

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of John Kerr v. Nuzzur Mahomed and Azeem Serang, from the late Sudder Dewanny Adawlut of Calcutta; delivered 1st July, 1864.*

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Present:

LORD KINGSDOWN.

SIR EDWARD RYAN.

SIR JOHN T. COLERIDGE.

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SIR LAWRENCE PEEL.

SIR JAMES W. COLVILE.

THE question in this case relates to a certain quantity of land between 3,000 and 4,000 beegahs, which are claimed on the one hand by the Appellant Mr. Kerr, and on the other hand by the Respondent Azeem Serang.

The right to these lands depends entirely upon the boundaries of two lots of land in the Sunderbund which were granted, in the year 1829 or 1830, by the Government of Calcutta. The lots are conterminous. One was granted to a gentleman of the name of Douglas, and now belongs to the Respondents. The other belongs to Mr. Kerr. These two lots are each bounded, on the east by a stream called the Poina Khal, on the west by a stream called the Tumbooldoha Khal, and the line where they join (being the southern boundary of the one and the northern boundary of the other) is described in one of the pottahs as "a line drawn due east and west from the confluence of the Aryhee Baukee Khal," and in the other, "as a line drawn from the Tumboolda to the Poina, where a small khal issues."

Now these two descriptions taken together ascer-

tain beyond all doubt or question what is the true boundary of these lands. Each description says, that it is to be a line from east to west from the Tumboolda Khal to the Piana Khal; and one of these descriptions specifies the point from which the line is to be taken as the confluence of the Aryhee Baukee Khal.

There is no question in this case as to the point where the Aryhee Baukee Khal is, and all the different maps that have been drawn correspond in that particular, and in drawing a line from the Aryhee Baukee Khal to the opposite stream of the Piana Khal. The question is, in what way that is to be drawn. The Appellant insists that the line is to be drawn not due east and west, but to the north-east, making a difference of several thousand beegahs of land in favour of the one or to the prejudice of the other lot.

We have the pottahs before us under which both parties claim, which state that the line is to be drawn due east and west.

Two maps, one by Captain Hodges, and the other by Captain Prinsep, are in evidence; the boundaries are marked upon them, and they entirely correspond with the description in the two pottahs, as a line drawn due east and west from the one point to the other. The quantities of each lot are stated in the maps, one as 8,900 beegahs, and the other as 8,300 beegahs, and the boundaries so described and so marked upon these maps entirely correspond with the quantities thus ascertained.

It is a matter of surprise that it should be possible under such circumstances that any difficulty could arise, or that the Government could have been induced to grant a pottah to the present Appellant, claiming under a grant of 8,300 beegahs, of no less than 13,000 odd beegahs; those 13,000 beegahs including between 3,000 and 4,000 beegahs belonging to the Respondents, and the remainder being made up from lands belonging to other persons not represented in this Suit.

When we come to look into the case, we find how this has happened. It turns out that in 1840, a dispute arose, not in the least with respect to the boundaries of Douglas' plot, not in the least with respect to the boundaries of Kerr's plot, but with respect to the division of a plot of land lying to the

south of Kerr's, and still more to the south of Douglas', which plot belonged to certain co-parceners or tenants in common, of whom Mr. Kerr was one.

There was a dispute as to the partition of these lands, and upon that occasion a Mr. Turner, a Government Surveyor, was called in for the purpose of settling that dispute, not for the purpose of settling anything as to the lots of Douglas' or Kerr's land, but to settle as between these differing cotenants what were the proper limits of their respective properties. A map was drawn out by Mr. Turner upon that occasion, and it seems that a large portion of land to the north, which included Mr. Kerr's plot, was described in that map.

Upon looking at that map closely, we do not see that it professes to describe the northern boundary of Kerr's land, but whether it intended to do so or not is utterly unimportant; it was not the subject of any question or dispute for the settlement of which Mr. Turner had been employed.

Some time after this the Respondents obtained a grant of Douglas' land, which had been resumed by the Government in consequence of the neglect of Douglas to cultivate it, according to the terms of the pottah. Upon this occasion a survey was made by Mr. Mullins, who was then the Surveyor of the Government, for the purpose of ascertaining the particulars of the grant, and Mr. Mullins made his report to the effect that Douglas' grant, described as No. 60 in Hodges' map, contained 8,900 beegahs of land. Some time after this, it seems that Mr. Kerr disputed the boundaries of Mr. Douglas' grant, and Mr. Mullins was called upon by the Government to draw a map determining the boundaries. Instead of doing that, he took Mr. Turner's map which had been prepared for a totally different purpose, and made a copy of it without any examination whatever into the subject on his own part.

In 1851 a new grant was proposed by the Government for the purpose of converting these grants, which had been originally made in 1829 or 1830, into tenures of a somewhat different description. Upon that occasion it became necessary to ascertain what quantity of land had been brought into cultivation in Mr. Kerr's lot, and upon what extent



therefore the rent was to be calculated, and Mr. Mullins was called upon by the Government to make the necessary survey and return. Mr. Mullins, it seems, was a son-in-law of Mr. Kerr, and he sent in to the Government a copy of the plan which he had prepared before in 1851, by which he actually made out that under this grant of 8,300 beegahs of land, Mr. Kerr was entitled to 13,640 beegahs, Mr. Kerr not even pretending to have the least additional title to any quantity of land beyond that which he held under his original pottah. A more scandalous abuse of the authority placed in the hands of this Surveyor was probably never witnessed. This very man who had certified 8,900 beegahs as being the amount of Douglas' plot, now made another report, by which he reduced that plot to 5,000 odd beegahs; the 8,300 which had been granted to Kerr, his father-in-law, being increased to 13,600 beegahs. It is satisfactory to find that this gentleman did not continue long in this office which he so abused; for it appears that in 1852 he was removed by the Government, the Government at the same time expressing its regret that he had not been removed two years sooner.

There is, therefore, really nothing in this case upon which any question can arise. We have the original grants, with the clear and precise descriptions corresponding with the boundaries and the quantities, and we have the maps to which those documents refer. The whole difficulty in this case has resulted from that improper proceeding on the part of Mr. Mullins to which we have referred.

What is there said on the other side? There is really nothing. It is said that the Respondent Azeem Serang was a servant of Mr. Kerr at the time when that map of Mr. Turner's was drawn. Of what possible importance can that be? He assisted Mr. Turner under the directions of his master. Probably he knew nothing about the boundary. It had nothing to do with the boundary of Douglas' property. It could not in the least affect the rights of the property as between those individuals. That map was drawn for a totally different purpose, and a purpose totally irrelevant to the subject of this dispute.

The only other point which is relied upon is, what is called the Receipt and supposed acquiescence on the

part of the Respondents in the boundaries subsequently proposed or settled by Mr. Gomes, another surveyor, and which in truth is neither more nor less than an adoption of this most erroneous and improper map which had been prepared by Mr. Mullins. It does not appear from that document that at the time when it was made the Respondents knew in the least what those boundaries were which had been thus settled. It is quite clear that they could not have done so. It was giving up the whole point for which, against extraordinary difficulties and with remarkable perseverance, and at great expense probably, they had been struggling for six years. It may be observed that Gomes had at first proposed to draw up a map and report according to the actual state of the titles and the truth of the case; but he was prevented from doing so by the interference of the Appellant, who procured an order from the Government that in settling the boundaries he should not disturb the plot granted to Mr. Kerr.

Their Lordships are of the opinion stated in the Report of Mr. Commissioner Stainforth, who was appointed by the Government after the institution of the suit, to look into the matter and correct what had been done so irregularly and improperly. After going through all the facts of the case he says, "Under these circumstances it is abundantly clear to me that Mr. Turner's map is an incorrect if not collusive document, and that Mr. Kerr in claiming a boundary running north-east from the Tumboolda, instead of due east and west, is encroaching on his neighbours' lands."

Their Lordships cannot look at what has taken place in this case without feelings of great regret, and of something more than regret. It is a case in which they can do but very inadequate justice by recommending, as they will do, that the Appeal should be dismissed with costs.

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