Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hurro Persad Roy Chowdhry v. *Gopal Das Dutt and others* (*No.* 29 *of* 1877), *from the High Court of Judicature at Fort William, in Bengal; delivered May* 26*th*, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THIS is a suit brought by the heir of a person who in the year 1861 purchased from the Government the talook or zemindary of Kashinuggur, which is situated in the Soonderbuns. When the purchase was made from the Government the talook was subject to a lease which expired in the year 1866. The Plaintiff complains that, when the lease had expired, he became entitled in possession to the lands of the talook, but that the Defendants, being in possession of a large quantity of these lands, have fraudulently kept themselves in, and kept him out of, that possession. Then he prays for possession of the lands mentioned in the schedule to his plaint, and for a declaration of his absolute right to possession thereof, as well as for a declaration that the Defendants have no sort of right thereto.

This plaint is one of three, filed by the same Plaintiff against different members of the Dutt family, in respect of different portions of the talook. But both in the Courts below and here all three suits have been treated as depending

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upon the same question, namely, whether the Defendants have such a title to the lands as enables them to resist the Plaintiff's claim to possession.

The Defendants' case is this:—They say they were in possession of the land "from a time long before the permanent settlement,"—meaning not what is usually meant by the permanent settlement, the settlement of 1793, but a permanent settlement of these very lands which was effected in the year 1832,—"by right of a jungleboori, "chukdari, mokurruri, and mourussi title, as "tenants." They state that though the Government had obtained a decree for resumption in the year 1824, the right, which may be called for shortness the chukdari right, previously acquired by their ancestors, was in no way destroyed by that resumption decree, "On the "contrary," they say, "the Government, after "the passing of the decree aforesaid, made a "separate jummabundi of the ryoti chukdari "right to the said land, confirming our chukdari "right, and made a settlement with the zemindar "as regarded the proprietary right; and the "zemindar too, confirming our chukdari right, "has since that settlement been receiving the "rents from us as before." Therefore the claim by the Defendants is to hold the chuks as distinct from, and as against, the zemindar.

The peculiarity of the case seems to be this: that the original zemindar was the joint family of the Defendants, who may be called for shortness the Dutts, while the claims made to the chuks are made on behalf of individual or separate members of the Dutt family. The Government became the zemindar in the month of July 1838, by virtue of a revenue sale under Reg. XI. of 1822, and the zemindary was held under direct management till the month of April 1841. Then it was farmed by one Bishonath Dey, benamidar for the Dutts; and this holding

was extended so as to expire, as before stated, in the year 1866.

Now the case was opened in this way: that, in order to resist the Plaintiff's title as zemindar, the Defendants must either prove the actual legal existence of the subtenures which they claimed, or they must prove that, being in possession by reason of their claim to those subtenures, they are protected by lapse of time; and then it was said that there was no evidence whatever of either the legal existence of those subtenures or of the Defendants' possession by virtue of their claim to such subtenures. On looking at the judgments of the Courts below, their Lordships found that on that point they were not very clear; they appeared to assume without discussing, or without very distinctly stating, that the Defendants were in possession as chukdars or under colour of title as chukdars. But when their Lordships came to hear the evidence of dealings between the Government officers and members of the Dutt family, it was fully explained why the judgments of the Courts below were not very distinct upon this point: because it seems to their Lordships that such evidence is exceedingly clear, and they have no doubt that the point which has been made the principal subject of argument here was not seriously argued in the Courts below, and therefore not specially discussed in the judgments of those Courts.

In order to show this their Lordships refer to page 439 of the record, where is set out an order of the Assistant Commissioner of the Soonderbuns, dated the 23rd February 1832. It recites that, "It appears from a perusal of the chitta of "measurement of mouzah Kashinuggur for the "Bengali year 1224"—that is, 1818—"that "one chuk named Ram Ruttun Banerjee was "measured." Then it is stated: "The said "chuk is in the name of Ram Ruttun Banerjee, "but in the benami of Kalidas Dutt, the

" shevayet of Sopal Thakoor (idol), and of Bijoy " Krishnadhun Dutt." Then some evidence of the tenants is mentioned, and the order runs thus :—" That the jummabundi of the portion " of the lands of the chuk aforesaid standing in " the name of Ram Ruttun Banerjee, which has " been measured, be made with Kalidas Dutt, " the shevayet of Gopal Thakoor (the idol) and " Bijoy Krishnadhun Dutt, chukladars." Now there is a clear order that the settlement shall be made, not with the Dutt family, but, as to this particular portion of the lands of Kashinuggur, with the persons who claim as chukdars, though it is true that they claim on behalf of an idol.

Turning to page 310, a similar document is found. That also is an order of the Assistant Commissioner of the Soonderbuns, dated the 20th February 1832, three days earlier than the former one. It recites that one chuk of the mouzah Kashinuggur was measured in the name of Bhawani Persad Bose, as benamidar on behalf of Raj Narain Dutt. Then it appears that Raj Narain Dutt is dead; that Roop Narain Dutt, his brother, has been in possession of the lands of the said chuk, and pays the rent to the talookdar. The evidence of the tenants is stated, and the order runs thus :—" That whatever " amounts of lands of chuk aforesaid have been " measured in the name of Bhawani Persad Bose " deceased, as benamidar on behalf of Raj " Narain Dutt deceased aforesaid, an assessment " of the rent of the same be made with Roop " Narain Dutt aforesaid." This is a distinct statement that the chukdar holds lands independently of the talookdar, who at that time must have been the head of the Dutt family—a distinct statement of the difference between the talook and the chuk, that the chukdar or the separate member of the family paid rent to the talookdar or the whole of the family; and it is ordered that the settlement shall be made, not

with the joint family, but with the individual chukdar.

Now we come to what was actually done when the permanent settlement was made a few months afterwards. At page 27 of the record is a document which is called the Dowl settlement of amount in the office of the Commissioner of Soonderbuns. There the settlement appears to be made with the Dutt family, who are described by their names, and as holding the talook in certain shares. So far the settlement would appear to be made with the family alone; but at page 443 of the record is an ikrar or document by which the Government take an engagement in favour of the tenants from the same persons who entered into the Dowl transaction. The engagement is in these terms:—"All the "hasil and putit (waste) lands of our putit abadi "talook of mouzah Kashinuggur, &c., of per- "gunnah Hatiaghur, &c., appertaining to the "jurisdiction of the Commissioner, having been "measured by the former Commissioner, a suit "was instituted by him for assessing the excess "lands under Regulation II. of 1819; and a "decree was passed in favour of the Govern- "ment." That refers to the resumption of 1824; the facts being that the Dutts at first settled upon a comparatively small quantity of cleared land; that they cleared a great quantity of land adjacent; that the Government took proceedings to have the additional quantity of cleared land assessed to the revenue; and that in that proceeding a decree was passed in favour of the Government. Then the engagement goes on to state:—"And the jummabundi settlement with "each tenant was entered into by the Assistant "Commissioner. That jummabundi was after- "wards approved of by the Huzoor. Knowing "that to be just and proper, we engage, and "give in writing, that the rates which the "Assistant has fixed for the chukdar, ticcadar,

" and tenants respectively, and which *has** been " approved of by the Huzoor, we will uphold " from generation to generation, and make the " collections. We will not deviate from those " rates. Except the jumma of the jummabundi, " we will not take a cowri more from any one in " excess in any manner." So that they refer to the jumma that was settled for chukdars, ticcadars. and tenants, and declare that they will not take any more from those persons.

It might be held upon this evidence that the Defendants have sufficiently proved their actual legal position as chukdars. The land was afterwards put up for sale by the Government for arrears of revenue, and, after one or two failures to sell to other purchasers, the Government itself became the purchaser. Still there was an effective revenue sale, and it is not necessary to say whether the Government, having recognised the position of chukdars in the way they did, could set aside those subtenures after the revenue sale had taken place; because, assuming that they could do so, they were bound at least to take some effective unequivocal proceeding for the purpose. It is quite clear, putting the Defendants' case at the lowest, that the members of the Dutt family were holding by their title as chukdars, and if their title was voidable it ought to have been avoided.

The revenue sale took place in the year 1838, and the Government being the purchasers entered into khas possession of the talook or zemindary, and remained in that possession for a space of about three years. It appears to their Lordships that there is no evidence of any proceeding having been taken by the Government during those three years for the purpose of avoiding these subtenures. A number of collectors' papers, extending over the three years, have

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* *Sic in Record.*

been put in on behalf of the Plaintiff for the purpose of showing that the Government did not recognise the title of the chukdars. Passing over the questions that have been raised as to the genuineness or authenticity of those papers, and assuming them to be receivable in evidence and to be without any blemish upon their character, it appears to their Lordships that, at the very highest, they amount to a negative: that is to say, that they do nothing more than show that, so far as the proceedings indicated by them go, the Government did not do anything to recognise the subtenures; but they do not show that the Government did anything to avoid them. That the Dutts were in possession during those three years is clear from the evidence in the suit referred to in the judgment of the High Court.

At the expiration of the three years came the sale to the Plaintiff's father, and he found the Dutts in possession under a lease of the zemindary. He says that the Dutts should have made some claim in respect of their chukdari tenure; but there was no necessity for them to make any such claim. They were in possession and in full enjoyment of all that they claimed; and there is no law or reason that a person in such a position should make a claim to what he has already got. It was for the purchaser of the zemindary to take some proceeding on his part to avoid these subtenures, if he had any right to do so.

The result is that their Lordships think that the Defendants, even if not in possession under a well-proved legal title, are in possession under a colour of title which might have been avoided as far back as the year 1838; and that, inasmuch as no proceedings were then taken to avoid it, time has run in their favour. Their Lordships will therefore humbly advise Her Majesty that the decree of the Courts below be affirmed and that this Appeal be dismissed. The Appellant must pay the costs.