(1873) 11 PRI CK 0001

Privy Council

Case No: None

Olivia H. Thery, Executrix of The Will of Lewis Tiery (Deceased); James George and Olivia Hovenden (Formerly Tiery), His Wife, Executrix of The Will of Lewis Tiery (Deceased)	APPELLANT
Vs	
Kristodhun Bose; Gobindchunder Dutt; Oomamonee Dossee and Thakormonee Dossee; Meer Ackbar Ali; Gobindchunder Dutt; Oomamoee Dossee and Thakomoee Dossee, The Mother and Guardian of Heeraloll Ghose (A. Minor), The Son of Nundololl Ghose (Deceased)	RESPONDENT

Date of Decision: Nov. 22, 1873

Citation: (1873) 1 IndApp 76

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, Lawrence Peel, JJ.

Judgement

Robert P. Collier, J.

1. In this case the Plaintiff was the possessor, under a gantheedaree lease, of a portion of land designated as Lot 100 in the Soonderbuns. The Defendant was the possessor, under a grant from the Government, of Lot 104, the northern boundary of which was admitted to be identical with the southern boundary of Lot 100. The parties have died since this suit was disposed of and are now represented by others, but the case may be treated as if the original parties were the litigants. The Plaintiff sought by a suit in the nature of an ejectment to dispossess the Defendant from a large tract of land which the Defendant had been in possession of for some years before the suit, and a portion of which he had reclaimed from the jungle.

2. The question was one of? boundary, and that question maybe shortly stated thus:-It was agreed on both sides that the boundary between the two lots on the northern side of the one and the southern side of the other, was a khal, called the Kankrea Khal; and it was further agreed that a watercourse flowing into or out of a stream, which was admitted to be the eastern boundary of both lots, was for some distance this same Kanlcrea Khal But at a point a mile or somewhat more from the eastern boundary this Kanlcrea Khal divided itself into two branches, the one flowing to the westward with an inclination to the north, the other in a south-westerly direction; both these branches ultimately finding their way into a stream called the Kolooargung, which was admitted to be the western boundary of the two lots. The Plain tiff sought to recover possession of the intermediate land between the northern and the southern branches, he contending that the southern branch was the Kankrea Khal, properly so-called the Defendant contending that the northern branch was the Kankrea Khal, properly so called.

3. The land in dispute is stated by the Plaintiff to be upwards of 8,000 biggas, but it does not appear ever to have been accurately measured or surveyed. The Plaintiff, on whom the burden of proving his title rested, was content to put in his gantheedaree lease, which was granted by Nazir Ally Khan. He attempted no proof of the title of Nazir Ally Khan, nor did he shew on what terms, or by what description of boundaries or otherwise, this lot had been originally granted by the Government. Strictly speaking, he proved no title to more than he shewed Nazir Ally Khan to have been in possession of at the time of the lease to him. The question of possession, therefore, in their Lordships'', opinion, becomes very material.

4. It appears to their Lordships, upon a review of the evidence, that the Defendant, Mr. Tiery, had been, before the date of the gantheedaree lease to the Plaintiff, which was the 27th of December, 1853, in possession of the disputed land; and further, that he had reclaimed or begun to reclaim some portions of that disputed land, those portions immediately south of the northern boundary which he contended for. It further appeared, that the Plaintiff at the time when he took this gantheedaree lease was not only well aware of the possession and reclamations of the Defendant, but that he was the Defendant''s servant, and was actually assisting in making these clearances, from which he now seeks to dispossess his former master. It further appeared that the Plaintiff, before he took this gantheedaree lease at the end of 1853, had been in possession of

some portions of Lot 100, as what are called chucks, and that he was in possession of one chuck, called Chuclc Buchhur, which their Lordships agree with the Zillah Judge must be taken upon his own shewing to be the southernmost part of Lot 100. It therefore becomes material to ascertain where this chuck was situated, and their Lordships have come to the conclusion, upon the evidence, that this chuck was situated immediately northward of the line which the Defendant claims as his boundary, a situation consistent with the case of the Defendant, and that it was not situated immediately to the north of the south line contended for by the Plaintiff, which it should have been if the case of the Plaintiff is correct. The situation of this chuck therefore appears " to their Lordships one material circumstance, at all events, in the determination of this case. In this case there have been three surveys, two by a Mr. Joseph and, by a Mr. Smith respectively, in the year 1856. They are not very intelligible, owing, as it appears to their Lordships, to various misprints j and they may observe that this record has been printed in India with scandalous negligence; but it sufficiently appears in their Lordships" opinion that both these gentlemen substantially reported in favour of the boundary contended for by the Defendants. A subsequent survey in 1857 was made by Mr. Gomes, the Government surveyor, who, acting chiefly, as it appears, upon a map or a field book which had been prepared by a Captain Prinsep some time before (it does not appear precisely when), came to the conclusion that the southern boundary contended for by the Plaintiff was the boundary. It should be observed that Mr. Gomes went upon the land twice, and on each occasion he made a map. On the first occasion, in 1854, his attention was directed merely to the amount of land cultivated and not to the question of boundary; and, oddly enough, his map of 1854 is put in by the Plaintiff. On the second occasion, in 1857, he went for the purpose of ascertaining the boundary, and the map which he made on that occasion is not put in by the Plaintiff. As far as would appear from all three reports, the northern channel was at the time of these surveys, and their Lordships are disposed to infer at the time of the granting of the gantheedaree lease, navigable and open all the way, whereas the southern channel does not appear to have been open to boats throughout its whole course. It is, indeed, suggested on behalf of the Plaintiff that at some former time the southern channel was the broader one, but of that he has given no proof. Both the grants, the grant to the Plaintiff in gantheedar tenure in 1853, and the grant to the Defendant from the Government, dated in 1854 (but it would appear very clearly to their Lordships that although the date of the pottah was 1854, the Defendant had been in actual possession for about a year and a half before that), refer to a certain map of Captain Hodges. The Plaintiff did not put in that map in the Court below, but appears to have relied upon a map made by a Captain Smyth, which professes to be in great measure taken from the maps of Mr. Hodges, among others. Upon an inspection of that map, the Zillah Judge appears to have come to the conclusion that it favoured the contention of the Defendant rather than that of the Plaintiff; and the Zillah Judge, upon the whole evidence, came to the conclusion that the Plaintiff had not sufficiently proved his case to entitle him to eject the Defendant, and gave judgment for the Defendant accordingly. Upon this an appeal was preferred to the High Court in Calcutta, whereupon this judgment was reversed.

5. It appears to their Lordships that the High Court acted almost entirely upon the map of Captain Hodges, which was before the Court, although it had not been put in evidence in the Court below. That map has not been sent to England, and is not before their Lordships. If the map of Captain Smyth is to be taken as an accurate copy of that map, their Lordships do not agree with the High Court in supposing that that map is conclusive in favour of the Defendant. But even assuming that that map on inspection would turn out wholly in favour of the Defendant, it does not appear to their Lordships that the reversal of the finding of the Judge below solely or mainly upon this ground is satisfactory; for from the summary before given of the evidence, it appears to their Lordships that there was a great deal of evidence in this case independently of that map, far more in favour of the Defendant than the Plaintiff, and they are of opinion that upon all the circumstances and probabilities of the case the Judge of the Zillah Court was justified in coming to the conclusion that the case of the Plaintiff had not been established.

6. Their Lordships may observe that the expediency of insisting on more strict proof on the part of the Plaintiffs in ejectment is illustrated by this very case, in which an application has been made on the part of another party to become a party to his appeal on the ground that he had a paramount and prior title to the Plaintiff in this very Lot 100, a contention for which there would appear to be some ground. Of course their Lordships do not give any opinion upon this matter, and it is scarcely necessary to say that their judgment in this case can only affect the parties to it, and cannot give any other persons any rights, or impose upon them any liabilities.

7. Entertaining this view of the case, their Lordships are of opinion that the judgment of the High Court should be reversed, that the judgment of the Zillah Court should be affirmed, and they will humbly advise Her Majesty to this effect; and they are of opinion that the Defendant should have the costs in the litigation below, and of this appeal [(1)].

[(1)] It may be inferred from the judgment that their Lordships thought the objections urged to the Plaintiff''s title to recover in this suit weighty objections. In form it was an ordinary suit in the nature of an ejectment suit. The matter disputed was one of boundary. The Plaintiff claimed as a lessee, but he neither proved his lessor''s title, nor the possession by the lessor of the lands in dispute antecedent to the creation of the lease. The law in India does not permit an entry in assertion of title on lands in adverse possession, from the fear, which experience confirms, of the dangers to the public peace from that mode of clothing a right with possession. A mere lease of lands operates on possession, and cannot be created by one out of possession so as to confer on another that which he has not himself a present right to enter. The title must be shewn, and in such a case the title of the lessor is necessarily involved in the suit, and must be proved by a Plaintiff. The proper suit to establish boundaries is one in which the owners of the estate are bound by the adjudication. A decision adverse to a mere lessee would not bind the absolute interest; and it is obvious that the dangers to possession would be much augmented if the Courts in India did not require from one attacking possession clear and strict proof of his title, and substantially a due representation of the parties interested according to the real

nature of the matter litigated.