

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Wise and others v. Bhoobun Moyee Debia and another, from Bengal; delivered 29th March, 1865.*

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Present at the hearing of the first Appeal, on the 23rd, 24th, and 26th March, 1863:

LORD KINGSDOWN.

SIR JOHN TAYLOR COLERIDGE.

SIR EDWARD RYAN.

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Present at the hearing of the second Appeal, on the 1st and 2nd March, 1865:

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

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SIR LAWRENCE PEEL and SIR JAMES W. COLVILLE were present on both Appeals.

IN the month of December 1833, a Zemindary called Tuppah Cooreekhuy, in the Collectorate of Zillah Mymensingh, was put up for sale by public auction to satisfy arrears of Government Revenue under Regulation 11 of 1822.

It was purchased by or on behalf of Bhoobanny Acharjee Chowdry, and it is not disputed that the purchaser acquired whatever rights in the Zemindary belonged to the Zemindar at the time of the Decennial or Perpetual Settlement. He was entitled to the immediate possession of such lands as at the time of the sale were in possession of the Zemindar, and he had a right under the Revenue Sale Law, to set aside by suit all subtenures created since the Decennial Settlement by the Zemindar, or any of his ancestors.

Within this Zemindary were certain mouzahs,

which, or portions of which, are the subject of the two suits now in appeal. These suits relate to different parts of the same property, are between the same parties, depend on the same evidence, and are substantially one suit.

The mouzahs in question were alleged by persons now represented by the Appellants to form a shikmee talook created before the decennial settlement held of the Zemindar by mocurruree tenure, *i. e.*, at a fixed rent, not liable to alteration.

The purchaser, on the other hand, whose interests are now represented by the Respondents, insisted that these mouzahs were part of the Zemindary, and were held khas by the Zemindar at the time of the sale, and that the purchaser, therefore, became entitled to them. Possession of the Zemindary was ordered to be delivered to the purchaser, and his agent was put into possession of the lands in question as part of the Zemindary. His possession, however, was disputed on the grounds already stated by the persons claiming as Talookdars, who insisted that they were in possession of the lands in that character at the time of the sale. After much litigation, the Sudder Court was of opinion that the Talookdars had been in possession at the period in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession.

Under this order the persons claiming as Talookdars were put into possession of part of the lands in dispute in December 1840, and of the rest early in 1841, as appears by certain dakhulnamahs in evidence in this case.

This decision left the right undetermined, and settled only the question of possession, and it became necessary for the purchaser of the Zemindary, if he meant to institute any suit for the recovery of the lands, to institute it within twelve years from this time. But about this time, that is, in the year 1840 or 1841, Chowdry the purchaser died, leaving a widow, and the widow and the mother of Chowdry became his representatives. The widow, as she alleges, under a will made by her husband, had power to adopt, and adopted, a son, and neither the validity of the will nor the fact of adoption is in controversy in this case. She instituted a suit in 1853 for the recovery of this property, which failed

upon merely technical grounds for want of a sufficient stamp on the proceedings, or for some such reason. In 1855 the first suit now under appeal was commenced. As regards any bar arising from the Statute of Limitations, this suit must be treated as if it had begun in 1853.

The Appellants, in their pleadings, insist that the period from which the Respondents' obligation to sue commenced is to be calculated from the time of the purchase in 1833, and they, therefore, insist on the Regulation for the Limitation of Actions in bar of the present claim; but they do not by these pleadings insist on such bar if the period is to be calculated from the time when the possession was taken from the purchaser in 1840 and 1841; and we are clearly of opinion that this is the period from which the time must be computed. The death of the purchaser and the minority of the heir would clearly take the case in that view out of the Statute of Limitations. The rights of the parties, therefore, must be decided on the merits.

The real question, which is one of some difficulty, is whether the lands in question were constituted a talook previously to the Decennial Settlement in 1790-91, by the then Zemindar, as alleged by the Appellants, or whether they were at that time held khas by the Zemindar as part of his Zemindary, as alleged by the Respondents.

The title set up by the Appellants is this: they allege that the lands in question were granted by Ghous Khan, the then Zemindar, by two Sunnuds, one dated in 1779, and the other dated in 1784, at a fixed rent to his sister Amina Bebee as Talookdar, in mududmash, or for her maintenance at a fixed rent.

If these documents be genuine, there seems to be no reasonable doubt about the Appellants' right.

The Judge in the Zillah Court was of opinion that they are genuine, and he therefore dismissed the Respondent's suit.

The Sudder Court, on Appeal, was of a different opinion, and made a Decree in favour of the Respondents.

The first of these suits was heard before us, on Appeal, in February 1863. It appeared that the second suit was coming on for hearing, and we were



of opinion that it might be material to see some of the original documents, and also to consider other evidence not at that time before us, and we therefore directed that the decision on the first suit should be delayed till the second had been heard, and that the Sunnuds relied on by the Appellants should be sent over to this country.

Some additional evidence has been printed, and the papers purporting to be the original Sunnuds have been sent over, and the question now to be determined is whether, upon the whole, the Appellants have sufficiently established their case.

It is not disputed by the Appellants that these lands, being situate within the Zemindary, purchased by the Respondents are *prima facie* to be considered as part of the Zemindary, and that it is for them, the Appellants, who insist on the separation of these lands from the general lands of the Zemindary, and on their settlement as a shikmee talook, to establish their title.

To prove their case they produce papers purporting to be the two Sunnuds to which we have already referred.

Nothing has been pointed out to us in the appearance of these papers throwing any suspicion upon them, nor have we been able to discover anything which does so.

We have three Deeds of Sale, by Amina Beebee, and persons purchasing from her, professing to convey different portions of the lands as parts of a Talook. One of these deeds is dated in 1808, and another in 1821.

There are also produced two other Sunnuds, one purporting to be dated in 1813, by Asheena Bebee, the then Zemindar, to Aymun Beebee (a purchaser, from Amina), and another in 1815 by Ibrahim Khan, the then Zemindar, to Khosh Kuddum, a purchaser of a part of this Talook from Aymun Beebee. These Sunnuds purport to recognize and confirm the title of the purchasers.

In proof that Amina Beebee had possession of these lands as a Talook, in conformity with the Sunnuds granted, we have Chittahs or measurement papers, signed by Ameens employed on behalf of the Zemindar to measure the lands of the Zemindary in the years 1787, 1788, 1789, 1790, 1791, and

1792. These Chittahs describe the lands as the Talook of Amina Beebee.

We have further the detailed accounts of the Agent in receipt of the rents of these lands in the year 1790, describing them as the Talook of Amina Beebee.

There are other measurement papers or chittas affording the same evidence in the years 1807 and 1816.

There are then produced dakhilas or receipts for rent on behalf of the Zemindar for the Talook of Amina Beebee in the years 1780, 1805, 1817, 1820, and 1823.

Several other documents are in evidence showing, if they be genuine, the same fact that at an early date and before the Decennial Settlement a Shikmee Talook had been constituted in favour of Amina Beebee at a mocurruree jumma, and that the lands included in it were held by her or persons claiming under her up to the time or nearly up to the time of the sale of the Zemindary in 1833.

It was established by the order of the Court restoring the Appellants to the lands in the year 1840, that they were in possession of them at the time of the sale, for the order was made entirely upon that ground and decided nothing as to the title.

Against this great body of evidence there is really nothing which can be called evidence on the part of the Respondents, but they allege and undertake to show that all the documents relied on by the Appellants are forgeries.

A long experience in Indian Appeals has no doubt satisfied us that the presumption in favour of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favour of forgery, and when a long series of documents is produced showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all-important fact of such possession existing at the time of the commencement of the Respondents' title by purchase in 1833, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

Still circumstances may be sufficiently strong for this purpose, and they have been held to be so in this case by the Judges of the Sudder.

We will remark upon the principal of these circumstances, but it is material to consider them with reference to the case set up by the Respondents.

The case set up by him is shortly and accurately stated in the Judgment of the Sudder Court in these terms :—

“The general allegation of the Plaintiff is that Ibrahim Khan, the proprietor of the Zemindary, up to the time of the revenue sale, fraudulently set up this Talook for his own benefit, for which purpose he has found it convenient to use the names of his relations and connections, Aymun Beebee (one of the alleged purchasers from Amina) being his wife, and Amina Beebee, the professed Talookdar of the Sunnuds of 1186 (1779) and 1191 (1784), being his aunt and the sister of the then Zemindar Ghous Khan.”

If this case be true no doubt the Sunnuds purporting to create this Talook half a century before the sale, and the various documents long before the sale referring to it, must be forgeries. On the other hand, if these documents be genuine, then the Respondent's case must be untrue.

No direct evidence is offered against the genuineness of the Sunnuds, but it is said that they cannot have been made at the time when they bear date, for several reasons, of which these are the principal :—

First it is said that the Talook is not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands are included in the Decennial Settlement, as part of the Zemindary for which the Jumma is assessed on the Zemindar.

We have not before us the particulars of these Settlements, but assuming the statements to be accurate, the fact does not seem to afford any strong inference against the existence of the Talook.

If it had been an independent Talook it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the Talookdar, but being only a Shikmee Talook paying rent to the Zemindar, the Talookdars were not required to mention it nor was it necessary for the Zemindar to do so.

It is then said that if the Sunnuds and the various instruments by which conveyances of portions of the Talook are alleged to have been subsequently made had been really executed, those instruments, or at all events some of them, would have been registered, and that none of them have in fact been registered.



No regulations have been pointed out to us by which the registration of these Sunnuds or of this Talook (created, if at all, before the Decennial Settlement) was made necessary; and though the observations of the Judges of the Sudder "that the deeds want the authentication which registration would have afforded," and "that the Talook wants the corroboration which registration and its mention in the quinquennial papers would have afforded," be perfectly well founded and entitled to weight, it must be considered whether, without this evidence, the proof be not sufficient.

A circumstance more strongly relied on by the Respondents' Counsel was this, that these Sunnuds were never produced nor mentioned by the Appellants on several occasions on which, it is said, if they had really been in existence at that time, they ought to have been produced, and certainly would have been produced.

First, it is said that a litigation went on from the time of the sale in 1833 up to the year 1840 with respect to the possession of these lands, and that in the course of that suit no allusion was made to these documents. But the answer given to this objection much diminishes its force, viz., that the question then before the Court was not one of title but of possession, and that it was only on the question of title, as to which the Court had no power in that suit to pronounce any decision, that the production of the original Sunnuds was of importance. Though these Sunnuds were not produced, the title under them was asserted, and the Sunnud of confirmation of 1813 from Asheena Beebee to Aymun Beebee seems to have been actually produced on the 2nd July, 1839.

Another objection which was much pressed at our bar was this:—

These Sunnuds describe the lands as Lakhiraj and Muddudmash, whereas it is said that they were not alleged to be Lakhiraj at the time of the Decennial Settlement, but were included in the lands subject to assessment, and that it was not till a much later period (not very long before the sale) that they were claimed to be Lakhiraj, and that these instruments must therefore have been fabricated after that claim had been set up.

Now, the force of this argument depends on the allegation that these lands were not claimed or pre-

tended by the then Zemindar to be Lakhiraj before the Settlement. But of this we find no sufficient evidence. It is well known that before that time, and especially about that time, a great number of fictitious claims to exemption from assessment of lands as Lakhiraj were set up by different proprietors, and although it was held in what is called the Alluvion suit that the lands were not in fact Lakhiraj, and that the firman of the Sultan purporting to make them so had been forged by Ibrahim Khan, yet that fact by no means shows that at the dates of these Sunnuds the then Zemindar did not claim or pretend them to be so. Whether they were or not included in the assessment was a question depending on the description contained in the Decennial Settlement; and though the Government officer was satisfied after much inquiry that they were in fact covered by the assessment, such descriptions are generally vague and uncertain, and the difficulty of identifying lands is greatly increased in a long lapse of years when it appears that the lands adjoin the great River Burhampootee, and are subject to be submerged and have their boundaries changed by not unfrequent overflows or changes in the course of the stream.

The last objection which we think it necessary to notice, and to which we confess we are inclined to attribute the most weight, is that, in 1836, Mr. Glass, the partner, as we understand it, with Mr. Wise, one of the present Appellants, insisted upon a title to a portion of these lands under a lease alleged to have been granted to him by Ibrahim Khan, the late Zemindar, whereas Mr. Wise now claims under a purchase subsequently made by him and Glass from Aymun Beebee in 1840, and insists that Ibrahim Khan was never in possession of the lands, and that they were not part of the Zemindary, except as being part of a dependent talook.

Undoubtedly these two titles are inconsistent, but it is not impossible that Mr. Glass might first procure a lease from Ibrahim, supposing him to be the owner, and might afterwards, when the title of the Talookdars was insisted on and seemed likely to succeed, make a purchase from them, in order that he might, under any circumstances, be secure in the enjoyment of his indigo plantations.

The probability of this being so is strengthened by the statement in the Petition of Glass to the



Sudder Court in 1838, in which he alleges "that he had from a long time been making indigo cultivation on the lands after taking izara pottahs of them from the proprietors, *i. e.*, Talookdars and Zemindars."

We are very far from thinking that the various objections thus made to the title of the Talookdars, and so ably urged at our bar, are without force. But against them we must set the evidence produced by the Appellants in confirmation of their title.

Now, any evidence which proves the existence of this Talook at a period antecedent to that at which the Respondents allege it to have been falsely set up by Ibrahim Khan tends more or less strongly to disprove his case. The Appellants' evidence upon that point seems to us very strong.

In 1819 there is a proceeding in the Appeal Court of Jehangur Nuggur, in which the question was, whether certain lands belonged to this Talook or were part of the khas lands of the Zemindar.

In 1824 we have a petition from a person complaining that Khosh Khuddum had agreed to sell to him a portion of his share of the Talook, but had refused to perform his contract.

In 1833 we find an order made in a suit which had been instituted in 1831 by Aymun Bebee against her husband Ibrahim Khan, by which a part of the lands of this Talook was ordered to be sold to satisfy fees due to the pleaders.

In 1843 we find it stated upon the result of an inquiry then directed by the Civil Court of Mymensingh, that when the Talook was about to be sold the Plaintiff's Mooktiar deposited in the Treasury of the Collectorate the sum demanded.

These proceedings are very important, not only because they show that in 1833 a portion of this Talook was dealt with by the Court as the property of Aymun Bebee, but because it makes the supposed collusion between Ibrahim Khan and his wife Aymun, which is essential to the Respondents' case, in the highest degree improbable.

That the Sunnuds in question have not been fabricated since the institution of these suits is clear from the proceedings in the suit with the Government as to the alluvion lands, which are of great importance.

It appears that some time before 1843 a tract of land which had been covered by the waters of the Burhampooter was left dry by some change in the stream. This tract was within the limits of Cooreekhuy. If these were new derelict lands they would be subject to assessment to the Government; but it was insisted by the purchaser of the Zemindary and the Talookdars that they were lands which had originally been part of the Zemindary, had been submerged and again left dry; the Zemindars insisting that the lands were part of the Zemindary, the Talookdars insisting that they were a part of their Talook.

After some proceedings in other Courts, which failed from some irregularity, a proceeding was instituted by the Government in the office of the Collector of Mymensingh, under Regulation XI of 1819, for the purpose of determining the right of the Government. To this proceeding Ibrahim Khan, the present Respondent, Bhoobun Debia, and the Appellants Aymun Bebee and Khosh Kuddum were parties.

A great deal of evidence was gone into, and amongst other documents the Sunnud of 1779 now relied on, and some of the chittas and other papers produced by the Appellants in this suit were put in by them, and the same case which they now set up was stated and insisted upon.

Whether the other Sunnuds now produced by the Appellants, and all the other papers were produced, we cannot clearly make out.

The Sunnud of 1779 was the subject of investigation at that time, and it appears by the order made in the proceeding, and which dismissed the claim of the Government, that on the 5th of April, 1845, in order to attest, as it is called (meaning, no doubt, to test the genuineness of) the aforesaid Sunnud of 1779 (which seems to have been disputed), the Record Keeper was directed to produce any other papers which might tend to show the truth, and the witnesses named by the Defendants to prove their case were summoned.

It is then stated, that subsequent thereto the Record Keeper filed a Kyfeut stating that along with the papers of Natoora Mehal of Tuppah Cooreekhuy has been found a Sunnud sealed by Mahomed Ghous, and signed by him in the Persian

character, and that the seal and Persian character thereon tally with the Persian character and seal on the Sunnud filed in this case. It is then stated that Aymun Bebee produced some chittas and a terij and Jumabundy, and produced witnesses who deposed that Ameena Bebee had in the year (worm-eaten) acquired a Sunnud of the Talook of these mouzahs from Mahomed Gous, Zemindar, had held possession since that year, and sold the same, and that in proportion to the said shares Khosh Kuddum, Aymun Bebee, and Messrs. Wise and Glass, paid the rents of the Talook and held possession.

Now, it is said that the only question in that case was as to the right of the Commissioner to assess the lands as to which all the Defendants had a common interest, and that as co-defendants the Respondents could not have disputed the evidence of the Appellants if they had had any interest to do so.

This may be true, although it is not easy to perceive why any inquiry into the truth of the Talookdar's title, or the genuineness of the documents produced in support of it, should have been made unless some contest on the subject had taken place between the Zemindars and the Talookdars. But, at least, at this time (in 1845), the Respondents having been turned out of possession in 1840 on the grounds which we have stated, had full notice of the title set up by the Appellants and of the evidence by which it was to be supported, and were bound to bring forward their claim in reasonable time. Yet these suits are not instituted for several years; and then, after every opportunity had been afforded of giving evidence to disprove these documents, no direct testimony against them is produced, and many of the witnesses who were examined in 1845 may very probably be dead or not forthcoming. We have already expressed our opinion that for the reasons which we have stated the Respondents' claim is not barred by the Statute of Limitations, but much allowance must be made for the difficulties which they have imposed on the Appellants by so long delaying a suit in a country where documentary evidence is peculiarly liable to destruction or effacement, as appears by the papers in this case.

Upon the whole we must humbly advise Her Majesty to reverse the Decrees complained of, and to restore the Decrees of the Sudder Ameen, and we



think that all the costs of these Suits, subsequent to the last-mentioned Decrees, including the costs of these Appeals, must be paid by the Respondents. We have thought it right to go at so much length into the circumstances of the case, because we are at all times extremely reluctant to reverse a unanimous Judgment of the Court below on a question of facts, and because it is due to those learned Judges to show that we have not done so without having carefully considered and weighed the evidence.

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