

Privy Council Appeal No. 28 of 1922.

Bengal Appeal No. 34 of 1920.

The Secretary for State for India in Council - - - *Appellant*

v.

Roy Jatindra Nath Chowdhury and another - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND MAY, 1924.

Present at the Hearing :

LORD SHAW.

LORD BLANESBURGH.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

LORD SALVESEN.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree dated the 15th March, 1920, of the High Court of Judicature at Fort William in Bengal, which affirmed a decree dated the 27th July, 1918, of the Additional Subordinate Judge of Backergunj.

The plaintiffs are Roy Jatindra Nath Chowdhury and Roy Harendra Nath Chowdhury.

They instituted this suit on the 30th January, 1917, after due notice, against the Secretary of State for India in Council, contesting the legality of the assessment imposed in the course of an alleged Diara Survey on lands in the villages of Amragachi Hagalpati and Nizamia Gopekhali in the district of Backergunj.

These villages are part of an estate called Debnathpur bearing towzi No. 4908 of the Backergunj Collectorate owned and possessed by the plaintiffs. The plaintiffs' title to this estate is undisputed, and its earlier history is set forth in a Rubokari of the Sunderbans Commissioner of the 15th July, 1872.

On the 1st September, 1839, a grant was made by the Government to Debnath Roy, benamidar for the plaintiffs' predecessors

in title, of a tract of the jungle and forest land then known as Tushkhali, but later as Debnathpur. The grant was an ijara lease for 20 years, and was rent free.

Debnath Roy, taking advantage of rules recently framed by the Government, obtained a grant on the 17th November, 1856, of the portion of waste land in the Sunderbans estimated to contain 34,000 bighas, described as Lot or Abad Debnathpur, shown in Captain Hodge's map, and bounded on the south and west by the Sapleza and Baleswar rivers respectively. The transaction was evidenced by a potrah and a kabuliyat (Exhibit 3). The grant was at a progressive rent for a term of 99 years, to take effect from the 1st September, 1839, and power was reserved to the Government to make a survey and measurement at any time between the twentieth and thirtieth years from that date to ascertain the area of the land granted and to calculate the stipulated revenue. In the course of a survey of the leased lands directed by the Commissioner of the Sunderbans in 1858, a map was prepared in or about 1863, and it was determined that the grant included an area of only 14,505 bighas 5 cottahs. This led to a litigation (after-mentioned), as the result of which a doul, of 9th April, 1870 (Exhibit H), was executed in favour of the plaintiffs' predecessors in title of 33,441 bighas 17 cottahs 7 chittacks of land known as Debnathpur for the remaining 68 years of the 99 years' lease. In 1870, Mr. Ellison, in the course of a survey, prepared a map (Exhibit J) in which the plaintiffs' mahal is depicted. The plaintiffs have been paying revenue in accordance with the arrangement, and their mahal has been numbered towzi No. 4908.

On the 2nd October, 1900, the Government issued five separate notifications. By No. 1959 T.R., the Lieutenant-Governor, in exercise of the powers conferred upon him by section 101 (1) of the Bengal Tenancy Act as amended and with the previous sanction of the Governor-General in Council, directed that a survey should be made and a record of rights prepared in respect of all lands included within the external boundaries of Thanas, Banphal, Nalchiti, Barisal, and Backergunj in the district of Backergunj, with certain exceptions therein specified. By notification No. 1960 T.R., under the powers vested in him by section 3 of the Bengal Survey Act V of 1875, the Lieutenant-Governor ordered that a survey be made of the lands in Thanas, Barisal, Backergunj, Banphal and Nalchiti, and that the boundaries of estates, tenures, mouzas and fields be demarcated in lands to be surveyed. By notification No. 1961 T.R., under section 4 of the same Act, Mr. Beatson-Ball was appointed to be the Superintendent of Survey for the purpose of carrying out the survey and demarcation of boundaries ordered in Notification No. 1960 T.R. By Notification No. 1962 T.R., under the same section, Babu Peari Mohan Basu was appointed to be an Assistant Superintendent of Survey for the same purpose. And by Notification No. 1967 T.R., under the powers conferred upon him by section 3 of Act IX of 1847, the Lieutenant-Governor ordered that a new survey be made of the

lands falling within the district of Backergunj which were situate on the banks of rivers and on the shores of the sea, and that new maps be prepared according to such survey. By two later notifications of the 27th October, 1902, and the 14th November, 1903, Mr. Bedford was appointed extra Assistant Superintendent and Mr. Beatson-Ball was again appointed Superintendent.

As already stated in 1900 the Government decided to make a Revenue survey of the Backergunj district in accordance with the provisions of the Bengal Tenancy Act (VIII of 1885). Whilst the Revenue survey was proceeding—itsself a work of great labour, minuteness and complexity—it was considered desirable to make a survey also of the alluvial accretions that had taken place to the north and east of the two rivers—Sapleza and Baleswar, by the recessions of the rivers between the years 1872 and 1900. The entire proceeding is set out in considerable detail in the final report of the Diara Commissioner (p. 30 of Pt. III). This is an important document which requires full consideration to judge whether the Revenue authorities acted in accordance with the law or not in carrying out the Diara measurements :—

“ It was originally intended ” says the report “ that the Diara survey should be carried out concurrently with the preparation of the Record-of-Rights in the district and by Notification No. 1967 T.R. dated the 2nd October, 1900, published in the *Calcutta Gazette* of the 10th October, 1900, a new survey was ordered of the lands situated on the banks of the rivers and on the shores of the sea within the district of Backergunj according to the provisions of Section 3 of Act IX of 1847. During the preparation of the Record-of-Rights, it was, however, found that the Settlement Officer's hands were too full to take up this additional work, which the Diara survey of 1879-1881, confined only to the Ganges and the Meghna rivers, had shown to be of considerable complexity, and it was then decided to postpone the Diara operations until after the final publication of the Record-of-Rights. The final publication was complete of the permanently settled portion of the district early in 1908 and the Collector in his letter No. 216 K.M., dated the 11th May, 1908, to the Commissioner of the Dacca Division proposed the initiation of Diara proceedings in the district.”

It appears to have taken eight years for the completion of the Revenue Survey. Then the Diara Survey was taken in hand. On its completion certain notices were issued by the Diara Deputy Collector to the plaintiffs. That of 4th July, 1914, will be hereafter cited.

It has to be borne in mind upon the one and only substantial question, namely, whether alluvion had taken place, that no doubt was or is thrown upon that as a matter of fact.

Nor, further, was any doubt suggested upon the proposition that emergent lands should certainly and naturally and under the statutes be lands from which Government revenue should be derived. The objections made on a variety of points, and with much minuteness, were that the correct procedure to enable such revenue to be imposed was defective, and that, consequently, up to date, the lands stood free from taxation.

On 4th July, 1914, the following notice was sent to the plaintiffs by the Diara Deputy Collector :—

“ Whereas by virtue of Government Notification No. 1967 T.R., dated the 2nd October, 1900, issued under Section 3 of Act IX of 1847, a new map has been prepared for the lands of mouzah Amragachia Hogalpati, No. 3500, on the bank of the Sapleza River in thana Matbaria and the said map has been compared with the Revenue survey map and it appears from such comparison that the undermentioned area has accreted to mahal Debnathpur, No. 4908, in the said mouzah.”

Then it is added :—

“ Be it further known that if there be any objection to this procedure the same should be filed within fifteen days from the date of receipt of this notice.”

No objection appears to have been filed. The Diara Collector accordingly made his order for the assessment of the accreted lands on the 22nd October, 1914. The objectors (the plaintiffs) applied for time (apparently for further representation) which was allowed three times. But they appear to have done nothing, and the order for assessment was finally enforced on the 2nd February, 1915. The plaintiffs thereupon executed a kabuliyat simply stating that they would bring a suit in the Civil Court in respect of the said Diara lands and that they executed the kabuliyat under protest.

By a further notice of the 11th February, 1915, it was stated that it had been found, on a comparison with the settlement map of 1870, that smaller areas had formed as Diara accretions. This correction was based upon the fact that it had been discovered that certain diluvion had taken place, reducing the extent of the emergent or alluviated lands. It was accordingly just and proper that the assessment should proceed upon the extent thus corrected. The parties were thus joining issue upon the fact (1) of alluvion and its extent, and (2) whether, notwithstanding alluvion, the emergent lands were assessable in law or were already assessed as within the existing mahals.

Objections were filed by the plaintiffs, but they were disallowed successively by the Deputy Collector, the Collector, and the Board of Revenue.

Revenue was accordingly assessed on the lands alleged to have accreted, and the plaintiffs executed under protest kabuliyats by which they undertook to pay this revenue.

The plaintiffs then instituted this suit in the Court of the Subordinate Judge of Backergunj, contesting the propriety and legality of this assessment. They allege in their plaint that “ no new survey was made of any land on the banks of the rivers Sapleza and Baleswar in accordance with Government notification No. 1967 T.R., dated 2nd October, 1900, issued under Act IX of 1847, and that no map was prepared under the said Act.” Therefore, they contended, all the operations in connection with the Diara proceedings were *ultra vires* and void.

The defendant's answer to this in his written statement was that new maps of mouzas Amragachia and Nizamia on the banks of the two rivers “ were prepared in the course of the District

Settlement operations," and that from comparison and relay of these maps and the Revenue Survey maps, as well as the Settlement map of 1870, it appeared that land had been added to towzi No. 4908, Abad Debnathpur. Other pleas were advanced to which it is not necessary to refer at this stage. The fourth issue framed is in these terms :—

“ Is the Diara proceeding valid and legal, and is it liable to be set aside ? ”

On the 27th July, 1918, the Additional Subordinate Judge of Backergunj pronounced judgment in the plaintiffs' favour and declared that all operations in connection with the Diara proceedings in respect of the lands in suit were *ultra vires* and void. The Court's decree was in accordance with the judgment.

An appeal from this decree was preferred by the defendant, but it was dismissed by the High Court on the 15th March, 1920. From this decree of dismissal the present appeal has been preferred.

Numerous points have been raised in the course of the litigation, but with one exception they do not call for more than passing notice.

The plea of limitation has not been pressed, for the defendant seeks a decision on the merits and, in particular, on the legality of the assessment.

The plaintiffs' contention that rule 745 of the Bengal Settlement Manual was expressly incorporated in their lease cannot be sustained, nor is there any force in their argument that this rule was otherwise a bar to assessment proceedings even if legally initiated.

Equally ineffective is the contention that a survey after the thirtieth year from its commencement was in contravention of the terms of the lease ; the survey proposed was of land not comprised in the lease. For this reason, too, the provision in the lease defining the rate of revenue has no application.

The High Court's view expressed in the forefront of their judgment that mahal Debnathpur is not, as Act IX of 1847 requires, “ an estate paying revenue directly to Government,” is obviously erroneous, as is its ground of decision on the position of the lands in dispute and the character of the rivers Baleswar and Sapleza.

With the exception of the one point about to be noted, their Lordships have now discussed all the objections that were dealt with in the course of a minute and protracted argument, and they are of opinion that these objections fail. As already mentioned it is not denied that considerable accretion of land by alluvion did in fact occur. Nor is it denied that the legislation upon this subject, including Act IX of 1847, will fail in its main object unless such lands be subjected to assessment.

Their Lordships desire to make it clear, however, that the proceedings of the assessing authorities may be still subject to being quashed in the ordinary Courts of law if they have been tainted by fundamental irregularity. Their Lordships say so in

view of the provisions of Section 6 of the Act of 1847. That section is in the following terms :—

“Whenever on inspection of any such new map it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Board of Revenue, whose orders thereupon shall be final.”

It appears to their Lordships that it is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities, with which the assessing officials on the one hand and owners on the other have presumably intimate local knowledge, such objection should be tabled to, and considered and reported upon by, the Board of Revenue. The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation appear to their Lordships not only to be imperative but most salutary.

Two conditions, however, must be noted; the first is that mentioned, viz., that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would still give ground for questioning the proceedings in a Court of law. The second proposition is that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. Unless this last rule be adhered to it is manifest that the way will be opened to endless objections to procedure, even though these are substantially on questions of fact, and the object of the statute, namely, the assessment of lands, will thereby fail.

To these two conditions a third, by way of supplement, may be added, namely, that it is not sufficient to submit in a Court of law that, upon the documents before the Board of Revenue, doubts arise as to whether this, that, or the other detail of investigation should have been set to rest more clearly in the course of the administrative procedure. If such doubts arise upon points of fact, the Board of Revenue is competent to deal with them and is, further, the proper Court before which they should be stated. In order that the doubts should be promptly set at rest, it may have to be on the ground itself. Such is the proper function of an administrative body.

All other objections having been dealt with, the one which remains is set out in Article 7 of the plaint in the following terms :—

“That actually no new survey was made of any land on the banks of the rivers Baleswar or Sapleza in accordance with Government notification No. 1967 T.R., dated 2nd October, 1900, issued under Act IX of 1847, and that no map was prepared under the said Act.”

This objection is in two parts, first, that there was no new survey, and, second, that there was no map. On these subjects the two witnesses are the Diara Deputy Collector, Hara Kishore Biswas himself and Pears Mohan Hazra, the surveyor who was in service in the Diara office under the Deputy Collector. The

result of the evidence is to leave no doubt upon these two points, namely, that there were previous maps to go by, and that the alluviated land was visited and surveyed in fact. The testimony of these witnesses makes that clear beyond question. The survey of 1862-3 and the maps of that date were used. Further information was obtained from the map prepared by Mr. Ellison in the year 1870, an important year in the history of this piece of ground. For a controversy had arisen which resulted in litigation under decree of the High Court dated 11th March, 1868, establishing Debnath Roy's right to hold 33,441 bighas. A map called the Ellison map was made at the time, and, following these proceedings, on the 9th April, 1870, the respondents' ancestors executed to the Government a doul kabuliyat, stating in detail the revenue to be paid. With these materials, namely the maps of 1862-3 and the map of 1870, the Deputy Collector in charge of the Diara operations and his surveyor proceeded to work. He reduced the district settlement map to a 4-inch scale map, then he superimposed it upon the revenue survey map, he himself prepared a comparative map, then he made comparisons locally "to test if the line was accurately drawn, and to find out where in the locality the line stood." He then adds details such as these :—

"The chowkidar, panchayet and many other tenants were present. In comparing the map in the locality and finding out how much land of each individual tenant fell within the Diara area, I at first enlarged the map of 1870 to 16-inch scale and, superimposing the cadastral survey map over it, drew out the line. and. locating it by measurement, found out the positions and drove pegs. . . . I first of all tested the accuracy of the District Settlement map and found it correct. I was not entrusted to enquire how much land was diluviated—still. I made measurement and showed the line of diluvion in the District Settlement map and comparative maps."

Various maps appear in a book on this appeal. One of these is No. 6, which was exhibit N in the Court below, which contains the line drawn to show the lines, not only of alluviation, but of the subsequent diluviation already referred to, and the witness explains that "the lines in yellow in Exhibits N, N (1), etc., are in my hand. I put them on that occasion in the locality. I showed the Diara as also the diluvion lines on the map."

As already explained, not only had this land been previously surveyed and maps made as mentioned, but much care seems to have been taken, not only to mark the alluvion in 1904-5, but in 1914 to give the benefit to the taxpayer by a re-survey and a re-drawing so as to exclude from assessibility land subsequently diluviated.

After a careful and anxious examination of all the facts submitted, their Lordships are quite unable to affirm that a Diara survey was not made. It is true that one map was superimposed upon another, surely a very natural thing to do when land was supposed to have between two dates undergone accretion; but the land itself was visited and surveyed.

What remains appears to be that—granted superimposition of plans—a separate map was not made of the alluviated land

per se. That is to say, the results of the comparative map formed by inscribing the results of superimposition marked upon the maps used in that process, and when marked thus formed a comparative map, were not put upon a separate piece of paper which contained the outline of the alluviated land.

Their Lordships are clearly of opinion that all this was in the practical region eminently cognisable by the officials acting in the revenue proceedings and eminently fit for settlement and decision by the Board of Revenue. So much so is this the case that it would appear to be pretty clear that, had this objection been made then and there, the Board of Revenue would at once have ordered the separate sheet to be prepared, which was desiderated.

Passages occur in the judgment of the Court below which seem to taint with illegality or impropriety the operation of superimposition of maps. There is nothing wrong with this from the legal point of view, and from the practical point of view the Revenue Court can deal with it. In *Rajcoomar Roy v. Gobind Chunder Roy* 19 I.A. 140 this Board said :—

“ In boundary cases of this kind nothing is easier than to propound riddles which cannot be answered by merely looking at the maps or reading the statement which appears in the Record. If it were enough to show to this tribunal difficulties which the respondent's counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local Courts have advantages over the remote ones.”

In their Lordships' view this language aptly applies to Board of Revenue Court proceedings, and more particularly so in view of the finality of that Board's orders under section 6 of the Act of 1847. In the same case the following pronouncement was made :—

“ They can show many difficulties of a kind which probably no amount of mapping or verbal description would avoid. *Mr. Madge's* map does not, so far as their Lordships can see, show in terms, and on its face, the *Thackbust* line which was complained of and corrected in the *mutnaza* suit, nor the lands described in the plaint. But those objections were before the High Court, who were satisfied that *Mr. Madge* had shown the things required ; and, though it does not appear that *Mr. Madge* was present to explain his map, the Court could certainly have required his presence if any real difficulties had been felt on those points.”

Again, their Lordships think it right to say that this language aptly applies to the Board of Revenue proceedings, and they further desire to add that, while the survey proceedings and the map proceedings had been the subject of the examination of the two officers practically and personally connected with this work, the respondents, who have resisted throughout having assessment made on these lands, did not appear as witnesses on the subject, although, in the evidence already given, it had been clearly shown that the survey had properly been made in the presence of many persons named.

It would rather appear as if the whole of this point was a mere incident in a case which was essentially founded on a mistake. The respondents resisted the assessment of this increment of the estate upon grounds which this Board has recently found to be unsound in law. They maintained, in short, that the mahal included the increment because its boundaries extended in the case of each of the rivers mentioned, namely, the Baleswar and Sapleza, *ad medium filum*. The High Court, in their judgment, erroneously treated this as a sound ground. Their judgment was pronounced upon the 15th March, 1920.

But the law applicable to this subject is to an opposite effect, as has been settled in the case of *The Secretary of State for India v. the Maharajah of Burdwan* in 48 I.A. 565. That case was *a fortiori* of the present, and it was held that the Government is entitled to Public Revenue under Act IX of 1847, from chars formed in a non-navigable river, even where it flows through a permanently settled Zamindari, as well as up to the middle line of the river where that is the boundary of the Zamindari, and this even where it appears that the river bed was part of the permanently settled Zamindari. Against this judgment of the Board, delivered by Lord Cave, no argument could, of course, be raised at their Lordships' Bar.

That was the matter of substance, and fundamental, because if the respondents' mahal included the alluvion as already assessed lands, the fresh assessment thereof was necessarily illegal. That fundamental objection having been got rid of, however, the respondents were, of course, within their rights in raising the other points now dealt with, including that just described as incidental. Upon that incidental point, however, whether there was or was not a new survey map prepared in such a way as to satisfy the requirements of the Act of 1847—it must be repeated that it lies upon the respondents challenging the assessment proceedings to prove the fundamental illegality of which they complain.

As the result of a long and searching argument, the most that can be said is that the point may have been left not entirely cleared up. On principle, and on authority, this is entirely insufficient. The appellants have merely propounded a riddle. The case of *Kumar Basanta Roy v. Secretary of State for India* 44 I.A. 104 has been cited by the Additional Subordinate Judge as an authority condemning the practice of finding an excess area by superimposition of maps. Their Lordships do not read the judgment in any such sense, but the passage of Lord Sumner's pronouncement, which is apparently referred to, has, in the view of the Board, a direct bearing of another kind upon the present proceedings. It is to the following effect:—

“ The respondents' argument rested on three points: First that since 1886 they had been, as they said, in possession of certain portions of a char known as char Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906 it would be seen that part of the area disputed

in this action, although claimed as part of char Raninuggur No. 2, really fell within char Raninuggur No. 1, and that there had been a confusion of mauza Jirat, which lay in the north of the disputed area, with an area called char Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now (*Rajcoomar Roy's Case*) to deprecate the practice of 'propounding riddles of this kind,' and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now."

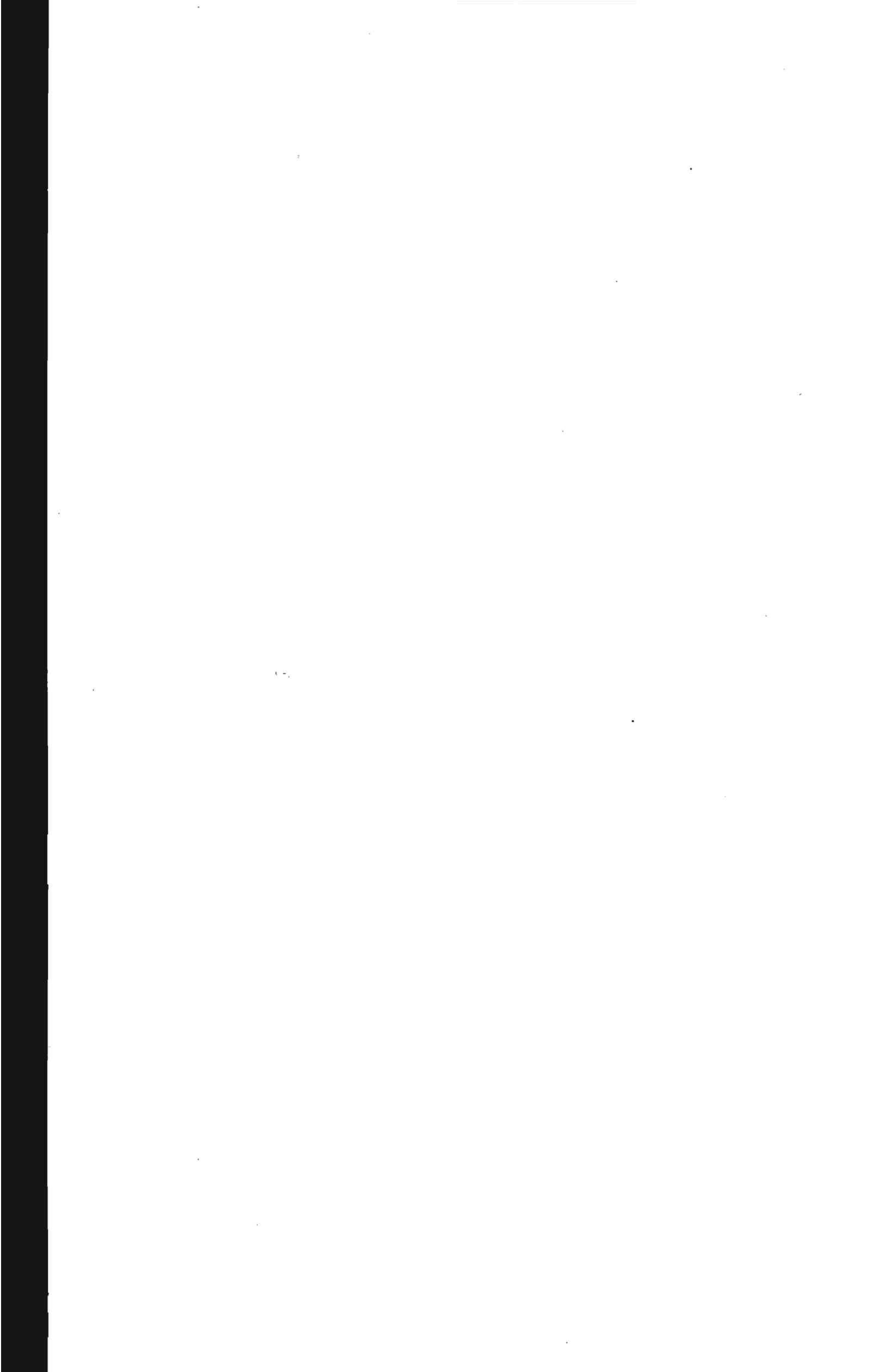
The Board is of opinion that these observations fitly apply also to proceedings in the Board of Revenue, a Board specially charged with the settlement of disputes as to boundaries and changes therein and other matters of fact and procedure which are capable of being most satisfactorily treated with all the advantages of local and special and accumulated experience. It has been noted accordingly that objections were taken and discussed before the Collector of Backergunj, and, after his disposal thereof, two petitions of appeal were presented by the respondents to the Board of Revenue on the 31st March, 1915, and 19th November, 1915, the latter being confined to the Sapleza river. Every conceivable point seems to have been taken, but, in the course of the 12 paragraphs of statement, and the five reasons for appeal, this point as to the alleged absence of a proper map is not taken. For the reason about to be given, their Lordships express little surprise at this. For the Record of the proceedings of the Board of Revenue appear to disclose, not only that such an objection is ill founded on fact, but must have been known to be so by the plaintiffs' local representatives appearing for the purpose before the Revenue Board.

On the 22nd October, 1914, a long entry appears in the order sheet of the objection existing in the Diara Settlement office, and point (b) thereof is in the following terms:—

"By virtue of Government Notification No. 1967 T.R., dated the 2nd October, 1900, a survey of the lands which are situated on the banks of the rivers within the district of Backerganj was made in the course of the District Settlement operations. An index map showing the surplus accretions was prepared by the Diara Officer. The portion diluviated since the District Settlement has also been shown in the comparative map after local enquiry."

The argument did not go so far as to suggest that this record is in any way impeachable. In these circumstances the map point may be said not to be left in doubt, but to disappear.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the suit dismissed with costs here and below.



In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL

o.

ROY JATINDRA NATH CHOWDHURY AND
ANOTHER.

DELIVERED BY LORD SHAW.

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