Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Forbes v. *Meer Mahomed Hossein from the High Court of Judicature at Fort William in Bengal; delivered 7th May* 1873.

Present:

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

SIR LAWRENCE PEEL.

THE Appellant in this case is the Zemindar of Sultanpore. Sultanpore, though now a separate zemindary, appears to have been at the time of the decennial settlement part of a larger estate called Pergunnah Havilee, which was then settled with a lady styled Ranee Indrabutty. When the separation took place does not very clearly appear, but what is clear is that, in the month of July 1850, Sultanpore was put up for sale for arrears of government revenue, that it was then purchased by one Protab Singh, and that in the following April he sold it to the Appellant, who thereby acquired all the rights which by virtue of that auction purchase had been vested in the vendor.

The Respondents may be taken to represent the holders of an istumraree or jageer tenure which, at the time of the perpetual settlement, existed under a grant or sunnud from the Government, but was then settled as part of Havilee, or, as one may take it, of Sultanpore in the nature of a dependent talook. It appears that, shortly after the auction purchase, Mr. Forbes found that the holders of this tenure, which

is admitted to be a tenure, which he as auction purchaser has no right to destroy, inasmuch as it existed before the decennial settlement, were in possession, and had long been in possession of certain julkur, or rights of fishery. He seems to have attempted by the strong hand, or otherwise, to dispossess them of those fisheries; but on their suit, the Magistrate by an order dated the 4th December 1852, and made in an Act IV. case, affirmed their possession, and on appeal that order of the Magistrate was confirmed by the Sessions Judge on the 9th April 1853.

It further appears by the proceedings that these julkurs, or rights of fishery, are of several kinds. Mr. Justice Phear, in his judgment, says "the most important of them is a river, "which for portions of its course lies wholly "within lands of the Plaintiff, and for other "portions wholly within the jageer or istumra-"ree lands of the Defendant, and thirdly, in "other parts divides the lands of the Plaintiff "and Defendant." There seem to be also some which do not strictly fall within either of the above descriptions. I mean those which are connected with the Seetadhar stream, and partially, at least, consist of rights which during the time of flood are exercised over the Appellant's admitted land.

It does not, however, appear to their Lordships to be necessary, at present at least, to examine very particularly into the distinction between these different rights of fishery, because if the Act IV. Proceeding, which has been referred to, and which is found at page 10 of the Record, be examined, it will be found that they were all then in question—that the Respondents were then found to have been in possession of all of them for a long time anterior to the dispute; and it is even stated in the judgment of the Sessions Judge, that the Defendant did not deny that possession in fact. They appear to have been all claimed by the Respondents as held by the same title, that title being that they had

been so held from a date previous to the decennial settlement, and, as an incident, to the tenure of which it is admitted the Respondents or their ancestors were the undoubted holders. The right of possession, or the fact of possession, having been thus found by the Act IV. Proceedings, Mr. Forbes took no steps to impeach that finding until the year 1860, when he instituted this suit.

Now the first question which their Lordships have to determine is, whether the Indian Courts have been correct in throwing upon the Appellant the burden of showing that the julkurs which he claimed by his plaint formed part of the assets upon which the settlement of his zemindary was made? For that purpose it seems necessary, although the thing is common learning, to go back to first principles, and to consider upon what the stringent rights which the law gives to a purchaser at an auction sale really rest.

It cannot be disputed that if there had been no auction sale it would have been impossible for the zemindar to question, at the time this suit was brought, either the possession or the title of the Respondents. There had been, in the year 1844, a previous Act IV. Case between one of the former zemindars and these parties, in which, as in the later proceeding of that kind, the possession of the Respondents had been affirmed, and, of course, after that it would have been essential for the zemindar to prove that within 12 years of bringing his suit he had been in possession of those julkurs, and at the time this suit was brought, 12 years had elapsed even from the date of the award of 1844.

It is conceded that by virtue of the purchase from the purchaser at the auction sale, immediately after the sale, and at a time when he cannot be taken to have waived any rights which that transaction may have given him: Mr. Forbes, the Appellant, acquired the same rights which he would have acquired had he been

the actual purchaser at the revenue sale. But what are those rights? The first is no longer here disputed. It is that in the case of an auction purchaser the cause of action must be taken to have first arisen at the date of the purchase, and consequently that the Defendants cannot plead their long possession as an absolute bar to the suit. The statutory title, however, which the law gives to an auction purchaser, is that, for the protection of the revenue, and in order to ensure its due payment by him, and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settlor at the date of the perpetual settlement had; and may, in consequence of that, sweep away, or get rid of all the intermediate tenures and incumbrances created by preceding zemindars since that date. In the assertion of this right, the auction purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burthen of proof on his opponent. That presumption, however, is founded not so much upon the principle which I have just mentioned, as upon the principle that every beegah of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable until the contrary is shown. Accordingly in many cases which may be found in the books a very heavy burden of proof has been placed upon the Defendants, whose tenures have been questioned by auction purchasers; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement, or even 12 years before, in order to escape the consequences of the claim.

It is, however, to be observed that the course of modern legislation, and also of modern decision, has, if not in the case of lakeraj lands at least in the case of undertenants, to a consider-

able degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession. In the present case the Respondents are almost admitted to have given proof of possession for a period of nearly 50 years. But, if they had not done so, this particular case would, in their Lordships' opinion, stand clear of the presumptions which the Appellant invokes in his favour. For the Respondents are claiming these julkurs, or rights of fishery, as an incident to a tenure admitted to be incapable of being disturbed by the zemindar, a tenure which existed before the date of the perpetual settlement. The question therefore resolves itself into one of parcel or no parcel,—whether the julkurs are parcel of the old estate of the undertenant, or whether they have been granted by an act of the zemindar for the time being, subsequent to the perpetual settlement. Therefore, it seems to their Lordships that there is nothing to relieve the Appellant from the ordinary rule which the law imposes on a Plaintiff, namely, that of establishing his own title affirmatively, and indeed of making out a strong title in order to disturb a possession of very long duration. Their Lordships are, therefore, of opinion that the Courts below were right in holding that the burthen of proving that these julkurs did form part of the assets upon which the settlement was made, and that his means of meeting the revenue had been diminished by the alienation of them by means of acts subsequent to the date of the perpetual settlement lay upon the Appellant. It remains to be considered whether they were also right in holding that he had failed to establish that case. The distinction between the different classes of julkurs in dispute has already been noticed; and it may be admitted that although the Respondents would presumably have the right of fishing in waters lying wholly within the limits of their dependent taluk, they would not presumably have the exclusive right of fishing in the waters

dividing their lands from those of the Appellant, or any right of fishing in places wherein the property in the soil is wholly in the Appellant. The proof, however, of the long possession of the Respondents applies equally to all the julkurs claimed. And that julkur, or the right of fishing, may exist in India as an incorporeal hereditament, and a right to be exercised upon the land of another, is shown by the case of Lutchee Dasee *v.* Khatima Beebee, reported in the second volume of the Sudder Dewanny Adawlut reports, at page 51. In that case A had purchased at a public sale by the collector the julkur of certain jheels. One of them became dry, and it was determined that A's purchase of the julkur only did not convey any property in the lands, which belonged to the proprietor of the jheel. But the julkur was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser. The case went through all the Courts, and was ultimately decided by high authority; for it was decided by the Sudder Court with the concurrence of Mr. Colebrooke.

Again, the issue to be established by the Appellant was purely one fact. It was first tried by the Principal Sudder Ameen, who dismissed the suit, and found in favor of the Respondents, and that after a local investigation. The cause then went by appeal to the High Court. The High Court thought that some further light might be thrown upon the question by the production of certain documentary evidence, and remanded the suit for re-trial on that ground. It was re-tried, and the Principal Sudder Ameen again found in favor of the Respondents. There was then a second appeal to the High Court, and both the learned judges who formed the divison bench of the High Court thought that there was no ground for disturbing the decision of the Principal Sudder Ameen. Therefore there has been a complete concurrence of all the Courts which have dealt with this case in India in favor of the Respondents,

and against the contention of the Appellant. It has been urged, however, upon their Lordships that the High Court in particular has mistaken the effect of two documents, namely, a copy of the quinquennial register and the return of the Subarakar during the time in which the Pergunnah Havilee or Sultanpore was in the custody of the Court of Wards. But it appears to their Lordships that the learned judges of the Court below addressed their minds to those two documents, and were satisfied that they failed to establish the Appellant's case. The learned judges in India are far more competent than their Lordships here can be to form an opinion of the credit due to documents of that kind coming from the collectorate. Their Lordships do not deny that there may be found here and there a name in those documents which raises some doubt whether the julkur of Seetadhar may not have been returned as part of the assets of the zemindary; but, considering what confusion there often is in the nomenclature of villages and other localities in India, their Lordships think that, even if the authority of the documents were upheld, they would not conclusively prove that the Plaintiff was entitled to any of the julkurs claimed in this suit. It is quite clear that there is considerable confusion as to the julkurs belonging to the estate, since the plaint originally included julkurs which were afterwards found and admitted to be in the Appellant's possession.

On the whole their Lordships have come to the conclusion, that if they were to reverse the repeated decisions in favour of the Respondents they would be departing, without any reason, from the rule which they have prescribed to themselves respecting concurrent findings of the Indian Courts upon questions of fact, and that therefore the decree ought to be affirmed. Their Lordships also desire to state, through me, that they come to this conclusion the more readily, because they observe that when this Board

granted special leave to appeal, in the year 1866, it did so upon the representation (and without that representation it seems very doubtful whether it ever would have done so) that this case involved a question of great public importance, and of general application,—a representation which, in their Lordships' opinion, the argument at the bar has entirely failed to support.

Their Lordships therefore will humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this Appeal, with costs.