Privy Council Appeal No. 30 *of* 1913.

Bengal Appeal No. 23 *of* 1909.

Kumar Basanta Kumar Roy and Others - - *Appellants,*

v.

The Secretary of State for India in Council and Others - - - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

This suit was brought by members of a family called the Kumars of Dighapatia against certain persons, called collectively the Kundu Babus of Mahiari, to recover khas possession, jointly with their co-sharer maliks, of a 10-anna share in portions of mouzahs Durlabhpur, Jirat, and Hatikanda. Wasilat was also claimed. Some years ago the Ganges overflowed these lands. They have now reformed *in situ*.

The plaintiffs held one moiety of the zamindari lot Mahomed Aminpur, the other moiety being held by various persons, who were joined as subordinate defendants. To this mahal, bearing Towzi No. 3980 of the Hooghly Collectorate, this 10-anna share was said to have belonged for at least a century. The 6-anna share was the property of the principal defendants in right of their zamindari, viz., lot Gobindpur bearing Towzi No. 100. The Trial Judge found for the plaintiffs' title. The High Court criticised this decision as having been arrived at "without any real discussion or consideration of the documentary evidence," but did not expressly dissent from it. They allowed the appeal on another ground. Having examined the documentary evidence in question with some

care, their Lordships conclude that the decision of the Trial Judge in this regard was right.

The plaintiffs put in an extract from the Quinquennial Register of pergunnah Mahomed Aminpur, for A.D. 1816, which showed that a 10-anna share in each of the three mouzahs then belonged to Taluq Mahomed Aminpur. An extract from the Mahalwari Register, apparently for A.D. 1880, showed these mouzahs still belonging to Mahomed Aminpur, though not under the same Towzi number, and stated the maliks, as recorded in the General Register, to be certain persons of whom one was Purna Chandra Roy, the plaintiffs' predecessor in title. It further remarked that part or all of the land of these mouzahs was ijmali, without naming either the co-sharers or the proportions of the shares. No doubt these entries are in some respects inconclusive. For several years, from 1888 onwards until 1894, when the guardianship of the Court ended, the plaintiffs were minors, whose property was in the charge of the Court of Wards, and they produced documents showing that year after year each of these mouzahs was administered on their behalf, and that rents and profits collected in respect of them were credited to the account of the plaintiffs. Amdanis of money on account of rent, Towzi accounts, extracts from the jumma-wasil-baki accounts and karcha accounts were forthcoming in regular sequence, in which the plaintiffs were stated to be proprietors and their share to be a 10-anna share in Towzi No. 3989. To these proofs of enjoyment no real answer was made, and their Lordships see no reason to question the finding of the Trial Judge in favour of the plaintiffs' title.

The identity of the lands in suit held by the principal defendants with those originally washed away, to which the plaintiffs made title, was accepted by the Trial Judge, doubted but not decided by the High Court, and strenuously contested before their Lordships. Before the trial an ameen was appointed to survey the *locus in quo* and set it out on a map. The limits of the ground in dispute were agreed and shown on this map. Portions of each of the three mouzahs fell beyond them. At the instance of the principal defendants the ameen also prepared a map purporting to show the natural features "as contained in the release map of 1886." In his report he stated that the latter features depended on the position of a palm-tree, which was taken as the datum because it was said to be the only thing that had survived from 1886, and to be identical with a palm-tree shown on a copy map produced by the defendants and alleged to be a map of things as they were in that year. No proof of the identity of this palm-tree was forthcoming; no thak map was produced; no release of 1886 or any evidence of it was put in. It is plain that the ameen thought that this map of the supposed features of 1886 was not worth much, and their Lordships think so too.

The respondents' argument rested on three points: first,

that since 1886 they had been, as they said, in possession of certain portions of a chur known as Chur Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906, it would be seen that part of the area disputed in this action, though claimed as part of Chur Raninuggur No. 2, really fell within Chur Raninuggur No. 1, and that there had been a confusion of mouzah Jirat, which lay in the north of the disputed area, with an area called Chur Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now (*Rajcoomer Roy's Case*, 19 Ind. App., at p. 146) to deprecate the practice of "propounding riddles of this kind," and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now. The Trial Judge records that, "it is admitted on both sides that the lands in suit are reformations on their old sites of diluviated lands of mouzahs Durlabhpur, Jirat, and Hatikanda." On that admission he proceeded, and by that admission, in their Lordships' opinion, the respondents must be bound. In the result the plaintiffs have made out their case alike as to title and parcels.

There remains the question on which alone the High Court proceeded, the question of limitation. This involves some account of the history of the reformed land. At the date of the Government survey of 1869 and 1870 the three mouzahs lay to the west of the Bhaghirathi. Shortly after that date the river began to traverse bodily to the south-west, in a direction at right angles to the axis of its course at that part of the stream, and steadily moved for some miles across country till in 1906 only portions of Jirat and Hatikanda, and no part of the Durlabhpur were any longer to the west of the river. The total area submerged no doubt extended far beyond the bounds of these mouzahs. As the river passed on churs began to form. Chur Raninuggur No. 1 was the first; Chur Raninuggur No. 2, somewhere within which the present reformations fall, began to appear as an island chur in 1888. The plaint in the present suit was filed on the 6th September, 1904. It is common ground that the period of limitation applicable is twelve years, the contest being whether article 142 of Schedule II of Act XV of 1877 is the article applicable or article 144. The critical time is the time prior to the 6th September, 1892.

A great body of evidence was called, of which the Trial Judge says that the witnesses "have sworn hard without any regard to truth." Neither side has ever thought it worth while to quote what they said to their Lordships. If the appellants are right, the question is whether the respondents had adverse possession before September 1892; if the respondents are right, the question is whether before that time the appellants

had not been dispossessed. A good deal has been said about the burden of proof in either case, but as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given. Their Lordships accordingly pass by the question who would have suffered if the facts had turned out otherwise or had not been proved at all, and proceed to examine them.

The best evidence of the history of the chur lands in question is to be found in the Collectorate reports of the Settlements of 1894, 1899, and 1902. An island chur in or about this spot was thrown up in 1888, but was unfit for assessment, and apparently for cultivation, till 1890. At first the surrounding water was unfordable on all sides, but further accretions soon attached it on the north to Chur Raninuggur No. 1. In 1889 it was first treated as an accretion to Chur Raninuggur No. 1 and Jirat, which had been released to Suksagar zamindars, as reformations *in situ* of their mouzahs, and then shortly afterwards came to be considered as an accretion to the part of Chur Raninuggur No. 1, which was a Government estate. It was not regularly surveyed till 1894, but, beginning in the year 1891–1892, it was under direct management on the utbandi system on yearly settlements. The area then producing a rent was about 350 bighas; in the following year it was slightly more. On the survey in 1894 the area of this chur was found to be 2,060 bighas, of which 585 were by this time under cultivation. The residue was uncultivated jungle, and the whole of it was every year completely under water from the beginning of June to the end of October. Naturally, the land was then very poor, and there was no resident raiyat in the mahal.

The chur had so far increased by 1894 that a raiyatwari settlement was then made with the utbandi raiyats for a term of five years. On the expiration of this term it was again surveyed, and its area was found to have increased to over 3,000 bighas, and 86½ acres of it were released to the proprietor of estate No. 399, as being land which was a reformation *in situ* of his mouzah Sardanga. It would seem that a further portion of it had been previously released to the owner of mouzah Baliadunga. The cultivable lands were then settled again for an undefined term.

In 1902 the principal defendants petitioned the Collector of Nuddia for the release to them of the lands in question, alleging that they were reformations *in situ* of lands belonging to their estate, lot Gobindpur, Towzi No. 100, and ten months later the officiating collector granted the petition. In his judgment the petitioners had proved their title and the identity of the reformed lands, and the Government could not legitimately resist their claim. Accordingly possession was delivered in due form, by planting a bamboo on the estate, by proclamation, and by beat of drum.

The report of 1899 in terms speaks of these reformed lands as being the "property" of the Government resumed in 1888, which at most means that in time the Government's actual possession, such as it was, might be expected to ripen into ownership. The report of 1902 speaks of possession, direct management, and settlement. The order of 1903, while avoiding the term "property," because it recognised the property of the petitioners, recited that the Government took possession of Chur Raninuggur No. 2 in 1888, the year in which it came into existence as a chur. These documents, however, were reciting what had happened some years before, and presumably after some change of collectors in the meantime, and it is very noticeable that in the khasras of the chur the column headed "Name of proprietor and landlord," appears to have been left blank until 1899, when it is filled in for the first time with the name of the Empress of India.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" (per Cotton, L.J., in *Leigh* v. *Jack*, L.R., 5 Exch. Div., at p. 274). It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

In the case of Krishnamoni Gupta (L.R. 29 Ind. App. 104), their Lordships' Board applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

Again, to apply the test suggested by Bramwell, L.J., in *Leigh* v. *Jack*, at p. 273, "to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and therefore it is necessary to look at the

position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. "It is impossible," says Lord Halsbury in *Marshall* v. *Taylor* (1895, 1 Ch., at p. 645), "to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh* v. *Jack*, to the nature of the property." An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which *primâ facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object. In the present case beyond the temporary utbandi cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities.

Their Lordships are of opinion that, whatever may have been the case later on, there had not been, down to September 1892, any dispossession of the plaintiffs within the meaning of article 142. The evidence of possession by the Government consists in the direct management under which bandobastdars cultivated at annual rents. Two collectors' orders, dated in 1889, are referred to, but not exhibited, under which the land was first of all "treated" as an accretion to one property and almost immediately afterwards "considered" as an accretion to another; but, beyond the utbandi cultivation, nothing was done. Whether the land cultivated was the same each year or not does not appear; at any rate, it was annually submerged, and there are no circumstances to link together various portions of ground, so as to make the possession of a part, as it emerged, amount constructively to possession of the whole (*Mohini* v. *Promoda*, I.L.R. 24, Calc., at p. 259). The lands in question in this suit form only a part of Chur Paninuggur No. 2. It cannot be shown that they formed part of the land cultivated, or of the chur which had emerged up to 1892. It is quite possible that most, if not all, of the land cultivated between 1891 and 1893 may have belonged to the land, which was shortly afterwards released to the Baliadunga and Sardanga zamindars. It is clear that in those early years there was considerable uncertainty as to the course the reformation was taking, and the fact must have been well known that the chur might turn out to be a reformation *in situ* of the land, which had only diluviated within the previous twenty years.

If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, article 144 is the article applicable, and not article 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants; but, be that as it may, in their Lordships' opinion the defendants' contention resting on

article 144 fails on another ground. The period of time requisite to bring the defendants under the protection of article 144 cannot be made out, unless to the period during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue authorities had possession, a number of years going back to 1892. The definition section, § 2, shows that in the present case this cannot be done. The defendants do not derive their liability to be sued "from or through" the Revenue authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue authorities, which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was inconsistent with and an invasion of their own superior title. On investigation the Revenue authorities recognised and submitted to this adverse claim and withdrew from any enjoyment or occupation. If the defendants could make good now the claim which they made then, well and good; but they would succeed, not by reason of, but independently of, the Limitation Act. Upon this ground they fail as far as article 144 is concerned.

In this view of the case it is not necessary to decide two points much discussed before their Lordships: first, that the defendants' possession could not, as such, be deemed to be adverse to their co-sharers or available to deprive the plaintiffs of their rights; and, second, that the possession of the Revenue authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. In differing from the High Court upon the determination of the appeal, their Lordships do not wish to be taken as expressing any opinion adverse to their view on this second point.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, the judgment of the High Court should be set aside with costs, and the decision of the Trial Judge should be restored. As the first defendant on the record, the Secretary of State for India in Council, lodged no case and did not appear before their Lordships to support or resist the appeal, their Lordships do not advise that the terms of any order as to costs should affect him.

In the Privy Council.

KUMAR BASANTA KUMAR ROY AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS.

DELIVERED BY LORD SUMNER.

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1917.