*Privy Council Appeal No.* 117 *of* 1920.

*Patna Appeals Nos.* 38-44 *of* 1917.

**Jagdeo Narain Singh and others** - - - - - *Appellants*

*v.*

**Baldeo Singh and others** - - - - - - *Respondents*

(7 *Consolidated Appeals*)

FROM

## THE HIGH COURT OF JUDICATURE AT PATNA.

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JULY, 1922.

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*Present at the Hearing:*

LORD ATKINSON.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

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These seven consolidated appeals from seven decrees of the High Court of Patna arise out of the same number of suits brought by the plaintiffs in the Court of the First Subordinate Judge of Patna on the 8th February, 1913, under the following circumstances.

The plaintiffs are part proprietors of a Mahal paying revenue to Government consisting of one Mouza named Amarpur Jabar, which bears on the Collector's register No. 9/4377, and is assessed with a jama of Rs. 225 odd annas. The *pro forma* defendants in the several suits are the co-sharers of the plaintiffs, and own the remaining share of the Mahal. The contesting defendants in the suits hold separate lands within the Mouza, which in the aggregate amount to a considerable part of the village. In respect of these lands the defendants claim to have acquired

either proprietary right by adverse possession, or the right of rent-free tenure-holders, who are known in Behar as *Malikanadars*. Sometime before these suits were brought, there appears to have been a cadastral survey under Chapter X of the Bengal Tenancy Act (V of 1885), and, on the contention of the defendants, they were entered in the Survey Register as *Malikanadars*. The plaintiffs seek in these suits to have it declared that the entry is erroneous, and that the defendants are not entitled to hold the lands in their possession and occupation, free of the obligation of paying rent. The Subordinate Judge, upon a careful review of the evidence, came to the conclusion that the defendants were mere tenants, and were liable to pay rent for the lands they hold; and accordingly decreed the suits. His decrees were upheld on appeal by the District Judge, but on second appeal, they have been reversed by the High Court of Patna and the suits dismissed. The appeals to this Board are from the decrees of the High Court dismissing the suits. One of the objections to the view taken by the High Court is based on the ground that the learned Judges in entertaining the second appeals had no jurisdiction to set aside the decision of the District Judge on questions of fact, in respect of which he concurred with the Court of first instance. This objection is not without force, but, in view of the fact that the learned Judges of the High Court have differed from the Lower Courts, not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case, and other circumstances, their Lordships deem it expedient to deal with the appeals on their merits.

It is proved beyond doubt that the village of Amarpore Jabar, together with some other villages which were considered as its *dakhili* (appurtenant hamlets), were granted free of revenue in the early part of the reign of the Emperor Aurangzeb, surnamed Alamgir, to one, Asadulla Chisti, whose name indicates that he belonged to a holy family. They were afterwards confirmed in favour of other members of the family. The villages in question came subsequently into the possession by purchase of one Khadim Husain Khan, and he and his successors held the property without question or assertion of right by anybody else until 1838. In that year the East India Company's Government instituted proceedings under Regulation II of 1819, for its "resumption"; in other words, to assess and impose revenue upon it. The documents in connection with the Resumption proceedings show that the investigation conducted at the time was thorough and covered not only the examination of the title of the possessor of the estate to hold the village revenue free, but included an investigation into the titles of all persons occupying lands on the allegation that they were not liable to the payment of rent. One was the natural corollary of the other; as the Government claimed the right to assess revenue upon every bigha of land from which the owner derived an income, it was necessary for the purposes of a fair assessment to examine the title of every one who claimed to hold any land within the Mouza free of rent.

In 1838, when proceedings were taken for the summary settlement of this village, the admitted owner of the property was a lady of the name of Umatuz Zohra, and the area of the land was recorded as 765 bighas, but this measurement was subsequently amended, and the total area was found to be 463 bighas. No person other than Umatuz Zohra had put forward at that time a claim to the summary settlement. Later on, the matter came before the Deputy Collector for confirmation of the temporary settlement, and on the 18th January, 1839, a formal order was recorded to the effect that the person with whom the permanent settlement should be made was Musammat Umatuz Zohra, who was in possession. The measurement in connection with this settlement was tested by the officer in charge in the presence of two men, who are thus described in the order then made, which runs thus :—

> " I tested the measurement of the undermentioned plots in the presence of the measurement staff and many other persons of the village and of its vicinity and Girwar Singh Gomashta and Sheo Dayal Singh, cultivator."

Girwar Singh and Sheo Dayal Singh are the ancestors of the contesting defendants, through whom they claim to have derived their Malikanadari right. Before the Settlement Officer, who was engaged in the assessment of the revenue on the village and the enquiry for that purpose into its assets, no person put forward any claim that he held any land within the Mouza adversely to the owner, or had any right therein which absolved him from the obligation of paying rent for the lands in his occupation. Girwar Singh is stated to have been only a servant and gomashta of the owner, and Sheo Dayal Singh, a cultivator. No other right is mentioned.

Subsequent proceedings throw further light on the character of the settlement. The property is situated in the district of Patna ; the owner lived in the district of Moughyr. It had consequently been let out in farm to one Asmani Singh and another. It also appears that originally it consisted of three Mouzas, *i.e.*, Amarpore Jabar, Aniarpore Roop and Jabarpore Khas, and that they were amalgamated under the settlement of 1839, and named Amarpur Jabar. The settlement with Umatuz Zohra is reaffirmed in accordance with the details given in the rubakari of the 12th August, 1839. It is stated :—

> " In view of the Aima being a Badshahi grant, this permanent settlement is made with the said possessor from 1247 Fasli at a Jama fixed with regard to the fullest crop of the land."

And regarding the measurement it is again stated :—

> " When the possessors arrived, the measurement was made from 22nd to 29th May of the said year in the presence of Tilakdhari Lal, Patwari, Asmani Singh Thikadar, Girwar Singh and Sheo Dayal Singh, Amlas of the possessors, Doma and Gur Dayal Goraits."

The Gorait is the village watchman.

Then comes the following statement :—

> " In spite of notification being issued, no one has raised any objection until now [up to this time] with regard to the boundary limits."

In the same proceedings there is a statement to the effect that nobody within this Mouza claimed "jaith rayati" right. A jaith ryot might be either a head ryot or a tenure-holder. Some lands are stated to be dedicated to pious purposes, but there is nothing to give colour to the suggestion that malikana rights were claimed, far less held, by anybody. The conclusion is given thus :—

> "Besides that, nobody came forward to claim Minhai and Milkiat rights from that time up to this day, notwithstanding the issue of Notification, etc., during the pendency of the case, and in the Moffasil Mussammat Umatul Zohra was found to be in possession. For the above reasons the said Mussammat is found entitled to settlement in exclusion of the Malikana right on the ground that she alone was the possessor of the Milkiat and Minhai land."

The settlement was thus made with the owner, Umatuz Zohra, after a thorough enquiry, in the presence of the thikadars, in respect of the whole Mouza, including the non-assessable lands, on the basis of the rent that they paid to her.

The owner, as stated already, was a non-resident landlord ; the property was let to thikadars upon a fixed rental. The landlord had no direct communication with the tenants or ryots ; the actual collection being left to the thikadars. At the time of the settlement of 1839, the rent payable by the thikadars was Rs. 351. The Deputy Collector, in his anxiety to assess as high a revenue as possible upon the Mouza, considered that 10 per cent. out of this Rs. 351, being the usual allowance or malikana to which proprietors were entitled, was sufficient remuneration for the zemindar and he accordingly fixed Rs. 316, which represented Rs. 351 less the 10 per cent. malikana, as the revenue payable by Umatuz Zohra.

With regard to the plea of the lady that some allowance should be made to her for what is called *saranjami* expenses, in other words, the expenses incurred by the landlord in the management of the property, the Deputy Collector was of opinion that the *saranjami* expenses were included in the thika rent, and he accordingly rejected her prayer. This settlement was confirmed by the Collector. It then went up to the Board of Revenue and was finally confirmed, but the jama or revenue payable by the landlord was reduced to a more moderate amount, viz., the revenue it now bears, Rs. 225. On the basis of this reduction, an ingenious argument was put forward on the side of the respondents. It was suggested that the revenue was reduced from Rs. 316 to Rs. 225, because there existed in the village these *Malikanadari* rights. It is enough to observe that throughout the proceedings there is not the faintest reference to such a ground. The Government's order confirming the assessment with the reduction appears to have been made a year later. The following entry in the Mouzawar Register of Amarpur Jabar explains exactly the final settlement with Umatuz Zohra :—

> "This Mouza is Aima Madad Mash (grant) with the recorded area of 765 (?). It was resumed and entered in the list of Khas Mahal as bearing

No. 1225, and was permanently settled on the 25th May, 1839, A.D., with effect from 1247 F.S., at an annual rental of Rs. 316 in the name of Mussammat Ummat-ul-Zohra. Thereafter, on the 6th October, 1840, A.D., it was, with the sanction of the Government, entered in the Rent Roll as paying a Revenue of Rs. 225. The land of this Mouza is joint with the land of Mohiuddin Nagar bearing No. 3082. Accordingly Thakbast and Survey measurements were effected and numbered as Halka No. 17 in Persian, and the area thereof was found to be 489 Bighas 10 Cottas according to Khatiawni."

As already observed, the investigation under Act II of 1819 was carried out with extreme thoroughness in respect of details, three Registers were prepared, named, respectively, *Mahalwar*, *Mouzahwar* and *Assamiwar*. In the last the names of all persons holding land within the ambit of the village are set out, including dedications to pious purposes, but there is nowhere any trace of lands held under *Malikanadari* right.

It appears that in 1840 the regular survey of the district in which the Mouza is situated was taken in hand. As is well known, these surveys are preceded by a preliminary measurement by an Amin, who lays down on a rough map the locality, without any guarantee of scientific accuracy, and enters in a register particulars regarding the plots gathered from people who collect to watch the proceedings. The map is called the thakbast map, and the register the thak khasra. The Amin's measurements are afterwards tested by expert surveyors.

The *khasra*, as its name implies, is a rough register, and statements entered in it have by themselves no evidentiary value. During the thak measurements connected with Amarpur Jabar, a statement appears to have been made before the Amin to the effect that within the Mouza in question there were certain persons who held malikanadari rights; and this officer is said to have made an entry in his register to that effect. The thak register was apparently produced in the Courts below. The District Judge refers to it, and the Judges of the High Court say they have looked into it themselves, but, strangely enough, neither the entry has been printed nor the register produced before their Lordships, and they are, therefore, unable to express any opinion on it, and must accept the statements contained in the judgments of the Courts in India that such an entry exists in the thak khasra. But, as already observed, by itself it proves nothing. Assuming that a claim of malikanadari right was put forward by some person or persons with regard to certain lands, it was one to the detriment of the actual owner of the property, and there is nothing to show that it was brought to her notice, or that she had an opportunity to controvert it. The property as it stood belonged to Umatuz Zohra, with whom the settlement was made in 1839 as owner and proprietor, and who has always paid the revenue assessed thereon, and until it can be proved that she knowingly acquiesced in the assertion made before the Amin, it would be absurd to treat it as evidence to support the present claim. The Subordinate Judge was of opinion that the Amin was fraudulently induced to make the entry; having

regard to what took place at the Resumption proceedings their Lordships do not think his surmise was unwarranted. In 1876 the Bengal Land Registration Act (VII of 1876) came into force. The preamble of the Act runs as follows :—

> " Whereas it is expedient to make better provision for the preparation and maintenance of Registers of revenue-paying and revenue-free land, and of the proprietors and managers thereof, and of certain mortgages of revenue-paying lands : It is hereby enacted as follows :—. . . "

Then follows the provision relating to such registration.

For the first time, in 1877, a claim is put forward, before the Revenue Authorities, in an application dated the 31st May, 1877, made under Act VII of 1876, for the registration of the names of the defendants' ancestors in respect of a share of Mouza Amarpore Roop as part proprietors. The claim is with respect to lands lying in Mouza Amarpore Roop which, as already stated, had been incorporated with Amarpore Jabar in 1839, and an area of 226 bighas is claimed within that Mouza, although it is stated distinctly in the application that Umatul Zohra stands registered as owner in the revenue records. This application was opposed in explicit terms by the proprietors ; they denied the existence of Mouza Amarpore Roop as a separate Mouza or that the applicants had any share in it. They stated further, that had Mouza Amarpore Roop been a separate Mouza, or a dependency of any other Mouza, the applicants would have paid its Government Revenue and Road-cess. The application for the registration of the names of the defendants' ancestors was dismissed by the Deputy Collector on the 7th December, 1878, with the following remark :—

> " On perusal of the report submitted by the Record-keeper it appears that Mouza Amarpore Jabbar stands recorded on the mutation register, that there is no Mouza known by the name of Amarpore Roop entered therein, and that the names of the ancestors of the applicants in respect of Amarpore Jabbar save and except the names of the ancestors of Nawab Ali Khan and Musammat Umdunnissa, do not stand recorded therein. From the evidence of the Patwaris and Gomashta, it appears that Mouza Amarpore Jabbarpore is in the possession and occupation of Nawab Ali Khan and Musammat Umdunnissa and that Bal Makund Singh and others, the applicants, have no connection with the registration of the name in respect of the said Mouza. Hence the objection of Nawab Ali Khan is allowed, and the application of Bal Makund Singh and others, applicants, is rejected."

From 1878, after the dismissal of this application, the defendants have taken no action whatsoever for the assertion of the rights they claimed, until the matter came for the purpose of the cadastral survey under Act V of 1885. Section 103 (B) declares that " every entry in or record of rights prepared and published under the provisions of Chapter X shall be presumed to be correct until the contrary is proved." Considerable stress has been laid on this presumption on behalf of the respondents. Once, however, the landlord has proved that the land which is sought to be held rent-free lies within his regularly assessed estate or *mahal*, the onus is shifted. In the present case, the lands in dispute lie

within the ambit of the estate, which admittedly belongs to the plaintiffs and the *pro forma* defendants, and for which they pay the revenue assessed on the Mouza. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government. This rule was pronounced as long ago as 1869, in a judgment by Sir James Colvile, in the appeal of *Rajah Sahib Pershad Sein* v. *Doorgapershad Tewarree*, 12 Moore's I.A. 331 :—

> "The appellant is the *Zemindar*; as such he has a *primâ facie* title to the gross collections from all the *mouzahs* within his *Zemindary*. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure."

The defendants have relied on two distinct facts in the assertion of the right they claim, viz., *first*, the statement in the thakbust khasra, and *secondly*, the non-payment of rent. It is clear upon the evidence that the property has all along been in the hands of *thikadars*. The *thikadar*, or lessee, pays the proprietor a fixed rental, and he is the person who collects the rent from the individual ryots. The proprietor has no responsibility so far as actual collections are concerned. The collections are thus entirely in the hands of the thikadar. There can be little doubt that at the time of the settlement of 1839 the thika was held, if not by members of the family, certainly by members of the clan who held these lands. The evidence of Mukh Lal Singh, who has lands in his cultivation in Amarpore Jabar, and who was a Gomashta in that village for many years, and whose father was before him Gomashta, shows the actual character of this village :—

> "The landlords' share of the produce of these lands were always taken by the Thikadars and Katkinadars under the landlords. I was Gomastha under the Kotkinadars, and collected their share of the produce for thirteen years. I worked with my father for three years. Collection papers were given by Gomasthas and Patwaris to Dildar Ali Khan Malik. Dildar Ali Khan's share was in Thica to Mozrul Huq. Mozrul Huq Katkina lease to Lolit Singh (*sic*) Mouza Amirpur Jabar was never in Seer possession of the Maliks."

The evidence of non-payment of rent rests upon the testimony of one of the defendants, Parsidh Narain Singh. He knows nothing of how they came into the possession of the property. He simply stated that "we were in adverse possession of these lands for the last seventy or eighty years," and can give no material for the conclusion he wishes the Courts to draw regarding his right to the lands. His evidence in cross-examination deserves notice :—

> "My father died in 1315 Fs. I am looking to our affairs for last thirty or thirty-five years. At present plaintiffs Dildar Ali Khan and Bakharali Khan are the Maliks of Mouzah Amirpur Jabbar. We defendants have Milkiat in Amirpur Jabbar also. I cannot say what are our shares in Amirpur Jabbar. I have no papers to show how we acquired Milkiat in Amirpur Jabbar. The statement made in my written statement that Amirpur Jabbar was the Milkiat of Musammath Ummothur Zohura

is correct. She was in exclusive possession of the lands of Amirpur Jabar. The vendors of the plaintiffs and Dildar Ali Khan and Bakar Ali Khan are the heirs and representatives of Mosammat Ummothur Zohur. The only evidence which we have of the statement that Mouzah Amirpur Rup, *alias* Chehutu, was the Milkiat of Girbar Singh and Shedayal Singh, our ancestors, and of Ummothur Zohura consists of the Thakbust paper and the Dakhil Kharij proceedings."

Upon this evidence the Subordinate Judge came to the conclusion that the claim put forward by the defendants was illusory. He considered the entry in the thakbust khasra as having been made in fraud of the owner; and that the withholding of the rent, under circumstances which he detailed, did not create an estoppel or destroy the relationship of landlord and tenant.

The District Judge, as already stated, substantially came to the same conclusion.

The Judges of the High Court seem to have misunderstood the position. One learned Judge considers the defendants' claim to be one of joint proprietorship with Umat-uz-Zuhra. He says as follows :—

"In the present case what is the evidence of fraud. The learned Subordinate Judge, in our opinion, has given no reason whatsoever upon which fraud can be established. He suspects fraud on the ground that there is inconsistency between the papers of 1839 and 1842. As a matter of fact, we do not think there was any inconsistency, because it is quite possible that Girwar and Sheodayal were both proprietors or claiming to be proprietors, and that one or the other of them was holding as tenant. The fact that Sheodayal was shown in 1839 as tenant of a plot would not in itself prove that the entry of 1842 showing them as proprietors of that land was fraudulent. Again, what is the evidence of fraud by the Patwari Sheodayal, Girwar and the Ticcadar. There is no finding, nor is there any evidence that in 1842 either Sheodayal or Girwar were the servants of the Ticcadar. There is no finding that there was any sort of conspiracy between the Ticcadar, the Patwari, Girwar and Sheodayal. In these circumstances, to record a finding of fraud is, in our opinion, merely to proceed on suspicion, and if that is so, the finding is liable to be challenged, in second appeal."

Their Lordships regret to observe that they do not follow the reasoning upon which this conclusion is based. The other learned Judge proceeds upon certain assumptions for which there does not appear to be any warrant on the record. He states :—

"There is nothing to show that prior to 1838 there was any relationship of landlord and tenant between the predecessors of the plaintiffs and those of the defendants and that the lands were rent-paying at all. On the other hand, no Revenue was paid for these lands to Government before the resumption of the lands in 1838. as the persons in possession of the lands claimed to hold them as Revenue-free lands. Presumably the defendants' ancestors held the lands in suit without payment of any rent or Revenue."

How he comes to draw the conclusion that "presumably the defendants' ancestors held the lands without payment of rent or revenue" is difficult to understand.

Mr. Justice Mullick says :—

"From the Glossary, published by the Settlement Authorities, we are satisfied that the meaning of the word is that the defendants are rent-

free tenure-holders by arrangement with the Maliks. It denotes that the lands belong to an estate which was resumed under the Regulation II of 1819 and in which there were persons in possession who, although not taking settlement from the Collector, received by private arrangement with the settlement holder some lands in recognition of their former proprietary rights either on the footing of a rent-free tenure or on a promise to pay the proportionate Government Revenue."

The Glossary itself shows that the Malikanadari right could only come into existence by arrangement. Their Lordships can find no trace of evidence of any arrangement of the character assumed by the learned Judges.

With regard to the claim by adverse possession, as already observed, the Mahal had all along been held in thika; the lessee collected the rents and paid a fixed sum to the proprietor. If the thikadar failed to collect the rent from any individual tenant it would not create adverse possession against the proprietor.

Again, mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession. The identical question came for decision before the Calcutta High Court in the case of *Prasanna Krimar Mookerjee* v. *Srikanta Rout*,* where Mr. Justice Mookerjee affirmed the proposition in clear terms.

On the whole, their Lordships are of opinion that the view taken by the High Court is erroneous, that their decrees in the several appeals should be discharged, and that the decrees of the District Judge should be restored. The appellants will be entitled to their costs of these appeals, and in the High Court, and their Lordships will humbly advise His Majesty accordingly.

* I.L.R. 40 Cal. 173.

**In the Privy Council.**

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JAGDEO NARAIN SINGH AND OTHERS

*v.*

BALDEO SINGH AND OTHERS.

(7 *Consolidated Appeals.*)

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DELIVERED BY MR. AMEER ALI.

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