

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Burdacant Roy v. Baboo Chunder Coomar Roy and others from the High Court of Judicature at Fort William in Bengal: delivered 10th December, 1868.*

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Present:

LORD CHELMSFORD.

SIR JAMES WILLIAM COLVILLE.

JUDGE OF THE HIGH COURT OF ADMIRALTY.

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SIR LAWRENCE PEEL.

THEIR Lordships would not have departed from their usual course of not disturbing the concurrent Judgments of the Courts below on a question of fact, if the facts as found were in truth decisive of the real issue between the parties.

That issue is whether the lands in dispute belong to the zemindary of the Appellant, or to the estate of the Respondents.

The Appellant is in possession under the Magistrate's order; and it, therefore, lay upon the Respondents, who were the Plaintiffs in the suit, to oust him from that possession by showing a better title to the property claimed. It is an admitted fact that at the date of the perpetual settlement both estates were settled for with the Defendant's ancestor either as one zemindary or as two separate revenue-paying estates. It is also clear that the Bheel from which these lands have been gained was part of that zemindary. The resumption suit proves that no right to re-assess lands which might be gained from the Bheel remained in the Government.

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue, and Pergunnah Dattia, which includes the village of Jhanpagram, was acquired by the Paul Choudhrys, through whom the Plaintiffs claim.

It is also an admitted fact that the Julkur and every right which could be exercised by the Zemindar while the land was covered with water (what the Judge calls the aqueous assets) remained in the Appellant or those whom he represents. In these circumstances it lay upon the Respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of Jhanpagram, any soil which might be recovered from the Bheel. It has been argued at the bar that this alleged title of the Plaintiffs must be inferred from the conformation of the ground or the name of the village. But if any presumptions, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact that after the sale the Julkur of the Bheel remained in the Appellant's ancestor. It has been argued that the right in the Julkur may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the Appellant's ancestor, and it lay upon the Plaintiffs, the Respondents, to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue, settled in the cause, viz. whether the Plaintiffs were in possession of the lands through their tenants, and had been ousted by the Order in the Act IV. case. That finding does not touch the material part of the issue, viz. whether the land in dispute appertains to the Plaintiffs' mouzah Jhanpa. Even if it were proved that some jolibila land was annexed to the village, and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the Bheel (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the bar went the full length of contending that the whole site of the Bheel, if cleared of water and made capable of cultivation, would fall into and become part of the Respondents' village, Jhanpagram, though whilst it was covered with water it remained under the dominion of the Appellant. For such a contention their Lordships can see no ground. The decision of the Fouzdary Courts as to the point of possession, was final. The question in this suit was, whether the Plaintiffs, by showing a

better title than the Defendant, could recover possession from them. In their Lordships' judgment the original title to this land was in the Appellant's ancestors, and it has not been shown that they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original settlement of these properties, and of what passed by the Revenue sale, this might have been done. Their Lordships therefore, in the peculiar circumstances of this case, though they think that the Appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly; will also recommend that Her Majesty's order be made without prejudice to the right of the Respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the Paul Choudrys, from whom the Respondents derive their title by the Revenue sale.

