

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Golam Ally v. Kalikisto Tagore, and another, from the High Court of Judicature at Fort William in Bengal; delivered 20th June 1872.

Present:

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.

SIR LAWRENCE PEEL.

[In this case the counsel for the Appellant, on the hearing of the appeal, which was from a decree of the High Court at Calcutta made on special appeal, applied to their Lordships, if they should think it necessary for the due administration of justice, to recommend Her Majesty to grant to the Appellant, *nunc pro tunc*, special leave to appeal from the decree of the Inferior Court in India, on the facts.

Upon this preliminary application their Lordships delivered the following judgment.]

THEIR Lordships have considered Mr. Doyne's application, and the conclusion they have come to is this, that, for the reasons which I am about to state, they would not be justified in the present case in giving special leave to include in this appeal an appeal against the decisions of the two Judges who have dealt with the questions of fact in the cause,—the Deputy Collector, and the Judge to whom there was an immediate appeal from him.

They have looked at the petition of appeal to Her Majesty and it is perfectly clear that

appeal is preferred simply against the order of the High Court on the special appeal. It is undoubtedly true that it has, recently at least, been the practice to allow the whole case to be opened upon questions of fact as well as questions of law, although the High Court, the appeal to it having been merely a special appeal, has been able to deal only with the latter. The mode of accomplishing this, if the party thinks it necessary for the justice of his case, is to apply to their Lordships in due time for special leave to appeal against the decisions of the subordinate Courts; an application to be granted, not as of course, but on sufficient grounds. No such application has been made in the present case; but it is stated by Mr. Doyne that the Board has been in the habit of granting this privilege at the hearing *nunc pro tunc*, if they thought the justice of the case required it. We are not aware of, nor is Mr. Doyne able to refer us to, any case in which this was done, nor does our recollection supply one; although, if their Lordships saw clearly that the justice of the case could not be reached without allowing such an application, they do not say that they would not grant it under any circumstances, or upon any terms. They are of opinion that nothing but very special circumstances ought to justify the granting of leave to appeal against the other decrees at so late a period as the hearing of the appeal; and that no such circumstances exist in the present case. The question is one of those which it is extremely difficult for a tribunal like this to deal with,—the simple question of parcel or not parcel, whether a certain portion of chur land is included in a particular tenure or remained liable to assessment for rent. It is emphatically one of those questions which are best decided, and can only be satisfactorily decided, upon the spot; and in re-opening the decisions

on the facts in the present case we should be running counter to that general rule which governs the proceedings of their Lordships, namely, that where there have been two concurrent findings upon questions of fact this tribunal will not, except upon very special grounds, disturb them. Therefore their Lordships think they would not be justified in granting this application. Of course they are ready to hear whatever may be argued further upon the question whether the decision of the High Court upon the special appeal was correct or not, and if it were not correct, what order that Court ought to have made on the grounds before it.

[Counsel proceeded further to address their Lordships, who ultimately pronounced the following judgment.]

This litigation began in the Court of the Deputy Collector, in consequence of a notice by the Respondent served upon the Appellant with a view to the assessment of rent upon land which had been measured, and was stated to contain 10 drones and some odd kanees. The land was the land indicated in the first map to which their Lordships were referred, being Map Number 18. The Appellant resisted the claim of the Respondent upon the ground—at least this is the only ground which it is now necessary to consider—that the land in question, or a portion of it, was included in the durputnee lease, or the putnee lease which had been granted to him by the Respondent at a fixed rent. In the course of the litigation, which it is not necessary to pursue particularly, it became an admitted fact that all the land from the east of the kole on the map was land which the Appellant, the Defendant in the suit, admitted was liable to be assessed, but that the land to the

west of the kole was still, as he contended, included within his putnee tenure, and was therefore incapable of any further assessment. In that state of things one would have supposed, though it is not necessary for their Lordships' decision to rule that it was so, that the burden of proof lay rather upon the Defendant than upon the Plaintiff, the former relying upon his title as zemindar to receive rent for the land of which the other was in occupation, and that claim being met by the allegation that the land in question was protected from further assessment by being included in a perpetual tenure at a fixed rent. However that may be, the issue upon which the parties went to trial upon the last remand was whether that land which was situated on the western side of the kole, and which, by one of the documents in the Record, appears to have comprised little more than six drones of land, was or was not included within the durputnee tenure. Now, what was that durputnee tenure? It may be described as such, **although the title of the Appellant to it rested upon two distinct grants, one made by the Respondent in the character of zemindar, the other in the character of a putneedar; and it is not very clear whether these grants were each a grant of an undivided 8 anna share in the same subject, or whether they were grants of different subjects.** It is immaterial, on the present appeal, to express any opinion on that point; because it is perfectly clear, that certain land, described as lukht kole chur lands of Mouzah Bowsia, was excepted out of the tenure granted, and that the question in dispute between the parties was ultimately reduced to the issue whether the land west of the kole was such lukht kole chur land of the Mouzah, and therefore excepted from the durputnee tenure, or whether it was included in it. That case when remanded was tried again, first by the Deputy Collector, and

afterwards on appeal by the Judge, and both Courts, proceeding upon a local investigation, came to the conclusion that the land in question was within the excepted land, and that it did not fall within the durputnee tenure of the Appellant.

The decision which their Lordships pronounced upon Mr. Doyne's application in an early stage of the hearing precludes any consideration of the propriety of this finding upon the mere question of fact; and they have now only to decide whether the High Court, in dealing with the special appeal brought before it after these last decisions of the Lower Courts, was correct or not.

Now the grounds of special appeal are stated at page 322 of the Record. They are summarised by the learned judges at page 323. The summary does not, perhaps, entirely agree with the grounds filed, for the first is stated to be "That the chitta of 1261 was not receivable as evidence; 2ndly, that even if receivable it can be treated only as corroborative evidence;" whereas in the grounds of special appeal, as filed, it was rather that there was not evidence sufficient to support the judgment that the land in dispute did not appertain to the putnee; and that, admitting for argument's sake, that the chitta filed by the Plaintiff was genuine the dags relied upon did not show that the disputed chur was excluded from the putnee.

The High Court, in dealing with what they understood to be the special grounds of appeal, put a construction upon the lease in these words: Mr. Justice Bayley said, "Again 11 drones 9 kanees are stated in the lease as the area of Geirlaik, unculturable, *i.e.* (sandy chur), and if we look to the terms of the lease we find that the contract was that a certain quantity of chur land was to go with the lease, but if there were any deficit by diluvion,

“ the deficit was to be made up from the accretion,
 “ and that every further accretion beside that was
 “ to be considered as being beyond the De-
 “ fendant’s lease. Therefore when the Lower
 “ Appellate Court refers to the area of the lands
 “ it only refers to it as one item of evidence
 “ on which the case is decided in Plaintiff’s
 “ favour. I cannot think that this objection is one
 “ which in special appeals affects the case on its
 “ merits.” The inference which their Lordships
 would draw from that passage of the judgment is
 this, that the High Court, putting upon the lease
 and the grants the construction most favourable
 to the Appellant,—a construction which it may be
 admitted for the sake of argument was not con-
 sistent with the construction upon which the
 Lower Courts appear to have acted,—still thought
 that the chitta being admissible as corroborative
 evidence, and there being a considerable body of
 other evidence in the cause, there was a sufficiency
 of evidence upon which the Courts below might
 properly have decided in the Plaintiff’s favour.

Their Lordships, as I said before, are merely, on
 this occasion, in the position of the High Court.
 They are by no means prepared to say that
 if they had to construe the terms of the grant
 for the first time for themselves, they should
 put the construction which the High Court has
 put upon it. The documents are ambiguous,
 and there are considerable difficulties, they think,
 in the way of that construction. It might well
 be held that the stipulation which has been
 so much relied upon might import only that
 in case there was a loss by diluvion that that loss
 should be afterwards made up by any accretion
 that might take place, but they do not think it ne-
 cessary for them to say to what construction, if the
 question was really open before them, they would
 finally adhere. It is sufficient for them to say
 that they agree with the High Court in thinking
 that the chitta was fairly admissible as corrobora-

tive evidence; that it tended very much to negative the case which appears to have been put forward as the case of the Appellant, and which it was almost necessary for him to put, namely, that the land which he claimed, as included in his tenure, had been included in the tenure of the Modafat, and that it is impossible to say that the High Court was wrong in coming to the conclusion that the grounds for special appeal had not been made out, or that there was no evidence upon which the Courts below might have properly decided in the Plaintiff's favour.

Their Lordships therefore, under these circumstances, can only humbly recommend to Her Majesty that this appeal be dismissed, with costs.

1870

1871

1872

1873

1874

1875