Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Juggodumba Dassee v. *Tarakant Bannerjee and others, from the High Court of Judicature at Fort William in Bengal; delivered 26th February* 1879.

Present:

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

THE earlier history of this long litigation and the facts out of which it has arisen are set forth in the report of the case when it was before this Board in 1866, which is to be found in the 10th Moore, page 476. It is not necessary to recapitulate those facts, though it will be necessary to refer to certain passages of the judgment delivered on that occasion.

The broad question to be determined between the parties is whether a considerable portion of land comprised within four villages belongs to a jote which the Plaintiff claims to hold under the Zemindars, who may be described as the Roy Zemindars, or to a talook of which the Defendant Rassmonee Dassee, who is now represented by the Appellant, was the unquestioned owner. If the title of both parties—the title of the Plaintiff, on the one hand, to the jote, and the title of the Defendant on the other hand—were admitted, this question would of course be simply that which occurs in every case of parcel or no parcel, viz., whether the land in dispute belongs to the one estate or to the other. The case however has come before their Lordships complicated by a further issue. The result of the former appeal to Her Majesty in Council

K 812. 125.—3/79. Wt. B 30. E. & S.

was that the judgments of the two Indian Courts were reversed; the right of the Plaintiff, notwithstanding those judgments, to maintain his suit was affirmed, and the cause remanded in order to try the principal issue, which had not been tried in the Courts below, of parcel or no parcel. Accordingly, when on the remand the cause came first before the Subordinate Judge, he settled only one issue, which was, in effect, whether the land in suit was parcel of the jote or of the talook. At some period—it does not appear exactly when, but before he gave judgment—he seems to have either settled, or to have considered as open to the parties, the further issue whether the Plaintiff purchased the jote as alleged by him.

The principal part of the evidence taken before him on the remand appears to have been addressed to that issue, which he decided against the Plaintiff and in favour of the Defendant. When the cause went to the High Court upon appeal from his decision, the Judges of that Court intimated that this issue was no longer open to the parties, and that the Subordinate Judge's finding upon it afforded no ground for dismissing the Plaintiff's suit. In an ordinary case it would, of course, have been open to Mr. Doyne to question the High Court's decision, and it would have been for their Lordships on this appeal to determine which Court was right; but on the opening of the case their Lordships intimated to him that, for the reasons which are now to be stated, he was precluded from raising the question involved in the issue by the former decision of this Board, and consequently that it was not open to him to go into that part of his appeal.

The cause came before their Lordships on the former occasion in this way. In the Courts below certain issues directed to the question

whether the suit could be maintained, as well as one which the Court described as " the real matter in dispute," being whether the land in suit belonged to the jote or to the talook, had been settled; and it had been determined that the former alone should be tried in the first instance; the " real matter in dispute" being left to be tried thereafter should it become necessary to do so. Of the issues in bar one was whether the claim was barred by limitation. Another, which seems afterwards to have dropped out of the cause, was whether, inasmuch as the validity of the deed of sale under which the Plaintiff claimed was questioned, the proper stamp had been paid upon the suit; the 2nd in point of order and the 5th, which was in these words, " Whether " or no the Zemindar Baboo Ramrutton Roy, " and others, are carrying on this suit in the " Plaintiff's name," seem both designed to raise the question whether the Plaintiff's right of suit was not barred by reason of a former decision, which had been passed between his alleged vendors and the Defendants. The Lower Court in India held that both the plea of limitation, and this plea in the nature of *res judicata* had been made out, and dismissed the suit on both grounds. Upon appeal the Sudder Court dealt only with the question of limitation, and finding that the Plaintiff, or those through whom he claimed, though dispossessed at a later date than that found by the Subordinate Judge, had nevertheless been out of possession for a period of more than 12 years before the institution of of the suit, confirmed the dismissal of the suit on that ground alone. This Board held that both Courts were wrong on the question of limitation, inasmuch as the Plaintiff, or those through whom he claimed, had been in possession up to the 18th November 1845, the date of the decision of Mr. Reid, who was then one

of the Judges of the Court of Sudder Dewanny Adawlut. There then remained the question whether the Plaintiff was barred by the plea of *res judicata*, upon which the Sudder Court had passed no judgment, and their Lordships had to deal with that question. What they say upon it is this: "The other point on which the "Zillah Court decided against the Appellant "was that the matter was already adjudged in "a suit by which he was bound. It has been "stated that the original purchaser at the "auction sale of the jote tenure sold to one "Ramdhone Sircar. Before the sale he had "instituted proceedings against the decree-"holders under the title of the talook. Ram-"dhone Sircar purchased therefore *pendente lite*. "He applied to be substituted in the suit in "lieu of Juggutchunder Rae, which application "was granted. This litigation terminated in "the Zillah Court in favour of Ramdhone "Sircar, the jote tenant. From that decision "Rasmoney Dossee appealed. On her appeal "the Sudder Court reversed that decision. "This was the decree of Mr. Reid of the "18th November 1845, which this suit seeks "to set aside. On this Ramdhone Sircar insti-"tuted a regular suit against Rasmoney Dossee "and others, claiming in substance the same "relief which is sought by this suit. Pending "that suit Ramdhone Sircar died, and his three "sons, Mohemachunder Sircar, Anundchunder "Sircar, and Greeschunder were substituted in "his place in the Record. Pending this litiga-"tion the present Appellant purchased the jote "tenure from the sons of Ramdhone Sircar. "He applied in his turn to be substituted on "the Record, and to conduct the suit. One "of the sons, however, denied the purchase, "and the Court refused the application. In a "few days afterwards the cause was decreed

" for the Defendants. It is alleged that the " actual Plaintiffs conducted their case negli- " gently, if not collusively. On the argument " before their Lordships, the Attorney-General " abandoned the case of fraud, but contended " that the Plaintiff was not barred by this " decision, that he was not a party to the " suit, and that his application to intervene " in it having been refused, it would be " unjust and inconsistent to hold him bound " by the decree; that the decision followed " so promptly on the refusal to allow him to " intervene that he could not reasonably be ex- " pected in the interval either to appeal against " the order refusing him leave to intervene or to " institute a suit as supplemental to the one in " which he sought to intervene. Their Lordships " concur in this view of the subject. As the law " allows a party interested to intervene in the " suit, that right should not be rigorously dealt " with. There is much danger in India of secret " collusion. Their Lordships think that the De- " fendants who obtained their decree so shortly " after the above refusal, in the absence of the " party really interested in contesting the " matter with them, should not be permitted to " prevail by this objection."

The question now is whether that was not a conclusive and final decision that the right of the Plaintiff to maintain this suit was not taken away by the decree in Ramdhone's suit; and whether the order of remand did not imply that his title to the jote generally was not in the subsequent proceedings to be taken as established. It was argued that the Defendants ought to be allowed to prove either that the kubbula under which the Plaintiff claimed had never been executed, in which case the title to the jote would be still in the sons of Ramdhone; or that, if it were executed, the

Plaintiff by reason of his position in life and want of means, was incapable of making the alleged purchase on his own account; and must be taken to have acted in the transaction as the mere creature of Ramrutton Roy and his co-sharers in the zemindary (for whom Ramdhone Sircar had also held *benamee*); and that on either view of the case the Plaintiff's right to maintain the suit would be barred by the decree against the sons of Ramdhone in their suit with Rassmonee Dossee. The case is thus presented in an alternative form. Taking the latter alternative, their Lordships observe that it raises the precise question of which the former decision of this Board disposed. The judgment of the Lower Court which was then under appeal (see Supplemental Record, p. 127) proceeds expressly on the ground that Juggutchunder Rae, Ramdhone Sircar, and the Plaintiff had all held benamee for Ramrutton Roy, who was in fact the person suing in both suits in the name of his creature. Again, the question whether there ever was a conveyance or not from the sons of Ramdhone Sircar might have been tried, and, as far as their Lordships can see, was tried and determined in the Plaintiff's favour in the former proceedings; and to allow that question to be raised again would equally be to re-open that which was decided by their Lordships on the former occasion.

The case being thus reduced to the broad question whether these particular lands are parcel of the jote tenure or of the talook—the first question which arises is what was decided here with respect to possession on the former occasion. Their Lordships think it quite clear that the judgment delivered by Lord Justice Turner must be taken to have decided that the Plaintiff and those through whom he claimed were in possession from at least the 7th August 1839, and that

there was no change of possession from that time until the date of Mr. Reid's order of the 18th November 1845. This may raise a presumption of anterior possession, but such possession of the joteedars claiming as purchasers at the sale of 1836 cannot be carried beyond the date of that sale, because up to that time, and at least from 1814, the moonshees, as they are termed throughout these proceedings, were in possession both of the jote and of the talook, holding the jote as a subordinate tenure under the Zemindars, the Roys, and the talook as a separate and distinct zemindari. There is, however, other evidence to show that the lands in question when in the possession of the moonshees were parcel of the jote. On the remand a local inquiry was made by the Court Ameen. The Subordinate Judge seems to have treated his report with very little respect, but the learned Judges of the High Court, in their careful and elaborate judgment, have said that they see no reason to doubt its honesty or correctness, and that it is supported by certain old documents to which they are disposed to attach credit. Then there are the circumstances which certainly have not been disproved, that these moonshees were sometime between 1814 and 1819 dispossessed or interfered with by the Zemindars; that they then, being at the time the owners of both estates, brought their suit against the Zemindars, seeking to be replaced in the enjoyment of the jote, and described the lands in dispute as part of that jote. The latter circumstance seems to their Lordships to be the more important, because it involved an admission against their interest, inasmuch as it was clearly more desirable for them to hold the lands as part of their independent talook than as part of a subordinate tenure.

Their Lordships therefore fully concur with

the High Court in thinking that a very strong *primâ facie* title was made out by the Plaintiff, which it lay upon the Defendants to displace. Mr. Doyne has fairly, and their Lordships think on sufficient grounds, and without in any way abandoning the interests of his client, admitted that he cannot find in the Record any evidence sufficient to have that effect.

Their Lordships desire to add the following observations with respect to the decision of this Board upon the former Appeal. It was said that that Appeal was heard *ex parte*. Mr. Doyne candidly admitted that he could not on that ground dispute the effect of it. It is in their Lordships' opinion quite clear that it is impossible to allow the Appellant to take advantage of her absence on that occasion, in order to re-open any question which either was expressly decided; or might have been raised and determined on that Appeal. Their Lordships always regret to have to hear an appeal *ex parte;* but their decision upon it, when heard, must stand as if all the arguments which the Respondents, if present, could have raised upon the case had been addressed to them. The absent parties must bear the consequence of their own laches. Why the then Respondents in this case did not appear in 1866 it is not for their Lordships to say; they do not seem to have had the stock excuse of poverty and want of funds.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this Appeal with costs.