

(1915) 08 CAL CK 0003

Calcutta High Court

Case No: None

Srimati Krishna Kalyani Dasi

APPELLANT

Vs

Mr. R. Braunfield and Others

 Rai Moni Lal Banerjee

Bahadur Vs Prince Kumar Kadir

RESPONDENT

Mirza Mahomed Abdul Ali and

Others

Date of Decision: Aug. 27, 1915**Citation:** 36 Ind. Cas. 184**Hon'ble Judges:** Roe, J; N.R. Chatterjea, J**Bench:** Division Bench

Judgement

N.R. Chatterjea, J.

This appeal arises out of a reference made by the Collector of the 24-Pergannas u/s 30 of the Land Acquisition Act. The reference was made as there were disputes about title between the parties claiming the compensation awarded by the Collector.

2. The land acquired was about 37 bighas, and is situated in Mouza Majerhat, which consists of Estates Nos. 167, 53 and several other estates which are referred to as ejmali estates which have no concern with the case.

3. The claimant No. 4, Mr. Braunfield, was at the time of the acquisition admittedly in possession of all the lands with the exception of those purchased by the Banerjees or Prince Kamar Kader (the claimants Nos. 5 and 6). He asserted that the greater portion of the lands were lakhiraj and claimed the whole of the compensation.

4. The claimant No. 2, Krishna Kalyani, claims about 17 bighas as appertaining to taluk No. 167 purchased by her from one Charu Chandra Bose, who purchased the taluk at a sale for arrears of Government revenue on the 21st June 1900.

5. The claimants No. 1 (Abdul Matlab and others) claim an interest in more than 10 bighas and the claimant No. 7, Apurva Kumari, also claims an interest in more than 10 bighas. The claimants Nos. 5 and 6, viz., the Banerjee brothers and Prince Kamar Kader, claim more than 13 bighas and there is a question as between them as to who is entitled to receive the compensation for the lands.

6. The following issues were framed for trial:

(1) Does any portion of the land in suit fall within taluk No. 167 and if so, which? As regards such land, is the interest of Mr. Braunfield or Prince Kamar Kader protected u/s 37 (Act XI of 1859)?

(2) If so, who is entitled to the compensation for such land?

(3) Did or did not Mani Lal Banerjee, claimant No. 5, as agent of Prince Kamar Kader purchase the portion of the land in suit from Gopi Krishna Mandal and others?

(4) Who is entitled to the compensation therefore Whether Prince Kamar Kader or Moni Lal Banerjee?

(5) For what land is Mr. Braunfield entitled to receive compensation?

(6) Has claimant No. 7, Apurva Kumari Dasi, a mortgage lien on some portion of the acquired land?

(7) Is any portion of the acquired land included in Estate No. 53? If so, who is entitled to the compensation for it? and

(8) How should the compensation money be apportioned amongst the claimants?

7. In order to determine whether the lands claimed by the claimant No. 2 fall within taluk No. 167, a Pleader, Babu Chandra Kumar Das, was appointed Commissioner to relay the thak map of Mouza Majerhat. He found that about 17 bighas of land (being portions of the different premises acquired) fall within plots Nos. 1, 4 and 6 of the thak map of taluk No. 167.

8. The case was tried in the first instance by Mr. Goodeve, who held that no reliance could be placed upon the thak map or on the relaying thereof by the Commissioner Babu Chandra Kumar, and accordingly held that claimant No. 2 had failed to establish that any of the lands fell within taluk No. 167. He also held that the claimants No. 1 failed to show that the lands claimed by them fall within taluk No. 53, or were in the possession of Mr. Braunfield but as the latter admitted that he held two mokarari jamas, the claimants No. 1 were entitled to receive the value of the rentals payable for them capitalized at 20 years' purchase.

9. As to claimant No. 7, Mr. Goodeve held that the claimant No. 7 is entitled to the whole of the compensation awarded for 10 bighas after deducting the amount which he found was payable to the claimants No. 1.

8. As to the land purchased by the claimant No. 5 from the Mandals, the learned Judge found that it was approximately 12 bighas, but he found that the Banerjees purchased the land for the claimant No. 7, Prince Kamar Kader, as his agents, and the latter was the true owner of the property, and entitled to the whole of the compensation money awarded for the same.

9. In the result Mr. Goodeve held that the claimant No. 2 Krishna Kalyani and the claimants No. 5 the Banerjees were not entitled to anything and apportioned the compensation among the other claimants according to the findings arrived at by him. The claimant No. 2 appealed to this Court in Appeal No. 534 of 1909 and the claimants No. 5 the Banerjees appealed in No. 44 of 1910.

10. Appeal No. 534 of 1909 came on for hearing on the 7th March 1912 before Chitty and Teunon, JJ., who were of opinion that there was considerable doubt as to the correctness of the Pleader Commissioner's survey and its results, and remanded the case to the Court below for findings on the first and second issues after having a fresh local investigation and survey made by a competent officer of the Court.

11. As no surveyor from the Surveyor-General's Office was available Babu Dsrijendra Nath Mukherjee, a Pleader, was appointed Commissioner by the Court below, none of the parties objecting to the appointment. He held a fresh local investigation and submitted his plan and report. The case then came on for hearing before Mr. Chotuner, the Land Acquisition Judge, and he was of opinion that Dwijendra Nath had been no more successful than his predecessor in his relay of the thak map, and doubted whether with the extremely inadequate materials available it is possible to relay it at all. He accordingly held that the claimant No. 2 had failed to show that any portion of the acquired land fell within taluk No. 167, and in that view did not consider it necessary to decide the latter portion of the issue No. 1 or issue No. 2.

12. It appears that a large number of documents which has been tendered in the Court below on behalf of the claimant No. 2 were rejected by Mr. Goodeve and when they were tendered before Mr. Chotssner the latter also rejected them on the ground that The High Court did not take in these documents."

13. The appeal came on for hearing before Fletcher and Richardson, JJ., on the 19th May 1914 with the findings of Mr. Chotzner. The learned Judges held that the previous order of remand did not in any way preclude the Court below from admitting the documentary evidence tendered before it, and again remanded it to the lower Court. Richardson, J., added that the evidence already on the record will be receivable subject to any just exceptions, and the parties will be at liberty to produce any further evidence which they may desire to produce."

14. When the case went back on remand for the second time, it was heard by Mr. Cuming. The claimant No. 2 again tendered the documentary evidence before him, but he rejected them on the ground that all these documents had been tendered

when the case was originally heard by Mr. Goodeve and Mr. Goodeve rejected them. This evidence is not, therefore, on the record and it cannot be considered as further evidence. Mr. Goodeve's order rejecting the evidence still stands. It has not been set aside and, therefore, it is not open to me to admit this evidence which Mr. Goodeve rejected."

15. Mr. Cuming, however, came to the conclusion that the findings of the second Pleader Commissioner (Babu Dwijendra Nath Mukherjee) were correct, and accordingly found the first part of issue No. 1 in the terms of the Commissioner's report. With respect to the second portion of issue No. 1 the learned Judge was of opinion that the only clause of Section 37 of Act XI of 1859 under which the present case could come would be the clause beginning fourthly" and held that the interest of Mr. Braunfield or Prince Kamar Kader was not protected interest within the meaning of Section 37; and that the claimant No. 2 was entitled to the whole of the compensation for the lands falling within taluk No 1157.

16. Objections were filed on behalf of the claimant No. 2 against the order of Mr. Cuming rejecting the documentary evidence tendered on her behalf and objections were filed against his findings on behalf of the claimants Nos. 4 and 6 and the representative of claimant No. 7.

17. The first question for our consideration is whether the result of the local investigation made by Babu Dwijendra Nath Mukherjee is correct.

18. There was a plan (Land Acquisition Plan) prepared by Mr. Smart, but the Commissioner was directed by the Court below to make an independent survey and he accordingly made an independent survey in order to find out whether the portions of the acquired land chimed by the claimant No. 2 fall within plots Nos. 1, 4 and 6 of the thak map of Mouza Majerhat.

19. The main point in connection with the relaying of the thak map is, whether the trijunction point has been correctly found-by the Commissioner. He found that out of the trijunctions shown in the thak plan, station No. 28 is the nearest to the disputed lands. It is the only trijunction with which the chuks in the interior are connected and is the trijunction point of the three Mouzzs Mijerhat, Durgapur and Bhahpur. He says: "If the points be satisfactorily identified at the locale, the chuks Nos. 1, 4 and 6 can be easily relaid as the stations on the boundaries of those ehuks are connected with this point and the distances and the directions of the connecting lines are recorded in the field-book given in the margin of the thak plan."

20. The starting point, which was pointed out on behalf of the claimant No. 2, is the northeast corner point of the junction between Diamond Harbour Road and Goragacha and Shahpur Road. The other claimants stated that it was not possible to locate Mouza Majerhat or any injunction point, and did not Show any point from which any enquiry could be made.

21. The Revenue Survey Map shows the Diamond Harbour Road to the east of Mouza Majerhat, and to the west of Durgapur and the Garden Reach-Tollygunge Road to the south of Majerhat and Durgapur and to the north of Shahpur.
22. It appears from the thak map of Majerhat that the stations Nos. 28, 27, 2 etc., are to the east of a road, and stations Nos. 30 to 33, etc., are to the south of another road and station No. 29 lies to the east of the junction. The statement of boundary pillars of Mouza Majerhat, dated the 6th January 1843 (Exhibit III), describes pillar No. 21 east of the village at a distance of 33 rods towards the south from pillar No. 27, east of the road. East of Gopal Bank's shop, up to this point, is Durgapur and then the boundary of Shahpur begins.
23. This would go to show that the Diamond Harbour Road, in so far as it lies between Majerhat and Durgapur, and the western portion of the Garden Reach-Tollygunge Road now called Goragacha Road are included within Mouza Majerhat.
24. The hhusra map of Durgapur, dated 1849 (Exhibit VI), supports the above. The map shows that Majerhat lies to its immediate west and Shahpur to its immediate south, and no portion of the road to its west or south is shown as included within any of the dags of the mouza, though the map describes all the dags in the mouza.
25. The map of Shahpur, dated 1817, describes the road to the west of the junction as the road of Mouza Majerhat. The eastern portion of the road is marked dag No. 521 to the north, and dag No. 61 to the south, the former being described as road patit and the latter as the khas patit metalled road from Behala to Durgapur and Kidderpur, and on the south of the Majerhat Road, whereas the road to the west does not bear any dag number which indicates that it was not included within Shahpur. The field-book of the map of Shahpur shows that stations Nos. 5, 4, 3 and 2 are to the north of the mouza situated to the south of the road, and the stations Nos. 7, 8, 9, etc., to the east are to the north of the road. From what is stated above it will appear that the roads to the south and east of Mourn Majerhat are included within that mouza, and the eastern portion of the Garden Reach-Tollygunge Road to the north of Shahpur is included within Mouza Shahpur and that the meeting point of the three mouzas is at the north-eastern corner of the junction. The Commissioner in his report has shown that the description of stations Nos. 28 and 29 of the field book of the Majerhat thak map, those of station Nos. 6 and 7 of the Shahpur plan and station No. 52 of the Durgapur plan support the above conclusion and we think that he has given good grounds for the same. Then the question is whether the trijunction point can be identified on the spot.
26. The Revenue Survey Map, Exhibit VIII, shows the meeting points of two roads and they appear to be similarly situated as shown in the case map, The other claimants, however, do not admit that the roads from Garden Etsach to Tollygunge as shown in the Revenue Survey Map are the present Goragacha and Shahpur

Roads, but they could not point out the junction of the roads in the Revenue Survey Map when asked by the Commissioner to do so. The Commissioner found the identity of the roads in the Revenue Survey Map with the present Diamond Harbour Road, Goragacha and Shahpur Roads in the locality to have been established, and the north-eastern corner of the junction having been found to be the trijunction point of the three mouzas, held that the position of the trijunction station No. 28 of the Majerhat Thak Map to be identified in the locality. This, however, involved one assumption, viz., that the roads have been in the same position all along. There is a bend in the present Goragacha Road and the bend is also shown in the Revenue Survey Map. There is some evidence to show that these roads have been in the same position all along (see witness No. 2 for claimant No. 1). The breadth of Shahpur Road according to the Shahpur Chita would be 57 feet, and the breadth of Diamond Harbour Road would be 63½ feet. The distance between stations Nos. 26 and 29 (S and B in the report of the Commissioner at pages 19 of the paper-book) is 62 feet, and the distance a few feet away from the junction (between S and B in the said plan) is 57 feet, the difference being only five feet.

27. As the Commissioner points out, it is unreasonable to expect that the exact mathematical point could be fixed with precision after such a lapse of time. It is impossible to avoid small errors in survey works and in attempting to relay an old plan like the thak, small errors would inevitably creep in. A work may be relied on when the errors are reduced to the lowest practical limits. Here the errors in fixing the position of the trijunction point, if any, may be but a few feet only and may be left out of consideration as it would not lead to any appreciable difference in the practical results."

28. Having fixed the position of the starting point in his plan after survey the Commissioner relaid the chuks Nos. 1, 4 and 5 according to the field-book given in the thak map of Majerhat, and found that the evidence on the record corroborated the description of some of the lands mentioned in the field-book which he detailed in his report.

29. A good deal of argument was addressed to us as to the exact position of Gopal Barik's shop. In the statement of boundary pillars of Mouza Majerhat (Exhibit III) pillar No. 28 is described as east of the village at a distance of 33 rods towards south from pillar No. 27 east of the road east of Gopal Barik's shop. Up to this point is Durgapur and then the boundary of Shahpur begins; and pillar No. 29 is at the south-eastern corner of the village at a distance of 7 rods towards south from pillar No. 28 between north-western corner of Gopal Barik's shop and east of the junction of four roads falls Shahpur. The Commissioner has shown two shops of Gopal Barik in his report, one at the north-west corner of the junction of the roads and the other at the south. It is pointed out on behalf of the respondents that the evidence shows the existence of only one shop of Gopal Barik and that there was no evidence to show that there were two shops.

30. On behalf of the appellant we were referred to the Viusra chitta of Shahpur (Exhibit B) of 1847, which shows that dag No. 446 was the brohmottar of Gopal Barik, jote of Bhandra potter." In 1848 it is described as Gopal Barik's shop in the stambha sumari of Shahpur (see Exhibit XXII) and it is suggested that the shop of Gopal was on the north and the shop in the possession of the potter in 1847 came into the possession of Gopal Barik in 1848 and probably became known as his shop. This may or may not be a possible explanation, but the question as to the exact situation of Gopal Barik's shop is not very material inasmuch as an error of a few feet in ascertaining its position does not affect the general accuracy of the map.

31. It is contended on behalf of the respondents that thak maps are not reliable and reference is made to certain passages in "Notes on the Old Revenue Surveys" by Captain Hirst at pages 9 to 14 of that book.

32. The learned author states that generally speaking there are three kinds of thak maps to be considered, viz., (a) eye sketches in which no actual measurements were made, (b) maps in which rough magnetic bearings were used and rough lineal measurements made, (c) maps made from careful magnetic bearings and careful lineal measurements, and states his opinion that the vast majority of thak maps made before 1852 are eye sketches and that some maps made after 1852 are little better. He also gives various reasons to show why thak maps are generally unreliable in determining the boundaries of villages and specially of boundaries of isolated estates within a village, except when they come under class (c) as stated above.

33. It is pointed out on behalf of the respondents that the thak maps relied upon on behalf of the claimant No. 2 were made before 1852, and are, therefore, unreliable. But although the maps were made before 1852, the thak map of Majerhat is certainly not an eye sketch. It is stated on the map that it was "made after measurements by compass." The scale is given. There is the field-book which gives the bearings and distances. The map was prepared in the presence of the agents of the owners of the various estates in the villages, and bears their signatures.

34. Appears, therefore, that the thak map in the present case cannot be rejected as unreliable. Thak maps have always been considered by Courts as good evidence, and although the value of a thak map depends upon its accuracy, we do not think that there is any presumption that thak maps must be inaccurate. The Judicial Committee in the case of *Maharaja Jagadindra Nath Boy v Secretary of State for India* 30 C. 291 (P.C.) : 30 I.A. 44 : 7 C.W.N. 193 : 5 Bom. L.R. 1 observed: Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made." These observations were made in connection with thak as well

as Revenue Survey Maps as a reference to the cases in their Lordships' judgment will show.

35. In the present case we do not see sufficient reasons to reject the thah map of Majerhat as unreliable. The thah plans of Durgapur and Shapur are not of the same class as the thah map of Majerhat but they can be relied upon, as they agree with the thak map of Majerhat.

36. It appears that Dwijendra Mohan had only copies of the thah map of Majerhat and not the original map, when he made the measurements, but he says that he subsequently compared the copies with the original and it appears that he gave notice on the 30th April 1913 to all the parties to attend on the 1st May when the original map would be produced before him. The original map was sent for by this Court, and the parties have not shown any difference in the copies.

37. Some arguments were addressed to us upon the question of magnetic variation. But Dwijendra Mohan appears to have allowed the magnetic variation in accordance with the letter from the Director of Survey about the variation in the magnetic north at the time of the thak map and at the present time.

38. Then as to the allowances for closing circuits, Dwijendra Mohan says, "in plotting the chuks I had to make small allowances ranging from 2 to 5 feet in the length of some lines in order to close the circuit according to the accepted rules of survey." He was cross-examined with regard to the distances between points Nos. 3 to 4, 5 to 8, 6 to 7 and 10 to 11. The figures given in the schedule to his report show that the limits allowed for closing circuits were not exceeded, except perhaps in one case in which it was seven feet. It is to be noticed that the claimants did not set up any substantive case of their own as to the trijunction point or as to any matter in connection with the relaying of the map, and their criticisms are directed to shewing inaccuracies. But as already pointed out, mathematical accuracy is hardly, to be expected in relaying ancient maps, substantial accuracy being all that is necessary for practical purposes.

39. On the whole I do not see sufficient reasons for differing from the conclusions arrived at by Babu Dwijendra Mohan which have been accepted by Mr. Cuming, and I hold that the lands claimed by the claimant No. 2, Krishna Kalyani Dasi, lie within the ambit of Taluk No. 167. My learned brother also has arrived at the same conclusion considering the matter from other points of view.

40. With respect to the documents tendered on behalf of the claimant No. 2 and rejected by the Courts below, it appears that some of them, Nos. 5 and 6, are copies of papers which are part of the record of the present case as to which, of course, no question could arise of their admissibility. For the purpose of the present appeal, the rest of the papers are unnecessary in the view we take of the case.

41. The next question, viz., that covered by the second portion of the first issue is as regards such land is the interest of Mr. Braunfield or Prince Kamar Kader protected u/s 37 of Act XI of 1859?"

42. Mr. Cuming, as stated above, was of opinion that the only clause of Section 37 of Act XI of 1859 under which the present case could come, would be the clause beginning with fourthly." That clause relates to leases of lands whereon dwelling-houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, etc., have been made. It is true Mr. Braunfield had arrowroot plantations and buildings on a portion of the land, but with the exception of six cottas of land it is not alleged or proved that there was any lease in respect of the other lands. That being so, he can claim protection under the 4th clause of Section 37 only in respect of the six cottas and four chittoks of land covered by kobala No 5 (from Munshi Abdul Basat to viz. Braunfield). With respect to the remaining lands his case as well as that of Prince Kamar Kader, as stated in their petitions of claim, was that they were lakhiraj. Mr. Goodeve who tried the case in the first instance did not come to a definite finding on the point. Mr. Chotznec who heard the case on the first remand did not think it necessary to decide the point having regard to his finding that the lands did not fall within Taluk No. 167 at all, and Mr. Cuming on the second remand considered that Mr. Braunfield or Prince Kamar Kader could claim protection only under the fourth Clause of Section 37. So that the question whether the lands were mal or lakhiraj up to this time has not been decided.

43. No doubt u/s 37 of Act XI of 1859 the purchaser of an entire estate sold for arrears of revenue acquires the estate free from all incumbrances which may have been imposed upon it after the time of the Settlement. But the lakhiraj rights set up by Mr. Braunfield or Prince Kamar Kader must be shown to be incumbrances which had been imposed upon the estate since the Permanent Settlement, in other words, that the lands formed part of the mal assets of the estate at the Decennial Settlement. Unless that is shown, Mr. Braunfield and Prince Kamar Kader would be protected and apparently that is the protection which was claimed by them in their petitions of claim. Some arguments were addressed to us upon the question of proof in such cases, and also upon the evidence such as is there on the record. As laid down in the case of *Hurryhur Mookhopndhya v. Madub Chunder Baboo* 14 M.I.A. 152; 8 B.L.R. 566 : 2 Suth. P.C. J. 484; 2 Sar. P.C.J. 713 : 20 E.R. 743 it lies upon the plaintiff to prove a prima facie case. His case is that his mal land has, since 1790, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal. The High Court in the judgment already considered has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790 or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Decennial Settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1720." It was also laid down in

that case that they "act that the lands were within the ambit if the estate is not sufficient to meet the burden of proof thrown upon the plaintiffs.

44. The principles laid down above are applicable to cases of ordinary nature as well is to cases of auction-purchases at sales for arrears of Government revenue see *Arfunlesna v. Peary Mnhun Mookerjee* 1 C. 378 : 235 W.R. 209 and even to the case of very small estates such is consisting of 5 bighas of land, see *Koylashbashiny Dossee v. Gocoolmoni Dossee* 8 C. 230 : 10 C.L.R. 41. Whether in a particular case the plaintiff has been able to prove & prima fact case would depend upon its own circumstances.

45. It may be pointed out that, although the lands have been acquired, the claimant No. 2 must be treated as if she is in the position of the plaintiff, as the rights if the parties have to be considered with reference to the state of affairs before the lands were acquired.

46. I do not express my opinion as to whether there is prima facie proof on the part if the claimant No. 2 in the present case, or whether the other claimants have been able to rebut it. The attention of the parties does not appear to have been directed to the questions and the materials on the record are not sufficient for coming; to a decision on the points, Under the circumstances, although the case has already-been twice remanded before, I think that for the ends of justice the case should go back to the Court below again for decision of the question, whether the lands which have been found to lie within Taluk No, 167 were mal or lakhiraj at the time of the Permanent Settlement.

47. It is contended by Mr. Donough on behalf of Braunfield that the purchase of the estate (Taluk No. 167) by the claimant No. 2, the wife of Lal Behary, for Rs. 500 from Charu Chunder Bose and the purchase at the revenue sale by the latter for Rs. 13 were really purchases made by Lal Behary Mitter and are merely speculative ones. The purchases appears to be speculative, but neither that fact nor the fact that Lal Behary was the real purchaser (assuming it to be so as to which, however, there is no direct evidence) affects a the legal rights of the parties or the merits of the case. It is next contended that the letters by Lal Behary Mitter to Mr. Braunfield show that the former offered for confirm the rights of the latter. But he offered to do so on certain terms which Mr. Braunfield did not accept and the attempted settlement fell through, it appears on the other hand that Charu Chunder, the purchaser at the revenue sale, gave notice on the 29th November 1900 to Mr. Braunfield to vacate the lands in his possession (although with respect to only 5 bighas) and the claimant No. 2, on the 17th October 1906, gave a notice to him to vacate all the lands.

48. It cannot be said, therefore, that the purchaser or his transferee did not signify their intention to annul the incumbrance of Mr. Braunfield.

49. Mr. Remfry on behalf of Prince Kamar Kader contends that his client was not served with any notice and that the purchaser ought to have taken steps to 4ml

incumbrances before the lands were acquired. It is said that in 1900 the Prince advanced money in the name of the Banerjees to the Mandals for the purchase of the lands (claimed by him in these proceedings) a suit for specific performance had to be brought and ultimately the conveyance was executed by the Court in pursuance of the decree passed in the suit, and although the revenue sale took place in 1900 the purchaser or his transferee never gave any notice of any intention to annul the incumbrance. It is urged that a person having a right to avoid an incumbrance must do so within a reasonable time and before he transfers his rights, and neither the purchaser nor his transferee can wait until third persons have acquired rights or dealt with the property in the meantime.

50. It cannot, however, be held that the purchaser at a revenue sale must exercise his right to avoid an incumbrance before proceedings are taken under the land Acquisition Act. Such proceedings may be taken immediately after a revenue sale takes place, and it cannot be said that in such a case the rights of the incumbrancer hold good against the purchaser although he had no time to take steps for setting aside the incumbrance. In the second place, the assignee or transferee of the auction-purchaser is entitled to exercise the rights of the purchaser. In the third place, it is not essential to give a formal written notice to avoid an incumbrance. All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul the incumbrance. It is unnecessary to consider whether delay in signifying intention to annul an underlease may lead to any inference that the purchaser is willing to continue the tenancy, and I express no opinion on the point. No such inference, however, can be drawn in a case where the incumbrance set up is a lakhiraj right--a right to hold the land without payment of rent. Lastly, the law gives the purchaser a period of 12 years within which to bring a suit to set aside incumbrances. No question of estoppel appears to have been raised in the case, and under the circumstances, I am unable to give effect to the above contentions.

We have next to deal with the questions covered by the 3rd and 4th issues, viz., "Did or did not Moni Lal Banerjee, claimant No. 5, as agent of Prince Kamar Kader purchase the portion of the land in suit from Gopi Krishna Mandal and others? Who is entitled to the compensation therefor? Whether Prince Kamar Kader or Moni Lal Banerjee?" The questions were decided by the Court below against the claimant No. 5 and he has appealed to this Court in Appeal from Original Decree No. 44 of 1910.

51. The quantity of land purchased from the Mandals has been found by the Court below to be approximately 12 bighas and that finding has been accepted by the parties. We have, therefore, to determine in Appeal No. 44 whether Prince Kamar Kader or Roy Moni Lal Banerjee Bahadur was the owner of the said 12 bighas of land.

52. It appears that the Prince formerly used to be friendly with Roy Moni Lal Banerjee Bahadur and his brother Nani Lal Banerjee and had confidence in them. They were close neighbours. The story of the Prince is that on the 5th June 1900, the

Banerjees proposed to him that he should buy property which was going to be sold very cheap. As it was, the time of the Moharrum when Muhammadans do not transact business, he was at first unwilling to buy, but the Banerjees having told him that they would buy the property in their own name if he made the payment for it, and that when the time became auspicious the conveyance would be executed in his favour, the Prince thereupon agreed and made over Rs. 3,000 to the Banerjees, which was paid to the Mandals from whom a hand-note was taken for the amount and it was agreed that the balance Rs. 600 would be paid by the Prince at the time of execution of the conveyance. Subsequently the Prince paid the Banerjees the balance of Rs. 600. Later on the Prince repeatedly requested the Banerjees to make over the property to him, but they refused to do so. Thereupon he instituted a criminal case against the brothers which, however, was dismissed. Moni Lall thereafter brought a suit against the Prince for malicious prosecution which was eventually withdrawn. The case of Moni Lall is that he borrowed Rs. 3,000 from the mother of the Prince for purchasing the property himself, that the Mandals executed the bynapatra in his favour and put him in possession of the property. But as the Mandals refused to execute a conveyance he instituted a suit for specific performance and obtained a decree on 15th April 1904 and paid into Court the balance of Rs. 650, and eventually the conveyance was executed in favour of Moni Lall in June 1908 and registered on the 28th June 1909.

53. Now as to the advance of Rs. 3,000 by the Prince there can be no doubt upon the evidence that it was advanced by him, and this is not denied in this Court. The fact that the Prince paid Rs. 600 in February 1801 was admitted in a written statement filed by the Banerjees in the criminal case, and is also proved by the Prince in his deposition. The purchase-money, therefore, was supplied by the Prince.

54. The letter written by the Banerjees to the Prince go to show that the former acted as agent of the latter in the matter of the purchase. For instance in his letter dated the 1st May 1902, Moni Lall wrote to the Prince that the Durgapur sale-deed will be ready next week. In the letter, Exhibit 37, he wrote, "the Durgapur land will be all right very shortly. If you do not want the land I can get you the money any moment." And in Exhibit 38 he informed the Prince that "The Mamenpore and Durgapur documents are ready for signature." On the 20th June 1903, he wrote, "I have this day filed the case against the Mandals and I am glad to say that I have saved the money from being barred by limitation with the greatest difficulty." These letters could have been written only on the footing that the Prince was the purchaser.

55. The decree for specific performance was passed on the 8th April 1904, conditional on payment of Rs. 650 to the Mandals within 15 months. The money was deposited accordingly by Moni Lall.

56. Nothing was done until 1908 when the conveyance was executed in favour of Moni Lall.

57. It is contended on behalf of Moni Lall that he was never the agent of the Prince and that although the Prince might at one time have been inclined to buy the property, he subsequently changed his mind. It is pointed out that the Banerjees informed the Prince of the difficulty about money for instituting the suit for specific performance, that he did not give any reply to the letter nor give any reply to the other letters, that he never thereafter expressed his willingness to buy the property "and that he did nothing until it became known that the property was going to be acquired.

58. The letters, however, up to June 1903 show that up to that time the Prince was treated as if he was the purchaser. Mr. Braunfield's letter dated the...and his deposition show that in May 1904 the Prince was treated as the purchaser and on the 22nd November 1905 there was a letter of demand from the Prince's Pleader to Moni Lall. Then again when Moni Lall applied for execution of the decree, the Prince applied to the Court praying that the conveyance should be executed] in his favour.

59. It is true the Prince did not reply to any of the letters written by the Banerjees nor apparently take any interest in the suit 1 for specific performance nor find the money 1 for conducting the suit. It appears, however, that the Prince is a close neighbour of the Banerjates and the letters might have been replied verbally. Apparently he is not a man of business and left everything to the Banerjees and as for money, it appears that Noni Lall, the brother of Moni Lall, had moneys of the Prince, and the two brothers lived joint: under the circumstances no inference can be drawn adverse to the Prince from the facts relied on as stated above.

60. As for the delivery of possession to the Banerjees the Court below held that such delivery of possession was not proved, that the statements of Jahuruddi who spoke to an amalnama was not trustworthy and that even if they were in possession they must be considered to have been holding the property in trust for the Prince, and I agree with the Court below in the view it has taken. Certain statements made by the Prince in his cross-examination in the criminal case are relied upon, on behalf of the Banerjees. But they are not sufficient to lead to the conclusion that he did not authorise Moni Lall to purchase the property for him. The learned District Judge says: In any case I should not be disposed to attach much weight to them, as the language ordinarily spoken by the Prince appears to be a peculiar dialect of Hindustani and it was difficult even in this Court to find anyone who could translate accurately into English replies which he gave to some of the questions put to him."

61. It is to be remarked that although the Prince examined himself, neither Moni Lall nor his brother came to the witness-box.

62. On a consideration of the evidence as a whole I agree with the Court below in holding that the purchase made by the Banerjees was an behalf of the Prince, that the latter is the true owner of the property, and is entitled to such compensation as may be paid for the (sic)2 bighas.

63. It was contended on behalf of Moni Lall that as the conveyance stood in his us in and as he was in possession, the Prince could not claim any compensation in the present proceedings so long as he did not establish his title by a regular suit. But the Court in a Land Acquisition case can go into the question of title or the purpose of determining which of the contending parties is entitled to the compensation. If his contention were well-founded, the jurisdiction of the Land Acquisition Court may be ousted merely by raising a question of title: we are accordingly of opinion that this contention must be overruled.

64. The result is that the first portion of the first issue, viz., Does any portion of the land in suit fall within Taluk No. 167, and if so, which," is decided in favour of the claimant No. 2 in accordance with the finding of Mr. Cuming and the finding of the Pleader Commissioner Babu Dwijendra Nath Mukherjea, and with the exception of the second part of the first issue and the second, fifth and eighth issues, the findings arrived at by Mr. Godeve are confirmed. The case will, therefore, go back to the Court below for decision only of the second portion of the 1st issue, viz., "As regards such lands is the interest of Mr. Braun-filed or Prince Kamar Kader protected u/s 37 of Act XI of 18(sic)9," in other words, whether the lands were mal lands of Taluk No. 167 or were lakhiraj at the time of the Permanent Settlement, and for decision of the second, fifth and eighth issues, viz., "If so, who is entitled to the compensation for such land? For what land is Mr. Braunfiled entitled to receive compensation" and How should the compensation money be apportioned among the claimants", in so far as they depend upon the result of the enquiry on the 2nd part of the first issue as stated above. The parties will be entitled to adduce evidence on the 2nd part of the first issue, it being understood that the claimant No. 2 will be entitled to prove and adduce in evidence any of the documents which were tendered and rejected, provided, of course, that they are relevant.

65. Appeal No. 44 of 1910 is dismissed with costs, 10 gold mohurs to be paid to Prince Kamar Kader. Costs in Appeal No. 534 of 1909 as including costs incurred in the Court below will abide the result, the hearing-fee of this Court for the three hearings being assessed at Rs. 500.

Having regard to all the circumstances surrounding the previous trials, we are of opinion that this case should be tried by Mr. Chotzner or his successor-in-office at Alipore (other than Mr. Cuming or Mr. Duval) and the Local Government may be moved to vest him with the powers necessary for trying the particular case.

Roe, J.

66. The main facts of this case and the claims and issues involved have been clearly set forth by my learned brother.

67. The first point for consideration is whether the claimant Kalyani Dasi has successfully demonstrated that the lands in dispute fall within the lands measured in the thak map of 1851 as lands of Touzi No. 167. Before discussing this point in

detail it is necessary to consider the probative force of thak maps and field-books. For this purpose it is necessary to consider the accuracy with which the theodolite can be worked. This first process in taking a bearing by a theodolite is to set your needle to the north as taken by the Thak Surveyor. Having ascertained the degree at which the compass needle is to be set, the first thing to be done is to get the compass needle to point exactly to this degree. Any one conversant with the use of the theodolite is aware that with an ordinary instrument it is extremely difficult to set the compass needle with exact accuracy. The thak survey before us does not attempt to deal with angles more accurately measured than to half a degree. An error of a quarter of a degree will clearly throw the station many feet out of the line at the end of a long distance. The first distance dealt with by the map relied on in this suit is 221 feet and the third is 475 feet. We may expect at the end of lines of this length errors of 2 or 3 feet, even in a bearing taken with the greatest accuracy possible. For this reason it is necessary in making a map to effect what is called the closing of the circuit, and instructions as to the closing of the circuit are given in the High Court rules for surveys by Pleader Commissioners. The present Pleader Commissioner Babu D.M. Mukerjee has made in closing his circuit allowances amounting in some cases to 5 feet, and it follows that even on a survey as accurate as that made by the present Commissioner the line drawn by him may well fall 5 feet on either side of the true line at the end of the first circuit from the trijunction point and there may be further errors of 5 feet for every circuit that is closed.

68. Comparing the maps of Babu Chandra Kumar Das Gupta and Babu Dwijendra Mohon Mukerjee, it will be observed that many of the stations have been fixed by each at a spot considerably distant from that fixed by the other. We must not look for greater accuracy in the relaying of the thak survey than 5 or 10 feet in the earlier stages of the survey and as each subsequent error, unless it accidentally corrects itself, accentuates the inaccuracy of the line, the farther we get from the first trijunction point the greater is the possible error in the relaying of the map. It is for this reason that Major First says that it is impossible to relay a thak survey unless you have two trijunction points one at each corner of the map for the correction of the errors which must arise from the impossibility of taking the bearing with absolute accuracy.

69. The first process by which, in my view, these maps should be tested is--Do the stations found by the two Commissioners coincide with any degree of accuracy with the places in which on a general consideration we should expect to find them?

70. Taking first the thak map itself we know that many of the stations are at the corners of tanks. In each case in which on the thak map we should expect to find the station in a certain position relative to a tank or pond we find that station in that position in relation to an existing tank or pond.

71. Another point which as a coincidence appears to me of considerable importance is this, that Babu Chandra Kumar brings his station No. 44 exactly at the south-east

corner of plot No. 46/6 of the Topographical Survey of 1901 to 1906. Babu Dwijendra on an entirely independent measurement fixed this station No. 44 in almost the identical spot in which Babu Chandra Kumar fixed it: we have valuable evidence on the record to indicate that No. 36/6 of the Topographical Survey-once belonged to Bistu Hazra. Turning to the thak map we see that station No. 44 is at the southeast corner of Bistu Hazra's jote.

72. The general accuracy of the relay may be tested also from the point of view of the existing drains and roads. We have before us a copy of the Topographical Survey of 1881. This is Exhibit 27. This map is on the same scale as the thak map, 16 inches to a mile. On a comparison between this map and the thak map we are at once struck with the extreme similarity of the shape of the thak boundary line to the shape of the angles formed by the roads and drains at the south-east corner of the angle made by the Shahpur and Diamond Harbour Roads in the Topographical Map of 1881. From the description given of the thak trijunction point 28 and its position relative to station No. 29 of the Thak Boundary Survey, we know for certain that Mahal No. 167 lies in this south-east corner. It does not require a long step in deduction to be satisfied that the drains and roads existent in 1881 were existent in 1851 and that they were the boundaries of the plots depicted in the thak map.

73. Comparing again the Topographical Survey of 1881 and the thak map, it is obvious that station No. 35 must be half way up the west bank of the long narrow tank shown in the Topographical Survey in a Mahomedan graveyard. Babu Chandra Kumar and Babu Dwijendra both set station No. 35 exactly in the position in which we should expect to find it.

74. To sum up, we know from the evidence on the record that station No. 28 of the Boundary Survey is within 15 feet of the corner made by the Diamond Harbour Road and Shahpur Road. We know where station No. 35 of the plot survey ought to be. We know that station No. 44 is probably correctly found if it is placed at the corner of 36/6, Sonadanga Road. From these three points we can check the relay made by Babu Dwijendra Mohon Mukerjee.

75. After an exhaustive check of which I have been given the general result, I am completely satisfied that the relay made by that Commissioner may be relied upon with confidence as showing within a few feet the position of the boundaries of the plots comprising Mahal No. 167.

76. That confidence has in no way been shaken by the criticisms made upon the relay by Counsel and Vakils on behalf of those claiming adversely to Kalyani Dasi. These are all based upon the cross-examination of Babu Dwijendra Mohon Mukherjee before Mr. Chotzner. They relate to the exact position of Gtupal Babu's shop--the exact change in the width of the Diamond Harbour Road between 1851 and the present day, the exact method of taking the bearing, the exact position of the holding of the chain. They all fail to impress me. They are based on the fallacy

that before a thak relay can be accepted as evidence it must be shown to be absolutely exact. It cannot be more exact than to an error of five or even fifteen feet. That the relay under consideration is to that extent accurate I am satisfied.

77. From a comparison of the Topographical Survey of 1881 with the Topographical Survey of 1901-1905 it is clear that the boundaries of present-day holdings lie along the drains and roads existent in 1881.

78. I have already shown that these drains and roads must have been existent in 1851 and that they were the boundaries of the plots comprising Taluk No. 167. The relaid line lies very nearly along the boundaries shown in the Topographical Survey of 1901. These boundaries should in my view be taken, where they have not been destroyed by Mr. Braunfield, as the boundaries of Taluk No. 167.

79. The boundary of plot No. 6 of that taluk follows the drains running from 64 to 65 and then westward. The whole of plot No. 33/4, 1, 2, 3, 4/1 and 4, (1) a, and a strip of land to the east of the tank in that plot form part of the old Taluk No. 167. The drains shown following stations Nos. 3 to 1, 1 to 18, and 18 to 13 is the boundary of plot No. 1 of the old thak map. 27 Diamond Harbour Road falls entirely within Taluk No. 167.

80. In dealing with plot No. 4 we have Very little to go on in the nature of existing boundaries, inasmuch as the old drains have been tilled in by Mr. Braunfield in the construction of: his arrowroot fields. From the fact that station No. 35 is obviously in exactly its right position we may accept the conclusion of the Commissioner as to the extent of premises No. 30, Diamond Harbour Road, which fell in the Taluk No. 167.

81. The next question for consideration is whether Mr. Braunfield is protected in his plea that he holds rent-free lands within this taluk. We regret that we have been unable to follow Mr. Donough's arguments on this point. As far as we understand his argument, it is that he is a tenant without a landlord. This, of course, is a contradiction in terms. There can be no tenancy without the relationship of landlord and tenant, and to constitute the relationship of landlord and tenant there must be one party landlord and the other party tenant. Mr. Donough, to use his own words, has another string to his bow. He contends that these lands are rent-free by virtue of some ancient grant dating back from before the Permanent Settlement. Mr. Remfry has developed this argument and we must apply the arguments advanced by Mr. Remfry for Prince Kader to the legal position of Mr. Braunfield, for the legal positions of the Prince and Mr. Braunfield are identical. The sole question here is, on which side is the burden of proof. The case of Harihar Mookerjee v. Madhah Chandra Babu 30 C. 291 (P.C.) : 30 I.A. 44 : 7 C.W.N. 193 : 5 Bom. L.R. 1 has been quoted to us as indicating that the burden of: proof is on the claimant Kalyani Dasi. Even supposing for the sake of argument that the burden of proof is primarily on those asserting that the lands shown as now representing Taluk No. 167 are not inal

lands, there is on the record evidence which it is noted would shift this burden.

82. Exhibit 26 (at page 74) shows that the raiyati land of the taluk measured, in 1190 B.S., 66 biahas 7 cottas carrying a rent of Rs. It. 3, of which Rs. 24-410 consisted of abwabs. The assets of the estate in that year were Rs. 88-0-16 gandas. The revenue now payable for this estate as shown in Exhibit 16 at page 61 is Rs. 7-2. The question naturally arises what happened between 1190 B. Section (which is 1783 A.D.) and 1793 A.D. (which is the date of the Permanent Settlement) to reduce the assets of the estate from over Rs. 100 to under Rs. 10. In *William Graham v. Phanindra Nath Mitter* 31 Ind. Cas. 41 : 19 C.W.N. 1038 we have it taken as well known that in Kidderpur, a suburb adjacent to the lands in dispute, roads were made at about this date by taking free of compensation a larger area than the land required for the road itself and restoring under rent-free grants the surplus lands. We are asked to presume that between 1783 and 1793 there must have been numerous rent-free grants of land bordering on the Diamond Harbour Road and a large reduction in the revenue in consequence of these grants.

83. We are next referred to Exhibit B, from which we see (pages 2, 3 and 4 to Book D) on the other side of the road in positions corresponding with the greater portion of the land now occupied by premises No. 27, Diamond Harbour Road, eight out of ten of the holdings measured in the chittas of village Shahpur as brahmottar or rent-free.

84. Further, we have the fact that never in the memory of man have the lands in dispute paid rent, and that all the various plots of land purchased by Mr. Braunfield were purchased as rent-free holdings save one plot of six cottas paying rent to Mehar Ali Khan, the proprietor of Touzi No. 53, which a comparison of the thak map with the Topographical Map of 1881 will show to be a plot of land covered by the letters of Mali of the words "Mahammedan graveyard" in the Topographical Map of 1881. On the probative value of these facts I do not now feel it necessary to express any opinion, for the reason that my learned brother is of opinion that there should be a remand for the purpose of giving the appellant an opportunity of showing that the lands are in fact mal lands. I agree that if indeed she is in a position to support this burden she should be given an opportunity of doing so, for both Mr. Goodeve and Mr. Chotzner declined to discuss the question and before Mr. Cuming it was not apparently rightly appreciated.

85. The interests claimed by the Prince and Mr. Braunfield could not possibly be interests protected under Act XI of 1859, and I cannot conceive why such an argument was ever seriously advanced. The land was held without payment of rent and without grant by lease from any proprietor, save in respect to the six cottas held in Touzi No. 53.

86. The occupiers were either trespassers or holders under a rent-free title. The Prince and Mr. Braunfield claimed rent-free titles. They now explain that by rent-free

they meant revenue-free. In Bengali the terms rent-free and revenue-free are synonymous. In English the distinction between them is extremely small. Lands held rent-free before the Permanent Settlement were not assessed to revenue and so became by the Permanent Settlement revenue-free. The question in issue in this case was, in my view, from the outset, have the lands in dispute been held rent-free from the date of the Permanent Settlement? If so, they cannot have been assessed to revenue at the Permanent Settlement. If they were not assessed to revenue at the Permanent Settlement, they were not the mal lands of the taluk. If they were not mal lands of the taluk, title in them does not pass to an auction-purchaser at a sale for arrears of revenue.

87. The issue, in its true significance, has clearly not been appreciated, or determined. Therefore to my very great regret, I must agree that a further remand is necessary. Appeal No. 534 should be remanded in the terms of my learned brother's judgment.

88. The claimant Kalyani Dasi is required to prove that the lands in suit were assessed to revenue in 1793. On the record as it now stands the burden of proof is on her to show that the lands in suit were not held rent-free in 1793.

89. She must be permitted to adduce any evidence relevant to the determination of this issue. All orders made by Mr. Goodeve, Mr. Chotzner and Mr. Cuming refusing to admit documents tendered in evidence on either side, are to be regarded as set aside, and each document now tendered whether or not previously tendered and rejected, shall be, if relevant and admissible in evidence, admitted and considered.

90. As regards Moni Lal Banerjee's case, I am of opinion that it is absurd to accuse Braunfield and the Prince Kader of falsehood on the meticulous criticisms of their evidence made by the Vakil for the Banerjees. The Banerjees are obviously afraid to enter the witness-box in support of their case. Braunfield's evidence shows clearly that the Banerjees admitted up to 1904 that the Prince was the owner. There is nothing on the record to show that ownership changed between 1904 and 1906, the date of the acquisition.

91. I agree that the appeal of the Banerjees must be dismissed with costs to Prince Kamar Kader.