Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Maharajah Rajendur Pertab Sahee v. *Lalljee Sahoo and others from the High Court of Judicature at Calcutta: delivered 1st August,* 1873.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THEIR Lordships regret to find that they are not at present in a condition to recommend to Her Majesty to make an order which will finally determine the long litigation between the parties to this Appeal.

The Appellant, the Maharajah of Hutwah, is the owner of a large estate in Zillah Sarun, which comprises a village named Doomree, and for the purposes of this Appeal may be called the Doomree estate.

The Respondents are Zemindars in Tirhoot. Their estates comprise a mouzah called Sohagpoor, and may be designated by that name.

The two zillahs are divided by the River Gunduck, which at that part of its course has a northern and a southern channel; and it is proved beyond a doubt that, during the dry months, the main body of the stream has run sometimes in the northern and sometimes in the southern channel.

In 1790-91, when the two estates were permanently settled, the Gunduck ran in the northern channel; which their Lordships think must be taken to have been at that time the boundary of the two zillahs, and also of the two estates—Tirhoot and Sohagpoor lying on the northern, Sarun and Doomree on the southern bank of the stream.

In the year 1837 the river, whether by gradual recession or sudden shifting is not very clear, had got into the southern channel; and a quantity of chur land to the north of that channel was then resumed by Government; and after an investigation which will be hereafter more particularly considered, a temporary settlement of it for the term of seven years, was made by the collector of Tirhoot with the Zemindars of Sohagpoor. This was confirmed by the Commissioner of Revenue on the 23rd of April, 1838; and, in August 1846, a second settlement of this land for a term beginning on the 1st of May, 1846, and ending on the 1st of May, 1856, was made by the same authority with the then Zemindars of Sohagpoor. Under the two settlements these Zemindars appear to have been in undisturbed possession until 1848, when, the river having returned to the northern channel, the Deara land so settled was claimed by the Appellant's father, and other proprietors on the southern or Sarun side of the river. This led to disputes, and to an Art. IV of 1840 suit, which, on the 16th of April, 1849, the magistrate of Sarun decided in favour of the Zemindars of Sohagpoor, and his decision was confirmed on Appeal by the Zillah Judge of Sarun on the 5th of October, 1849. It appears from these proceedings that, on that occasion, the jurisdiction over the lands in question was admitted to have passed, on the change in the channel of the river, from the Tirhoot to the Sarun authorities. Both the magistrate and the Judge, however maintained the possession of the Zemindars of Sohagpoor under the subsisting settlement; leaving the Sarun claimants to establish their title by regular suit. Some such suit, as to part of the land, appears to have been brought; but the final determination in it of the question of title was prevented by the proceedings which are next to be mentioned.

On the 1st of May, 1856, the last temporary settlement with the zemindars of Sohagpoor expired, and the question then arose with whom the Government should engage for the revenue of the Deara land. On the 7th of January, 1857, the Collector of Tirhoot (Mr. Lautour) entertaining, in consequence of the change in the course of the river, doubts as to his jurisdiction to make a new

settlement, though the revenue assessed under the previous settlements had always been paid into his treasury, brought the question before the Commissioner of Patna, Mr. Tayler. That officer held a proceeding on the 3rd of March (both parties being represented before him), and came to the following conclusion :—

"In this suit I have no doubt in the matter which the Collector has referred to me for my opinion, because from the purport of the Report of the Collector, it is evident that the lands appertaining to the Deara settled, were, without any dispute, in possession of the proprietors of Sohagpoor, and the revenue has been paid by them to the Collectorate of Zillah Tirhoot; under these circumstances, the stream of the river having been changed, the rights and interests of the proprietors cannot be prejudiced thereby. Neither can the boundary be altered, as, for instance, there is much land on this side the Ganges which still belong to Patna; therefore,

"Ordered—

"That an answer to the letter of the Collector of Zillah Tirhoot be forwarded to him, and he should act according to the directions in the said letter."

And, on the 15th of March, 1857, he wrote a letter to the same effect to the Collector of Tirhoot, who resettled the Deara with the zemindars of Sohagpoor, by a proceeding dated the 15th of April, 1857. The Appellant, however, appealed against this settlement to the Commissioner, and, through him, to the Board of Revenue; and the decision of the latter body was given on the 4th of September, 1857, in a letter from their Secretary, of which the following are the material paragraphs :—

"2nd. 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.

"3rd. In accordance with this usage, the Chur, the object of the present dispute, has been twice temporarily settled with the Maliks of Mouzah Sohagpoor on the Tirhoot side, on which estate it was an increment, the main channel of the Gunduck being to the westward of the Chur. On the expiry of the last lease, when the Chur became open to settlement as if it had been a new formation, Maharajah Cuttardharee Sahai claimed the settlement to be made with him, as the lands by a change in the main channel of the river had become separated from Sohagpoor, and formed then an increment on his estate within the district of Sarun.

"4th. Local inquiries by the proper officers verified this fact, but on reference to him, Mr. Tayler, the Commissioner, directed the

settlement to be again made by the Collector of Tirhoot with the Maliks of Sohagpoor, as they were in possession, and the lands of the Chur, not having been washed away, were fully capable of identification.

"5th. But the lessee's right of occupancy, the Board are of opinion, ceased with his lease, and Mr. Tayler's decision is not only opposed to established usage, and to Section 2, Regulation XI of 1825, but also to the principle laid in the Sudder Court's decision in the case of Rajah Greesh Chand, Appellant, *v.* Maharajah Tez Chand, Respondent,* in which the Court disallowed the Plaintiff's claim to alluvial lands which had originally formed in his estate, and had afterwards become united to the Defendant's estate by the return of the river to its former course.

"6th. The Board would particularly refer to the note in this case, as showing the distinction between the separation by change in the course of a river of an alluvial increment not incorporated with an original estate by permanent settlement, and the separation from the same cause of a portion of original land from its parent estate, provided for in clause 2, section 4, Regulation XI, of 1825. In the advertisement to this volume of the Reports, the notes are stated to have been written or approved of by the Judges who decided the cases, and they are consequently entitled to weight.

"7th. Under these circumstances, the Board have reversed Mr. Tayler's orders, appealed against, and they will be obliged if you will direct, in case the lands remain in their present state, that the papers and proceeding may be made over to the Collector of Sarun, within whose jurisdiction the Chur now lies, in order that he may form a settlement of it with the Petitioner Maharajah Chutterdharee Sahai."

In conformity with the directions contained in this letter, a summary settlement of the Deara lands, which are the subject of this appeal, was made with the Maharaja of Hutwa, who obtained possession of them.

The present suit was brought on the 31st of January, 1860, by the Zemindars of Sohagpoor, to impeach the ruling of the Board of Revenue, and the settlement made under it, and to recover possession of the lands in dispute.

This being the object of the suit, it is desirable to observe what were the principles laid down by the Board of Revenue, upon which the settlement with the Plaintiff was set aside, the new settlement made, and the possession of the property changed. They are:—

1. That a clear and distinct usage that the main channel of the Gunduck should be the constant boundary, not only between the two districts of

* Sudder Dewanny Adawlut's Decisions, vol. i, page 274.

Sarun and Tirhoot, but between the Zemindaries on each bank divided by the river, existed at the time of the permanent settlement, and had since continued to exist.

2. That the Chur land, when twice settled with the Maliks of Sohagpoor, had been so settled with them on the ground that the river then ran in what has alone been called the southern channel, thereby making it an increment for the time being to their estate within the district of Tirhoot.

3. That by reason of the change in the main channel of the river, the land, of which they do not dispute the identity, had become an increment of the Maharajah's estate within the district of Sarun, and accordingly ought to be settled with him.

4. That the right of occupancy of the Maliks of Sohagpoor, who are called lessees, ceased on the expiration of their, so-called, lease.

The two principles then upon which the determination of the Board, and therefore the title of the Appellant rests, are the existence of the alleged usage and the inference that by reason of that usage the antecedent interest of the Plaintiffs, and their predecessors in the land, was only of a limited, temporary, and conditional character.

Their Lordships do not propose to go at length into the pleadings in the suit, which appear to them to have sufficiently put in issue the propositions of the Board of Revenue. They must remark, however, that the trial of the cause has been unfortunate, inasmuch as it has failed to determine these substantial questions. The suit came originally before a Principal Sudder Ameen who dismissed it first on a technical question of parties; and secondly, on the ground that the orders of the Board of Revenue were conclusive and binding on the Civil Courts. On appeal, both these objections were overruled by a divisional Bench of the High Court, which remanded the case for trial on the merits, but, in doing so, unfortunately intimated an opinion that the question to be tried was "whether (with reference especially to clause 2, of section 4 of Regulation XI, of 1825) the lands were the property of the Plaintiffs; the Defendants alleging (with reference to clauses 1 and 3 of the same section) that the lands were their property, having been acquired by gradual accretion to their estates." The

opinion thus intimated clearly implies that the principal, if not 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 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. And the greater part of the Judgment is devoted to the consideration of the questions whether the change in the course of the river had been sudden or gradual; and whether the land in dispute was capable of identification as the land formerly held by the Plaintiffs, or had formed by gradual accretion on the Appellant's estate. Deciding these questions in the Appellant's favour, he dismissed the suit. The cause then came again before a Divisional Bench of the High Court, which pronounced the decree now under appeal. The learned Judges differed from the findings of the Principal Sudder Ameen as to the gradual recession of the river, and the formation of the land in dispute. They held that the latter had been shown to be identical with that which was formerly held under the temporary settlements by the Maliks of Sohagpoor, and had been the subject of adjudication in the Act IV, Case of 1849; and that it had been separated from Sohagpoor by the Gunduck causing a sudden disruption of the Plaintiffs' land. Their judgment assumes that the Plaintiffs had a permanent proprietary interest in the Deara land settled with their predecessors in title; and does not in any way deal with the question of usage.

On the argument of the Appeal, the contention between the parties finally assumed the following form :—

The case of the Plaintiffs—who, coming to disturb the Defendant's possession, must establish their title to do so—was, 1st, that the Deara land settled with them in 1837 was so settled with their predecessors in title as the proprietors of the alluvium which had formed on their estate, subject to the right of the Government to assess revenue thereon; and that, though from its nature it continued to be subject to a fluctuating revenue, it thereupon became an integral part of their estate; and, 2ndly, that this land having been separated from the rest of their estate by a sudden change in the course of the river, and remaining capable of identification, continued to be their property.

On the other hand, the case of the Appellant was, 1st, that the Deara land had not been settled with the Maliks of Sohagpoor in 1837 as proprietors of the alluvium, but in conformity with the usage which made the main channel of the river the boundary of the two estates; that such land had not been shown to have been formed by gradual accretion on the Sohagpoor estate, which could alone give the Maliks of that estate a right to claim it as proprietors; and that, by virtue of the alleged usage when the northern channel became, in 1847, again the main channel of the river, the Deara land ceased to belong to Sohagpoor, and became part of the estate of Doomree, the temporary settlements having given to the Maliks of Sohagpoor at most only a right of occupancy during their subsistence. The Appellants moreover, as their Lordships understood, did not abandon the defence founded on the findings of the Principal Sudder Ameen to the effect that the return of the river from the southern to the northern channel had been gradual and not sudden; that the lands in dispute were incapable of being identified as those settled with the Maliks of Sohagpore, but had been formed by gradual accretion on the estate of Doomree, and were therefore an increment to that estate under the general law of alluvium.

Of this latter part of the Appellant's defence their Lordships propose, finally, to dispose.

Upon a full consideration of the evidence they are of opinion that the High Court was right in

holding that the land in dispute has been shown to be identical with that which was the subject of the Act IV, Case of 1849, and therefore with that which was the subject of the settlements of 1837 and 1846; and to have been separated from Sohagpoor by a sudden change in the course of the main stream of the river. They agree with the High Court in thinking that, on this latter point, the conclusion of the magistrate, formed when the change was recent, is to be preferred to that of the Principal Sudder Ameen.

The necessary consequence of this finding of their Lordships is that the Plaintiffs are entitled to follow their lands across the stream, under the second clause of the fourth section of Regulation XI of 1825, unless they are prevented from doing so by force of the alleged usage, being a clear and definite usage within the meaning of the second section of the Regulations; or by reason of their never having had the proprietary right in the soil. Upon the latter point it was argued for the Appellant that the proprietary right in the soil may all along have remained in the Government; which, though it made the two temporary settlements with the Maliks of Sohagpoor, may have retained and lawfully exercised the power of settling with the proprietors of Doomree on the expiration of the last of those settlements. Their Lordships, however, are unable to find in the settlement proceedings, or in the rest of the Record, any evidence that the Government ever asserted a title to the land as a Chur thrown up in a navigable river, or as being wholly or in part the bed of the river. 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 Lordship's 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 acccession 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 may observe that the admitted or proved existence of such an usage was the basis of the decision cited from the 1 Sudder Dewanny Adawlut decisions in the letter of the Board of Revenue; a case which, remarkably like the present in many of its circumstances, was decided many years before the passing of Regulation XI of 1825 upon the principles afterwards embodied in that Statute.

Again, from what has been said above, it also appears that, in their Lordships' opinion, some further inquiry is necessary touching the settlements of 1837 and 1846; the grounds upon which the Maliks of Sohagpoor were treated as the persons entitled to settle; and the nature of the proprietary interest in the alluvium then recognized in them. If it should clearly appear that the Revenue Officers then dealt with them as persons who had acquired a proprietary interest in the accretions under the provisions of clauses 1 or 3 of section 4 of the Regulation, their Lordships are of opinion that this should be held to be sufficient evidence of their proprietary title. Their Lordships do not think that it would be right to cast upon them the burden of proving at this distance of time that the lands settled had, in fact, been formed by gradual accretion. If, on the other hand, it should appear that the alleged usage exists, and that the settlements were made on the basis of it, or that for any other reason the interest of the Maliks of Sohagpoor in the same land was of a limited and temporary character, and had expired, that would be fatal to the Plaintiffs' suit. But these are questions for the determination of which their Lordships have not now before them the necessary materials.

Upon the whole then, their Lordships have reluctantly come to the conclusion that it is their duty to advise Her Majesty to reverse the decree under appeal, and to remit the cause to the High Court with

instructions to cause the following issues to be tried; and to pronounce a decree according to the findings upon such issues in the manner provided by section 354 of the Code of Civil Procedure. The issues are—

1st. Whether the land in dispute was settled in 1837 with the then Maliks of Mouzah Sohagpoor as the proprietors of alluvium which had become an increment to their estate by gradual accretion; or upon what other grounds was such settlement made. The burden of proving the affirmative of the first part of this issue to be on the Plaintiffs.

2ndly. 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 lie on the Defendant (the Appellant). Each party is to be at liberty to produce such further evidence on these issues as he may think necessary; and their Lordships will also recommend that the costs of this appeal on both sides be taxed, and the amount thereof certified to the High Court; and that it be part of the order that such costs be costs in the cause.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—13/8/73.