The 4th June, 1857.

PRESENT: H. T. RAIKES, B. J. COLVIN AND J. H. PATTON, ESQRS., *Judges*.

CASE NO. 635 OF 1856.

Special Appeal from the decision of Mr. D. I. Money, Judge of Moorshedabad, dated 10th December 1855, reversing a decree of Moulvee Syed Abdool Wahid Khan Bahadoor, Principal Sudder Ameen of that district, dated 17th November 1848.

BEJOYGOBIND BURRAL AND OTHERS (*Defendants*), *Appellants v.* BISHESHWUR RAE AND OTHERS (*Plaintiffs*), *Respondents*.

[*Special appeal—Dismissal—Wasilat—Costs.*]

Special Appeal dismissed on the first point set forth. Order amended as to wasilat and costs.

Vakeels of Appellants—Baboos Kishenkishore Ghose and Jugdanund Mookerjea.

Vakeels of the Respondent, Mr. Robert Watson—Baboo Ramapersaud Roy and Mr. R. T. Allan.

Vakeels of the Respondent, Omeshnarain—Baboo Unnodapersaud Banerjea and Sreenath Dass.

THIS case was admitted to special appeal on the 12th December 1856, under the following certificate recorded by Messrs. A. Sconce and J.S. Torrens:—

Mr. A. SCONCE.—"Plaintiffs, now respondents, in the position of purchasers of pergunnah Rokenpore, &c., which at a sale for arrears of revenue, they bought on the 30th January 1842, instituted this suit to recover possession of beegas 435-2-5, described as *bhuratee* land, which they claimed as belonging to beel Sonadeh, situated within the zemindaree of pergunnah Rokenpore.

[968] "On the 24th April 1850 the claim of plaintiffs' was dismissed by the zillah judge under the law of limitation, but on the 19th August 1852, the Sudder Court ruled that limitation against an auction-purchaser, at a sale for arrears of revenue, must be reckoned from the date of purchase, and accordingly the suit was tried by the zillah judge on its merits on the 25th June 1853. In this decision, the judge remarked that beel Sonadeh (as such) was proved to belong to the plaintiffs' zemindaree, and that the disputed land was the *bhuratee* of beel Sonadeh, but in considering whether by virtue of the terms of the permanent settlement the lands fell within the plaintiffs' zemindaree, and should of right be held to belong to that estate, the judge observed that *if the solid land had been formed prior to that settlement, the plaintiffs can have no title to it*, for the Government could not sell to them more than they had actually settled in permanency with the original proprietors, and if subsequent, the defendant should be held to have been in possession of a portion of an estate, which formed the original zemindaree of plaintiffs, and that plaintiffs would be entitled to recover this portion by their purchase. The judge appears to have concluded that as the case stood, the defendants were proved to have been in possession of the land for more than fifty years; that their possession at the time of the permanent settlement should show that the land formed part of their estate, and not of plaintiffs, and that plaintiffs, who came into court, asserting that the disputed land belonged to their estate, were bound to prove that it had accreted subsequent to the permanent settlement. The judge from his remarks, at page 50, on a second case, in which the same issue was raised, was of opinion that plaintiffs *by the terms of their settlement* had a right to the julkur or water of

beel Sonadeh, and not to the land; and he concluded, as I apprehend, from the whole evidence before him, that the long adverse possession of defendants always recognised by the predecessors of these plaintiffs, established the presumption that the land at the time of the permanent settlement belonged to mat Bagdeh under their village of Ramdebpore.

"This decision came before the Sudder Court on the 9th April 1855. It was observed that as the judge has decided that the lands in dispute are the *bhuratee* lands of a beel comprised in plaintiff's zemindaree, and plaintiff has a right to possess that zemindaree with all its appurtenances, it was for defendants to shew cause why these lands so found to have been included in plaintiff's estate, could be held by them as belonging to their zemindaree: the judge has gone on a wrong principle in requiring the plaintiffs to prove when these lands accreted. The case was accordingly remanded, and finally the zillah judge observing that the defendants only showed a presumptive proof of ownership by reason of their very long undisturbed possession of the disputed **[969]** lands, but not such evidence, as under the ruling of the Sudder Court, appeared to be required, decreed the plaintiffs' claim as laid in the plaint.

"In the application made for the admission of a special appeal against this judgment, several grounds are laid before us; one is that it was wrong to throw the onus on defendants; and a second that the zillah judge has not decided the case upon his own view of the evidence but upon what appeared to be the view of the Sudder Court; and upon the whole, it seems to me that the decree of the zillah judge has failed legally to determine the most material point at issue in the cause. It appears to me that an incidental remark made in the order of remand has injuriously for the defendants, narrowed the issue, which the zillah judge thought it competent to himself to try. It was said in the order of the Sudder Court that 'plaintiff has a right to possess his own zemindaree with all its appurtenances;' it has been inferred that the disputed land was an 'appurtenance' to the plaintiff's zemindaree; and defendants have been required to prove that it was not. Undoubtedly the Sudder Court did not mean to pronounce definitely that the disputed land *was* an 'appurtenance' to the plaintiff's estate, this would have been to beg the whole issue. On the other hand the zillah judge declared generally that possession by defendants at the formation of the permanent settlement was a good title; and on a review of the evidence was of opinion that the presumption was in favour of defendants' possession; nevertheless upon the supposed inference (which neither the Sudder Court nor the zillah judge can be said to have independently and legally inferred); that *prima facie* the disputed land *was* an 'appurtenance' to the plaintiff's zemindaree, defendants have been required to prove the contrary, and have been cast in the action, not because they did not prove the contrary, but because they failed to adduce evidence stronger than that of presumption.

"Under these circumstances, seeing that the plaintiffs come into court, asserting that the disputed land belongs to their estate, and justifying, by their privileges as auction purchasers, their exemption from the ordinary law of limitation, I admit the special appeal to try whether the material issue affirming their title to the disputed land can be held to have been fully and legally found by the zillah judge.

"I also admit the special appeal to try whether, under the circumstances of the case, wasilat should be awarded to the plaintiffs from the date of their purchase, or from the date of the demand made by them for the land."

Mr. J. S. TORRENS.—"I do not see grounds for admitting the special appeal in this case. The assertion of the defendants, on which they staked their case, was that the bheel in dispute belonged **[970]** to their zemindaree, not to that of which plaintiff was the auction purchaser; they did not raise, it appears to

me, the question of difference in the right of the julkur, and in the land, and as the fact appears to me to have been found that the property in dispute was not with their (defendants') settlement, and that it follows under the circumstances of the case, that it must have as a consequence, been with the settled estate of which plaintiff is auction-purchaser, I do not think any length of possession on part of defendants can be held to bar the claim of the auction-purchaser, who comes into court with all the rights of the party originally in settlement with Government, as such rights stood at the period of the decennial settlement."

JUDGMENT.

The first point raised by the certificate of special appeal is whether the material issue, affirming the plaintiff's title to the disputed land can be held to have been fully and legally found by the zillah judge, and the remarks of the judge, who admitted the appeal on this ground, would seem to imply that an incidental remark made in the order of remand by this court has, injuriously for the defendants, narrowed the issue which the zillah judge thought it competent to himself to try. But this does not appear to us to have been the effect of the court's order of remand. The judge had held in the original enquiry instituted by him to ascertain the proper locality of the lands, that they were *bhuratee* lands of bheel Sonadeh, which bheel appertained to plaintiff's zemindaree. A doubt then suggested itself to the judge as to whether these lands accreted before or after the permanent settlement, and he considered the plaintiffs bound to prove that the accretion and consequent possession of the defendants had occurred afterwards.

But the court in remanding the case held that as the lands constituted part of a bheel, which at the permanent settlement belonged to plaintiffs' zemindaree, the assumption of the fact, as found by the judge, compelled the defendants to prove that they were entitled to hold those lands as part of their zemindaree.

This, the judge says, they were unable to do, and clearly states that the evidence required was evidence to show "that the lands appertain to their zemindaree, or that they held possession of them prior to the decennial settlement and have continued to hold them up to the period of the purchase by plaintiff of the zemindaree, to which bheel Sonadeh belongs."

From this it appears to us that the judge rightly regarded the full intent and object of the issue he was directed to try, and has decided it against the defendants on their failing to produce the evidence, which was requisite to prove their right to the lands, and that neither the grounds of remand, as stated by this court, nor **[971]** the view taken by the judge in giving full effect to the order has tended in any respect to narrow the issue tried by him to the prejudice of the defendants.

On this first point then we see no reason to interfere with the lower court's decision.

On the question of wasilat, we would, however, modify the judge's order, and under the circumstances, decree to plaintiff wasilat only from the date of institution, a corresponding deduction being made for costs in the lower courts, but the costs in all other respects to be on the special appellants.