(1879) 06 PRI CK 0004

Privy Council

Case No: None

Rughoobur Dyal Sahoo and Others		APPELLANT
	Vs	
Maharajah Kishen Pertab Sahee		RESPONDENT

Date of Decision: June 25, 1879

Citation: (1879) 6 IndApp 211

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

Judgement

Barnes Peacock, J.

1. The facts of this case are very clearly stated in the judgment of their Lordships upon the remand in the year 1873. It is clear that in 1837 a settlement of the lands in dispute was made with the predecessors of the Plaintiffs. That settlement was made at a revenue of Rs. 84,200 3a. In 1847 the settlement was renewed, and the predecessors of the Plaintiffs continued in possession of the lands from 1837, when the settlement was first made with them, down to the expiration of the settlement of 1847. Prior to the renewal of that settlement in 1857 the River Gunduck, which was to the south of the Plaintiffs'' zemindary and to the north of the Defendant''s, had so completely changed its course that the lands in dispute, which were formerly on the north side of the river, were capable of being identified on the south side of it.

2. A question arose as to the renewal of the settlement of 1847, and the lands being then on the south side of the river, which was the acknowledged boundary between the districts of Sarun and Tirhoot, were then in the district of Sarun. Mr. Lautour, who was the Collector of Tirhoot, and who had formerly settled the lands when they were on the north side of the river, and were then in his district, had some doubt whether he had jurisdiction to re-settle them. The question was referred to the Commissioner, Mr. Tayler, who decided in favour of Mr. Lautour''s jurisdiction, and directed him to renew the settlement with the owners of the Plaintiffs'' zemindary,

Sohagpoor, upon which an appeal was presented to the Board of Revenue, and they ordered the settlement not to be made with the owners of the Plaintiffs'' zemindary but with the owners of that of the Defendant on the southern side of the river. It is in consequence of that order that differences have arisen between the parties as to whether the Plaintiffs were entitled to a renewal of the settlement in 1857 or whether the Defendant was entitled to it.

3. The rule under the first clause of the fourth section of Regulation XL of 1825 is that land gained by gradual accession, whether from the recess of a river or of the sea, is to be considered as an increment to the tenure of the person to whose land or estate it is thus annexed, "whether such land or estate be held immediately from Government by a zemindar or other superior land-holder, or as a subordinate tenure by any description of under-tenant whatever." The Plaintiffs claimed that the lands in dispute were formerly an increment to their estate by gradual accession, and that they had been settled with the owners of Sohagpoor upon that basis. By the second clause of the fourth section the rule before mentioned was not to be considered applicable to cases in which a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment, or by the violence of its stream separates a considerable piece of land from one estate and joins it to another estate without destroying the identity and preventing the recognition of the land so removed. The change of the course of the River Gunduck on the last occasion was a sudden change, and the land which had originally been settled with the Plaintiffs on the north side of the river was capable of being identified on the south side of the river. Therefore this land which had been in the possession of the Plaintiffs for twenty years and had been brought into cultivation by them, did not, according to the 4th section of Regulation XI. of 1825, belong to the owner of the zemindary on the south side of the river as having been gained by gradual accession. But a question arose whether in consequence of an established usage the river, however its course might be changed, was not to be considered as the boundary between the two zemindaries as it was between the two districts. The second section of the Regulation of 1825 was relied upon by the Defendant. By that section it was enacted that, " Whenever any clear and definite usage of Shekust pywust respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates, divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage." The Sudder Board of Revenue thought that there was a clear and definite usage that under all circumstances the river should be the boundary between the zemindaries on the one side and those on the other. They say, '' At the time of the permanent

settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the Gunduck should be the constant boundary between the two districts of Sarun and Tirhoot, and between the zemindaries on each bank divided by the river." They accordingly ordered a settlement to be made with the Defendant, and in conformity with those directions a summary settlement of the lands, which are the subject of this appeal, was made with the Defendant, the Maharajah of Hutwa, who obtained possession of the lands. Thereupon the Plaintiffs, in January, 1860, commenced this suit. They contended that the lands having been settled as an accretion to their zemindary on the north side of the river were theirs by virtue of proprietorship; and that being capable of identification, notwithstanding the change of the river, the lands belonged to them under Clause 2, Section 4, of the Regulation of 1825, and not to the Defendant; and then the question arose whether there was such a custom as that which the Board of Revenue stated, namely, a custom that the river should be the boundary, not only of the districts, but of the zemindaries on either side.

4. The Principal Sudder Ameen tried the case, and he dismissed the Plaintiffs'' suit upon some technical objections, and also upon the ground that the decision of the Board of Revenue that the settlement should be made with the Plaintiff was final and conclusive. Upon appeal to the High Court they reversed that decision, and remanded the case to the Principal Sudder Ameen for re-trial.

5. The case afterwards came before this Board upon appeal, and their Lordships in their judgment of remand, alluding to the trial of the case by the Principal Sudder Ameen after the remand by the High Court, say: " The opinion thus intimated clearly implies that the principal if not the only questions between the parties were whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second clause, or whether the recession of the stream having been gradual, it had taken from the Tirhoot estate what had once belonged to it, and given what it so took to the Sarun estate by accretion in the proper sense of the term. The High Court seems to have assumed that the Plaintiffs may once have had the permanent and proprietary interest in the lands, and altogether to have ignored the existence of the alleged usage as an element in the case. This seems to have misled the Principal Sudder Ameen who tried the cause on remand, for although in one part of his judgment he treats the temporary settlements with the Maliks of Sohagpoor"--that is, the Maliks of the zemindary on the north side of the river--" as having been made with reference to some such usage as that alleged, and therefore to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact." Their Lordships afterwards went on to say: " The first settlement certainly purports to have been made with the then Maliks of Sohagpoor in the character of proprietors of the alluvial land settled; but in their Lordships'' opinion it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the Deara land was supposed to have formed by gradual accession on their estate, and to have

become an increment thereto within the meaning of the first or of the latter part of the third clause of Section 4 of Regulation XI. of 1825. Their Lordships have not before them the whole settlement proceedings, and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favour it, though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen. From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage, yet the issue upon that point has never been tried." Their Lordships finally remanded the case in order that two new issues should be tried; first, whether the land in dispute was settled in 1837 with the then Maliks of mouzah Sohagpoor as the proprietors of alluvion which had become an increment to their estate by gradual accretion, or upon what other grounds such settlement was made; the burden of proving the affirmative of the first part of this issue to be on the Plaintiffs. Secondly, whether there was at the date of the permanent settlement, and has since been, a clear and definite usage that the main channel of the River Gunduck should be the constant boundary, not only between the districts of Sarun and Tirhoot, but also between the zemindaries on each bank divided by the river. The burthen of proving the affirmative of this issue to be on the Defendant."

6. The case then went down and was re-tried upon those issues, and further evidence was given on the part of the Defendant to shew that there was such a usage. The Subordinate Judge, upon the evidence, found that no such usage had been proved; and he also found on the first issue that the settlement in 1837 was not made upon the ground of the alleged usage under section 2, Regulation XI. of 1825, but on the ground of their proprietary title under the provisions of Clause 1, Section 4 of that Regulation, that is to say, that the land was settled in 1837 with the owners of Sohagpoor as the proprietors of alluvion which had become an increment to their estate by gradual accretion. An appeal was preferred from that judgment to the High Court, and that Court overruled the decision of the Lower Court upon the finding on the first issue, and they abstained from coming to any conclusion upon the second issue. There certainly is no sufficient evidence to justify their Lordships in finding that there was such a clear and definite usage as that stated in the second issue, and in overruling the decision of the Lower Court upon that issue upon which the High Court have expressed no opinion.

7. Mr. Justice Kemp; one of the learned Judges of the High Court who decided the case upon appeal, held that the Subordinate Judge was wrong in finding that the lands had been settled with the owners of Sohagpoor in 1837 upon the ground of their proprietary title under Clause 1, Section 4 of the before-mentioned regulation. In his judgment he does not quite accurately state what the issue really was. Speaking of their Lordships'' judgment on remand, he says: " They then remark, ''

that if it should appear that the alleged usage, that is, the usage set up by the Defendants, namely, that the River Gunduck is the boundary between the two zillahs of Sarun and Tirhoot, exists, and that the settlements were made on the basis of that usage, or (and these observations are very important) '' for any other reason the interest of the Maliks of Sohagpoor in the land in dispute was of a limited and temporary character and had expired, that would be fatal to the Plaintiff''s suit.'"" There was no doubt that the river was the boundary between the two zillahs of Sarun and Tirhoot; but the real question was whether there was a clear and established usage that that river should be the constant boundary between the zemindaries on either side. That was the question as to usage which their Lordships intended to be decided.

8. On reversing the decision of the Lower Court upon the first issue, Mr. Justice Kemp says: " Then comes the document, which is a proceeding of the Deputy Collector of Tirhoot, Mr. Edward De Rozario, dated the 28th of November, 1837. He says that, '' Having held a local inquiry and examination I effected a temporary settlement for seven years from 1245 to 1251 Fusli, with Jugdeo Narain, the proprietor of the bureri lands above mentioned,'' that is, the lands of Sohagpoor." That does not affect the case at all. He merely says that he had made a temporary settlement with the owners of Sohagpoor. Mr. Justice Kemp proceeds, "Then follows a copy of the report of the same officer, viz., Mr. Edward De Rozario, the Deputy Collector of Tirhoot, to his immediate superior, Mr. Campbell. Before referring to this report we notice a passage in the settlement proceeding of Mr. De Rozario, where he says '' The proprietors of mouzah Bhukain, &c., per-gunnah Goa, zillah Sarun, were given to understand that a settlement of the land that has accreted from the Gunduck cannot be made contrary to the line of demarcation, namely, the River Gun-duck.'' Returning to the report of Mr. De Rozario, submitting his proceeding to his immediate superior, we find that the petition of the Maliks of Bhukain, in which they had claimed for an exception to the established usage of the recognised boundary of the main channel of the Gunduck to be made in their favour, was opposed to all regulation and was inadmissible." Those two documents are set out in the present record, in the first of which Mr. Rozario says, " Therefore the proprietors of mouzah Bhukain, &c., pergunnah Goa, zillah Sarun, were given to understand that a settlement of the land that has accreted from the Gunduck cannot be made contrary to the line of demarcation, namely, the River Gunduck." He does not say that a clear and definite usage existed that the River Gunduck was to be the boundary between the two zemindaries. The other document to which the learned Judge refers is contained in a letter to Mr. Campbell, who was the Deputy Collector in charge of Khas and resumed mehals in Tirhoot. That letter was dated the 16th of February, 1838, and contains the passage to which the learned Judge refers: " The petition of the Maliks of Bukain, &c., zillah Sarun, for exception to the established boundary of the main channel of the Gunduck in opposition to all regulation was inadmissible, and their unfounded officiousness pointing out the

permanently assessed land as portion of the alluvion from a puerile motive." To say the least of it, it is very ambiguous what was meant by that statement. But in the last paragraph of that letter, he says: " These lands established as an alluvion of the estate registered in the name of Futteh Sing, descending on his demise to his sons Gunga Persad and Jugdeo Narain Sing, with the latter as the surviving proprietor, I have, under Regulation XI., of 1825, effected a temporary settlement for seven years, from 1245 to 1251 Fusli inclusive, on the Sudder jumma of Sicca Rupees 789 9, or Company''s Rupees 842. 3a. 2p., which I now have the honour to submit to your approval." If Mr. De Rozario had relied upon a clear and established usage that the river was, under all circumstances, to be the boundary between the two zemindaries, it was unnecessary to say that it had been established that the lands were an alluvion of the estate, &c. It would have been sufficient to say they are to the north of the river, and consequently, according to the established usage, are part of the zemindary on the northern side of it. It appears, therefore, to their Lordships that the lands were settled with the predecessors of the Plaintiffs as an alluvion of their estate, and that, as far as the statements in the letters go, they do not establish that it was made with the Plaintiff upon the ground of there being an ancient and established usage that under all circumstances the River Gunduck should be treated as the boundary between the two zemindaries. Having referred to those documents, Mr. Justice Kemp proceeds to say that the settlements were merely temporary. He says," These are all the proceedings of any importance with reference to the first temporary settlement made with the Plaintiffs by the revenue authorities. The second settlement was made for ten years with the Plaintiff, from 1816 to 1856, by Mr. Deputy Collector. At page 45 will be found the proceeding of that officer with reference to this second temporary settlement made with the Plaintiff. That proceeding was before their Lordships of the Privy Council." It does not appear that the second settlement at all affected the case; it was merely a renewal of the settlement of 1837, and if the settlement of 1837 had been made on the principle of established usage, the second settlement followed upon the ground of that usage. If, on the contrary, it was made with the Plaintiff as the proprietor of an estate to which the lands had become an accretion by gradual accession, then the second settlement was made upon the same principle. Mr. Justice Kemp proceeds, " The next proceeding is at page 55. This was not before the Privy Council, but was subsequently filed after the remand by the Plaintiffs. It is merely a letter of the Collector forwarding the proceedings connected with the temporary settlement concluded with the Plaintiffs. But a passage has been referred to in it by the pleader for the Plaintiffs in which the Collector says that a settlement has been concluded for a period of ten years with the heirs of Gunga Persad and Jugdeo Narain as Maliks of the Kurrari Mehal." That shews that the settlement was made with them, not in consequence of any known and established usage, but upon the ground of the ordinary rule under Regulation XI. of 1825. Then he says ''Having reviewed the documents filed by the Plaintiffs both before and after remand, we come to the decision upon the first issue laid down by their Lordships of the Privy Council; and as

alter a careful consideration we have come to a conclusion different to that which the Subordinate Judge has arrived at, we shall confine our decision to the finding on the first issue laid down, inasmuch as we consider it unnecessary to enter into the second issue laid down by their Lordships of the Privy Council. We are of opinion that the settlements made with the Plaintiffs were temporary settlements, and were made on the basis that the Gunduck was the boundary line, not only of the two zillahs Sarun and Tirhoot, but of the estates appertaining to those districts; that the land in dispute was settled with the Plaintiffs on temporary leases, and that those settlements were of a limited and temporary character. Such being the case, to use the words of their Lordships, this finding is fatal to the Plaintiffs'' suit."

9. With reference to the settlements being of a temporary character, we must consider what the law is upon the subject. If this accretion belonged to the Plaintiffs by virtue of the first clause of Section 4 of Regulation XI. of 1825 as lands which had been gained by gradual accession to their estate, then by virtue of the first clause of that section it became an increment to the Plaintiff''s estate, and the property became his property. The words are: " When land is gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landowner, or as a subordinate tenure of any description of under-tenant whatever; provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation XL, 1819, or of any other regulation in force." Assume it to be a case within this section, the land became the property of the predecessors of the Plaintiffs liable to be assessed by the Government for revenue; but there was no obligation on the part of the Government to assess it permanently, nor would it have been proper to do so, because at the time when it was first annexed it was mere sandy soil scarcely culturable, and was so reported by Mr. D''Rozario. In his report he says: "At first he"--that is, Jugdeo Narain Sing, the Plaintiffs'' predecessor--" raised a number of pleas as to his inability to pay the rent,"--that is, the revenue--and that the diara will not remain in existence, owing to the force of the River Gunduck. Upon this he was made to understand that the whole of the land is somewhat like a sandy desert, and, of course, after the lapse of some time it will become culturable, and yield a great profit." Then he assented to take it at the revenue, which the Government fixed at the time, of Company''s Rs. 842, and began to cultivate it; but the Government only assessed temporarily that which was his permanent property. A temporary assessment did not reduce to a temporary estate, or to an estate of a limited and temporary character, the interest of the Plaintiffs in

the accretion, which was permanent, as being an increment to an estate which was permanent, but it merely fixed the period during which the increment should be subject to the revenue of Rs. 832, so that the Government at the expiration of the settlement might be at liberty to raise it according to the value of the land. At the expiration of the settlement of 1837 they renewed the settlement at a revenue of Rs. 1500. The land had then become improved. The Plaintiffs remained in possession of the land under temporary settlements from the year 1837, for a period of nearly twenty years, down to the year 1857, and during the whole of that time they paid revenue to Government, partly during the time when the land was little better than a sandy desert. The Plaintiffs and their predecessors cultivated the land, and so improved it that in 1847 it was assessed at Rs. 1500. The Plaintiffs were during twenty years in occupation of the land, when at the expiration of the settlement of 1847, in consequence of a sudden turn of the River Gunduck, it was on the southern side of the river capable of being identified, and still belonged to the Plaintiffs, unless there was a clear and definite usage that the River Gunduck was to be the boundary, not only between the two districts, but between the zemindaries on either side.

10. Such a custom has not been proved ever to have existed. The Subordinate Judge has found that there was no such usage. The High Court has not considered the evidence or reversed the finding of the Subordinate Judge upon the second issue, and their Lordships are of opinion that the alleged usage was not made out. The usage not having been proved, their Lordships are of opinion that there was no sufficient evidence to justify the finding of the High Court that the revenue settlements were made on the basis that the River Gunduck was the boundary line not only of the two zillahs, Sarun and Tirhoot, but of the estates appertaining to those districts; on the contrary, they are of opinion that the settlements, though temporary, were made with the predecessors of the Plaintiffs as an alluvion to the estate of Sohagpoor, which in 1837 was registered in the name of Futteh Sing, and upon the ground that the predecessors of the Plaintiffs were the Maliks and proprietors of the estate, and consequently that the finding of the Lower Court upon the first issue under the remand from this Board was a correct finding, and that the reversal of that finding by the High Court was erroneous.

11. They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that it be declared that the Plaintiffs are entitled to the lands in dispute, and to have a settlement made with them, and that it be ordered that the Plaintiffs do recover possession of the said lands, with mesne profits from the date of the institution of the suit, such mesne profits to be assessed in execution of the decree; and that the Respondent do pay the Plaintiffs the costs in all the Lower Courts and the costs of the former appeal to Her Majesty in Council as already taxed as part of the costs in the cause; and their Lordships order that the Respondent do pay the costs of this appeal.