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defendants, but the decree being entirely in their favour, it was not necessary for them to file a notice of objection under section 561 of the Code of Procedure. They could support the decree on the ground that the second issue ought to have been decided in their favour. The High Court ought to have decided that issue, or have shown in their judgment a reason for not doing so. If it had been decided that the suit was barred by section 33, the appeal to the High Court ought to have been dismissed.

Upon both the grounds which have been considered, their Lordships are of opinion that the decree of the High Court ought to be reversed, and the appeal to that Court dismissed, with costs, and the decree of the Lower Court affirmed, and they will humbly advise Her Majesty to order accordingly.

The respondents, other than the Secretary of State for India in Council, must pay the costs of this appeal.

Appeal allowed.

Solicitors for appellants: Messrs. *T. L. Wilson & Co.*

C. B.

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*P.C.** 1890 *January* 31, *February* 4 *and* 5.

KHAGENDRA NARAIN CHOWDHRY AND OTHERS (PLAINTIFFS) v. MATANGINI DEBI AND ANOTHER (DEFENDANTS), AND A CROSS APPEAL.

[Consolidated appeals from the High Court, Calcutta.]

Decree—Form of decree—Suit for possession by owners of adjoining estates—Right of parties to equal moieties of property decreed, although each had claimed the exclusive title—Decrees dismissing their suits reversed, the evidence being sufficient as to the former, but not the latter right.

In cross suits between the owners of adjoining estates, each claimed against the other to be entitled to, and to be put into possession of, property situate on the boundary between their estates.

The High Court dismissed both claims on the ground that the evidence of the exclusive right of either party was insufficient.

Held that, although this might be so, there was nevertheless sufficient evidence of possession having been held by both the one and the other, and of the title of both, to support the conclusion that each had a claim to an equal moiety, to which each should be declared entitled. Each should be put into possession of the moiety which was opposite to and adjoined his estate.

* *Present*: LORD WATSON, LORD MORRIS, SIR B. PEACOCK, and SIR R. COUCH.

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Two appeals, consolidated and heard as one, from two decrees (21st May 1885) of the High Court, reversing one decree and affirming another (21st September 1883) of the Subordinate Judge of Goalpara, whereby the latter had dismissed the appellants' suit and had decreed the other. The decrees of the High Court dismissed both suits.

These consolidated appeals arose out of cross suits between, on the one side the appellants, who were zemindars of the Mechpara zemindari, and on the other the respondents, who represented the late Kirti Narain Chowdhry, the zemindar of Chapar, the latter having died while the suits were pending before the Subordinate Judge. Each party claimed the exclusive title to a water-course, termed by the one the danga of Bahirgacha or the Kodalkati bil, and by the other the Tilukmari sota, together with the julkar or fishery, of which the value was stated to be Rs. 5,500. It was situate on the boundary between the two zemindaries, on the west, north, and east of it being villages belonging to Chapar, while on the west, south, and east of it were villages belonging to Mechpara. According to the High Court, it was "what is called a sota;" "apparently an elbow, or offset of part of the Brahmaputra river," or low-lying land exposed to the action of the river or its channels. The boundaries were differently stated in the plaints in the two cases, while the amin's report made a third statement. The right to possess it had been for many years in dispute, the earliest decision, which however did not dispose of the question, having been in 1828. In 1849 the thakbust survey, preceding the regular survey, commenced, and the Deputy Collector in that year made an order, based on the "permanent lands having been washed away," which was followed by litigation in the Civil Courts, with orders for the amendment of maps in 1850, 1863, and 1875. None of these however were conclusive as to the present issue, which in effect was whether the disputed sota and julkar were within the one zemindari or the other. The disputes in the year 1877 were such that the Deputy Commissioner of Goalpara, as Magistrate of the district, attached the piece of water under the provisions of the Code of Criminal Procedure then in force, section 530 of Act X of 1872, by an order of 10th December 1877, which both parties in their suits filed in December 1880, on the same

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day, sought to have set aside, each party claiming exclusive possession.

The judgment of the Subordinate Judge, which by consent was to govern both the cases, dealt first with the name of the disputed water, and on this point concluded that Mechpara was right. His judgment continued thus :—

"I consider from all the circumstances of the case that the title to the disputed water has always been vested in the Mechpara zemindars. I now come to the question of possession, and I think from the fact of title alone a strong presumption of possession in favour of Mechpara is created, and this presumption is supported by the oral evidence of witnesses and by the production of kabuliyats and other documents. As I said in the course of the trial, I am not disposed, in cases of this kind, to place much reliance on the oral testimony of fishermen and villagers in regard to title and possession ; but in the present suit the documentary evidence produced by Mechpara is ample. Chapar has also produced kabulyats and jumma-wasil-bakis to show that they have for years leased and collected the rent of the Tilakmara sota ; but, as I have already held, the disputed water is not the Tilakmara sota."

He therefore decided in favour of the Mechpara zemindars, ordering that the attachment of 10th December 1877 be set aside, and that they should be put in possession of the disputed water, receiving the money realised by the Collector by the lease of it during attachment.

This decision was not maintained by the Judges of a division bench of the High Court (FIELD and O'KINEALY, JJ.), who were dissatisfied with the evidence relating to the possession of the sota by either party. They found that the maps represented only had been the Deputy Collector's view of the merits, and not the real possession by either party. Looking at all the proceedings from 1849 onwards, they found it to be impossible to decide that either party had been in possession of the disputed sota. Both parties were clearly out of possession at one time, and the possession in 1849, 1850, and 1851 had been disputed. Being of opinion that neither party had shown a title to the possession, or to the property, sufficient to outweigh the evidence in

favour of the other, the Appellate Court was of opinion that both suits should be dismissed. Decrees were made, accordingly, from which both parties preferred their appeals, under sections 595 and 596 of the Civil Procedure Code.

On these appeals,

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the Mechpara zemindars, argued that there was sufficient evidence to show that they were the owners of the sota as belonging to the Mechpara zemindari, and that they were in possession when possession was taken by the Deputy Commissioner of Goalpara in 1877. The decree of the Subordinate Judge had been set aside on insufficient grounds. Not claimed by the Government, nor by any third party, the sota was, in any view of the case, the property of either the plaintiffs or the defendants, unless, as might be the case, it belonged to both. The property had not been attached in order to its remaining in the possession of the Government for an indefinite time, and it was contended that both parties, according to a view of the evidence least favourable to the Mechpara zemindars, were shown to be entitled.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the representatives of the Chapar zemindar, argued that the evidence had shown an exclusive possession by the latter for a considerable period, and that the absence of claim by the Government, and the entire failure to prove title or possession on the part of Mechpara, gave weight to the claim on behalf of Chapar.

Mr. *T. H. Cowie, Q.C.*, in reply, contended that the judgment of the High Court, being purely negative, proceeded on evidence that in reality required an affirmative decision, viz. that Mechpara was entitled in equal part with Chapar. It was not necessary that the shares should have been marked out by evidence in the suit: that could be effected in future proceedings, and the statement of the title of the parties would satisfy the requirement of section 565, Civil Procedure Code, which, in effect, was that when the evidence on the record was sufficient, the Appellate Court should determine finally. The present judgment should be reversed, and an affirmative decree passed, in favour of each plaintiff, for half the sota, opposite to and adjoining Mechpara and Chapar, respectively.

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At the end of the argument, their Lordships' judgment was delivered by

LORD MORRIS.—These two appeals, which have been consolidated, come before their Lordships on appeal from the High Court at Calcutta. The High Court came to the conclusion that neither party had proved their case, and that both the suits instituted in the Subordinate Court should be dismissed with costs.

It appears that the Subordinate Judge had decided in favour of the zemindars of Mechpara, and had given them a decree setting aside an Order of Attachment which had been issued by the Magistrate under the 530th and 531st sections of the Criminal Procedure Code, and declaring in favour of their title to the sota in dispute and to the consequent relief.

Their Lordships are of opinion that the decrees of the High Court cannot be sustained, although their Lordships concur in the decision on the matters of fact which the High Court arrived at, namely, that neither of the parties, the zemindars of Mechpara or their representatives on the one side, or the zemindars of Chapar or their representatives on the other, have proved a title to the exclusive possession of the sota in question. The Mechpara zemindars claim the piece of water as the northern boundary of that part of their estate, and included in their estate, and known as "the Godalkati, Bahirgacha danga," while the Chapar zemindars allege that the piece of water is a portion of their estate and is called the "Tilukmari sota." The identity of the place appears to be very clear upon the map made by the amin who was sent to survey it, and that is the map which their Lordships now deal with, and which was dealt with by the High Court and by the Subordinate Judge. Their Lordships arrive at the same conclusion as the High Court with regard to the insufficiency of proof given either by the zemindars of Mechpara or by the zemindars of Chapar as to the right and title to the exclusive possession of the sota in question. But their Lordships are of opinion that the decrees of the High Court cannot be supported as pronounced by the High Court. They are of opinion that, although neither party has proved a title to an exclusive possession, there can be no doubt that possession belongs to the zemindars of Mechpara and to the zemindars of Chapar.

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The Government, who have attached the valuable point of the fishery pending this litigation make no claim, and they are really in the position of stakeholders.

The evidence in the opinion of their Lordships is insufficient, as already stated, to establish an exclusive possession by either of the parties. On the other hand it is equally cogent in their Lordships' opinion to show that there is possession between the two.

The result that their Lordships arrive at is that the decrees of the Subordinate Court and of the High Court should be respectively reversed and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective zemindaries, and be decreed to be put into possession thereof accordingly, and that both of the parties having failed in their contention as to an exclusive possession, each should bear their own costs of the litigation in the Subordinate Court, in the High Court, and of these appeals; and their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the Mechpara zemindars, Khagendra Narain Chowdhry and others: Messrs. *Watkins & Lattey.*

Solicitors for the representatives of the Chapar zemindar, Kirni Narain Chowdhry: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ghose.

MADHUB NATH SURMA (PLAINTIFF) *v.*

MYARANI MEDHI (DEFENDANT).*

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April 29.*

Assam Land and Revenue Regulation, 1886, *ss.* 2 *prov.* (*b*), 12, 39, 151, *and* 154—*Settlement-holder, his rights under a settlement—Nisf-kherajdar, his right to a settlement—Section* 154 *of the Regulation.*

The effect of sections 39 and 151 of the Assam Land and Revenue Regulation, 1886, is that a settlement made by a Settlement Officer, unless

* Appeal from appellate decree No. 943 of 1888, against the decree of A. C. Campbell, Esq., Deputy Commissioner of Kamrup, dated the 1st of February 1888, affirming the decree of Baboo Sibo Prasaud Chuckerbutty, Extra Assistant Commissioner of Gauhati, dated the 30th of August 1887.