Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Tarakant Banerjee v. Puddomony Dossee and others, from Bengal; delivered February 26th, 1866.

Present:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

SIR LAWRENCE PEEL.

THIS is an Appeal from a Decree of the late Sudder Dewanny Adawlut of Bengal, affirming a decision of the Zillah Court, at Dacca, which dismissed the Plaintiff's suit. The suit of the Plaintiff was instituted on the 28th day of August, 1856. It was brought to recover 1384 beegahs 14 cottahs of land, described as jote, set out by fixed boundaries, and situate in certain mouzahs or kismuts called respectively Narainpore, Khoondkarkandee, Goonerkandee, and Kuddumpoor; and also to reverse a summary order of the Sudder Dewanny Adawlut, bearing date 18th November, 1845, and made in a miscellaneous or summary suit in that Court. The Zillah Court dismissed this suit of the Plaintiff on two grounds,—first, that it was barred by the Law of Limitation, and secondly, that the matter had been decided adversely to the Plaintiff's claim in a former suit, by which the Court adjudged him to be bound. The Sudder Court, on appeal by the present Appellant, decided the case against him on the Law of Limitation only, and expressed no opinion on any other point. The decision of the Sudder Court on the Law of Limitation, proceeded on a different ground from that on which the Lower Court had founded its decree, dating possession under the adverse title from a time later than that which the Zillah Court had fixed for its commencement. The Appellant

reckoned the time of his dispossession from the 18th November, 1845, the date of the decree for the reversal of which his suit is brought. If he is right in this view of the subject, his suit was brought in time. The Sudder Court carried the adverse possession back to an earlier order of the Court, bearing date the 11th April, 1844, and counting the time of adverse possession from that last date, it held the suit to be barred by effluxion of time. The Zillah Court, in their judgment, had carried the time still further back to the year 1841, considering that the Plaintiff's dispossession was effected by possession, having, as the Court considered, been at that time delivered to the Plaintiff in another suit, to which we shall presently refer, by one Ramgottee Rae, the Ameen delegated by the Court to execute the decree in that suit. The case is somewhat complicated by reason of the long continuance of litigation between different parties, and the conflict of claims in two different concurrent suits. It is necessary therefore to state the nature of this litigation and the titles of the Appellant and of the principal original Respondent Rasmoney Dossee, in order to clear the subject of possession from some confusion in which it has become involved.

The jote tenure is a dependent tenure within and part of a zemindary, called Pergunnah Taleehate Ameerabad. In the month of February in the year 1814, a litigation commenced between the Zemindar and three persons named Reazooddeen Mahomed, Fyzooddeen Mahomed, and Mahomed Cossim, termed the Moonshees (a description which for the sake of brevity it will be convenient to adopt). The moonshees complained that they had been dispossessed by the Zemindar of their jote tenure, including the lands claimed in this suit; the Zemindar denied that inclusion, and claimed them as part of his zemindary. At this time, the moonshees were possessed of a talook called Ooturnarainpore, paying revenue direct to government; and throughout their litigation with the Zemindar, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their jote tenure, and made no claim to them as included in the talook; proof of this inclusion in the talook would have been a complete answer to the claim

of the Zemindar, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The moonshees succeeded in that litigation, and the decree in their suit declared the lands to be part of the jote tenure, and limited the zemindar's claim to a title to assess them for rent. The Zemindar appealed against this decree, which was however affirmed, and Byrubchunder Bannerjee, an Ameen, was ordered to give possession of the lands to the moonshees. This was done in conformity to the decree, and possession was given in the usual way by the Ameen, by taking cabooleuts from the cultivators, and by fixing bamboos to mark the boundaries. The Ameen's report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the moonshees, of this tenure so pleaded, proved, and adjudged, nor of any attempt to withdraw any part of the lands from the jote tenure, on the ground of mistake or otherwise, and to ascribe them to the talook title before the time of the judicial sale which is now about to be stated. The rent of the jote tenure fell into arrear, the Zemindar sued the moonshees for rent, recovered in the suit, and caused the jote tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th June, in the year 1836, and one Juggutchunder Rae was the purchaser. The Appellant's title is derived from him under two intervening private sales, one by Juggutchunder to one Ramdhone Sircar, and the other by the sons and heirs of Ramdhone to the Appellant. By this purchase, Juggutchunder obtained the right, title, and interest of the moonshees in the jote tenure. He became by force of this purchase, in the same relation to the Zemindar in which the moonshees before stood. As against the moonshees themselves and the Zemindar, the title of the purchaser was that which the moonshees had had adjudged to them in their suit against the Zemindar. The possession given to the purchaser was co-extensive with that given to the moonshees, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep this origin of the possession clearly in view.

The moonshees appear to have disputed, at that time, the title of the auction purchaser to have these lands included in his purchase; they claimed them then as included in their talook. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *boná fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court therefore leaves the purchaser to assert his title by regular suit. In this case, however, the moonshees, the debtors under the decree, were themselves in possession. The decree was for rent of the jote tenure; the Zemindar caused the tenure, including these lands, to be put up to sale; the moonshees, in claiming these lands, had pleaded this tenure, and it was adjudged in their favour by a suit which bound both them and the zemindar. The suit for rent was against them as jote tenants, for rent due under that very tenure, and the demand included the rent of these lands; consequently, the Court which directed the execution of the Decree was perfectly justified in acting on their own pleaded and by them admitted title, and by putting the decree purchaser in possession. This was done in the regular mode, by taking caboolcuts, except as to one small part, as to which however possession was also given, and the purchaser was thus put in complete possession of these lands under the jote tenure. This appears from the Report of the Ameen, pp. 105–109 of the Record. Unless this possession was changed at some intermediate period between the 5th August, 1839, the date of the delivery of the possession above stated, and the 18th November, 1845, the date of the order of the Sudder Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger, or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the Ameen Ramgottee, on which the Zillah Court relied.

That Ameen was acting in the execution of a Decree in another suit which had been pending between the moonshees and their mortgagee of their talook. A dispute had arisen between them of this nature: the mortgagor had mortgaged the talook, but, as he contended, excepting these lands from it, as to which he was carrying on a litigation with the purchaser of the jote tenure. The mortgagee, on the other hand, insisted that these lands were included in the mortgage. The suit was decided in favour of the mortgagee, and, as between him and the moonshees, these disputed lands were adjudged to be within the talook; but as the jote tenant was not a party to that suit, the decision in it did not bind him. The mortgagee obtained execution of that Decree, and it was under this proceeding the Zillah Court considered that the Appellant was dispossessed and the possession given to the mortgagee in the year 1841. The Proceedings and the Decree, however, are not in evidence in this cause. In the execution of that Decree a conflict arose between the purchaser of the jote tenure and the mortgagee as decree-holder, each party claiming the same lands, but the jote tenant being in possession.

If this title of the mortgagee could be successfully asserted against the purchaser of the jote tenure, it could be asserted legally in no other mode than by a regular suit instituted for that purpose, for such a possession as that of the jote tenant could not be changed merely in proceedings to execute a Decree. This appears to have been entirely overlooked, both by the Ameen Ramgottee and by the Zillah Court in the consideration of his acts. It appears that Ramgottee did, in effect, attempt to disturb the possession of the jote tenant, and that he took fresh cabooleuts from the cultivators who had before attorned to the jote tenant under the direction of the Court. The Court, however, on the complaint of the jote tenant, set that matter right, and directed in substance the cancellation of the new cabooleuts. The legal effect of this order of the Court was, to set up the original cabooleuts, and to restore or confirm the jote tenant's possession. Now there is not only no evidence of any subsequent change of possession before the Decree of the Sudder Court

of the 18th of November, 1845, pronounced by Mr. Reid, but the very language of that Judgment conflicts with such a supposition, for by that Judgment, which was adverse to the jote tenant, the possession was ordered to be restored by him to the talookdars. It is plain that there is no error in the language of the Judgment; it is language perfectly consistent with the order of the Court directing the second set of caboo-leuts to be brought in, and it is also consistent with the course of practice in executing Decrees. It is plain, therefore, that both Courts have fallen into error on the point of possession, and that the Appellant is perfectly correct in maintaining that he was dispossessed only by virtue of the decision which he seeks to reverse. The Act of the Court which directs the cultivators to attorn, is of course not designed to expose them to risk of forfeiture; their simple obedience to the Act of the Court, in pursuance of the mode in which it executes a Decree, could not be attended with that consequence; and when the Court corrected its error it meant to restore, and did in law restore the old possession. As their Lordships think that the possession was not in fact disturbed until within the period of twelve years from the institution of this suit, it becomes unnecessary to consider whether the claim would have been kept alive through the whole time by the litigation as to the execution of the Decree.

The other point on which the Zillah Court decided against the Appellant was that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser at the auction sale of the jote tenure sold to one Ramdhone Sircar. Before this sale, he had instituted proceedings against the decree-holders under the title of the talook. Ramdhone Sircar purchased, therefore, *pendente lite*. He applied to be substituted in the suit, in lieu of Juggutchunder, which application was granted. This litigation terminated in the Zillah Court in favour of Ramdhone, the jote tenant. From that decision Rasmoney Dossee appealed. On her appeal the Sudder reversed the decision. This was the decree of Mr. Reid of the 18th November, 1845, which this suit seeks to set aside.

On this, Ramdhone Sircar instituted a regular

suit against Rasmoney Dossee and others, claiming in substance the same relief which is sought by this suit. Pending that suit Ramdhone died, and his three sons, Mohemachunder Sircar, Anundchunder Sircar, and Greeschunder Sircar, were substituted in his place on the record. Pending this litigation, the present Appellant purchased the jote tenure from the sons of Ramdhone. He applied in his turn to be substituted on the record and to conduct the suit. One of the sons, however, denied the purchase and the Court refused the application. In a few days afterwards, the cause was decreed for the Defendants. It is alleged that the actual Plaintiffs conducted their case negligently, if not collusively. On the argument before their Lordships the Attorney General abandoned the case of fraud, but contended that the Plaintiff was not barred by this decision; that he was not a party to the suit; and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that the decision followed so promptly on the refusal to allow him to intervene that he could not reasonably be expected in the interval either to appeal against the order refusing him leave to intervene or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the Defendants who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection.

The cause has not been decided in either court on the principal point—whether the lands formed part of the jote tenure or of the talook. Their Lordships are unfortunately unable to decide this Appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a Cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second Appeal as well as that of another hearing below. It is much

to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points. In the present case, the merits not having been entered into in the Courts below, their Lordships find themselves unable to dispose of the suit; and as they do not agree in the opinion either of the Sudder or of the Zillah Court, they will humbly recommend to Her Majesty that the decisions of both Courts should be reversed, and that the High Court at Calcutta should remand the cause for hearing in the Zillah Court on the issues on the merits other than the issues already decided in this Court on Appeal. Their Lordships will further recommend that the costs of the Appeal be paid to the Appellant, and that it be referred to the Registrar of this Court to tax the costs of the Appeal, with directions to disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from India of matters which he shall consider to have been improperly introduced therein, and that any taxation which may be had in India be regulated by the course which the the Registrar of this Court may adopt.

Their Lordships have observed with regret the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts printed in India and sent over in that form to the Registry of the Privy Council, an evil which appears to be on the increase; and their Lordships trust that the attention of the Courts in India from which Appeals lie to Her Majesty, will be directed to the subject, with a view to provide a remedy for a very serious evil.