Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Grija Kant Lahory Chowdhry v. *Hurrish Chunder Chowdhry from the High Court of Judicature at Fort William in Bengal; delivered 18th December* 1872.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

IN this case the Appellant brought his suit to recover a large tract of chur land, which he claimed as parcel of his mouzah of Jogdash. The Defendant is the zemindar of a zemindary which includes a mouzah called Ghoogoomaree; and he asserts that the piece of chur land claimed by the Plaintiff is parcel of his mouzah Ghoogoomaree. The single question in the case is,—parcel or no parcel, whether this land belongs to the Plaintiff's mouzah Jogdash, or the Defendant's mouzah Ghoogoomaree?

The opening of this Appeal by the learned counsel, Mr. Leith, presented a simple and apparently consistent case in favour of the Appellant. It seems that about the year 1830 a large tract of land was diluviated by the River Chutol within the mouzahs belonging to the Plaintiff and the mouzahs belonging to the Defendant,—and that after a reformation of some part of it in 1837 a proceeding was taken under Act XV. of 1824 by the Plaintiff before the magistrate, under which he was ordered to be put in possession of a considerable tract of such newly formed land. It was declared by the decision of the magistrate that he was to have

possession of that land; and the magistrate laid down the boundaries in this way: "By the "papers of the Nutthee, the boundaries of "mouzahs Jogdash, Singhessur, and Besh-"Maluncha are found to be situated as follows: "A canal to the east of mouzah Jogdash running "from east to west; Daokoba, *i.e.*—the River Chutol, to the south," and it may be observed here that this has turned out to be a doubtful boundary, because there were two channels of the River Chutol,—"the house of Mothura "Moody to the east, and a dry branch to the west; "and the culturable lands of Murad Numdul are "situate to the west of mouzah Singhessur."

That decision having been given, there is some evidence that the Appellant was put into possession of the land so described. After a period of nearly twelve years, viz., in 1849, the Respondent's father brought a suit in the civil court to set aside the order of the magistrate. The reason of the suit was, as stated in the plaint, a fear that that decision of the magistrate might be used to disturb the Respondent's father in the possession of land which clearly belonged to him. The result of that suit, in which final judgment was given in 1852, was in favour of the Appellant. An issue was raised in it as to the fact of the actual possession of the land from the time of the magistrate's order; and upon that issue the ultimate finding was that the Appellant had been in possession of the land described in the magistrate's order from and since the date of that order in 1837. The issue as to possession was distinctly raised, and a distinct and explicit judgment given upon it. Their Lordships are of opinion that the parties are precluded by that judgment from now averring that the Appellant was not in possession of the land described in that decree from the time when the magistrate's order was passed in 1837 up to the time of the suit of 1849. So far the Plaintiff's case is clear. That decree must be taken to have established that the Plaintiff was in possession of the land described in the Magistrate's

order, and had remained in such possession. The question in the present suit is whether or not the lands which are now claimed by the Plaintiff are identical with the lands so described.

Now, undoubtedly, that issue lies upon the Plaintiff, because the foundation of his suit is that he, having been in possession of the land, was shortly after the decree of 1852 dispossessed of it by the Respondent, as a sequel or a consequence of certain measurements which had been made by the surveying officers of the Government, which resulted in the lands being measured into the Respondent's mouzah of Ghoogoomaree. The proceedings on that survey appear to their Lordships to be entitled to considerable weight. The Government officers, of course, went on the ground, and, when on the ground, endeavoured to ascertain the boundaries as they had been laid down in the magistrate's order. It appears that the Appellant had first obtained from the surveying and measuring officers a measurement of the land now in dispute into his mouzah of Jogdash. There was then a complaint made by the Respondent to the superior officer of that measurement, and other officers were sent down to ascertain whether the first measurement had been properly made or not; and after conflicting reports from two officers successively sent upon the land, the appellate tribunals from them decided in favour of the report of the first officer, namely, that this land belonged to the Respondent's mouzah of Ghoogoomaree. The report of the surveying officer who decided in favour of the Appellant is very explicit on the point of possession. He examined witnesses, and he came to the conclusion that the land then and now in dispute had been for many years in the possession of the Respondent, and he declared himself to be unable, upon the ground, by a comparison of the maps with any land marks that he could find there, to ascertain that the land then and now in dispute formed a part of that described in the magistrate's decision. Mr. Leith pointed out that that report was not entitled to great

weight, inasmuch as the officer had mistaken the position of the River Chutol; and there is undoubtedly force in that observation; still their Lordships cannot but think that in a question of this kind, where so much must depend upon local investigation, the opinion of that officer, confirmed by his superior officers, is entitled to great weight. It must be remembered that the Appellant had first obtained the measurement in his favour, and therefore that the officer was called upon to displace that which had been already done; and it certainly would appear from his report that he had, at all events, endeavoured to execute his duty carefully, for he made a full and long report, going into the circumstances of the ground, the appearances which it exhibited, and giving reasons, and very full reasons, for the opinion at which he arrived. These measurements having been made, this land was assigned to the Respondent's mouzah. This was in the year 1852. The Appellant avers that at that time, or about that time, he was dispossessed by the Respondent. If he were so dispossessed, he certainly did not take very prompt measures to obtain redress; for, although then, as he alleges, dispossessed of what he now contends he had been for many years in possession of, he takes no step to reverse what had been done by the measuring officers until the year 1859, when this suit is commenced.

In this suit, which has been brought by the Appellant to annul the orders of the measurement officers, and for possession, the inquiry as to the identity of the lands has been fully gone into, with the result that the Principal Sudder Ameen found in favour of the Appellant; but his judgment was reversed by the High Court.

Their Lordships have felt the extreme difficulty of arriving at a decision satisfactory to their own minds in this case. The Appellant has relied, and principally relied, upon the boundaries which are given in the decision of the Magistrate and upon the map called the Sketch map prepared at that time, and also upon a

map which was prepared in the year 1851; and by comparing those maps with the Government map of 1853, he has endeavoured to establish the identity of the boundaries described in the Magistrate's decision with the lands which are now in dispute. It was difficult for those who went on the ground to ascertain, by these means, the boundaries which the Magistrate's decision had pointed out. Indeed they were unable to do so. The difficulty is certainly not less when the comparison has to be made, not upon the land itself, but with reference to a map which—assuming it to be a correct representation of the ground—is on a very small scale, and does not contain one of the important land-marks upon which the Appellant relies, viz., the canal to the north, which forms the northern boundary. As far as their Lordships were able to conjecture from an examination of the maps, there was a great deal to support the contention that a portion of the chur in question was in the situation or near the situation which was contended for on the part of the Appellant, and that it was not to the south of that which was asserted by the Appellant to be the Chatol stream. But no firm conclusion can really be drawn from such an examination. The maps prepared in India by the native authorities are extremely unsatisfactory. The Sketch map has straight boundaries which cannot exist naturally upon the ground; it marks a square block, and gives very few bearings beyond it. Their Lordships, therefore, have felt that they cannot place such firm reliance upon any inference to be drawn from these maps as to satisfy them that they would do justice between these parties by assenting to the conclusions which the Appellant draws from them.

The great strength of the arguments on the part of the Appellant has been drawn from the maps; and the important element on which the Defendant mainly relies, viz., the evidence which was given as to the actual possession of this land, was not only not repelled by any anticipatory argument on the part of the Appellant, but in the

opening of the case that evidence was not adverted to further than that the learned counsel told us the number of witnesses, and pointed out the pages where the evidence might be found. On coming to the Respondent's case, their Lordships must observe that this evidence came upon them with rather sudden force. There is a great body of it, and great consistency in it. It shows, if it is believed, that from the time when the chur land now in dispute was formed, the Respondent and his father were in possession of it. The witnesses who were called were tenants who had paid rent, and other persons who knew the land; some of them, who knew it before it was submerged, say, that it was the land which belonged to the village of Ghoogoomaree.

The evidence of possession on the other side is extremely slight. It was pointed out by Mr. Doyne that no witnesses were called who had ever lived upon this particular land, and those who were called came principally from Joneally, a place beyond the southern stream of the Chatol.

In questions of this kind, where the natural boundaries and land-marks have disappeared, where there are no fences to mark what is the extent of the property, evidence of possession is very important and very satisfactory. Their Lordships, on looking at this evidence, see no reason to discredit the witnesses for the Respondent. The Principal Sudder Ameen has apparently disregarded the testimony altogether; but he has given no reason for so doing, and afforded no assistance to those who have to consider the weight to be attached to the witnesses. If the Principal Sudder Ameen had found that the witnesses were not entitled to credit, their evidence might then be disregarded; but there is no intimation whatever that these witnesses are not speaking the truth; and if they are speaking the truth, then it is plain that the Respondent has been in possession of this ground, or of parts of it, ever

since it became habitable or culturable after the waters had subsided. Assuming then that there is evidence which can be relied upon that the Respondent has been long was in possession of the land now in dispute, the effect of it upon the judgment which ought to be given in this case appears to their Lordships to be very strong. An estoppel must be mutual, and both parties must be bound by the finding in the decree of 1852. Now, assume that the Appellant was in possession from the date of the magistrate's order of the ground described in it up to 1852, as conclusively found by the decree in that year, and also supposing the conclusion is right that the Respondent has always been in possession of the land now in dispute, the consequence is inevitable, that the land now in dispute, of which the Respondent has been in possession, is not the land described in the suit of 1852, of which, on the hypothesis, the Appellant has been in possession. The Appellant has in truth given no satisfactory evidence that he was really in possession of the land now in question.

Again, if the Appellant had been in possession of the land now in dispute, and had been dispossessed, the mode of dispossession might have been shown; and it is reasonable to expect that if there had been an actual dispossession, it could have been shown. Proof of actual dispossession would have greatly helped to establish the fact of a real possession capable of being so disturbed. But the manner of the alleged dispossession is left entirely unexplained. That there was a constructive dispossession, as the result of the action of the measuring officers, may be clear, but no actual dispossession is at all shown by the evidence.

There are other circumstances in the case which also weigh against the Appellant. The quantity of land the Appellant now claims is larger than that which was found for him by the judgment of the Court in 1852. The judgment finds that the mouzah of Jogdash contained 50 or 60 khadas of land. The Plaintiff now claims

71 khadas out of 250, of which he says his mouzah Jogdash consisted. There has been a question whether the judge, in saying that the mouzah Jogdash was composed of 50 or 60 khadas, was not speaking of the cultivated land only, and whether there was not beyond the cultivated land a portion of chur land which he did not mean to include in that quantity. But, upon looking at his judgment, it is by no means clear that he did not mean to describe the whole quantity which belonged to the mouzah, and that, in fact, he was not describing the entire mouzah. The inference would rather be that he considered the 50 or 60 khadas as the total quantity of which the mouzah consisted. If this be so, in the claim which the Plaintiff now makes he has exceeded the quantity which was declared to belong to him, wherever it was, by the decision of 1852.

It is also to be observed that, with regard to the nature and quality of the land, there is considerable difficulty in the Appellant's case. The land with which the magistrates order of 1837 dealt appears to have been at that time inhabited and cultivated land. It is singular that if the land now claimed be the same as that which was the subject of that order and the former suit, it should have degenerated between 1837 and 1864, when the Ameen sent down by the Court in this suit surveyed it. He describes it as at that time sparsely inhabited by two or three Mohammetans only, and destitute of habitations and trees. It is a description of the land extremely different from that with which apparently the magistrate was dealing, and affords some indication that the land now in dispute in the present suit is not identical with the land which was the subject of his order and the decree in 1852.

Their Lordships do not think it necessary to go minutely into the evidence. They are perfectly aware of the difficulty of arriving at a decision in cases of this kind—where the boundaries shift, the rivers change their course, and where nothing

naturally on the ground, or artificially placed there, remains in the same state so that old descriptions can be followed and compared. They were desirous, in order that complete justice might be done, that if there was any real doubt whether sufficient care had been exercised in ascertaining the rights of the parties, a further inquiry should be made. But upon a suggestion of that kind being made, the counsel on both sides pointed out that there would be considerable expense, great prolongation of this already protracted litigation, and, after all, difficulty, perhaps insurmountable, in discovering exactly where the lands were. Their Lordships, therefore, have felt, upon consideration of all the circumstances of this case, that they best exercise their own duty and really best consult the interests of the parties, by arriving at a decision which will put an end to this litigation, which has been for so many years going on between these parties.

On the best opinion they can form upon the materials before them, their Lordships have come to the conclusion that the Appellant, upon whom the burden of proof lies, has failed to sustain it. He has not satisfied their Lordships that the land he now claims is identical with that of which he was put into possession by the magistrate's order, and consequently has failed to establish his right to obtain possession of the land, and to reverse the orders of the surveying officers.

Their Lordships desire to say that they do not concur in all the reasons which were given by the learned judges of the High Court for their judgment. They think they did not give sufficient effect to the decree of 1852 as a conclusive judgment upon the possession of the land then in dispute; but, whatever the effect to be given to that decree, the High Court came to the right conclusion that the Plaintiff had failed to establish his right to the land he now claims.

They also desire to express their satisfaction that their present decision will establish the

title of the Respondent in accordance with, as they believe, the long and actual possession of the land itself. They think that if the evidence of possession stood alone, and they had to determine the case upon the issue, whether the Appellant or the Respondent had been in possession of this chur land since its reformation, their verdict must have been in favour of the Respondent.

Their Lordships are of opinion that substantial justice will be done by the conclusion at which they have arrived; and they will humbly advise Her Majesty to affirm the decree of the High Court, with costs.