Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sham Chand Bysack v. *Kishen Prosand Surma, from the late Sudder Dewanny Adawlut, at Calcutta; delivered 26th March* 1872.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian river, concerning certain churs formed in the course of that river, each landed proprietor maintaining that he was entitled to those churs, as appertaining to his estate.

The case of the Plaintiff was in substance this, that he was the owner of a talook called Meer Syud Mahomed, together with certain other persons of the surname of Chowdry; that his ancestors, by reason of their possession of this talook, were entitled to two churs in the channel formed by the junction of two rivers, the Booree-gunga and the Dhuneesurree; that those churs, one named Goag, otherwise Kodalia, and the other Bhedur, were what is called diluviated, that is, covered by water, some fifty years or more ago. Chur Goag was said to be diluviated in a great measure, though not wholly (indeed it has never been quite diluviated), as long ago as the year 1814. The other chur, Bhedur, was diluviated somewhere about the year 1817 or 1818. The case of the Plaintiff was, that those churs had gradually reappeared, chiefly owing to a change in the course of the river; in fact that they had re-formed upon their original sites not many years after they

were diluviated; and he gave evidence of measuring from time to time those churs as they reappeared and exercising acts of ownership upon them. Among other acts of ownership, he gave evidence of a lease granted, by the Chowdhrees, who were co-shareholders with him in the estate of Meer Syud Mahomed, to a person of the name of Dowcett in 1829, for a term of five years, and that Dowcett cultivated indigo upon a portion of the *locus in quo*. It is to be observed, however, that there is evidence on the other side, of Dowcett having taken the precaution of also obtaining a lease from the proprietor on the opposite bank.

According to the Plaintiff's evidence, he was in as complete possession as the subject matter admitted of, at all events up to the year 1832, when this litigation with the riparian proprietor on the other side of the river, who owned a talook of the name of Bucktbully, commenced.

It is not necessary to refer to the proceedings which took place before the magistrates from 1832 to 1835, further than to state their result, which appears to have been this: The Plaintiff, or rather those under whom he now claims, were put into possession of Chur Goag, or at all events, a portion of Chur Goag, and they have remained in possession of that portion from that time to this. But in the year 1835 an order was made for putting the Defendant's father, Gopal Pershad, in possession of Chur Bhedur. Actual possession would appear to have been delivered in 1836, and Gopal Pershad and his son, the present Defendant, have remained in possession of Chur Bhedur from that day to this.

The Plaintiff, having been dispossessed, as he alleges, in the year 1836, of this Chur Bhedur, did not institute this suit for the purpose of recovering that possession until the year 1847. He does indeed make some attempt to explain this delay by stating, that in the interim what is called a resumption suit was instituted in respect to these lands. As to the pro-

ceedings in that suit, it is not necessary for the present case to refer to more than this, that the proprietor of Mouzah Bucktbully, on the opposite side of the river, appears to have instituted a proceeding against the Government, with a view of obtaining possession of the lands in dispute, and some more upon payment of the Government revenue. As to a portion he succeeded, that he now occupies, and in respect of that there is no dispute. As to the lands now in question he failed, and undoubtedly the collector did find that the Plaintiff was entitled to those lands. That decision, however, was subsequently set aside, on the ground that the collector had no jurisdiction to make it, his jurisdiction being confined to determining the questions which arose between the owner of Bucktbully and the Government, and not extending to deciding on the conflicting claims of landowners.

It appears also that in the interim between 1836 and the institution of this suit, there was some family suit with respect to this property. Their Lordships, however, are of opinion that no sufficient explanation has been given for the very long delay on the part of the Plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. The hardship may be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away or witnesses may have died; indeed in this case it would appear that Gopal Pershad, the then owner, died before the institution of this suit, and possibly Gopal Pershad's evidence might have been of an important character, which his son could not supply.

But the delay in the institution of this suit

is not the only delay with which the Defendant is chargeable, for the judgment in this suit was given so long ago as 1861; the Appeal was brought in 1862; and in 1863 the Record was lodged. Some years afterwards, in the year 1868, the Defendant filed a supplemental Record, but he did not lodge a case until the year 1871, so that there has been a delay of nearly eight or nine years wholly unexplained in the prosecution of this Appeal.

The case then stands thus: the Defendant seeks to oust from possession persons who have enjoyed this property from the year 1835 to the present time, and for nearly twenty years of that delay he is responsible. Under these circumstances their Lordships certainly require to be satisfied by clear proof of the grounds which he alleges for disturbing a possession of such long continuance.

This suit began in the year 1848, and it lasted to the year 1861. It is not necessary to refer at length to its history. It may be enough to say that at an early stage, in the year 1848, a local investigation was held by an ameen of the name of Monier, which appears to have resulted in favour of the Plaintiff. Subsequently to that there was a hearing in 1850, before the Principal Sudder Ameen, who decided against the Plaintiff, upon the ground of the Statute of Limitations. The case on appeal was sent back to be re-heard, in order that the grounds of that judgment might be more clearly stated. It was again heard in 1852, and again decided against the Plaintiff, on the plea of the Statute of Limitations, the Principal Sudder Ameen at the same time expressing a somewhat strong opinion against the Plaintiff's case generally. Subsequently the case was again sent back to be re-heard upon the merits; and previous to its re-hearing upon the merits another local investigation was ordered before the moonsiff of Naraingunge, which took place on the 30th January 1858, whereupon the report of the Moonsiff was against the Plaintiff. The

Principal Sudder Ameen, on the hearing of the cause, indeed set aside the moonsiff's report, which he considered unsatisfactory, and decided substantially all the issues in favour of the Plaintiff. The case then came on for appeal before the High Court, and it is against this judgment that the present Appeal is lodged.

It has been contended that the High Court mistook the law as applicable to this case, and that their decision is in contravention of two cases; one, Mussumat Imam Banda *v.* Hurgovind Ghose, reported in the 4th Moore's Indian Appeals, p. 403, and another in the 12th Moore's Indian Appeals; in which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly that the High Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision; but it appears to their Lordships impossible to suppose that the High Court could not have been acquainted with the first of those cases, reported so long ago, as before observed, as the 4th of Moore's Indian Appeals; and on looking at the judgment, although there are some expressions in it which may give some colour to the contention of the Appellant, it does not appear to their Lordships that the High Court have, in the reasons of their decision, acted in contravention of either of the above decisions. It appears to their Lordships that the judgment must be taken to have proceeded mainly upon the ground, that the Plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the chur, which he alleged to have been diluviated. Whether the second clause of the fourth section of Regulation XI. of 1825 applies, or whether the fifth paragraph of the same section applies, which is in general terms and to this effect, "That in all cases not previously provided "for, and in all cases of claims and disputes "respecting land gained by alluvion or by dire-

" liction of a river or sea, which are not speci-
" fically provided for by the rules of this
" regulation, the courts of justice, in deciding
" upon such claims and disputes, shall be guided
" by the best evidence they may be able to
" obtain of established local usage, if there be
" any applicable to such a case; if not, by
" general principles of equity or justice;" in either case it is equally essential for the maintenance of the Plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think that on the face of the judgment it appears that this consideration must have been present to the High Court, and they read their finding, " that there were not any
" marks by which the lands can be identified as
" having at any time formed part of the estate
" of the Plaintiff," not as intimating (as it has been contended) that proof was necessary of the existence of some specific land marks; but as a general finding on the part of the Court that the lands had not been identified; and if so, undoubtedly there was an end of the Plaintiff's main case. But, further, it would appear from the judgment that the Plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as reformed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession; for, in the judgment of the Court it is said: " But he," the Plaintiff,
" urges that being in possession of part of the
" chur as the Goag under a decree of a com-
" petent court which has become final, the rest
" of the chur lands must be considered an incre-
" ment to that village." The Court disposed of that argument by stating their opinion that if the lands in question had formed to the south of the portion which was in possession of the Plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north.

They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the Plaintiff.

Under these circumstances, their Lordships, whatever might have been their view if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High Court, which was to the effect that the Plaintiff has failed to prove his case, that he has not proved the lands which have re-formed, if lands have re-formed in the bed of the river, to have been the same as those which belonged to his predecessors and had been diluviated; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

On these grounds their Lordships will humbly advise Her Majesty that this Appeal be dismissed.