

Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Ranee Surnomoyee v. Jardine, Skinner, and Co. and others (No. 40 of 1869), and Ranee Surnomoyee v. Robert Watson and Co. (No. 44 of 1870), from the High Court of Judicature at Fort William, in Bengal; delivered 26th June, 1873.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THESE Appeals, which were consolidated and have been heard together, arose out of four suits instituted by the Plaintiff; two of them against Messrs. Jardine, Skinner, and Co. and others, and two against Messrs. Robert Watson and Co.

One of the suits against Messrs. Jardine, Skinner, and Co., No. 87 of 1866, was to recover possession of 2,428 biggahs 6 cottahs and 4 gundas of land claimed by the Plaintiff as part of a Khas Mehal called Chur Doomreah Jazeerah, No. 560 on the rent-roll of the Collectorate of Moorshedabad, purchased by her at a Government sale in the year 1864, and also to set aside an Order of the Joint Magistrate made on the 14th October, 1865, under Section 318 of the Code of Criminal Procedure, for maintaining the Defendants in possession of a portion of the said lands.

The other suit against Messrs. Jardine, Skinner, and Co., No. 88 of 1866 (Record, p. 955), was to

recover damages for crops alleged to have been sown by the Plaintiff on 1,918 biggahs of the said lands, and to have been wrongfully taken possession of by the Defendants.

The two suits against Messrs. Robert Watson and Co. were similar to those against Messrs. Jardine, Skinner, and Co., No. 86 of 1866, being to recover possession of 752 biggahs of other land, alleged by the Plaintiff to be a portion of the same Khas Mehal, and also to set aside an Order of the Joint Magistrate made on the 21st of December, 1865, for maintaining the Defendants in possession of the said land; and the other of the said suits, No. 89 of 1866 (Record, p. 133), being to recover damages in respect of the crops alleged to have been sown by the Plaintiff on 569 biggahs of the said land and to have been wrongfully taken possession of by the Defendants.

The lands which form the subject of these Appeals, so far as they relate to the suits numbered 86 and 87 of 1866, are portions of the dried-up bed of the River Padma, and the main question to be considered is, did they form any part of the Khas Mehal Chur Jazeera Doomreah purchased by the Plaintiff from Government.

The principle upon which the High Court acted in the two suits for possession, was to exclude from the Decrees in favour of the Plaintiff all the lands which formed the bed of the river, and were not included in the measurement made by Bissonath Dutt, prior to the Ijarah granted to Mr. Dalrymple (see page 977). Their Lordships are of opinion that the High Court was right in acting upon that principle.

If the lands in dispute had been annexed by gradual accretion to the estate granted by the Ijarah to Mr. Dalrymple, they would, by virtue of the Bengal Regulation 11, of 1825, have become part of his tenure, and would have passed to the Plaintiff under her purchase of the Khas Mehal. But it was held by the High Court that the lands were not gained or annexed to the island by gradual accretion caused by the recess of a river, but consisted of the dried up bed of the river which formerly flowed to the south of the island, and which gradually dried up, in consequence of its having become closed at the east and west ends

thereof. Their Lordships concur in that view. Indeed, it was scarcely contended by the learned Counsel for the Appellant that the land was gained by gradual accession to the island by the recess of the river.

The Plaintiff must recover upon the *strength* of her own title, and cannot turn the Defendants out of possession, upon the ground that they have failed to prove their title.

The Government survey of Mouzah Chur Jazeera Doomreah, made in 1853, included not only the land, but the river on the south of the island; and on the map the southern bank of the river was shown as the northern boundary of the Zemindaries to the south, and the whole of the Mouzah was stated at the foot of the map to be "No. 306 of the former, and No. 560 of the present Chur Jazeera." In the same statement, however, the quantity of land included in the Mouzah was represented to be 28,974 odd biggahs.

It was contended that the map of 1853 proves that that part of the bed of the river which was then covered with water and has since dried up and now forms the lands in dispute, formed part of the Khas Mehal Chur Jazeera Doomreah purchased by the Plaintiff. It is clear, however, that the lands in dispute in this Appeal were not included in the survey or measurement made by Bissonath Dutt prior to the renewal of the Ijarah to Mr. Dalrymple on the 29th April, 1856.

Their Lordships have already held in appeal No. 16 of 1868 that nothing was sold to or purchased by the Plaintiff beyond what was included in the Ijarah granted to Mr. Dalrymple on the 29th April, 1856, at the Sudder Jumma or annual revenue of rupees 2,409 : 13 : 11, the amount stated in the certificate of sale to the Plaintiff. Acting upon that principle their Lordships held in that appeal that the 15,000 biggahs to the east of the Chilmaree Dara and which formed part of the 28,974 biggahs included in the map of 1853, and were claimed by the Plaintiff in her suit, No. 89 of 1866, against the present Defendants, formed no part of the Khas Mehal purchased by the Plaintiff. The opinion expressed by the High Court is in entire accordance with the view taken by their Lordships in that case.

The argument of the High Court, with reference to the survey map of 1853, appears to their Lordships to be unanswerable. They say (page 950) :—

“ There can be no doubt that the lands in dispute were *thacked* or surveyed in 1853, as within the boundary of Jazeera Doomreah; but it may be observed that that survey included not only those lands, but also a large *chur* to the eastward, and separated from Doomreah by a running stream, as part of the Jazeera. This *chur* clearly formed no part of the lands settled with Mr. Dalrymple in 1855; and by a judgment of this Court dated 11th February, 1868, reported in IX, W. R. p. 259, it has been definitely settled that, it was not included in the Plaintiff's purchase, and that she had no claim to that land. So in the present case it is evident that, though at the time of the survey the bed of the river was included within the boundary of the Jazeera, yet when the subsequent survey was made by Bissonath Ameen, on whose inquiry the settlement was made, the bed of the river, though partly dried up and in the possession of the Defendants, was excluded from that settlement; so that there is no better reason to conclude that these lands are part of the island, on the ground that they have been surveyed as part of it, than there was in the other case.”

The judgment to which reference has been made by the High Court, in the passage above quoted, is that which formed the subject of the appeal to Her Majesty in Council, No. 16 of 1868, and in which their Lordships have already expressed their entire concurrence.

It appears that, in point of fact, a portion of the bed of the river which had dried up before Bissonath Dutt's survey was included in his measurement; but that does not affect the argument of the High Court as to that portion of it that had not then dried up and was not included in his survey or field-book.

Their Lordships remark that in these suits, as in the suit in which Appeal No. 16 of 1868 was preferred, the Khas Mehal held by Mr. Dalrymple under the Ijarah and the Mehal which the Plaintiff purchased are shown by the plaint to be identical. The Plaintiff says, “ During the Khas possession by Government, Defendants held the said Mehal on an Ijarah settlement. The term of the Ijarah settlement expired on the 30th April, 1865” (Plaint Record, page 1).

The island itself, as appears from the proceeding of Mr. Toogood (page 123 of the Record, in Appeal No. 16 of 1868) was resumed by Government under the provisions of Regulation XI, of 1825,

section 4, clause 4. That section, however, vested in the Government only the island which was thrown up, or, in other words, the land surrounded by water, and not the unfordable channel of the river by which the island was formed. Though an island or land thrown up and surrounded by a river may be vested in Government, it does not follow that, if the river which separates the island from the main land dries up, after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of the first clause of section 4 of Regulation XI of 1825.

Their Lordships have not sufficient materials before them to enable them to determine whether that portion of the bed of the river which was covered with water and was not included as part of the Khas Mehal granted by the Ijarah to Mr. Dalrymple, became the property of Government upon its subsequently drying up. Nor is it necessary to do so for the purpose of these appeals, for in the opinion of their Lordships it was not included in the sale to the Plaintiff.

It was, however, contended that the bed of the river was included in the Ijarah to Mr. Dalrymple, and was part of the Khas Mehal sold to the Plaintiff. It was argued that the words of the Ijarah, "You are entitled to the revenue which you will be able to assess on the waste lands of the said Mehal up to the end of the period of the Ijarah," were sufficient to entitle Mr. Dalrymple to the waste land subsequently formed by the drying up of that portion of the river which was not included in Bissonath Dutt's survey of the Khas Mehal.

Their Lordships cannot assent to that view of the case, for, at the time of Bissonath Dutt's survey and measurement, that part of the bed of the river which has since dried up and is now in dispute was under water, and no part of the revenue of 2,409 rupees reserved in the Ijarah to Mr. Dalrymple, and in the sale to the Plaintiff was calculated or assessed in respect of it.

The quantity of land in dispute in the suits under appeal is, no doubt very much less than the 15,000 biggahs which were the subject of the

Decree from which the Appeal No. 16 of 1868 was preferred. But the construction of the Ijarah to Mr. Dalrymple, and of the sale to the Plaintiff, can not depend upon the quantity of the land claimed in excess of Bissonath Dutt's measurement. Even if the bed of the river upon its drying up became the property of Government, a point upon which their Lordships are unable upon the evidence in the cause to form an opinion, it would be an innovation in the manner of construing grants of this nature to hold that that part of the bed of the river which was not in the possession of Government, and had not even been resumed or assessed to the Government revenue, and was not included in the survey and measurement made preparatory to the grant of the Ijarah, was intended to be included in the Ijarah or in the sale of the Khas Mehal, under each of which the revenue reserved was fixed upon the basis of the survey.

It should be remarked that the words of the Ijarah are "the waste lands of the said Mehal." Those words can not include waste lands which were no part of the Mehal and were excluded from the survey, measurement, and report upon which the revenue settlement was made. It must be borne in mind, as remarked by their Lordships in Appeal No. 16 of 1868, that what was granted in Ijarah to Mr. Dalrymple, and what was sold to the Plaintiff, was a Khas Mehal, a term which could not include lands which had never been in the possession of Government, or ever resumed or included in the estate which was assessed to the public revenue.

The proceedings of Mr. Towgood, and the field-book of Bishnath Dutt, contain a complete description of the lands included in the Khas Mehal. The proceedings are headed, "Particulars of the Origin and Reason of the Settlement of, and the Right which the Government has, in the said Mehal" (p. 124 of the Record, in Appeal No. 16 of 1868). They contain a description of the lands of the Mehal, and, amongst other things, a statement of lands at present not fit to pay, &c.; and under this head there is the following statement:—

"Within this Mehal there are biggahs 120 6 0 $16\frac{1}{2}$ gundahs of road land, and biggahs 372 12 0 $3\frac{1}{4}$ gundas of sandy unculturable waste lands, and biggahs 255 8 0 $7\frac{1}{4}$ of unculturable

land covered with water; in all, biggahs 748 7 0 17½ gundas of land, on which no rent has been assessed, the reason being that those lands are not fit to be assessed" (p. 126 and 128 of same Record).

Those 748 odd biggahs were included in the 11,381 odd biggahs upon which the annual revenue of rupees 2409 : 13 : 11 was assessed; and are sufficient to satisfy the words "the waste lands of the Mehal" as used in the Ijarah, by the terms of which Mr. Dalrymple was to have the benefit of all waste lands included in the estate which was assessed and granted to him in the same manner as every Zemindar under the permanent settlement has the benefit, without any increase of revenue, of all waste lands, which at the time of the settlement were included as part of the Zemindary.

The proceedings then contain a statement of the rates prevalent in the Mehal for each description of land (p. 126), a statement of the various descriptions of cultivators, and, finally, under heading No. 2, a statement of the Jumma, according to the rates recommended by the Ameen, and the particulars thereof, showing the description, quality, quantity, rate of assessment and amounts of jumma in respect of all the lands in the Mehal, giving a total of 10,632 odd biggahs, assessed at a gross jumma of 2,667 odd rupees, and 748 biggahs of land unculturable, and not fit to pay, making a grand total of 11,381 odd biggahs of land included in the Mehal. The field-book of Bishnath Dutt gives the particulars of each dag in the Mehal, and of the quantity and quality of land contained in it, and the name of the occupier.

The result of the proceedings before Mr. Towgood appears from the following passage in his Report, p. 125. Referring to the Report of Bishnath Dutt, he says—

"From the papers filed by the Ameen it appears that the said Ameen, having measured biggahs 11,381 6 12½ of land, and fixed Rs. 2,677 10 1 as the Hustabood Jumma thereof, filed the papers accordingly. Hence it is deemed proper to enter into an Ijara settlement with Mr. Dalrymple, the former Ijaradar, for a term of ten years, commencing from the first of May, 1855, at an annual rental of Rs. 2,409 13 11, being the balance, after deducting Rs. 267 12 2 on account of collection of charges, at the rate of 10 per cent. on the said Jumma (Hustabood)."

The proceedings were forwarded to the Commissioner of Revenue for his orders (page 129), and,

on the 15th March, 1856, an Order was made by the Commissioner to the effect that the *said* Ijara settlement, for a term of ten years, from the 1st May, 1855, at an annual rental of rupees 2,409 : 13 : 11, should be entered into with Mr. Dalrymple. The Ijarah was accordingly granted, and shortly before its expiration the Khas Mehal was sold to the Plaintiff subject to a revenue of rupees 2,409 : 13 : 11, the same amount as that reserved in the Ijarah. The document signed by the Plaintiff upon her purchase of the Mehal stated the quantity of land in the Mehal to be 10,377 odd biggahs, the same as in the measurement of Bissonath Dutt. (See No. 11, Supplemental Record in 162, 1868, p. 8.)

It cannot be disputed that the Plaintiff has got possession of the 10,377 biggahs of cultivable land, and the other lands, making up 11,381 biggahs, included in Bissonath Dutt's survey and field-book; but she claims, in addition, that part of the bed of the river which was not included in Bissonath Dutt's survey, but was at the time of that survey covered with water, and has since dried up.

In support of the argument that the Plaintiff is entitled to those lands, it is said that part of the bed of the river, which dried up after the first Ijarah to Mr. Dalrymple, was included in Bissonath Dutt's survey and measurement in the second Ijarah to Mr. Dalrymple. That is so. But there is a great distinction between that part of the bed of the river which was included in the second Ijarah to Mr. Dalrymple and that part which has since dried up and is the subject of the present Appeals. The former portion was resumed by Government, and whether they were in strictness entitled to it or not, it was included in the revenue settlement, treated as part of the Khas Mehal, and included in the second Ijarah to Mr. Dalrymple; whereas the land now in dispute, being that part of the bed of the river which dried up after Bissonath Dutt's survey, has never been resumed by Government or assessed to the public revenue, and has never been included in the Khas Mehal. Whether Government was entitled to resume that part of the bed of the river which was included in the second Ijarah to Mr. Dalrymple, is not a question in the present Appeal. The Plaintiff is in possession of it, and her title to it is not disputed in the suits under appeal.

As to the lands in dispute, she is not in possession of them ; she seeks to turn out the Defendants who are in possession of them, and she has therefore to prove that they were the property of Government and were included in the sale to her. In both of these respects she has failed to make out her case.

It was contended on behalf of the Plaintiff that even if the land in dispute was not part of the Khas Mehal, either originally or as an accretion to the island, within the meaning of Regulation XI of 1825, she was still entitled to it upon the general principles of equity and justice according to the provisions of clause 5, section 9, Regulation XI of 1825.

It appears to their Lordships that the land in dispute was not gained by alluvion or dereliction of a river within the meaning of that clause. Furthermore, the Plaintiff did not in her plaint rest her case upon the provisions of that section, or upon the general principles of equity and justice. Her claim was based upon an alleged title to the land as part of the Khas Mehal purchased by her from Government, of which after the expiration of Mr. Dalrymple's Ijara she had obtained actual possession, and from which she had been afterwards ousted by the Defendants. But even if she were entitled to rely upon the 5th clause of section 4 of the Regulation above referred to, their Lordships fail to discover upon the facts disclosed any general principles of equity or justice in her favour.

As to the suits for damage to the crops, it is clear that the Plaintiff must fail as to the crops alleged to have been sown upon that portion of the lands in dispute to which she has failed to prove title. As to the crops alleged to have been sown upon the lands in respect of which decrees have been given in her favour in suits Nos. 86 and 87 of 1866, their Lordships concur in the view taken by the High Court. The suit is founded upon an assumed possession and actual ouster ; but the Plaintiff has failed to prove that she was in possession of the land when she sowed the crops, and that Defendants ousted her from possession, as alleged in her plaint ; on the contrary, it appears that the Defendants were then in possession of the lands.

It becomes unnecessary, therefore, to consider upon what portion of the lands in respect of which the Plaintiff has succeeded crops sown by the

Plaintiff were destroyed or appropriated by the Defendants, or what was the value of such crops. This decision will not prejudice the Plaintiff's right, if she has any, to sue for the mesne profits of the lands to which she has established her title, and for which she has obtained decrees in the lower courts. The result is that their Lordships will humbly recommend Her Majesty to affirm the decisions of the High Court with the costs of these appeals.