RAI MANIK CHAND *v.* MADHORAM AND OTHERS.

P. C.*
1869.
Mar 10.

ON APPEAL FROM THE LATE SUDDER DEWANNY ADAWLUT AT AGRA.

Land separated from Estate by a change in course of a River—Reg. XI. *of* 1825, *s.* 4, *cl.* 2—*Immemorial Custom.*

When a party has proved that land which formed part of his estate has by a sudden change in the course of the river been separated, he is entitled to recover such land under clause 2, section 4, Regulation XI. of 1825.

When a party claims such land upon the ground of immemorial custom, he must prove such custom.

The canoongo papers are not sufficient evidence to prove immemorial custom.

The proceedings shewing that such custom obtains on the banks of one river will be no evidence to prove that it obtains on the banks of another.

THEIR Lordships are of opinion that the only arguable question upon this appeal is, whether it has been established, within the meaning of the 2nd section of Regulation XI. of 1825, (1); that there is an immemorial custom by virtue of which the river Ganges at the point in question is taken to be the boundary between the estates on either bank, so that alluvial land, like that in question, belongs to one or other of those estates according to the actual course of the river.

If that custom is not established, their Lordships are perfectly satisfied that the appellant had succeeded in the Court below in establishing every circumstance which was necessary to bring his case within the 2nd clause (2), of the 4th section of the same

* *Present*:—LORD CHELMSFORD, SIR JAMES W. COLVILE, LORD JUSTICE SELWYN, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEEL.

(1) *Sec.* 2, *Regulation* XI. *of* 1825.—"Whenever any clear and definite usage of shikast pawast, respecting the disjunction and junction of land by the encroachment or recess of a river, may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates, shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment of one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usages."

(2) *Clause* 2, *Sec.* 4, *Regulation* XI. *of* 1825.—"The above rule shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity and preventing the recognition of the land so removed. In such cases the land, on being clearly recognized, shall remain the property of its original owner."

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Regulation; that he had shown that the land was separated from his estate by a sudden change in the course of the river; and had clearly identified it as cultivated land which had formed a portion of his estate.

Upon the question of immemorial custom, he had the judgment of the Zilla Court in his favour. The learned Judges of the Sudder Court have reversed that judgment on the ground that they thought there was sufficient evidence of the custom to warrant them in so doing. That is not their Lordships' opinion.

The reasons assigned by the learned Judges do not support their conclusion.

They rely principally on the letter of the Collector, Mr. Morris, which was written in an earlier stage of the proceedings mentioned in the record to the Sudder Board of Revenue, but it seems to their Lordships that they have put an entirely erroneous interpretation upon that letter. That letter, as their Lordships read it, amounted to this: that the main stream of the Ganges had hitherto been held to constitute the boundary of the two pergunnas for police and fiscal purposes; and that if that rule were to determine the proprietary right to an alluvial land, it would no doubt follow that the land in question belonged to the zemindari on the southern side of the river. But the Collector went on to state his opinion, and to give reasons for that opinion, that the question of proprietary right was not to be determined upon that principle. Therefore, the Judges of the Sudder Court seem to have been in error in treating the opinion of the Revenue Officer so given as an argument for coming to the conclusion to which they did come, and it may be further observed that the Sudder Board of Revenue, the authority to which the Collector's letter was addressed, does not appear to have taken that view.

Then as to the other evidence upon which the Judges of the Sudder Court rely, it seems to their Lordships to be far from sufficient to justify the conclusion that an immemorial custom had been proved. The canoongo's evidence, which has been chiefly relied upon, is clearly too slight for that purpose. The proceeding with reference to the Gogra, which is set forth in the record, if it amounts to a decision that such a custom as

that which is now set up obtains on the banks of that river affords no evidence that a similar custom exists on the banks of the Ganges where it forms the boundary between the pergunnas Jhosi and Chail. The language of the Regulation implies that the custom to be proved is a local custom.

Upon the whole, then, their Lordships are of opinion that in holding that the custom was established, the Court below was wrong.

The only further question for their Lordships to consider is, whether they should reverse the decree under appeal and affirm the decree of the Court of first instance, or whether they should remit the case as the Judges of the Sudder Court seem at one time to have thought of remitting it for a new trial? It appears that the parties were fully informed what issue they had to prove; they should have come prepared with evidence to prove it if it was capable of proof, and they have failed to do so.

Their Lordships think therefore they ought to take the first of the before mentioned courses, *viz.*, reverse the judgment of the Court of Appeal, and affirm the judgment of the Zilla Court.

Considering however that the case of the respondent may have failed from mere defect of proof, and that similar cases may arise between other parties in the neighbourhood of this locality, their Lordships are desirous to state by way of caution that this judgment should not be quoted in any future case between other parties as a conclusive decision of this Court of Appeal, to the effect that any such custom as that which has been here alleged exists. All they intend to decide is, that it lay on the respondents to prove the custom which it was essential to their title to prove, and that, as they have failed to do so, the title of the appellant must prevail.

Their Lordships therefore will humbly recommend Her Majesty to reverse the decree of the late Sudder Dewanny Adawlut at Agra; in order that, in lieu thereof a decree be made dismissing the appeal to that Court from the decree of the Zilla Court of the 27th July 1864 with costs. And the respondents must also pay the costs of this appeal.