

(1879) 08 CAL CK 0003
In the Calcutta High Court

Sheo Pershad Singh

APPELLANT

Vs

Kally Dass Singh and Others

RESPONDENT

Date of Decision : 30-08-1879

Acts Referred:

Citation : (1880) ILR (Cal) 543

Hon'ble Judges : Richard Garth, C.J.; Prinsep, J

Bench : Division Bench

Judgement

Richard Garth, C.J.—It has been, in the first place, contended that the mokurari was void under Reg. XLIV of 1793, except for a term of ten years, and that, after the expiration of that term (that is to say, in 1808), the tenancy became an annual one, which terminated in 1875 on the death of the grantee. Reg. XLIV of 1793, Section 2, declares, that "no zamindar shall grant pottas to ryots or other persons for the cultivation of lands for a term exceeding ten years;" and further, that every potta which has been or may be granted in opposition to such prohibitions, shall be null and void." This was repealed by Reg. V of 1812, Section 2; but Reg. XLVII of 1803 declares such leases to be null and void, "only as far as respects the jumma or rent thereby illegally stipulated, but without affecting any other rights which the parties may respectively possess or to which they may be entitled." These Regulations were followed by Reg. V of 1812, Section 2 of which declared that "proprietors of lands should be competent to grant leases for any period which they might deem most convenient to themselves and tenants, and most conducive to the improvement of their estates." Thus the prohibition against granting leases for terms exceeding ten years was removed; but no provision was made for rendering valid those leases which had been granted in violation of the prohibition whilst it remained in force; such for instance, as the mokurari lease in the present case. In order to remedy this omission, Reg. VIII of 1819 was passed. The preamble to that Regulation, after reciting the previous Regulations upon the subject, proceeds thus: "In practice, the grant of taluqs and other leases at a rent fixed in perpetuity had been common with the zamindars of Bengal for some time before the passing of

the two Regulations (V & XVIII of 1812) last mentioned, but notwithstanding the abrogation of the rule, which declared such arrangements null and void, and the abandonment of all intention or desire to have it enforced as a security for the Government revenue in the manner originally contemplated, it was omitted to declare in the rules of Regs. V & XVIII of 1812, or in any other Regulations, whether tenures in existence and held under covenants or engagements entered into by the parties in violation of the rule of Section 2, Reg. XLIV of 1793, should, if called in question, be deemed invalid and void as heretofore. This point it has been deemed necessary to set at rest by a general declaration of the validity of any tenures that may now be in existence, notwithstanding that they may have been granted at a rent fixed in perpetuity, or for a longer term than ten years, while the rule fixing this limitation to the term of all such engagements, and declaring null and void any granted in contravention thereto, was in force." This being the preamble, Section 2 of the Regulation declared in effect, that any such leases then in existence, which might have been granted for a term of years, or in perpetuity, should be deemed good and valid tenures according to the terms of the covenants or engagements interchanged, notwithstanding that the same might have been executed before the passing of Reg. V of 1812, and while the rule of Section 2, Reg. XLIV of 1793, was in full force and effect. We cannot doubt that this Regulation was intended to apply to leases like the present, which might have been avoided by the grantor or his heirs during the time that the rule of 1793 was in force, but which (so far from having been avoided) had been acted upon by both parties, after the expiration of the ten year's, and were treated and considered as in existence at the time of the passing of the Regulation of 1819. The sole question, therefore, in this case is, whether the potta was intended to be in perpetuity or only for the life of the grantee. It is granted by the raja to Roghu Nath Singh under the description of the "mokurari ijaradar" of Mouza Bhalwana. It states that the mokurari ijara potta of the mouza is thereby granted to Roghu Nath from 1206 Fusli at a consolidated jumma of Rs. 6 for the years 1206, 1207, 1208, and 1209, and at a uniform rent of sicca Rs. 25 from the year 1210 to be paid year after year. It provides that this rent shall be inclusive of malikana, and that the mokuraridar should, with case of mind, make cultivation and improvements, and pay the rent year after year to the raja, raising no objection on the score of drought, inundation, &c., but should himself bear the loss arising therefrom. It further provides, that any profit to be derived from salutary improvements should belong to the mokuraridar, and not to the raja; that the mokuraridar should treat the tenants well, and should not give a single span of land in the village without asking permission of the raja, nor resume any land previously granted, without the raja's orders; and that, should the lakhiraj lands be resumed under the raja's orders and should the raja be pleased to make a settlement of the land with the ticca mokuraridars, the latter should pay the rent according to the settlement to be made with the raja. It then provides, that the mokuraridar should not suffer a single span of the land on the limits and boundaries to pass away from the estate, or to be included in the boundary of other persons; and

that, should anything of the kind happen, the raja should be informed of it, and the matter should be settled with the "aid of the raja, and the boundaries of the mouza preserved and confirmed; and further, that the mokuraridar should not allow robbers and bad characters to settle within the ticca, and that he should act in strict conformity with the orders passed and to be passed by the raja for the payment of rents by tenants and malguzari of all classes." The plaintiff contends, that the instrument in itself does not confer an hereditary estate, and that there is nothing in the terms of it, or in the circumstances under which it was granted, to lead to the supposition that it was intended to be of an hereditary character, or extending beyond the life of the mokuraridar. The defendants, on the other hand, contend, that the mere fact of its being a mokurari potta is sufficient to raise a prima facie presumption in favour of its being hereditary; and that the terms of the instrument, the circumstances under which it was granted, and the subsequent conduct of the parties, all tend to strengthen that presumption. There certainly is one peculiarity about this case, which distinguishes it from most others of a similar character which have come under the consideration of the Courts, namely, that, notwithstanding the potta was granted some eighty years ago, the original grantee has lived until the year 1875, and the question as to the effect of the instrument has arisen immediately upon his death; so that we have here no usage or course of succession to guide us, which has served in some cases as a means of interpreting the intention of the parties, and has been held to supply the omission of words of inheritance: see *Dhunput Singh v. Gooman Singh* (11 I.A., 433; S.C. 9 W.R., P.C., 3) and the case of *Joba Singh* (4 S R 271). We must, therefore look mainly to the terms of the instrument itself, and to the circumstances under which it was made, in order to see whether there is any reason for holding that it conferred an hereditary tenure. The Subordinate Judge very properly observes, that in the word "mokurari" itself there is nothing which necessarily imports perpetuity. In several cases decided by the Sudder Dewany Adawlat it was held, that "mokurari," even when coupled with "istemrari", did not denote an hereditary estate, and although [as was said by a Division Bench of this Court in the case of *Lakhoo Koer v. Hurree Kishen Roy* (12 W.R., 3)] the decisions of the Court of Sudder Dewany Adawlat may not be absolutely binding upon the High Court here, it seems to us that they are entitled to great respect, especially when they relate to a technical expression in a lease, the use and meaning of which was understood at least as well, thirty or forty years ago, as it is now. The learned Judges in that case considered that the words "mokurari istemrari" did not confer a lease in perpetuity, and the same construction appears to have been put upon them by *Trevor and Campbell, JJ.*, in the case of *Monorunjun Sing v. Rajah Lelanund Singh* (3 W.R., 84). In this last case a review was applied for (see 5 W.R., 101), upon the ground that the learned Judges had not correctly apprehended the meaning of word "istemrari." They had considered it as meaning "perpetual in point of time;" and to that construction they adhered. On appeal (13 B.L.R., 124, 133), however, from that decision to the Privy Council their Lordships held, that the words "mokurari istemrari" might mean "either permanent during the life of

the person to whom the grant was made, or permanent as regards hereditary descent;" but that in that particular case, coupling the words with the usage that had prevailed, the tenures were hereditary. In this case the word "istemrari," which is relied upon, on the above authorities, as importing perpetuity, is not used; and with regard to the meaning of the word "mokurari" alone, their Lordships of the Privy Council, in the case of *The Bengal Government v. Nawab Juffer Hossein Khan* (5 I.A., 467), say thus: "It was intimated in one of the precedents cited, that the word "mokurari" may import perpetuity, but their Lordships apprehend that although the word may have that import, this is not the necessary meaning of the word, and they are satisfied that, as used in the documents in this case, it has not that import. "As, therefore, the word "mokurari" alone raises no presumption that the tenure was intended to be hereditary, we must see whether, having regard to the other terms of the instrument, the circumstances under which it was made, or the conduct of the parties, we have reason to suppose that in this instance the potta was intended to be hereditary. The Subordinate Judge has held that it is so principally for these reasons: He says, that as the gross produce of the village was put down in the year 1250 at Rs. 6-3-10, and as the entire area of the mouza was found in 1846 to be 7,500 bighas, of which, 3,000 were cultivated and 4,500 covered with jungle, it must be taken that, when the potta was granted, the larger portion of the mouza was covered with jungle, and that the lease was granted with a view to large improvements being made, and a good deal of money being laid out by the grantee; and he further finds as a fact, that the property has been largely improved by the grantee, and that latter would not have laid out so much money upon it unless he held it in perpetuity. The Subordinate Judge also lays some stress upon the subsequent conduct of the parties. It appears that, upon the death of Raja Gopal Singh, who granted the potta, his son Raja Jeswant Singh declined to receive the rent of this mouza from Roghu Nath under the potta in question, contending that one Seolal Singh, who was Roghu Nath's uncle and guardian, had surrendered that potta to Raja Gopal Singh, and had taken from him another ticca potta on behalf of Roghu Nath at a rent of Rs. 51, and for a term of eleven years. In the proceedings which were taken to try that question, Roghu Nath was successful, the Judge considering that Roghu Nath held the property under the potta of 1798. The same point was afterwards raised in a regular suit by Raja Nowah Singh, the successor of Raja Jeswant Singh. He sued Boghu Nath under the alleged eleven years' lease for the rent of Rs. 51, and in that case Roghu Nath set up the potta of 1798. In the first Court the raja was successful, but on appeal to the Judge, the decision was reversed, and Roghu Nath was adjudged to hold under the mokurari potta. The Judge says,--"The appellant took the said mouza in mokurari from the respondent's father at a small rent, when he had to clear it of jungle and bring it into cultivation, and has now reclaimed and brought it into cultivation at a considerable outlay, and has not yet reaped benefit commensurate with the expenses incurred by him;" and the decree was, that the appellant should remain in possession of Mouza Bhalwana in accordance with the mokurari potta. The Subordinate Judge in the

present case appears to attribute some weight to the above judgment, as showing that at that time Roghu Nath had brought the mouza into cultivation at heavy expense; and that Roghu Nath himself considered and described his interest as a permanent one. We think it clear, however, that we can only use this judgment for what it really decided, namely, that Roghu Nath was decreed to pay the Rs. 25 rent, and not the Rs. 51; or in other words, that he held under the potta in question, and not under the potta set up by the raja. The Judge did not mean to decide, nor could he have decided in that suit, that the potta conveyed an hereditary tenure, and we think the word "permanent" is used in the judgment to describe the mokurari potta as distinguished from the ticca potta for eleven years only. The Subordinate Judge is of course quite right in saying that the lease was granted with a view to the improvement of the mouza. The potta in fact says so in plain terms. It was not at all likely that the raja would have granted so large a property, even for the life of the grantee, at little more than a nominal rent, unless with a view to some advantage for himself; and the only advantage which he apparently obtained or could obtain in this instance, consisted in the improvements to be made by the grantee. The area of the estate seems to be no less than 7,500 bighas. The value of it at the present time is estimated at Rs. 1,00,000. Roghu Nath was a minor at the time when the potta was made; and, therefore, in the ordinary course of things, a lease for life of such a property at such a rent would be a most advantageous bargain for the grantee. He was not bound down to any particular measure of improvement. If his life was a short one, the improvements which he effected would probably be but few. The longer his life, the more improvements he would probably carry out, and the greater in such case would be his own gain. He might use his own discretion in that respect; but under no circumstances, having regard to the smallness of the rent and the fact that he paid no premium, would, if he were an ordinarily prudent man, be a loser. But, on the other hand, if the tenure was to be in perpetuity, what advantage could the raja or his successors ever expect to get from it? He would then have parted for ever with this valuable property at a nominal rent of Rs. 25. The Subordinate Judge says, that the consideration for this grant was the improvement to be made by the grantee. But how could this improvement be any benefit or consideration to the grantor or his heirs, if the grant were to be made in perpetuity? In that case the grantee would secure the whole benefit of them; and the grantor would get nothing, let the property be. increased in value ever so much, except his Rs. 25 a year. In most other cases of this kind, where leases have been held to be hereditary, either the rent reserved has been a substantial one, or a considerable premium has been paid to the grantors. But here the grantor, if the potta were construed as hereditary, would be parting with his property for no consideration whatever. It is strange that this view of the matter seems wholly to have escaped the notice of the Subordinate Judge. If any other argument were wanting to induce us to find in favour of the plaintiff, it would be supplied by some of the other provisions of the lease, which seem necessarily to imply that a substantial interest in the property remained in the raja, and which are quite inconsistent with his having permanently parted

with that interest. If the grant was in perpetuity, why was the permission of the raja necessary, before a single span of land in the mouza could be parted with to anybody? Why was the raja to be consulted in the adjustment of boundary disputes with neighbouring proprietors? Why should there be any provision for securing the tenants of the mouza in their holdings, and giving the tenants proper receipts upon payment of their rents? All these would be very important stipulations for the raja, if the grant were to be for the life of the grantee, but would be wholly, or almost wholly, immaterial if the raja's interest in the estate were only the possibility of an escheat at some future time". For these reasons, we are clearly of opinion that the judgment of the Court below is wrong, and that the plaintiff is entitled to recover possession of the property in suit with mesne profits against the defendants of the first part as regards the twelve-annas share, and against the defendant of the second part as to four-annas. The plaintiff will also recover his costs in both Courts from the defendants of the first and second parts, in proportion to the shares which they respectively claim; but he must pay the costs in the first Court of the defendants third party, inasmuch as they never disputed his title, but, on the contrary, admitted it before the Magistrate, and allowed him to take possession.