similar in its nature and extent to the *dyhal* of the *birtias*.

“The use of the terms *chahárum* and *daswant* arose in this way. The terms of the lease were usually as follows:—For five years the land was rent-free; in the sixth year the tenant paid one-sixth of the produce; in the seventh, one-fifth; in the eighth, one-fourth; in the ninth, one-third; and in the tenth, one-half the full rent. Henceforward the clearer was entitled to hold at that rent so long as the land was held *pakka*; but if the landlord held *kacha* the clearer was entitled to have one-fourth or one-tenth of the produce which in practice, came to mean one-fourth or one-tenth of the land rent-free in under-proprietary right. This tenure, like the others, was liable to encroachment in the shape of an assessment of rent, but that would be low in any case.”

The *Pottah* in the present case expressly declares that the grantor has given the land of the village to the grantee to get it cultivated and populated. It was for the purpose of clearing the jungle, making the land fit for cultivation and bringing in *raiya*t, which carried with it the duty of sinking wells, etc. It is declared in the *Pottah* that “the *birt*-holder was to enjoy it free for five or six years.” A comparatively small but gradually ascending rent is fixed for the years 1210 to 1214, in proportion, it would seem, to the increasing productiveness of the soil. After 1214 he was to pay “the revenue to the *sarkar* prevalent in the Taluqa, and take the *daswant* prevalent in the Taluqa.” The deduction was in the nature of a rebate.

By his order of the 30th January, 1871, the Extra Assistant Commissioner declared the right of the *birt*-holder, and made a decree “upholding” in express terms his “possession and occupation as an under-proprietor . . . under the provisions of Circular II of 1862 in respect of the village Kunderwa.” The reference to the Circular in the decree shows, as the Judicial Commissioners rightly observe, that “the Extra Assistant Commissioner decided and must have intended to decide” that the *birt*-holder was an under-proprietor under the provisions of that Circular. The Extra Assistant Commissioner further declared the condition on which the land was held under the *Pottah*, that “the Taluqdar shall always have the power to renew the *Pottah* and to award and assess the *Jama* according to the practice observed during the *Shahi* times”; that is, before the Annexation. The *Jama* is to be assessed according to the practice observed prior to 1855, as indicated in the Circular itself. There is no evidence, however, in the case what the practice was in those days. The *Pottah*, however, lays down a standard for the assessment of the *Jama*. The Taluqdar cannot capriciously enhance the rent; the assessment must be in accordance with the rate prevalent in the Taluqa. Whether it is in accordance with such rate or not, in case of a dispute, is a matter wholly within the cognizance of the Revenue Courts. Nor, from the terms of the *Pottah* or the decree of 1871, does it appear that the Taluqdar is vested with the power of amending and assessing the rent arbitrarily at short intervals, which would

necessarily be a harassment to the inferior holder as well as the raiyat.

The facts already recited show that for a number of years the defendants have been paying a rent of Rs. 500, less their tenth. It is alleged by the plaintiff that between 1875 and 1879 there was an interruption of their possession, and the village was let on a higher rental to other people. If these *Pottahs* represented real transactions it is difficult to understand why no reference was made to them in the proceedings in 1898, or 1901 before the Deputy Collector. Again, considering that the rent in the *Pottah* for 1287 is stated to be Rs. 1,451, and in that of 1875 it is stated to be Rs. 1,826, it is not explained how the defendants were found in 1901 to be paying only Rs. 500. Anyhow, interruption of that character cannot affect or alter the defendants' rights under the *Pottah* of 1802 or the decree once they got back into possession.

On the whole their Lordships concur with the Judicial Commissioners in holding that the respondents, as declared in the decree of 1871, possess an under-proprietary right in the village of Kandarwa, granted to their ancestor in 1802. The appeal will, therefore, be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

RAJA MOHAMMAD ABUL HASAN KHAN, SINCE
DECEASED (NOW REPRESENTED BY THE
DEPUTY-COMMISSIONER OF GONDA)

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LACHMI NARAIN AND OTHERS.

DELIVERED BY MR. AMJER ALI.

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