

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dharani Kanta Lahiri Chowdhuri and another v. Gabar Ali Khan, since deceased, and others, from the High Court of Judicature at Fort William in Bengal (P.C. Appeal No. 58 of 1911; Bengal Appeal No. 36 of 1908); delivered the 5th December 1912.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

This is an Appeal from two decrees of the High Court of Judicature at Fort William in Bengal, dated the 3rd July 1908, which were made in an Appeal and Cross-Appeal from the decree of the Second Subordinate Judge of Mymensingh, dated the 19th March 1906.

The Appellants are the zamindars of Mauzah Sahildeo in Pergunnah Mymensingh. The Respondents are in possession of seven puras or 592 bighas of land within Mauzah Sahildeo from the possession of which the zamindars sought in the suit in which this Appeal has arisen to eject them. The dispute as to the right to the possession of the seven puras of land arose out of an application which was made in 1891 under Section 103 of the Bengal

Tenancy Act, 1885, by the then zamindars of Mauzah Sahildeo to have lands in Mauzah Sahildeo measured and a Record of Rights prepared. The zamindars of 1891 are represented in this Appeal by the Appellants. Upon that application the Collector of Mymensingh deputed an Amin to make the necessary measurements and to prepare a Record of Rights. When the measurement papers and ground plans were submitted by the Amin to the Revenue-officer, Gabar Ali Khan and Abdul Ali Khan, who are here represented by the Respondents to this Appeal, filed objections to the Amin's report and claimed under a sanad of 1815 seven puras of land, equivalent to about 592 bighas, as their mokurari chuck at an annual rent of Rs. 9. The Amin had measured the seven puras as land liable to the payment of ordinary rent to the zamindars. The zamindars disputed the claim. Thereupon the Revenue-officer proceeded under the provisions of the Bengal Tenancy Act, 1885, to hear and decide the dispute between the claimants and the zamindars. The defence of the zamindars was that the sanad upon which the claimants relied was a forgery, and that the claimants had no title to the lands in dispute. The Revenue-officer on the 21st March 1892 found that the sanad was genuine and gave the claimants a decree for two puras of land as their mokurari, the two puras being equivalent to about 156 bighas, and decided that the claimants must pay a rent to be fixed for the remainder of the 592 bighas which he found was in their possession. From that decree of the Revenue-officer the claimants and the zamindars respectively appealed to the Special Judge. The Special Judge on appeal found that the sanad was genuine. He was, however, apparently in some doubt as to the extent of land which the

claimants were entitled to hold under the sanad as their mokurari. In the sanad the land was stated to be two puras, and boundaries which were capable of being ascertained on the north, south, and west of the land were mentioned in the sanad, but the eastern boundary was stated to be an *ail*, boundary ridge. To the eastward of the western boundary of the land the nearest boundary ridge which was found was the boundary ridge between Mauzah Sahildeo and Dattagathi, but if the boundary ridge between Sahildeo and Dattagathi was the *ail* which was mentioned as the eastern boundary in the sanad the Mokurari chuck comprised seven puras or 592 bighas and not two puras only. The Special Judge, however, found as a fact that the claimants had for more than 12 years been in possession of the land which they claimed to hold under the sanad, and gave them a decree on the 11th November 1893, establishing their right to hold the lands up to the boundary line between Mauzah Sahildeo and Dattagathi as their mokurari at a rent of Rs. 9 per annum.

From the decree of the Special Judge of the 11th November 1893 the zamindars appealed to the High Court at Calcutta. In that appeal it was contended on behalf of the zamindars that they were entitled to eject the claimants from the land held by them in excess of that covered by the sanad, and alternatively that they were entitled to additional rent in respect of the excess land. The High Court construing the judgment of the Special Judge held that he had found as a fact that the whole of the land claimed by the claimants was held by them as a mokurari grant under the sanad, and their title to the land had not been acquired by adverse possession. The High Court also held that the question as to whether the zamindars had a right to eject the claimants did not properly arise in the pro-

ceedings. The High Court by its decree of the 9th July 1895 dismissed the Appeal from the decree of the Special Judge.

The suit in which the present Appeal has arisen was brought on the 8th July 1896 in the Court of the Second Subordinate Judge of Mymensingh. The Plaintiffs in this suit, who claimed as or as representing the zamindars of Mauzah Sahildeo, in their plaint referred to the previous litigation which had been determined by the decree of the High Court of the 9th July 1895, and alleged that there being no relationship of landlord and tenant between them and the Defendants the decision in the previous proceedings was no bar to the suit; they further alleged that the sanad of 1815 was a fraudulent and forged document; that the Defendants were wrongfully in possession of the seven puras odd of land; and they claimed a declaration of title to the land in dispute and a decree for possession and for mesne profits and other reliefs. The principal Defendants, who were Gabar Ali Khan and Abdul Ali Khan, in their written statement alleged that neither the Plaintiffs nor their predecessors in title had been in possession of the lands in dispute within 12 years immediately preceding this suit or at any time; that in the previous proceedings it had been decided by a competent Court that the lands in suit were the mokurari chuck of the answering Defendants, that that decision was upheld by the High Court, and the Plaintiffs' claim was barred by Section 13 of the Code of Civil Procedure; they further alleged that the sanad of 1815 was a genuine sanad; that the sanad of 1815 had been granted by the then zamindar in renewal of a previous sanad of 1740; and that the Defendants and their predecessors had for a long time been in possession of the lands in suit in mokurari chuck right under the sanad of 1815. In effect,

according to the plaint the Defendants were mere trespassers in possession, claiming to hold the lands in dispute as their mokurari chuck under a forged sanad and, according to the written statement, the Plaintiffs' suit for possession was barred by limitation, and the Defendants were entitled under the sanad of 1815 to hold the lands in dispute as their mokurari chuck at a rent of Rs. 9 per annum. Putting a reasonable construction upon the written statement, the case of the Defendants apparently was that they had held all the lands in dispute under the sanad of 1815; that that question was concluded by the decision in appeal in the previous proceedings, and should it be held that they did not hold the lands under the sanad, they in that event and to that extent relied upon limitation as a bar to the suit.

The suit came on for hearing before the Officiating Subordinate Judge of Mymensingh, who held that it having been decided in the previous proceedings by a competent Court that the Defendants held the lands in suit as a mokurari chuck under the sanad set up by them, the principle of *res judicata* applied, and the suit was barred by Section 13 of the Code of Civil Procedure, and by his decree of the 29th August 1898 dismissed the suit. From that decree the Plaintiff, Dharani Kanta Lahiri Chowdhuri, on his own behalf and as executor of Abhoya Kanta Lahiri Chowdhuri, appealed to the High Court at Calcutta. The High Court in Appeal held that Section 13 of the Code of Civil Procedure did not apply, allowed the Appeal, and by their order of the 13th August 1902 remanded the suit to the Court of First Instance to be decided on its merits.

On the hearing of the suit under the order of remand of the 13th August 1902, the Officiating Subordinate Judge of Mymensingh found that the sanad of 1815 was genuine and binding on

the Plaintiffs; that the sanad covered only two puras of land and nothing more, and that as to the lands lying to the eastward of those two puras he stated:—

“There is virtually no evidence to suppose that the eastern portion or any portion of it was at all cultivated or otherwise occupied by anyone beyond 12 years of the institution of the suit.”

The Officiating Subordinate Judge, by his decree of the 19th March 1906, fixed the eastern boundary of the two puras and gave the Plaintiffs a decree for possession of that portion of the lands in suit which lay to the eastward of that boundary, and for mesne profits.

From the decree of the 19th March 1906 of the Officiating Subordinate Judge each side appealed to the High Court at Calcutta. The High Court on Appeal found that the sanad of 1815 was genuine, that the two puras mentioned in the sanad were merely a misdescription of the extent of the area covered by the sanad, and that the sanad covered all the lands in dispute up to the boundaries between the Mauzah Sahildeo and Dattagathi. In effect the High Court found that the seven puras or 592 bighas of land in dispute were held by the Defendants under the sanad of 1815 as their mokurari at a rent of Rs. 9 per annum. The High Court also found that the Plaintiffs had entirely failed to prove that they were ever in possession of any of the lands in suit or that they were dispossessed by the Defendants. The High Court dismissed the Appeal of the Plaintiffs and allowed the Appeal of the Defendants. The result was that the suit was dismissed. From that decree of the High Court this Appeal has been brought.

Their Lordships accept the concurrent findings of the High Court and the Officiating Subordinate Judge as to the sanad of 1815 being a genuine sanad as conclusive on that question. There can

be no doubt that the Defendants-Respondents have under the sanad a mokurari right in at least two puras of land bounded on the north by a cattle track, on the west by the Kalni Bil, on the south by the Utiarkona Khal, and on the east by an *ail*, boundary ridge. There is also no doubt that the nearest boundary ridge to the eastward of the Kalni Bil is the boundary ridge between Mauzah Sahildeo and Mauzah Dattagathi. There is no reliable evidence to prove that between the Kalni Bil and the boundary ridge between Mauzah Sahildeo and Dattagathi there had ever existed any *ail* or boundary ridge. The Defendants-Respondents were for more than 12 years before the commencement of this suit in possession of the seven puras or 592 bighas of land in dispute which are bounded on the west by the Kalni Bil and on the east by the boundary ridge between Mauzah Sahildeo and Dattagathi, and there is no reliable evidence to show when the Defendants-Respondents, or those whom they represent as sanad-holders, first obtained possession of those seven puras of land. If the lands which it was intended that the sanad should cover had not been described as two puras, there would have been no difficulty in holding that the seven puras of land were the mokurari holding of the Defendants-Respondents. Their Lordships have found it difficult to accept the conclusion of the High Court, that the mention of the two puras in the sanad merely amounted to a misdescription which may be rejected for the purpose of interpreting that document, but the land in dispute was in 1740 and in 1815 covered by jungle, and it does not appear that it had ever been measured until it was measured by the Amin in consequence of the application of 1891, and the facts, so far as they can now be ascertained, point strongly to the conclusion that the Defendants-Respondents, and those whom they represent as sanad-holders have held the whole seven puras as their mokurari, and

the Plaintiffs-Appellants have failed to prove that they or the zamindars whom they represent have had possession of any portion of those seven puras since the sanad was originally granted in 1740, and further they have failed to show what was the *ail* which was the eastern boundary of the lands covered by the sanad if it be not the boundary ridge between Mauzah Sahildeo and Dattagathi.

The suit is one for the ejectment of persons who admittedly were at the date of suit in possession of the seven puras of land from which it is sought to eject them. It lay upon the Plaintiffs to prove not only a title as against the Defendants to the possession, but to prove that the Plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit. Their Lordships find that the Plaintiffs failed to prove a title as against the Defendants to the possession of the lands in dispute or any part of them; they failed to prove that the lands, the possession of which they claimed, were not the lands covered by the sanad; and they failed to prove that they had been dispossessed or that their possession had been discontinued within 12 years before suit. Under the circumstances, their Lordships do not consider it necessary to express any opinion as to whether the decision of the Special Judge of the 11th November 1893 in the previous proceedings did or did not, by reason of Section 13 of the Code of Civil Procedure, operate as a bar to the maintenance of this suit.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed, and the decrees of the High Court of the 3rd July 1908 be affirmed. The Appellants must pay the costs of this Appeal.



In the Privy Council.

DHARANI KANTA LAHIRI CHOWD.
HURI AND ANOTHER

v.

GABAR ALI KHAN, SINCE DECEASED,
AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

LONDON :

PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY,

1912.