Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Rani Hemanta Kumari Debi v. *The Secretary of State for India in Council; and of Sri Sundari Debi* v. *The Secretary of State for India in Council and Robert Watson & Co., Limited, from the High Court of Judicature at Fort William in Bengal; delivered the 21st March* 1906.

Present at the Hearing:

LORD DAVEY.
SIR FORD NORTH.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The subject-matter of these consolidated Appeals is a large tract of land forming part of a larger tract known as Marichar Diar. A large river called indifferently the Ganges and the Pudma—it is probably a branch of the Ganges bearing the local name of the Pudma—has during the last hundred years frequently changed its course, diluviating what was previously dry land and again re-forming the diluviated land into islands or churs. Marichar Diar is a chur which commenced to be thus formed in the year 1841. It has since that year undergone alteration both in extent and in its physical aspect. For some years after its formation Marichar Diar was an island separated from the adjoining land on all sides by an unfordable stream. Before the year 1863, however, the northern branch of this stream had become fordable, and it has now been

silted up and the chur has become united to the adjoining land. The chur is of large extent, comprising in the year 1869 some 60,000 bighas.

The first Appellant, Rani Hemanta Kumari, is the owner by inheritance of a 2 annas and 15 gundahs share of a permanently settled estate called Pergunnah Luskurpur comprising many sub-denominations. The second Appellant, Sri Sundari Debi, has a putni right in a 5 annas 5 gundahs share in mehal "Taraf Rajapur," and a 17½ gundahs share in Mehal "Taraf Jotasai" comprised in Pergunnah Luskurpur. The word "taraf" appears to mean a sub-division of a pergunnah, including several villages. The two Appellants have instituted separate suits in which they claim to recover the whole or part of Marichar Diar on the allegation that the lands sought to be recovered are either re-formation *in situ* of land comprised in the pergunnah or in the putni lands, or are an accretion thereto. As will be seen hereafter, the area of the lands in dispute has been very much narrowed in the course of the proceedings, and the claim on the ground of gradual accretion, which is plainly untenable, has been disposed of in the Courts below, and was not pressed by the Counsel for the Appellants. The real question, therefore, is whether the Appellants can prove that any lands formerly belonging to them or their predecessors in title have been re-formed *in situ* after submersion. If so, they will be entitled to recover in accordance with the decision of this Board in *Lopez* v. *Muddun Mohun Thakoor* (1870) 13 Moo. Ind. Ap. 467, subject to any question arising under the Limitation Act.

See Wilson's Glossary, *s.v.*

Before, however, considering the question what lands were comprised in Pergunnah Luskurpur, or can be identified with any part of Marichar Diar, it will be convenient to state

shortly the history of the chur from the time of its formation in 1841 to the commencement of the present litigation. When the dry land emerged from the floods the Respondents Messrs. Watson & Co. entered into possession without any kind of title and planted indigo, and were in possession in 1863. A suit was then commenced by the predecessors in title of the first Appellant to recover the share now claimed by her in the lands comprised in the chur as land formed by alluvion after diluvion of, and by continuous accretion to, certain mouzahs comprised in Pergunnah Luskurpur. A similar suit was simultaneously commenced by the father and predecessor in title of the second Appellant in respect of his shares in "Taraf Rajapur," "Taraf Jotasai," and other parcels of land not now in suit, and there was a third suit by another co-proprietor of Luskurpur. All these suits were dismissed by the Subordinate Judge; but on Appeal the High Court, after a remand to try certain issues, varied the Judgment of the Subordinate Judge in all three suits. By the final decree in the suit of the predecessor of the first Appellant, dated the 12th February 1868, it was ordered that the decree of the Lower Court, in so far as it dismissed the Plaintiff's claim in regard to the accretions of Mouzah Jotasai, be reversed, and it was declared that the Plaintiff had established her title to a 2 annas and 15 gundahs share of 18,180 odd bighas, which had been found to be that portion of the accretions which adjoined the parent estate, called Mouzah Jotasai, as defined in the map of the 3rd April 1867, prepared by the Amin (Makund Narain Chowdhry), and to a similar share of another 650 odd bighas mentioned in the plaint, but not now in question. By the Decree in the suit of the second Appellant's father and predecessor of the same date, after

decreeing the reversal of the Lower Court's Decree so far as it dismissed the Plaintiff's claim in regard to the accretions of Mouzahs Jotasai and Rajapur, it was declared that the Plaintiff was entitled to recover a 17 gundahs and two cowries share in the accretions to Mouzah Jotasai shown on Narain Chowdhry's map, and also to recover a five annas and five gundahs share in 8,940 odd bighas found by the said Amin to be that portion of the accretion which adjoined the parent estate called Mouzah Rajapur. And a similar Decree was made in the third suit. There were Appeals to the Queen in Council. But one Appeal was dismissed for want of prosecution, and the others were apparently withdrawn by consent, and they never came before this Board for argument or decision. Messrs. Watson & Co. were the only effective Defendants to the suits of 1863. The proceedings in them and Narain Chowdhry's map are not evidence against the Government, which was not a party, except for the purpose of showing the nature of the claim made and what lands were recovered in them, and explaining the Decrees made. For that purpose (which will be found to be important) the map may legitimately, and must necessarily, be used, and is in fact made part of both Decrees.

The Decrees of 1868, it will be observed, were not based on the identification of parts of Marichar Diar with lands comprised in Pergunnah Luskurpur or the putni mehals, but on continuous accretion to certain mouzahs adjoining the chur. The case of *Lopez* v. *Thakoor* had not then been decided, and the decision come to was in accordance with the construction then put by the Indian Courts on Regulation 11 of 1825. It was then held that if the Government did not exercise its right to dispose of a chur while the channel remained unfordable, the land formed

by the recess of the river is an increment to the lands most contiguous to it, and the Government lost their title. That view of the law, however, was in the year 1870 overruled by a full bench of the Calcutta High Court in *Budrunnissa Chowdhrain* v. *Prosunno Kumar Bose*, 6 Beng. L. R. 255. The correctness of this decision was not challenged before their Lordships, and the law as now settled by that case, and the case of *Lopez* v. *Thakoor* appears to be correctly stated in the Judgment of the Subordinate Judge in the present suits which were heard together.

In the year 1869 the Government, disregarding the Decrees of 1868, released from assessment 14,000 bighas, part of Marichar Diar, in favour of the owners of the adjoining permanently settled lands and made temporary settlements of the rest of the chur comprising the land recovered in the litigation of 1863 (so far as not included in the released land) with Messrs. Watson & Co. But it has been held by both Courts below in the present suits that the Appellants or their predecessors in title were put into possession of the lands recovered by them and retained such possession until 1883 when they were ousted by the Government. A map was then prepared by Babu Bijoy Krishna, a Government officer, showing the lands which the Government then claimed, and claim in these suits, as their khas mehal.

On the 28th March 1895 the second Appellant commenced her present suit against the Government and Messrs. Robert Watson & Co. And the suit of the first Appellant was commenced on the following 1st of April. It has been decided in both suits that as regards the lands recovered by the decrees in the litigation of 1863 the claims of the respective Appellants were not barred by limitation, but as regards any lands

which lay outside the previous Decrees the claims of the Appellants were barred.

In the second Appellant's suit, therefore. the issue is narrowed to the questions whether any part of the area of "Taraf Rajapur" and "Taraf Jotasai" is included in so much of what is claimed by the Government as its khas mehal, as was recovered by the decree made in favour of her predecessor in title in 1868. The earliest and, indeed, the only authentic record in evidence of the area of "Taraf Rajapur" and "Taraf Jotasai" is to be found in the survey maps of 1850. It is made clear in the Judgment of the Subordinate Judge (referring to Babu Bijoy Krishna's map of 1883–84) that what the Appellants are claiming in this litigation does not include the lands comprised in the 14,000 bighas released by the Government in 1869, and it was admitted in the High Court that they did not claim such lands. In the map prepared by the Civil Court Amin in the first Appellant's suit, and dated the 27th July 1897, the sites of Taraf Jotasai and Taraf Rajapur are delineated as laid down in the survey maps of 1850, and the boundaries of the released 14,000 bighas and of the land claimed by the Government as its khas mehal are drawn. And no objection has been made to the accuracy of the map in these respects. The map in the first Appellant's suit is rather more clear than that made in the other suit, but the two maps substantially agree. It appears on the face of these maps that large portions of Taraf Jotasai and Taraf Rajapur were cut off by the river which originally formed the northern boundary of Marichar Chur, and are in fact included in what are called Block Jotasai and Block Rajapur, meaning the lands recovered under the Decrees of 1868 as accretions. And it also clearly appears that those separated

portions were comprised in the 14,000 acres released to the adjoining owners, including the predecessor in title of the second Appellant in 1869. The second Appellant does not and cannot claim anything outside Taraf Jotasai and Taraf Rajapur, and it is not proved that any land forming part of either of these tarafs is included in the lands now in dispute. Her case therefore fails and her Appeal must be dismissed.

The question on the first Appellant's Appeal is a more difficult one. The question is whether she can show that the site of any part of the lands claimed by her is within the area of Block Jotasai included in the land claimed by Government as its khas mehal. Anything outside Block Jotasai is excluded by the decision of the Subordinate Judge as to limitation. In her plaint she alleges that she is the proprietor of a zemindari right in a 2 annas 15 gundahs share of Pergunnah Luskurpur, &c., of the Collectorate of Zillah Rajshahye, and her said share has been entered separately in the towzi and numbered I 1. The Counsel for the first Respondent contended that the first Appellant had thereby confined her claim to land within the Rajshahye district, and it was stated that the land in question was in the Nuddea district. Their Lordships do not know whether any or what alterations have been made in the division between the two districts, which is purely a question of administration. They read the allegation in the plaint as descriptive merely, and not restrictive. The point, it should be said, is not mentioned in the Judgment of the Subordinate Judge or of the High Court.

The Subordinate Judge, on consideration of the whole evidence and the circumstances bearing on the point, was of opinion that the first Appellant had very satisfactorily made out that the disputed lands are on the original site of the diluviated permanently settled estate

Pergunnah Luskurpur. The High Court was of opinion that she had failed to make out her case. No record of the permanent settlement of Luskurpur has been put in evidence. The earlist documentary evidence is an extract from Rennell's survey map dated the 7th July 1780, and therefore nearly contemporary with the decennial settlement on which the permanent settlement was based. This map shows that the disputed land was then dry land, and that there were many villages to the north of what was then the river bed. But beyond this general remark it does not appear to their Lordships to afford any safe inference either for or against the first Appellant. Their Lordships are of opinion that the first Appellant has not identified any of the mehals named in Schedule A to her plaint as being in Block Jotasai. If Ramkrishnapur was on the site of the place of that name mentioned on the Amin's map of the 27th July 1897 as Mouza Ramkrishnapur, it is comprised in the released 14,000 bighas. Otherwise the site of it is not identified. There was at one time, according to the oral evidence, a village called Sadasibpur which had "gone into the Pudma." If it was on the same site as the Sadasibpur marked on the Amin's map of the 6th June 1898, it was in Block Rajapur. One of the Respondent's witnesses stated that what was formerly Sadasibpur was at the place where Bahirmadi has formed, and confirms the statement of other witnesses that the second Appellant in 1880–81 had a cutchery in Bahirmadi. That place also would therefore appear to be in Block Rajapur. The sites of Kadirpur and Manikpur are not identified with any part of the Marichar Chur. But their Lordships do not agree with the learned Judges in the High Court in regarding the failure of the first Appellant to identify the sites of these villages as fatal to her case. The proceedings in the

suit were conducted in the Court of the Subordinate Judge on the assumption that the real and substantial question between the parties is whether any part of Block Jotasai can be identified with land in Pergunnah Luskurpur in which she is a co-sharer, and the argument before their Lordships proceeded on the same assumption.

The other grounds upon which the learned Judges in the High Court based their decision sufficiently appear from the following extract from their Judgment :—

"We may here add that it would not be enough to prove, "even if it had been proved, that the disputed land is a re- "formation on the site of Pergunnah Luskurpur as it existed at "the time of the Permanent Settlement, because Pergunnah "Luskurpur was partitioned in 1839 (see Ex. 19 page 75 of "the paper-book of Appeal No. 52); and different mouzahs or "parts of mouzahs fell to the shares of the different co-sharers; "and the Plaintiff in this suit" [meaning the second Appellant's suit] "or rather her lessors, obtained certain "shares of certain mouzahs only; and accordingly the parties "went to trial, not upon the broad issue, whether the disputed "lands are re-formations on the original site of the pergunnah, "but upon the narrower issue, whether they are re-formations "on the original site of certain specified tarafs; and it lies "upon the Plaintiff to make out the affirmative of that issue."

The latter part of this extract is quite true of the second Appellant's suit, but it is not strictly accurate with respect to the first Appellant's suit. The Government, in its written statement (paragraph 12), put in issue the question whether the lands claimed in the suit or any portion thereof are re-formations *in situ* of, or accretions to, "the "Plaintiff's permanently settled estate Per- "gunnah Luskurpur," but did not traverse the allegation of her title to be a co-sharer of that estate, and did not mention the alleged partition. No issue was directed to the first Appellant's title, or to the partition. The Subordinate Judge expressly states in his Judgment: "The "Plaintiffs, it is to be observed, claim the lands "as re-formations *in situ* of their diluviated "and permanently settled estate Pergunnah

" Luskurpur. That the Plaintiffs are the separate " owners of that estate in their alleged shares is " not disputed in these suits." The documents referred to by the High Court as evidence of the alleged partition, unexplained, are of a meagre and inconclusive character. In particular, it is not shown, and it is most unlikely to be the fact, that any partition which was made extended to the area in question, which was then a diluviated waste, and to all appearance lost to the estate. Beyond quoting the above extract from the Judgment of the High Court as part of a larger quotation the Respondent makes no mention in his case of the alleged partition, and no argument was addressed by the learned Counsel for the Respondent to the Board on the subject. Their Lordships are somewhat embarrassed by the mode in which the case has been presented to them, but they think that on the materials before them, they ought to treat the first Appellant as having a *primâ facie* title as co-sharer in every part of the permanently settled estate of Luskurpur which is not shown to have been alienated, and that they ought not to attach any weight to a suggestion not made in the Court of the Subordinate Judge, where it might have been explained and met by evidence, or supported by argument before their Lordships, and also that they ought to follow the course taken by the Subordinate Judge and decide the larger question.

Some difficulty and obscurity has, perhaps, arisen from the two cases having been kept united for the purpose both of argument and of judgment. The issues are not the same, and their Lordships cannot agree with the High Court that the considerations applicable to the case of the second Appellant apply *mutatis mutandis* to that of the first Appellant.

The evidence in favour of the first Appellant's

case is chiefly documentary. The earliest document is a proceeding of the Court of the Deputy Collector of Rajshahye, dated the 12th August 1837. It contains the record of an investigation made by the Deputy Collector in pursuance of a petition of the Zemindars of Pergunnah Bhobanund Diar stating that their estate, which at the date of the decennial settlement was on the north side of the river, had been diluviated. It thereby appears from the statement of witnesses that the northern boundary of Bhobanund Diar consisted of certain mouzahs (named) appertaining to Luskurpur, and the Deputy Collector reported that Bhobanund Diar began to be diluviated in 1202 or 1203 (corresponding to A.D. 1795–96), and was completely diluviated within the years 1238–39 (or A.D. 1831–32) and that he could find no trace of Bhobanund Diar on the northern bank of the river in that district, and it appeared that some of the mouzahs on the north-west of the Diar had also been diluviated. The zemindari Bhobanund Diar must not be confused with the mouza of the same name which is in the south-east corner of Taraf Jotasai.

It appears to their Lordships to be a fair inference from the document of the 12th August 1837 that no material alteration took place in the position of the northern boundary of the river as shown in Rennell's map until the year 1795, or six years after the date of the permanent settlement, and that at that date there was a zemindari estate called Bhobanund Diar situate on the then northern bank of the river which was its southern boundary, and having for its northern boundary the Pergunnah Luskurpur which was coterminous with it, and that in the course of the 36 years from 1795 to 1831 the river had moved northwards, so that in the year 1837 the whole of Bhobanund Diar and some

mouzahs in the adjoining Pergunnah Luskurpur had been diluviated.

It does not appear to their Lordships that the Rubokari of the Collector of Nuddea, dated the 6th September 1839, affords them any assistance in deciding any question in this Appeal. It contains proposals for the settlement of a large chur which had been formed on what was then the southern bank of the river and is referred to as Chur Bhobanund Diar. The predecessors in title of the first Appellant (it seems) were formerly co-sharers of Bhobanund Diar as well as of Luskurpur. But it appears from an official communication from the Collector of Rajshahye to Maharani Sarat Sundari Debi, the predecessor in title of the first Appellant, and dated the 14th September 1878, that at the permanent settlement an arrangement had been made by which the share of her predecessors in Bhobanund Diar was incorporated with, and included in, the same settlement as Luskurpur.

In the minute of the Lieutenant-Governor, dated the 6th April 1883, recording the resolution of the Government to take Marichar Diar into the direct management of the revenue authorities, it is stated that careful inquiries which had then been completed had failed to discover proof that any part of Marichar Diar was a re-formation of Bhobanund Diar, and on that ground the Lieutenant-Governor rejected the claim of the Chowdhrys to any part of Marichar Diar.

The case for the first Appellant, therefore, may be thus stated. She has a *primâ facie* right to a 2 annas 15 gundahs share in the permanently settled estate Luskurpur which has not been displaced or rebutted by evidence, though of suggestion there is plenty. No part of Marichar Chur is a re-formation of the zemindari estate called Bhobanund Diar, and

there is no proof of any other zemindari intervening between what is undoubtedly Luskurpur on the north and that part of Luskurpur which at the date of the permanent settlement abutted on, and was the northern boundary of, Bhobanund Diar. The inference is irresistible that the lands comprised in block Jotasai lying between Jotasai on the north and the southern boundary of the chur are a re-formation *in situ* of lands which before diluviation were comprised in Pergunnah Luskurpur.

This conclusion is confirmed by the Thak map of 21st January 1868, on the basis of which the first settlement of the chur was made in 1869. Marichar Diar, said to contain 860 houses and an estimated population of 4,260 residents is there described as being in Pergunnah Luskurpur. It is unfortunate that no claim, founded on the first Appellant's real title to be a co-sharer in the chur as a re-formation of her permanently settled estate, was presented to, or considered by, either Mr. Grimley, who made the settlement of 1869, or the Lieutenant-Governor in 1883. The former declined to pay regard to the Decree of 1868, which was then under Appeal to the Queen in Council and had not been executed, and as he had no other claim by the Appellant's predecessor in title before him he made the settlement with Messrs. Watson and Co., who were in possession of the land without payment of rent to any superior. The claim made in 1883 was also founded exclusively on the Decree of 1868, and the Lientenant-Governor was able to say that the Government was not a party to the suit in which the Decree was made and was not bound by it, and that the Decree having been made in accordance with a view of the law which had since been decided to be wrong, he was entitled to disregard it.

The oral evidence was chiefly directed to the

issue of limitation and to the question whether the Appellants were placed in possession in execution of their Decrees, and had been ousted by the Government. But some aged witnesses were called by the Respondents and cross-examined on behalf of the Appellants. Their evidence, whether strictly admissible or not, was not unfavourable to the first Appellant. For example a witness aged 78 stated that before the formation of the chur "there were villages all "over the place," and he heard that these villages appertained to Pergunnah Luskurpur. This was about as much as you could expect from one who was only a lad at the time he was speaking of. But it is of doubtful admissibility, and their Lordships do not rely upon it.

Their Lordships will, therefore, humbly advise His Majesty that the Appeal of the Appellant Sri Sundari Debi be dismissed, and that the Appeal of the Appellant Rani Hemanta Kumari Debi be allowed, and that the Decree of the High Court, dated the 30th May 1901, so far as it relates to Appeal No. 64 of 1899 therein mentioned be reversed, and the Decree of the Subordinate Judge of Zillah Nuddea, dated 15th October 1898 in original suit No. 72 of 1895, be restored, and that the Respondent the Secretary of State for India do pay to the Appellant Rani Hemanta Kumari Debi the costs of his Appeal to the High Court. The Appellant Sri Sundari Debi will pay the cost of her present Appeal, and the Secretary of State for India will pay to the Appellant Rani Hemanta Kumari Debi her costs of her present Appeal. If the Counsel for the Appellants, who appeared together, and Counsel for the Secretary of State agree, there may be no costs of these Appeals as between them. But the Appellant Sri Sundari Debi will, in any event, pay the costs of the Respondents Messrs. Robert Watson & Co.