Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of The Secretary of State for India in Council v. *Krishnamoni Gupta and others and Krishnamoni Gupta and others* v. *The Secretary of State for India in Council (Appeal and Cross-Appeal consolidated), from the High Court of Judicature at Fort William in Bengal; delivered the 18th April 1902.*

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

The river Pudma is one of those great rivers in India which frequently change their course. Sometimes it has cut from north to south and then again from south to north and sometimes it has cut in both directions at the same time. As the bed of the river has shifted from time to time cultivable lands have been submerged and again lands which had been submerged have been reformed and become cultivable. The Plaintiffs in the action out of which these appeals arise are the present representatives of a family named Mozumdar and they and their ancestors are conveniently referred to as the Mozumdars. A permanent settlement was made with this family under Regulation I. of 1793 of Zemindaris Nos. 898 and 148 at a fixed assessment. These Zemindaris were on the north of what was at the time of settlement the river bed. They are said to have comprised a Mouzah

20530. 125.—4/1902. [18] A

called Mowkuri but owing to changes in the river bed the name has disappeared from the maps and the identification of the site of this Mouzah was one of the questions of fact in the case. The Government are the proprietors of the Khas Mehals Chur Dhunchi Sonakandar and Gachiadaha situate on what was in earlier times the southern bank of the river.

The Mozumdars commenced this action on the 30th March 1894 claiming certain lands which had been submerged and were reformed as appertaining to Mouzah Mowkuri and part of their Zemindaris. The Government by its written statement pleaded (amongst other things) that neither the Plaintiffs nor their predecessors ever were in possession of the land claimed in their alleged proprietary right and that the suit was barred by limitation. The only issues to which their Lordships' attention was directed were the second whether the suit was barred by limitation and the fourth whether the land in dispute formed any portion of estates Nos. 898 and 148 at the time of the permanent settlement.

The land originally in dispute is defined by a yellow line on the Amin's map appended to the High Court's decree. It was admitted by Counsel for the Mozumdars that they could not maintain their claim to the pointed triangular piece to the south of what is called the line of 1845 and on the other hand the Government do not now claim a small piece to the north of the line of 1859. The land now in dispute therefore is comprised between the lines of 1845 and 1859 which describe approximately the southern bank of the river at those respective dates. Those lands are divided into two nearly equal portions by a blue line describing the river bank of 1869. The Subordinate Judge decided wholly in favour of the Government. The High Court decided in favour of the Mozumdars as to the portion of the land

lying between the line of 1859 on the north and the blue line of 1869 on the south and in favour of the Government as regards the southern portion between the line of 1869 and the line of 1845. Both parties have appealed.

The learned counsel for the Government for the purposes of the Appeal accepted the facts as found by the High Court and relied exclusively on limitation in support of its claim. Their Lordships therefore are not called on to discuss any of the questions of fact which were in issue in the Courts below. The High Court has found that the lands now in dispute formed part of a tract of 9,407 bighas which had been released to the Mozumdars in 1827 as forming part of their permanently settled lands. Their Lordships need only state the subsequent events so far as may be necessary to make the argument on behalf of the Government intelligible.

Between 1839 and 1845 the river had moved northwards to the line of 1845 and an island had been formed on the south of the then river bed. By a proceeding in the Collectorate of the 17th April 1846 this land was decreed in favour of the Government as Jajira. Ijara settlements were made by the Government with the Mozumdars for this Jajira land for terms of ten years.

By the year 1859 the river had again moved northwards to the line of 1859 and the lands now in dispute which in 1845 had been submerged were reformed. The Government claimed these lands as an accretion to their jajira land and by proceedings in the Collectorate of February 1859 they were adjudged to the Government as being within Dhunchi Sonakandar and Gachiadaha. Thereupon ijara settlements of these lands also were made with the Mozumdars for terms of ten years from 1st May 1859 to 30th April 1869—and the Mozumdars entered into

possession under the ijaras and paid the jummas thereby reserved.

After 1859 the river moved southwards and in 1869 when the last named ijara settlements determined the southern bank was the blue line called the line of 1869 the lands in dispute north of that line having become submerged. The Mozumdars appear to have renewed their ijaras for the parts of the disputed land from time to time unsubmerged usually from year to year until the year 1882. The river has now again moved northwards and all the lands submerged between 1859 and 1882 have been reformed.

In 1885 the Mozumdars took possession of the lands in dispute but were dispossessed by the Government in the following year.

On these facts the Government contend that the possession of the Mozumdars under the ijaras granted to them was in fact and in law the possession of the Government claiming proprietary right in the disputed lands and that such possession was in exclusion of and adverse to the claim of the Mozumdars to be proprietors thereof. As regards the southern portion between the lines of 1845 and 1869 the learned Judges in the High Court have found that the Government was unquestionably in possession from the year 1859 to the year 1874–5 and they hold that if it acquired an adverse title in respect thereof that title could not be lost unless it was out of possession of the same for sixty years.

It may at first sight seem singular that parties should be barred by lapse of time during which they were in physical possession and estopped from disputing the title of the Government. But there is no doubt that the possession of the tenant is in law the possession of the landlord or superior proprietor and it can make no difference whether the

tenant be one who might claim adversely to his landlord or not. Indeed in such a case it may be thought that the adverse character of the possession is placed beyond controversy. On the expiration of the first ijara settlement for ten years the estoppel came to an end and the Mozumdars might have asserted their title against the Government. But they preferred to renew their ijaras from year to year. This part of the case was not seriously contested by Mr Mayne on behalf of the Mozumdars and indeed it was admitted by him that the Government was in possession from the date of the proceedings in the Collectorate of February 1859.

As regards the northern portion of the disputed lands other considerations apply. The Government have never had actual possession of the land through their ijaridars for a continuous period of twelve years because the lands became submerged prior to the year 1869 and remained so (it is found by the High Court) until within ten years of the commencement of the suit. But it is urged on behalf of the Government that having been in possession through their tenants when the lands became submerged their possession must be deemed to have continued in law while the lands were under water and to have revived on their being reformed and reliance is placed on a case of *Kally Churn Sahoo* v. *The Secretary of State* decided by the High Court in 1881 and reported 6 Calcutta 725. For the purpose of trying the question whether limitation applies the Government must be regarded as a trespasser and dispossessor of the rightful owners and in the opinion of their Lordships it would be contrary both to principle and authority to imply such constructive possession in favour of a wrongdoer so as to enable him to obtain thereby a title by limitation. In order to sustain a claim to land by limitation under the

Indian Act there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him. The possession of the Government was in fact determined by the submergence of the land which then became derelict and so long as it remained in that state no title could be acquired against the true owner. Sir R. Garth however seems to have thought that in such a case the possession of the trespasser would continue until the true owner resumed possession.

Their Lordships cannot agree in this view. On the contrary they think that on the dispossession of the Government by the *vis major* of the floods the constructive possession of the land was (if anywhere) in the true owners. In the case of the *Trustees Executors and Agency Company* v. *Short* (13 A.C. 793) it was laid down by this Board that "if a person enters "upon the land of another and holds possession "for a time and then without having acquired "title under the statute abandons possession the "rightful owner on the abandonment is in the "same position in all respects as he was before "the intrusion took place." And the opinion of Parke B. is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the statute.

Their Lordships think that for this purpose dispossession by *vis major* has the same effect as voluntary abandonment and they are of opinion that the case of *Kally Churn Sahoo* v. *The Secretary of State* was wrongly decided and ought to be overruled. In the result therefore their Lordships agree with the Court below on this part of the case and the appeal of the Secretary of State fails.

Only one point was raised in the cross appeal of the Mozumdars which may be shortly disposed of.

They say that the whole of the disputed land has been found to have been at one time part of their zemindaris of which (as already mentioned) a permanent settlement was made with them and they point to the third clause of the Regulation of 1793 by which the Government engages not to raise the assessment on permanently settled lands. They have always paid and continue to pay the full amount of this assessment and it is argued that the exaction by the Government of the jummas under the ijaras in addition to the assessment under the permanent settlement was a breach of its engagement and the Government (they say) is estopped from asserting khas proprietary rights in the land. It is difficult to see where the estoppel comes in and what must be meant is that the zemindars should be deemed to have been in possession of the lands as part of their zemindaris and not under the ijaras (which should be treated as a mere usurpation or overcharge) and therefore there is no case of limitation. The grievance felt by the Mozumdars is intelligible enough but their Lordships can only decide the questions between the parties according to law and it is outside their province to deal with any question of hardship. The question really is what was the character of the possession of the lands after the grant of the ijaras and whether in the events which have happened they remain or are part of the zemindaris in respect of which the permanent assessment is paid. The answer can only be that the Mozumdars elected and agreed to hold the lands not as part of their zemindaris but as a part of the khas mehal of the Government and to pay the jummas reserved by the ijaras on that footing. What led to the change of the position of the Mozumdars was the decision of the Collectorate in February 1859 that these lands belonged to the Government as an accretion to their jajira land.

This decision was acquiesced in by the Mozumdars and no case has been proved for relieving them from the legal consequence of their acquiescence. But it may be observed that this decision of 1859 was given prior to the case of *Lopez* v. *Muddun Mohun Thakoor* decided by this Board in 1870 and reported in 13 Moo. Ind. Ap. 467. It is for the Government not for their Lordships to say whether the Government should insist on a title acquired by limitation in consequence of a decision in the Collectorate under an erroneous impression of the law. Their Lordships can only say that they agree on this part of the case also with the learned Judges of the High Court and the cross appeal fails.

Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed and the Appellants in each case will pay the costs of their appeal.