Privy Council Appeal Nos. 107 *and* 108 *of* 1921.

Patna Appeals Nos. 112 *of* 1918 *and* 6 *of* 1919.

Kumar Satya Narain Singh - - - - - - *Appellant*

v.

Raja Satya Niranjan Chakravarti and others - - - *Respondents.*

Raja Satya Niranjan Chakravarti and others - - *Appellants*

v.

Kumar Satya Narain Singh and others - - - - *Respondents.*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH OCTOBER, 1923.

Present at the Hearing :

LORD BUCKMASTER.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD SUMNER.]

This was a suit to enforce by sale certain mortgages of lands, which may be shortly called the Hundwa estates, created by the late Udit Narayan Singh of Lagma, in Pergana Hundwa, a jungleterry taluq in the Santal Perganas District. The suit was defended on behalf of Kumar Satya Narayan Singh, whom the widow of Udit Singh adopted under his testamentary authority as his son, and the ground of defence was that the Hundwa estates

were and are inalienable and passed unencumbered to this defendant as successor on the death of Udit Singh, the mortgages notwithstanding. Two main questions arose: the first, whether the estates were ever inalienable at all; and the second, even if so, whether before the dates of the mortgages they had not become alienable in full. Both Courts rejected the defence: the Subordinate Judge mainly on the first point; the High Court of Patna, while accepting the original inalienability of the estates, definitely upon the second. This defendant now appeals.

The title and tenure asserted by the appellant rest on an alleged grant and subsequent confirmation of a permanent ghatwali tenure made to his ancestor Subha Singh by Captain Brown and Mr. Dickinson, officers of the ruling power, in 1776 and 1794 respectively. The respondents' case is that nothing more took place than an ordinary revenue settlement of these estates, then belonging to Subha Singh, confirmed at the permanent settlement, and subject to no tenure or condition of inalienability.

In a very elaborate judgment the learned Subordinate Judge examined the whole history of Hundwa for over a century and a half, and his conclusions, may be thus summarised. Hundwa was originally acquired in absolute ownership in or before the sixteenth century by a Khetauri family driven from its earlier home by Rajput pressure from the west. Subsequently, at a date unknown, it became annexed to the Kharakpur Raj and was tributary to it, but, for their own purposes and not under obligation to any overlord, the Rajas of Hundwa continued to appoint their own ghatwals in Hundwa and to maintain an armed force of jaghirdars. Hundwa was at this stage of its history, when the East India Company obtained the Dewani in 1763 and, in assessing revenue on the mahal of Hundwa, included it as part of the Kharakpur estate for fiscal purposes. When the Santal Perganas came under martial law the landed proprietors *ex majori cautela* obtained pottas and sanads from the military officers in charge confirmatory of the rights which they had enjoyed in quieter times. They were, as was the whole population, liable to military service if called upon, and no doubt they accepted in their pottas mention of a service which arose out of the state of the country. When about the end of the century peace had been fully re-established in the district, no further service of the kind was requisite, and, in spite of the language of the pottas, none was ever required. Such was the case of Hundwa, as of many other estates. Nothing more had been done by its proprietors than the ordinary rural police work, which fell on all landed proprietors of consideration, and, although in a country where names die hard the old tradition of the existence of ghatwals in Hundwa, and with it the name, continued to survive, there was in fact no correspondence between the old and the recent state of things. The Raja of Hundwa himself never was a ghatwal, either appointed by the Mogul power at Delhi or by the East India Company. He was, when he chose, a grantor of ghatwali holdings of his own creation, but, subject

only to his payment to the Zemindars of Kharakpur, he was an independent proprietor and not the holder of any service tenure.

The learned Judge thus made light of the title deeds, on which the defendant relied, regarding them as mere recognitions, not very accurately expressed, of pre-existing rights, for which view he thought that he found conclusive record and authority in the reports of various officers of the company, which have been published from time to time. From similar sources, and to the like effect, was derived a whole series of other incidents and of official acts, which he considered to be of capital importance.

At the beginning of the last century the Collector of Bhagulpore prepared a list of the ghatwals in Kharakpur, and this list does not mention the defendant's ancestor, who was then in possession of the Hundwa estate and must have held it, according to the defendant, as a ghatwali tenure. A few years later Mr. J. P. Ward reported, in 1833, that Hundwa was held by the defendant's ancestor as a ghatwali tenure, but as a ghatwali tenure under the Raja of Kharakpur, though he added that this dependency had been successfully disputed. Mr. Ward records this without making any suggestion that it was really held from the Government direct, except that Captain Brown and Mr. Dickinson are spoken of as having respectively made and continued a " grant." In 1838 Government took proceedings under Reg. xi of 1819 to resume Hundwa, on the ground that it was lying unassessed to revenue, though it had been included in the permanent settlement of Mahalat Kharakpur in 1796, when Kadir Ali was the Kharakpur raja. The claim failed, and the Government acquiesced in the decision, although an entry in the Settlement Register of Mokurrari Istamrari Jumma of Bhagulpore for 1801–1802 recorded in regard to Hundwa that after the Dewani a mokurrari potta had been granted subject to ghatwali, and mentioned as the foundation for this record Captain Brown's potta for the whole pergana Hundwa, dated 1776, and Mr. Dickinson's sanad of 1794. In 1863, after the adverse decision of their Lordships' Board, reported in 6 Moore's Indian Appeals, the Government agreed with the Raja of Kharakpur of that day, in consideration of an annual payment of Rs. 10,000, to surrender its right to the advantage of having ghatwals regularly appointed for the performance of public police services, whose jaghirs the raja would have to provide himself. For this purpose a list had been prepared of the ghatwals, to whose services the Government might lawfully lay claim, but Hundwa is not in the list. It is, of course, matter for argument whether the reason for the omission is that Hundwa, as a ghatwali tenure, was not included in the Zemindary of Kharakpur, not being the subject of a public service as to which the Raja of Kharakpur had any responsibility, or whether, as the learned Judge thought, the true reason is that the Raja of Hundwa held his lands as an independent proprietor and not by any manner of ghatwali service at all. It certainly is of some importance that such a list should have been made for such a purpose without any mention of Hundwa and without any explana-

tion of the reason why it was not mentioned. In subsequent years various less important proceedings took place, as to which the observation is that the official ignorance of the fact, if fact it was, that Hundwa was held direct from the Government on a ghatwali tenure is singular in any case and doubly so in view of the existence of Captain Brown's and Mr. Dickinson's grants, which could hardly have been entirely lost sight of. Thus in 1867 part of the lands of Hundwa were acquired for a public road and paid for without any indication that Hundwa differed from any other of the lands under Kharakpur. A similar incident, of no great importance in itself, was given in evidence when more land was required for the road in 1872. In 1875 the Commissioner for the Division called on the Collector of the district for information as to all ghatwali tenures, from which police services were then demandable, and again Hundwa was omitted from the replies, as though all trace had been lost of the Government right to call for ghatwali service. From his comments on these events the learned Judge appears to have thought that, if a Government could be conceived to be capable of losing sight of rights of great antiquity and small value, legal consequences would follow in the lapse of years, disabling the Government, to the advantage of the proprietor, from enforcing its claims. He recites, however, in his judgment, extracts from official correspondence from 1869 onwards, which show that the writers themselves were alive to the fact, that there might be still existing ghatwali tenures in the districts in question as to which, for various reasons, the demand of services had in fact ceased, and contrasts them with other passages, from which he infers, not without reason, that the writers had not lost sight, at any rate, of Hundwa, but were clearly, if erroneously, of opinion that it was not a Government ghatwali, but probably was a shikmi tenure under the estate of Kharakpur.

The Subordinate Judge finally attached very great importance to the entries in the Record of Rights relating to Hundwa, in which at the settlements made in 1874–79 and 1898–1907 the taluqas in question were entered as the Istamrari Mokurrari property of the Raja of Hundwa without any qualifying addition, such as might have been made and in the case of other ghatwali properties was made, and he regarded the Record of Rights as being " the clearest possible positive evidence of the fact that Hundwa is not a ghatwali at all, whether under the control of the Government or of the Zemindar."

Undoubtedly this long series of administrative acts, records and reports, which either affirmatively declare Hundwa to have been a shikmi ghatwali of Kharakpur or negatively treat it as, at any rate, wholly free from any ghatwali services to the Government, is, as the learned Subordinate Judge found it, a very impressive circumstance. If the problem had been to infer the true original grant, which, in the absence of the text of it, could only be collected from the evidence of what was done and left undone in connection with Hundwa by the ruling power, it would,

no doubt, have been difficult to infer, as the explanation which best fitted all the facts, that the right originally granted consisted of a ghatwali tenure, held from the East India Company direct. The production of the authentic texts of the original grants completely alters the question, and it becomes in the first instance one of construction. The reports of the Government officers are not even *contemporanea expositio*, for the earliest one must have been based on hearsay accounts, already one or two generations old, and presumably not on any inspection of the original grants, since they are not mentioned.

In the High Court the learned Judges differed from the conclusion of the learned Subordinate Judge, holding that Hundwa was originally a Mogul ghatwali, hereditary in the family of the defendant's ancestors, which Captain Brown and Mr. Dickinson confirmed but did not originate, by the potta and sanad in question. They arrived at this conclusion on the construction of the two documents, read in the light of contemporaneous conduct and of prior history, which they conceived to have been sufficiently established or to be common knowledge. Roe, J., thus states their conclusions :—

> "The Hundwa tenure was, prior to the Dewanee, a Mogul ghatwali. The effect of assumption of jurisdiction over the jungle Terai Mahals by the East India Company was at most to convert the allegiance of the ghatwal from an allegiance to the Mogul Empire to an allegiance to the East India Company. The permanent settlement did not destroy the Company's right to enforce nor relieve Purander Singh from liability to render that allegiance. Nothing that has since been done has altered the position. . . . The descendants of Purander Singh have never specifically refused to render services as ghatwals. . . . The entry of the ghatwali service attached to the Mahal in Exhibit F still stands. . . . It may be that the power to enforce these services has lapsed by limitation. That question was not argued at the bar and could not be raised in this suit. I am satisfied that the right has not been destroyed by any definite act."

As the construction, which was put upon these documents in the High Court, was strenuously contested at their Lordships' bar by the respondents, who prayed that the judgment of the Subordinate Judge on this point should be restored, the first question for decision will be whether or not the lands of Hundwa were at any material time a ghatwali tenure at all or not. Without proceeding upon the same line of reasoning as that adopted in the High Court, their Lordships are of opinion that they were. 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 potta 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 Hundwa rests upon their true construction and import and not upon the notions entertained about them in later generations.

The instrument of 1776 is one of a considerable number of similar instruments executed by Captain James Brown, of the

East India Company's service, who gave a full account of the district, which was published in India Tracts, 1787. He was one of the officers employed in introducing order into the five jungle Terai mahals, including Birbhum and Kharakpur. Though the originals of the two documents in question are not now forthcoming and probably have been lost, they had been so often produced and accepted in numerous suits for the last eighty years and more, that the translations used in the present case have been accepted without question as truly representing authentic originals. The document of 1776 is headed " Patta in terms of Kabuliyat granted," etc. (which Kabuliyat, however, is also not forthcoming), and is entitled in the commencement thus : " This Istamrari Mokurrari Patta is granted to you . . . at a varying consolidated jumma, Rs. 2,701, in respect of Pergana Hundwa." The document itself sets out no parcels for Pergana Hundwa, though there is an express exception of Brahmottar and other lands, " jagirs granted to archers and Barkandases, perquisites of Imlah lands and other Zemindari expenses." Then follow certain clauses which may not go beyond duties then ordinarily discharged by Zemindars, though among them occur the words " You should go round your village, escorted by archers and Barkandases holding jagir grants, as per details given below, and protect the villages " ; but further on occurs this most significant clause : " When called by the Hazur you should be escorted by a body of archers and Barkandases 307 in number, of whom the Sardars will be 7 and archers and Barkandases will be 300, and should appear before the Hazur, and you ought to be careful about the boundaries and limits of your village."

There follows a sort of summary or schedule headed " Annual jama of the Istamrari Mokurrari settlement . . . Barkandases and archers," with details showing how Rs. 2,701 are made up, which throw no light on the present question. It is clear that the whole sum payable to the revenue is payable by Raja Subhao Singh. There is, further, a contemporaneous Dowl, which, it is common ground, supplies the parcels intended to be included in this settlement. It is admitted that the lands in mortgage are lands to which the instrument of 1776 applied, but it has to be observed that, when Hundwa is mentioned in the interval, since then, it cannot always be concluded that the whole of the lands so referred to were either lands covered by this instrument or lands belonging to the family of Subhao Singh and Udit Singh. Their content seems to have changed from time to time. These facts add to the obscurity of the past history of Hundwa, but as no issue turned on these discrepancies in the Courts below, their Lordships are of opinion that they do not affect the present question one way or the other.

Importance has further been attached to the persons named in the instrument of 1776 and to the manner in which they are referred to. It is expressed to be granted to " Raja Subhao Singh, Babu Udit Singh, Babu Gopal Singh, Babu Lal Singh

and others, ghatwals of Pergana Hundwa appertaining to Kharakpur." No doubt the senior of the kinsmen is called Raja out of respect. The term does not mean that Subhao Singh was an independent proprietor, while the other kinsmen were not but were ghatwals only; the whole class are ghatwals of Hundwa, though varying in social importance. In the operative part it is mandatory, though always in general terms—" You should always obey the Government," and so forth. The Dowl mentions Subhao, Gopal, Lal and Udwant, (who may really be Udit), in connection respectively with the Taluqas Khandwa, Phuljheri, Kesri and Sarji, and it names six or seven other persons whom the instrument itself does not name at all. These discrepancies, for the same reason as that above stated, seem to their Lordships not to require further discussion.

In 1794 this instrument was perused and considered by Mr. Dickinson, the Government officer then in charge of this district, and he issued a perwana, which is also relied on by the appellant as part of his title and, in view of the fact that it purports to be a substantive confirmatory grant, has throughout been accepted on both sides as being one with the instrument of 1776 for purposes of construction of the title. It is in the name of the East India Company. It is addressed to the Mutsaddis, present and future, of Pergana Hundwa, and ultimately directs them to " treat the said Pergana as a mokurrari tenure," to " receive the fixed Jama of the said Pergana by regular instalments each year from Raja Purundar Singh, Zemindar, and others "; and it adds, " You shall not demand anything in excess, nor shall you demand production of fresh sanads every year."

The rest of this perwana consists of recitals of details and parcels and of words of grant. It records that, since Captain Brown granted Hundwa, " old Zemindari of Raja Subhao Singh," " as permanent Mukarrari " to him, Udit Singh, Gopal Singh, Lal Singh, Bishun Singh, Fatêh Singh, and other ghatwals of the said Pergunna," all these persons except Gopal Singh have died, and Subhao Singh's nephew, Purandar Singh, has been in possession of the shares of his uncle and also of Udit Singh and of Gopal Singh, paying the Government revenue; while in the case of the others, sons in each case have succeeded to fathers' shares. The perwana concludes: " Therefore, taking into consideration their right of inheritance, so much of the said Pergana as formed the share of Raja Subhao Singh, Zemindar, and of Udwant Singh and Gopal Singh, ghatwals, is granted as before to Raja Purandar Singh, Zemindar, and so much of it as belongs to Lal Singh has been granted to Budhan Singh, the share of Bishun Singh to Manik Singh, the share of Fatêh Singh to Rohan Singh and other ghatwals, and to their descendants as permanent Mokurrari tenure." The rent, " excepting the Jagir lands of Barkandases and archers," is Rs. 2,701. The obligations of the document of 1776, as to looking after the villages and appearing before the Huzur with a force 307 strong, are referred to, but whether for

the purpose of reciting that these obligations have hitherto been performed, or of directing the Mutsaddis to see that they are performed in the future, is not, as a matter of drafting, quite clear. What is clear is that there is nothing to take away from the earlier document in this respect and that, reading the two instruments together, effect must be given to these provisions as part of their terms. What, then, must that effect be ?

The respondents' contention, briefly, is that these provisions are nothing more than the expression of duties then currently required of Zemindars, and, whether required or not, discharged by them in their own interests and in the interests of their ryots ; that the mention of ghatwals does not include Subhao Singh or Purandar Singh themselves ; and that the " other " ghatwals mentioned do not include them in one class but are ghatwals subordinate to them, whose duties are of earlier origin than either of these instruments and are not based upon them. The language employed is relied upon in support of the view that Hundwa was, before 1776, an independent Zemindari in the family of Subhao Singh, held subject only to payment of Government revenue ; that such ghatwals as then existed were his shikmi ghatwals, and that all that Captain Brown and Mr. Dickinson did was to settle what eventually became the permanent revenue payments due in respect of the whole estate and to signify this in an ordinary settlement potta, confirmed by the later perwana. These contentions their Lordships think unsound.

It may be advisable to consider generally the law relating to ghatwali tenures, partly for the purpose of determining whether the construction adopted by their Lordships is in any way inconsistent with that law, and partly for the purpose of deciding the incidents which the law attaches to the form of tenure resulting from that construction. In the Santal Perganas there are for practical purposes three classes of ghatwali tenures, (*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 Zemindari estate and formed into a unit in its assessment ; and (*c*) Zemindari 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. The matter may, however, be looked at broadly. In itself " ghatwal " is a term meaning an office held by a particular person from time to time, who is bound to the performance of its duties, with a consideration to be enjoyed in return by the incumbent of the office. Within this meaning the utmost variety of conditions may exist. There may be a mere personal contract of employment for wages, which take the form of the use of land or an actual estate in land, heritable and perpetual, but conditional upon services certain or services to be demanded. The office may be public or private, important or the reverse. The ghatwal, the guard of the pass, may be the bulwark of a whole country-side against invaders ; he may, be

merely a sentry against petty marauders; he may be no more than a kind of gamekeeper, protecting the crops from the ravages of wild animals. Ghatwali duties may be divided into police duties and quasi-military duties, though both classes have lost much of their importance, and the latter in any strict form are but rarely rendered. Again, the duties of the office may be such as demand personal discharge by the ghatwal and personal competence for that discharge; they may, on the other hand, be such as can be discharged vicariously, by the creation of shikmi tenures and by the appointment and maintenance of a subordinate force, or they may be such as in their nature only require to be provided for in bulk. It is plain that where a grant is forthcoming to a man and his heirs as ghatwal, or is to be presumed to have been made though it may have since been lost, personal performance of the ghatwali services is not essential so long as the grantee is responsible for them and procures them to be rendered (*Shib Lall's case*, 9 W.R. 126). So much for the ghatwal. The superior, who appoints him, may also in the varying circumstances of the organisation of Hindostan 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. It would not be easy to draw with precision the distinction in the duties performable by him between a person who might properly be called a ghatwal, and a person, who is only to be styled a chowkidar, though the legal incidents of the respective positions are clearly different. At the other end of the scale the term "ghatwal" may be the honourable badge of a great proprietor, who in his day was a veritable Warden of the Marches. In the minor senses of the word, "ghatwal" can hardly be said to connote a tenure at all. A jaghir, assigned for the support and remuneration of a ghatwal, may be no more than wages in kind, arising from the use of a plot of land customarily in the occupation of the ghatwal for the time being, and in such a case personal service by the employee and personal selection and appointment by the employer may well be in every case essential incidents of the relationship. Incompetence and misconduct on the part of the employee may be causes for removal of the ghatwal and resumption of his holding (*Neelamund* v. *Surwan Singh*, 5 W.R. 292); actual appointment may be the necessary initiation and seal of his office; personal selection may be the whole basis of his service and mere family claims valueless in the matter. On the other hand, there are great estates, whose proprietors are found holding them or parts of them upon the terms of providing that ghatwali services, shall be forthcoming, either regularly or when required; services, which it is impossible for the proprietor himself to render in his own person, and which become possible to him and to those to whom he renders them simply by virtue of his possession of the lands thus granted. In such cases the

ghatwali tenure, even if not originally granted as heritable, easily becomes so, and is commonly found on the death of an incumbent of the office to descend to some member of his family, if not necessarily to the senior member. Thus in Kharakpur ghatwals have a perpetual hereditary tenure at a fixed jumma (*Munrunjun* v. *Lelanund ;* 3 W.R. 84). A recognised right to be appointed ghatwal, then takes the place of a formal appointment; a recognised right in the superior to dismiss the ghatwal, if he is no longer able and willing to render the service required by his tenure, and to appoint another person to the office and the tenure of the lands, then readily suffices to maintain in perpetuity the incidents of the tenure. Women of rank have thus in some instances come to be the recognised holders of ghatwali lands (*Doorga Pershad's* case, 20 W.R. 154). The case of Rani Surbessuri occurred in 1783 in Kharakpur, and there are said to have been many such cases in Birbhum. A further incident of such a tenure is the inalienability of the ghatwali lands, for it is obvious that, if the whole lands were alienated together at the choice of the ghatwal, he would be in a position either to make his own alienee, possibly a person non-resident or unfit, the ghatwal in succession to himself without the consent of his superior, or to deprive himself of the whole of the means provided to enable the services to be rendered, while himself retaining the office, whose obligations he could in consequence no longer fulfil. The office cannot, except by special custom, grant or other arrangement, either run with lands or be severed from them. If the lands are alienated piecemeal—and this must be involved in a right to alienate them at all—the same difficulty arises in another form, for here, the office being indivisible, the question is to which of a number of several purchasers of the lands is it to pass? *Hurlal Singh's* case 6 Sud. Dew. Rep. 170; *Lelanund Singh's* case 6 Moore's I. A. 101; *Nilmoni Singh's* case L.R. 9, I. A. 104; *Munooranjan's* case, L.R. I.A. Suppl. vol. 181.) It is true that, so far as the superior is concerned, the inconveniences which would arise from allowing to the ghatwali a free right of alienation may be met by reserving to the superior the right of withholding consent to the alienation and thus defeating it, and this, coupled with the right to appoint a successor to the office when it falls vacant, may in practice be sometimes all the protection that the superior requires, but in two points affecting others it is insufficient. First of all, when the ghatwal's office has become hereditary in his family, alienation by him becomes impossible without infringing the right of his heirs; and secondly, when the office is of a public character and held for the general good, it is not enough to safeguard the superior's personal right of appointment, but it is also necessary to ensure that the lands and the services shall remain substantially connected so that actual performance and not mere subordination may be assured, and this involves that the lands must remain impartible and inalienable. These considerations peculiarly apply where the

superior, by whom ghatwals are appointed and of whom ghatwali lands are held, is the ruling power itself. In Mogul times such grants were common ; nor did their existence by any means come to an end with the assumption of the Dewanny. Government ghatwali tenures have to some extent lost, or appeared to lose, their identity by being included for revenue purposes in the assessment of zemindary 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 zemindary 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.

In view of these considerations, their Lordships think that there is nothing in the general law to limit the interpretation of these documents according to their natural sense, and they are unable to accept the argument, which the respondents base on the special words employed in them. Even now the words " raja," " zemindari," " potta " and " istemrari mokurrari " are not so strictly used as always to bear a precise meaning or to refer invariably to cases, in which nothing is due but an annual Government jumma for an absolute estate in lands. There is even less ground for so holding when the documents under construction are nearly 150 years old. No authority is forthcoming to show that a holding on the terms of both yielding a jumma and rendering a quasi-military service may not be consistent with the use of these words. Whether the service tenure is made a term or not, the holder might be a " zemindar " or landholder and his holding be " perpetual " and " on fixed terms," and the position of Subhao Singh depends not on his being styled " raja " and zemindar, which are general expressions of consideration, but upon the conditions upon which he held the land. Their Lordships are further unable to refer the obligation to furnish a force of 307 men to any ordinary police administration of a Bengal zemindari. The force is precise and it is large ; it is military rather than civil ; it does not vary according to the needs of the moment, but is fixed at a standing number at all times, and attendance on the Huzur with the whole force on demand is clearly beyond the scope of mere constabulary duties. Effect must be given to these very special and express words, and although no forfeiture is stated in case of non-compliance with them, it is only possible to do so by regarding them as descriptive of an obligatory service tenure, whether of the ordinary ghatwal type or not, and as the condition on which the ghatwal holds the lands.

It is, however, objected that the authority of Captain Brown and Mr. Dickinson to make a grant on combined terms of revenue rental and quasi-military service is an essential matter and that, as servants of the East India Company, then only exercising the

Dewanny of Bengal, Orissa and Behar, these officers would naturally be concerned only with military action and with revenue revisions, and not with making new grants of old estates. It may be conceded that there is no evidence to show that the holder of this estate prior to 1776, who appears to have been Subhao Singh himself, had conducted himself in any way that would have justified a forfeiture of it, nor is it shown that, if it were so, Captain Brown had any authority to forfeit the lands into the company's hands. He was acting under martial law, it is true, in a time of acute disturbance in this region, but that of itself would not make him a person to exercise such a power. The answer to these objections appears to their Lordships to be this. It must be presumed that for anything done by Captain Brown in the purported discharge of his functions some valid authority existed until the contrary is proved, especially in a matter which was repeatedly brought before Government officials and courts of law within but a short time of the event without once, so far as their Lordships know, having any doubt cast upon its validity. It is very probable, though not absolutely proved, that before 1776 some ghatwali tenure of these lands had existed in this family for many years and that Captain Brown's policy was to confirm what he found already existing. The grant to Subhao Singh of land previously held by that proprietor would be explicable and regular, if Subhao Singh either surrendered this estate, already held on a ghatwali tenure, in consideration of a re-grant from the new ruling power on satisfactory terms as to jumma and service, or if, being already holder on joint rent and service terms, subject to revision at the will of the old ruling power, which is known historically to have been common in Mogul times, he now received and accepted from the new ruling power a grant, which fixed his rent and his service favourably and for a term, which was expected to be, and soon actually became, a term in perpetuity. It is probable enough that Subhao Singh would turn from the setting to the rising sun and make new terms if he could. It is certain, from the map in Mr. Macpherson's report and from the history of the district, that, if Hundwa was not a ghatwali tenure, whatever be the time of its first creation, a singular and perilous gap was left for no discoverable reason in the line of defences consisting of ghatwali tenures, which was devised to protect the lands, known as the Dâman-i-Kôh. In upholding old titles, of which the authentic records are still forthcoming, their Lordships are justified in making all reasonable presumptions to explain them and give them validity. Certainly in making either of these assumptions they are not trespassing beyond the bounds either of actual probability or of legal precedent, and as the alternative would be either to disregard express words and to leave them no force at all, or else to assume that what has been treated as a good title for over a century is really an instance in which an official, unsuspecting and unsuspected, has outstepped the limits of his unknown power, their Lordships have no hesita-

tion in saying that the grants of Captain Brown and Mr. Dickinson created a valid permanent service tenure of the estate of Hundwa.

It must be conceded that from the time of Purandar Singh to the present day no zemindar of the Hundwa estate has ever been personally appointed ghatwali either by Government sanad or otherwise. The fact is common ground. It may be observed that, if the fact be material in this case, the consequences would not be those contended for by the respondents, for if a person enters into possession of a ghatwali jaghir, not having obtained the appointment which is required to make him the lawful holder of it, his possession is without title at all, and until by prescription or otherwise he acquires a right which he is capable of alienating—a question which does not arise here—the lack of a sanad of appointment is really the proof of the defect of his title, not of the completeness of it. In this case, however, the grant of 1794 expressly makes the tenure hereditary without any renewal of the appointment. It is a grant to the named persons and their descendants, and the direction to the Mutsaddis is, "Nor shall you demand production of fresh sanads every year." Nor is this inconsistent, as the respondents contend, with the grant being a service grant at all. Their Lordships are unable, however, to accept the argument that in this case the lands are merely subjected to a pecuniary charge, so that the personality or the appointment of the holder would be of no importance. The tenure-holder has to raise and maintain the force, not merely to pay for it. Whatever may be the other incidents, it is clear that these grants impose on him the duty of providing a specific armed force and of attending with it upon the competent Government officers whenever this service is required of him. What can this be but a service tenure?

Again, it is objected that true heritability is inconsistent with a ghatwali tenure when the office is of a personal character. A jaghir may, it is true, be held by a ghatwal on the terms of personal employment and service of the strictest kind and in the most complete subordination. In such a case selection and appointment are the natural commencement of the service, and its determination in fact involves the determination of this highly personal tenure. Where everything depends on personal qualifications and exertions a heritable tenure is out of place. On the other hand, services may be due in bulk and the obligation of the ghatwal may consist, not in personal guardianship of a particular post, but in providing the service of others who are competent to discharge the services in person. The obligation to embody and keep up an armed force of 300 men with an appropriate staff of officers is pre-eminently an obligation of this kind. It is personal in that the grantee under this tenure is himself bound to the provision of this force from time to time and is not merely chargeable in respect of the expense, or bound to make a contribution to the expense of forces embodied and kept on foot by others. It is personal in that the lands are

granted upon this tenure in order that out of their produce the obligation in question may be discharged by the grantee. It is, however, impersonal in that the very nature of the service is rather one of purveyance than of arms. For this purpose the ghatwal must be a person of property, and for that reason he is the grantee of lands as ghatwali lands ; but he need not be himself a soldier or watchman, and for that reason also the lands, though ghatwali lands, may descend to heirs without personal selection and appointment, as is the case here. Since the tenure is a service tenure, the lands are liable to forfeiture if the obligation of service is expressly repudiated, while the rights of the ruling power are similarly sufficiently safeguarded by holding that the succession of an heir incapable of rendering even the vicarious service involved in the provision of this armed force, might be treated as being in itself a ground of forfeiture in the person of that successor, if not in the persons of the entire family, for it is what might be called an anticipatory repudiation. It is enough to indicate this principle as an answer to the argument that the absence of actual appointments and the presence in the perwana of 1794 of an actual dispensation from periodic sanads are both fatal to the existence of any true ghatwali tenure. It is not necessary to decide whether and to what extent an appearance of personal unfitness in a particular heir would operate to disable him from succession as ghatwal.

In view of the considerations above set out, their Lordships have arrived at the following conclusions with regard to the construction and effect of the potta of 1776 and the sanad of 1794 :—

(1) The instruments contain words of grant and purport to make grants on behalf of and in the name of the East India Company. They must be so interpreted, nor can this construction be defeated merely because there may be ground for thinking that the grantees were already holders of these lands under earlier grants or on customary service terms. The tenure is therefore a Government tenure. A similar construction was adopted by the High Court of Calcutta in *Raja Leelanund's case* (L.R. Ind. App., Suppl. vol., p. 181).

(2) As the grants are expressed to be istemrari mokurrari grants, and as in fact the lands have for generations descended in the family of the defendant from ancestor to heir, they are a perpetual and hereditary tenure. A similar conclusion was arrived at in *Munrunjun Singh's* case, 3 Cal. W.N., p. 84, when a sanad of 1777, granted by Captain Brown in similar terms, was under construction.

(3) The express obligation imposed on the grantees, as an integral part of the grant, to support a specified number of barkandases, and with them to attend the Huzur when required, shows that the tenure is a service tenure and is ghatwali in its nature.

(4) A tenure so granted is inalienable and indivisible (*Hurlal Singh* v. *Jorawun Singh*, 6 S.D.A. 169) and cannot be sold in execution of a decree against the person of the incumbent of the office of ghatwal for the time being (see *Nilmoni's* case, 9 Calc. 187, and *Joykishen's* case, 10 Moore's I.A. 16).

(5) Neither by the terms of the grant nor by the general law applying to such ghatwali tenures is an actual appointment of the next heir to be ghatwali in the room of his predecessor requisite, nor is actual performance of the stipulated ghatwali services from time to time necessary. Readiness and willingness to perform them when required may be inferred where there is no proof of any refusal to perform and where performance within a reasonable time, if required, is not shown to have become impossible.

At the last stage of this argument the respondents' counsel raised the further contention that Hundwa is in any case locally in Kharakpur, and that, by a well-established local custom, now always recognised, Kharakpur ghatwali lands are alienable. They disclaimed any contention that a family custom existed, and put the point solely as one of local custom. Their Lordships might well have refused to entertain this contention, for it involves important considerations of fact as well as of law, and it had not been determined or even discussed in the courts in India. It was, however, said to rest on a series of decisions of long standing, and their Lordships, loth to appear to cast any doubt upon such authorities by refusing to take account of them on the ground of a rule of procedure, have determined, under the circumstances, to deal shortly with this contention.

The proposition that Hundwa is in Kharakpur must, in consequence of the litigation of 1812 to 1819, to be mentioned hereafter, be now regarded as a purely topographical statement. What the area or the site known as Kharakpur may be is a matter for evidence, and no evidence was given about it. It is further a matter as to which the courts in Bengal have original means of knowledge which their Lordships do not possess, and for this reason the fact that the contention was never submitted to those courts becomes doubly significant. If it is well founded, the whole of the discussions and proofs, which led to two long hearings and two elaborate judgments, would have been obviated *in limine*, for the whole point of the defence disappeared, if Hundwa was by binding custom and by decisions recognising that custom an alienable tenure. If such a crucial point was never made, it was probably because the local knowledge of the Courts themselves would have compelled them to overrule the point as soon as stated.

A local custom is one binding on all persons in the local area within which it prevails, and differs entirely from a family custom, binding only on members of the family as to rules of descent

and so forth (*Rajkishen* v. *Ramjoy*, 1 Calc. 186). It is one which must be pleaded with particularity as to the local limits of the area of which it is alleged to be the custom, and the evidence must be evidence as to the prevalence of the custom in that area (*Marquis of Anglesey* v. *Lord Hatherton*, 10 M. & W. 218 ; *Hiranath* v. *Narayan*, 9 B.L.R. 274). Except so far as analogy may serve to explain anything that is in itself obscure, the customs of other localities are not relevant and such rules in cases relating to Birbhum or Pachete are not in point.

It has been long held that certain ghatwali tenures in this district are alienable with the consent of the Zemindar. This was decided after an elaborate examination of the evidence in *Anund Roy's* case (15 Ind. App. 18 ; see too I.L.R., 15 Calc. 471) by their Lordships' Board. This authority has repeatedly been followed and applied in India, and, so far as the reports show, without proof of the custom being required over again. What, however, does this amount to ? Their Lordships' Board pointed out that ghatwali tenures are generally inalienable but that evidence may be given to show that in a certain district they are by local custom subject to special incidents in this regard. Such evidence was forthcoming and was to the effect that many transfers had taken place in Kharakpur without being questioned or questionable, provided that the Zemindar of Kharakpur expressly assented to and accepted the transferee as his ghatwal or indicated an implied acceptance by an absence of objection after twelve years' notice of the transfer. This evidence satisfied both the High Court and the Judicial Committee. It is plain that the custom depended on the proof, and as the tenure in question was one in the Zemindari of Kharakpur and under its Zemindar, it could have no reference to ghatwali tenures not under him or forming part of his Zemindari. The personal intervention or omission to intervene on the part of the Zemindar could not be material unless the ghatwali tenure, to which it applies, was one as to which the Zemindar had the right to appoint to the office of ghatwal, and this view is confirmed by the further observations of Lord Fitzgerald, that the conclusion arrived at is encouraged by the fact that the purposes for which the Kharakpur ghatwals were originally appointed no longer existed. In sundry cases, both previously and subsequently decided in India in conformity with this decision, the ghatwali lands appear always to have been held under the Zemindar of Kharakpur (e.g., *Doorgabutty's* case, Sutherland's Rep. 1864, p. 249). The explanation of the customary rule, that the Zemindar's consent is necessary, is said in *Kartick's* case (S. D.A. Rep., 1853, p. 900), which was followed in *Doorgabutty's* case, to be that the Zemindar is responsible to Government if the ghatwal's services, which are public services, are not performed, and so ought in self-defence to have a veto on any transfer. If this is so, it is an additional reason for saying that, until the Government releases or abolishes the services in some effective and lawful manner, the tenure-holder remains

bound and holds the lands without power of alienation (see too *Nilmoni's* case, 9 Calc. 187–208).

With regard to Hundwa this is not so. All that can be said of *Ram Chandra Marwaris's* case (36 Ind. App., 85) is that, if the Udit Narayan Singh then concerned was the appellant's father, as may be the case, no one seems to have thought it advisable on that occasion to rely on the inalienability of his tenure. Nothing, therefore, comes of it. Their Lordships see no ground for thinking that the custom of Kharakpur, relied on by the respondents' counsel, has any application to ghatwali tenures, which, like Hundwa, are independent of the Kharakpur zemindari, even though they may be not far off Kharakpur.

The ultimate conclusion of the High Court was that " the property mortgaged by the late Udit Narain Singh was a ghatwali tenure not held by him as a ghatwal," and it was on this ground that they decided the suit in favour of the mortgagee. The proposition requires somewhat close examination.

It is true that Udit Singh neither himself rendered the services prescribed in Captain Brown's potta, nor appeared to be conscious of any legal restrictions upon his power of alienating the lands of Hundwa. In the first respect he differs little, if at all, from the position of his predecessors after the time of Purandar Singh; in the latter he certainly stands alone, for he was the spendthrift of the family and purported to dissipate the estate of Hundwa by all forms of alienation, nor in his lifetime did anyone venture to say him nay. As, however, there is no question here of any actual assent being given either by his family or by the Government, and as the whole matter in dispute is whether his alienations were valid, the fact, that in other transactions besides the present he purported to alienate and appeared to believe in his own power to do so, proves nothing. What is singular is that from the time of Purandar Singh the officials of the ruling Power never required that the services in question should be rendered, and for long periods and in important connections even seem to have been unaware that any obligation of the kind existed.

The first matter to be cleared up is the relation of Hundwa to Kharakpur. As early as 1781 a perwana, signed by Mr. Hastings as Governor-General in Council, records that the duties of Zemindar of the Pergana Kharakpur have been conferred on Raja Kadir Ali, and includes, at a revenue payment of Rs. 2,800, Hundwa among the estates, to which the perwana applies. A Potta and Kabuliyat of 1796 are next forthcoming, which purport to include in Raja Kadir Ali's Zemindari of Kharakpur the Pergana Hundwa. To these documents, however, and to the transactions, whatever they were, out of which they arose, no ancestor of the present appellant was a party, and although the East India Company itself is a party, still, as they relate only to the jumma payable and to other ordinary obligations of zemindars, and as the jumma for Hundwa was in fact paid through the Raja of Kharakpur, these documents do not greatly advance matters.

What is of more significance is that in 1802 the result of the Permanent Settlement for Hundwa was registered as involving the annual payment of a jumma of Rs. 2,701 under Captain Brown's potta; that Purandar Singh is then recorded as the present possessor, personal and not hereditary; and that in the "Remarks" column it is stated that the potta was "subject to ghatwali," while the perwana of 1794 is recorded as a sanad, under which the persons named, other than Purandar Singh, were in possession as heirs of their father.

Between 1809 and 1819 protracted litigation was carried on between Kadir Ali, then Zemindar of the Kharakpur Mahals, and the family of Purandar Singh, recently deceased, with reference to the estate of Hundwa. Kadir Ali asserted a right to nominate the ghatwal, who was to succeed to Purandar Singh, a claim which eventually Jhabban Singh disputed, asserting that he was mokuraridar of Pergana Hundwa with heritable rights. Though he was also described as malik zemindar, this is not enough in such a context to show that he alleged that his estate was not a ghatwali tenure. In order to inform itself as to the ownership of the disputed Taluqas, the Court referred it to the Collector of the District to report, who the Zemindar of the lands in litigation really was, although this would appear to have been one of the very questions which arose for the determination of the Court itself. This report, which is now not forthcoming, was in favour of the Raja of Kharakpur. Nevertheless, when the case was heard in the Civil Court of Bhagulpore in 1812 and on appeal in the Court at Murshidabad in 1819, both judgments were in favour of Jhabban Singh, the ancestor of the present appellant. Accordingly, no further appeal being taken, the claim of the Raja of Kharakpur to be entitled to appoint the ghatwali of Hundwa, whenever a vacancy occurred, was finally dismissed. It is not necessary to consider how far, if at all, these judgments, which as between the holders of the two estates are *res judicata*, would technically preclude the present respondents, as mortgagees from one of the holders of Hundwa, from reopening this question as against their mortgagor's heir, for in fact no attempt has been made to do so, and in no event after the lapse of a century would their Lordships have been disposed to entertain or to make criticisms upon judgments, arrived at upon ampler documentary materials than those now available, which have for long laid at rest a claim once so keenly advocated.

These decisions, which separate Kharakpur from Hundwa so far as this appeal is concerned, have a profound effect on the position of Hundwa. Whatever else Hundwa may be now, it is not nor ever was for present purposes a ghatwali estate under Kharakpur and its rajas. Comment is, however, justly made that, with the documents of 1776 and 1794 before them, neither Court pointed out nor apparently was invited to hold that, as they granted Hundwa to Subhao Singh and to Purandar Singh on the terms of services to be rendered to the Government, the holders

of Hundwa were therefore Government ghatwalis and could not be the ghatwalis of the Raja of Kharakpur. Furthermore, as has been already stated, the reports relating to the Santal Perganas generally and to Kharakpur and Hundwa in particular, nowhere mention Hundwa as an original and direct Government ghatwali. Thus Mr. Sutherland in 1819 records the history of the estate of Hundwa, but nowhere suggests that the holders owed military service to the Ruling Power. In 1833 a Special Commissioner, Mr. Ward, deals with the relations of the Rajas of Kharakpur and Hundwa from Mogul times downwards and refers in some detail to the potta of 1776, to the perwana of 1794 and to the litigation above discussed, and records his conclusion thus :—

> " 24. Under the foregoing history of Hundwa the tenure under which the jagir is held can only be considered ghatwali subject to the payment of a certain fixed rent and other conditions of service, but claimed by Jhuban Singh as a Zemindari for which no revenue has been paid since 1828."

All that can be said of these and similar passages from other and later reports is this. The writers were dealing with large tracts of country and were chiefly concerned with questions strictly affecting the Government revenue. Ghatwali services, as services to be actually called for and performed, were not in question. Their sources of information were largely hearsay. Dr. Buchanan for example records that he was only told the family account of Hundwa matters and did not hear the other side. It is doubtful if they had the opportunity of seeing the actual documents of 1776 and 1794, but if they had, the interest of the Government in the service of the barkandases of Hundwa was so inconsiderable that it is small wonder if the somewhat complex language of those instruments did not deeply engage their attention. High as the reputation of these reports for care and research deservedly stands, there can be nothing surprising if an error is made in the account given of particular rights connected with a single estate, where the value of those rights to the Government must be trivial and on the whole problematical, and where their relevancy, as this case shows, chiefly regards the private rights of heirs as against the incumbent for the time being. If, in the result, their conclusions were erroneous, they can, fortunately, be corrected by attaching the real weight to the potta and the sanad and upholding the rights as disclosed therein, without further considering the mistaken accounts of them given by some officials and the pardonable ignorance of them displayed by others. Nor must it be forgotten that the entry in the register of permanent mokurrari right in 1802 is a precise statement to the contrary and rests on a precise reference to the material documents of title, and that the entries in the Record of Rights of 1874–79 and 1898–1907 are not inconsistent, to say the least of it, with the same state of things; (*see* observations in the cases reported in 3 W.R. 84 and 13 B.L.R. 124).

The High Court appears to have attached little or no impor-

tance to the express direction in the sanad of 1794 that " production of fresh sanads every year is not to be demanded," and dwells on the fact that since the death of Purandar Singh no proprietor of Hundwa had applied for a renewal of the Istemrari Mokurrari ghatwali grant or had been required to do so. For a hundred years no muchilka or kabuliyat, undertaking military service, had been given. No ghatwal of Hundwa had been appointed by Government. Udit Narayan Singh " was merely *de facto* holder, without licence from the ruling Power, of the lands attached to the post of ghatwal," and it was as such that he mortgaged these lands to the plaintiffs. His son, who succeeds by inheritance, cannot, it is concluded, impugn his title or ask that it should be investigated, for, the ruling Power not being represented, its permanent title cannot be gone into.

It appears to their Lordships that, as this decision does not purport to rest on prescription or adverse possession of the lands by Udit Narayan or his predecessors against the Government, it must be rested on legal assumption that, if during a sufficiently long period the incumbent of the office of ghatwa ldoes not happen to be called on to render the services which he is bound to render when required, the quality and incidents of his tenure of ghatwali lands change, at any rate so long as this abeyance of the services lasts, and that he becomes, to the prejudice of his heirs—who are, be it said, heirs of ghatwali lands with the advantages as well as the disadvantages attaching thereto—a full mokurrari istemrari proprietor for the time being. This seems to be involved in the argument, on which Roe, J., bases his conclusion, for he propounds this dilemma. If the defendant's right to succeed was a right to succeed to Udit Singh's interest as ghatwal, there was nothing to succeed to, for Udit Singh, if ghatwal at all, held nothing heritable in virtue of that office. If, on the other hand, the right to succeed was a right to succeed to the right and interest, which Udit Singh then had even *pro tempore*, that right was one which Udit Singh could and did encumber in favour of the plaintiffs, and since the defendant is not in a position to discharge the encumbrance, he must suffer the legal consequences and submit to have these lands alienated from him. In truth the defendant is not asking, as the learned Judge seems to have thought, to have the Government's title investigated. He is relying on his own interest in the tenure of the Hundwa estate, which on the true construction of the original grants bears the character of a ghatwali tenure with its legal incidents. He does not set up a *jus tertii*; his case is not that there is an interest outstanding in a stranger to the suit—the Government, to wit—in which he seeks some defence against a decree for sale against himself, but he alleges a title in himself to succeed his father in the enjoyment of lands which, as against himself, his father had held without any right to encumber them in favour of strangers. This, and this alone, is the relevancy in the present suit of the circumstance that the lands are held on ghatwali

tenure, for the ghatwali services themselves have long been so insignificant that little remains in the tenure, except potentially, beyond the quality of being heritable, impartible and inalienable.

To terminate the ghatwali character of the lands, it seems to their Lordships that it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and re-grant of the lands on new terms, or, at any rate, of a release of the right to appoint the ghatwal and call for the performance of the services. Nothing of this sort, at any rate, is shown. The burden of proof is on the mortgagees, and the Government not having been made a party, such proof may even have been for the time being inadmissible. Even the corps of barkandases was still in existence within living memory, whether in embryo or in dissolution does not matter. Not to mention the dubious exploits of this force in the Santal rebellion of 1855, when with their bows and arrows they were said to have slain 300 rebels at the cost of three casualties, there was called as a witness a veteran member of the force, who still held a jagir as such, and down to twenty years before had continued to receive from the raja presents of money on the occasion of weddings in his family. The trial Judge does not deal with this evidence at all, though he comments naturally and adversely on the supposed battle, by which the force of barkandases quelled the revolt of the Santals.

As is well known, the estate of Kharakpur was the subject of long and complicated litigation arising out of claims to reassess or to resume ghatwali lands where, as was no doubt generally the case, ghatwali services had ceased to be of practical importance. Long before 1765 ghatwali tenures under the Zemindar of Kharakpur had been created by the various holders of those lands for their own purposes, and as late as 1770–1785 Mr. Cleveland, who managed the estate during the minority of Kadir Ali, followed the same policy. The lands thus made the subject of ghatwali tenure were included in the permanent settlement of the whole Kharakpur estate in 1796, and the Government of Bengal sought long afterwards to reassess these lands to a further jumma beyond that fixed in 1796, on the ground that local zemindars had ceased to be called on to render police services, since the Government had itself undertaken the necessary Thanadari organisation (Regulations 49 and 50 of 1792). The claim was finally dismissed by their Lordships' Board in 1855 (*Raja Lelanund* v. *The Government of Bengal*, 6 Moore's Ind. App. 101). Now there is a clear distinction between the case where the Government thinks fit itself to perform duties theretofore performed by ghatwals and the case where the ghatwali service is formally abolished or discharged (per Sir Barnes Peacock, Suppl. vol. Ind. App., p. 185; and see the analogous case as to a palayam in Madras, 48 Ind. App. 100). In the Kharakpur district it does not appear that there has been any formal termination by law of ghatwali public services apart from the above-mentioned composition *inter partes* with the Zemindar of Kharakpur.

It is true that in Appendix XVII to Mr. Macpherson's Report on the Santal Perganas, which contains extracts from Dr. Buchanan's MSS., there occurs this passage : " By far the greater part of Hundwa is still in the possession of a Kshetauri family, although it pays to the Raja of Kharakpur Rs. 2,372 a year ; but it has been entirely exempted from military service." What foundation there may have been for this statement remains unknown. It may be a lax allusion to the Regulations of 1792. At any rate, Roe, J., records, " To this day no outpost has been set up in Pergana Hundwa, which is still a non-police tract." After 1855 there followed numerous suits, in which Raja Lelanund endeavoured to resume his shikmi ghatwali lands, alleging that he was entitled to disclaim the services and thereupon to oust the ghatwal, and also that by his agreement of compromise with the Government for an annual money payment in lieu of further services, the ground for the appointment of ghatwals and for the tenure of ghatwali lands had disappeared. These attempts failed, and it was held that he could not renounce the services without the consent of Government or some legislative or administrative extinction of them (*Kooldeep's* Case, 14 Moore's Ind. App. 247 ; and see L.R. Ind. App., Suppl. vol., 1873, p. 181 ; *Munrunjun's* case, 3 W.R., p. 84, High Court, and 13 B.L.R. 124, P.C.). As long as they were ready and willing to render services if required, the Zemindar could not put an end to the ghatwals' services, whether required or not, even by compromising with the Government and substituting a rent for the former services, for, as against the tenure-holders, this was *res inter alios acta* (see L.R. Ind. App., Suppl. vol., at p. 185).

Although none of these decisions governs the present case, they involve the principle that where a tenure is created, as distinct from a mere personal employment, the tenure-holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land ; it constitutes a personal right in so far as the land held on that condition is concerned, and a personal obligation in so far as concerns the grantor, which, being in the nature of a public obligation, cannot be waived by the grantor for his own advantage, nor, being in the nature of a title to the lands, can be relegated to desuetude for the mere disadvantage of the ghatwal. The truth is that, where rights can once be shown to have been established and continue to be vested in living persons, obsolescence and desuetude are popular expressions rather than solid legal grounds for refusing a continuing recognition to the right as originally established.

One circumstance remains to be mentioned, if only for the purpose of pointing out that no definite conclusion can be drawn from it one way or the other. For a time the revenue assessment on the Hundwa lands was paid to the Government direct, but now and for a century or so past—in fact ever since the time of

the permanent settlement—it has been paid to the Zemindar of Kharakpur by the Hundwa proprietors, he being assessed to the revenue on the lands both of his own Zemindari and on those of Hundwa too, and paying the revenue contribution direct in respect of both. As it is now settled that Hundwa is not an under-tenure to Kharakpur, one obvious inference from these facts is finally negatived. The other, that there is a direct liability of Hundwa for revenue payments, which are for convenience collected indirectly, is, after all, immaterial when once it has been decided that the ghatwali tenure of Hundwa, as it now exists, rests on grants made directly by the East India Company. The explanation suggested for the bare fact is that in disturbed times the transport of treasure through the jungles from Lagwa in Hundwa, to Bhagulpore was precarious, but as it is not shown to have been any safer from Kharakpur to Bhagulpore, and as in any case Hundwa's money must have run the risks of transport to Kharakpur, the explanation is unconvincing. Fortunately, it is also academic.

In the result the appeal succeeds. The judgments of the High Court and of the Subordinate Judge in favour of the plaintiff-mortgagees ought to be set aside and their action should be dismissed with costs both here and in both Courts below. There is a cross-appeal by them consolidated with the defendant's main appeal, which refers to the interest to be allowed to them upon a decree, if any, in their favour, and this cross-appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty to the above effect.

In the Privy Council.

KUMAR SATYA NARAIN SINGH

v.

RAJA SATYA NIRANJAN CHAKRAVARTI AND OTHERS.

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v.

KUMAR SATYA NARAIN SINGH AND OTHERS.

(*Consolidated Appeals.*)

DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2

1923.