

(1913) 06 CAL CK 0004
In the Calcutta High Court

Case No : Appeals from Original Decrees Nos. 219 and 296 of 1909

Kripasindhu Roy Pitam

APPELLANT

Vs

Mohunt Parmanand Das Goswami and others

RESPONDENT

Date of Decision : 04-06-1913

Acts Referred:

Citation : (1913) 06 CAL CK 0004

Final Decision : Dismissed

Judgement

1. The suit out of which these 2 cross-appeals arise relates to 2 Mouzahs, Bande and Koranga, and a half share in a 3rd Mouzah Sardhapore all comprised within Gurh Atiri situated in Killah Khurdah in the District of Puri. From the Government publication, entitled "Selections from the Correspondence on the Settlement of the Khoordah Estate," we find that Killah Khurdah formed part of the Crown lands of the Native Princes who once ruled over Orissa, and at the time of the British Conquest was in the possession of their descendant Rajah Mukund Deo. In 1804 Rajah Mukund Deo rebelled, and thereupon his estate was forfeited to Government and has ever since been treated as a khas mehal.

2. Under its Native Princes the greater part of Khurdah was parcelled out into Jaghirs, the holders of which were bound by the terms of their tenure to perform certain services, and also in some, if not in all, cases to pay a light quit rent. The most numerous and important class of jagirdars consisted of the Dalbeheras or hereditary Military Chiefs, having under them a body of "Paiks" performing police and military duties. The jagirs of these Dalbeheras were known as Gurhs and Gurh Atiri appears to have been originally a jagir of this nature. Whether the Dalbeheras were also responsible to the Rajah for the revenue assessed on the lands within their several jagirs is not clear but whether working as village communal officers, or under the Dalbeheras or directly under the Rajah's Sadar Sherista were a number of Revenue Officers known as Padhans, Bhuimals, Kotekharans, Kowri-Bhagias, and by other titles, all remunerated by service lands.

3. The British occupation, was followed by a number of successive settlements of land revenue. At the earlier of these settlements, jagirs (other than the lands in the immediate possession of the jagirdars) were in general resumed. Apparently, in part compensation, the Dalbeheras and the revenue officers above referred to were admitted, when willing to do so, to engage, under the denomination of sarbarakars, for the collection and payment of the Government revenue assessed on their several Gurhs or villages.

4. From Exhibit "E," a hukumnamah, dated 7th March 1823 and signed by Mr. Wilkinson, the Deputy Collector then in charge of Khurdah, we find that at that time and for the settlement of 5 years from 1/1, 2/8, 8/2, 1/4 to 1/1, 2/8, 3/2, 5/8, the sarbarakars of Gurh Atiri were Parmeswar Ray Pitam Dalbehera, Charan Gajendra Kowri-Bhagia, Pindik Das Bhuimal, Dina Bandhu Mahanty Kotekharan and Lokenath Santra Behera-Padhan. From Exhibit "F," a similar hukumnamah, dated 17th January 1831, we find that in the settlement of 1/1, 2/8, 8/3, 2/1 to 1/1, 2/8, 4/4, 7/0 Parmeswar Ray Pitam Dalbehera became the sarbarakar for the 2? mouzahs now in question. This settlement is known as the "Decennial Settlement" and was in fact extended to 1856. In 1856 the Decennial Settlement was followed by what is known as the "Noyabadi" settlement for a term of 24 years from 1857 to 1880. From hukumnamah, Exhibit "G," dated 2nd August 1856, we find that the sarbarakar at that time of these 2? mouzahs was Brindaban, the son of Parmeswar. Of the other half of Saidhapur, and of a 4th Mouzah named Atiri the sarbarakar at the settlement of 1857 was admittedly Gajendra Charan, Kowri-Bhagia and of a 5th Mouzah Chulupalang the sarbarakar was Juggernath Das Bhuimal, the descendant of Pindik Das.

5. From Ex. 6, para. 7, we learn that the Gurh had been divided into 5 Kismats the remaining two being the Kotekharan and the Behera-Padhan.

6. During the currency of the 24 years" settlement made in 1856, that is to say in 1861, the Government of Bengal decided to discontinue an allowance of salt granted in the times of the Hindu Rajahs to 20 Mathdharis or Mahants of Maths in Puri, associated with the worship of the God Juggernath Mohaprabhu. In lieu of this allowance Government by its letter, 437A of 13th September 1861 (Ex. 1), made to the Mathdharis a grant of Gurh Atiri. The orders of Government were communicated to the local officers in the Board of Revenue's No. 1001 of 19th September and thereupon, on the 19th November 1861, Gurh Atiri, described as comprising 3 Kismats, Kismat Dalbehera, Kismat Kowri-Bhagia and Kismat Bhuimal, i.e., the 5 villages Bandeh, Koaranga, Satdhapur, Atiri and Chulapalang, was struck off the revenue roll and made over to the possession of the Mathdharis with effect from the beginning of the year 1269 (v. Exh. K.)

7. For some time the local officers appear to have been in doubt whether the grant by Government represented a grant of the five villages or merely an assignment of the revenue payable by the sarbarakars. We find these doubts and the consequent difficulties discussed in Ex. 4 (letter 637 of 9th November 1875 from the Board of Revenue to Government), Ex. 6 (letter 304 of 24th March

1879 from the Commissioner to the Board of Revenue) and Ex. 5 (letter No. 185A of the 31st May 1880 from the Board of Revenue to the Commissioner). These doubts should have been set at rest when in 1875, in its No. 2755 of 25th November (Ex. 3), Government repeated or confirmed the grant to the Mathdharis of Gurh Ariri but in Ex. 5 already referred to, the Board of Revenue in 1880 found it necessary again to explain the position and to enjoin upon the local officers the necessity of refraining from all interference with the Mathdharis in the management of their properties. In the written statement in the present suit we further find a suggestion that the grant was made not to the Mathdharis but to the God Juggernath Mohaprabhu. This suggestion is also negated by the terms of the grant (Exs. 1 and 3) and by the correspondence contained in Exs. 4, 5 and 6.

8. As we have already stated Gurh Atiri was transferred to the Mathdharis during the currency of the 24 years' settlement made in 1857. That settlement expired in 1880 but in the khas mehal portion of Khurdah was extended to 1882, when it was followed by the first Cadastral Settlement of the Estate, a settlement which remained in force from 1882 to 1897. That again was followed by the new current settlement made under the provisions of Chap. X of the Bengal Tenancy Act.

9. Neither the settlement of 1882 nor the settlement of 1897 affected Gurh Atiri which had become the property of the Mathdharis. When the khas mehal portion of Khurdah was under re settlement in 1880-82, the Mathdharis apparently did nothing, but in 1897 whether at the instance of the Mathdharis or at the instance of Government, under the provisions of sec. 101 of the Bengal Tenancy Act, the making of a survey and the preparation of a record-of-rights in respect of the lands in Gurh Atiri was undertaken. The records were finally published and the proceedings completed apparently in 1899 (v. Exhs. 16a, 16b, 16c and Q, also para. 9 of the plaint). Meanwhile, some time about 1889, Kripasindhu Roy Padhan, Defendant No. 1, had succeeded his father Brindaban in the position of sarbarakar of Mouzahs Bande, Karanga, and Sandhapur (8 annas).

10. In the record-of-rights of Mouzah Bande (Exh. 16c) Kripasindhu is recorded as the holder of two plots of sarbarakari jagir measuring 8,170 acres and similarly in the record of Mouzah Panasabasta (Ex. 9) he is shown as holding 6 plots of jagir measuring 19,677 acres. Otherwise he is not recorded as having any interest in any of the mouzahs in which he is or was sarbarakar.

11. On the 21st August 1873 in suit No. 116 of that year (v. the decree filed and admitted in evidence in this Court Exh. App. A) the representatives of the 20 Mathdharis partitioned Gurh Atiri and on this division the Dalbehera Kismat, that is the 27 villages now in suit, fell to the Mahanta of 11 Maths.

12. On the 20th December 1899 the Mahants of these 11 Maths served upon Kripasindhu a notice of dismissal and as they failed to obtain or to retain possession, the suit out of which these appeals arise was instituted on the 5th

October 1907. The 8 Plaintiffs and pro forma Defendants 13 and 14 now represent the 11 Maths to which the villages in dispute fell at the partition of 1873.

13. The case of the Plaintiffs is that Defendant No. 1, his father and grandfather before him were mere officers or servants first of Government then of the Mathdharis, liable to dismissal for misconduct during the currency of a settlement, and having no right to any renewal of their appointments at the close thereof, They therefore sued for the ejectment of Defendant No. 1 from the 2? mouzahs in suit and also from the jagir lands recorded in his name in villages Bande and Panasabasta.

14. Defendant, on the other hand, contends that he and his ancestors were and are tenure-holders not liable to dismissal or summary ejectment and that he held the jagir lands in Bande and Panasabasta as Dalbehera and not as sarbarakar.

15. The Sub Judge found that the Defendant was not a proprietary tenure-holder ; at the same time he also held that he was not a mere servant, that his succession to the right or office of sarbarakar had been recognised by the Plaintiffs and that on his executing a kabuliyat undertaking during the currency of the present settlement to pay to the Plaintiffs year by year a sum equivalent to 80 per cent, of the rent assessed on the raiyats or tenants in the record-of-rights proceedings, he was entitled to retain possession. Against the decree both parties have appealed, and in the appeals the two questions that have been argued are (1) whether Defendant No. 1 is a tenure-holder or a servant and (2) whether his jagir lands in Bande and Panasabasta are his Dalbehera or his sarbarakari jigir. We may take both these questions together.

16. Of the documents independently exhibited in the case, the earliest in date are the hukumnamahs (Exs. "E. F and G") of 1823, 1831 and 1856. These are all addressed to the raiyats of the villages, direct them to pay rents to the sarbarakar at the assessed rate and recite that the sarbarakar or sarbarakars have executed kabuliyats or engagements for the term of the several settlements. Now when in 1861 Gurh Atiri was made over to the Mathdharis these kabuliyats or at least the kabuliyats of the then current settlement should in ordinary course have been made over to them. In 1865 (v. Exh. L) we found them suing Brindaban on his kabuliyat of 1856. We may therefore safely infer that the Plaintiffs have in their possession or have access to these kabuliyats or some of them or copies of them. When the appeals came on for hearing on the 28th of February we therefore thought it right to give the Plaintiffs a further opportunity of producing either the original kabuliyats or certified copies of one or more of them, but on the 28th of April when the appeals were finally heard, the pleader for the Appellants was still unable to produce any of these documents. He then placed before us certified copies of applications made to the Collector of Puri for certified copies of the kabuliyats executed by the sarbarakars in 1831, 1844 and 1856, but none re the the kabuliyat of 1823 The kabuliyats of which copies were applied for, it appears, could not be found. Apart from this no

explanation of the non-production of the kabuliyats has been given in evidence and we can only infer that if produced they would not support or would not wholly support the Plaintiff's case. In this conclusion we are strengthened by such references to the kabuliyats as we can find in exhibited documents. Thus in his letter No. 304 of 24th March 1879 (Exh. 6) Mr. Smith, then Commissioner of the Orissa Division, in a marginal note to his para. 13 writes :--"The old form of agreement was somewhat that of a farmer and somewhat that of a servant."

17. Again in his note, dated 5th October 1880 (Selections, Vol. 2, p. 258), Mr. Metcalfe, then Commissioner, writes as follows :--Sarbarakars.....have hitherto held their office under agreements which for purpose of reference have been called A. B. C. and D. Forms A and D were drawn up so far back as 1836.....It has been held that the position of a sarbarakar holding under agreement A was that of a Mustagir" (lessee)...Sarbarakars holding under D agreements were considered by Mr. Smith to be in the position of farmers." Similarly in his No. 86 of 15th December 1879 Mr. Armstrong, then Collector of Puri, when forwarding the Settlement Officer's rate report for the purposes of the impending cadastral settlement of the khas portion of Khurdah, writes as follows :--"The new form of agreement for sarbarakars is a vast improvement on the old sanad which left their position very doubtful. It might however be still further improved by an acknowledgment on the part of the sarbarakar that he is a servant of the Government (Sel. Vol. II, p. 130, para. 22).

18. We next proceed to examine the documents contained in the 2 volumes of Selections in so far as they throw any light on the position of Dalbeheras and sarbatakars prior to the transfer of Atiri in 1861.

19. In 1817 occurred the insurrection of Jagabandhu Mahapatra, the hereditary Bukshi or Commander of the Forces to the Rajahs of Khurdah. The rising was quickly suppressed and, soon thereafter, an officer named Mr. Ewer was appointed Commissioner to enquire into the affairs of Orissa. On his report, dated 13th day of May 1818, that is on the portions dealing specifically with Khurdah (v. Selections, Vol. I, pp. 58, to 61 and p. 90, para. 235), the description of affairs contained in the first portion of this judgment has been largely based. From his report (v. pp. 12, 61-3) we further find that in the settlement s of Major Fletcher and Gholam Kadir from 1804 to 1817 the sarbarakars were permitted to appropriate to themselves whatever they could realise from the raiyats over and above the sum which they themselves had engaged to pay to Government provided only that they adhered to certain imperfectly ascertained or wholly undefined rates and had thus, in Mr. Ewer's opinion, been given an interest of some sort in the soil.

20. Soon after Mr. Ewer's report followed the settlement of Khurdah for the years 1818 to 1820. The report on this settlement dealing more particularly with the year 1819-1820 is by Mr. Forrester, a Deputy Collector placed in 1818 in special charge of Khurdah, and is dated 17th October 1819. In this report (v. Selections, Vol. I, p. 105 et sequitur) Mr. Forrester states that he had in general

admitted as sarbarakars the persons who had entered into engagements at the preceding settlements, that he had reverted to the rates fixed for different classes of land in the different villages by Gholam Kadir in 1/1, 2/8, 1/0, 2/6, that the sarbarakars were bound by their engagements to adhere to those rates and not charge more than 4 annas per man on new cultivation, and that they had no proprietary right in their Gurhs or villages (paras. 47, 8, 10 and 50). He further speaks of the general resumption of the jagir lands that had taken place after the rebellion of Rajah Mukund Deo and his followers, and states that with the previous approval of Government he had exempted from quit rent the small portions of jagir lands reserved for the Dalbeheras and some of the Dalvis, and in order to secure their more active assistance in police matters proposed some small augmentation to the reserved areas. (Paras. 63, 49 and 67). In Government's letter No. 8 of 24th December 1819, the Governor-General in Council confirmed Mr. Forrester's settlement, extended it to the close of the year 1228 (1821) and approved his suggestion for the improvement of the condition of the Dalbeheras (Selections, Vol. I, pp. 121-2, paras. 17, 18 and 24).

21. Mr. Forrester was succeeded by Mr. Wilkinson and in the selections we next find Mr. Wilkinson's report dated the 24th October 1836 on his settlement of Khurdah for the year 1/1, 2/8, 3/3, 2/1 to 1/1, 2/9, 4/4, 7/0 (Selections, Vol. I, p. 123). In this report he refers to a settlement made by him in 1825 for a period of five years. This is evidently the settlement referred to in hukumnamah Exh. E and though for five years in fact remained in force up to 1836. Mr. Wilkinson then proceeds to say that during the currency of the five years' settlement he had deputed officers to measure the lands in the estate, had fixed rates for the several descriptions of land, had distributed to the cultivators pottahs specifying their fields, areas, and rent assessed, and had then taken from the old sarbarakars engagements or agreements for the payment of the aggregate of the raiyati rents less 20 per cent, in lands and money. (Selections, Vol. 1, pp. 123 126, paras. 4, 8, 10 and 11). He further stated that in this 20 per cent, he had included the assessed or estimated rents of the jagirs reserved for and confirmed to Dalbeheras and Dolois by Government orders dated 1st August 1822, and also the rent of additions to such jagirs made in subsequent settlements. In the 14th para, of his report he describes the classes of persons who as sarbarakars had entered into engagements for the collection and payment of Government revenue. From this we find that the Kotekhara, the Bhuimal and the Kowri-Bhagia were officers in the nature of accountants who had been admitted to engage jointly with the Dalbeheras of their Gurhs, and that Padhans or Behera-Padhans were officers appointed for the superintendence of cultivation and the collection of rents in villages held directly by the Rajah or his chief officers at head-quarters. In his description of the Dalbeheras he agrees in the main with Mr. Ewer but adds that they were removable for misconduct and claimed no proprietary rights. He further states that the few Dalbeheras who had declined to engage for the revenue of their Gurhs were nevertheless in possession of their reserved jagirs. The hukumnamah Exh. F evidently refers to

the settlement forming the subject-matter of this report of 1836 and the division of Gurh Atiri into 5 Kismats would seem to be explained by the suggestion made in Mr. Forrester's report of 1819 to the effect that in subsequent settlements, as opportunity occurred, Gurhs in the open country should be broken up and the component parts separately settled (Selections, Vol. I, p. 3, paras. 52-3, p. 116, para. 8).

22. Mr. Wilkinson's report was forwarded to Government by Mr. Halliday, then Member of the Board of Revenue. In its No. 1201 dated 22nd August 1837 (Selections, Vol. I, p. 136) Government confirmed the settlement with effect from 1/1, 2/8, 4/3, 4/7 extended it to the close of 1/1, 2/8, 6/5, 3/3 and in para. 5 observed as follows:--"As regards the sarabarakars who as the settlement has been formed by Mr. Wilkinson, are merely collectors of certain fixed rents, receiving in land and in a share of the rental about 20 per cent, on the collections His Lordship (i.e., the Governor) entirely agrees with Mr. Halliday that neither the engagements with Government, nor of course the lands by which the service rendered is remunerated should be matters of inheritance and liable to subdivision among heirs. Government has clearly the power to forbid its offices, and such the sarbarakarships of Khurdah clearly are, or the lands by which the holders of these offices are remunerated, from being subdivided." Those orders were communicated to the Commissioner by the Board in its No. 36 of 15th September 1837 with the following instructions: "You will cause it to be distinctly notified to the sarbarakars that at the expiration of the present settlement, Government will select its own engager, wherever they may choose to exercise the right so to do, and that the present incumbents will be held liable to dismissal for default or bad behaviour satisfactorily proved before the local authorities. It is very desirable that in all future cases individuals only should be acknowledged and allowed to treat as sarabarakars" (Selections, Vol. I, p. 138, para. 3).

23. The next settlement was made in 1857 and it was for a term of 24 years, i.e., for 1857/1880. This settlement merely extended the previous settlement in respect of areas then assessed, and added to it all subsequently cultivated lands. It is hence known as the "Nayababi" settlement. The Collector Mr. Annand's report on this settlement, and Government orders thereon, add nothing to our information re sarbarakars and Dalbeheras. It may however be noted that it was at this settlement that hukumnamah Ex. G was issued, and it was of course during the currency of this settlement that the 3 Kismats of Gurh Atiri were transferred to the Mathdharis.

24. We have now dealt with all the important documents of dates prior to 1861 to be found in the volumes of Selections. But it would appear that with a view to the cadastral settlement which subsequently took effect from 1883 further enquiries into the fiscal history of Khurdah were initiated in 1875. The reports of the officers of that time are not of course of the same value as the earlier reports (e.g., the report of Mr. Ewer) except in so far as they reproduce their original

sources of information. In Mr. Taylor's report of 21st May 1877 (Sel. Vol. I, p. 160) we find that Mr. Trower who was Collector at the time of Mr. Ewer's enquiry had in March 1818 begun a settlement for the years 1225-26. In the report of 23rd March 1818 Mr. Trower is quoted by Mr. Taylor as stating that so far as he could ascertain the collections from raiyats in the times of the Rajahs were made as follows :--" An Amin was deputed from the Sudder who, together with the Kajeess on the part of the Rajah, his Dewan and the Bukshi made an estimate of the resources of each mehal. The collections were then entrusted to the Padhans and other village officers who from being employed in different duties were sarbarakars. These village officers appear to have been hereditary and they are the people with whom, generally speaking, all settlements under the British Government have been made. On the resumption of the jagir lands of the Paiks and of a portion of that of the Dalbeheras and Dullais by Major Fletcher these people also (that is the Dalbeheras and Dullais) appear also to have been admitted as sarbarakars (para. 12)."

25. This is the only indication we have that in Khurdah sarbarakars were known prior to the British occupation.

26. We may next notice that on the 19th February 1876 when dealing with questions arising in connection with the then impending settlement, Mr. Dampier, then Member of the Board of Revenue, wrote as follows:--

A separate report is required on the subject of Dalbeheras and Dullais' jagirs.

..The services which the Dalbeheras and Dullais were bound to perform under the Rajahs were of a military and semimilitary nature. At Mr. Forrester's or Mr. Wilkinson's settlement a certain number of these Dalbeheras were invited to become sarbarakars and executed agreements accordingly. The condition was that they should continue to enjoy their jagirs and should in addition receive a certain stipulated percentage on the collections. At the same time certain of their number were left alone enjoying their jagirs without being called on to perform any services in return.

27. The complaint is that those left in the possession of their jagirs have since been and are recognised as absolute proprietors of them, their title being heritable and transferable, whereas those who accepted service as sarbarakars have been very differently treated, their old military Dalbehera and Dullai jagirs have been declared to be mere sarbarakari jagirs and are being declared liable to forfeiture (as being part of their sarbarakari remuneration) if they are at any time removed from the sarbarakarship. The matter requires closer investigation (Sel. Vol. II, pp. 20-21, para. IV). After the investigation that followed Government in 1880 decided that the jagirs of those Dalbeheras, and other old service tenure-holders who had not been appointed sarbarakars and who therefore had been enjoying their lands free of rent in return for liability to perform some indefinite police service which was really not required should be assessed at favourable rates at the settlement of 1882-97 and thereafter at full

raiya rates (Sel. Vol. II, p. 170, para. 13).

28. Mr. Dampier appears to have been misinformed as to the attachment of any condition re their jagirs when Dalbeheras first became sarbarakars. In any case events subsequent to 1861 in the khas mehal portion of Khurdah cannot affect the title of Defendant No. 1 to his jagir and there is no suggestion that prior to the present proceedings any attempt was at any time made to oust him therefrom. On the other hand the statements made re the jagirs of Dalbeheras who did not become sarbarakars are of importance.

29. From the papers contained in the two volumes of Selections which we have now examined, it is clear that from 1818 onwards the tendency of Government and of the majority of its officers was to regard the sarbarakars as mere officeholders. But it does not appear that at any of the settlements prior to 1861 the sarbarakars distinctly acknowledged that this was their position. Moreover there are facts which militate against this view. For instance, the sarbarakars were held responsible for the full sum entered in their engagements whether they succeeded in realising from the cultivating raiyats less or more (v. e.g., Sel. Vol. 2, pp. 258-9, para. 41). Again they were entitled to retain for themselves the rent assessed on such waste lands as they succeeded in bringing under cultivation during the currency of a settlement [v. e.g., Sel. Vol. I, p. 106, para. 10, Vol. II, p. 178 (9)]. Further in practice their position was hereditary.

30. On the whole the evidence we have discussed leads to the conclusion that when Gurh Atiri was transferred to the Mathdharis in 1861 the status of the sarbarakar under his engagement or sanad was something higher than that of a servant.

31. With regard to the jagir lands of the present Dalbehera sarbarakar [v. Exs. H and G Jamabandis of 1231 (1824)] it is manifest that they represent what was reserved to the Dalbehera on the general resumption of Dalbehera and other jagirs in 1804-5. They represent grants for police and semi-military services and even if the Plaintiffs could succeed in removing Defendant No. 1 from his position as sarbarakar they could not in the present suit succeed in resuming his Dalbehera jagir. Moreover with regard to the jagir lands lying in Mouzah Panasabasta, as no grant of that mouzah was made to the Plaintiffs or their predecessors, to those lands it does not appear that they have any title whatsoever.

32. We have now to consider the oral and documentary evidence of events subsequent to 1861.

33. We have already referred to the suit for rent brought by the Mathdharis against Brindaban Roy Pitam in 1865. From the judgment- (Ex. L) it would seem that the sum due from the sarbarakars was claimed and was decreed as rent. Further, the sum due represented 3 years' arrears and it appears obvious that if he had been regarded as a servant he would surely have been dismissed for such a serious default.

34. It is next stated by the Plaintiffs that in 1866 they dismissed the sarbarakar of the Kowri-Bhagia Kismat. No papers relating to his dismissal have been put in evidence but from the recitals in the plaint (Ex. M) in suit No. 116 of 1873 it appears that the Kowri-Bhagia was not dismissed but was sued for arrears of rent and on his failure to pay was ejected under the provisions of sec. 78 of Act X of 1839. It is thus evident that he was treated not as a servant but as a tenant.

35. In the plaint (Ex. M) in suit No. 116 of 1873 brought by the predecessor in interest of Plaintiff No. 2 against Brindaban Roy Pitam, the Bhuimal sarbarakar, and the co-sharer Mathdharis, it is recited that the sarbarakari was "the property (Hakait) of 3 sarbarakars," that "the rent payable by them" was so much and that the remaining 2 sarbarakars were "in possession" of their Kismats.

36. When giving the Plaintiffs a further opportunity of producing the kabuliyats executed by the sarbarakats we thought it right to give to Defendant No. 1 also an opportunity of supplementing the plaint (Ex. M) by a copy of the decree in the suit. From the certified copy now produced it appears that the suit was compromised, that the Mathdhari Defendants, the sarbarakar Defendants and the Plaintiff respectively filed petitions of compromise and that the suit was decreed in terms of those petitions (which were embodied in the decree) on the 21st August 1873. The petition of the sarbarakars concludes thus : "Be it known that the sarbarakari right which we have in the disputed sarbarakari according to the terms mentioned in the rubakari dated 8th October 1861 of W. L. Heeley, Esq., Acting Salt Agent, will continue according to ancient custom."

37. The rubakari referred to (Ex. K) merely recites that the interests of the sarbarakars "will remain as hereafter" but from the proceedings in the suit it is fairly obvious that in 1873 the sarbarakar Defendant was asserting right as a tenant and was in 1865 not regarded as a servant.

38. The settlement made and the kabuliyat executed by Brindaban expired in 1880. Though the Mathdharis were well aware of their position as proprietors of the mouzahs in question, as is apparent from their resistance to the attempts made by Government officers to encroach upon their right (v. Ex. 6, para. 5 and Exs. II to 13), they made no attempt to oust the sarbarakar or to disturb the pre-existing state of things.

39. In 1889 Brindaban died and his son Kripasindhu, Defendant No. 1, succeeded him as sarbarakar. From the receipt (Exs. C series and P series) granted by at least 6 of the present Plaintiffs or their predecessors-in-interest and extending from 1890 to 1906 it is clear that the Mathdharis recognised Kripasindhu, and received rent and road-cess from him and that he remained in possession of the mouzahs as his father had done before him. This is also apparent from the oral evidence.

40. In fact it is not until 1894 or 96 that we find any attempt by any one of the Mathdharis to disturb Kripasindhu's possession. From Exh. N, judgment in rent suit No. 143 of 1896, it appears that the Mahant of Revassa (predecessor of

Plaintiff No. 6) realised or attempted to realise rents for 1302 and 1303 (1895-96) direct from at least one raiyat. Defendant No. 1 successfully asserted his claim to the rent.

41. Next followed the settlement proceedings of 1897-99. In this no doubt the Plaintiff succeeded in procuring the omission of the Defendant's name from the records. But apart from this, the notice of dismissal (Exh. 17 dated 20th Decr. 1900) and the uncorroborated oral evidence of the Plaintiff's sole witness Chintamani Dass to the effect that Plaintiff collected the rents of the raiyats from 1308 (1901), there is no evidence of any attempt actually to oust the Defendant until 1903-04. Exhs. 14 and 15, the judgment and decree in rent suit No. 317 of 1903-4, and the Exh. 10 series (deposits of rent in November 04 and January 1905) no doubt show in those years a serious attempt on the part of the Plaintiffs as a body to eject the Defendants and to collect the rents of the raiyats direct. But in this attempt from the oral evidence of Defendant 1 and his witness Ananta Santra, Exh. O, the judgment in appeal in rent-suit No. 317, and the J series of Exhibits (deposits of rent) it is clear the Plaintiffs failed.

42. Thereupon on 5th October 1907 the Plaintiffs filed their present suit.

43. From the evidence we have discussed it is abundantly clear that from the transfer of the mouzahs in 1861 until 1896 the sarbarakar Defendant and his father before him were regarded and treated as tenants and that they have successfully asserted their status and maintained their possession as such from 1861 until the present day.

44. On a review of the whole evidence we must therefore hold that Defendant No. 1 is a tenure-holder.

45. Into the incidents of that tenure it is neither necessary nor proper to enter. The issues framed raised no such question and the evidence was not directed to any such issue.

46. It follows that the Plaintiffs' appeal No. 296 must be dismissed. Having regard to paragraphs 6 and 8 of the written statement and the 1st, 2nd and 3rd grounds of appeal, the declaration of the Plaintiffs' title as proprietors of the 2? mouzahs in suit must be affirmed. In other respects the appeal of Defendant No. 1 (Appeal No. 219) is decreed and Plaintiffs' suit dismissed. Under all the circumstances we direct that parties do bear their own costs throughout.