Privy Council Appeal No. 70 *of* 1921.

Patna Appeal No. 36 of 1919.

Raja Indrajit Pratap Bahadur Sahi - - - - *Appellant*

v.

Amar Singh and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MAY, 1923.

Present at the Hearing :

VISCOUNT FINLAY.
LORD ATKINSON.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

The facts of this litigation are set out in detail in the judgments of the Courts in India ; it is consequently not necessary to state them here at any length. The suit relates to two villages, named respectively Lakhawar Khas and Lakhawar Faridpur, lying within Mahal Margaon, appertaining to the Tikari estate in the Province of Behar. It appears that in 1843 there was a Government survey of Mahal Margaon, in the course of which a Khasra map was prepared by the Amin of these two villages along with another called Lakhawar Damodarpur. The map is Exhibit 14 in this case, and the memorandum on the back is marked 14A.

In the middle of the nineteenth century the Tikari estate belonged to one Raja Mode Narain Singh. He died somewhere in the year 1856 or 1857 without any male issue, leaving him surviving two widows named respectively Rani Asmedh Koer and Rani Sunit Koer, a brother's son, Ran Bahadoor Singh and a sister's grandson, Krishna Pratap Sahai, the ancestor of the present appellant often named in these proceedings as the Raja of Tankuhi. On Raja Mode Narain Singh's death, in the absence of any direct male heir, natural or adopted, his widows took possession of the estate for their lives. Ran Bahadoor Singh,

who, under the circumstances, was the reversioner, appears, however, to have acquired possession by some arrangement with the widows.

In 1875 Raja Krishna Pratap Sahai brought a suit against Ran Bahadoor Singh and the two widows of Raja Mode Narain Singh, for recovery of the whole estate, on the allegation that he had been adopted by the widows subsequent to the death of the Raja under authority given by him in his lifetime. This suit was dismissed by the Subordinate Judge; from his decision an appeal was preferred to the High Court of Calcutta. Whilst the appeal was pending the parties came to a settlement and an *ekrarnama* was executed by Krishna Pratap in which were embodied the terms of the compromise. This document is marked Exhibit 20, and bears date the 30th of May, 1880. By the terms of this agreement Raja Krishna Pratap Sahai undertook to withdraw all claims to the estate, in consideration of the grant to him by Ran Bahadoor Singh, of a Mokarari settlement of certain villages set out in detail in that document. Pursuant to this agreement Ran Bahadoor Singh, by a pottah of even date, granted to Krishna Pratap Sahai, the Mokarari of the villages named in the *ekrarnama* and set out specifically in the grant. The potta recites the agreement already referred to and then proceeds to describe the properties demised thereunder. One of these is named as Damodarpur Lakhawar.

The controversy in the present suit relates solely to the question, what does Damodarpur Lakhawar denote ?

It should be noted here that the rental fixed for the Mokarari was Rs. 2,701 per annum.

Raja Krishna Pratap Sahai, the grantee, appears to have taken possession, under the potta, of the properties conveyed to him thereunder by Ran Bahadoor Singh. The plaintiffs' claim that under the designation of Damodarpur Lakhawar only one village was granted to Raja Pratap Sahai and that the grantor retained possession of the other two, viz. : Lakhawar Khas and Lakhawar Faridpur, and that they on the 24th January, 1914, obtained a grant of the same from the present owner of the 7½ annas share of the Tikari estate within whose property these villages lie; and they ask, as against the first defendant, the representative of Raja Krishna Pratap Sahai, recovery of possession of these two villages with mesne profits. The defendant No. 2 is the present possessor of the 7½ annas share and she supports the plaintiffs' claim.

The contesting defendant, on the other hand, alleges that " in the mofassil all the three villages are known by the name of Damodarpur Lakhawar," that they were " measured together " (in the survey of 1843) and that all three were entered under the name of Damodarpur Lakhawar in the zemindari office of the Tikari Raj; and he claims that what was granted to Raja Krishna Pratap under that name was not one village only but all the three bearing the common designation of Lakhawar. He further alleges that the grantee and his heirs have ever since

been in possession of the three villages and that the present suit has been falsely instituted against him. As already stated the sole question at issue between the parties is what does the name Damodarpur Lakhawar denote; in other words, whether it refers to only one village or to the three villages together.

This is an action in ejectment; in the proceedings under S. 145 of the Criminal Procedure Code in 1912 the defendant was found to be in possession of the villages in dispute, against the claim of the plaintiffs; and in the cadastral survey proceedings taken under the provisions of the Bengal Tenancy Act of 1885 they again failed to establish their allegation. Their failure in those proceedings led in fact to the institution of the present action in August 1914. The onus thus lay heavily on the plaintiffs to show that the defendant was not in possession of these properties by virtue of the title he alleges. And this they could easily have done, in order to shift the onus, by proving that the rent for the two mouzahs was paid separately into the estate office, and that the three villages were separately entered in the estate records. Their Lordships have not observed in the judgments of the Courts in India a reference to this aspect of the case.

In both the Courts the matter in controversy has been dealt with as involving a simple construction of the words of the pottah. Both the Subordinate Judge and the learned judges of the High Court of Patna have found that the three properties form separate mouzahs, that the two disputed villages are not appurtenant hamlets (*Dakhilis*) of Damodarpur, that consequently what was granted under the pottah was only one village specifically named in the grant. They put aside the documentary evidence adduced by the defendant of the dealings with the three mouzahs as a composite property, mainly on the ground of a lacuna in the evidence which made the transactions look suspicious.

The Subordinate Judge decreed the plaintiffs' claim, and his decree has been affirmed by the High Court, though it has held he had fallen into error on several findings of fact.

The present appeal to His Majesty is from the judgment and decree of the High Court.

In dealing with this case it is necessary to bear in mind two undisputed facts. First, that in the survey of 1843 the lands of the three mouzahs were measured together. The learned judges of the High Court find it impossible to say why this was done. But Exhibit 14A, the memorandum on the khasra map prepared by the Amin for purposes of the regular survey, which was to follow, contains the explanation. The three mouzahs were measured together, as the lands were intermixed (*Makhlût*). In this circumstance may be found the key to the whole history of these villages. Though the areas found on measurement are given separately, all three bear the same number in the Collector's register.

The Appellate Court thinks that this is due to the fact that the three villages appertain to one mahal. This explanation

seems hardly well-founded. Besides, were this the correct view, all the other villages described in Exhibit 14A which also bear the name of Lakhawar would have borne one and the same number. Their Lordships have no doubt that the three *Makhlût* villages bearing one number in the Collector's register were regarded as one composite revenue unit. The revenue assessed on these mouzahs appears also to be a consolidated amount.

As stated already the grant was made on the 30th May, 1880. In it the name of the property is given as "Damodarpur Lakhawar." In the schedule which contains the details of the mouzahs the names of the Thikadars (lessees), who were in possession at the time and the *Jama* at which settlement was made are set out. The particular property forming the subject of the grant is described thus : "Damodarpur Lakhawar, Pargani Okri, Mahal Sufi, District Gaya."

Twelve years before viz., on the 5th April, 1868, Rani Sunit Koer, the second widow of Raja Mode Narain Singh, had granted to one Ram Sahai, whose name appears as lessee in the list attached to the potta of 1880, a lease of 7½ annas share of 6 mouzahs for 15 years at a yearly rental of Rs. 757. In this document also the property is described as Damodarpur Lakhawar. On the 15th September, 1875, Raja Ran Bahadoor himself granted to one Mohar Singh a potta for 13 years in respect of the remaining 8½ annas share of the same villages at a rental of Rs. 749— thus making a total of Rs. 1,506 for both shares. On the 23rd January, 1880, shortly before the compromise in the suit of 1875 Ran Bahadoor Singh gave to one Harihar Narain Singh, whose name also appears in the list attached to the potta of the 30th May, 1880, an usufructuary lease for 15 years. In the kabuliat executed by Harihar Narain Singh, the component parts of Damodarpur Lakhawar are for the first time specifically set out. It recites that he had "obtained a Thika settlement of the whole and entire 16 annas of Mauza Lakhawar Khas, Lakhawar Makhlut Damodarpur, Lakhawar Makhlut Faridpore, Mahal Sufi, Pargana Okri, District Gaya, original with dependencies, on a fixed and consolidated Jama of Cos. Rs. 1,495," together with certain other items, amounting in the aggregate to Cos. Rs. 1,507. After giving other details it goes on to state that :—

> "Under the Order of the authority for the time being, resting with me the Thikadar, on payment of Cos. Rs. 10,800 as Zarpeshgi bearing interest at 8 annas per cent. per mensem, according to Katowli Satawa [*i.e.*, usufructuary mortgage] account given below, and Rs. 501, as Zarpeshgi bearing no interest, to be set off at the end of the term, from Sarkar Raja Ran Bahadur Singh . . . . . for a term of 15 years, I shall take and hold possession of the leasehold properties. . . . . ."

A schedule is attached to this document showing the annual rental of the properties of which Harihar Narain Singh had obtained the lease, the deductions to be made therefrom on account of interest, the amounts to be deducted on account of principal, and the balance remaining therefrom, which was to be paid to the

Mokararidar, the grantee under the potta of 1880. This document would go to show that what was granted in 1880 referred to all the three villages which were grouped under the one name of Damodarpur Lakhawar, and would be conclusive on the point in controversy. But both the Subordinate Judge and the learned judges of the High Court think, as already mentioned, that there was a gap in the evidence which the defendants had failed to supply and that, therefore, the story that the grant included all three mouzahs could not be true. On this point the Subordinate Judge expresses himself thus : –

> "Thus the grantor of the lease as shown by Exhibit 15 makes a clear profit of about Rs. 6,000 by way of interest over the Peshgi money received, and he takes about Rs. 8,000 more as Peshgi money than that in Exhibits L and G; under such circumstances simply because the rental in Exhibit 15 happens to be Rs. 1,507 and 30 Mds. of rice almost equal to what there is in Exhibits L and G it cannot follow that the same profit accrued to the landlord, and therefore the same property was leased out in Exhibit 15 as in Exhibits L and G. In fact the landlord for apparent larger profits might have reduced the rent and might have granted three villages by Exhibit 15 and, as the profit was not so much before he took larger rent and granted only one village and 7½ annas of Ampathua for almost the same rent."

The learned judges of the High Court take a similar view. They say :—

> "Now there is evidence to show that the portion of the Jama which was to be set off in favour of the Tikari Raj against the Zarpeshgi was actually set off, but there is nothing to show that any corresponding set-off was ever made by the Tikari Raj in favour of the Tamkuhi Raj (the appellant). The only conclusion to be drawn from this is the conclusion drawn by the learned Subordinate Judge, viz.: that the Tikari Raj was getting the benefit of the set-off and that the Tamkuhi Raj was not in possession of the three Mouzas but of only one. Even if the Tamkuhi Raj did take the whole of the cash rent from the Ticcadar, however, this also would show nothing. Under his Mokarari the Raj of Tamkuhi was to get a clear profit of Rs. 1,151–12 a year after deduction of Mokarari rent. Now the highest amount that in any year was ever payable by Harihar Narain to the Tikari Raj was Rs. 708–10, so that even if the Tamkuhi Raj took the whole of this sum it was less than the whole amount to which it was entitled under the Mokarari, and the fact of taking it all would not in any way show that it had possession of the Mouzas in suit."

The conclusion of the Indian Courts being thus based on the absence of evidence on the part of the defendant to show what arrangement had been made by Ran Bahadoor Singh in respect of the demands of Harihar Narain Singh, who held the usufructuary mortgage, the appellant tried to trace further transactions to elucidate the gap to which the Subordinate Judge and the High Court referred, and on which practically the case was decided. It appears that before judgment was delivered by the High Court he traced, after diligent search, certain documents contemporaneously executed by Ran Bahadoor Singh by which he had made effective provision for meeting the demands of the usufructuary mortgagee and the claims of the Mokararidar; and obtained copies from the registry office where the documents executed by

Ran Bahadoor Singh were registered, and applied to the Appellate Court for their admission as material evidence in proof of his case. One of these documents is the *Hukumnamah* (authority) addressed by Ran Bahadoor Singh to Harihar Narain Singh which bears date the 31st May, 1880. The other is a *Tunkhah* or authorisation addressed by Raja Ran Bahadoor to one Telkhari Singh dated the 24th January, 1880. Telkhari Singh appears to have been a lessee of certain mouzahs belonging to Ran Bahadoor Singh and the direction to him is in these terms :—

> " WHEREAS Harihar Narayan Singh, son of Babu Mukha Singh, resident of Bishunpore Pandui Pergunnah Ekil District Gaya by occupation zemindar has been granted a lease for a term of 15 years in respect of 16 annas of Mouza Khas Lakhwar Lakhwar Makhlût Damodarpore Lakhwar Makhlût Faridpore Mahal Sufi Pergunnah Ekil Distt. Gaya original with dependencies at a nannual Jama of Rs. 1507/- of company's coins, in cash Mal with Abwab and 30 Maunds of sunned rice from 1296 to 1310 for a consideration of Rs. 10,878/- as an advance bearing interest at the rate of -/8/- per mensem as per *Katwa Satwa* Account and Rs. 561/- as advance bearing no interest to be set off against the rent of the last year of the term. And Rs. 5520/11/- as is the interest on the said advance bearing interest from November 1287 to 1295 the period of dispossession and the payment of that amount is necessary. Therefore it is written to you that you should pay the said Rs. 5520/- as per details out of the rental in respect of Bhekhdharaut Mahal Sufi Perg. Bhelawar the leasehold village, year after year to the said lessee (Harihar Narayan Singh) after obtaining receipt."

The *Hukumnamah* directed to Harihar Narayan Singh bears date the 1st June, 1880, namely the day after the Mokarari potta of the 30th May, 1880, in favour of Raja Krishna Pratap Sahai. The document runs thus :—

> " To
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> " Sri Harihar Narayan Singh, son of Mukhi Singh, resident of Mouzah Bishunpur Pandul, Pergunnah Ekil, District Gaya and Thikadar in respect of 7 as. 6 pies out of the entire 16 annas of the Mouza Damodarpore Lakhawar and Lakhawar Khas, Pargunnah Okri and of 8 annas 6 pies of the said villages in all 16 annas of the said villages by occupation zemindar."

Then it goes on to say :—

> " WHEREAS the 16 annas of Mouza Damodarpur Lakhwar and Lakhwar Khas original with dependencies together with Mouza Mohamadpur Khurd and Mohamadpur Kalan and Manikpur Bahari bearing an annual fixed Jama of Rs. 2701-12, half of which is Rs. 1350-14 as according to the currency have been given in perpetual mokarrai commencing from 1288, from generation to generation, from progeny to progeny, from heirs to heirs, from successor to successors without any provision for forfeiture, cancellation and resumption from the Sirkar of this estate, in favour of Raja Krishna Pertap Bahadur Sahi, son of Raja Kharga Bahadur Sahi, resident and proprietor of Raj Reyasat Tamkohi, Pergunnah Sidhua Jobna, District Gorakhpore under a Mokurrari deed dated this day. Hence it is given to you in writing that you should pay and deliver Rs. 1507 mal (rent) with cesses in cash and 30 Maunds of Arwa rice the rent of the said Mouza due from you, commencing from 1296 Fasli to 1310 Fs. up till the terms of your Thika, to the officers of Raja Krishna Pertap Sahi, Mokurraridar from year to year, from season to season, from kist to kist in accordance with the conditions and terms of kistbandi embodied in Thika Kabuliyat. And in case of the non-payments of the rentals specified to the extent of cash as set forth above."

There can be no question as to the genuineness of these documents. They appear to have been duly registered on their execution, the copies produced have been obtained from the registry office under the rules and regulations framed by authority. The only question is whether they can be admitted as evidence. If they are admissible they place beyond dispute the fact that the grant was in respect of all three villages which are known under the composite name of Damodarpur Lakhawar. But the learned judges have held that they had no jurisdiction under Rule 27, Order 41 of the Code of Civil Procedure Act, 1908, to admit in evidence these documents.

Rule 27 runs as follows :—

> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if :—
>
> (*a*) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted ; or
>
> (*b*) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, *or for any other substantial cause*, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

The matter does not come under clause (*a*). With regard to clause (*b*) the High Court construed the rule with the assistance of the decision in *Kessowji Issur* v. *The Great Indian Peninsula Railway* (1 A.R. 34 I.A. 115), that it implies a prohibition against the admission of additional evidence except where the Appellate Court has itself discovered some inherent lacuna or defect, and required evidence to fill up the gap or remedy the defect. They have apparently not considered the question that the suitor may be entitled for any "substantial cause" to apply to the Court for the admission of such additional evidence. The case of *Kessowji Issur* v. *Great Indian Peninsula Railway*, on which the learned judges have relied, was peculiar in its character. A suit had been brought on the Original Side of the Bombay High Court against the Great Indian Peninsula Railway to recover damages for injuries sustained in consequence of an accident occasioned by the laches of the officials of the railway. The suit had been decreed by the Court of first instance; the Railway Company then, on discovery of some new evidence, applied for a review of judgment before the learned judge who had decreed the claim ; he refused the application. Then the Company filed an appeal, and applied to the High Court in its appellate jurisdiction for leave to produce the same evidence they had presented to the first Court and which had been rejected. The High Court not only gave permission to the appellants in that case to produce the evidence, but extended the permission to other evidence. As this Board pointed out, the procedure adopted by the Appellate Court was quite irregular. In the course of their judgment the Board laid stress on the limitations to the power of an Appellate Court to require additional evidence on their own motion to supplement what had been produced by the parties. In their

Lordships' opinion *Kessowji's* case has no bearing on the present debate. In this connection it may be useful here to refer to the remarks of Lord Westbury in the case of *Sreemanchunder Dey* v. *Gopalchunder Chuckerbutty* (1) 11 Moo. I.A. p. 28, where, dealing with the power of the Appellate Court to require additional evidence under the provisions of the cognate section, S. 355, in the Civil Procedure Code of 1859, he said as follows :—

> " When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it ; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome ; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly, because, where it is done not at the instance of the parties but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce ; and it is possible (which appears to be the case here) that the new original inquiry by the High Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice."

Both in the case of *Sreemanchunder Dey* v. *Gopalchunder Chuckerbutty* and *Kessowji Issur* v. *Great Indian Peninsula Railway* their Lordships were dealing with the power of the Appellate Court to require evidence to be produced for the purpose of enabling the Court to pronounce judgment. Those cases did not refer to the right of one or other of the parties to produce evidence which he considered essential for the determination of the action. Under Order 47, Rule 1, which reproduces Section 623 of the Civil Procedure Code Act XIV of 1882, a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in Rule 1. In the present case an appeal had been preferred and a review, therefore, was out of the question; and the defendants took the only and proper course, viz. : to apply to the High Court, which was in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of Rule 27, which lays down that the Appellate Court may for any other substantial cause (viz. : other than those particularly specified) allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. As the application is now before their Lordships for the admission of the documents to which reference has already been made, it is desirable to observe that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out. It is only necessary to refer to page 289 of Mr. Bentwich's " Privy Council

Practice" where he has set out the cases in which the power has been exercised.

Their Lordships, therefore, have admitted the two documents in respect of which the application is made, and on these two documents they have no doubt that Ran Bahadoor Singh, by the words "Damodarpur Lakhawar," denoted all the three villages, and that he purported to give, and gave in mokarari all three of them to the grantee. On the whole, therefore, their Lordships are of opinion that the decrees of the Courts below should be set aside and the plaintiffs' suit dismissed. The appellant will be entitled to his costs both here and in the Courts in India, and their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

RAJA INDRAJIT PRATAP BAHADUR SAHI

v.

AMAR SINGH AND OTHERS.

DELIVERED BY MR. AMEER ALI.

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