negotiation and settlement, and that the settlement having been achieved the goods were forwarded in the name of Chowdhry, himself. This being so there was no duty left in the circumstances except, of course, to deliver to Chowdhry or to his order, and this was done. The failure of duty pleaded completely disappears, the respondents having fulfilled all the duties resting upon them, either by contract, or under the Common Law.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and the respondents are entitled to costs.

J. V. W. *Appeal dismissed.*

Solicitors for the appellants : *Bramall & White.*

Solicitors for the respondents : *Sanderson, Adkin, Lee & Eddis.*

PRIVY COUNCIL

ARUN CHANDRA SINGH
v.
KAMINI KUMAR.

P. C.*
1913
Oct. 31,
Nov. 3,
Dec. 10.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Landlord and Tenant—Owner of patni taluk within zamindari—Diluvion caused by tidal river—Right to abatement of rent under patni lease—Diluviated land part of taluk re-forming in situ—Claim by zamindars and patnidar—Bengal Act VIII of 1869, s. 19—Limitation by adverse possession—Failure to show relinquishment of submerged land by patnidar.

The appellants were owners of a zamindari within which was a patni taluk created in 1837 by one of the predecessors in title of the appellants : this taluk was owned by the first respondent as patnidar, and a strong tidal

* *Present* : LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

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river flowed close to the boundaries of the taluk. The patni lease covenanted that "if the land be found to be more in measurement by *nal* prevalent according to the custom of the pargana, I shall separately pay the rent thereof at this rate; if it be found to be less I shall get remission therefor". In 1843 the appellants obtained a decree in the Revenue Court for increased rent on the ground that additional land was found on measurement to be in the patnidar's possession. In 1889 part of the taluk having been washed away by the river, the respondent obtained a proportionate abatement of the rent. Subsequently the land so diluviated re-formed *in situ*, whereupon both parties claimed it, and each party attempted to exercise rights of ownership as evidence of adverse possession against the other; but it was found that neither party had proved sufficient adverse possession to give him a title. In 1906 the appellants sued for a declaration of their title to khas possession of the land re-formed on the ground that it was part of their zamindari; or in the alternative were entitled to receive a proper rent for it. The respondents pleaded that the land was an accretion to their taluk, and that the appellants were only entitled to rent and not to khas possession.

Held, that the High Court whilst rightly holding that the land re-formed did not come within the provisions of section 4 of Regulation XI of 1825, and that it could not be claimed by either party as an accretion to his lands, had laid too much stress on the terms of the lease; and the evidence of intention deducible from the proceedings in respect of additional rent and abatement of rent. There was nothing to show that by claiming or accepting remission of rent in respect of land washed away from time to time by the action of the river the respondent abandoned or agreed to abandon his rights to such land on its re-formation *in situ*. The diluviated land formed part of a permanent heritable and transferable tenure, and until it could be established that the holder of the tenure had abandoned his right to the submerged land, it remained intact.

Hemnath Dutt v. *Ashgur Sindar*(1) dissented from.

Mazhar Rai v. *Ramgat Singh*(2) followed.

APPEAL from a judgment and decree (29th June 1909) of the High Court at Calcutta which reversed a decree (6th December 1906) of the Court of the District Judge of Noakhali.

The representatives of the plaintiff were the appellants to His Majesty in Council.

(1) (1879) I. L. R. 4 Calc. 894. (2) (1896) I. L. R. 18 All. 290.

The suit out of which this appeal arose was brought on 12th January 1906 by the Administrator-General of Bengal as executor of the will of the late zamindar of Pargana Bhulua, to eject the present respondents from certain char lands described in the plaint, within the area of which zamindari the first defendant Kamini Kumar Ashutosh Roy held a patni taluk called Ramsaran Pal, and he was in possession of the lands in dispute as part of the taluk. The other defendants were tenants of the first defendant.

The taluk was created by a dowl kabuliat executed by Ramsaran Pal on 11th June 1837. It was situated on a river the rise or fall of which subjected the lands to alluvion and diluvion. The taluk comprised two kismats, Algi and Paniar Tek, and its area in 1837 amounted to 2 drones, 12 kanis, 16 gundas which was assessed with rent at the rate of sicca Rs. 48 per drone. The rent then was Rs. 143-5-9; but one of the conditions in the kabuliat was that "if the land be found to be more on measurement by *nal* prevalent according to the custom of the pargana, I shall separately pay the rent thereof at this rate; if it be found to be less, I shall get remission therefor. If I fall into arrears you shall be entitled to realize the arrears by making application to the Court every six months according to Regulation VIII of 1819. I shall not be entitled to raise any objection thereto and to the land being measured."

In 1843, in consequence of the river receding, the culturable area increased, and the zamindar obtained by suit a proportionate enhancement of the rent, which was fixed at Rs. 386-10-6. Subsequently diluvion took place, and in consequence of the river encroaching on the land the talukdar in 1877, 1886, and 1889 obtained decrees for a proportionate abatement of rent. In 1890 the river again receded, and

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the land now in dispute was gradually re-formed on the original site of kismat Algi.

In 1875 the talukdar leased the taluk to one Mahomed Bakshi Mian and put him into possession, but the lessee made default in payment of rent for arrears of which a decree was passed against him, in execution of which his interest was brought to sale, and purchased by the talukdar in 1898.

The plaintiff after setting out the facts claimed that land in dispute was a re-formation on the site of land which had been washed away by the river in respect of which the first defendant had asked for and obtained abatements of rent; that it was therefore part of the plaintiff's zamindari, and had been since its re-formation and up to the dispossession by the defendants in 1902 in possession of the plaintiff who had from 1889 to 1901 realized grazing rents therefrom. He denied that the first defendant had any title whatever to the land, and prayed for a decree for possession with mesne profits against him, and in the event of his claim for ejectment not being granted against the other defendants he prayed for a decree against them for a fair and equitable rent.

The defence of the first defendant was that he and his tenants had all along been in possession of the land in dispute, and that he was entitled to hold it both under the kabuliat of 1837, and on the ground of limitation by adverse possession for more than 12 years; the char land in suit having begun to form some years previous to 1889. The other defendants supported the case of the first defendant, and contended that the appellant was not entitled to mesne profits or to rent from them.

The District Judge found that the plaintiff had proved possession of the char land in suit up to 1896, and also in 1901; and that the first defendant had

failed to prove adverse possession for 12 years; that the possession of the latter only commenced from 1899; and that the suit was therefore not barred by lapse of time; that gradual abatements had been granted to the first defendant on the ground of diluvion for the entire land in suit, and that therefore he could not claim it as re-formation on his taluk, nor assert any title to it by accretion. In the result a decree was made in favour of the plaintiff for possession as against the first defendant, for his ejectment and for mesne profits and costs, and also for a declaration of his right to receive fair and equitable rents from the other defendants.

From that decision the first defendant appealed to the High Court and a divisional Bench of that Court (SHARFUDDIN AND COXE JJ.) allowed the appeal and reversed the decree of the District Judge.

SHARFUDDIN J. (after stating the facts and referring to other points not now material) said—

"We have it that soon after the execution of the kabuliat the river began to recede which brought more lands into the possession of the talukdar, and that the zamindar twice obtained rent decrees for the excess lands; and on no occasion did she ever claim these lands as her khas zamindari land. From her conduct I gather that she allowed the talukdar to hold possession of those lands as a part of his taluk, while she claimed to be entitled to receive rent from him. The talukdar latterly obtained abatement decrees in three successive suits for the diluviated lands. These lands having been washed away by the river were thus thrown into the category of unassessable lands. When these lands again re-formed on their old sites or became accretions to the lands already in possession of the talukdar, I do not see why the representatives-in-interest of the zamindar who created the taluk should not follow the procedure that was followed by her in the two suits for rent of excess lands. On the construction of the kabuliat coupled with the conduct of the original grantor of the mokurari in bringing enhancement suits instead of suits for ejectment, I am of opinion that the intention of the parties at the time of the creation of the taluk was that with the increase or decrease of area the rents would enhance or abate, and that if the talukdar was dispossessed by the action

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of the river of any portion of the taluk, he would be entitled to take into his possession the lands that might be thrown up by the river, but that he would be bound to pay rents at the stipulated rates. . . . . We have been referred to a number of authorities both of the Judicial Committee and of this Court with reference to right to accretion or re-formation I do not think it necessary to discuss those authorities inasmuch as I hold that the terms of the kabuliat in conjunction with the recognition by the andlord of the lawful possession of the defendant in the two suits for excess rent mentioned above proves the title of the defendant to the char in dispute."

COXE J. (after referring to the cases in which it was held that section 4 of Regulation XI of 1825 did not apply to land that had been washed away by a river and had again re-formed on the original site, unless it had been so abandoned as to have merged in the public domain) continued:—

"Now in the present suit it is the case of both sides that the disputed land is a re-formation *in situ*. Nor is it alleged that any remission of Government revenue has ever been asked for or given with respect to the land washed away from the estate in which the taluk Ram Saran Pal is situated. So far as the estate is concerned, the land cannot be regarded as an accretion or as coming within the scope of section 4 of the Regulation. That being so it seems hardly possible to me that it can be regarded as an accretion to the subordinate taluk. I think therefore that the defendant cannot claim the land as an accretion to his tenure, nor can he, I think, claim it as a re-formation *in situ* under the general law inasmuch as he has thrice applied for and obtained remission of rent for diluviations. To succeed therefore he must show that he is entitled to the land by virtue of his contract with the plaintiff."

And after referring to the terms of the kabuliat his Lordship proceeded—

"Now these words may, of course, be differently construed by different persons. But reading them with the evidence of what the parties did under the kabuliat I am satisfied that by that instrument the whole of Algi was let to the defendants' predecessor; that it was recognized that the area would probably vary from time to time, inasmuch as, to quote the written statement, a strong tidal navigable river was situate near the boundaries; that therefore a rate of rent per drone was fixed and provision made both for enhancement and reduction of rent; and finally that it was understood

that no allowance would be made for temporary fluctuations of cultivation due to causes not of a permanent nature such as inundation, drought, etc."

On this appeal,

De Gruyther K. C. and *A. M. Dunne*, for the appellants, contended that the char land in dispute formed on its re-formation part of the khas lands of the appellants' zamindari, and the title to it was in the zamindar and not in the patnidar. The High Court had held that the terms and provisions of the patni lease, together with the conduct of the parties, governed the case, and had decided it on a wrong construction of the lease in favour of the respondents. But the lease was of a patni taluk, and there was no intention that it should be subject to variation from time to time. It was meant to be a definite lease of certain land, which was within certain stated boundaries, and at a fixed rent (subject to the conditions as to measurement). The patnidar had obtained an abatement of rent when the land was diluviated: he therefore then lost all title to the diluviated land, and on its re-formation the zamindar became entitled again to receive rent for it. Reference was made to *Lopez* v. *Muddun Mohun Thakoor*(1); *Hemnath Dutt* v. *Ashgur Sindar*(2); *Saligram Singh* v. *Palak Pandey*(3); *Mazhar Rai* v. *Ramgat Singh*(4); *Afsurooddeen* v. *Shorooshee Bala Dabee*(5): and Bengal Act VIII of 1869, sections 18 and 19 as to the right of a tenant to claim abatement of rent for land diminished in quantity by diluvion. The respondents had not proved the adverse possession of 12 years which they set up. The District Judge rightly held that the appellants were entitled to eject the respondents. But should it be held that they were

(1) (1870) 13 Moo. I.A. 467.
(2) (1879) I. L. R. 4 Calc. 894.
(3) (1906) 6 C. L. J. 149.
(4) (1896) I. L. R. 18 All. 290.
(5) (1863) Marsh. 558, 560.

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not so entitled, they claimed a right to receive a fair and equitable rent for the land in dispute.

Kenworthy Brown, for the first respondent, contended that the High Court was right in the construction it placed on the patni lease of 1837, the contract between the parties on which that Court held the suit must be decided: the same construction had been put upon the lease in the previous litigation between the parties. By the decision of the High Court the respondent was entitled to the land which had re-formed, paying rent to the appellants for it. The respondent, it was submitted, was therefore entitled to lands added to his taluk by the action of the river. The suit, so far as it claimed to eject the respondent and his tenants, was barred by limitation because the appellant had not proved the cause of action alleged by him, namely, that he was dispossessed by the respondent in 1902.

DeGruyther, K.C. replied.

The judgment of their Lordships was delivered by

Dec. 10.

MR. AMEER ALI. The sole question involved in this appeal, which is from a judgment and decree of the High Court of Bengal relates to the title to certain lands that had been washed away some years ago by the river Siddhi in the Noakhali district and have since re-formed in consequence of a change in the course of the stream.

The plaintiffs, appellants, are the owners of a zamindari called pargana Bhulua, situated in that district. Within this zamindari lies a patni tenure called taluk Ramsaran Pal, created so long ago as 1837 by one of the predecessors in title of the present zamindars. The taluk is now owned by the first and second defendants, respondents in this appeal. The

remaining numerous defendants are ryots placed on the land, by the patnidars, since its re-formation.

The dowl kabuliat executed by the patnidar in respect of the tenure shows that it comprises parts of two kismats or subdivisions of villages named respectively kismat Paniartek and kismat Algi; and the area included in the taluk was evidently given approximately, for the lease contains the following covenant—

"If the land be found to be more on measurement by *nal* prevalent according to the custom of the pargana, I shall separately pay the rent thereof at this rate; if it be found to be less, I shall get remission therefor."

Their Lordships have little doubt that the reason for the approximate statement of the area and the particular provision regarding the variation of the rent in certain probable contingencies was due to the fact, which has not been seriously controverted, that a strong tidal river flowed close to the boundaries of the taluk in question.

It is in evidence that in 1843 the plaintiffs obtained a decree in the Revenue Courts for increased rent on the ground that additional land was found upon measurement to be in the patnidar's possession.

Later, considerable parts of the Algi lands having been washed away by the action of the river, the defendants obtained, under the provisions of s. 19 of the Bengal Council Act VIII of 1869, a proportionate remission of rent. The last proceeding in this respect was in 1889.

Since then the diluviated lands have re-appeared and admittedly reformed *in situ*. With their re-appearance disputes arose between the parties; the plaintiffs claimed that the lands in question formed part of their zamindari, whilst the defendants contended that they were accretions to the taluk. Each

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party attempted to exercise rights of ownership in order to create evidence of adverse possession against the other side. Their Lordships agree with the High Court that the evidence on this point is wholly inconclusive.

The suit was brought by the plaintiffs, the zamindars, in June 1906 to obtain khas, or direct and exclusive, possession of the lands in question by a declaration of their title, the usual form of relief asked for in the Indian Courts in these cases. In the atlernative they urged that if their claim to khas possession failed, it might be declared that the defendants were entitled to hold the land subject to the payment of proper rent for the same. The defendants, besides pleading that the lands in suit were accretions to their taluk, urged that the zamindars were only entitled to rent, but not to khas possession.

The District Judge made a decree in the plaintiffs' favour substantially on the ground that as the defendants had obtained abatement of rent in respect of the lands that had been washed away by the river, they had lost all title to the re-formed lands. On appeal the High Court has taken a different view. It has held in substance that having regard to the terms of the contract and the conduct of the parties, the plaintiffs had no right to eject the defendants from lands which originally formed part of kismat Algi and had been washed away by the river. They accordingly dismissed the plaintiffs' suit. In their Lordships' opinion the learned Judges are right in holding that the lands do not come within the provisions of s. 4 of Regulation XI of 1825, and cannot be claimed by either party as accretions to their respective property. The learned Judges of the High Court appear, however, to have laid too much stress on the terms of the kabuliat and the evidence of intention deducible

from the various proceedings in respect of additional rent and abatement of rent. They evidently felt pressed by an older ruling of the Calcutta High Court in *Hemnath Dutt* v. *Ashgur Sindar* (1). Their Lordships, however, do not find themselves in accord with the rule of law expressed in that case. They think that the principle applicable to this class of cases is correctly enunciated in *Mazhar Rai* v. *Ramgat Singh* (2).

In the present case there is nothing to show that, by claiming or accepting remission of rent in respect of lands washed away from time to time by the action of the river, the defendants abandoned, or agreed to abandon, their rights to such lands on their re-formation *in situ*, as is admittedly the case here. The diluviated lands formed part of a permanent, heritable, and transferable tenure; until it can be established that the holder of the tenure has abandoned his right to the submerged lands it remains intact.

In the result their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

This decree, however, will be no bar to any proceeding on the part of the plaintiffs authorized by law to recover proper rent in respect of the re-formed lands.

Appeal dismissed.

Solicitors for the appellants: *Morgan, Price & Co.*

Solicitors for the first respondent: *T. L. Wilson & Co.*

J. V. W.

(1) (1879) I. L. R. 4 Calc. 894. (2) (1896) I. L. R. 18 All. 290.