

*Privy Council Appeal No. 15 of 1923.*

*Bengal Appeals Nos. 24 and 25 of 1921.*

The Secretary of State for India in Council - - - - *Appellant*

*v.*

Raja Jyoti Prashad Singh Deo Bahadur and others - - - *Respondents*

The New Birbhum Coal Company, Limited, and another - - *Appellants*

*v.*

Raja Jyoti Prashad Singh Deo Bahadur and others - - - *Respondents*

*(Consolidated Appeal.)*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1926.

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*Present at the Hearing :*

VISCOUNT FINLAY.

LORD PHILLIMORE.

LORD BLANESBURGH.

SIR JOHN EDGE.

LORD SALVESEN.

*[Delivered by LORD PHILLIMORE.]*

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This suit was brought on the 3rd September, 1914, by the respondent, the Raja of Pachete against the Secretary of State for India and certain coal and iron companies who are, with the Secretary of State, appellants before their Lordships' Board and other parties described as digwar ghatwals, alleging that three mouzahs known as Kendua, Parira and three-quarters of Garh Parira in the Burdwan District of Bengal were included in his

zamindari, and that this being so he was the proprietor of the mineral rights under the said mouzahs, and that the Secretary of State and the digwars had purported to grant leases of the mineral rights to the defendant companies, and praying that it might be declared that he was the rightful owner of the minerals and that the lessees and sub-lessees had no right to them and should be restrained by injunction from trespassing and working the minerals, and asking for damages with interest and costs.

The Secretary of State in his defence said that the plaintiff was never within 12 years in possession of the mineral rights claimed by him, and that he and the defendants 2, 3 and 5, had been for more than the said period openly and as of right in enjoyment of the minerals, and that the three mouzahs did not form part of the permanently settled estate of the plaintiff, but had been digwari chakran from before the permanent settlement of 1793. He further denied the plaintiff's title to the minerals. The other defendants set up similar defences.

Issues having been settled by the Subordinate Judge, the case was transferred by the District Judge to his Court in July, 1917, and heard by him on oral and documentary evidence, in the months of April and May, 1918.

On the 28th May, 1918, he delivered judgment, supporting all three of the defences raised, *i.e.* holding that the plaintiff had no title to the villages in suit, that if he had been the landowner he would not have the right to the minerals which would still be in the Crown, and that the defence of adverse possession and consequent limitation was also good.

The appeal being taken to the High Court of Judicature at Calcutta, that Court on the 24th July, 1921, reversed the judgment, and while refusing the plaintiff some of the relief which he claimed, made a decree in his favour in terms following :—

“It is ordered and decreed that the plaintiff be and he is hereby entitled to a declaration that the mouzahs in dispute described in the plaint out of which this appeal arises together with the minerals underlying them are included within his permanently settled estate, that he is the rightful owner of the minerals in the mouzahs and that none of the defendants has any right to the minerals in the mouzahs. And it is further ordered and decreed that a perpetual injunction do issue restraining the defendants from working coal or other minerals in the mouzahs.”

The Secretary of State and the companies have appealed to His Majesty in Council from this decree.

The ground upon which the High Court held that the mouzahs in dispute with the minerals underlying them were within the permanently settled estate was that they were what is called thanadari lands. Having so decided, the Judges thought that the further defence of limitation was not good, nor was the defence good that the minerals under these villages belonged to the Crown. Their Lordships will take the question of ownership first.

The learned counsel for the respondent Raja when it came to their turn, while accepting and supporting the reasoning of the

High Court, rested the main strength of their argument upon two other grounds, the first of which comes to be discussed in logical order before the submissions made by the appellants.

This first argument was founded upon the language of the regulations of 1790 and 1793, which established the decennial and permanent settlements of Bengal, Orissa and Behar.

Regulation 8 of 1793, sub-section 4, speaks of the settlement being "concluded with the actual proprietors of the soil whether zamindars, talukdars or chaudhris."

Upon the strength of this and other passages in the regulations, it was urged that the government of the day recognised a pre-existing right in the zamindars and others and did not confer rights by the settlement, and consequently that it was possible that lands owned by a zamindar—though not la-khiraj or thanadari—might never have been settled and yet be his property and so might descend to the successor in title of the original zamindar, having remained unsettled through all these years.

Whether such lands according to the argument were to be reckoned as part of a zamindari or to be treated as de hors the zamindari was not made clear.

The argument receives no support from decided cases and appears at first sight to be contrary to the teaching of the text-books ; but their Lordships are relieved from considering its force because it was never submitted to either of the Courts in India.

Courts of Final Appeal—whether it be the House of Lords or this Board—have long established it for themselves as a principle of wisdom and prudence that they should be very chary of entertaining an argument which has not been sifted in the Courts below ; and if this be true as a general rule, it is especially true when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land.

Not only is there no trace of this point having been brought before the Indian Courts ; but it is apparent that the case of the respondent was rested from the beginning on other grounds. Paragraph 2 of his plaint states that the three mouzahs in question are "included in the revenue-paying ancestral zamindari of the plaintiff known as Chakla Pachete."

The 2nd issue as suggested by the plaintiff was :—

"Are the mouzahs Kendua, Parira and three-fourths of Garh Parira situate within Chakla Panchkote the permanently-settled zamindari of the plaintiff, and are they included within the said permanent settlement ?"

and as actually fixed, was in the following words :—

"Were the mouzahs in suit permanently settled by Government with the plaintiff's ancestors, and is the plaintiff by right of such settlement entitled to the mineral rights under the mouzahs ?"

These things being so, their Lordships do not feel that they ought to give further consideration to this argument.

The argument, however, as to the kind of recognition which was given to those who were in the position of zamindars at the time of the decennial and permanent settlements, and the deductions

to be drawn not only from the regulations but from the despatches and minutes of those in authority is not, as will be noticed hereafter, without valuable bearing upon the question, which in their Lordships' opinion is the real question which was intended to be raised, that is, whether the three mouzahs were permanently settled with the plaintiff's ancestors and form part of the plaintiff's zamindari.

The zamindari of the Raja of Pachete is of great size and is said to extend over more than 2,000 square miles, with more than a thousand villages or mouzahs upon it. The three mouzahs in question are interlocked with the unquestioned portion of the zamindari but it is doubtful whether all three are absolutely enclosed in it. The topographical situation is such as to afford some slight presumption that the three mouzahs are part of the zamindari.

The contents of the plaintiff's estate are to be deduced from the kabuliat given by the then Raja upon the occasion of the permanent settlement of his zamindari in the year 1793.

The divergence of the two Courts in India begins with the construction of this kabuliat.

The material parts of it are as follows :—

“ This kabuliyat is executed by me Maharaja Sri Sri Raghunath Narayan Deb to the effect following :—That my zamindari Pargana Punchkoti, &c., appertaining to the Province of Bengal, the paradise of the world, exclusive of Gunjes, Bazars and Hats and of the entire *sayerats* and *mulfara* (ground rents) and exclusive of all lakheraj lands whether *Sanadi* or *Besanadi* of that pargana, is settled with me in *mokurari* as my Tahut for the term of ten years from 1197 B. S. to 1206 B. S. as per schedule below, at a jumma of sicca Rs. 52,853 (fifty-two thousand eight hundred and fifty-three) annually, *i.e.*, at sicca Rs. 5,28,530 (five lakhs twenty-eight thousand five hundred and thirty) in the total, inclusive of all *abwabs* in force in the said zillah. So I agree, and give in writing that I shall pay the said amount of revenue as per separate kistibandi without excuse or variation. . . . And I shall file within the current year in the Zilla Record Room a list under my signature, showing village by village the mofussil distribution of the jumma fixed in the Sadar for my Tahut in proportion to the rentals therefrom together with the areas of Talabi and Betalabi lands within the four boundaries of the settled Hudda. And in future in the beginning of each year, within the first three months, I shall deliver a list of such distribution of revenue. In case of neglect or delay in this matter, I shall be answerable to the Government. I shall not without the Huzur's permission and advice make any Brahmottar, Debottar, Mahatran, Aima, Madadmas, Piran and Fakiran grants, &c.—any sort of lakheraj (tenures)—to anybody in the said pargana. . . .”

The schedule, if ever there were one, is missing. There are certain sarsikan papers of 1790 bearing the signature of the Raja, which in the opinion of the District Judge represent the list which the Raja undertook to file within the current year showing not only the mofussil distribution of the jumma but also the area of the lands whether talabi or betalabi. These sarsikan papers mention 1,197 villages. They do not contain the three mouzahs in question. They contain, however—and this is of some

importance—the name of one mouzah stated to be occupied by digwars and to be paying a rent.

The three mouzahs in question in this suit have been in the occupation of the digwar ghatwals for as far back as can be traced, certainly for a period anterior to the settlement with the Raja. They may, notwithstanding, be within his zamindari; or the digwars may hold directly of the sovereign power as co-ordinate with rather than subordinate to the Raja.

In the weighty judgment prepared and delivered in 1855 on behalf of the Board by Mr. Pemberton Leigh (afterwards Lord Kingsdown) in the case of *Raja Lelanund Sing Bahadoor v. The Bengal Government* (6 Moore's I.A., p. 101), an account was given of the three classes of service tenures which are or were not uncommon in India.

The lowest class of chakeran lands are those held by minor officers of the zamindar whom he appoints and with whose services he could dispense, thereupon resuming their lands for the purpose of imposing upon them suitable rent. Next in order come the tannahdars, police officials, whom in old times it was the duty of the zamindar to provide, whom he allowed to occupy their lands, either rent free or subject only to a quit rent, and in respect of whom the Government made an allowance to the zamindar to recompense him for the rent which he had lost.

By regulation 1, section 8, clause 4 of 1793, it was provided that the zamindars might be relieved of their police duties; and in that case the Government might resume the allowances or the produce of the lands, as it thought proper. In such cases the zamindars would in turn resume the lands of their subordinate tannahdars.

A higher class is that of ghatwals, some of whom, as mentioned in Lord Kingsdown's judgment, might be persons of high rank, though in other cases the position of a ghatwal might be treated as "something between that of a chowkadar and an office peon," to adopt the language of the District Judge in this case.

But whatever their dignity, these ghatwals were always of ancient date. It is said by the High Court in this case that the East India Company never created a ghatwali tenure; and though there is some indication in the narrative in Lord Kingsdown's judgment that there actually were creations of some ghatwali tenures in that case, no doubt the action of the East India Company was generally confined to recognition and confirmation. Digwars in this district appear to take the same position as ghatwals in other districts.

Still the question remains—were the officers of the highest class always subordinate to the zamindar, or were they sometimes co-ordinate? In the case in 6 Moore, I.A., it was held that the Raja had made his settlement for his zamindari as a whole or block, that the ghatwali lands were included in this settlement, and that the ghatwals held of him. Indeed, it was agreed and

admitted in that case that the ghatwali lands formed part of the zamindari, the holders paying a quit rent to the zamindar.

But as stated in the judgment already quoted, the nature and extent of their rights probably differed in different districts and in different families. That judgment refers to the tenures in Beerbhoom, the holders of which—though no doubt they paid a fixed rent to the zamindar—are entitled to hold their lands in perpetuity, subject to the performance of certain duties. (*See Regulation 29 of 1814.*)

The classes of possible ghatwali tenures and their nature are described in much detail in the case of *Narayan Singh v. Niranjan Chakravarti* (51 I.A., at p. 50), in which the judgment of the Board was delivered by Lord Sumner in 1923, dealing with the Sonthal parganas. He says :—

“ In the Sonthal parganas 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 zamindari estate and formed into a unit in its assessment ; and (c) zamindari ghatwalis, created by the zamindar or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. 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. . . . The superior who appoints him may also, in the varying circumstances of the organisation of Hindustan, be the ruling power over the country at large, the landholder responsible by custom for the maintenance of security and order within his estates, or simply the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office.”

The tenure though peculiar, because of a certain reserved power of selection, nevertheless ranks as hereditary (*Raja Durga Prashad Singh v. Tribeni Singh*, 41 I.A., p. 251). Colonel Dalton, Commissioner of Chota Nagpur in a letter of 14th June, 1869 (Record, Pt. II, p. 389) gives a useful account of their origin.

While, therefore, it may well be—and in fact it is ascertained in respect of some tenures in this very case—that the digwars or ghatwals are subordinate to the zamindar, it is always a question of fact whether they are or are not subordinate ; and it is upon this footing that the Courts in India and their Lordships have approached the present case.

That the burden was upon the respondent to prove that they are part of his zamindari is well settled. The case of *Forbes v. Meer Mahomed Tuquee*, 13 Moo, I.A. 438, where this Board held that the disputed lands were within the geographical limit of the zamindari and yet not proved to be of it, is strong on this point (*see pages 457 and 458.*)

Now the point made by the District Judge is that the kabuliat covers the whole estate of the Raja, that it refers to a list of villages and undertakes to show village by village the mofussil

distribution of the jumma, that in fact the list (*i.e.* the sarsikan papers) does show the revenue set aside for each, and therefore, in his view, it is not an engagement for a block but a series of engagements for the several villages which are parcel of the zamindari.

The learned Judges in the High Court are of opinion that the engagement was for the block, and that it was only intended to enumerate the villages which paid revenue.

But the Raja had made a previous return of the bazizamin or lakhiraj lands within the zamindari, in 1771. These villages are not included in that return. Further, he undertakes in the kabuliat to set out in his list the areas of both talabi and betalabi lands. If these mouzahs were in the zamindari they should be in some list.

Then there is a point which the High Court makes upon the description. This rests on the words: "my zamindari of Pargana Punchkoti, etc." There really seems little in this. If the word pargana is used in its more technical sense, Punchkoti must be taken as the same as Pachete, and then as his zamindari contained other parganas, they must be read as enumerated here. It is, however, quite possible that pargana is used loosely for chakla, a not very technical word which may embrace several parganas, and the "etc." may stand for the fraction or kismet of Shergarh, which is divided between three parganas. Reference upon this head may be made to Hunter's Imperial Gazetteer of India, vol. 7, p. 277, under title Panchet. Incidentally it may be mentioned that Hunter takes the view that all the villages in this zamindari were mentioned in one or other of the two documents.

The word "etc."—or whatever may be its Indian equivalent—seems to give no assistance in arriving at the answer to the one question: "Is this kabuliat an engagement for the whole block or for a number of villages set out *seriatim*?"

A suggestion made by the High Court which was also pressed at their Lordships' bar by counsel for the respondent Raja was rested upon the fact that the kabuliyat apparently contemplates two documents, one to be delivered in the first year which is to show both the distribution of the revenue village by village and the areas of talabi and betalabi lands, and the other being the annual document which is to be confined to the distribution of the revenue.

The suggestion is that the sarsikan papers represent the second kind of list and therefore would not have any mention of lands within the zamindari which paid no revenue and might be called betalabi.

It is a possible explanation.

After the sarsikan papers, the only early documents are Lala-Kanji's report and the lot bundi papers of 1795, 1803 and 1807. As to these latter, the argument for the appellants is based upon the fact that when the property of the Raja was to be sold for non-payment of revenue, the Collector was directed to take a convenient unit and that there be put up for sale all the villages in the Pergunnah within which the three villages in suit are supposed to

be topographically situate, and that these three are not included, the Collector's return showing that he had intended to include every village in the Pergunnah except certain villages already sold.

The argument is of weight, but there is again an explanation to be offered for the respondent. It is said that the sale was for the purpose of procuring money, and that these are not revenue-producing villages, and that supposing that they were as the respondent contends within the limits of the zamindari, the rights of the Raja to some possible reversion or some claim to the minerals were in those days so shadowy that they would not be thought of.

This, however, is not the view taken by either of the Courts in India. Both have thought that these villages were omitted because the Government officers did not think that they were in the zamindari.

Now as regards Lala-Kanji's report, both sides rely upon it, but it is more valuable to the respondent than to the appellants. It appears in two forms, one abbreviated and one fuller. It was made in 1799 and has been preserved by reason of its being made the appendix to the report of Captain Hannynghton in 1841.

It is a police report in answer to the enquiry whether besides the digwars there were any other police guards in Chakla Pachete—with further enquiries as to the pay of the digwars and other police guards.

Lala-Kanji says that besides the digwars there are other guards of three classes, jagirdars, ghatwals who are under the digwars and village chowkidars.

His report states that there were formerly 36 ghats under the digwars, and that in 23 of them the establishment was kept up and is yet in some places : that 13 were under the Raja who paid them, but that since the fixing of thanas and the Government taking from the zamindar R.1,600 yearly for thana expenses, the ghatwals had been dismissed.

Then he says that there were  $57\frac{3}{4}$  or  $57\frac{1}{2}$  digwari villages, the rent of which was fixed in 1771 by Mr. Higginson at R.5.000 ; but later on he proceeds to say that no rent is paid for these villages except for the one village of Kasthulia. He adds that the digwars hold their respective jagir villages in lieu of service without payment of rent, and he includes two if not three of the villages in suit, in the list appended to his report which is headed " Particulars about the jagir mouzahs of the digwars in the Pergunnah Pachete." From all this it is sought to be inferred that he treated these villages or thought that Mr. Higginson treated them as within the zamindari.

On the other hand, he distinguishes the digwars from the jagirdars who paid two-thirds rent and received one-third for their service, and he speaks of the ghatwals in 13 ghats having been dismissed, which is what one would expect if they held their lands from the Raja by a service tenure. Then the probability would be that those who looked after the other 23 ghats did not hold of the Raja.



Mr. Hunter, Collector, reports in 1794 that the only sum appropriated to police establishments, is the "resumed thanadari allowance" of R.1,662. Counsel for the respondent stress the word "sum," but if there were lands so appropriated, it is curious that they were not mentioned.

Further, Captain Hannyngton—to whom we owe the preservation of Lala-Kanji's report, and who wrote in August, 1841, before the Mutiny and before the great local destruction of papers which the Mutiny brought about—in giving an account of the digwari or police lands in his district, says :—

"These lands have been held from time immemorial by a species of police termed Digwars or Jagirdars or Ghatwals whose tenures are feudal and hereditary. They are of two classes.

"First, the Digwars with their followers the Ghatwals. These held their lands in lieu of wages and absolutely rent-free. It is to be specially remarked that the Digwari lands were not included in the Permanent Settlement. The Digwars themselves are appointed (regard being, however, had to hereditary claims) and are liable to be dismissed by the Magistrate. On these grounds it is held that the actual property of the soil is vested in the British Government. This is not denied by either the zemindars or the Digwars."

In that report he mentions, incidentally, that it has been ascertained that coal mines exist in one of the digwar villages, not however being one of those in suit.

In regard to all this part of the case, it is to be remembered that under Regulation 18 of 1805, passed for policing the jungle Mahals of which Pachete was one, the zamindar was made a police magistrate, and as such would have a hierarchical superintendence of the digwars so far as they were required to perform police duties ; and care must be taken not to confound this superintendence with what may be called feudal overlordship.

Captain Hannyngton in the same document speaks of the Raja's having made serious encroachments on the digwari lands.

Counsel for the respondent relied on this statement and suggested that as there was no evidence that these so-called encroachments had ever been set aside, they must be treated as acts of ownership and valuable assertions of title by the Raja.

But he seeks to strengthen his case, and there is force in his contention, by reference to the same Bengal Regulations of 1793 on which counsel relied for the proposition which their Lordships have rejected as not raised in the present case.

The argument is this. The Raja or Maharajah was before cession to or conquest by the East India Company—and the argument preferred conquest to cession—a sovereign power tributary to the Great Mogul, but otherwise in possession of sovereign rights. These three villages must have formed part of his territory and must be taken to have been at some very remote date granted by him to be held of himself by military service or military or police service : Therefore the ownership of the land was in him ; and when the Government in 1792 expressed its intention of settling

with the proprietors of the soil, this would mean that the Government would recognise him as proprietor of the whole area.

As already stated, there is force in this contention. But there is an opposite side. If the Raja was a sovereign, and his territory was conquered, it was conquered from him as a sovereign and not as a landowner, and it by no means follows that when, to use the Raja's own expression, "he was gradually reduced to a zamindar," it would be the intention of the Government to recognise him as landowner throughout the area of his sovereignty; and in particular when it came to lands held on military tenure by public officers, the Government might very reasonably desire that these officers should be responsible to it and be—to use the language already quoted in the judgment delivered by Lord Sumner—Government ghatwals created by the ruling power rather than Government ghatwals which at the time of the permanent settlement were to be included in a zamindari.

When to all this it is added that the legal status of a Raja as a tributary Prince is quite vague and uncertain, probably varying with the power and activity of the Emperor at the moment reigning at Delhi, that it is agreed that these digwars have existed from time immemorial and may be coeval with the Raja and may have been created or recognised by a sovereign power superior to both, it follows that this class of argument would merely land their Lordships in the region of speculation. The only safe course, therefore, is to see what actually has been written or done.

Much weight was attached by the High Court and by counsel for the respondent in their argument to the opinion of Mr. Millet in his report of 1842. He appears to have been acting as legal adviser to the Bengal Government and to have given a legal opinion upon certain materials submitted to him. He assumed certain facts for the purpose of his opinion, but his assumption only shows at best that there was at that time a general opinion among the Government officials, as there was when resumption proceedings were started in the present century, that in some shape or other the digwars were tenure holders under the Raja.

Mr. Millet's view (or the view of those who instructed Mr. Millet) is opposed to that of Captain Hannyngton and Colonel Dalton.

The other matters which were relied upon for the Raja were a return made in a mulki form in 1841, in which the then Raja included in his list of properties the villages in possession of the two digwars. There is no doubt that there are errors in this return, and the mere fact that it does not appear that the Government made a protest against it, does not come to much. Then there is the placing of these lands on the General Register of revenue-paying lands, called "the A register," after the Pargana of Shergarh was transferred into the district of Burdwan in 1871. On what grounds the Collector did this does not appear. That it would not come to the knowledge of the digwars seems pretty certain. The Collector, however, had no power to adjudicate upon title; and

this matter and the payment of small sums to the Raja in some land acquisition proceedings fall into the class of instances when the Government officials apparently took the opposite view to that which had been taken by Captain Hannyngton and the other earlier officers. They make some evidence against the Secretary of State but none against the other appellants.

More important perhaps is the action of the Government—though it proved abortive—in taking steps to effect a resumption of these lands as between themselves and the Raja in the years between 1904 and 1908. But except that these are more elaborate and solemn proceedings, the same observations apply to them as to other official proceedings of late date.

Against the expression of the opinion by Government officials upon which the respondent relies may be set the comparatively early opinion of Captain Hannyngton and that of Colonel Dalton.

There is no evidence except the encroachment censured by Captain Hannyngton of any act of ownership or suzerainty on the part of the Raja. He has not taken the waste land of the mouzahs. He did not choose members of the families to be the digwars, nor did he approve the choice, except during the period when he was made daroga or head police officer.

If there was substantial evidence that the possession of the property had been in accordance with the respondent's contention, the explanations which his counsel have offered in respect of the sarsikan papers and the lot bundi papers might be accepted.

But the contrary has been the case. The existence of practicable mines of coal has been known since at least 1860, when as the respondent himself says in his pleading that the minerals under the village of Garh Parira were let by digwars to Mr. Erskine. There have been further leases and assignments of leases and workings in at least one of the villages off and on from that time since. A claim was made by the respondent in 1907, but he did not follow it up till he brought the present proceedings in September, 1914. Presumption should not be made against but in favour of the existing state of things.

Their Lordships are therefore of opinion as indeed were both the Courts in India, that in the ordinary sense of the word these villages were not within the zamindari of the respondent, or, to put it in another way, both Courts held that they were neither malguzari nor chowkidar chakran.

The High Court however—and this is the third point to be discussed—decided in his favour upon the theory that they were thanadari lands. Whether it is right as a matter of terminology to describe thanadari lands as being within the zamindari or outside need not be here discussed.

No doubt the holders of thanadari land stand in a certain position to the contiguous zamindar. If the lands are resumed, they are to be settled with the zamindar; and it may be that they may even be described as settled with the zamindar in a certain sense, and that there is a sort of superiority in the

zamindar which might entitle him to the surface of the land in case of escheat. Whether this would give him a claim to the minerals is a further question. But for the purposes of this case their Lordships will assume that such things are possible.

But if so, the respondent is in the same difficulty in dealing with the actual facts. If the minerals should be his because they are under thanadari lands, he has been as already pointed out, backward in asserting his rights.

However, in the view of the High Court these are thanadari lands, and their Lordships must deal with this view. They got little help in this respect from counsel for the respondent who preferred the suggestion that they were "like thanadari lands."

At first sight the view of the High Court appears contrary to the regulations.

The regulation of 7th December, 1792, is as follows :—

"First. The police of this country is in future to be considered under the exclusive charge of the officers of Government who may be specially appointed to that trust. The landholders and farmers of land, who keep up establishments of Tannadars and police officers for the preservation of the peace, are accordingly required to discharge them, and all landholders and farmers of land are prohibited entertaining such establishments in future." (Colebrooke, p. 168.)

And Section 8, sub-section 4 of Regulation 1 of 1793 :—

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

But the learned Judges of the High Court took the view that thanadari lands though made resumable, were not always resumed. This view is a difficult one to support in the face of the observations of this Board in the cases of *Raja Lelumund Sing Bahudoor v. The Bengal Government* (6 Moore's I.A., pp. 114-15), *Joykishen Mookerjee v. Collector of East Burdwan* (10 Moore's I.A., p. 44), and *Ranjit Singh v. Kalidasi Debi* (44 I.A., p. 122).

But a further difficulty is created by the documents in this particular case.

Mr. Leslie, the Collector, reporting in August, 1793, says that at the making of the decennial settlement in his district, no allowance was made for police officers to any of the zamindars except the Pachete Raja who got a deduction from his revenue of R.1662 for the maintenance of thanadars. Mr. Leslie proceeds to say that

he has directed the Raja to discharge the thanadars employed by him at the end of the present month and to pay to the revenue R.1662, which it is known he did pay. The sum is slightly differently stated by Lala-Kanji as R.1600.

If these lands were thanadari, why have they not been long ago resumed? If they had been resumed, Government would have acquired an increase of revenue from the Raja, and the Raja would have been able to draw rent from the land.

As their Lordships have already observed in dealing with the earlier part of the case, the long established usage and possession is not reconcilable with the theory that these are thanadari lands.

In considering the effect of the kabuliat the principles of the decision in the *Duke of Beaufort v. The Mayor, Aldermen and Burgesses of Swansea* (3 Exchequer, p. 413, decided in 1894), fortified by the observations in the judgments of this Board delivered by the Earl of Halsbury in *Van Diemens Land Co. v. Table Cape Marine Board* (1906 A.C., p. 92), and by the Lord Atkinson in *Watcham v. Attorney-General of East Africa Protectorate* (1919 A.C., p. 533), may be applied, viz., that should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage.

The result is that, in the opinion of their Lordships, these lands are not thanadari lands, and the District Judge was right on the first point to be decided, viz., whether these mouzahs were or were not within the Raja's zamindari. Having arrived at this conclusion their Lordships deem it unnecessary and inadvisable to pronounce upon the other two defences raised by the several appellants. The question whether mines and minerals belonged to landowners or to the Government is a far-reaching one, on which they would be unwilling to embark without having the fullest assistance of counsel.

In a case which came before this Board several years ago, the *Imperial Japanese Government v. the P. & O. Steam Navigation Company* (1895 A.C., p. 644), two points of great public importance were raised by the decision of the Court under appeal, and their Lordships having come to the conclusion that they must advise His Majesty to reverse the decision of the Court below on the first ground, abstained from expressing any opinion on the second ground, while they carefully explained that in so doing they were not to be held to have given any authority thereby to that part of the decision which they did not touch. Their Lordships would desire to be understood to be acting in the same way in the present case.

The respondent has failed to prove that he has any right to the minerals under these three villages, and the decision of the High Court must be reversed and that of the District Judge restored. This is all that their Lordships have to do. They have not to determine as between the two sets of appellants which is entitled to the mines, nor who is entitled to them.

The appeals will be allowed with costs here and below for both sets of appellants ; and unfortunately provision must be made for the costs of the abortive hearing in December, 1924. On that occasion, owing to the misconduct of the solicitor then acting for the respondent, he was not represented ; and it was not till after their Lordships had heard the appellants' counsel for several days and the arguments had been concluded, that it was discovered that the absence of counsel for the respondent at their Lordships' bar was due to the misconduct of his solicitor.

The case has accordingly been set down again and heard anew. As it was due to no fault of the appellants that the respondent was not represented at the first hearing, they must have the costs of their attendance at that hearing. But their Lordships think that the respondent need not be charged with the costs occasioned by his motion to restore his case to the paper, and that in respect of this motion which was heard on two occasions, each party should bear his own costs. Their Lordships would humbly advise His Majesty accordingly.



In the Privy Council.

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THE SECRETARY OF STATE FOR INDIA  
IN COUNCIL

<sup>v.</sup>  
RAJA JYOTI PRASHAD SINGH DEO BAHADUR  
AND OTHERS.

THE NEW BIRBHUM COAL COMPANY, LIMITED,  
AND ANOTHER

<sup>v.</sup>  
RAJA JYOTI PRASHAD SINGH DEO BAHADUR  
AND OTHERS.

*(Consolidated Appeals.)*

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DELIVERED BY LORD PHILLIMORE.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.  
1926.