Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shama Soondory Chowdhranee v. *Dukhina Mohun Roy Chowdhry, and of Shama Soondory Chowdhranee* v. *Mohima Runjun Roy Chowdhry and others, from the High Court of Judicature at Fort William, in Bengal; delivered Tuesday, 17th November* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THE subject matter in dispute in these causes is a considerable portion of alluvial land, which seems to be most accurately described in the Thakbust Map, No. 74. From that it appears that the whole chur, so to speak, is adherent at its western extremity to the original land of the Appellant's mouzah of Bongram, and extends in an easterly direction to the confluence of the Dhalla with a stream described in the map as the Rutnaiee, though there is a dispute as to the character of that stream. The westernmost portion of this chur is admitted to be alluvial land belonging to the Appellant under the designation of Seeb-kotee. The eastern portion of the chur from the easternmost of the red lines on the map is the disputed land. The chur, in its present form, seems to have existed certainly, and probably for some years before, the year 1849. It is said that the Dhalla River, which originally flowed in somewhat the same channel as that in which it now flows, gradually advanced, until it joined the

Rutnaiee stream, and afterwards receded, leaving this alluvial land dry. The Dhalla had originally divided the British territories and the zillah of Rungpore from the independent territory of Cooch Behar, belonging to the Rajah of Behar; and there were early disputes, respecting either the disputed land, or other chur land, between the Rajah of Behar and his people on the one side, and the predeccssors in title of the Respondent the then Zemindars of Koolaghat. There was also in 1848 a dispute between the Rajah of Behar and his people on the one side, and the Appellant, as the Zemindar of Bongram, on the other side. In both these classes of cases the decisions of the East India Company's officers were against the Rajah; but in 1849 all three parties came, for the first time, together, in the presence of each other. The proceeding on that occasion originally commenced with a complaint under Act 4, of 1840, made against the Rajah's people on behalf of the Zemindar of Koolaghat. The tenants of the Zemindar of Bongram thereupon intervened, and the decision of the Magistrate, which was afterwards confirmed by the Sessions Judge, was that the possession of the land then in dispute, which, it must be taken, since that is now admitted on both sides, to be identical with the land now in dispute, of right belonged to Koolaghat, and that the Zemindar of Koolaghat ought to be put in possession. He experienced, however, considerable difficulty about recovering possession, and the three parties continued, more or less, to litigate this question before the Company's officers up to the year 1852. In the meantime, or before that year, however, the dispute, at least so far as it concerned the Appellant and the Rajah, had been transferred by the Rajah into his own Court, the result of that being, that under an arrangement then subsisting

between the Cooch Behar Rajah and the British Government, there was a survey by darogahs appointed on each side, and the disputed land was found by them to be out of the Company's territories, and as such to belong to the Rajah. The Rajah thereupon, applied to the Magistrate to take recognizances from the other parties to prevent their interference with his possession. The Magistrate refused to do this, but on appeal to the Sessions Judge, he, on the 19th of June 1852, directed those recognizances to be taken, and from that time it is perfectly clear that the whole chur, including land in dispute, was removed altogether for nearly 10 years from the jurisdiction of the British Courts and from the possession of both the now contending parties, remaining in the possession of the Rajah of Cooch Behar. In 1856 certain Thackbust proceedings took place, in which it became the duty of the survey officer to lay down the limits of the mouzahs of Bongram and Koolaghat, and the other surrounding mouzahs. On that occasion the dispute between the three parties again came before the Thackbust deputy collector, Baboo Hurrochunder Ghose, who, on the 7th of July 1856, came to the conclusion, that the chur ought of right to belong to British territory; that the better title to it was in the Zemindar of Bongram; and that the lands, as to which there had been former decrees in favour of the then Zemindar of Koolaghat, which decrees had been very much relied upon by the Judge and the Magistrate in the proceeding of 1849, were, in fact, south of the channel called the Rutnaice. The deputy collector, however, held that it was not for him, in the circumstances, to interfere with what had been previously settled as to the possession of the Rajah, and that, so far as his proceeding was concerned, the whole chur must be treated as being in the possession of the Rajah

as part of Cooch Behar. After that there followed a proceeding, on the 17th of December 1860, before Mr. Macdonald, the collector, acting as a special commissioner for the determination of the real boundaries between Cooch Behar and Rungpore; and he, the three parties being then before him, went very fully into the question, and decided that the Dhalla was the proper boundary of Cooch Behar; that the land belonged to British territory. He further expressed an opinion—though it was beyond his province to determine any question of title or of possession in the land as between British subjects—that the Appellant ought to be put in possession of the whole chur, and the other party left to bring a regular suit to recover possession of the portion claimed by him. Several references to the Governor-General's agent for the North-Eastern Frontier, and other authorities, became necessary in order to get the land finally out of possession of the Rajah of Cooch Behar, and the result was that the Appellant was not put into possession until about February 1862. She had previously, however, brought the first of these suits, the object of which was to have a declaration of her title as against the Respondent. The Zemindars of certain other villages intervened, and the final decision of the Principal Sudder Ameen was, that the Plaintiff in the suit, the present Appellant, had established her title to the disputed land as an accretion to Bongram; but the decree pronounced by that Judge was not a mere declaratory decree of title, but just such a decree as would have been made supposing the party being out of possession had brought a suit to set aside the possessory order of 1849, and to be restored to the possession which she had thereby lost. An appeal was preferred against that decree to the High Court, which reversed it and dismissed the suit. The Respondent had also brought a suit (the second of those embraced in

this Appeal), mainly with the object of being relieved from the supposed effect of Mr. Macdonald's Order of the 17th December 1860, but also praying for a declaration of his title to the disputed land as part of a village, *Dipchandkotee*, alleged to have formed part of the Zemindary of Koolaghat, and to have been washed away.

Their Lordships, having to deal with this state of things, have first to consider whether the decree of the High Court, as it stands, can be supported. They cannot concur in the principles upon which the learned Judges of the High Court have decided the case. They appear to have treated it as an ordinary case in which the Plaintiff comes to be relieved from the effect of a possessory order, under Act 4, of 1840; and to establish a title to land in the possession of which the other party had thereby been put or maintained. They say distinctly in their judgment, "The Magistrate and Sessions Judge, in "1849, found the Defendants in possession and "we are bound to believe that they remained "and are still in possession." That, however, is clearly an assumption contrary to the plain facts of the case, from which it is obvious that both parties were for nearly ten years, from 1852 to 1862, out of possession—the lands, notwithstanding the orders of 1849, remaining all that time in the possession of a third party. Therefore, the learned Judges do not seem to have addressed themselves to what were really the facts of the case, and have decided it by applying a rule which, however well founded, had the facts been as they were assumed to be, is not, in their Lordships' opinion, applicable to the special circumstances of this case.

The next question is, whether the decree of the Principal Sudder Ameen is to be affirmed. Their Lordships have already observed that this as it stands, is erroneous, and not in accordance with

the circumstances of the case, or the prayer of the Appellant's plaint. The questions which really arise on this Appeal are whether there are sufficient grounds for a declaratory decree in favour of the title of the Appellant, or whether, on the other hand, the Respondent is entitled to any substantial relief in his suit. The Respondent has certainly failed to satisfy their Lordships that he has such a title to the land in dispute, as would justify any declaration that would have the effect of interfering with the possession in fact which the Appellant has now obtained. On the contrary, the evidence, as far as it goes, would rather incline their Lordships to the opinion that the Appellant has the better title of the two.

On the other hand they are not satisfied that the Appellant has made out such a case as would justify them in exercising the discretion that is given to the Courts, of pronouncing a purely declaratory decree as to her title. It appears to them, that although after 1852 the land had been withdrawn from both parties, she might between 1849 and 1852 have brought a suit to set aside the award of 1849 as erroneous. She did not do so, and she is so far responsible for the delay which has increased the difficulty of proving such a title as would justify a declaration of title. Considering this, and the imperfect evidence as to the origin of her title, which leaves it doubtful whether she claims the chur as a reformation on or an accretion to her original land, their Lordships are not prepared to exercise the discretion which the law gives them, by making the declaration of title which her plaint asks for. On the other hand, they do not think that any case has been made for interfering with her possession. They think that this suit was not necessary; for she might have rested on the possession which Mr. MacDonald's

proceeding ensured to her and left the other party to bring a suit to recover the land in dispute and have defended that suit on possession. Their Lordships think, therefore, that the justice of the case will be met by dismissing both suits, and that, both parties being in the wrong or partially in the wrong, each should be left to bear his own costs.

Their Lordships will, therefore, humbly recommend to Her Majesty that the decrees of the High Court of Judicature should in both Appeals be discharged, and that in lieu thereof both the suits should be dismissed, each party paying his or her own costs in these Appeals and in the Courts below.