Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Beerchunder Jobraj v. *the Receiver of the Supreme Court of Calcutta from the High Court of Judicature at Calcutta; delivered 29th April*, 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is an appeal from a judgment and decree of the High Court at Fort William in Bengal, in a suit in which the Respondent, the Receiver of the Court representing the estate of Maharajah Shibkristo and others, successors of the late Maharajah Rajkristo was Plaintiff, and the late Maharajah of Tipperah the predecessor of the Appellant, was Defendant. The suit was brought to recover possession of certain mouzahs and portions of certain other mouzahs specified in the plaint together with mesne profits from the 32 Srabun, 1252, B.S., corresponding with the 15th August, 1845, to the 24th Assar, 1264, B.S. The Plaintiff claimed the property as part of Pergunnah Jaffarabad *alias* Lohogurh in his Zemindary of Pergunnah Gungamundle. On the other hand, the Defendant contended that it was situate in Pergunnah Meherkool part of his Zemindary of Chuklah Roshonabad, and he also contended that the Plaintiff's claim was barred by limitation. The Principal Sudder Ameen, who tried the case in the first instance, decided in favour of the Plaintiff in accordance with the report of an

Ameen who was deputed to make a local investigation in the case. The principal question was one of disputed boundary involving only matter of fact. The High Court upon appeal affirmed the decision of the Principal Sudder Ameen.

The rule of the Judicial Committee is not to disturb the concurrent decisions of two Lower Courts upon a question of fact unless it clearly appears that there has been a mis-trial affecting the merits, or some miscarriage of justice, or that the conclusion of the Lower Courts is very plainly erroneous. If there is one case more than another in which it would be dangerous to depart from that rule, it is one in which the dispute relates to the boundary between two estates, and in which the decisions of the two Courts are in accordance with the report of an Ameen, by whom a local investigation has been made.

In the present case the Ameen, who was occupied more than two months in making the local investigation, says :—

"It is established on investigation by me that the lands in litigation form part of Pergunnah Lohogurh, that the boundary between Pergunnah Meherkool and Pergunnah Lohogurh is the palm tree on the north of Choagong, north of which is Lohogurh, and south Meherkool, that *prior* to the Khas possession" (that is the possession taken by Government in the resumption suit), "the lands in litigation were held by the Zemindar of Gungamundle who also occupied the same *after* Khas possession, but it is the province of the judge to determine on reference to, and consideration of the documents, for what length of time, and whether he had during that time held all the mouzahs in suit or not."

The principal Sudder Ameen says :—

"It is satisfactorily established that the property in suit appertains to Pergunnah Lohogurh, being the rignt of the proprietor of the said pergunnah."

Again, he says :—

"I conclude that the present boundary between the independent raj of the Defendant and Lohogurh is represented by the double black line drawn by Mr. Roe in the survey map."

The High Court says :—

"On the merits which in some measure have had to be considered closely in deciding the point of limitation, we are of opinion that the Plaintiff has established his title in the disputed land, while we are equally of opinion that the Defendant has failed to establish his."

As to the question of boundary and of the

Plaintiff's title to the lands in dispute, so far from considering that the decisions of the lower Courts are erroneous, their Lordships, after a careful examination of the maps and of all the documents and evidence in the cause, concur so entirely in the findings of those Courts, that if they were now about to determine the question of fact for the first time they would have no hesitation in arriving at the same conclusion.

As to the question of limitation the Ameen in his report says :—

"Lastly, I have stated the result of the inquiry as to 'with whom was the possession prior to the date of ouster' as alleged by the Plaintiff so far as I have succeeded in the matter, which is to the following effect: That the lands under litigation were *prior* to their being held *Khas* under Regulation II of 1819 *in the possession* of the zemindars of Gungamundle, and that they held the same in farm can be openly maintained on the proofs and the testimony of the majority of witnesses over and above those cited by both parties. But it cannot be positively asserted that *after release from Khas possession* the *whole* of the lands in suit had been *continually* in the occupancy of the Plaintiff up to the date of the Act IV award, which is the alleged date of dispossession. The reasons are these, that out of the forementioned witnesses, some have spoken to the possession of the zemindar of Gungamundle having extended over one year, some two years, and some two or three years *after* the *Khas* possession. Others again have spoken to the possession of the Defendant, the Maharajah, ever since the date of release from *Khas* possession. Such inconsistency is, however, not quite unexpected, nor strange, inasmuch as all the facts relating to a period long or short time ago, are by no means equally remembered by all. In order to prove their respective possessions *during the said period*," (that is after the release from Khas possession) "both parties have filed certain decisions, but with reference to the same to hold either of the parties to have been in uninterrupted and continual possession of one and all of the mouzahs in suit, is to exceed my powers, nor am I satisfied therewith."

Further he says :—

"On reference to the Istahar issued from the Collectorate after the settlement as regards *Khas* possession, and filed by the Plaintiff so far it can be maintained that even *fter* release from *Khas* possession the zemindars of Gungamundle had held possession, but how long they had been in possession, and whether such possession extended over all the lands in litigation cannot be positively and indisputably ascertained. And the evidence of the witnesses cited on both sides which is given in support of the statements of the parties respectively citing them, is not in my opinion worthy of credit. As I do not think it essential on my part to take into consideration the defects or otherwise of, and to draw a comparison between all the documents filed by both parties, I abstain from making any remarks thereupon."

The Principal Sudder Ameen found that it was fully and clearly established that the disputed property always remained in the possession of the proprietors of Pergunnah Lohogurh from time immemorial, and that the latter were ousted in the year 1252 by the Defendant's father, under colour of the Act 4 award, dated the 15th August, 1845.

In support of that finding he relied, as he stated, upon, amongst other things, the evidence of the witnesses of the common and respectable class of people adduced by the Plaintiff, together with the exhibits put in by such witnesses, and he further stated that the Defendant could not show by any sufficient adverse evidence, that the property in dispute was formerly held by his ancestors.

Now the Principal Sudder Ameen was in a far better position than their Lordships, and even than the High Court, to form a correct estimate of the credibility of the witnesses examined in the cause.

The High Court were of opinion that, looking to the whole of the evidence, the Plaintiff was certainly in possession of the disputed lands until 1845, and they held that the Plaintiff was entitled to a deduction of five years for the time during which his nonsuited case was pending, and to the three subsequent years during which Dr. Roe's inquiries were in progress and undecided, and, consequently, that the suit commenced on the 17th July, 1857, was in time.

It was contended at the Bar that the judgments of the lower courts were based upon error in supposing that in the resumption proceedings the Defendant's father raised no objection to the fact of the Plaintiff's possession of twenty-one of the villages which he now claims, but objected only to two other villages, viz., Buckshnuggur and Rohimpore, which are not now in dispute, and also in supposing that, under the Istaher of the 5th December, 1843, possession of the mouzahs to which the resumption proceedings related, was released and given up to the ancestor of the Plaintiffs.

It is true that the Defendant set up in the resumption suit that the Detia Ail was the boundary between the two Zemindaries, and alleged that the Zemindary Pergunnah Gungamundle was to the west, and Pergunnah Meherkool in the Zemindary of Chuckla Roshonabad to the east of that Ail;

but it is clear that, notwithstanding that claim, he did not attempt in any way to prove that he was then in possession of any of the disputed mouzahs except Buckshnuggur and Rohimpore, or that they were part of his Zemindary Chuckla Roushunabad.

Mr. Bidwell, the Special Deputy-Collector, in his Roobokary of the 30th April, 1838, remarked :—

"Although the Zemindars of Chuckla Roushunabad, that is, Defendant, first party, in relation to Poornomutty and Bukshnuggur, has raised the plea that all the land of the said mouzah appertains to Pergunnah Meherkool, Tuppa Ootturballessur, his zemindary, and the zemindars of Pergunnah Gungamundle, Defendant, second party, have alleged that all the claimed land belongs to Poornomutty, and to their zemindary and settlement; but the pleas of those parties are not worthy of hearing; for, from the circumstances of the suit, from the evidence borne by the witnesses, and from the investigation and inspection of the locality by myself, it is shown that Mouzahs Poornomutty and Buxunugger, &c., and the mouzahs mentioned above, at the time of decennial settlement, were covered with thick jungles and wild beasts, and were not connected with Pergunnahs Meherkool, Gungamundle, Jaffirabad, Lohogurh, &c. At the time of settlement, the said lands have not undergone any settlement with any other pergunnah. After this, gradually, the lands of the said mouzahs, being formed into a chuck, were begun to be cultivated by both parties. Dispute between the Zemindars of Pergunnah Gungamundle arose, and is still continuing, for their possession.

"But that extent of land which has been newly cultivated, close to mouzahs appertaining to the Zemindary Pergunnah Gungamundle, the zemindars of the said pergunnah *possess* the same, by calling it as their said ancestral mouzah. On this account it appears that all the mouzahs, Poornomutty and Buxunuggur, Saroshpathor, Rohimpore, Nuzurmoorah, Kullumoorah, Baugasur, Kolanasur and Sonarjollah, which were not mentioned in the records of the quinquennial settlement of Pergunnah Meherkool and Jaffirabad, have been excluded from settlement.

"Defendant, second party, except a petition of objection, filed no reliable document by which the settlement of the said mouzahs could be proved. Rather, the Defendant, first party, excepting Bukshnuggur and Rohimpore, has raised no objection in respect to other mouzahs."

He then proceeded to dispose of the case, releasing some entire mouzahs, and parts of others, by name, from assessment, upon the ground that they had been proved by the quinquennial registers and Tahoot Milani papers, &c., to have been assessed at the decennial settlement, as part of the mal lands of the Zemindary Gungamundle.

It is not unimportant to remark that the resumption proceedings, although at the commencement

tated to be a claim of Government to assess the newly-cultivated land of Poornomutty Bukshnuggur, and others, specifying only two mouzahs by name, included under the word "others," many other mouzahs; and that the fact of Mouzahs Poornomutty and Bukshnugger being alone specially named, appears to have arisen from the fact that the resumption proceedings originated out of certain suits in respect of lands claimed by the ancestor of the Defendant, as part of Buxnuggur appertaining to Meherkool in Chuckla Roshanabad; and by the ancestor of the Plaintiffs, as part of Mouzah Poornomutty in Pergunnah Gungamundle. (Record, p. 582.)

From the above-mentioned decision of the Special Deputy Collector appeals were preferred by both parties; and by a decision of Mr. Bruce, vested with the powers of a Special Commissioner, dated 30th June, 1842, the appeal of the zemindar of Chuckla Roshunabad was dismissed, and the claim of the zemindar of Pergunnah Gungamundle was held to be just, and it was ordered that his appeal be decreed; and the decision of Mr. Bidwell, the Special Deputy Collector, was reversed, and the lands then in dispute were released from the claim of Government (Record, p. 694-700), thus determining that the lands were included in the settlement of Gungamundle.

It was further ordered that if, after the decision of the Special Deputy Collector, the disputed lands had come under the attachment and claim of Government, and their mesne profits appropriated, they were to be paid, with interest, to the possessors from whose possession they came under the collection of Government. Afterwards, viz., on the 19th December, 1845, proceedings were taken in the Collectorate, to which both zemindars were parties; and, on the 19th December, 1845, the mesne profits having been assessed, it was ordered by Mr. Buckland, the officiating Collector, that they should be paid to the zemindar of Gungamundle. (See Record, p. 848-851.)

The error of the Lower Courts, if error at all, so far as it relates to the supposed non-claim by the Defendant's ancestor, of any other mouzahs than Buxnuggur and Rohimpore, does not appear to their Lordships to be important, for it is evident from the

proceedings of the Special Deputy Collector that the zemindars of Gungamundle were treated as being in possession, under the names of their settled mouzahs, of the newly cultivated lands which adjoined mouzahs appertaining to Gungamundle, and that when the decision of the Special Deputy Commissioner was reversed, the newly cultivated lands were treated as lands which had already been assessed to revenue at the time of the decennial settlement, and were part of the mal lands of Gungamundle. Upon the whole their Lordships are of opinion that the Courts below arrived at a right conclusion upon the facts both as to the title to the lands, and as to the possession of them up to the time of the Government's taking Khas possession under the resumption proceedings.

As to the possession of the lands since the date of the Istahar of the 5th December, 1843, there appears to be more difficulty.

It does not clearly appear who took possession of the lands included in the resumption proceedings after the date of the Istahar or proclamation, and the High Court certainly does appear to have fallen into some error in assuming that the possession of the lands was given up by Government to the Plaintiffs. The Proclamation was merely to the effect that it was the duty of the ryots and cultivators to pay their respective rents as before to the proprietors. It seems to have been assumed that, as the Plaintiffs were the proprietors, and were in possession up to the time of the Government's taking Khas possession, the ryots would naturally, after that Proclamation, pay their rents to the Plaintiffs as before, and that they did so. However this may be, their Lordships are of opinion that it does not substantially affect the decision.

The suit was commenced on the 17th July, 1857. It is found by the Ameen, who made the local investigation, that Plaintiff was in possession up to the time of Government's taking Khas possession; and both the Lower Courts concur in that finding, though they carry the possession of the Plaintiffs down to a later period, viz., the date of the Act IV award, of August 1845. Taking the fact, however, to be that Plaintiff was in possession only down to the time when Government took Khas possession, it appears to their Lordships that the suit was commenced in

time. The period during which Government was in Khas possession, would not operate against the Plaintiff, for after the order for release and for payment of mesne profits, the possession of Government must be considered as the possession of the persons who were entitled and in possession of the lands when the Government attached them, and took Khas possession; and those persons, according to the findings of the Ameen deputed in this case and of both the lower Courts, were the Plaintiff's ancestors. That takes the case down to December 5, 1843, the date of the Istahar. Assuming that Defendant then took possession the period would not be quite fourteen years before the commencement of the suit on the 17th July, 1857. Deducting from that period the time occupied in the suit to set aside the award, viz., from the 6th of September, 1847, to the Decree of the Sudder Court on the 8th June, 1852, and the time occupied in settling the boundary line between dependent and independent Tipperah the present suit was in ample time. It was argued that the last mentioned suit, and the resumption proceedings did not relate to all the Mouzahs, the subject of the present suit, but their Lordships are of opinion that the Plaintiff under Regulation 4 of 1793, was not bound to sue whilst proceedings were pending in which the Defendant claimed as part of his Zemindary, all the lands to the east of the Deetia Ail, and the boundary between dependent and independent Tipperah was unsettled. If, before Mr. Roe's award, he had sued for that portion of the lands now in suit which was not included in the suit of 1847, he would have been liable to be non-suited, as he was in the suit which he commenced in 1847 for the other portion of the lands. This brings the case within the exception in section 14, Regulation IV, of 1793.

Upon the whole, therefore, their Lordships will humbly recommend Her Majesty in Council to affirm the decision of the High Court, and the Appellants must pay the costs of this appeal.

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