PRIVY COUNCIL.

*P.C.** 1891 *November* 20, *December* 2, 1892, *February* 6.

SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF) *v.* DURBIJOY SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code, 1882, *ss.* 13, 224—*Decree for land, not effectively defining the boundaries, effect of—Act XIV of* 1882, *ss.* 13, 224.

The proprietary possession of alluvial land was claimed upon the averment that, having been gained as an accretion to the plaintiff's village, it had been wrongly excluded from settlement with the latter, in consequence of a prior decree, which, however, had not decreed the land to the defendants, as they alleged it to have done. In pursuance of that decree, which was made in 1865, the land had been, according to the evidence, taken by the defendants, in whose possession it was in 1868; from which date till 1883, when the present suit was brought, that land had been treated, alike by the Government authorities and by the defendants, as belonging to the latter. Had the question been one of limitation, the possession of the defendants for a period of twelve years would not have been sufficient to exclude this claim by the plaintiff, the Government, to recover whatever could have been shown to be its property. The question, however, was not one of limitation; and the fact of the possession having been retained for so long a period was used by the defendants, not to make a title, but to define or identify the land which the decree of 1865 had awarded to them. Although the specification of the boundaries (which had been merely by reference to the plaint which mentioned adjoining villages) had been ineffectual, the acts of the parties had been such as to fix the meaning of the terms used; and it was established by the evidence that the land now claimed was identical with that which had been made over under the decree of 1865, to which it related.

APPEAL from a decree (13th December 1886) of the High Court reversing a decree (30th March 1885) of the Subordinate Judge of Bhágalpur.

The suit out of which this appeal arose related to 2,169 bighas claimed by the Government as belonging to Bhawanundpore,

* *Present:* LORDS WATSON, HOBHOUSE, and MORRIS, SIR R. COUCH, and LORD SHAND.

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a mauza which it owned in the Monghyr district. This the Government had purchased in the year 1838, at a sale for default of revenue, at a nominal price; there having been no buyers for this village, which was then in immediate danger of being submerged, as it lay near the north bank of the Ganges, with four other mauzas, Simeria, Dumri, Kamraddinpore, and Ishakpore, of which last the defendants, thirty-six in number, were the owners.

Between Bhawanundpore on the south and Dumri on the north lay Kamraddinpore. On the west was land of which the designation and ownership were not determined in consequence of changes on the river's course. On the outside line of circumference of all these villages was Ishakpore, mixed up with parts of others of them. The course of the river changed as follows:—"Originally the river appears to have had its course considerably to the south of all these estates. It gradually moved to the north. It was moving northwards in 1843. It was further north still in 1846, and probably remained on the north side of the mahâls for some time after that. Subsequently it began moving to the south again. In 1858 it was far more southerly than it had been. In later years it was more to the south still, and, as we understand it, is so now." Thus the judgment of the division Bench (WILSON and O'KINEALY, JJ.) dealt with the physical state of things; and intimated that Ishakpore, the defendants' village, having been formerly to the north of the river, and having been washed away before 1848, there were afterwards large alluvial formations in the place where it had been, and upon neighbouring sites, more or less near the above-named group of villages, so that to which of them the new land belonged was not readily ascertained. When the course of the river was again further south, after having been north, the newly-formed land was dealt with by the revenue officers as an accretion to the old mahâl Bhawanundpore, which originally contained 1,700 bighas.

This was re-settled by the revenue authorities in 1846, but only for a few years. In the same year 1846 the thakbust survey and the geometrical survey were made. The newly-formed land, treated and re-settled as an accretion to the old mahâl Bhawanundpore for ten years, amounted to about 2,169 bighas, and

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was the subject of the present claim by the Government;—without reference to a much larger accretion of land on the river bank, still further south, said to amount to 13,000 bighas.

The High Court, after referring to the maps of 1843 and 1848, and the evidence, concluded that the eastern portion of the lands then assessed were substantially the same lands for which the present suit was brought. They added—"From 1848 onwards the Government remained in possession of that land as their own property. The settlement of 1848, though it shows that down to that time the Government had never claimed a proprietary right over the land, was a settlement of the land, as land in which the proprietary right had vested in the Government. That went on down to year 1858, the settlement of 1848 having been a ten years' settlement. In 1858 proceedings were taken to re-settle the same land. During the progress of the re-settlement proceedings of 1858 objections were raised by various persons. The defendants as owners of Ishakpore objected that what it was proposed to settle, or rather to re-settle, as part of Bhawanundpore, was really their property, and in Ishakpore. Objections were also raised by the owners of Simeria, one of the northern properties, that the land then being settled was their land. Others raised objections. All were disallowed by the settlement officers and the higher revenue authorities. The result was that in a suit brought in 1862 the Ishakpore shareholders claimed the land as owners of that village. They were aggrieved at the settlement proceedings of 1858, giving boundaries as to what was their claim. On an appeal to the High Court the suit was remanded on the 17th December 1866 to the Court of the District Judge, who, on the 21st June 1867, gave a decree to the then plaintiffs for the land claimed by them. On the 30th June 1868 there was an application for execution of the decree. A parwána for giving possession was issued on the 7th February 1868; and it would appear that whatever possession was given by the Court officers was given on the 26th April 1868."

The Court then considered the proceedings in execution, and also the arrangements for the re-settlement of Bhawanundpore in 1868-69; and held it perfectly clear that the settlement was made on the basis of the lands, then claimed by the Ishakpore people, being Ishakpore lands, and not part of Bhawanundpore. Therefore

in the settlement of Bhawanundpore those lands were excluded. That was a settlement for two years. It was first intended that it should be for ten years. But the higher authorities limited the settlement to two years only. What happened afterwards with regard to the settlement of the lands of Bhawanundpore was unknown. A series of maps prepared at that time made it clear that the land which was then excluded from the settlement as being Ishakpore land, and not included in Bhawanundpore, was the land which formed the subject of the present suit. And the defendants continued in possession of the land down to the date when the present suit was filed, which was on the 15th February 1883. Upon this the judgment continued thus:—

"In that state of things two questions arose: first, apart from the former suit brought in 1862, has the title of the Secretary of State to these lands been established? And, secondly, if so, are the lands the subject-matter of the present suit the same lands which were recovered by the now defendants in the suit of 1862? For if they were, notwithstanding any title in the Secretary of State existing prior to that date, the suit must fail.

"On the first question the lower Court has found in favour of the Secretary of State, but without giving at any length the reasons for so finding. The only property to which the Secretary of State ever acquired any title by any of the ordinary modes of acquisition of property, such as conveyance or the like, was the original mahál Bhawanundpore, containing 1,700 bighas, and bearing originally a jama of Rs. 1,001. Now, it is perfectly clear that the lands in suit form no part of the original mahál. Again, it is clear that at the earliest date at which we have to deal with the several properties which we have mentioned, they were all lying together, occupying between them the whole of the area included within the outside limits, and that therefore no action of the river could possibly wash away any land except at the cost of some of these mauzas. No land could form except as a reformation upon some of the mauzas. The result is that, under the law as it is now settled by the highest authority, there could be really no title acquired by accretion by anybody to the land now in dispute, or to any land similarly situated. The only title, then, which the Crown can possibly have to this land is a title by

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adverse possession under the Limitation Act. And the only time that they ever were in possession in any sense was from the year 1848 down to the time when they were ousted in consequence of the suit of 1862. Apparently, possession for the period from 1848 down to the time of the bringing of that suit gave the Crown a good title to this land by adverse possession under the Limitation Act. It is not necessary, however, for us to express any opinion decidedly upon that point. There may be some matters bearing upon the question which have not presented themselves to our mind. Had it been necessary to decide that question, we should have heard Mr. Woodroffe in reply. But we think it unnecessary to do so by reason of the view that we take upon the other question in the case.

"In the Court below it has been held that these lands were not the lands recovered in the former suit, and that conclusion has been arrived at in this way. It is said that the parties to that suit all had before them the survey and other maps of the year 1846. They all looked to those maps in preparing their plaint and written statements, and so on. It is assumed, therefore, that that suit was based on the survey maps, that it was decided on the survey maps, and that the decree must be construed as intending to give the Ishakpore people what appeared to be Ishakpore on the survey maps. That appears to us to be too summary a mode of disposing of the effect and construction of the decree in that case. It is especially open to this objection, that the settlement of 1848, of which the settlement of 1858 was really a reproduction, was itself based on the survey maps, and it is plain that it was justified by the survey maps. Yet that suit was brought to dispute the settlement of 1858. It seems almost impossible that the suit which disputed the settlement could have been based on the very maps on which the settlement was based. We think it necessary to examine more closely than has been done by the Court below the materials before us, in order to determine what was recovered in the former suit.

"That was a suit brought to question the settlement of 1858, and it was brought because certain claims, which were made by the Ishakpore people during the settlement of 1858, had been overruled by the settlement officers. Now, let us see what was the

subject-matter of the settlement of 1858, and what were the claims disallowed by the settlement officers. There is no difficulty in ascertaining them. It is clear that the settlement of 1858 was of the same lands as those settled in 1848. And as we have already shown, the settlement of 1848 was of the land lying between Simeria on the north, Kamraddinpore on the east, Bhawanundpore on the south, and some less clearly ascertained boundary on the west."

The Court then referred to maps made during the settlement proceedings of 1858, and to the survey maps of 1846. They found that the boundaries of the land sued for in 1862 fairly corresponded with those of the land now in suit, allowance being made for changes in the course of the river. They also found that possession, whether given by the Civil Court or not, was taken by the defendants after the decree of 13th June 1865, with the deliberate acquiescence of the settlement officers. The Judges, then, having pointed out that there had been nothing adduced to show what, if not this, the land formerly decreed was, concluded that its identity was established.

The appeal of the defendants was allowed, and the plaintiff's suit and cross appeal were dismissed with costs against him in both Courts. The Government having appealed—

Mr. *W. F. Robinson, Q.C.*, and Mr. *J. H. A. Branson*, for the appellant, argued that it having been found by the first Court (from which finding the High Court had not dissented), in accordance with fact, that the appellant had been in possession of the land in dispute from the year 1848 to 1862, a *primâ facie* title by prescription had thereby been acquired, unless the decree of 1865 had annulled that title. This the decree would not effect, unless it was proved by satisfactory evidence that the land in dispute was identical with that to which the decree related. The contention was, upon an examination of the maps and proceedings, that this was where the respondents' case failed.

The respondents did not appear.

Afterwards, on the 6th February 1892, their Lordships' judgment was delivered by—

LORD SHAND.—The Government of India, by their plaint in this case, dated the 30th January 1883, claim possession, as their

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property, of 2,169 bighas of land in the district of Monghyr, described by boundaries and delineated on a plan produced with the plaint. It is not disputed that the defendants have been in possession of the lands since June 1870, but the plaintiffs allege that this possession was obtained improperly and without title on the defendants' part; that although it has endured for upwards of 12 years, the ordinary law of limitation will not avail the defendants in a question with the Crown; and that the lands remain the property of the Government, being part of the mauza of Bhawanundpore which admittedly belongs to them.

The defendants maintain that the lands claimed are their property, and form part of their mauza of Ishakpore. They explain that many years prior to 1862 the river Ganges, which had flowed considerably to the south of Ishakpore, gradually encroached on the land to the north, and that in this way, in the course of time, it encroached on and covered or washed away the lands of Ishakpore prior to 1848; but that subsequently the river receded, taking again a southward course, and that in this way the lands of Ishakpore gradually again emerged on the north of the river, their old situation; and they maintain that their property never was lost, but that in 1862 they had right to these lands under the Government settlements and surveys of a much earlier date. In addition, however, to this contention they maintain as a defence, which must in the first place be entertained and disposed of, that it is *res judicata* that the lands in question belong to them, for they say that it was so decided in a suit at their instance against the plaintiffs which was raised in 1862, and in which final judgment was given in their favour in 1865, followed by possession taken shortly after the decree, and at all events by possession since June 1870.

The Subordinate Judge held that the plaintiffs were entitled to succeed in their claim to the land in question, with the exception of a triangular area described in his judgment. His view was that the possession obtained by the defendants after the judgment in their favour in the suit of 1862 was not such as could be effectual to them, as the Government officials had been misled in the proceedings relied on, and that the Government settlements and surveys of earlier times sustained the conclusion that the

lands in 1862 were not part of Ishakpore but of Bhawanundpore. The High Court, however, reversed this decision and decreed the dismissal of the suit with costs, holding that in a question between the parties "the lands now in dispute must be found to be lands which were recovered by the now defendants against the Government in the suit brought in 1862, and that therefore the claim on behalf of the Secretary of State wholly fails."

It cannot be disputed that if the lands now in question were included in the decree granted in the suit of 1862, the judgment of the High Court must stand, and it becomes necessary therefore in the present appeal to ascertain the facts bearing on this question.

The decree, dated the 13th of June 1865, ordered "that the suit of the plaintiffs be decreed," and "that the plaintiffs be put in possession of the lands in suit." The plaint itself described the lands of Ishakpore (of which a share of 15 annas 5 dams formed the subject-matter of the suit) by general boundaries only, and not by boundaries stated with so much detail or so delineated on a detailed plan, as to admit of the lands being identified and taken possession of in the same way as if they had been demarcated or described in detail. The decree was issued on the 16th June 1865. An execution suit followed, in which an order was granted on the 7th February 1868 directing possession to be given to the decree-holders. A return to this order, dated the 6th May 1868, bears that the peon "went to the mufassal and duly delivered possession" to the decree-holders, from whom he took a receipt acknowledging the delivery of possession; and this receipt duly filed in the proceedings of the Court, and dated the 26th April 1868, declares that possession was "awarded by beat of drum," and was obtained. On the face of these proceedings there is nothing to define the lands in suit more exactly than they are defined in the plaint. Some evidence has been adduced to show that the peon who executed the order placed *bullas* or bamboos along the boundaries of the ground to mark off the special lands of which delivery was made, but the evidence as a whole does not support this view.

It is, however, quite clear on the evidence that immediately after the delivery of possession of the 26th April, *bullas* were put into the ground to mark off the land described in the decree—it does

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not clearly appear by whom—and the evidence shows that the possession since that time, or immediately after it, of the land enclosed by these *bullas* has been with the defendants. Their Lordships hold this to be the result of the evidence because of the following facts proved. On the 29th April 1868, Gundur Singh and others had obtained a renewed lease and settlement of lands of Bhawanundpore, and on the 13th May 1868 they complained to the Settlement Officer that the Ishakpore maliks had, in execution of decrees through the nazir of the Court, taken possession of about 2,000 bighas of Bhawanundpore by posting *bullas*. The Collector deferred inquiry into the matter until the next cold season, and in the meantime other persons obtained the settlement from Government, the original settlement-holders having failed to find the requisite security. The order of the Collector on the 16th May, on the complaint made to him, was "that if it should appear on enquiry that some portions of the lands of this mehal" (*i.e.*, Bhawanundpore) "which were settled have been taken possession of by the proprietors of Ishakpore, then, after settlement of the question, the said portions of lands and jama can be deducted, and that they should at present submit a kabuliyat." The proceedings which followed are stated with considerable detail in the judgments of the Subordinate Judge and the High Court, and may be now briefly noticed. By an order proceeding from the Collectorate of zillah Monghyr two amíns were sent to the spot, who, on a date prior to the 12th March 1869, measured the lands of which the owners of Ishakpore had taken possession; and again delay occurred before the Collector personally took up the subject of the disputed lands. In June 1870, however, the matter was taken up and investigated by Mr. Lyall, the Collector, who, in the rubokari of the Collectorate, dated the 16th June 1870, after narrating the proceedings which had previously taken place, states:—"This year the papers on the record of this case were sent to this Court under the rubokari of the Collector for measurement, test and enquiry into the rate, and settlement of the boundary disputes;" and he thereupon goes on to say that he went to the mahál and tested the measurement, and found it to be correct. He adds, that "after the necessary enquiries and settlement of the disputed land, a detail of which

is given in the English judgment, dated the 25th February 1870," he made a settlement for ten years. While, in a subsequent passage of the rubokari, which deals with the detailed measurements of lands under the heading "The determination and enquiry made by the Settlement Officer regarding the same," occurs this passage :—"Accordingly, for the reasons assigned in the judgment in English, dated the 25th February 1870, the entire quantity of land, the subject-matter of the dispute which was between (the proprietors) of mauza Mahadeo Simeria, Ishakpore and Siswa, is excluded from this mahál," &c. If the judgment of the 25th February 1870 had been produced, it would probably have thrown light upon the posting of the *bullas*. It is not in the record; but there is enough in the other papers produced to show that the land excluded from Bhawanundpore was that of which the lessees of the Government complained in 1868 that it had been taken by the maliks of Ishakpore. From that time till 1883, when the present suit was instituted, the lands in question have been treated alike by the Government authorities and by the defendants as part of the defendants' mauza of Ishakpore, and not as belonging to the Government mauza at Bhawanundpore.

The question remains, what is the legal effect of these proceedings extending over so long a course of time? The appellants maintain that these proceedings shall have no effect in reference to the settlement of the disputed questions of property which have arisen between the parties, either in the suit of 1862 or in the present case. Their Lordships cannot assent to this view. If the question were one of limitation, the possession of the defendants for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property. The question raised, however, is not one of limitation. The possession given and taken, and retained for so long a period, and in the circumstances stated, is used by the defendants not to make a title, but to define the land which the decree in the action of 1862, followed by the execution order, gave them. The decree gave the defendants the lands they claimed in the suit, and then in the possession of the appellants. It did not contain specific boundaries; but the acts of the parties immediately after the

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decree are very important to fix the meaning of indefinite terms in the decree. And when we find that the Ishakpore party took possession within a few days of the peon's visit, ostensibly under the nazir's authority, as the petition of Gundir Singh shows; and that the Bhawanundpore party complained to the Collector; and that the Collector supported the action of the Ishakpore party, there is very strong reason to infer that the possession taken was rightfully taken in execution of the decree. It is true the proceedings were not those of a Civil Court. Had they been so, it would not have been possible to maintain the present suit. But the proceedings were taken before the revenue authorities whose duty it was to fix the right boundaries for revenue purposes. It is not suggested that these officials acted otherwise than honestly. The argument submitted by the appellants' counsel was that the officials erred or were misled; that the Government amín too readily accepted the boundaries shown to him as covered by the decree, and that the Collector merely adopted what the amín had reported without any sufficient independent inquiry. Their Lordships can see no sufficient ground for any such inference in the documents and other evidence adduced. They will humbly advise Her Majesty that the appeal should be dismissed, and the judgment of the High Court affirmed. The appeal having been argued *ex parte*, their Lordships make no order as to costs.

Appeal dismissed.

Solicitor for the appellant: The Solicitor, India Office.

C. B.

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*P.C.** 1891 *December* 1 & 18.

NECKRAM DOBAY (PLAINTIFF) *v.* THE BANK OF BENGAL (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Pledge—Mutual rights of pledgor and pledgee—Pledgee's taking over the property pledged, crediting the value as if it had been sold to himself, effect of—Wrongful conversion—Absence of proof of damage to the pledgor—Account—Damage to pledgor, proof of.

Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged, without the authority of the

* *Present:* LORD MORRIS, LORD HANNEN, SIR R. COUCH, and LORD SHAND.