

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Choudhri Makbul Husain and Another v. Lalta Pershad (ex parte) from the Court of the Judicial Commissioner of Oudh ; delivered the 11th May 1901.

Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD LINDLEY.

SIR RICHARD COUCH.

SIR FORD NORTH.

[*Delivered by Lord Davey.*]

This is an Appeal from the decree of the Judicial Commissioner of Oudh of the 3rd June 1897 reversing the decree of the District Judge of Hardoi of the 26th February 1895 and restoring the decree of the Subordinate Judge of Hardoi of the 20th August 1894 which dismissed the suit of the Plaintiffs and present Appellants. The Respondent has not appeared which their Lordships regret the more because it is stated to be a test case upon the decision of which 36 similar cases will depend. It is surprising that the 37 Defendants did not combine to instruct Counsel to argue their case at their Lordships Bar.

The Appellants are the heirs of the original Plaintiff Choudhri Abdul Baki who by his plaint claimed to be entitled to the land or soil occupied by a bazaar called Amaniganj in the town of Sandila in Oudh as his ancestral property. It

was alleged that the residents of the said bazaar live there as ryots having built houses at their own costs and that the Defendant was one of such residents in occupation of two shops and having without permission built another shop on a piece of fallow. The plaint contains an allegation of a custom in the town of Sandila that if a ryot leaves of his own accord a house or shop occupied by him the materials thereof become the property of the zemindar. If he wishes to sell the materials of a house or shop he pays one-fourth of the price to the zemindar and if the zemindar desires the ryot to vacate a house or shop he pays the ryot three-fourths of its estimated price. The prayer is for possession of the land occupied by the Defendant subject to the payment of three-fourths of the price of the Defendant's shops (other than the one erected without permission) according to the custom.

The defence is in substance a denial of the Plaintiff's title and a plea of limitation.

After the Mutiny the town of Sandila shared the general confiscation of Oudh territory. Other family property was restored to the Plaintiff, but in 1860 the bazaar was entered in the Nazul Register under the belief (which appears to have been mistaken) that it was previously the property of the King of Oudh. In the year 1877 the Government determined to impose the payment of a ground rent upon the occupiers. The occupiers refused to pay apparently on the ground that they were not liable by their tenure to pay rent and the Teshildar was ordered to institute a test action. Before anything was done however an inquiry was directed to be made as to when and by whom the shops were built how did they become a Nazul property and what proof there was of their being such. On the 3rd September 1877 Abdul Baki (the Plaintiff) petitioned the Government " that an executive inquiry be made through

Rec. 89.

“ the Tehsildar or some other officer, and if the
 “ bazaar be found to be the petitioner’s property
 “ an order for its release be passed ” and an
 inquiry was directed accordingly.

The report of the Tehsildar by whom these inquiries were conducted is dated the 20th July 1878. It is a lengthy document and contains a history of the case. He reported that the entry in the register was the only proof of the bazaar being Nazul, and that with regard to the proprietorship of the bazaar there was no contradiction to the Choudhris being the owners of it whose heirs were Abdul Baki and others. And he also found that although payment of rent in money or of 2 pice and betel at the construction of a new shop had not been stated by any witness yet no one denied the proprietorship of the petitioner and his ancestors and the payment of other dues was also admitted.

On the 1st March 1879 the Deputy Commissioner of Hardoi forwarded to the Commissioner the following docket as to “ the Nazul “ Amaniganj : ” —

“ Sir,

“ Certain shops in Sandila, known as Amaniganj, are
 “ in the Nazul Register. Last year I imposed a light ground-
 “ rent on them, and the rent not being paid, threatened
 “ to sue.

“ Petitions of objections were lodged, first, by the Zemindars,
 “ who claimed that the proprietary right was theirs ; secondly,
 “ by Mussammat Lado, who claimed a portion of the property
 “ as hers. A very careful inquiry has been held on the spot
 “ by the Tehsildar in each case. I forward translations of his
 “ reports.

“ 2. The result may be summed as follows :—

“ I. That the bazar was built 80 or 90 years ago and
 “ was called after the reigning King, but no one
 “ can say who built it.

“ II. That the Zemindars hold :—

“ (a) A *mazhar* or attested statement of title ;

“ (b) A mortgage deed executed by them ;

“ (c) A deed of gift on their part in favour of
 “ Mussammat Lado, with regard to a
 “ portion of the property.

“ III. That these documents are apparently genuine.

“ IV. That they appear to have received presents from
 “ the owners of shops in acknowledgment of their
 “ proprietorship up to 1860, when the *ganj* was
 “ declared Nazul.

“ V. That as far as is known no proprietary rights have
 “ ever been exercised or rents received either
 “ by the Kings of Oudh or by the present
 “ Government.

“ Under these circumstances I recommend that the *ganj*
 “ (market) be struck out of the Nazul Register. A copy of the
 “ entry in the register is annexed.

“ (Sd.) J. QUINN,
 “ Deputy Commissioner.”

Their Lordships do not refer to these documents as evidence against the Respondent of the truth of the matters stated in them but for the purpose only of showing the materials which the Government had before it when it gave its decision in the ambiguous terms to be next stated and the nature of the case upon which that decision was given.

On the 26th May 1879 the Government addressed the following letter to the Commissioner of Sitapur :—

“ Robert Smeaton, Esquire,
 “ Junior Secretary to Government,
 “ North-Western Provinces and Oudh.

“ To the Commissioner of the Sitapur Division.

“ With reference to correspondence ending with your
 “ No. 1464, dated 10th May, regarding the removal from the
 “ Hardoi Nazul Register of certain shops, known as Amani-
 “ ganj, in Sandila, I am directed to say that as the occupants
 “ appear to have all along exercised proprietary rights without
 “ question of their title to do so, it is too late now to attempt
 “ to disturb their status; and the Lieutenant-Governor and
 “ Chief Commissioner is accordingly pleased to sanction the
 “ Deputy Commissioner’s proposal to expunge these shops from
 “ Nazul Register.”

In compliance with this order the bazaar was struck off the Nazul Register and proclamation made thereof.

The principal question on this Appeal is what the effect was of this act of the Government? The Appellants contend by their pleadings and at the bar that the letter of the 26th May 1879

was according to its true construction and when read by the light of previous proceedings a regrant to the zemindar of the land and soil of the bazaar. The Respondent on the other hand relied upon the letter of the 26th May 1879 as a grant to the occupiers of full proprietary rights in their houses and shops and the land upon which they are constructed and thus turned them from ryots and occupiers into landowners. It is of course agreed that any person claiming land in Oudh must show a title from Government subsequent to the confiscation but the question is to whom it is to be inferred from these informal proceedings that the grant was intended to be made.

The following issues were framed by the Subordinate Judge:—

“ 1. Is the land on which the bazar called Amaniganj in Sandila is situate Plaintiff’s ancestral property and the residents of the bazar live in it like ryots ?

“ 2. Was the bazar restored in favour of the Plaintiff, or given to the Plaintiff, and the Plaintiff has been in possession ever since, and has regularly received or taken zemindari dues from all the tenants of the same ?

“ 3. When did the cause of action accrue to Plaintiff, and is Plaintiff’s claim within limitation ?

“ 4. Is there any custom prevailing in Sandila to the effect that whenever the Zemindar or owner of the land wishes to turn out any tenant living on his land, he can do so and pay three-fourths of the value of the materials of the tenant’s house, and if so, does such custom apply or govern the bazar of Amaniganj ?

“ 5. If the Plaintiff be found to be entitled to the possession of the houses and shops, what is the amount in each case on payment of which he can obtain possession ? ”

The Subordinate Judge did not think it necessary to determine the first issue because he held that the letter of the 26th May 1879 operated as a grant by the Government of full proprietary rights to the occupiers. He also found on the third issue that the Plaintiff had not been in possession within limitation and his suit was barred by Article 142 Schedule II. of the Limitation Act.

The District Judge on appeal held that the Government in 1879 surrendered the proprietary right in the land of the ganj to Abdul Baki and that he was not barred by limitation from bringing the suit and remanded the case for trial of Issue No. 4 and if necessary Issue No. 5. The District Judge thought that it was clear from the history of the case that by the word "occupants" in the letter of 26th May 1879 was meant the zemindar. Their Lordships cannot see their way to adopting this construction. But they think that the following sentences of the learned Judge's judgment are well founded:—"It was a question of " proprietary right between Government and " the zemindar. It was not a question between " Government and the shopkeepers. It was " never asserted that the shopkeepers had a " proprietary title to the land. The only " question with them was whether they could " be made to pay rent and that question " was left in abeyance until it was decided " whether Government or Abdul Baki was the " proprietor of the land."

Finally the Judicial Commissioner reversed the decree of the District Judge and restored that of the Subordinate Judge substantially for the same reasons. The Judicial Commissioner comments upon the fact that the whole of the correspondence upon which the Government Order of 26th May is based was not before the Court. Since the hearing before the Judicial Commissioner the Appellants have obtained from Government copies of certain letters which preceded those of the 26th May and asked leave to read them on the hearing of this Appeal. But as the Respondent has not appeared and it did not appear that any notice had been given to him that leave to produce fresh evidence would be asked for their Lordships did not

think fit to accede to the application though they do not doubt their power to do so. Both sides seem to be equally in default in not obtaining earlier production of these letters.

Their Lordships are impressed by the weight of the observations which have been quoted from the judgment of the District Judge. Throughout the exhaustive report of the Tehsildar there is not a trace of any claim by any of the occupiers (of whom seven gave evidence) to the ownership of the land, but on the contrary it is expressly stated in the report that there was no denial of the title of Abdul Baki and his ancestors.

They cannot without the clearest evidence attribute to the Government any intention to adjudicate upon or decide a matter which was not before it, or gratuitously to confer title on persons who never claimed it to the prejudice of others whose claim was reported by the Government Officers to be well founded. Their Lordships attach more importance to the act of the Government than to the terms of the letter. They think that the intention of the Government was simply to annul the entry in the Nazul Register and restore the rights which existed when it was erroneously made. And they think that the effect of expunging the entry in the Register was a disclaimer by the Government of all title, and a surrender or release of the property to those whom it might concern, or (in other words) those who would have been entitled but for the confiscation according to their several rights and interests, thus following out the policy of the Government at the general settlement of the land in Oudh. It would seem that some of the land had been parted with by ancestors of the Appellants before the confiscation. Nor is there anything in the letter of the 26th of May 1879 which is inconsistent with this view of the effect of expunging the bazaar from the register. Whatever the

opinion of the Government might be on the materials before it it would naturally not desire to prejudge any rights which might be asserted before the Law Courts, and the only direction in it is "to sanction the Deputy Commissioner's proposal to expunge the shops from the Nazul Register." This proposal, based on the report of which he gives a summary, is certainly not to give the ownership of the land to the occupiers. The earlier words in the letter which are relied on state the reasons for this order, which may have been based on an imperfect appreciation of the effect of the Deputy Commissioner's recommendation. But it must be remembered that the bazaar was classed with the other lands belonging to the King of Oudh (p. 89) and so was entered as Nazul. The minds of the Oudh Executive in 1879 would doubtless be addressed to the question whether the bazaar did really belong to the King. As the report showed that Zemindars and shopkeepers alike dealt with the land independently of the King, it was not far from accurate, though not well chosen, language to say that "the occupants appear, &c., &c." (p. 78), with the meaning that the private claimants of interests enjoyed them undisturbed, in the same way as other people enjoy private property. What the Government does is to sanction the Deputy Commissioner's proposal, and reading the letter with the Tehsildar's report, and the Deputy Commissioner's recommendation, their Lordships cannot find in it any indication of the Government's intention to benefit either party at the expense of the other.

Their Lordships are also of opinion that the Appellants are not barred by limitation. There could not be any bar or title by limitation prior to the annexation. The act of State known as the confiscation, which followed soon afterwards, made a clean sweep of all titles and vested them in the Company from whom they passed to the Crown. There is no suggestion of a title by

limitation against the Crown. As long as the Crown remained owner neither zemindars nor ryots had interests which they could enforce against one another. Nothing was done to divert the title of the Crown and to restore it to the former owners prior to the letter of 26th May 1879. To take that letter rather than the actual alteration of the registers as the act which conveyed title to the former owners from the Crown is the most favourable view for those who plead the bar of limitation. But this suit was commenced within 12 years of the date of the letter and bar by time is therefore out of the question.

There was no actual finding by the Subordinate Judge on the first issue as to the title of the Appellants. That Judge presumed for the purpose of argument that it might be answered in the Plaintiff's favour, but as already stated it became immaterial. There should be a finding upon it now and in this respect the decree of the District Judge requires amendment.

Their Lordships are of opinion that the Judicial Commissioner should have left the decree of the District Judge undisturbed except by directing that the matters contained in Issue 1 should be tried as well as the other matters of remand. Issue 1 however as at present framed will not enable the Court to finally adjudicate on the respective rights of Plaintiff and Defendant. It may be that the ryots have by long occupancy acquired some rights which will protect them against eviction at the will of the Zemindar. Their Lordships therefore think it should be broken up into two issues as stated below.

In the result their Lordships think that the order of the Judicial Commissioner should be reversed and that the simplest course will be to discharge all the orders made in the Courts below and to direct that a decree be passed in the following form. On the second issue declare that the letter of the Government dated the 26th

May 1879 coupled with the consequent removal of the bazaar from the Nazul Register operated as a surrender and regrant by the Government of the bazaar and the shops and houses in it to those persons who if they had not been confiscated would now be entitled thereto according to their several rights and interests and on the third issue find that the Plaintiff was not barred from bringing his suit by limitation. Substitute for Issue 1 the following issues :—

- 1A. Is the Plaintiff (having regard to the foregoing declaration) proprietor of the land on which the bazaar called Amaniganj in Sandila is situate?
- 1B. Have the residents of the bazaar any and if so what rights and interests in the houses and shops therein occupied by them?

Remand the case to the Subordinate Judge for trial of the above issues and also (if and so far as necessary) of Issues 4 and 5. Direct that the costs of the trial which has already taken place and of the appeals to the District Judge and Judicial Commissioner respectively abide the result of the suit. And they will humbly advise His Majesty accordingly.

Their Lordships observe that the Issue 4 does not accurately follow the words in which the custom is pleaded in paragraph 4 of the plaint inasmuch as it speaks of "the value of the materials of the tenant's house" whereas the plaint says "its" (*i.e.* the house's) "estimated price." But no doubt the variance was deliberately made and is the result of explanations given at the time of the settlement of the issues. Their Lordships content themselves with pointing out the variance and will not advise any alteration to be made in the language of the issue.

Their Lordships will direct that the costs of this Appeal also do abide the result of the suit and be disposed of by the Courts below accordingly.