

Privy Council Appeal No. 68 of 1928.

Jahandad Khan and others - - - - - *Appellants*

v.

Khan Bahadur Abdul Ghafur Khan - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH-
WEST FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1930.

Present at the Hearing :

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The Khans of Zaida and Hund are owners of adjacent landed estates on the bank of the Indus. Near by and situated between two branches of the river is an island of waste ground, a portion of which, comprising about 20 acres, is covered with shisham trees of considerable value. This plot is known as Bela Fakir Buti, and now bears survey number 2084, but is unassessed. The part of the island in which the Bela lies is just opposite to a bungalow belonging to the Khan of Zaida in the village of Rana Dheri, and has for long been a subject of dispute between the rival estates. Prior to 1875 the Bela, together with most of the rest of the island, then bearing Khasra numbers 1-6, was entered in the revenue records as the property and in the possession of Zaida. In that year the Khan of Hund instituted a suit in respect of this area, claiming both title and possession, and praying that it might be recorded as his property. His suit succeeded; it was held that the area claimed was part of the Hund estate,

and it was ordered that the Revenue authorities should make the necessary entry in the settlement papers. The decree also directed possession to be given, but there is no evidence that this was done.

In the present proceedings it is only the Bela that is in dispute. It is admitted that it was part of the area covered by the decision of the 1875 suit, and it is clear, therefore, that so far as the claim of Zaida is based upon title, it must fail.

The real question in the case, however, is whether the Khan of Zaida has established a right to the Bela by adverse possession. The suit out of which this appeal has arisen followed upon proceedings taken under S. 145 of the Criminal Procedure Code. In 1922 the Khan of Zaida commenced to fell trees on the Bela and his men were forcibly evicted by the Khans of Hund. The Khan of Zaida then applied to the District Magistrate under the section above referred to, alleging that he was in possession, and praying for reinstatement and protection. The District Magistrate held an enquiry and came to the conclusion that ownership and possession were with Hund. Thereupon the suit was instituted by the Khan of Zaida praying for a declaration of his title and for possession.

Under these circumstances it lay upon him to establish affirmatively his adverse possession of the Bela for 12 years prior to 1922. The District Judge of Peshawar, by whom the suit was tried, held that he had not done so, and dismissed his suit. The Judicial Commissioner, on appeal, held that he had, and gave him a decree for possession as owner. The Khans of Hund now appeal to His Majesty in Council. The Khan of Zaida is the respondent.

The possession which the respondent is required to prove "must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor" (*per* Lord Robertson, in delivering the judgment of the Board in *Radhamoni Debi v. Collector of Khulna*, 27 I.A. 136 at 140). Their Lordships think that there is special difficulty in establishing this in the case of uncultivated jungle land such as the Bela in dispute, which produces nothing beyond self-sown trees and a seasonal crop of wild grass: see the remarks of Lord Shaw in *Kuthali Moothavar v. Peringati Kunharankutty*, 48 I.A. 395 at 402.

There is, as might be expected in such a case, a mass of oral evidence on both sides, most of which is unsatisfying. Standing out from it is the evidence of the Government records, in which, apparently from 1891, and certainly from 1895 right down to 1922, when the present dispute arose, possession is shown as being with the appellants. It is not disputed that these records come within the terms of S. 44 of Act XVII of 1887, and, therefore, that the entries of the appellants' possession must be presumed to be true until the contrary is proved.

In the course of the settlement proceedings of 1894 the old dispute between the two estates was reopened, and the settlement

collector ordered all the land except certain plots, which admittedly do not include the Bela in dispute, to be entered as the property and as in the possession of Hund. This order was carried out by the records above referred to. It is clear that the respondent was a party to and fully informed of these proceedings, but he took no steps thereafter to establish his title, though his case even now is that his possession had continued undisturbed after and in despite of the 1875 decree. The Patwari of Hund, who had held office from 1919, and whose duty it was to inspect twice a year every survey number in his circle and to enter, with other particulars, in whose possession they were, was a witness in the case. In addition to vouching the Government records he deposed to having found at his biennial inspections prior to 1922 men from Hund in possession of the Bela. The trial Judge attached considerable weight to his evidence, supported as it was by the records, and their Lordships think that he was right in so doing, and that the Judicial Commissioner who disagreed with him on this point failed to appreciate its true significance. Entries of possession would be open to the inspection of the respondent, who was not merely an educated man, but a first-grade District Judge, and their Lordships find it hard to believe that if he had in fact been in open and continuous possession of the Bela for a number of years, a man of his position and experience would have allowed such entries to pass unchallenged. This would, their Lordships think, be the more remarkable if, as the respondent stated in his application to the District Magistrate in 1922, the appellants and their ancestors had been "incessantly trying to secure possession of the Bela from 1875."

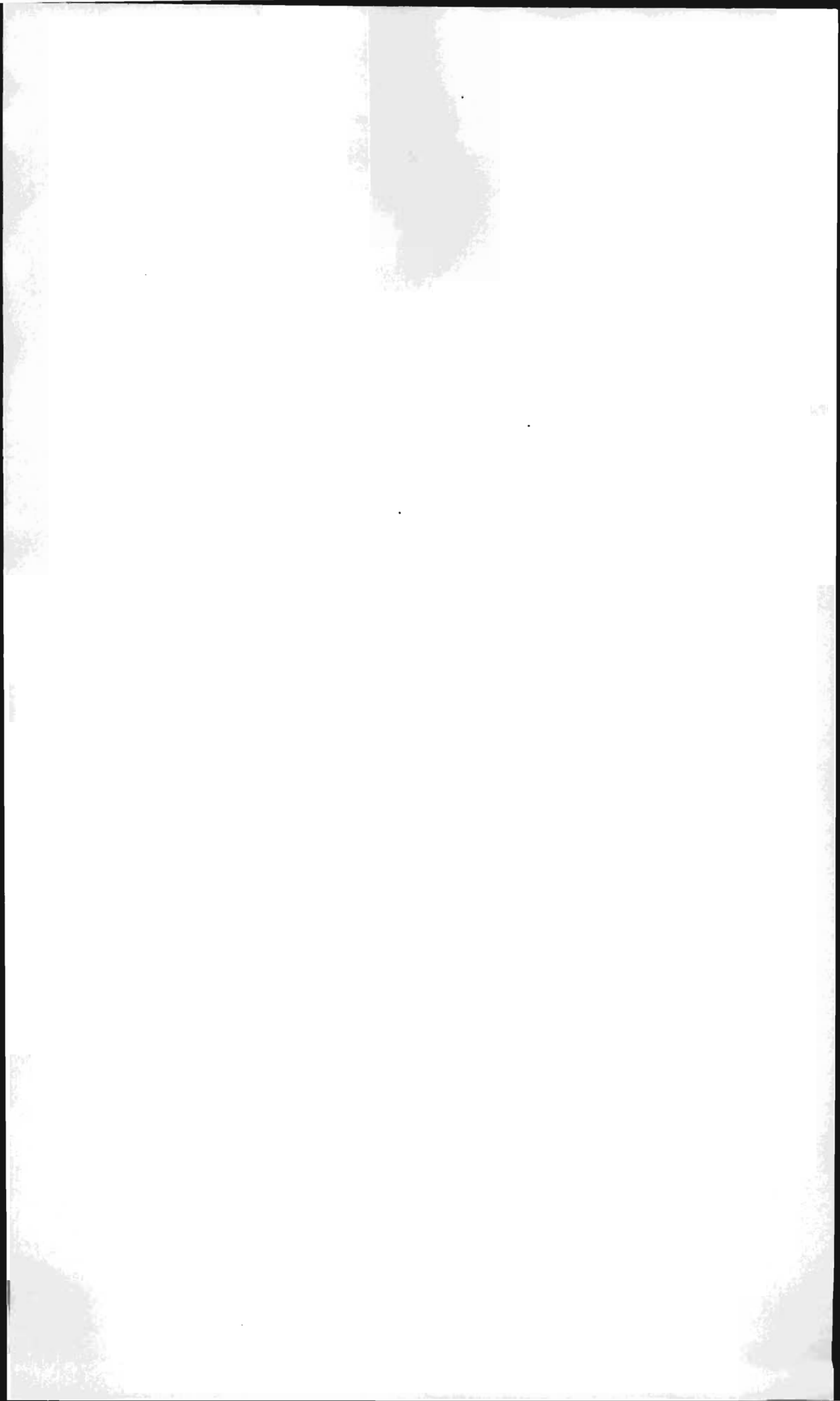
Under these circumstances their Lordships must hold that it would require very clear and definite evidence of possession by the respondent to discharge the onus which is upon him. Their Lordships doubt whether the Judicial Commissioner approached this question in the right way. He seems rather to have thought that where both sides gave evidence of possession it was sufficient for him to be satisfied that the evidence adduced for the respondent was more worthy of credit than that on the other side. He says that "though none of the individual points" upon which the respondent relied "may be very strong, yet the cumulative effect of all of them is sufficient to discharge the initial burden of proof which lay upon the plaintiff," and that "this being so it is for the defendants to show that they have maintained their title and have not been excluded by the plaintiff."

It is impossible for their Lordships to accept this as the true criterion in such a case. The only question can be whether the respondent has established affirmatively his exclusive possession of the Bela for the requisite period of 12 years, and this, in their Lordships' opinion, he has failed to do.

Their Lordships have been taken through all the evidence upon which the respondent's counsel relies, and they have come to the conclusion that taken with the other facts, to which

reference has already been made, it falls short of establishing his case. The cutting of trees by the respondent does not go back beyond 1916, and it is at least noteworthy that as soon as felling was planned on any large scale the appellants interfered. The marking of the trees to which one witness deposes is not even referred to by the respondent in his examination, and if it in fact took place may be ascribed to no earlier date. The grazing and carrying away of grass and the cutting of firewood could be little more than sporadic invasions of a conveniently adjacent jungle. The temporary occupation by a fakir with the respondent's permission is of no real significance. The absence from the long tale of witnesses of Shera, who is said to have been employed by the respondent for eight or nine years as his custodian of the Bela, and whose evidence would have been most material, is altogether unexplained. The fact that in 1911 the respondent succeeded in establishing his title by adverse possession to certain cultivated plots on the other side of the river which were within the Hund boundary, is clearly no evidence of his possession of the Bela.

Their Lordships think that the trial Judge approached his examination of the case from the right point of view, and that he came to a correct conclusion upon the evidence. They think that the decree of the Judicial Commissioner should be set aside, and that of the District Judge restored, and they will humbly advise His Majesty accordingly. The respondent must pay the costs before the Judicial Commissioner and here.



In the Privy Council.

JAHANDAD KHAN AND OTHERS

v.

KHAN BAHADUR ABDUL GHAFUR KHAN

DELIVERED BY SIR GEORGE LOWNDES.

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