***Judgment** of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raj Coomar Roy and others* v. *Gobind Chunder Roy and others from the High Court of Judicature at Fort William in Bengal; delivered 19th March* 1892.

Present:

LORD HOBHOUSE.
LORD MORRIS.
LORD HANNEN.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Hobhouse.*]

This is one of the disputes which give rise to so much litigation, more apparently than is accounted for by the value of the property, about the boundaries of contiguous estates when the land is uncultivated and the action of water is always tending to remove landmarks. The Respondent, Gobind Chunder Roy, is the zemindar of the mouzah Babupore, and is Plaintiff in the suit. The Appellants are talookdars or putnidars of the adjoining mouzah Baraset, and are Defendants in the suit. The controversy is whether two plots of land stated in the plaint to measure 633 bighas belong to Baraset or to Babupore.

The plaint was filed on the 9th April 1881. It states that the disputed land remained under water for a long time and that the Plaintiff's predecessors were in possession by receipt of the fishery rent; that a dispute arose between the

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predecessors of the Plaintiff and those of the Defendants with regard to the thakbust of the lands, and that a mutnaza case, No. 401 of 1857, was instituted before the Survey Deputy Collector, was decided in favour of the Plaintiff's father on the 22nd May 1857, and the decision confirmed in appeal.

The sixth and eighth paragraphs of the plaint are as follows:—

"6. From 1276 the south-eastern portion of the aforesaid bil began gradually to silt up. The silted up land used to remain waste and covered with dense jungle in the dry season, and in the rainy season overt acts of possession were exercised on the part of the plaintiff's father by receipt of the fishery rents of that place. The Roy defendants, with a view to dispossess the plaintiff's father from the said lands, and having recourse to divers acts of fraud and injustice, exceeded the boundaries of their estate of mouzah Baraset, as fixed by the thakbust authorities, and after gradually bringing the said silted-up bil land under cultivation and making settlements thereof, they have continued without any right to possess and enjoy the same from the month of Srabun 1278."

"8. As the act of dispossession commenced in Srabun 1278, and as the plaintiff is not in a position to ascertain the exact time when each plot of land became cultivable, he takes the cause of action in this case against the Roy Defendants to have arisen from the said month of Srabun 1278."

The Plaintiff adds statements to account for the delay in suing, but it is not material to consider them. He prays to recover possession on the Plaintiff's zemindari right, and for mesne profits. A description of the property is added in a schedule, of which the only thing now needful to say is that the larger of the two plots is described as lying south of Betaga shore. (Rec., pp. 2—4.)

The Defendants put in a written statement, claiming the disputed land as belonging to Baraset, denying in effect that the land sued for is the same as the land awarded to Babupore in May 1857, and contending that inasmuch as they do not admit that the Plaintiff or his predecessor was ever in possession of the disputed land, the suit is barred by limitation. (Rec., p. 6.)

The questions raised by the pleadings are two: First, do the lands now in suit form part of the mutnaza lands, *i.e.*, those comprised in the proceedings of 1857, called the mutnaza suit? If they do not, the whole foundation of the Plaintiff's case fails. If they do, the second question arises: How far is the Plaintiff's title barred by the possession of the Defendants, or by his own non-possession?

The order made in the mutnaza suit, with preliminary statement, is set out at p. 29 of the Record. The then zemindar of Babupore, the present Plaintiff's father, complained that the talookdar of Baraset had caused 400 or 500 bighas of land belonging to Babupore to be measured with Baraset in the thakbust proceedings. The Court caused a plan to be made, and the Survey Deputy Collector, Taruck Nath Ghose, went in person to view the spot and to investigate the matter in dispute. He found that on the northern boundary of Baraset was a khal named Nowdara, and that the mutnaza lands lay north of that khal, and west of the Bil Betaga, and that the Plaintiff received the julkur rents of Bil Betaga, &c. He ordered that the map should be corrected by enclosing the said land within the boundaries of mouzah Babupore. (Rec., p. 32.)

The Defendants appealed to Mr. Watson, the Survey Superintendent, who, on the 1st of January 1858, made an order confirming the Deputy Collector's order, on the same grounds. (Rec., p. 36.) The thak map was then altered and is numbered 742 in this Record. The mutnaza map is also in the Record numbered 751.

When this suit came before the Subordinate Judge of Jessore, he sent an Ameen to survey the ground and make a plan of it, but his work was not satisfactory and was set aside. Another Ameen was sent, whose map, numbered 326, is in

the Record. The Subordinate Judge states, and it so appears from the map No. 326, that, according to this Ameen's survey, nearly the whole of the land now in suit lies within the circuit of mouzah Babupore. (Rec., p. 353.)

The Subordinate Judge subjected the various maps and also the oral and other documentary evidence to a very long and minute examination, and he came to the conclusion that the Ameen's map was wrong (Rec., p. 353), that the thak map also was wrong (Rec., pp. 364 and 368), and that the lands in suit formed no part of the mutnaza lands. (Rec., pp. 353—368.) His main reason appears to be that the lands in suit are described in the plaint as being to the south of the Betaga shore and Khal, and were so pointed out to the Ameen by the Plaintiff's men; whereas, he says, according to the mutnaza map the shore is to the south of the mutnaza lands. (Rec., p. 351–353.) He also decided that there was no evidence to prove the Plaintiff's possession of the disputed lands within 12 years of the suit (Rec., p. 347), and that the Defendants have proved their possession for more than 12 years. (Rec., p. 368.)

Their Lordships may say at once, that though there are difficulties in the question of identity, they cannot understand that particular difficulty which has impressed the mind of the Subordinate Judge. Seeing that the land has till within a few years been all covered with water; that it is now mostly covered with thick jungle so as to throw serious obstacles in the way of a survey; that there are formations of water on its northern southern and eastern extremities, of irregular shape, much hidden in parts by vegetation, and with names not well defined but differently given by different informants, there is plenty of ground for dispute. But their Lordships are unable to see any inconsistency between the mutnaza map and the description in the plaint. They find that the names Betaga Bil,

Betaga Khal, and Betaga Shore, are used interchangeably to designate a water course which in the mutnaza map is shown on the north the east and the south of the mutnaza lands. At the south-west end of it the Nowdara Khal is marked, which appears to be in some seasons one with the Betaga, and in others separated from it. In point of fact, the Betaga Khal, according to the mutnaza map, lies to the north of a large portion of the mutnaza lands, and of nearly, if not quite, the whole of that portion of the mutnaza lands which is now in suit. The Subordinate Judge seems to have been misled by looking at a marginal note on the map without the explanation afforded by the map itself. The note, apparently referring to the lands generally, says, "North of the "Betaga Khal of Nij Mouzah;" and the map shows that the writer must refer to the southern branch of the khal. The Plaintiff then is justified in stating that he sues for lands south of the Betaga Shore, and though his people may easily have made mistakes in pointing out the land under circumstances calculated to baffle a skilled surveyor, no proof that they did so can be drawn from the fact that they pointed out land to the north of which lay water which they called, and which probably was, the Betaga shore or khal. These observations will dispose of a great deal of the argument pressed upon the Board by the Counsel for the Appellants.

As regards the Subordinate Judge's finding on the question of possession, it is very much, and quite properly, mixed up with his finding on the question of identity. The evidence has a different bearing according as it is supposed to apply to land which is, or to land which is not, portion of the mutnaza lands.

The Subordinate Judge dismissed the suit, and the Plaintiff appealed to the High Court. That Court considered it necessary that a fresh

local inquiry should be held and a map prepared by a competent officer; and they appointed Mr. Madge to be a Commissioner for that purpose. Briefly stated, his instructions were to show the boundary fixed by the thakbust map prior to the mutnaza case, and to ascertain the mutnaza lands, and the lands described in the plaint. (Rec., p. 375.) The result of this commission was the preparation of two maps by Mr. Madge, of which No. 2 is now the important one, and a report by him, which is to be found at page 429 of the Record. The Defendants took objections to the report, and the case came again before the High Court.

The High Court held that, notwithstanding the great difficulties in the way of a proper survey, Mr. Madge had accurately depicted the lines of the original thak survey as well as of the lands relating to the mutnaza case, and that his proceedings formed a reliable basis for determining this suit by the result of the mutnaza case. And as his map No. 2 showed two plots of land, amounting to about 862 bighas, as forming part of the mutnaza lands, the Court gave the Plaintiff a decree for those plots with mesne profits.

As regards the question of possession, the view of the Court was that, until the land became fit for cultivation by the drying up of the water, they could not find that either party was in possession of any particular portion so as to define a boundary line between their estates; that the possession found in the mutnaza case must be held to have continued; and that the Plaintiff's title was not barred.

The Defendants now appeal from this decree; contending that, upon both the points in controversy, the Subordinate Judge is right and the High Court wrong. They complain that the High Court has trusted too implicitly

to Mr. Madge's survey, and has not examined the other voluminous evidence to which the Subordinate Judge addressed himself. Their Lordships will first deal with the question of identity.

On this point, with reference both to this case and to several others of a like kind which have come before them, their Lordships think it right to express an opinion that in order to set aside the decision of the Court below, the Appellants should come prepared to show clearly where it is wrong, and what other course is right. 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 statements which appear 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. To a certain extent the same remark is true as between the Subordinate Judge and the High Court, but the High Court possessed a resource which this Board would be very reluctant to use again in this suit. They felt the local difficulties, and they met them by ordering a local survey of their own. On the results of that survey they saw their way to affirm the Plaintiff's title. To induce this Board to disaffirm it, the Defendants ought to do something more than to show that the Plaintiff's title is not free from doubts; they should at least give some acceptable explanation of the circumstances which have led the Court below to its conclusion.

Now that is exactly what the Appellants have failed to do. 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 Lord-

ships can see, show in terms, and on its face, the Thakbust 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.

But the difficulty of the Defendants is this. It is certain that the Plaintiff recovered land from the Defendants in the mutnaza suit. Where are the mutnaza lands? According to the thak map, the mutnaza map, the Ameen's map, and Mr. Madge's map, they are so placed as to correspond more or less closely with the land now in suit. Observations have already been made on the arguments used to show that there is error in the thak map and the Ameen's, and discrepancy between them and the mutnaza map. If the maps are all wrong, where shall we place the mutnaza lands? The defendants say that they should be placed somewhere to the north of the northern branch of the Betaga Khal, in a region which no one of the maps enables us to ascertain. To that theory there seem to be two strong objections.

The first is that though Mr. Madge was occupied in surveying the ground from the 18th May to the 18th June, and though from the 19th May he was attended by the Ameen of the Defendants, and from the 26th by their surveyor, no one objected that his operations were being conducted in a wholly wrong place, so that the work would all be thrown away.

The second is that we cannot have any evidence of the position of the mutnaza lands so good as the mutnaza map, and where it speaks intelligibly we ought to follow it. Now the

mutnaza map gives as a land mark a mound called Gozmara Tek, not on the face of the map, but in the marginal note before referred to, which says that the land lies to the south of it and to the north of Betaga Khal. The Gozmara Tek does not appear in the thak map or in the Ameen's. But Mr. Madge discovered it, and clearly identified it as one of the stations used in the mutnaza survey; and he has placed it at the northernmost point of the mutnaza lands. According to the mutnaza map the lands cannot be between the Gozmara Tek and the north branch of the Betaga Khal; there is no space for them there; and the map-maker places them between the site of the Tek and the south branch of the Khal. If a line be drawn on the mutnaza map from west to east through the Gozmara Tek placed at the point now ascertained by Mr. Madge, and if a parallel line be drawn at a tangent to the southernmost portion of the Betaga Khal, the whole of the mutnaza lands will be found between these two lines. Another important landmark on the mutnaza map is the Nowdhara Khal at the extreme south-west. It is not marked on the thak map, or on the Ameen's, but it was ascertained by Mr. Madge, and treated by him, in the presence of the agents, as the south-western boundary of the lands; for from that point he began to work due north; and it is so set down in his map. It appears therefore that Mr. Madge found these two cardinal points on the north-east and the south-west, just where they ought to be if the Plaintiff's theory of the lands is correct, and where they could not be if the Defendant's theory is correct.

The Defendants have insisted very earnestly that Mr. Madge has passively followed the thak map to produce his own. But his report has not been impugned and must be taken to speak the truth. It shows a laborious survey lasting for a month and carried into minute

detail. Moreover, the points just now insisted on, to say nothing of some small variations having the effect of throwing some five bighas out of the thakbust boundary, show that the survey is to be taken as an independent and original work, though of course Mr. Madge availed himself of the mutnaza map and field-book, as indeed the High Court directed him to do.

Much reliance was placed at the bar on the expression by the High Court of their agreement with the Subordinate Judge that the thak map does not accurately show the lands of the mutnaza case. In the absence of explanation their Lordships do not know what inaccuracy is referred to, unless it be the small variations just noticed. It is certainly not the inaccuracy, or rather the glaring error, supposed by the Subordinate Judge; and it is something which is consistent with the accuracy of Mr. Madge's map. It appears to their Lordships that in deputing Mr. Madge, the High Court took the best course open to them; that in the absence of proof that there are specific and material errors in his map, they were right to rely on it; and that their conclusion on this part of the case ought to be maintained.

The next question is whether the title of the Plaintiff which, accompanied by possession, was affirmed in 1857, has been lost by subsequent non-possession on his part, or adverse possession on the part of the Defendants. In this controversy the Defendants start with the advantage that the Plaintiff admits their possession from a time nearly ten years before the suit. Still there remain two years during which possession must be proved, or inferred on legal grounds, on one side or the other. The Plaintiff claims, and the High Court has held, that presumption must be in favour of the title and former possession. The Defendants claim

that it should be in favour of the state of things existing for ten years. Each party has tendered positive evidence on the point.

The condition of the land is such as to offer great difficulty in the proof of possession. At the date of the thakbust the whole was under water, together with a contiguous larger tract. The only use or enjoyment consisted in fishing. There has been a gradual slow and still incomplete conversion of this lake into swamp, and of swamp into habitable land; and it is obvious that during such a process there may be parts of the land which for many years are not used at all for any purpose of enjoyment. Mr. Madge's map shows two plots divided by a channel called the Bhaisa or the Arpangasia. Plot 1 consists of 829 bighas lying to the west of the Arpangasia; and this plot is still for the greater part in a state of swamp and jungle, though portions of it were used for growing paddy as early as the autumn of 1871, whether earlier or not is matter of dispute. Plot 2 consists of 32 bighas lying to the east of the Arpangasia; and there is evidence that land in this quarter, whether actually land of plot 2 or not is again matter of dispute, was dried by the cutting of a channel about the years 1868 or 1869.

The Defendants contend that though the Plaintiff shows title and possession in 1857 he still must fail unless he can show acts of possession and enjoyment later than the 9th April 1869, or that he must prove the act of dispossession by the Defendants later than that date. Their Counsel went so far as to argue that if the land, being in a state of swamp and jungle, had been left wholly unused for 12 years, and then a stranger were to settle upon it, the Plaintiff could not assert any title against him.

The High Court do not enter upon any

discussion of this question. In their view of the evidence, it does not enable them to find that either party was in possession of the sheet of water so as to define any boundary line between their respective estates. Therefore they conclude that, so far as the lands now claimed are identical with the mutnaza lands, the possession found in 1857 must be taken to have continued, and to show the boundary line of the two estates.

After hearing a great deal of argument to impugn the view of the High Court, their Lordships are not disposed to differ from it. It is in accordance with the decision in the case of *Runjeet Ram Panday* v. *Goberdhun Ram Panday*, 20 *W.R.*, *pp.* 29, 30, a case which fell under the Limitation Act passed in 1859, when the Plaintiff (as pointed out in *Rao Karan Singh* v. *Raja Bakar Ali Khan*, 9 *L. R. Ind. App.*, *p.* 99) was subject to a burden of proof heavier than that established by the Limitation Acts of 1871 and 1877. But their Lordships say no more upon this point; nor do they feel called upon to examine the subsequent cases, because they think that, even assuming the burden of proof upon the Plaintiff to be such as the Defendants contend for, he has sufficiently discharged it.

Their Lordships will first consider the evidence adduced by the Defendants. Seven of their witnesses have been selected by their Counsel, doubtless those who are the most effective. Five of them speak to Plot 1 and two to Plot 2. Six of them are tenants of the Defendants, and one (witness No. 10) was present at the Court Ameen's survey. They were examined in May 1884. Let us first take the five who speak to Plot 1. As regards time, one witness, No. 14, specifies no time of occupation; one, No. 7, proves too little, only nine or ten years. The other three prove

too much; No. 10 has seen tenants there 27 or 28 years previously, *i.e.*, before the thak survey, when it is agreed on both sides that all was under water; No. 18 carries the settlement by habitation back to 1859 at latest, No. 16 to 1861 at latest; but, as has been stated, paddy planting was carried on in 1871, so that down to that time the land must have been under water and uninhabitable. As regards the situation of Plot 1, No. 7 and No. 10 do not fix any. The other three fix it in village Bhawanipore, which is in mouzah Baraset; and one of them, No. 16, adds that Nowdhara is to the north of the Plot. Now Bhawanipore does not appear on the earlier maps; but it is marked on Mr. Madge's map, outside the mutnaza lands. And Nowdhara is one of the cardinal points ascertained by him as the south-west extremity of those lands. There is no reason to suppose that these witnesses were consciously telling any untruth. But there is very strong reason to conclude that they were speaking of other land; an error not difficult to fall into, perhaps not easy to avoid, in such a country. There is, then, in their Lordships' judgment, no evidence at all given by the Defendants which touches Plot 1.

Of the two witnesses who speak of Plot 2, No. 8 holds 27 bighas of the Defendants, 17 of which are again held of him by No. 4. No. 8 says that he got his grant 21 or 22 years ago, *i.e.*, in 1862–63; that his land was then covered with water; that within two years it became fit for cultivation; and that it became dry after a Khal, which he calls the Kata Khal, was cut 15 or 16 years ago, *i.e.*, in 1868–69. The cultivation he speaks of as possible in 1864–65 must have been for paddy, though he does not say so; neither does he say that it actually was cultivated; he does not cultivate personally, he says. No. 4 (who is 45 years old) says that his father took 13 bighas 18 or 19 years ago, *i.e.*,

in 1865–66, and built a house on it a year after. He took the other four bighas two or three years later. "When I first saw my land it was in a "cultivated state. That was some eighteen or "nineteen years ago." He does not speak of any alteration of the surface, but speaks of his cultivation as if it were the same thing as that of 19 years back.

It is impossible not to feel serious doubt of the value of this evidence. The lessee tells us that the land was cultivated at a time not later than 1866 and was built on at a time not later than 1867, while the lessor says that either a year or two years after the latest of those dates it was covered with water. And such events as the taking of a farm, the building of a house, and the drainage of a lake, are not likely to be forgotten in the life of a countryman.

As regards the situation of their land, both witnesses say that it is east of Arpangasia. No. 8 tells us nothing more. No. 4 says that it lies within the little disputed Plot, but how he makes that out does not appear. There is no further identification. It was pointed out by Mr. Arathoon that the Ameen's measurement of the land in suit was 1,215 bighas, and of Plot 2 71 bighas, the bulk of which he made out to be mutnaza lands; whereas Mr. Madge's survey only gives 829 bighas for the mutnaza lands now in suit, and for Plot 2, 32 bighas. It is therefore quite possible that when witnesses speak of the "land in dispute" they may be speaking of some of that excess portion which was in dispute before the Ameen and before the Subordinate Judge, but which is not in Mr. Madge's map or in the decree. This is conjectural, but it introduces an additional element of uncertainty into the Defendants' case.

It can hardly be said of Plot 2, as of Plot 1, that there is absolutely no evidence which can

be applied to it; but it is so extremely weak that, even if uncontradicted, it would hardly advance their case.

The Plaintiff's evidence, on the other hand, is of a character which, having regard to the nature of the land, is as substantial as can be expected. It is proved clearly that fishery leases were granted from 1861 onwards by the Plaintiff or his predecessors at substantial rents. There can be little doubt that these leases covered Plot 1, because the Plaintiff's witness No. 6 shows that he was lessee in 1871 when the Defendant's tenants planted paddy, apparently for the first time; and that, on account of this encroachment, he obtained an abatement of rent from the Plaintiff. The place of encroachment he describes as being the south-east corner of Betaga Bil.

That the leases covered Plot 2 is not made clear by any positive evidence. But seeing that the whole of the mutnaza lands were covered with water in 1857 and afterwards, apparently down to 1868–69, the proper inference is that they did include Plot 2. And as the Plaintiff's evidence is in accordance with, and is aided by his title and previous possession, which is now made clear, and is not countervailed by anything of the slightest weight on the Defendant's part, their Lordships hold that the evidence clearly applying to Plot 1 must be taken to apply to the whole of the mutnaza lands now in suit.

They will humbly advise Her Majesty to dismiss the appeal, and the Appellants must pay the costs.