
(1944) 11 PAT CK 0009
In the Patna High Court

Rudreshwari Prasad Sinha

APPELLANT

Vs

Smt. Rani Prohabati and Others

RESPONDENT

Date of Decision : 22-11-1944

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Permanent Settlement Regulation, 1793 — Section 8(4)

Citation : AIR 1945 Patna 339

Hon'ble Judges : Shearer, J; Manohar Lall, J; Chatterji, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This appeal by the judgment-debtor arises out of their objection u/s 47, Civil P. C The question for consideration is whether the property in dispute described as Kakwara Ghatwali tenure is liable to sale in execution of a decree for arrears of rent and cess obtained by the landlord respondents. The facts are not in dispute except that there is a serious controversy whether the property in question which will be described hereinafter as Kakwara for the sake of brevity, is merely a zemindary Ghatwali forming part of the estate of the respondent zemindar or is a Government Ghatwali tenure. The respondents are the well-known proprietors of the Banaili Raj and are the owners of the estate Mahalat Kharagpur. Kakwara admittedly forms a part of this estate. The learned Subordinate Judge on a consideration of the documents, which will have to be discussed in the course of this judgment, has taken the view that Kakwara is a zemindary Ghatwali and, therefore, can be sold in execution of the decree, which was obtained by the decree-holder respondents. In the Court below an objection was raised that the judgment-debtor cannot be allowed to raise this question in the present execution proceedings in view of the fact that he did not raise this question in the original suit itself, but the learned Subordinate Judge correctly held that the judgment-debtor can be allowed to raise this question.

2. The origin and nature of Ghatwali tenures in the district of Bhagalpur has been considered in a number of decisions, in the Indian Courts and before their Lordships of the Judicial Committee. The classical judgment of Lord Kingsdown

in. *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101 and of Lord Sumner in *Satya Narayan Singh v. Niranjan Chakravarti* AIR 1924 P.C. 5 and the most elaborate judgment of this Court delivered by Fazl Ali J. (now my Lord the Chief Justice) in *Sonabati Kumari v. Kirtyanand Singh* A. I. R. 1935 Pat. 306 are of immense assistance in deciding the question in dispute in the present case, and indeed the observations in 14 Pat. 703 have been freely referred to by the learned advocates on both sides in support of their respective arguments before us.

3. Mahalat Kharagpur is an extensive estate in the District of Monghyr, Bhagalpur and the Santal Pargannas. This is a permanently settled estate with a land revenue of Rupees 72,532-5-0 and is borne in the revenue roll of the Bhagalpur collectorate under tauzi No. 445. This estate includes Kakwara which pays annually to the proprietor of Kharagpur estate a fixed sum of Rs. 245-12-15. We have valuable information regarding Kakwara in some of the Calcutta cases and a case decided by this Court a few years ago, which will be referred to hereinafter. There is also a well-known treatise written by Captain Brown who was an officer of the East India Company through whose sanad the appellant derives his title which contains a thorough description of the jungle tarai districts which were in his charge (in which Kakwara is included) and of the policy which he pursued and the methods which he adopted in the settlement of that area. A brief account of the information that is available regarding the early times will throw some light on the documents exhibited in this case and will enable us to construe these documents which is the task before this Court because after all the real nature of the estate of Kakwara rests upon a true construction and import of these documents which relate to Kakwara.

4. According to Hunter's Statistical Account of Bengal, vol. 14, which deals with Bhagalpur at p. 144, Kharagpur was originally ruled by a number of chiefs and about the middle of 16th century passed into Rajput domination. One of these rulers was Sangram whose son Todar Mull became a Mahomedan. His descendants were Muzaffar Ali, Faiz Ali and Kadir Ali. Muzaffar Ali succeeded to the Raj in 1734 while yet a minor. But some time before 1766 Muzaffar Ali was in open rebellion against the East India Company who had obtained the Dewani in 1765. Captain Brown was sent to subdue him and other rebels with the Company's troops in 1766. The ghatwals of the jungle tarai who are described by Captain Brown as the Raja's own chiefs plundered his baggage during his retreat. But Muzaffar Ali was reduced to subjection and made a prisoner in 1768. A sanad was given by Captain Brown in 1171 Pasli by which the zemindary of another rebel Jagannath Deo of Lachmipur, one of the most powerful ghatwals of the jungle tarai, was conferred upon Faiz Ali, the son of Muzaffar Ali. But the zemindary of Kharagpur was restored to the family only in 1780; the official confirmation was a little later by the sanad of the Governor-General, Warren Hastings in 1781:

In the Santhal Pargannas there are for practical purposes three classes of

Ghatwali tenures : (a) Gov-enment Ghatwalis created by the ruling power, (b) Government Ghatwalis, which since their creation and generally at the time of the Permanent Settlement have been included in a zemindary estate and formed into a unit in its assessment, (o) zemindary Ghatwalis created by the zemindar or his predecessors and alienable with his consent. The second of these classes is really a branch of the first.

5. I am quoting from the judgment of their Lordships of the Judicial Committee in 511. A. 37.2 The question which falls to be determined in the present case is whether Kakwara is a Government Ghatwali or a zamindari Ghatwali. In order to decide this question we have to construe the patta and sanad which dates from a time anterior to 1793, the date of the Permanent Settlement. On 17th of Pus, 1183 corresponding to 31st September 1777 Captain James Brown who was in the service of the East India Company, who had obtained the Diwani of Bengal, Bihar and Orissa, in 1765, and who was in charge of the troops from 1766 to introduce order in the five jungle tarai mahals including Kharagpur, granted a sanad as head of the jungle tarai or low forest land to Bankoo Singh and Bhairo Singh the ancestors of the appellant. This sanad bears his seal on the top and describes him as the Captain on behalf of the East India Company. The sanad is addressed to the present and future mutsaddis of affairs, chaudhuries, kanungoes, zamindars and ghatwals of the jungle tarai area appertaining to Kharagpur and states that from the beginning of 1184 Fasli, Taluka Kakwara is let out in perpetual mu-karrari to Rankoo Singh and Bhairo Singh ghatwals of the taluka at a fixed jama of Rs. 245-12-15 gandas consolidated from all sources excluding the perquisites of the zamin-dari, nankar, chaudhuris and kanungoes and also excluding the lands given in charity to deities, brahmins and also the lands of jagir-gars, bar qandazes etc. It then states that it is requisite that they should peacefully cultivate and pay the Government revenue according to the kabuliat, year after year and crop after crop, into the Government treasury, and after enjoining on them to keep the tenants pleased and contented with their good treatment and not to oppress any one and make excessive demands and not to fix the allowance of the jagirdars and bar quandazes etc., over and above the rent, contains the following important provisions:

They should provide for the protection" of the tenants within their jurisdiction and of the villages of the said Taluka. Whenever the chakars be sent for by the huzur, the sardar should appear before him with his men. If at any place, within their boundary limits", murder, disturbance, daoity, theft, highway robbery etc., be committed, and the culprit be traced or be found conspiring advisedly with any one and the Government work suffer, and proper punishment be meted out after inquiry, they will be responsible by virtue of their position, and will be dismissed from their post and will not be re-instated. The amlas of the zamindars of the said Taluka should, on knowing the said instimrari mukarrari rent to have been fixed, continue to receive the mukarrari rent from year to year and should not demand even a farthing in excess.

6. Then follows a summary in the form of a schedule of all the terms of the sanad which I have reproduced above and the names of the 22 villages are given under the heading "specification of Villages." On the margin is written "Ammal Nama to Rankoo Singh and Bhairo Singh" (printed at pr 3, Part. 3, Ex. 1). On 17th January 1780, Raja Qadir Ali granted a sanad to Rankoo Singh and Bhairo Singh which is printed at page 25 and is Ex. 1 (a). On the top is the seal of Raja Qadir Ali, fidvi (devoted to or servant of) Emperor Shah Alam, the victorious 1193. It is addressed to the present and future mutsaddis of affairs and the gumastas holding the posts of chaudhurs and kanungoes of paragana Danda Sukhwara appertaining to mahals Kharagpur, Sarkar Monghyr, in the province of Bihar and then states:

The Ghatwali service tenure of Taluka Kakwara appertaining to the said pargana is held under a sanad, by Bhairo Singh and Rankoo Singh, with 172 musketeers and archers including sardars, on the condition of allegiance and loyalty to the Sarkar. Of late also, the said tenure being upheld and kept intact as usual according to the endorsement, is assigned and granted with effect from the beginning of the kharif season of 1189 Fasli, Rajwara, corresponding to 1188 Fasli, Mughlana. They should discharge the duties and obligations with honesty and fidelity and keep the tenants pleased and contented with their good treatment, and should watch the ghats and ohaukis very carefully and cautiously, so that no thief and night robber may come around and about them. If, God forbid, the properties of any one be stolen or plundered and oattle be concealed or murder be committed, they should trace the thieves and night robbers with the properties intact, restore the properties to the owner and produce the party of the mischief mongers before the Huzur and prove the murder. In case they fail to find out the thieves and to prove the murder and the concealment of cattle, they should hold themselves responsible therefor. They should continue to pay the quit-rent to the Sarkar as usual. When summoned, they should appear before the Huzur with their body of men. It is desired that you should consider them as permanent Ghatwals of that place and maintain them in their possessions and you should not fail to give them sound advice so as to ensure by all means the advantage of the Sarkar and the well-being of the tenants.

7. Then follow these words:

The Ghatwali service tenure of taluka Kakwara, pargana Danda Sukhwara, is granted as before to Rankoo Singh and Bhairo Singh with 172 musketeers and archers including sardars with effect from on the condition of allegianoe and loyalty to the Sarkar.

8. Then details are given of the number of sardars and musketeers. The fixed perpetual quit-rent, rent and zamindary are mentioned and the amount separately payable by Rankoo Singh and Bhairo Singh. Thenihe names of 16 villages are stated as having been given in jagir. Only 16 villages are mentioned here because the other six which are to be found in the sanad of Captain Brown were merely Tolas, or kitas.

9. The sanad of Captain Brown (Ex. I) and the sanad by Raja Qadir Ali (Ex. I (a)) were produced in a suit which went up to the Calcutta High Court and is reported in *Munrunjun Singh v. Rajah Leelanund Singh* (1865) 3 W. R. 84. That was a suit by the zamiridar of Kharagpur claiming possession of Kakwara on the ground that this ghatwali tenure was held for certain police services, that the appointment and dismissal of ghatwalis rested with the zemindar and that as he had lately compounded with Government for a money payment in lieu of the police services which he was bound to render through the ghatwals and such services being no longer required he was entitled to resume the lands. In their defence the defendants, the ancestors of the appellant before us, urged that they held a permanent tenure of the character known as ghatwallee, that it existed long before the permanent settlement, being held at a fixed jumma as set forth in sunnuds derived directly from the representatives of the British Government, and in Compensation for service in guarding the mountainous country and passes which service they have performed, are performing and are able and willing to continue to perform. In support of their case the defendants filed the sanad given to them by Captain Brown and the sanad granted by Raja Qadir Ali. The learned Judges of the Calcutta High Court in considering the effect of these sanads observed as follows at page 85:

It is addressed to the ancestors of the defendants in the character of ghatwals, and seems to us to be rather a confirmation of an existing tenure than the creation of a new one. It describes the tenure as a "mokurruree istemraree" holding, or perpetual holding at a fixed jumma the word "istemraree" we think, referring to perpetuity in point of time, the word "mokurruree" to fixity in respect of jumma. The jumma is stated to be Bs. 245, besides rasoon akrajat, etc. The conditions of service are not specifically set forth, general terms only being used. That the tenure was at the Permanent Settlement included in the zemindary of Kur-rugpore, and that the jumma is payable to the zemindar, there is no doubt. And about the time of the settlement we have the sunnud of the zemindar Raja Qadir Ali certainly genuine, and which is the strongest evidence of the status of the defendants at the time of the settlement. For it recites that the ghatwals held under previous sunnud, and confirms them in their holding according to previous custom. It specifies 172 burkundazes as the force which the ghatwals are bound to keep ready, details the fixed jumma to be mal, Rs. 215-3-0, zemindary rasoon Rs. 30-12-0, total Rs. 245-15-0 and it gives a detail of the villages included in the holding. The only discrepancy between this and Captain Brown's sunnud is that the later described the jumma as Rs. 245 besides rasoon, while Qadir .Allee's specifically in-cludes the rasoon in the Rs. 245 : but no detail being given in Captain Brown's sunnud, a mistake in a single word may easily have occurred.

On these terms the defendants' ancestors and themselves have continued to hold down to the present (that is to say 1865) in common with many other ghatwals holding on a similar tenure.

10. The learned Judges at page 86 dealt with the general character and nature of these tenures known under the general name of ghatwali in different parts of the country and divided them into two classes, the superior and the inferior ghatwals, the superior being larger tenures were more of the nature of serni military colonies where a chief with his followers were settled down in parts of the country so unsafe that it could not be otherwise occupied, and the inferior being those in which the zamindar or ruling power deals direct with the individuals who do the work assigning them pieces of land in the established villages and then observed:

As in the present instance, the exact origin of each tenure is generally lost in the confusion and obscurity of the troublous ages which preceded British Rule, but in this and many other instances we find them existing and useful at the earliest periods of which we have official record.

11. After referring to the well-known Regulation 29 of 1814 which defines the status of ghatwals in Beerbhoom the learned Judges gave their decision as to the nature of Kakwara tenure in these words:

It appears to us that the tenure now before us is rather analogous to those of Beerbhoom than to those of Bishenpore. It is a large tenure of a superior character comprising many villages, and it has come down in the defendants' family from ancient times, subject to the payment of a fixed and established rent to the zamindar. We can have no doubt of the hereditary character of the holding. All analogy, all history, and all the facts, which have been brought to our notice go to show that, as a matter of fact these tenures, whatever may have been the express terms of the grant, have been constantly handed down from generation to generation. Such being the nature of the tenure, are the ghatwals, under the circumstances stated by the plaintiff, liable to be evicted or not? For misconduct and failure to perform the conditions annexed to their tenure they, no doubt, are liable to be, and sometimes have been ejected, and when so vacant, the right of nomination to the office, no doubt, rests with the zamindar. But no instance can be shown in which the zamindar on his own mere motion has ejected the ghatwal, and determined the tenure. We are quite clear that, under the established usage and constitution of the country, he cannot do so.

12. A little later on they observed:

The conditions of service expressed in the papers are not of a proper military character against foreign enemies, but rather against murderers, robbers and cattle lifters from the hills.

13. The result of the decision was that notwithstanding the contract between the zamindar and the Government by which he compounded his liability to the Government the status and rights of the ghatwals were not affected in any way because when their services were required they were bound to perform it and by custom they held the tenure subject to the performance of it and no act of

Government and the zamindars could defeat the rights of the ghatwals unless there was the authority of the Legislature. This case went up to the Privy Council where the judgment of their Lordships was delivered by Sir Barnes Peacock and is reported in *Rajah Leelanund Singh v. Munriinjun Singh* I. A. Supp. 181 reference is made to the two sanads of Captain Brown and Raja Qadir Ali. Their Lordships observed that it was held in the case of the same Rajah, *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101 that the Government was not entitled to resume this talook as police lands and that although the Government could not re-assess the talook with revenue, it did not dispense with the service upon which the lands were held at the time of the permanent settlement, and therefore the lands remained liable to the ghatwali services. Their Lordships further construed these two sanads to be "grants of the land subject to certain services, namely, the service of paying a small rent of Rs. 245-12-0 and also of performing the ghatwali duties. They were not therefore the hiring of a servant, giving him certain land by way of wages, but grants of land upon the condition of certain services."

14. The decision of the Calcutta High Court was affirmed, and it was held that the zamindar had no right to put an end to the tenure so long as the holders of those grants were willing and able to perform the services. In 1877, Kakwara was again the subject of a litigation which went up to the Calcutta High Court. *Rajah Leelanund Singh v. Tha-koor Munrunjun Singh* (77) 3 Cal. 251. Raja Leelanund Singh instituted a suit to recover arrears of rent regarding Kakwara and to have his right declared to enhance the rents of the same at a rate which the Court might think fit as an equivalent for the ghatwali services which had been rendered unnecessary through the agency of the Government in compounding the matter with the zamindar. The plaintiff put his case in this way that the ghatwali grants of Kakwara were made on condition of the performance of certain police services by the ancestors of the defendants, that these services were now undertaken by the Government in consideration of the plaintiff paying an additional sum of Rupees 10,000 annually and therefore the zamindar by reason of such arrangement and by reason of his right as zamindar was entitled to enhance the rent. The defendants, the ancestors of the appellant before us, denied their liability to pay more than they were bound to pay by the terms of these two sanads granted by Captain Brown and Raja Kadir Ali. The judgment of the High Court was delivered by Sir Richard Garth C. J., who expressed the hope—which unfortunately has not been fulfilled—that the suit before the High Court at Calcutta was probably the last scene in a long series of litigation which has been going on between these parties for upwards of thirty years past. The learned Chief Justice then considered the origin of this ghatwali tenure and observed at p. 255:

And it is very necessary for our present purpose to bear in mind what was the true origin and nature of these tenures. They were created by the Mahomedan Government in early times, as a means of providing a police and military force to watch and guard the mountain passes from the invasions of the lawless tribes

who inhabited the hill districts. Large grants of land were made in those days by the Government, often to persons of high rank, at a low rent or at no rent at all, upon condition that they should provide and maintain a sufficient military force, to Protect the inhabitants of the plainr from these lawless incursions; and the grantees on their part subdivided and regranted the lands to other tenants (much in the same way as military tenures were created in England in the feudal age) each of whom, besides paying generally a small rent, held their lands in consideration of these military services, and provided each according to the extent of his holding a specified number of armed men to fulfil the requirements of the Government.

15. He then referred, to the fact that the East India Company by the Hegn. 72 of 1791 effected the decennial settlement of Bengal, Bihar and Orissa and observed that at this time the zemindary of Kharagpur was in the hands of Raja Kadir Ali, that a large proportion of the lands of this zemindary was held upon ghatwali tenure, and, amongst others taluk Kakwara was held upon that tenure by the predecessor in title of the defendant. The learned Chief Justice then gave the details of the contents of the two sanads in extenso. At p. 259 there is a quotation from the judgment of the Privy Council in *Rajah Leelanund Singh v. Munriinjun Singh I. A. Supp. 181* which I have quoted already. The learned Chief Justice then addressed himself to the question whether the plaintiff was entitled to enhance the rent and observed that the defendants were still perfectly ready and willing, as they always have been to fulfil the obligations of their sanads as between them and the plaintiff, and it is not because the plaintiff has thought fit to compound the ghatwali services with the Government, without the defendant's consent that the plaintiff has any right to change the terms of the defendant's tenure, and that there was nothing in the sanads themselves, nor any law or custom applicable to those sanads, which would justify the plaintiff's claim for enhanced rent. The suit of the zemindar was therefore dismissed. In *Tikait Basuki Prasad Singh v. Mr. Christian Misc. Appeal No. 285 of 1930* of this Court the judgment was delivered by Khwaja Mohammad Noor and Dhavle JJ. on 23rd January 1934. In that case, which is known as the Chakai case, the question for decision was whether taluk Chakai in the district of Monghyr was a Government ghatwali or a zemindary ghatwali. The learned Judges construed the sanad given by Captain Brown of 1779 to the ancestor of the defendant in that case and held that there was no such obligation of service imposed upon the grantee as an integral part of the grant and that the duties implied were clearly no more than were incidental to the position of a zemindar (as distinguished from a service holder) in the days of the grant. They also observed that further light was thrown on this part of the case by the fact that while in the Hundwa grant the usual summary at the end or schedule gave not only the annual jama settled but also the barkandazes and archers, the grant in the present case made no men-tion of any services at all in the schedule but only stated the jama and that the difference seemed to them to be very significant and to show pretty clearly that the Chakai grant was not conditional on service, but was only an

ordinary zemindary grant. The learned Judges then observed as follows which can be quite pertinently considered in this case:

Another grant of Captain Browne which related to taluk Kakwara, came under notice in the cases brought by the zemindar Raja Leelanund Singh first for resumption and afterwards for enhancement of rent against the ghatwal Munrunjan Singh. These cases are reported in *Munrunjun Singh v. Rajah Leelanund Singh* (1865) 3 W. R. 84, *Rajah Leelanund Singh v. Munriinjun Singh* (74) I. A. Supp. 181 and *Rajah Leelanund Singh v. Tha-koor Munrunjun Singh* (77) 3 Cal. 251 The grant, which was made in 1777 during the suspension of the zemindar Raja from office "such as was common in those days" was addressed to the ancestors of the defendants in the character of ghatwals, and appears from the judgment of Garth C. J., in the report in *Rajah Leelanund Singh v. Tha-koor Munrunjun Singh* (77) 3 Cal. 251 to have required the grantees "when summoned to the presenoe (of the superior zamindars) to attend the presence with their body of men." Captain Browne's Kukwara sanad of 1777 was followed by a sanad from the zemindar, Raja Kadir Ali, confirming the grantees in the tenure (requiring them inter alia to look after the ghat and chaukis) and giving a detailed statement showing the number of barkandazes and archers with sirdars to be maintained by the grantees. As we have already shown, the grant in the present case lays down no such requirement. Another case to which our attention has been drawn and which will be again referred to when we come to deal with Mahal Chandwari, is *Baboo Kooldeep Narain Singh v. Mahadeo Singh* (66) 6 W. R 199, where the terms of a ghatwali grant (which related to Tuppah Dakhilgunj) are set out in the judgment of Peacock C. J. at page 200. What was disputed in the case was the hereditary character of the grant and the power of an auction-purchaser of the zamindary to put an end to it; there was no dispute that the grant was ghatwali and indeed there could be none on the face of the deed, which began: "Whereas the service of ghatwalee of Tuppah Dakhilgunj pertaining to the said pergannah (Bhaugulpore) and Mouzah, Khotul, etc., appertaining to the said Tuppah as ghatwali tenure were conferred. The grantee, further, was required (among other things) "in the performance of the duties attached to the said service" not only to guard and protect the roads and watch over the Tuppah with great diligence, but also to take care of the ghats or passes. Had there been any such mention of ghats in the sanad before us, that might have afforded some reason for contending that Mitra Narayan was the grantee of a ghatwali tenure under Captain Brown's sanad. For, an obligation of service in connexion with ghats in the hills, unless it is merely what was incidental to the position of a zamindar of those times, might well suffice to make the grantee a ghatwal, even without any obligation to maintain a specific military or quasi military force.

16. In my opinion, it is needless to refer to the other cases which were cited before us to decide the question in controversy in the present appeal because they related to the construction of other grants although they undoubtedly are useful in understanding the principle upon which such cases should be decided.

But the two decisions of Calcutta High Court and the decision of their Lordships of the Judicial Committee in the Supplement Volume of the Indian Appeals relate to the construction of these two very sanads which are now before us--these two sanads were also considered by this Court in the unreported case while construing the particular sanad which related to Chakai Mahal. It should be observed here that the decision of the Calcutta High Court in 3 W. B. 844 and the decision of the Judicial Committee in I. A. Sup. 1815 were referred to with approval by Lord Sumner in *Satya Narayan Singh v. Niranjana Chakravarti* AIR 1924 P.C. 5.

17. During the course of the argument we asked the parties to produce before us a copy of an extract from the survey record of rights regarding Kakwara. The learned advocate for the respondent has furnished us with a plain copy of khewat Part 8 relating to Kakwara. This has been brought on the record with the consent of both the parties. It shows that the area of this tenure is 2247.79 acres and is held at a rental of Rs. 245-12-9. Column 9 shows that the land was settled by means of a patta dated 1188 Bangla which is the sanad of Captain Brown and in Col. 11 the interest of the immediate holder and the terms under which he holds are shown as "ghatwali istam-rari mokarari." In the remarks column it is stated that for fixing cess this property has been valued at Rs. 4624-14-0. These details point to the inference that the ghatwali is not an ordinary zemindary ghatwali but was of the superior ghatwali kind. 22 villages with an area of 2247.79 acres were granted at a small rent of Rs. 245. The ghatwalis had an obligation to furnish a force of 172 men--a force precise and large--and military rather than civil and does not vary according to the needs of the moment but is fixed at a standing number at all times. As the terms of the two sanads show the attendance on the huzur with the whole force on demand is clearly beyond the scope of merely constabulary duties.

18. It is needless that I should repeat in my own words the same reasoning which appealed to the learned Judges of the Calcutta High Court, but I am satisfied that upon a proper construction of the two sanads before us it must be held that Kakwara is a Government ghatwali. I would also be prepared to hold that whether it was a ghatwali or not, the tenure was analogous to a ghatwali tenure of the nature described in the preamble to Regn. 29 of 1814 as was pointed by their Lordships of the Judicial Committee in *The Raja of Pachete's case Nilmoni Singh Deo v. Bakranath Singh* (83) 9 Cal. 187. It was conceded by the learned advocate for the respondents and indeed it is obvious that if Kakwara is a Government ghatwali then it is inalienable and cannot be sold in execution of the decree for rent and cess which has been obtained by the respondents. An argument was advanced that the zemindar in this view would be in a difficulty to recover the rent if the ghatwali tenure cannot be sold in execution of a decree for rent against the tenant. But this matter can be easily disposed of in the words of Sir Barnes Peacock who delivered the judgment of the Judicial Committee in 9 I. A. 1049:

It is sufficient to say that the zemindar at the time of the permanent settlement must have been aware of the nature of the tenure upon which the lands were held, and that this case does not involve the necessity of deciding what remedy the zamindar has for recovering his rent, whether by sequestration of the estate or by application to the Government to remove the tenant, or by what other mode.... It is quite clear that if the jaghirs were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character, as remarked by the Court in *Rajah Leelanund Singh v. Doorgabutty* (1864) W.R.249 .

19. The Government however can dismiss the appellant for any misconduct in relation to the office of ghatwali and if they are proved to have deliberately and persistently defaulted to pay rent and cess which are justly due to the landlord respondent, the Government may well consider whether these defaults do not constitute such a misconduct which would entail dismissal of the appellant, because one of the conditions of the grant under which Kakwara is held is that the holders are liable to pay a certain annual sum to the Government and that sum has now been made payable to the zamindar of Kharagpur.

20. It is but right and proper that I should now deal with the argument which was addressed to us on behalf of the respondents in support of their contention that we should hold that Kakwara is merely a zamindari ghatwali and not a Government ghatwali. Mr. B. C. De who presented a clear argument on behalf of the respondents argued in the first place that the sanad of Captain Brown, Ex. 1, was entirely different from the patta in the Handwa case AIR 1924 P.C. 5 which is printed at p. 1, Part 3 and is Ex. 3 in the case. In particular he pointed out to the fact that in the Handwa case AIR 1924 P.C. 5 it was clearly stated that whenever the ghatwal was called for by the huzur he was to present himself accompanied by sardars with a body of archers and barkandazes 307 in number, of whom the sardars will be seven and the archers and barkandazes 300. In my opinion it is not permissible to construe the words and effect of one document by the contents of another. But even as it is I do not see any serious difference between the two sanads except that the number is fixed in Ex. 3 whereas in Ex. 1 the number is left vague in the sanad "whenever the jagirdars be sent for by the huzur, the sardar should appear before him with his men." It may be that Captain Brown had not sufficient information at that time to state a fixed number, but the number is fixed in the sanad by Raja Kadir Ali which as the document itself shows was merely confirming the earlier sanad, and that earlier sanad must be either the sanad of Captain Brown or a still earlier sanad which could only be granted by the ruling power (see the observations of Sir Barnes Peacock in *Rajah Nilmoney Singh v. The Government* (66) 6 W.R. 121 to the effect that if the jagir existed before the date of the Permanent Settlement it must have been created by the British Government or by the native

Government, because the zamindar had no power before the Permanent Settlement to grant a rent-free tenure or a tenure at less rent than the share of the produce payable to the Government for revenue).

21. Mr. De also drew our attention to Ex. D, a list of ghatwali mahals in Mahal Kharagpur, which was prepared on 28th March 1860 to, show that Kakwara is mentioned as item 73 as a ghatwali mahal appertaining to Kharagpur and to another list prepared in March 1863 Ex. F (1) of the Kharagpur ghatwalis which also includes Kakwara as item 40 at p. 16 of Part 3. It is enough to say that this Court is not concerned with what view the officers took as to the true nature of Kakwara ghatwali remembering that before the decision of their Lordships of the Judicial Committee in the celebrated case in *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101 the true position of a ghatwali was not correctly understood. See similar observations in *Sonabati Kumari v. Kirtyanand Singh* A. I. R. 1935 Pat. 306:

We doubt whether in those early days the distinction between the status of a Government ghatwal and that of a zamindari ghatwal was fully comprehended.

22. It was then strenuously argued that the failure of the defendants in the earlier litigations which were the subject of appeals to the Calcutta High Court and to their Lordships of the Judicial Committee to set up a defence that Kakwara was a Government ghatwali prevented the appellant from now contending that Kakwara is such a ghatwali. But this argument can be met in the first place by the observation which I have just made that in those days the distinction between the status of a Government ghatwal and that of a zamindari ghatwal was not fully comprehended and therefore no inference can be drawn from the failure of the ghatwals to assert rights of the existence of which they may not have been aware. But in *Munrunjun Singh v. Rajah Leelanund Singh* (1865) 3 W. R. 84 the ancestor of the appellant set up these two very sanads successfully as a defence to the suit by the Raja for possession. The High Court considered the nature of the tenure under which the defendants held and I have adopted that same view in construing these sanads before me. In 3 Cal. 251,6 the defendants again successfully resisted the claim for enhancement of rent by relying upon the very terms of these two sanads. In my opinion, the appellant is not precluded from putting forward his objection to the inalienability of the tenure. The appellant may equally argue that the respondent is bound by the result of these decisions. But I have preferred to rest my decision on the construction of these two sanads themselves. Attention was also drawn to the following observations of Sir Barnes Peacock when delivering the judgment of the Board in I. A. Sup. Vol. 1815 at p. 186:

Some documents were referred to from which it appeared that certain ghatwals had been dismissed by the zamindar, but it does not appear that that was merely because the zamindar did not require their services. They may have been dismissed for incompetence or because they did not properly perform the services to which their tenures were subject. In such a case they might be

dismissed, but the zamindar has no right to put an end to the tenure so long as the holders of the tenure were willing and able to perform the services.

23. It was, therefore, argued that these observations which related to Kakwara in a dispute between the ancestors of the present disputants show that the zamindar had the right to dismiss ghatwals and, therefore, the ghatwali must be held to be a zamindari ghatwali. No document has been produced before us to show that the zamindar had the right to dismiss the Kakwara ghatwals as a zamindar. It may be that he dismissed the ghatwal as a representative of the Government as it has been stated in several cases that the true position of a zamindar as a proprietor was not recognized till after the Permanent Settlement, or it may be that the zamindar had dismissed the ghatwals for incompetence or because the ghatwal did not properly perform the services to which the tenure was subject, the Government acquiescing in that dismissal. But this would not show that the Government had not the power to appoint and dismiss the ghatwal or that the Government by its acquiescence must be taken to have terminated the ghatwali character of the tenure. It was also argued that by the decision of the Calcutta High Court in 3 Cal. 251, 6 so often referred to, it was decided at p. 262 that the ancestors of the appellants are holders of a hereditary tenure which comes under the denomination of dependant talukdars as defined in Regn. 8 of 1793. It was therefore submitted that this decision being a decision inter partes should be treated as res judicata and, therefore, the respondents have a right to sell this dependant taluk. But this argument is without any substance and appears to be concluded by two decisions of the Judicial Committee. In AIR 1930 45 (Privy Council), Sir John Wallis in delivering the judgment of the Board observed as follows:

The Chief Justice has also relied on the fact that the defendant's predecessor after the Permanent Settlement, did not seek for separation as he was entitled to do if his present case is true. Now, it is matter of history that the number of talukdars entitled to separation was so great that Lord Wellesly's Government found it necessary to pass a Regulation in 1801 limiting the time for making such an application to three months from the date of the Regulation. In their Lordships' opinion the failure of the defendant's predecessor in this backward and remote part of the Presidency to put in an application within the time limited cannot be considered as raising any presumption that he was not entitled to make such an application.

24. In the next year in AIR 1931 5 (Privy Council) Sir John Wallis re-stated this view while delivering the judgment of their Lordships in these terms:

With regard to this part of the case, it is only necessary to add that, it is well settled that if the Jagadih Raja was the proprietor of these nankar villages, his title was unaffected by his estate being included in the Permanent Settlement or any of the previous settlements with the Raja of Ramgarh (Juggut-mohinee Dossee v. Sookhemony Dossee (72) 14 M. I. A. 289) and that his failure as such proprietor for the separation of his estate under Regulation 8 of 1793 within the

time limited by Section 14 of Regulation 1 of 1801 merely deprived him of the right to separation as the section expressly left his other rights unaffected.

25. Mr. De also contended that if it is held that the grant by Captain Brown was a Government grant then he would submit that this grant came to an end when the Raj was restored to Eaja Kadir Ali and after that the Raja gave another grant, Ex. 1 (a). Therefore, so he submitted, this was merely a zemindary grant making the appellant a zemindary ghatwal. In this connexion he also relied upon the observation of Sir Barnes Peacock when delivering the judgment of the Board in *Rajah Leelanund Singh v. Munriinjun Singh* (74) I. A. Sup. 181 where his Lordship observed that the grant by the subsequent sanad by Kadir Ali was a ghatwali grant. His argument was that his Lordship did not state that the earlier grant by Captain Brown was also a ghatwali grant. I am not impressed with this argument because in the view which I have taken of the construction of these two documents the grant by Eaja Kadir Ali was merely a confirmatory grant. It says so expressly in the opening lines of the sanad that the ghatwali service tenure of taluka Kakwara is held under a sanad by Bhairo Singh and Rankoo Singh with 172 musketeers and archers including sardars.

26. It was faintly argued that the word "huzur" wherever it appears either in the sanad of Captain Brown or in the sanad of Raja Kadir Ali must refer to the zemindar and reliance was placed upon the translation of these documents in *Rajah Leelanund Singh v. Thakoor Munrunjun Singh* (77) 3 Cal. 251 where the translation is : "summoned to the presence (of the superior zamindar)." But the word "huzur" read in connexion with the context clearly means the Government of the day and not the zeminda. In 1777 when Captain Brown granted the sanad Ex. 1 there was no zemindar who could have been in contemplation because the zemindar was then a rebel and had been turned out of the estate. If Raja Kadir Ali intended by the word "huzur" to mean himself he would have said in janab or myself and not "huzur." See also the observations in *Sonabati Kumari v. Kirtyanand Singh* A. I. R. 1935 Pat. 306. I am quoting from page 99:

Indeed there being no zamindar at Kharagpur at that time "Huzur" could not by any stretch of reasoning be construed to refer to him. There is nothing in the patta, Ex. 1, to suggest that it was being granted on behalf of the zamindar. On the other hand Captain Browne is described as the "Sardar" of the Company for the Jungle Terai of Gidhaur, Kharagpur, Bhagalpur, Cologong and Bir-bhum.

27. For these reasons I would allow the appeal set aside the decision of the learned Subordinate Judge and hold that the respondents are not entitled to sell Kakwara in execution of their decree. The appellant is entitled to his costs in this Court and in the Court below.

Shearer, J.

28. I agree with my learned brother that, when in 1777 Captain James Browne granted a sanad to the then ghatwals of Kakwara, their tenure became a Government ghatwali tenure. At the same time, I am of opinion that it has not

continued to be a Government ghatwali tenure down to the present day, and, as on this ground I think the order of the learned Subordinate Judge should be maintained, I proceed to record my reasons for coming to such a conclusion at length.

29. Rai Bahadur Ranjit Sinha, in his monograph on the Law of Service Tenures in Bengal, which was published in 1911, states that there were then but five ghatwals, one of whom was the ghatwal of Kakwara, under the Kharagpur Raj. In 1863, the Collector of Bhagalpur caused a list of the ghatwali tenures under the Kharagpur Raj to be prepared and this list shows that there were then no fewer than 98 of them. In 1860 the Government of Bengal entered into an arrangement with the Banaili Raj, which had succeeded to the interest of the Raja of Kharagpur, and, in consequence of this arrangement, the Banaili Raj instituted proceeding against certain ghatwals and threatened to institute proceedings against the others for the resumption of their tenures. The ghatwals, with the exception of five entered into a compromise with the Banaili Raj, by which they relinquished their status as ghatwals and accepted instead the status of ordinary mukarraridars. At this length of time, it is a matter of very great difficulty indeed to ascertain what exactly were the incidents of the tenures of the five surviving ghatwals. One reason is that, in 1742, or shortly afterwards, the then Raja of Kharagpur, Raja Muzaffar Ali, incurred the displeasure of Kasim Ali and was deprived of his property, and, for many years, kept in close confinement. His estate was placed under the charge of an aumil, and, although in 1766, immediately after the grant of the diwani to the East India Company, Raja Muzaffar Ali was released, his estate was not then, or indeed ever, restored to him. In consequence of this, documentary evidence which might otherwise have been available to show the relationship in which the ghatwals stood to the Raja of Kharagpur prior to the grant of the diwani is not forth coming. "Another reason is that, since 1836, and possibly from an even earlier date, the Government of Bengal has never demanded either from the Raja of Kharagpur or from the ghatwals themselves the services, on condition of rendering which they held their tenures.

30. There can, I think, be no doubt but that the grant made to Ranko Singh and Bhairo Singh in 1777 by Captain James Browne of the East India Company was a grant made by the state and the services to be rendered by the grantees were services which were to be rendered to the state. On the latter point, the provisions contained in the sanad, that the ghatwal was to appear with his men, when called on, before the huzur, appears to me to be decisive. In Wilson's Glossary "huzur" is defined as "the presence, the royal presence, the presence of a superior authority as of a Judge or Collector of revenue." In 1770 there occurred the great famine which led to a complete break-down of the arrangements which existed for keeping the paharias or hill tribes in the south of Bhagalpur and in the Santal Parganas in check. These wild and lawless men invaded and harried the low lands at the foot of the hills, and Captain James Browne was placed in command of a very considerable military force and sent to

subdue them. Technically, his position was that of a Collector of the land revenue and his jurisdiction comprised what were then known as the jungle terai mahals. From the map, which is to be found in MacPherson's Settlement Report, it appears that, although the jungle terai mahals comprised a portion of the Kharagpur Raj, it did not by any means comprise the whole of it. It is clear from the report which Captain James Browne himself prepared of his activities, that the ghatwals or some of the ghatwals were in collusion with the hillmen or paharias, and that his object in granting them sanads was to detach them from the insurgents and obtain their assistance in suppressing the rebellion and in restoring order. The provision contained in the sanad, that the ghatwals of Kakwara should appear with their men when called on before the huzur, meant, in my opinion, that they were to appear before Captain James Browne himself or his successors in office. Captain Browne was engaged in suppressing a rebellion, and it is more than possible that, in order to meet pressing emergencies which arose from time to time, he did acts which he was not strictly authorised to do. In the absence, however, of anything to show that he was not authorised to make grants of land or rather of land revenue it must, I think, be assumed that he did in fact have authority to make this particular grant. That is the view which has consistently been taken by the Courts in dealing with a sanad of very much the same kind granted a year earlier by Captain Browne to the ghatwals of Handwa. In other words, it must, I think, be assumed that the ghatwali tenure created by the sanad, granted to Bhairo Singh and Ranko Singh by Captain James Browne, was a Government ghatwali tenure. The question, however, that arises in this appeal is not, to my mind, whether the tenure was in its origin a Government ghatwali tenure, but whether it has continued to be such down to the present day, or whether, in course of time, it has not ceased to be a Government ghatwali tenure and become instead a ghatwali tenure under the Kharagpur Raj.

31. In *Kali Pershad v. Anand Roy* (88) 15 Cal. 471, their Lordships of the Judicial Committee recognized the existence of a local custom in the Kharagpur Raj, by which alienations of ghatwali tenures under the Kharagpur Raj, whether a voluntary alienation made by the ghatwal himself or an involuntary alienation by a court sale, were valid and binding on the heirs of the ghatwal if made with the previous permission of the zamindar. This decision was based on two earlier decisions of the Calcutta High Court and also on evidence given at the trial of the suit, out of which the appeal arose, of numerous such alienations. It is obvious that the inconvenience of ghatwali tenures, which in this part of the country were, at one time, numerous, being wholly inalienable, must have been felt to be serious, and the growth of a custom, by which such tenures might, in certain circumstances, be validly alienated, is not surprising. Lord Sumner in 8 Pat. 1882 referred to the existence of this local custom and said that *Kali Pershad v. Anand Roy* (88) 15 Cal. 471 had

repeatedly been followed and applied in India, and so far as the reports show, without proof of the custom being required over again.

32. The existence of this local custom is thus a fact of which this Court can take judicial notice. Immediately after making the observation, which I have just quoted, Lord Sumner went on to consider whether an alienation made by the ghatwal of Handwa, who was undoubtedly the holder of a Government ghatwali tenure, was valid by reason of this local custom. The conclusion, to which his Lordship came, was that the Handwa ghatwali tenure was not a ghatwali tenure under the Raja of Kharagpur. The ground on which his Lordship based his decision was that, between 1809 and 1819, there had been protracted litigation between Raja Kadir Ali, the then zamindar of Kharagpur, and the relations of Purandar Singh, the deceased ghatwal of Handwa, in which Raja Kadir Ali asserted a right to nominate the ghatwal who was to succeed to Purandar Singh and that, in this litigation, Raja Kadir Ali had been unsuccessful.

33. The judgments of the District Judge of Bhagalpur and of the Provincial Court of Murshidabad are in the paper-book of the Privy Council Appeal No. 112 of 19182 and I have thought it proper to refer to them as they were to a very large extent the basis of Lord Sumner's decision. It appears from them that Raja Kadir Ali asserted that Raja Purandar Singh was a ghatwal and that he was entitled to appoint his successor. It was further asserted that as Raja Purandar Singh had declined to apply to him for a sanad and execute the usual kabuliat, Raja Kadir Ali had appointed one Bhawani Singh as ghatwal and Bhawani Singh had been unable to obtain possession of the Handwa estate. The claim for possession was resisted by Raja Purandar Singh on the ground that he was not a ghatwal but was a zamindar and mokararri-dar. An attempt was apparently made to show that Raja Purandar Singh, had obtained a sanad from Raja Kadir Ali and had executed a kabuliat in his favour but the documents produced were thought to be spurious and the suit was dismissed. The judgment of the District Judge was delivered in 1812 and two or three years earlier Dr. Buchanan had visited Handwa and in his description of pargana Handwa had given some account of the dispute. An extract from the Buchanan Manuscripts is to be found in Appendix 17 at page 41 of MacPherson's Settlement Report on the Santal Parganas. This is of interest as showing that as early as 1809 the Handwa estate "had been entirely exempted from military service" and also as showing the extent of the authority which the Raja of Kharagpur then claimed to exercise over the ghatwals in his estate. The argument put forward on behalf of the appellant was based wholly or almost wholly on the similarity of the provisions contained in the two pattas granted by Captain Browne, one of the ghatwal of Handwa and the other to the ghatwal of Kakwara. There are, however, indications in the pattas themselves and in what we know to have taken place in the period immediately following the grant of the pattas, that the status of the two ghatwals was, by no means, the same. For one thing the ghatwals of Handwa appear never, or at least never since 1776, to have paid any rasum of two annas in the rupee on the amount of the land revenue assessed on their lands to the Raja of Kharagpur. For another, in and immediately after 1776, they paid the land re-venue, for which they were liable, into the Government treasury direct and not through the Raja

of Kharagpur. Then in more than one list of the ghatwali tenures under the Kharagpur Raj prepared by the Collectors of Bhagalpur, Handwa is not to be found whereas Kakwara is always found. Finally, after the restoration of the Kharagpur Raj to the family of Raja Muzaffar Ali the ghatwals of Handwa, instead of obtaining a sanad from Raja Kadir Ali, obtained instead a sanad from the then Collector of Bhagalpur, Mr. Dickson, and a claim made by Raja Kadir Ali to appoint a new ghatwal of Handwa on the occurrence of a vacancy in the office was negatived by the Courts. For these reasons the decision of the Judicial Committee in *Satya Narayan Singh v. Niranjana Chakravarti* AIR 1924 P.C. 5 is, in my judgment, of little or no assistance in dealing with the question now at issue. What is of importance for our present purpose in the decision is, in my opinion, the following observations of Lord Sumner at p. 202 of the report which show that their Lordships of the Judicial Committee contemplated the possibility that a tenure which was originally a Government ghatwali tenure might later have been converted into a zamindari ghatwali tenure:

The question "whether or not a given ghatwali tenure is a Government ghatwali tenure must depend on the original grant, and unless the inclusion of the tenure in the assessment of zamindari lands can be shown to have amounted to a release by the Government of the ghatwali services or to a grant to a third party of the right to receive them and of the right to appoint the ghatwal, the tenure must remain, as it originally was, a Government ghatwali tenure.

34. Before I proceed to consider certain events which took place subsequent to the grant of this sanad to the ghatwals of Kakwara in 1777, it will be convenient to consider what exactly their status then was. There is no reason to suppose that, in their origin, the ghatwali tenures in the Kharagpur Raj were not of precisely the same kind as the ghatwali tenures in the district of Birbhum. Now, it would seem that, during the greater portion of the eighteenth century and the first decade or more of the 19th century, there was a continuous struggle between the Raja of Birbhum on the one hand and the ghatwals in his estate on the other, the latter endeavouring to throw off any allegiance they owed to him and asserting their complete independence (see the footnote at p. 509 et seq of Harrington's Analysis, vol. 8).

35. At the permanent settlement or subsequently, the ghatwals of Birbhum strenuously asserted that they were independent taluk-dars and were entitled to engage for the land revenue separately. This claim was ultimately negatived, and, although Egn. 29 of 1814 provided that they should pay the land revenue assessed on their tenures direct to the Government, it also provided that, if and when the assessment was increased, the Raja of Birbhum should share largely in the benefit. The ghatwals of Lachmipur and of Chandwa Pasi were eventually permitted to pay the land revenue assessed on their tenures into the treasury direct, and not to the Raja of Kharagpur. The remaining ghatwals in the Kharagpur Raj do not, however, appear ever to have claimed that they were independent talukdars, and, as such, entitled to be separated from the

Kharagpur Raj under Regn. 1 of 1801. If some of the ghatwals under the Kharagpur Raj, and the ghatwals of Kakwara were not among them, were ever in possession of sanads granted by the Moghul Emperors or their viceroys, the indications, to my mind, are that they must have obtained these sanads, very possibly after the arrest of Raja Muzaffar Ali, in an attempt, such as was being made by the ghatwals in Birbhum, to assert their independence. In any event, whatever the origin of the ghatwali tenure of Kakwara was, it seems quite clear that, immediately prior to 1777 the ghatwals were in subordination to the Raja of Kharagpur. The sanad, granted by Captain James Browne, provided, not merely that the ghatwals of Kakwara should pay the land revenue assessed on their tenures through the zamindar, but also that, over and above the land revenue, they should pay to the zamindar a rasum of 2 annas in the rupee. This rasum-i-zamindari was a payment similar to malikana which was "the unalienable right of proprietorship" and was paid to the family of zamindars who had been deprived of their estates for disobedience or contumacy: (see the answers to questions 12 and 17 by Gholam Hussain Khan, formerly Nazim of Bihar, at pp. 320-1 in Harrington's Analysis, vol. 3).

36. It is, of course, true that, at the permanent settlement, many persons who were independent talukdars and actual proprietors of the soil were assessed with and, therefore, compelled to pay their land revenue to zamindars. It is also true that, when such persons failed, as in many cases they did fail, to apply for separation under Regn. 1 of 1801, their rights were not thereby otherwise affected. The circumstance, however, that, in 1777, Captain James Browne recognised that the proprietor of the land in the possession of the ghatwals of Kakwara was the Raja of Kharagpur, and that, in consequence, the ghatwals were liable to pay a rasum to him shows, I think, clearly enough, that these ghatwals never were, or, at any rate in 1777, were not, independent talukdars. The Calcutta High Court in 3 Cal. 2516 has already expressed the opinion that the status of the ghatwals of Kakwara was the status of dependent talukdars, and this point must, therefore, now, in any case, be regarded as settled by authority.

37. In Mr. P.W. Murphy's Report of the Survey and Settlement Operations in Bhagal-pur (p. 15) it is stated that the leaders of the insurgents, whom Captain James Browne was engaged in suppressing, were certain ghatwals, and among them Biru Singh one of the ghatwals of Kakwara. It is also there stated that, in 1777, the ghatwals of Kakwara were arrested by the thikadar or farmer of the Kharagpur Raj, and, when on their way to Bhagalpur, were forcibly removed from his custody and taken before Captain Browne. In the Bhagalpur District Gazetteer (p. 159) it is stated that, in consequence of some trouble with the aumil or other local authorities, Faiz Ali, the son of Raja Muzaffar Ali, joined the ghatwal of Lachmipur who was the leader of the insurgents. This course of events justifies the conclusion that the object of Captain James Browne in granting the sanad which he did to the ghatwals of Kakwara was to detach them from the insurgents and to ensure that the not inconsiderable force of barkandazes and archers which they commanded should either be used against

the insurgents or, at all events should not be used against himself. The sanad, no doubt, converted the tenure which the ghatwals of Kakwara held, whatever its nature was, into a Government ghatwali tenure. If, however, the sanad was granted as a measure of temporary expediency, and if before it was granted the ghatwals of Kakwara were dependents of, and subordinate to the Raja of Kharagpur, is there anything at all unlikely in their having been permitted or forced to revert to their previous status as soon as normal conditions were restored? There are a number of reasons for supposing that this is what in fact actually happened. In 1780, the Kharagpur Raj was given to Raja Kadir Ali, the grandson of Raja Muzaffar Ali, who was then a child of five or six. During his minority the Raj would seem to have been managed by Mr. Cleveland and other Collectors of Bhagalpur. Now, very soon after the estate was given to Raja Kadir Ali, the ghatwals of Kakwara appear to have taken steps to obtain from him a sanad confirming them in the enjoyment of their tenure. It is unnecessary to discuss this sanad in detail or to contrast it with the earlier sanad granted by Captain Browne. It is, however, perhaps not without significance that, in the later sanad, the precise amount to be paid by the ghatwals to the Raja of Kharagpur as rasum was stated. Although the earlier sanad had made it clear that rasum was to be paid by the ghatwals, the amount of the land revenue and the amount of the rasum had not been set out separately. This was not an isolated act on the part of the ghatwals of Kakwara. We know that every one of the ghatwals except the ghatwal of Handwa who were granted sanad by Captain James Browne, took precaution to obtain sanad confirming them in the tenure of their lands from Raja Kadir Ali: see *Sonabati Kumari v. Kirtyanand Singh* A. I. R. 1935 Pat. 306. We also know that, in 1783, the Collector of Bhagalpur sent a letter to Raja Kadir Ali, informing him that Ranee Surbissuree, the ghatwal of Jummee Hamapa, had been dismissed, and stating that

as the office is in your Highness's gift, your Highness will, should you deem it necessary and proper, appoint a person to the office of Ghatwal of the said Pergunnah, to watch day and night at the said Ghat. Should it be advisable, your Highness may retain it under your Highness's control, informing the Court of the circumstance : see *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101.

38. Again, it appears that, in 1786, the Collector of Bhagalpur issued a parwana to Babu Chuni Lal, who was the sarbarakar or manager of Raja Kadir Ali, which contained the following:

It is very laudable that he has granted new sanads to the Ghatwals on his own behalf, that he has changed the ghatwals of some places and that he has brought under direct collection some of those ghatwali tenures where ghatwals were not so very necessary. It is requisite that in future also whichever ghatwal may be unfit and slow and negligent in looking after the ghatwali affairs should be at once changed. Otherwise, he shall be responsible for the negligence of the ghatwals, as, on account of being the Peshkar and Sar-barah-kar of Raja Quadir

Ali, he has got the power of changing the ghatwals. He should bring under his direct collection those places where there are no ghatwals up to this time and where it is not necessary to keep ghatwals. He is competent to do so.

39. In order to understand this course of events, it is necessary to bear in mind that, in the eighteenth century, rights in land were based almost wholly on custom and scarcely, if at all, on statute law. The sanads, which the zamindars were in the habit of obtaining from the ruling power or dependent landholders, were popularly regarded not so much as title deeds, which could be relied on in Courts of law, but rather as solemn and binding assurances that the custom of the country would be respected and land owners would not be arbitrarily or capriciously disturbed in the enjoyment of their property by the hand of power. In 1777, the jungle terai mahals were under martial law and the ghatwals obtained, or were forced to accept, sanads from Captain James Browne who was the person administering martial law. When normal conditions were restored and a grandson of Raja Muzaffar Ali succeeded to the Kharag-pur Raj, the ghatwals would seem to have followed the usual practice and obtained sanads from him confirming them in the enjoyment of their tenures. At no time would it seem to have occurred either to the Collector of Bhagalpur or to the ghatwals themselves that the sanads granted by Captain James Browne were the foundation of their rights. In 1813, for instance, the Collector of Bhagalpur, in speaking of the ghatwals, wrote that

they hold their lands in virtue of sanads granted by the zamindar of Kharagpur except some who have received theirs from the former authorities.

40. Such of the ghatwals, as for instance the ghatwals of Lachmipur or Handwa, who, at the end of the 18th or at the beginning of the 19th century, endeavoured to throw off the control of the Raja of Kharagpur, asserted that they were zemindars or actual proprietors of the soil. They do not appear ever to have contended that they were made proprietors of the soil by the sanads granted to them by Captain James Browne, and such a contention, if put forward then, would have been regarded as wholly untenable and indeed absurd. "The true and rightful proprietorship of land" said Gholam Hussain Khan

may be obtained by either of the three following modes : by purchase with the mutual consent of the parties; by gift from the proprietor; or by inheritance.. According to strict right, no person can become the proprietor but by one of the three above mentioned modes; though by usage the Emperor or his representative, being displeased with a zemindar on account of his contumacious and refractory behaviour, may displace him and appoint another by sanad in his room. The person, so appointed, is by usage considered as zemindar and proprietor of the soil; though according to strict right he be not so.

41. Again, the same" authority said:

The Emperor is the proprietor of the revenue-issuing out of the territory under his authority but he is not the proprietor of the soil. Hence, it is that" when he

grants any ayman altamghas and jageers he merely transfers the revenue from himself to the grantee ": see Harrington's Analysis, Vol. 3, pp. 301 and 328-9.

42. I do not make these observations with a-view to casting any doubt on the correctness of the proposition which I have already stated; namely, that, in law the effect of the grant by Captain James Browne of this sanad in 1777 to the ghatwals of Kakwara was to convert their tenure, whatever it had previously been, into a Government ghatwali tenure. The various incidents or events which I hare just detailed are, however, in my opinion, pertinent when we come to deal with what is the crucial question at issue in this case and which, to use the language of Lord Sumner, may be stated thus:

Did the inclusion of this ghatwali tenure in the assessment of the zemindari lands amount to a release by the Government of the ghatwali services or to a grant to a third party of the right to receive them and of the right to appoint the ghatwal?

43. Prior to the permanent settlement the zemindars of Bihar had, no doubt, certain inchoate rights of a proprietary nature, using that word in the sense in which it was understood in the England of the 18th century. The permanent settlement, however, once and for all recognized and gave further definition to these rights and led to all subordinate land-owners being regarded as having derived their rights in land from the zemindars. Prior to 1796, when the permanent settlement of mahalat Kharagpur was concluded, the ghatwals of Kakwara and other ghatwals held their lands on condition of rendering certain services and also on condition of paying a certain amount of land revenue and, over and above that, a rasum to the Raja of Kharagpur as the actual proprietor of the soil. As a result of the permanent settlement, the ghatwals ceased to pay land revenue and a rasum and instead paid rent to the Raja of Kharagpur. From-being merely in some kind of rather vague and indefinite subordination to the Raja they became his tenants. Their status was un. doubtedly the status of dependent talukdars, and, when Regn. 7 of 1799 was enacted and during the 60 years thereafter it remained in force, the Raja of Kharagpur was given wide powers to enable him to realise hia rent, among which were, in certain circumstances, the power to evict the ghatwals. There can be no doubt that, from time to time, this power was exercised, and various ghatwals were removed. In 1873 there came before the Judicial Committee of the Privy Council a number of appeals by the Banaili Raj, which had by then succeeded to the Raja of Kharagpur, against orders made in suits instituted by them to recover possession of certain ghat-wali lands including those of the ghatwals of Kakwara. At the hearing of these appeals, it was apparently admitted by the respondents that, from time to time, the zamindar had dismissed certain ghatwals. All that was contended by them was that there was nothing to show that these particular ghatwals had not been dismissed for incompetence or failure to perform the services to which their tenures were subject, but had been dismissed merely on the ground that the zamindar had no further need for their services which the ghatwals were required to render. I would point out that the sanad of 1777

contained a provision that the ghatwals of Kakwara should, when murder, dacoity, robbery or theft was committed in their taluk, take steps to trace out and bring the culprits to punishment. The sanad of 1780 was more explicit and contained the following:

If, God forbid, the properties of any one be stolen or plundered and cattle be concealed or murder committed, they should trace the thieves and night-robbers with the properties intact, restore the properties to the owner and produce the party of the mischief-mongers before the huzur and prove the murder.

44. These were the provisions ordinarily inserted in the sanads granted at this time to zamin-dars (see Phillips Land Tenures of Lower Bengal Appendix, page 478 and Harrington's Analysis vol. I, page 510). The force of bar-kandazes and archers which the ghatwals were required to maintain would seem to have been a force of a rather unusual kind but suited to the difficult and unsettled condition of the country to enable them to perform this obligation to maintain order and suppress crime. The provision that the ghatwal should appear with his men before the huzur when called on was, I imagine, probably designed merely to ensure that the force should be liable to inspection by the authorities to see that it was kept up to strength and in a proper state of equipment. At any rate, there is nothing to show that the forces of a number of ghatwals were ever embodied at the same time and used together as a kind of feudal levy. However these forces were used, they would not seem to have been used for any appreciable length of time after 1777. In 1780, Mr. Cleveland formed the Bhagalpur Hill Rangers which survived until 1855 and must, from the outset have been a far more effective force than the barkandazes and archers of the ghatwals in coping with any large-scale incursions of the paharias into the low-lands, and, in 1793, the zamindars and the ghatwals were relieved of any responsibility for suppressing and punishing crime within their villages. By 1839 and possibly a good deal earlier, the services such as they were, had ceased to be demanded and in, 1863 the Government of Bengal formally relinquished any claim to them. In 1840, mahalat Kharagpur was sold for arrears of land revenue and was purchased by the proprietors of the Banaili Raj. The latter appear to have called on a certain ghatwal, Tikait Jugmohan Singh "to attend on them" and when he did not do so formally dismissed him. Subsequently they instituted a suit to obtain possession of his land and this suit was decreed. From the report (Sadr Diwani Reports for 1857, vol. 2, page 1812) it appears that Tikait Jugmohan Singh was one of those ghatwals to whom Captain Browne had granted sanads in 1777. The report is, of interest as showing that the rent of this ghatwal had more than once been enhanced and also that by 1857 the zamindar was regarded as the authority entitled to demand such services as the ghatwal was still liable to render. This was the natural and inevitable result of the permanent settlement which converted the zamindar into a proprietor in the sense in which the word was then understood in England, which he had not quite been before, and depressed the ghatwal to the status of a mere tenant. The change in status was no sudden or catastrophic or even very unnatural one. In 1777, the ghatwals of

Kakwara were in rebellion against the ruling power and against the thikadar or farmer of the Kharagpur Raj. Captain Brown won them over by the grant of a sanad which gave them what they had very probably had before, hereditary rights in their lands and also what, in theory at least they very probably had not, exemption from any enhancement in their jama or land revenue at least during the period of their own lives. Nevertheless, the grant was expressed to be a grant of a taluk which signified a dependency and a rasum-i-zamindari as well as land revenue was to be paid by them. Phillips, in describing the origin of talukdars says:

The result is that the characteristic feature of a talukdar's position is that he either has a zamindar above him and then gets only a share of the profits of collection; or if there is no zemindar he yields a portion of those profits to a representative of the former zamindar. When neither of these restrictions is present he is practically a zamindar; although he may still be called by the name of talukdar after he has outgrown its limitations. It is certain that in some cases the talukdar enjoyed full rights although in others he did not" (Land Tenures of Lower Bengal, pages 153-154).

45. In 1779 the Kharagpur Raj was, and for thirty years or more had been, settled for shorter or longer periods with thikadars or farmers of the land revenue. The ghatwals of Kakwara were then brought into direct relations with the ruling power, but it would not seem to have been intended radically to alter their status as dependent or subordinate land-holders. Three years later, when the zamindari was restored to an infant grandson of the dispossessed Raja the authorities appear to have made it clear that no such alteration in status was intended to take or had in fact taken place. Only in this way can the grant of fresh sanads to the ghatwals and the letters and parwana of the Collector of Bhagalpur to which I have already referred be explained. In my judgment, the Government ghatwali tenure by the sanad of 1777 was converted into a ghatwali tenure under the Kharagpur Raj, certainly, at the permanent settlement in 1796, if not earlier in 1780, when the zamindari was restored to Raja Kadir Ali. It necessarily follows that the local custom, of which since the decision in Cal. 47115 judicial notice can be taken, applies and makes any alienation of the ghatwali tenure of Kakwara, to which the Raja of Kharagpur has given his assent, a valid alienation. The question that arose in 15 Cal. 47116 was whether an alienation by the ghatwal of Kharna was a valid alienation and Kharna, it may be observed, was one of the five ghatwali tenures which like Kakwara, survived the litigation in and after 1863 between the ghatwals on the one hand and the Banaili Raj on the other. In 1929, the present appellant obtained from the proprietors of the Banaili Raj a considerable sum of money on the security of a mortgage. In the mortgage bond, which he executed, it was stated that

as the said mahals are deemed to be Kharagpur Ghatwali tenures and as without the consent of the proprietors of mahalat Kharagpur, i. e., the Banaili estate, the same cannot be mortgaged, let out in rehan or transferred in any other way, at

my request, the! proprietors of the Banaili estate.... gave me permission to let out in rehan and mortgage the ghatwali mahals, Kakwara and Dudhari.

46. It was not contended before us that the recital in this deed operated by way of estoppel and it is unnecessary to consider the point except to say that it affords still one more piece of evidence, if evidence were needed, that the lands of the appellant can be alienated provided the permission of the Raja of Kharagpur, or rather his successor in interest, the Banaili Raj, has been previously obtained. The law favours alienation and the burden was, therefore, very heavy on the judgment-debtor to show that his tenure was not liable to sale in execution of this decree. He could not really find anything to support his contention except the circumstances that more than 150 years ago his ancestors and the then ghatwal of Handwa were both granted somewhat similar pattas and it has been decided that the Handwa estate is inalienable. In the latter part of the 18th century, the land revenue was still and always had been periodically revised or reassessed and it was also the custom of the country for the heirs of zamindars and ghatwals alike to obtain fresh sanads or pattas and to enter into fresh kabuliyats. With the greatest respect I venture to think that too much importance ought not to be attached to a sanad or patta which must have been merely one in a series. This sanad may have converted an existing tenure into a Government ghatwali tenure in the sense that it stipulated that the quasi-military service which the ghatwal then had to render was to be rendered to the State. But there is no charm or magic in a word or label. It is, in my opinion, clear that the Handwa ghatwali estate differs and has always, since 1777, and probably earlier, differed *toto coelo* from the Kakwara ghatwali tenure. In my judgment, the decision of the learned Subordinate Judge was correct and I would accordingly dismiss this appeal with costs.

Chatterji, J.

47. This appeal, which arises out of an execution proceeding, has come before me owing to a difference of opinion between Manohar Lall and Shearer JJ. The point on which they differed is : "Whether Kakwara ghatwali tenure is a Government ghatwali or a zamindari ghatwali and therefore liable to sale in execution of a decree for arrears of rent and cess obtained by the zamindar."

48. Admittedly Kakwara is a ghatwali tenure situated within the estate known as Mahalat Kharagpur, which is a big permanently settled estate bearing Touzi No. 445 of the Bhagalpur Collectorate. This ghatwali tenure carries a fixed annual rent of Rs. 245-12-9 payable to the proprietor of Kharagpur. The respondents are the present proprietors of Kharagpur, and the appellant is the present holder of the Kakwara ghatwali tenure.

49. The respondents obtained against the appellant a decree for arrears of rent and cess payable for this ghatwali tenure. In execution of this decree, the decree-holders prayed for sale of the tenure. The judgment-debtor filed a petition of objection u/s 47, Civil P. C, contending, *inter alia*, that the tenure, being a

"ghatwali tenure," was not liable to be sold. At the hearing of the objection, the judgment-debtor further asserted that it was a Government ghatwali tenure and was, therefore, inalienable. The decree-holders, on the other hand, urged that it was a zamindari ghatwali tenure and was, therefore, saleable with the consent of the zamindar. The Subordinate Judge overruled the judgment-debtor's objection and held that Kakwara is a zamindari ghatwali tenure. The judgment-debtor has, therefore, preferred this appeal.

50. This appeal was at first heard by Manohar Lall and Shearer JJ. Manohar Lall J. held that Kakwara is a Government ghatwali, while Shearer J. held that it is a zamindari ghatwali, alienable with the consent of the zemindar. The question, therefore, which I have to decide, is whether Kakwara is a Government ghatwali or a zamindari ghatwali. It is not disputed that if it is a zamindari ghatwali, it is alienable with the zamindar's consent. The origin and nature of ghatwali tenures were fully explained by Lord Kings-down in *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101. These tenures originated with the Mahomedan rulers, as will appear from the following passage in his Lordship's judgment (pp. 109-110):

The mountain or hill districts in India were at this time inhabited by lawless tribes, asserting a wild independence, often of a different race and different religion from the inhabitants of the plains, who were frequently subjected to marauding expeditions by their more warlike neighbours. To prevent these incursions it was necessary to guard and watch the ghats, or mountain passes, through which hostile descents were made; and the Mahomedan rulers established a tenure called ghatwali tenure, by which lands were granted to individuals, often of high rank, at a low rent, or without rent, on condition of their performing these duties, and protecting and preserving order in the neighbouring districts.

51. But ghatwali tenures were also created by the Eaja or zamindar of Kharakpur, as will appear from the following passage in the judgment at p. 112:

A very large quantity of lands within this district had been granted by the ancestors of the Raja on the ghatwali tenure before described.

52. From the context, "this district" refers to Bhagalpur "district, and "the Raja" refers to Raja Lelanund Singh, the appellant, in the case, who was the zamindar of Kharakpur. Again at p. 123 of the judgment, there is refer. ence to the following class of ghatwals:

The ghatwals attached to the Kharakpur estates, who pay a stipulated rate of rent for their lands and villages, being bound to protect and guard the highways, to watch the stations at the passes,"to prevent disturbances being created by the mountaineers, thieves and highwaymen. They hold their lands in virtue of sanads granted by the zamindar of Kharakpur, except some who have received theirs from the former authorities.

53. In *Satya Narayan Singh v. Niranjan Chakravarti* AIR 1924 P.C. 5 their Lordships of the Privy Council had to deal with the Handwa ghatwali, which is situated topographically within the Kharakpur estate. Lord Sumner, who delivered the judgment, classified the ghatwali tenures in the Sonthal Parganas under three heads:

(a) Government ghatwalis created by the ruling power; (b) Government ghatwalis, which since their creation and generally at the time of the permanent settlement have been included in a zamindari estate and formed into a unit in its assessment ; and (c) zamindari ghatwalis, created by the zamindar or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. (page 50).

54. His Lordship's following observation (at p. 54) is important:

Government ghatwali tenures have to some extent lost, or appeared to lose, their identity by being included for revenue purposes in the assessment of zamindari lands held by another and an independent proprietor, but the question whether or not a given ghatwali tenure is a Government ghatwali tenure must depend on the original grant, and unless the inclusion of the tenure in the assessment of zamindari lands can be shown to have amounted to a release by the Government of the ghatwali services or to a grant to a third party of the right to receive them and of the right to appoint the ghatwal, the tenure must remain, as it originally was, a Government ghatwali tenure.

55. In that case there were two grants, one by Captain Brown in 1776 and the other, which was a confirmation of the first, by Mr. Dickinson in 1794, both these gentlemen being officers of the ruling power, the East India Company. On a construction of these grants, the Handwa ghatwali was held to be a Government ghatwali. It was found that though in assessing revenue on Handwa, it was included as part of the Kharakpur estate for fiscal purposes, it was quite separate from Kharakpur. The Kakwara ghatwali was undoubtedly in existence from before 1765 when the East India Company became the ruling power in the Provinces of Bengal, Bihar and Orissa. But there is no document for the prior period forthcoming. The earliest document on the record is a sanad Ex. 1 granted by Captain James Brown in 1776 to Rankoo Singh and Bhairo Singh, who were the ancestors of the present appellant. It runs as follows:

Know ye, the present and future mutasaddis of affairs, chaudhuris, kanungos, zamindars and ghatwals of Pargana Danda Sukhwara, Zilla Jangaltari,, appertaining to Kharakpur, Sarkar Monghyr, in the province of Bihar.

From the beginning of 1184 Fasli, Taluka Kakwara, pargana aforesaid, is let out in perpetual, mukarrari, without any objection or contention to Rankoo Singh and Bhairo Singh, ghatwals of the said taluka, at a fixed jama of Rs. 245-12-15 (rupees two hundred and forty-five, annas twelve and gandas-fifteen) in current coins noted in the endorsement, consolidated from all sources, including mal-wajhat, sair-wajhat and all grains, and excluding the perquisites of the

zamindari, nankar, chaudhuries and. kanungos, parganati expenses, lands given in charity, e. g. barhmotar, shibotar and bishunparit lands, aima lands of jagirdars, barqandazes (musketeers),, dhupars (?), mahus (?) etc. It is requisite that they should peacefully cultivate (torn) and pay the Government (torn), according to the kabuliyat year after year, and crop after crop, into the Government treasury. They should make such effort as to increase the cultivation of the said taluka from day to day. They should hold themselves responsible for deficient cultivation. They should keep the tenants pleased and contented with their good treatment and should not oppress any one and make excessive demands. They should not fix the allowance of the jagirdars and barqandazes, etc., over and above the rent. They should bear this in mind. They should provide for the protection of tenants within their jurisdiction and of the villages of the said taluka. Whenever the chakars (?) be sent for by the huzur, the sardar (?) should appear before him with his men. If at any place, within their boundary limits, murder, disturbance, dacoity, theft, highway rob-bery, etc., be committed, and the culprit be traced or be found conspiring advisedly with anyone and the Government work suffer, and proper punishment be meted out after inquiry, they will be responsible (?) by virtue of their position, and will be dismissed from their post and will not be reinstated (unintelligible). The amlas of the zamindars of the said taluka should, on knowing the said istim-rari mukarrari rent to have been fixed, continue to receive the mukarrari rent from year to year and should not demand even a farthing in excess. They should treat this as peremptory and act as written herein.

56. It will be noticed that Rankoo Singh and Bhairo Singh are described as "ghatwals of the said taluka," which implies that they were already ghatwals. This sanad was construed by the Calcutta High Court in *Sonabati Kumari v. Kirtyanand Singh* A. I. R. 1935 Pat. 306 as follows:

It is addressed to the ancestors of the defendants in the character of ghatwals and seems to us to be rather a confirmation of an existing tenure than the creation of a new one.

57. I shall have occasion to refer to this case again. If Captain Brown's sanad Ex. 1 had stood by itself, there could be no escape from the conclusion that the grant being by the ruling power, the tenure would be a Government ghatwali, whatever might be its previous history. But this was followed by another sanad Ex. 1(a) granted in 1780 by Raja Kadir Ali, the zamindar of Kharakpur, to the same two persons, Rankoo Singh and Bhairo Singh, in the following terms:

Know ye the present and future mutasaddis of affairs and the gumashtas holding the posts of Chaudhuris and Kanungos of pargana Danda Sukh-wara appertaining to mahals Kharakpur, Sarkar Monghyr, in the Province of Bihar.

The ghatwali service tenure of taluka Kakwar appertaining to the said pargana is held, under a sanad, by Bhairo Singh and Rankoo Singh, with 172 musketeers and archers including sardars, on the condition of allegiance and loyalty to the

Sarkar. Of late also, (the said tenure) being upheld and kept intact as usual, according to the endorsement, is assigned and granted with effect from the beginning of the kharif season of 1189 Fasli, Raj-wara, corresponding to 1188 Fasli Mughlana. They should discharge the duties and obligations with honesty and fidelity and keep the tenants pleased and contented with their good treatment, and should watch the ghats and chaukis very carefully and cautiously, so that no thief and night robber may come around and about them. If, God forbid, the properties of anyone be stolen or plundered and cattle be concealed or murder be committed, they should trace the thieres and night robbers with the properties intact, restore the properties to the owner and produce the party of the mischiefmongers before the Huzur and prove the murder. In case they fail to find out the thieves and to prove the murder and the concealment (theft) of cattle, they should hold themselves responsible therefor. They should continue to pay the quit rent to the Sarkar as usual. When summoned, they should appear before the Huzur with their body of men. It is desired that you should consider them as permanent ghatwals of the place and maintain them in their possessions and you should not fail to give them sound advice so as to ensure by all means the advantage of the Sarkar and the well-being of the tenants. Treat this as peremptory and act accordingly.

Dated, the 17th seventh (sic) day of the holy month of Moharram of year 22, corresponding to 1194 A. H-Endorsement.

The ghatwali service tenure of taluka Kakwara, pargana Danda Sukhwara is granted as before to Bankoo Singh and Bhairo Singh with 172 musketeers and archers including sardars with effect from the beginning of the kharif season of 1189 Fasli, Bajwara, corresponding to 1189 Fasli Mughlana, on the condition of allegiance and loyalty to the Sarkar.

58. It is necessary to state here that after the East India Company came in power, Raja Mozaffar Ali, the zamindar of Kharakpur, rose in rebellion. He was, however, subdued and made a prisoner in 1768. The East India Company took possession of his zamindari and managed it by their own officers, Captain Brooke, Captain Brown and Mr; Cleveland, in succession until 1780, when it was restored to Mozaffar Ali's grandson Kadir Ali, a boy of 6, his father being dead. The formal sanad from the Governor-General restoring the zamindari to him, however, did not come until January 1781. It thus appears that the second sanad Ex. 1(a) was granted by Raja Kadir Ali just after he got back the zamindari. It bears his seal, and no question has been raised as to its validity on the ground that it was granted by an infant. It was produced by the judgment-debtor himself, and his title partly rests on it. It had also been produced in previous litigations, to which I shall refer later, between the respective predecessors of the parties, and the decisions proceeded on the footing that it was a valid grant.

59. It has been argued by Mr. L. M. Ghosh on behalf of the appellant that the sanad Ex. 1(a) was granted by Kadir Ali not in his individual capacity, but as representing the Government. This argument is sought to be based on the fact

that the seal used on the sanad is the seal of Raja Kadir Ali fidvi (devoted to or servant of) Emperor Shah Alam, the victorious-1193. It is said that the use of the Emperor Shah Alam's name suggests that Kadir Ali was acting on behalf of the Emperor. But the ruling power at the time was actually the East India Company and not Shah Alam who was a mere titular Emperor. Why the Emperor Shah Alam's name was used, it is difficult at this distance of time to say. It might be out of respect for the mere name of the Emperor. Whatever the reason might be, there can be no doubt whatever that Kadir Ali was not acting on behalf of the East India Company. That being so, it must be held that he granted the sanad in his own right as the zamindar.

60. The question then arises as to the effect of this sanad granted by Kadir Ali. It was undoubtedly a confirmatory grant, but did it confirm the tenure created by Captain Brown's sanad or some pre-existing tenure ? The words "as usual" which occur in more than one place in the body of Kadir Ali's sanad and the words "granted as before" in the endorsement indicate that the grant was of an old existing tenure. The words "sarkar" and "huzur" do not necessarily mean the Government. These words, must be understood with reference to the context. These are terms of respect which may be used by a subordinate, while addressing his superior.

61. In construing this sanad, the most important point to be borne in mind is that it was a grant by Kadir Ali as zamindar. It will be noticed that in Captain Brown's sanad it is stated that the ghatwals should pay the Government revenue (here in the original the portion which obviously contained the word "jama" or "revenue" is torn), according to the kabuliat, into the Government treasury, while in Kadir Ali's sanad it is stated that they should pay the quit-rent to the "sarkar" as usual. Admittedly the rent is paid to the zamindar, though, according to the appellant's case, the zamindar in his turn pays the amount of rent as revenue to the Government. According to the context therefore the word "sarkar" in the sanad means the zamindar. It is to be noted that the word "sarkar" is not to be found in Captain Brown's sanad. Of course, in both the sanads the services required from the ghatwals are practically the same. But ghatwali services, by their very nature, are practically the same, whether the ghatwali is a Government ghatwali or a zamindari ghatwali. In the case of a Government ghatwali, the ghatwal is to render the services directly to the Government, whereas in a zamindari ghatwali, the zamindar, who in those early days was responsible for peace and order within his zamindari, used to provide ghatwali services, of course, through the agency of the ghatwals.

62. If Kakwara was really a Government ghatwali what was the meaning of Captain Brown's grant being confirmed by Kadir Ali, an infant zamindar only six years old, to whom, by the grace of the East India Company, the zamindari was restored ? The fact that the sanad was granted by Kadir Ali almost immediately after the zamindari was restored to him suggests that the ghatwali tenure was handed over to him as part of the zamindari. Contrast this ghatwali with Handwa,

which was held in the case in 611. A. 37,2 already cited, to be a Gov?ernment ghatwali. In the case of Handwa, Captain Brown's sanad of 1776 (the same year in which he granted the Kakwara sanad) was confirmed by the Collector, Mr. Dickinson's parwana of 1794.

63. Captain Brown wrote a treatise called "India Tracts" which was published in 1786. In that book he mentioned only three ghatwali estates, Handwa, Lachmipur and Chah. dan Katoria as being kept under the control of the Collector of zilla jungle terai. Appa?rently Kakwara and similar other ghatwalis were kept under the charge of the rent farmer, and they were handed over to Kadir Ali when the zamindari was restored to him. The true position seems to be that the Kakwara ghatwali was, in its origin, a zamindari ghat-wali, but after the East India Company took possession of the Kharakpur zamindari after displacing the rebel, Raja Mozaffar Ali, Captain Brown, as the District Officer of the jungle terai mahals, granted the sanad of 1776. When, however, the zamindari was restored to Raja Kadir Ali, the latter granted the sanad of 1780. The latter sanad cannot be accounted for, unless the ghatwali was a zamindari ghatwali. After all, what is a zamindari ghatwali ? It is a ghatwali created by the zamindar. Kadir Ali's sanad of 1780 was the subject of consideration before the Privy Council in I.A. Sup. Vol. 181,8 which I shall refer to again. Eeferring to this sanad, Sir Barnes Peacock, who delivered the opinion of the Board, said: "That grant was a ghatwali grant." This grant being by the zamindar, there is no reason why it should not be regarded as creating, if not confirming, a zamindari ghatwali. In the cir? cumstances, the earlier grant by Captain Brown may be said to be no more effective than a grant made during the suspense of the zamindar. The view that Kakwara is a zamin?dari ghatwali receives support from its subse?quent history. At the permanent settlement, it was assessed to revenue and included as part of the Kharakpur zamindari. In 1836 the Government started proceedings for resump?tion of the ghatwali lands comprised in Kak?wara ind. various other taluks which had been included in Kharakpur zamindari at the Permanent Settlement. The Government based their claim on the following provision of Section 8, Clause (4), Permanent Settlement Eegulation 1 of 1793:

The jama of those zamindars, independent talukdars and other actual proprietors of is declared fixed in the foregoing articles, is to be considered entirely unconnected with, and exclusive of any allowances which have been made to them in the adjustment of their jama, for keeping up thanas or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose, and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances, or produce of such lands, according as he may think proper in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of Government to superintend the police of the country.

64. In the course of these proceedings, eleven suits were instituted on behalf of

the Government before the Special Deputy Collector of Bhagal-pur against different ghatwals to assert the Government's right to resume the ghatwali lands. In these suits the ghatwals only were originally impleaded as defendants, but subsequently the Raja of Kharakpur was added as defendant on his application. In the meantime, the Kharakpur zamindari was sold for arrears of revenue and was purchased by an ancestor of the present respondents. The purchaser was impleaded in the above suits. Eventually, on appeal to the Special Commissioner, the suits were decreed in June 1845, and the Government's claim for resumption was allowed. One of these suits, which related to Ghat Foujdar ghatwali, was taken on appeal to the Privy Council, and it was agreed that the decision in this appeal would govern the other ten suits. Their Lordships of the Privy Council allowed this appeal and dismissed the Government's claim for resumption, holding that the ghatwali lands in question were not within the meaning of Section 8 Clause (4) of Regn. 1 of 1793, that

they were a part of the zamindary of Kharakpur, and were included in the settlement for that zamindari and covered by the jamma assessed upon it.

65. This decision which was given in 1855 is reported in 6 M. I. A. 101 which I have already cited. At pp. 126-127 of the judgment there is the following pertinent observation

in the reports of the Collectors to which we have already referred, it is stated, that it is the province of the Raja to appoint and dismiss the Ghatwals attached to the Kharakpur estate.

66. On the basis of the decrees passed by the Special Commissioner in the aforesaid eleven resumption suits, the Government resumed 98 ghatwalis including those involved in these eleven suits. Kakwara is within those 98, but whether it was included within the eleven suits is not clear from the report, 6 M.I.A. 101 Admittedly, however, it is covered by this decision.

67. After this decision of the Privy Council, the Government released the 98 resumed ghatwalis in 1860, as will appear from the order dated 19th April 1860 passed by the Collector on the report Ex. c and from the rubakari of the Collector Ex. E dated 28th August 1860. A list of these 98 resumed ghatwalis had been prepared in March 1860. This list is Ex. D. Kakwara is item 73 in this list. In 1863 the Government came to an agreement with the Raja of Kharakpur whereby the ghatwali services which the Raja had to provide were compounded in consideration of an annual payment of Rs. 10,000 to be made by him to the Government. This Rs. 10,000 was added to the revenue of Kharakpur, and the Collector issued a parwana Ex. H, dated 9th November 1863, to the Raja in terms of the said agreement. This composition between the Government and the Raja could not be thought of, unless it was in respect of zamindari ghatwalis. For the purpose of this composition a list of the ghatwali mahals was prepared in March 1863: see Ex. P (1). Kakwara is item No. 40 in this list. Mr. L. M. Ghosh suggests that this is a list of the resumed ghatwalis and not of the ghatwalis in

respect of which the ghatwali services were compounded. But, as I have shown above, a list of the resumed ghatwalis had already been made in March 1860, and there was no reason for making such list again in March 1863. In Lord Sumner's judgment in 51 I.A. 372 there is a reference to the list of ghatwals that was prepared for the purpose of the said composition. Apparently that is the list given in Ex. P (1). His Lordship referred to this list to point out that Handwa was not included in it.

68. After the ghatwali services were thus compounded, Raja Leelanund Singh, the zamindar of Kharakpur, brought a suit against the ghatwals of Kakwara, Munoorunjan Singh and others, for possession of taluk Kakwara on the allegation that the lands were held for certain police services, that the appointment and dismissal of ghatwals rested with the plaintiff, that he had lately compounded with the Government for a money payment in lieu of the police services which he was bound to render through the ghatwals, and that, therefore, those services being no longer required, he was entitled to resume the lands. The defendants pleaded that they held that ghatwali as a permanent tenure at a fixed jama under sanads derived directly from the representatives of the British Government, being grants of the land subject to ghatwali services, which they were always ready and willing to perform. The principal Sudder Ameen decreed the suit, but on appeal to the Calcutta High Court, it was dismissed. Their Lordships considered both the sanads of Captain Brown and Kadir Ali and held

that the defendants hold a perpetual hereditary tenure at a fixed jama, in money and service, and that, except for misconduct on, their part, they cannot be evicted.

69. This decision which was given in June 1865, is reported in 3 W.R. 84 to which I have already referred. The following observation of their Lordships is relevant:

For misconduct, the failure to perform the conditions annexed to their tenure they, no doubt, are liable to be and sometimes have been ejected, and when so vacant, the right of nomination to the office, no doubt, rests with the zamindar.

70. The implication of this observation is that, for misconduct, the ghatwal may be ejected by the zamindar. Mr. L. M. Ghosh relies on the following observation:

It appears to us that the tenure now before us is rather analogous to those of Beerbhum than to those of Bishanpore.

71. The incidents of Beerbhum ghatwalis are governed by Regn. 29 of 1814, according to which they are Government ghatwalis to be held by the ghatwals and their descendants in perpetuity. It is argued that when their Lordships said that the Kakwara tenure was analogous to the Birbhum ghatwalis, they meant that Kakwara was a Government ghatwali. This cannot be the meaning. Their Lordships made the above observation, while dealing with the question whether Kakwara was a permanent hereditary tenure. The analogy of the Birbhum ghatwalis was used with a view to make it clear that Kakwara ghatwali was

permanent and hereditary like the Birbhum ghatwalis. This will appear from the following observation which appears in the same context:

All analogy, all history, and all the facts which have been brought to our notice, go to show that, as a matter of fact, these tenures, whatever may have been the express terms of the grant have been constantly handed down from generation to generation.

72. If, on the analogy of the Birbhum ghatwalis, their Lordships had the least intention to hold that Kakwara was a Government ghatwali, the short and simple ground on which the suit could have been dismissed would be that the plaintiff had no cause of action for the suit and had no locus standi to sue for possession. This case went on appeal to the Privy Council. The decision of the Privy Council which was delivered in March 1873, is reported in I. A. Sup. Vol. 181,5 which has already been cited. Their Lordships affirmed the decision of the High Court, briefly on the ground:

The lands were held upon a grant, subject to certain services, and as long as the holders of those grants were willing and able to perform the services, the zemindar had no right to put an end to the tenure, whether the services were required or not.

73. In their Lordships' view, the fact that the Government consented to dispense with the ghatwali services as regards the zemindar and, the zemindar agreed to pay an additional revenue of Rs. 10,000 in consideration of the Government having absolved them from the services, did not entitle the zemindar, as between him and the ghatwals, to treat them as trespassers and turn them out of possession. Referring to the case in 6 M. I. A. 101 already cited, their Lordships said:

It was held in the case of the same Rajah, 6 M. I. A. 101,1 that the Government was not entitled to resume this talook as police lands. That was upon the ground that the talook had been assessed to revenue, and was a portion of the mal lands of the zemindari.

74. This last sentence makes it perfectly clear that at the permanent settlement Kakwara was included within Kharakpur zemindari not for fiscal purposes, but as part of the assessed lands of the zemindari. In other words, the fixed annual rent of Rs. 245-12-9 payable by the ghatwal to the zemindar was included as part of the assets of the zemindari, and the revenue of the zemindari was assessed on the entire assets including this rent of Rupees 245-12-9. This is completely destructive of the appellant's case that the entire amount realized by the zemindar as rent from the ghatwal is paid by him as revenue to the Government. It follows that the ghatwali is held under the zemindar and not under the Government. After referring to the case in 6 M. I. A. 1011 in the above-quoted words, their Lordships went on to state:

But although the lands were not resumable, that is to say, although the

Government could not reassess the talook with revenue, it did not dispense with the services upon which the lands were held at the time of the permanent settlement. The lands therefore remained liable to the ghatwali services.

75. From this it has been argued by Mr. L. M. Ghosh that the ghatwali services were still due to the Government and, consequently, the ghatwali remained a Government ghatwali. This contention is inconsistent with the whole tenor of the judgment. In more than one place, their Lordships stated that the zamindar had no right to put an end to the tenure so long as the holders of the tenure were willing and able to perform the services. Such statement would have been out of place, if the tenure were held directly under the Government. The question, which their Lordships were dealing with, was whether the zemindar, by dispensing with the ghatwali services, had a right to recover possession of the lands. Ghatwali services, in the case of a, zemindari ghatwali are to be rendered to the Government by the zemindar through the ghatwals under him. Ghatwali services, however, being of a public nature, the zemindar cannot, as between himself and the ghatwal, dispense with "these services, except with the consent of the Government. The Government may dispense with these services as regards the zemindar so that the zemindar may be absolved from these services, but that does not amount to total extinction of the services. In the passage in question their Lordships pointed out that the Government did not dispense with the services, that is to say, did not abolish the services, and therefore the lands remained liable to the same. This does not mean that the ghatwali was held directly under the Government. Their Lordships considered both the sanads of Captain Brown and Kadir Ali, and if they thought that it was a Government ghatwali, the suit could be dismissed on the short and simple ground, which I have indicated above. It cannot possibly be suggested that their Lordships of the Privy Council did not in those days appreciate the distinction between a Government ghatwali and a zemindari ghatwali. On the strength of the Privy Council decision in *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101 Raja Leelanand Singh, after protracted proceedings, obtained in August 1868 a decree for mesne profits in respect of Kakwara against the Government in the Calcutta High Court. The decree was in these terms:

The whole of the money paid by the ghatwals to the Government in the shape of revenue should be paid over to the zemindar Rajah Leelanand Singh, partly as the quit-rent due to him, and the remainder as compensation for the loss of the services of the ghatwals during the period the settlement with the ghatwals continued in force.

76. It is necessary to mention here that the Government, after resuming the ghatwali lands comprised in Kakwara and similar other taluks on the basis of the resumption decrees, settled the lands with the respective ghatwals. The list Ex. D shows that the sadar jama payable for Kakwara, according to this settlement, was Rs. 2977-8-8. Apparently the Government realized this amount of revenue annually from the ghatwals of Kakwara during the period when this settlement

was in force. According to the aforesaid decree for mesne profits, the whole amount thus realized was to be paid to Raja Leelanand Singh. The ghatwals of Kakwara, Thakoor Munoorunjun Singh and another, being dissatisfied with this decree, preferred an appeal to the Privy Council against Raja Leelanand Singh and the Government. This appeal was allowed in part and the decree of the High Court was varied as follows:

That out of the moneys received by the Government of Bengal in respect of the lands included in the tenure of the appellants the zemindar do receive the amount of the money rent payable under the "ghatwali tenure during the period in respect of which the moneys in the hands of the Government were received as revenue, that the remainder be paid to the appellants.

77. This decision, which was pronounced in March 1873, is reported in Thakoor Munoorunjun Singh v. Leelanund Singh (73) I. A. Supp.188. If Kakwara was a Government ghatwali, how could the Raja of Kharagpur be entitled to mesne profits from the Government? How could the possession of the Government be wrongful as against the Raja? Mr. L. M. Ghosh suggests that the amount allowed as mesne profits to the Raja represented the loss suffered by him on account of his having to pay Rs. 245-12-9 annually as revenue to the Government for Kakwara, though, by reason of the resumption he was not in a position to realize this amount as rent from the ghatwals. This argument assumes that Kakwara formed a unit for the purpose of assessment at the permanent settlement and was included within Kharakpur estate merely for fiscal purposes. But I have already shown from I. A. sup. vol. 1815 that Kakwara was included "as a portion of the mal lands" of Kharakpur. It is true that the mesne profits allowed to the Raja did not include any compensation for the ghatwali services, to which the tenure is subject, but nothing was allowed to be retained by the Government either as compensation for these services.

78. Kakwara was the subject of another litigation between the Raja of Kharakpur and the ghatwals of Kakwara: see Rajah Leelanund Singh v. Thakoor Munrunjun Singh (77) 3 Cal. 251, decided by the Calcutta High Court in 1877. That was a suit brought by the Raja of Kharakpur against the ghatwals of Kakwara for recovery of arrears of rent in respect of taluk Kakwara and also for enhancement of rent. The claim for enhancement was based on the ground that the ghatwali services which the defendants used to render were, through the agency of the Government, discontinued. The defendants, relying on the two sanads of Captain Brown and Kadir Ali, pleaded that the rent was fixed and not liable to enhancement. The trial Court dismissed the entire suit. On appeal, the High Court decreed it only in respect of the arrears of rent for 3 years at the old rate. The claim for enhancement was dismissed. The High Court (Garth C. J. and McDonell J.) held:

The defendants are thus found to be holders of an old hereditary tenure which was established long before the Government took possession of the country; and we are of opinion, that they do come under the denomination of dependent

talukdars as defined in Regn. 8 of 1793, and further that they are protected by Clause (1) of Section 51 of that Regulation, which is very comprehensive, and includes all taluqdars not included in Section 5.

79. Clause (1) of Section 51 runs thus:

No zamindar or other actual proprietor of land shall demand an increase from the talukdars dependent on him, although he should himself be subject to the payment of an increase of jama to Government : except upon proof that he is entitled so to do, either by the special custom of the district, or by the conditions under which the talukdar holds his tenure; or that the talukdar, by receiving abatements from his jama, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it.

80. Their Lordships also held that the defendants were not independent taluqdars, because the zamindar had a beneficial interest in the tenure, and these tenures were never registered as independent taluqs.

81. The following observation of their Lordships is also pertinent:

The defendants, as far as we can see, are still perfectly ready and willing, as they always have been, to fulfil the obligations of their sunnuds as between them and the plaintiff; and it is not because the plaintiff has thought fit to compound the Ghat-wali services with the Government, without the defendants' consent, that, the plaintiff has any right to change the terms of the defendants' tenure,

82. Their Lordships considered both the sanads of Captain Brown and Kadir Ali. The above-quoted passages from the judgment of the High Court show that the Kakwara ghatwali is a subordinate tenure under the Kharagpur zemindar and that the ghatwali services are to be rendered to the zamindar. Mr. L. M. Ghosh relies on the following passage in the judgment:

And it is very necessary for our present purpose to bear in mind, what was the true origin and nature of this tenure. They were created by the Mahomedan Government in early times, as a means of providing a police and military force to watch and guard the mountain passes from the invasions of the lawless tribes who inhabited the hilly districts.

83. Here their Lordships were merely stating that the ghatwali tenure originated with the Mahomedan rulers. But that does not mean that no ghatwali tenure could be created by the zamindar or that the Kakwara ghatwali was originally created by the Mahomedan Government. As I have already shown from *Raja Leelanund Singh v. The Government of Bengal* (1854) 6 M. I A. 101, the Kharagpur Eaja in the old times granted a very large quantity of lands on ghatwali tenure. Again it appears from Lord Sumner's judgment in *Satya Narayan Singh v. Niranjana Chakravarti* AIR 1924 P.C. 5 that long before 1765

ghatwali tenures under the zamindar of Kharagpur had been created by the various holders of those lands for their own purposes,

that is to say, for the purposes of protecting their zamindari and discharging the obligation which they owed to the State for keeping peace and order within their zamindari. Reference may also be made to the following passage in that judgment at page 51, which shows by which authority a ghatwal may be appointed:

The superior, who appoints him, may also in the varying circumstances of the organization of Hindustan be the ruling power over the country at large, the landholder responsible by custom for the maintenance of security and order within his estates, or simply the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office.

84. Though in the aforesaid decisions relating to Kakwara, *Munrunjun Singh v. Rajah Leelanund Singh* (1865) 3 W. R. 84, *Rajah Leelanund Singh v. Munriinjun Singh* (74) I. A. Sup. 181, *Thakoor Munoorunjun Singh v. Leelanund Singh* (73) I. A. Sup. 188 and *Rajah Leelanund Singh v. Thakoor Munrunjun Singh* (77) 3 Cal. 251 the question did not arise whether it is a Government ghatwali or a zamindari ghatwali, the grounds on which these decisions proceeded, as I have already shown, are hardly consistent with the tenure being a Government ghatwali. Great reliance has been placed by Mr. L. M. Ghosh on Lord Sumner's judgment in *Satya Narayan Singh v. Niranjana Chakravarti* AIR 1924 P.C. 5, particularly on the following passage at p. 46:

Formidable as the series of official acts and reports above mentioned appears to be, their Lordships think that as soon as the texts of original instruments, such as the patta and sanad in question, dating from a time anterior to all these matters, are produced and put in evidence, the nature of the estate of Handwa rests upon their true construction and import and not upon the notions entertained about them in later generations.

85. But the facts of *Satya Narayan Singh v. Niranjana Chakravarti* are essentially different from those of the present. In *Satya Narayan Singh v. Niranjana Chakravarti* AIR 1924 P.C. 5, both the grants were made by officers of the East India Company, Captain Brown and Mr. Dickinson. In 3 Cal. 251, the first grant was by Captain Brown, but the second was by Eaja Kadir Ali. At the permanent settlement Handwa was included "as part of the Kharagpur estate for fiscal purposes": 51 I. A. 87. Kakwara was assessed as "a portion of the mal lands of the zamindari": I.A. Sup. Vol. 1816 at p. 184. In the list of ghatwalis that was prepared in 1863 for the purpose of compounding the ghatwali services Handwa was not included; Kakwara was. Between 1809 and 1819 there was protracted litigation between Kadir Ali and the ghatwals of Handwa in which the former asserted a right to nominate the ghatwals, whenever a vacancy occurred. This claim was eventually dismissed. With regard to this litigation, Lord Sumner said (at page 65):

These decisions, which separate Kharagpur from Handwa so far as this appeal is

concerned, have a profound effect on the position of Handwa. Whatever else Handwa may be now, it is not, nor ever was for present purposes, a ghatwali estate under Kharagpur and its rajas.

86. The result of the litigations between -the Raja of Kharagpur and the ghatwals of Kakwara is just the contrary. The decisions in *Munrunjun Singh v. Rajah Leelanund Singh* (1865) 3 W. R. 84, I.A. sup.1815 and 3 Cal. 251as I have already shown, establish a subordinate relation of Kakwara to Kharagpur. It is important to observe that the suit which resulted in the first two of these decisions is one of the numerous suits brought by Raja Leela-nand, which are referred to in Lord Sumner's judgment at page 69 as suits "to resume his shikmi ghatwali lands," which, as the context shows, mean subordinate ghatwalis under the Raja. Thus, in Lord Sumner's view, Kakwara is a subordinate ghatwali under the Raja of Kharagpur. After this, can there be any room for the contention that Kakwara is a Government ghatwali ?

87. It appears that, during the hearing of the appeal before Manohar Lall and Shearer JJ. the parties were asked to produce a copy of an extract from the record of rights relating to Kakwara. Thereupon, the respondents' advocate produced a plain copy of khewat Part 3. This was brought on the record with the consent of both parties. The date on which it was finally published is, however, not known. Column 2, under the heading "Intermediate title holder's name" (I think title is a mistake for tenure), shows the name of the present ghatwal. Column 4, under the heading "Names of the intermediate holder's proprietors," shows the name of the zamindar. Column 6 shows the area of the tenure to be 2247.79 acres. Column 8 shows the rent, Rs. 245-12-9. Under the heading "Method of settling rent" in column 9 there is the entry "By means of patta; Poos 1188 Bangla" this refers to Captain Brown's patta. Under column 11 the entry is " Ghatwal istimrari mokarari." Column 12 is for "remarks" and contains the entry " For fixing cess this property has been valued at Rs. 4624-14." Manohar Lall J. thinks:

These details point to the inference that the ghatwali is not an ordinary zamindary ghatwali but was of the superior ghatwali kind.

88. With all respect for my learned brother, I do not myself see how this inference follows. It is true that column 9 of the khewat refers to Captain Brown's patta and not to Kadir Ali's. But the obvious explanation is that Captain Brown's patta is apparently the first document by which the rent of Rs. 245-12-9 was settled. The entries in columns 2 and 4 make it clear that the ghatwal holds the tenure under the zamindar. However, I do not think the record of rights is of any importance in the face of the aforesaid decisions.

89. For the reasons given above, I am of opinion that Kakwara is a zamindari ghatwali under the zamindar of Kharagpur. It necessarily follows that Kakwara ghatwali is alienable with the consent of the zamindar. Lord Sumner in 51 I. A. 372 speaks of zamindari ghatwalis as ghatwalis "created by the zamindar or his

predecessors and alienable with his consent." In *Kali Pershad v. Anand Roy* (88) 15 Cal. 471 it was held that a Kharagpur ghatwali, that is, ghatwali under the Kharagpur zamindar, is transferable, if the zamindar assents and accepts the transference. Referring to this case, Lord Sumner in *Satya Narayan Singh v. Niranjana Chakravarti* AIR 1924 P.C. 5 says:

That authority has repeatedly been followed and applies in India, and, so far as the reports show, without proof of the custom being required over again.

90. My answer, therefore, to the point referred] to me is that Kakwara ghatwali tenure is a zamindari ghatwali, and is, therefore, liable to sale in execution of a decree for arrears of rent and cess obtained by the zamindar.