

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Radha Proshad Singh v. Rancoomar Singh and others (No. 50 of 1874), and Radha Proshad Singh v. The Collector of Shahabad (No. 57 of 1874), from the High Court of Judicature at Fort William in Bengal; delivered November 29th, 1877.

Present:

SIR JAMES COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE appeals of which their Lordships have now to dispose are those which the Appellant has preferred in two out of seven suits instituted by him in order to recover a large quantity of alluvial land lying now to the south of the Ganges, and accordingly transferred by order of the Government from the zillah of Ghazeepore to that of Shahabad. Notwithstanding the great volume of the record, and the number of the proceedings contained in it, the facts essential to the determination of these appeals may be brought within a narrow compass. It appears that at the time of the perpetual settlement the river Ganges was not only the boundary, as it is still, between the two zillahs of Ghazeepore and Shahabad, but also the boundary between the Mouzah Nowruna, belonging to the Plaintiff's ancestor on the left or northern, and a number of mouzahs on the right or southern bank of the then channel of the river, which were settled with other proprietors. Immediately on the southern or Shahabad side of the river, and included in these mouzahs, was an area of low soft land, some six

miles wide, favourable to the erratic habits of the Ganges, but bounded on the south by higher or harder land, that opposed itself to the further progress or invasion of the stream in that direction. The precise changes in the course of the river have been proved with greater clearness than is usual in cases of this kind, and are delineated in what has been called the Ameen's Map, No. 7. 2. From this and from the evidence it appears that in the year 1839 the river occupied a position considerably to the south of that which it occupied at the date of the settlement, and now occupies; that in 1844 it had travelled to an ascertained channel still further to the south, and in 1857 had for some years reached its southernmost limit, viz., the high or hard bank which has been referred to. It is, moreover, clearly shown that towards the end of the rains of 1857 the river, when subsiding into its cold-weather channel, made a sudden change of that channel, intersecting the land to the north of its former course, and occupying the position designated upon the Ameen's map as "Bhagur 2." Its course, however, in that channel was not permanent; for, either by sudden change or by gradual recession, it travelled still further to the north until it returned to the bed from which it is supposed to have started at some time after the date of the perpetual settlement, being that which it occupied when the decrees under appeal were made.

Upon the sudden change of 1857-8, different persons, claiming to be the owners of some of the villages which had before been diluviated, seem to have taken possession of the land reformed upon the sites of their old villages, so far as it was then south of the new channel of the Ganges. And when the river went further back, their Lordships presume that other persons similarly claimed and took possession of the

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Grice
and others v. Richardson and another, from
the Supreme Court of Victoria; delivered
December 6th, 1877.*

Present.

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal from a Judgment of the Supreme Court of the Colony of Victoria making absolute a rule nisi obtained on the 25th November 1876 to set aside a nonsuit, and enter a verdict for the Respondents for 1,252*l.* 4*s.* 2*d.* with costs, in an action brought by the Respondents as trustees of the property of Joseph Webster and James Grice Goulstone, trading as Joseph Webster and Company, insolvents, to recover from the Appellants damages for the alleged conversion of 551 half chests and 297 boxes of tea.

The tea in question was the residue of three parcels which had been purchased at different dates between the 13th of February and the 1st of June 1876 from the Appellants by the Respondents, who gave their acceptances or promissory notes for the price. The Appellants, who had imported the tea, were also warehousemen, having a bonded warehouse, in which, upon its importation, they had warehoused it. On the occasion of each sale they handed to the Respondents certificates or warrants, each of which stated that the tea covered by it was

C 100. 100.—1/78. Wt. 3458.

warehoused by the Appellants on the 1st of January 1876, and was deliverable to order by endorsement thereon. The certificates were in the first instance endorsed generally by the Appellants. Subsequently the clerk of Messrs. Joseph Webster and Co. got the words "of J. Webster and Co." written upon each of the delivery orders or certificates. The additional words were signed by J. D. L. Morton, the clerk of Grice, Sumner, and Co.; and by virtue of those words it appears that the delivery orders, instead of making the teas deliverable generally to order by endorsement, made them deliverable to the order of J. Webster and Co. On three subsequent dates between the 13th and 30th of June 1876 entries were made in the transfer of certificates at the bonded warehouse, importing that the teas had been transferred to J. Webster and Co. On the 3rd of July 1876 Joseph Webster and Co. became insolvent, and their acceptances and notes were subsequently dishonoured, and have never been paid. Before their insolvency all the teas purchased by them, except those for which the action was brought, had been actually delivered to them or to their order, and the question is whether the transactions above described were such as to deprive the vendors of their right of lien.

In the cases of *Bloxam v. Saunders*, and *Bloxam v. Morley*, which are reported in 4 Barnwell and Creswell's Reports, page 949, Mr. Justice Bayley lays down the rule very clearly. He says, "The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender, he has no right to the

additional land that had then become south of the Ganges. The result was that, after some discussion between the authorities of the two zillahs, a thackbust was made by the revenue officers of Shahabad in 1864, which apportioned the whole of this disputed land, as re-formation on the sites of the ancient villages, among the representatives of the persons with whom those villages had originally been settled; and confirmed their possession of the plots allotted to them. Between 1858 and this thackbust of 1864 there had been various proceedings before the revenue officers of zillah Ghazeepore, at the instance of the Plaintiff as owner of Nowrunga, under Act I. of 1847; but to these it is now unnecessary to advert. After the thackbust of 1864, the Plaintiff brought one suit against all the claimants of the disputed land. That was dismissed as improperly framed, He then instituted the different suits, with two of which their Lordships have now to deal. These it will be convenient to call suit No. 2 and suit No. 6; distinguishing them by the numbers whereby the lots claimed in them respectively are described on map No. 7.2, rather than by the numbers which the suits themselves bore in the Indian Court. It lies of course upon the Plaintiff to prove in each a superior title in order to dispossess the Defendants.

Neither party originally put his case precisely in the form in which, after the decision in *Lopez's case*, and the second remand of the suits by the High Court, it assumed.

Their Lordships propose to treat that second remand as a new departure, and the commencement of the litigation upon which they have to form a judgment. And they may at once state that they cannot concur in the final judgment of the High Court in so far as that casts any doubt upon the propriety of directing the third and

fourth of the issues for the trial of which the suits were remanded. The doctrine in *Lopez's case* was doubtless in favour of the Defendants in both suits; and, if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thackbust proceedings of 1864 as within the boundaries of their original mouzahs, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's case* cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. In the present suits the Plaintiff relies on an alleged adverse possession for more than twelve years of the lands after their re-formation; and therefore the real point to be decided in the suits was whether a title had been thus acquired by the Plaintiff the proprietor of Mouzah Nowrunga.

Now, for the purpose of considering this, which seems to be the only material issue, it will be convenient to travel, as the river originally did, from the north to the south. Their Lordships consider that the point to be determined is whether in 1857 such a new title existed as to all or any of the lands in dispute, because they think it is clearly proved that the change of the river in 1857-8 was a sudden change, which left the rights of the parties as they then existed unaffected thereby. The nature of the change in 1861 is perhaps not so clearly proved. The Zillah Judge certainly found that to have been also a sudden change; for he says that the river began to leave the channel in which it had gone from 1858, in 1267 F or 1861, and in 1268 F was found in the place in which it now is; a state of things which implies

suddenness of change. Moreover, the evidence, on the whole, preponderates in favour of this last change having been also a sudden change. Their Lordships, however, do not think it very material to find one way or the other upon that point, because even if the river had receded from the channel, marked as Bhagur 2, gradually to the place which it now occupies,—if it had passed, for instance, over Mouzah Sreepore, submerging that mouzah again; the submergence and reappearance of the land both taking place within the three years,—if that were so, and the question was, who was entitled to the reformation of the mouzah upon that site of Sreepore, upon this second reappearance, their Lordships conceive that, according to the strict doctrine in *Lopez's case*, if the Plaintiff had previously to 1857 acquired the proprietorship of that land it would be he and not the original owner of Sreepore who would be entitled to claim the benefit of that doctrine.

Then going back to the application of the principle which has been already laid down to the lands in dispute in this case, their Lordships have to consider first whether the Plaintiff had or had not in 1857 acquired such a title as has been described to the land north of the river as it ran in the year 1839; and they think that upon the evidence there can be no doubt he had such a title. They rely mainly upon the thackbust proceedings of that year. It appears to them clear upon those proceedings and the maps embodied in them, that the land down to the north part of the river as it existed in 1839 was then measured as belonging to Nowruna, and in possession of the Plaintiff's ancestor; that the greater part of that land was laid out field by field as land which had been gained by accretion at that time; and that although there was a small portion which is described in the

thackbust maps as "registrar or sand," that too was measured into Mouzah Nowruna and the zillah of Ghazepore. No objection or claim seems then to have been preferred on the part of any proprietor on the Shahabad side of the river. And it is clear that the Plaintiff and his ancestors were afterwards, and up to 1857 or 1858, in possession of this land; that is, for a period of about 18 years.

The whole of the land in dispute in suit No. 6 falls within the boundaries of Nowruna as thus defined in 1839. In that suit it has been attempted at the bar to raise some contention on the supposed effect of the confiscation of Koer Singh's estate, of which Mouzah Sreepore once formed part. But that is a point that never seems to have been raised in the Court below; and, so far as their Lordships can see, there can be no ground for the contention. It seems to them that the whole of this lot must have been diluviated, and that, when left dry as the river receded still further, it was assumed to have become by accretion part of Nowruna. It was measured as such in 1839; and if the second change of the river in 1861 was a sudden change, that land has ever since 1839 been dry land, and was up to 1861 in the possession of the Plaintiff. Again, if the changes in the course of the river between 1858 and 1861 were not sudden, but gradual, the subsequent diluviation and reappearance of the land could not, as has already been stated, defeat the title to the site which the Plaintiff had gained before 1858. These considerations suffice to dispose of the appeal in suit No. 6.

With respect to the appeal first heard, that in the suit No. 2, the case is different. In order to substantiate the whole of the Plaintiff's claim, it would be necessary to show that in 1858 he had been in possession of this land almost up

to the extreme southern boundary for more than 12 years. Now their Lordships have felt no hesitation in concurring with both the Courts in so far as they have found that no such title was established to land beyond the course of the river in 1844. There is no clear evidence how, or in what particular year, that land accreted; and it is impossible to say that there has been a possession for 12 years, or any possession that would be sufficient to defeat what is *prima facie* the superior title of the Defendants. Their Lordships have had more doubt as to the land lying between what was the northern bank of the river in 1839 and that which was its northern bank in 1844; but, even if they had been disposed to agree with the Zillah Judge in respect of this land, they could not have concurred in his judgment in so far as it gives to the Plaintiff the bed of the river as it existed in 1844, and carries his boundary up to what was then the southern bank of the river. Although in the case of a wandering and navigable stream like this, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground; and it clearly appears on the face of the thackbust map of Mouzah Sohia which was made in the course of the survey of 1844, (and these proceedings are the strongest evidence, such as it is, which the Plaintiff has given of his possession of the land now in question,) that some land which had once formed part of that mouzah was then on the northern bank of the river, and consequently that the ground over which the river then ran had also been part of Sohia; and if this be so, when the bed of the river became dry, the right of the Defendants to the new formation on that site would attach, and there is no proof of a length of possession of that re-formation which would defeat their title.

The point upon which their Lordships have felt greater difficulty is whether there was not sufficient proof of possession for twelve years on the part of the Plaintiff of the land up to the northern bank of the river as it ran in 1844. It has been argued that the thackbust proceedings of 1844-5 were as strong to prove the possession of the Plaintiff or his ancestor of the land north of the river as it then ran, as were those of 1839 to prove his possession of the land within the boundary then laid down, up to the line of the river in 1839. Their Lordships, however, do not think that this is so. The later thackbust proceedings related to Mouzah Sohia, and were made in Shahabad, and the river was then the boundary not only of the Zillah of Shahabad, but also of two provinces under distinct Governments, viz., the North-West Provinces and the lower provinces of Bengal. The authorities of Shahabad presumably had no authority to carry their thackbust beyond the southern bank of the river as it then ran. Again, upon the face of the thackbust map is the statement already referred to, wherein, after mentioning that the entire area of Sohia had been 2,451 beegahs, but that out of that only 400 beegahs existed which were under cultivation, (that being, as their Lordships understand, the portion of Sohia that was then on the south side of the river,) it is stated, "The remaining land"—that is 2,051 beegahs—"was washed away by the Ganges, and has now accreted on the north side of the River Ganges in a small quantity, and consists of sand." Therefore that which was out of the bed of the river on the northern bank seems to have then been, according to this statement, waste uncultivated land, over which no acts of ownership had been exercised, and in which the possession or the right of the Plaintiff had been positively affirmed by no measurement on the other side of the river. The

doubt their Lordships have had is whether there was not other evidence from which it might be properly inferred that cultivation had afterwards been extended and acts of ownership exercised over this land by the Plaintiff between 1845 and 1857, without question, so as to establish an adverse possession of it as against the Defendants for 12 years. But, upon the whole, looking to the uncertainty of the general evidence as to this strip of land; to the not very clear finding of the Zillah Judge regarding it; and to the fact that much better evidence as to payment of the rent and the like might have been given than was given; they have come to the conclusion that they have not sufficient grounds before them for disturbing the finding of the High Court upon this part of the case. The Plaintiff, therefore, must be taken to have failed to have made out a sufficient title to any land which was not north of the river as it ran in 1839.

The result is that in suit No. 6, in which all the land claimed lies above the line of 1839, their Lordships must humbly advise Her Majesty to reverse the decision of the High Court in that suit, and to affirm the decision of the Zillah Judge, with the costs of the appeal in the High Court. When they delivered judgment they proposed to advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court in suit No. 2, inasmuch as they then understood that all the land claimed in that suit lay below the line of 1839. It having, however, been brought to their notice, before the report was drawn up, that, notwithstanding the statement of the Zillah Judge to the effect that no part of the land north of that line was in question in the suit, the maps which are in evidence in the cause, and particularly the Ameen's map No. 7. 2, afford ground for believing that a small portion of the land claimed, being part of that in the

possession of the Defendants as their Mouzah Pursownda, is, in fact, above the line of 1839, the order which their Lordships will recommend Her Majesty to make in this suit is, "that the decree of the High Court be varied, by declaring that the Plaintiff is entitled to recover, and ordering that he do recover, so much (if any) of the land claimed by him in this suit as lies to the north of the line delineated in the Ameen's map No. 7. 2. as the northern bank of the river Ganges in the year 1839; the amount (if any) of such land to be ascertained, in case of dispute, by proceedings in execution; but that in all other respects the decree of the High Court be affirmed."

This order seems to their Lordships calculated to assure to the Plaintiff, with the least risk of future litigation, that to which he may be entitled upon the principle laid down by them in their judgment. But, considering the manner in which the question concerning this, at most inconsiderable, portion of the land in dispute has been brought before them, they do not think it would be right to make any order touching the mesne profits of what may be recovered, or to vary the decree of the High Court as to the costs of the litigation. They think also that the Plaintiff ought to pay the costs of the appeal to Her Majesty in this suit. The Respondents in suit No. 6 must pay the costs of the appeal in that suit.