

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Toolshi Pershad Singh and others v. Rajah Ram Narain Singh, from the High Court of Judicature at Fort William, in Bengal; delivered 13th June 1885.

Present:

LORD BLACKBURN.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

The Respondent (the Plaintiff in the suit) is the grandson of Raja Nirbhoy Singh, who was the owner of the zemindary of Gidhowr, an ancient impartible estate, which descended according to the law of primogeniture. The Appellants (the Defendants) are the sons of Kumar Sarnam Singh, who married Srimati Nawah Koeri, one of the daughters of Nirbhoy Singh. In 1852 Nirbhoy Singh died, leaving one son, Raja Mohender Narain Singh, who succeeded to the estate, and having had five daughters, two of whom died before him. Nawah Koeri died in 1844. Raja Mohender Narain Singh died in 1869, leaving four sons, of whom the Plaintiff, Ram Narain, is the eldest, and two daughters. Ram Narain succeeded to the zemindary.

The only question in the suit is what is the construction of a pottah, granted on the 29th of August 1850 by Nirbhoy Singh to his son-in-law Kumar Sarnam Singh, of certain mouzahs which were part of the zemindary of Gidhowr. Sarnam

Singh died on the 10th of June 1878, and on the 29th of March 1880 the Plaintiff filed his plaint to recover possession of the mouzahs, in which he alleged that the pottah was granted in lieu of a former pottah, dated 11th Bysack 1254 Fusli (11th April 1847), which was granted in lieu of the first pottah, dated the 11th Cheyt 1239 Fusli (27th March 1832); that the first pottah was granted at a smaller jumma than specified in the second, and was granted on account of paternal affection and kindness to Sarnam Singh, the husband of his daughter, for the assistance, maintenance, and support of his daughter and her husband; and that the pottah was to remain in force only during the lifetime of the grantee. The Defendants, in their written statement, alleged that Sarnam Singh was a member of a family of the Rajpoot caste, and Nirbhoy Singh was inferior to him in family and caste, and that on account of his marriage with Nawah Koeri, and of his living at Gidhowr with his wife and children, Nirbhoy Singh on the 11th Cheyt 1239 F. granted to him an *istimrari mokurruri* tenure, *i.e.*, for perpetuity, at an annual jumma of Rs. 201. They denied that the grant was for his lifetime, and submitted that it was for perpetuity to be enjoyed generation after generation. The pottahs of 1847 and 1850 are in the Proceedings, but that of 1832 is not. By that of 1847 the annual jumma was raised from Rs. 201 to Rs. 651, for a reason which is there stated. That of 1850 was made to settle some dispute as to a word in that of 1847. It is not necessary to state the terms of either of these pottahs. They both contain the words "*istimrari mokurruri*," the meaning of which is disputed, and it appears from the recital in that of 1847 that the original pottah contained those words.

The case was heard in the first instance by the Subordinate Judge of Bhagulpore, who in his

judgement, after stating that the issue was whether the pottah of 1850 to Kumar Sanjam Singh, the ancestor of the Defendants, was for life or for perpetuity to be enjoyed generation after generation, proceeded to refer to the decisions of the Sudder Dewani Adawlut, which are noted in the margin of the judgement. One of these was in 1848, another in 1853, and another in 1860. He says that it was held in these cases that in mokurruri deeds merely the use of the words "istimrari mokurruri." without any such words as "ba farzandan" (with children), or "naslan" "bad naslan" (generation after generation), or any similar words having the same meaning, will not signify perpetual tenure to be enjoyed by heirs; on the contrary, it will mean life interest. He then refers to two decisions of the High Court at Calcutta, which was established in 1862, when the Sudder Dewani Adawlut was abolished. The former of these was in 1869, and is reported in 3, Bengal L. R., 226. The latter was in 1877, and, not having been reported, an attested copy of the judgement is in the Record of this appeal. These decisions are opposed to those of the Sudder Dewani Adawlut, the High Court holding that the words "istimrari mokurruri," without any others, must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee. With reference to these decisions, the Subordinate Judge seems to be of opinion that in 1850 the parties to the pottah must have known the meaning of the words "istimrari mokurruri" to be the same as was then held by the Sudder Dewani Adawlut, *i.e.*, for life, and as the pottah contained only those words, without any word to denote that it was for perpetuity to be enjoyed generation after generation, it was taken as a mokurruri for life. He then refers minutely to the documentary evidence. This consisted of mokurruris granted

by Nirbhoy Singh to his three brothers, his brother-in-law, who married his only sister, and his five sons-in-law and two other relatives, and also of mokurruris granted by Mohender Narain. It is not necessary to refer to this evidence, as it can only prove a custom of the family of Nirbhoy Singh, and what was understood in his family to be the meaning of "istimrari mokurruri" when used without any other words. The effect of it is stated by the Subordinate Judge to be that when a pottah was granted to one of the male members of the family who would become heirs according to the Shastra, in addition to the words "istimrari mokurruri," the words "with children," or other words having similar meaning, were inserted, and when it was granted to a son-in-law or other relative, no other words but "istimrari mokurruri" were used. The Subordinate Judge concluded by finding that the pottah in this case created "a life mokurruri, and not a perpetual mokurruri to be enjoyed generation after generation," and made a decree in favour of the Plaintiff.

The Defendants appealed to the High Court at Calcutta. That Court in its judgement, after distinguishing the cases relied upon for the Defendants (and, their Lordships think, rightly), says that in the later years of the Sudder Dewani Adawlut it was repeatedly held that an istimrari lease conveyed no hereditary right, unless expressly given by such words as "ba farzandan" or "naslan bad naslan," but there have been cases in the High Court in which the words "mokurruri istimrari" were held to convey a hereditary right. It then refers to two cases before this Committee, and says, "It is therefore fully established at the present day that the words contained in the Defendants' pottah do not *per se* convey to them an estate of inheritance." And after referring to the evidence of

the custom of the family, the Court dismissed the appeal.

It is necessary now to consider the decisions which have been referred to. The earliest reported case appears to be *Tulsee Narain Sahee v. Modpurain Sing* (S. D. A. Rep., 1848, p. 752). There a mokurruri istimrari pottah had been executed in favour of two brothers, who were both dead, and the principal Appellant was the heir of both. He claimed to succeed to the possession of the lands, and the suit was brought to try the question. The Judge of the Sudder Dewani Adawlut said :—

“The Principal Sudder Ameen, admitting the pottah to be genuine, has decided against the Appellants on the second plea of the Respondent, that the heir cannot claim what the deed guaranteed only to the individuals named in it. The decision is founded on the commonly understood purport of deeds so worded, as shown by precedents referred to in the judgement. It has been repeatedly ruled by the Courts generally that the permanence (istimrar) expressed in these pottahs has reference only to the term of existence of the grantee, and that to render them hereditary the addition of ‘ba furzundan’ (including children or descendants), or ‘nuslun bad nusl’ (from generation to generation), is necessary. My own knowledge confirms the correctness of this, and upon this and the following precedents of the Court, amongst the many which doubtless might be produced, I affirm the decision appealed against.”

Three precedents are then mentioned, one of the 27th May 1817, another of the 2nd April 1827, and a third of the 28th September 1835.

The next reported case is *Ameeroonissa Begum v. Hetnarain Singh* (S. D. A. Rep., 1853, p. 648). It is described as a suit to resume an istimrari mokurruri lease, on the grounds that the lease was not hereditary, and that, the original lessee being dead, his heirs had no right to retain the tenure, and it came before three Judges of the Sudder Dewani Adawlut. The judgement refers to the decisions of the 20th September 1835 and 2nd April 1827, and says (p. 654) :—

“The Appellant urges that the term ‘mookurree’ applies to the fixed amount of jumma, and ‘istemrree’ to the right of

succession in perpetuity, or to the duration of the tenure. But such is not the interpretation of the term 'istemraree' according to local custom, as shown by the decisions quoted, though the strict meaning of the word in lexicography certainly is 'perpetuation.'

Another decision was on the 22nd May 1860, by three Judges of the *Sudder Dewani Adawlut*, two of whom became Judges of the High Court. An attested copy of the judgement is in the Record. The suit related to the pottah granted by Nirbhoy Singh to his brother-in-law, Kumar Dewan Singh, and was brought against his son by Mohendra Narain Singh. It is said in the judgment that the Plaintiff set forth that his father, Nirbhoy Singh, on the 21st Kartick 1213 F. gave to Kumar Dewan Singh, the father of the Defendant, a perpetual lease (*mowrussi istimrari*) of the villages Jogi and Nirbund, and on the death of the grantee he claimed to resume possession. The Defendant answered that the deed under which he held was, as stated by the Plaintiff, one of the 21st Kartick 1213, for a jumma of Rs. 21, but that so far from being restricted to the life of the first grantee, it had in express words the terms "to sons and generation after generation, and descendants after descendants." The Principal *Sudder Amin* held that the document put forth by the Defendant was not the genuine lease, and decreed for the Plaintiff. The judgement of the *Sudder Dewani Adawlut*, after deciding that the deed put in by the Defendant was not the real lease, says:—

"Lastly, it is urged that the plaint admits that a *mowrussi istimrari* lease was given to Defendant's father on the 21st of Kartick 1213, and that as these terms are equivalent to hereditary and perpetual terms the lease must descend from father to son. But it has been definitely ruled in the case of *Amirunnissa*, S. D. A. Decisions for January 1853, p. 648, that an *istimrari* lease does not convey any hereditary right unless such terms as 'ba-furzandan' or 'nuslan-bâd-nuslin' are contained in the body of the deed, and this precedent has always been followed."

The word "mowrussi" must be used by mistake

for "mokurruri," as there was evidence in the present suit that the grant by Nirbhoy Singh was an istimrari mohurri, and the Principal Sudder Amin in his judgment describes the claim as for recovery of possession by setting aside "the istimrari mokurruri sunnud."

The first decision of the High Court on this matter is in *Mussumat Lakhu Kowar v. Hari Krishna Sing*, 3 Bengal L. R., 226. The suit was brought by the successor of the grantor of a mokurrari istimrari pottah against the widow of the grantee and others, the Plaintiff alleging that it was only a life tenure, and the Defendants that it was an hereditary tenure in perpetuity. The Sudder Amin dismissed the suit on the ground that istimrari meant perpetuity and nothing else. On appeal to the Additional Judge of Tirhoot this decision was reversed, and the Defendant appealed to the High Court. The decision of the Sudder Court in 1853 was relied upon for the Respondent, but the Court said it was a very peculiar one, and proceeded to a considerable extent, at least, on evidence which tended to qualify the wording of the pottah, and to show that it was not intended to convey an hereditary title. They reversed the decision of the Additional Judge on the ground appearing in the following passage of the judgement which was delivered by one Judge, the other concurring :—

"Then as to the meaning of the words themselves. It cannot, I imagine, be for a moment contended that the words mokurrari istimrari do not in their lexicographical sense mean 'something that is fixed for ever.' No doubt there is a custom which adds to these words 'generation after generation,' but this is by no means an universal custom, and the extra words are etymologically redundant. Moreover, if the patta were merely for the life of the grantee, what could be easier than to say so, and what was the object of using words that could be applied in their ordinary sense only to hereditary rights. I should say that when a grantee holds under a patta worded in this way he has, at least, made out the very strongest *prima facie* case, and that the onus of showing that by the custom of

the district pattas conferring hereditary title always contained and were obliged to contain the words 'ba-farzandan,' 'nashin bayd nashin,' or similar phrases, would be heavily upon the person seeking to set aside the lease."

The decisions of the Sudder Court previous to 1853 were not referred to. The ground of them appears to have been that the words, when used in a pottah, had a customary meaning. This is distinctly said in the case in 1853, p. 654. If this had been noticed it might have been thought that the customary meaning of the words, rather than the lexicographical, ought to be regarded, and the former would be their ordinary sense when used in a pottah.

In the other case in the High Court in 1877, this decision seems to have been treated as having settled the question. The Court say :—

"Having regard to the ordinary meaning of the words 'mokurruri istimrari,' and to the construction which this Court has put upon them in the case of *Mussammatt Lukkhi Koer v. Roi Hurri Krishna Singh* (3 Bengal Law Reports, 227), it appears to us that an 'istimrari mokurruri' pottah containing no words of inheritance on the one hand, nor any words that the lessee is only to have an estate for life, on the other must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee."

In *Rajah Leelanund Singh v. Thakoor Munoorunjun Singh*, L. R., Ind. A. Sup., Vol. 181, where the question was, whether certain ghatwali teures, created before the permanent settlement, could be determined by a zemindar dispensing with the ghatwali services, this Committee said :—
 "The words 'mokurruree istemraree' are used,
 "and although it may be doubtful whether they
 "mean permanent during the life of the person
 "to whom they were granted, or permanent as
 "regards hereditary descent, their Lordships are
 "of opinion that, coupling those words with
 "the usage, the tenures were hereditary." The
 doubt thus stated is not removed by the lexicographical meaning of the words.

After this review of the decisions, their

Lordships think it is established that the words "istimrari mokurruri" in a pottah do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual. It was held by this Committee, in a case where the instrument was called "the mokurruri ijara pottah" (Law R., 9 I. A., 33), that this was the question. Such an intention was not shown in this case, and in the argument before their Lordships the Appellant relied solely upon the terms of the pottah. As has been said, their Lordships, having regard to the customary meaning of the words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal. The costs of it will be paid by the Appellant.
