

of opinion that the judgment of the Commissioner of Ajmere should be affirmed.

They will therefore humbly advise Her Majesty that that judgment be affirmed, and that this appeal be dismissed.

*Appeal dismissed.*

Solicitors for the appellant : Messrs. *W. & A. Ranken Ford.*

1884

RAO  
BAHADUR  
SINGH  
v.  
PHUL KUAR.

ALIMUDDI AND OTHERS (DEFENDANTS) v. KALI KRISHNA TAGORE  
(PLAINTIFF.)

[On appeal from the High Court at Fort William in Bengal.]

*Measurement of land subject to alluvion and diluvion according to agreement—Effect of error as distinguished from fraud.*

P. C.\*  
1884.  
February 22.

A superior owner of chur land, and his tenants, who held it in "hawaladari" tenure, agreed, with reference to alluvion and diluvion, that the chur should be measured from time to time, on notice, and that unless the tenants should give a separate "daul kabuliyat" for the land found to be accreted, the superior owner should take possession of it.

A measurement by the superior owner was made on notice to the tenants, and *bond fide*; but it was incorrectly made, the tenants, however, raising no objection at the time. They, afterwards, when a suit was brought against them by the superior owner for possession of alleged accreted land, set up the defence that the measurement had been made in their absence, and was incorrect.

*Held*, that the tenants could not defeat the suit, merely on the ground of the incorrectness of the measurement, there being no fraud; but that they were entitled to ask the Court to decide what the amount of the property was which the plaintiff was entitled to recover.

APPEAL from a decree (2nd February 1881) of a Divisional Bench of the High Court, reversing a decree (16th June 1879) of the Second Subordinate Judge of Backergunj.

The question raised by this appeal was as to the right of the plaintiff to obtain khas possession of land that had accreted to a chur, of which the defendants were tenants as hawaladars (1),

\* *Present*: LORD BLACKBURN, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) "Hawaladari," a local term for a tenure (hawala being literally "an entrusting") in the district, where zemindars and taluqdars, with a view to reclaiming land, made it over to tenants, giving them a permanent and transferable interest therein.—*Hunter's Statistical Account of Bengal*, Vol. V, p. 372.

1884  
 ALIMUDDI  
 v.  
 KALI  
 KRISHNA  
 TAGORE.

and of which the plaintiff was superior owner, there being an agreement between the parties relating to alluvion.

In 1859 a kabuliyat, of which the material portions are set forth in their Lordships' judgment, was executed by the defendants to the plaintiff; and the latter having on measuring the chur, after due notice, found that accretion had taken place, claimed the above right, in pursuance of the defendants' agreement with him. The measurement, however, was incorrect.

The Court of first instance dismissed the suit, holding that, as the quantity of the excess land had not been correctly ascertained, in pursuance of the agreement between the parties, the cause of action had not been established.

On appeal, a Divisional Bench of the High Court (McDONELL and FIELD, JJ.) found that, the land having been measured by the amin of the District Court, there was upon the evidence no doubt as to the quantity of the accretion, and holding that the defendants had failed to carry out their part of the contract, decreed to the plaintiff the possession of land accreted to the chur, according to the amin's map on the file.

On the appeal of the defendants,—

Mr. J. Graham, Q.C., and Mr. J. D. Mayne appeared for the appellants.

Mr. T. H. Cowie, Q.C., and Mr. R. V. Doyne for the respondent.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—In this case the plaintiff, who may be conveniently hereafter called the landlord, was the superior owner of certain chur land which was held by the defendants in *hawdadari* tenure. The rights of the parties are determined by a pottah and kabuliyat which were executed in 1859. It may be stated generally that the plaintiff's claim is to recover khas possession of certain land which, since that pottah and kabuliyat were executed, have accreted to the chur of the defendants. The kabuliyat, in the first place, fixes a certain rent for the land then in existence—a rent variable according to the nature of the property and the extent to which it is cultivated or culturable, and gradually rising to a maximum of five rupees, and after a certain number of years amounting

in the whole to a sum of Rs. 2,998. The part of it more immediately material in this case is as follows: "At the interval of every three years, in the month of Magh of the fourth year, we will take a measurement amin from the principal office appointed by you, cause the laud of the said chur and the whole *haradli* to be measured with the prevailing rod of eight cubits and eight fingers, and record our presence on the measurement chitta. And of the land which, according to that chitta, is found to have accreted in excess of the settled land of the said *haradli*, we shall get a deduction of an area of land equal to one-sixth of each of these descriptions of excess land, i.e., assessed land, culturable land, and *dhal* chur land, and after executing a separate daul kabuliyat for the remaining quantity of land with a *keisbundi* similar to the present one, stating the rents which will be due, i.e., the rent of the assessed land at the permanent rate of Company's Rs. 5-6-6 pies from the year succeeding that of the measurement, that of culturable potit land after being rent-free for three years, and for the next three years paying rent at the progressive rate;" and then the rent is stated to rise in the succeeding years. Then it goes on: "If by that measurement the quantity of land now given be found to be diminished by reason of diluvion, after deducting an area at the same rate from the falling-off in the quantity of land, we will get a deduction from the year succeeding that of the measurement of an amount which will be due at the rate of Rs. 5-6-6 pies per kani for the falling-off in the quantity of the talabi land; and separate deeds shall be executed and delivered, and we will pay rent accordingly. And until the whole of the above chur land is settled according to rules, you will continue to receive separate rent for the *heli* and *hogla* growing on the said chur. If at the stated time we do not take an amin and cause measurement, you will appoint an amin and cause the entire land of the said chur to be measured. And no objection shall be entertained that we have not recorded our presence on the chitta of such measurement. And if for the excess land, after deducting the settled land covered by our daul from the land stated herein, we do not duly file a separate daul kabuliyat, then we shall be deprived of our right of obtaining a settlement of such excess land, and of the land which will

1884

ALIMUDDIN

v.  
KALI  
KRISHNA  
TAGORE.

1884

ALIMUDDI

v.  
KALI  
KRISHNA  
TAGORE.

accrete in future; they shall become your khas property." It is under this clause of the kabuliyat that the plaintiff claims. He alleges that the defendants have not duly filed a daul kabuliyat, as they ought to have done, and that therefore the land has become his.

The facts, so far as material, are these: No measurement was made by either party until the year 1875. Nothing would appear to turn upon that, because neither party appears to have required the other to do it; and possibly there was no necessity for it. In 1875 the plaintiff caused a measurement to be made. He gave the defendants notice to attend. They did attend for a day or two; but subsequently they attended no more. He appears to have taken no steps upon that until December 1876, when he gave them a notice, whereby, after recording the terms of the kabuliyat, he goes on to say: "Thou, as you did not take an amin and cause measurement at the stated time, an amin appointed by me measured the lands of the said chur and drones: 65 drones 9 kanis 2 gundahs of land have been ascertained to be in your possession; and after deducting the said quantity of settled land therefrom, 24 drones 1 kani of excess land has been found. Deducting from the said excess land an area (rokba) equal to one-sixth thereof, i.e., 4 drones 3 kanis 1 gundah and 1 krant, according to the stipulations of the kabuliyat, rent and salami must be received according to the terms of the kabuliyat and pottah dated 8th of Cheyt 1205 for the remaining 20 drones, 10 kanis 2 gundahs 2 krants of talabi land, i.e., 12 drones, 2 kanis 12 gundahs 2½ krants of assessed land, 2 drones 11 kanis 5 gundahs 1 cowri of culturable poti land, and 5 drones 2 kanis 18 gundahs 3 cowris 2½ krants of dhali potit land"—which is to a great degree waste land. "Therefore, by this notice you are directed that within fifteen days from the service of this notice you shall appear before the principal officer of my catchery at Kayurhya, and, according to the terms of the said pottah and kabuliyat, give salami, and file a kabuliyat with a *kistbundi*, in respect of the rent of the excess land found on measurement. If you fail herein, i.e.: if you do not appear within the term stated in this notice, give salami, and file a kabuliyat by complying with the covenants as

stated, you shall be ejected from the said excess land, according to the terms of the said pottah and kabuliyat, and it shall be taken under my possession in khas right."

Of that the defendants took no notice whatever, and they did nothing. About twelve months afterwards the plaintiff brings this action, in which he seeks to obtain khas possession of the land which he had mentioned in this notice ; but he also prays for a further inquiry if necessary, and further demarcation of boundaries. " It is prayed that after demarcating the boundaries of 4 drones 1 kanis 82 gundabs of land settled with the defendants, or the settled lands, with any portion of the land covered by the pottah which may be found on mofussil investigation to have diluviated from the land covered by the boundaries given below, you will be pleased to give me khas possession of the excess land, according to what is stated in the schedule."

The case coming before the Court, the defendants filed a number of pleas, which gave rise to a number of issues, which were found against them. But upon the last issue, which is in these terms, " what is the quantity of the accreted land ; and whether, under all the circumstances, the plaintiff is entitled to khas possession thereof ?" the Subordinate Judge dismissed the suit of the plaintiff, upon the ground that the measurement which the plaintiff had made, and which is referred to in his notice of the 6th December 1867, was in many respects defective. There can be no question that it was defective, inasmuch as an amin of the Court was deputed to make a further inquiry ; and his report, which differs from that of the plaintiff's amin, is adopted by both Courts. The Subordinate Judge appears to have thought that the making of a substantially correct measurement, and giving a substantially correct notice in pursuance of it, was a condition precedent to the plaintiff's right to insist upon the defendant's filing the daul. That judgment was reversed by the High Court ; and the effect of the High Court's judgment is, that although the measurement of the plaintiff, was in some material respects defective and wrong, nevertheless that the conduct of the defendants was such that they must be deemed to have been in default in not filing a daul kabuliyat, as they ought to have done ; and that they, having made no objec-

1884

ALIMUDDI

v.  
KALI  
KRISHNA  
TAGORE.

1884  
 ALIMUDDI  
 v.  
 KALI  
 KRISHNA  
 TAGORE.

tion at the time, or indeed until the action was brought, to the measurements of the plaintiff, could not then be allowed to defeat his action on the ground of the measurement being defective, although they were unable to show what the correct measurements were—measurements on which the Court would act. That is the ground of decision of the High Court, in which their Lordships concur. It appears to their Lordships that the defendants were in default; that the plaintiff having made a measurement which is not impeached on the ground of fraud,—if it had been, the case would have been different,—but a *bona fide* measurement, in pursuance, as he believed and intended, of the agreement between the parties, it was the duty of the defendants, if they objected to it, to have stated their objection; but they having made no objection at the time, or indeed until the action was brought, it is too late for them to say that he had no cause of action, although they are entitled to ask the Court to decide what the amount of the property is which the plaintiff is entitled to recover.

On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they are of opinion that it should be affirmed subject to a slight modification. The High Court direct that a line be drawn on the map from a station marked 12, and so on. It appears to their Lordships that it would be more correct, instead of the Court drawing the line itself, to refer it back to the Subordinate Court to set out so much of the accreted land as, having regard to the nature, quality, and situation, ought to be taken to replace the *asli* land which has been diluviated since the date of the kabuliyat of the 21st March 1859, so that the defendants may continue to hold the 41 droves 8 kanis 2 bigahs of land, according to the terms of that kabuliyat.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment should be affirmed, subject to this slight variation; the appellant must pay the costs of the appeal.

Solicitors for the appellants : Messrs. *Barrow & Rogers*.

Solicitor for the respondent : Mr. *T. L. Wilson*.