Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kali Krishna Tagore v. *The Secretary of State for India in Council and another, from the High Court of Judicature at Fort William, in Bengal; delivered 23rd June* 1888.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

This is an appeal in a suit brought by the Appellant against the Secretary of State for India in Council (represented by the Collector for the district of Backergunge), and Moulvi Syed Moazzam Hossein Chowdhry, to obtain possession of about 300 bighas of land, described as marked D in a map prepared by the Civil Court amin in a previous suit, being reformation on the original site of the Plaintiff's zemindari, and to have it declared that the proceedings and orders in connection with the diara revenue survey of the disputed lands, by which the land had been attached as liable to be assessed for revenue, and a temporary settlement of it made with the Defendant Hossein Chowdry, could not stand against the Plaintiff's right, and were not binding on him.

The written statement of the Collector of Backergunge denied that the land in dispute was a reformation on the original site of the Plaintiff's land, and asserted that it was not

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included in the old thakbust or survey boundaries as Plaintiff's estate. It also stated that the boundary between the Plaintiff's land called Gopalpore thakked in No. 1585, and the Defendant Moazzam Hossein's land called Chotua thakked in No. 1625, was not a line during the time of the thakbust or survey measurement, but a big and navigable done (or stream), the bed of which was the property of no individual, and as such was at the disposal of the Government under the present law; that the land in dispute was formed by the drying up of the big and navigable done which existed at the time of the first survey between Gopalpore and Chotua, and as such was assessable as surplus under the existing law. Moazzam Hossein in his written statement relied upon the proceedings of the revenue authorities with regard to the diara as being final, and also claimed the land as reformation on the original site of his lands.

The Appellant and Moazzam Hossein are proprietors of two contiguous estates, viz., Nazirpore and Saistabad respectively. Some time before 1842 considerable portions of these estates were diluviated by the river Arial Khan. On the reappearance of the land, in the shape of five churs separated from each other by dones, resumption proceedings were instituted by the Government, but ultimately the churs were released, and an amin named Sumbhu Nath was deputed by the Collector to make over to the proprietors the different portions of the reformed land appertaining to their estates. In 1842 the amin, after making a measurement of the lands, prepared separate chittas and a sketch map assigning different portions of the land to the several proprietors. The lands assigned to the ancestor of Moazzam Hossein were named chur Chotua, and those released to the Appellant's father, Gopal Lal Tagore, were called Chur

Gopalpore. Some years after, but it is not clear when, the river again changed its course, and, flowing through Chotua and Gopalpore, washed away portions of those two mouzahs. In 1868 a thak survey was made, and after that the river gradually receded towards the east, and is now flowing through the Appellant's land of Gopalpore. The land in dispute, which the Appellant claims, is the newly formed lands on the west of the river, in contiguity with the lands of Chotua. After this last reformation the western portion of the land in dispute, together with some other land, was measured by the diara survey authorities in 1879 as excess lands of Chotua. Moazzam Hossein objected to this, and claimed the land as reformations on the site of the diluviated land of his mouzah Chotua. The objection being disallowed, instead of bringing a suit to set aside the order of the revenue authorities, he accepted a settlement of the land from the Government as an accretion to his mouzah. In 1881 the Appellant sued him for this and other lands, and he pleaded that the land claimed was a reformation of the diluviated land of Chotua, and also claimed to hold as before of the Government. An issue was settled, "whether "the land in dispute is a reformation on the site "of the Plaintiff's chur Gopalpore, or on the site "of the land of chur Chotua, released to the "Defendant." The Court found this issue in favour of the Plaintiff (the present Appellant), but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside, "the Plaintiff's right "to the portion of the disputed land measured as "surplus accretion to Chotua, and settled with "the Defendant, must be considered as either "extinguished or in abeyance. Consequently "the Plaintiff is not entitled to recover it *now*." It was ordered that the Plaintiff should recover

possession of a portion of land described by reference to a map prepared by the amin, excluding therefrom the portion covered by the plot marked by the Court as D in the map. This plot is the land which is the subject of this appeal.

By the Act IX. of 1877, "An Act regarding "the assessment of lands gained from the sea "or from rivers by alluvion or dereliction in the "Provinces of Bengal, Behar, and Orissa," it is enacted that the Government of Bengal, in all districts or parts of districts of which a revenue survey may have been completed and approved by Government, may direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey. In 1860 a survey was made under this Act.

It is said by the Subordinate Judge in his judgement in this suit that, on comparison of the thak and survey maps by the Civil Court amin it has been found beyond doubt that the land in dispute was then thakked as part of the Plaintiff's mouzah Gopalpore, and that the assertion of the Defendants to the contrary was erroneous. And he held the map to be an admission by the Government of the Plaintiff's title. It could not be disputed that it made a *primâ facie* case against the Government. However the case of the Appellant was not rested only upon this admission. The proceedings in 1842 were put in evidence by him, and from an examination of these their Lordships have come to a conclusion in his favour. The decision of the Special Commissioner of Moorshedabad and Calcutta, dated the 15th December 1841, contains a history of the pro-

ceedings for assessment of Government revenue on the five churs which appear to have begun in 1833. It is stated that the Collector decreed the case in favour of the Government, and on an appeal from his decision it was set aside by the Special Commissioner, and it was ordered that whatever accreted lands might, on investigation, be found to have accreted to the original site by the Government officers should be released from the claim of the Government.

In October 1842 Sumbhu Nath, the amin who, as has been stated, was deputed to make over to the proprietors the different portions of the released lands, made two reports, one relating to 14,359 bighas 14 cottahs 3 dhoors of land, and the other to 6,792 bighas 16 cottahs 6 dhoors. In the former of these reports is the following passage:—"The measurement by Anund Chunder "Mookerji and Joychunder Chatterji" (a measurement made in the year before the decree of the Special Commissioner) "shows that there "were 20,391 bighas 13 cottahs of land inclusive "of *done* in the five plots of chur. The lands in "those five plots of chur, inclusive of khal and "*done*, amount by my measurement to 21,152 "bighas 10 cottahs 9 dhoors of land in all, and so "there is an excess of 760 bighas 17 cottahs "9 dhoors of land measured by me in the five "plots of chur." In the other report, where he speaks of the quantity of land being relinquished to other parties than the Appellant's ancestor Gopal Lal Tagore, he says including khals and dones. Thus the dones appear to have been included in the plots. At page 61 of the Record there is a document described as the measurement chitta of the lands in five plots of chur included in the Haria and Chaola rivers, being the subject of dispute between the Government and Gopal Lal Tagore in Cases Nos. 1,474 and 1,555 pending trial.

In several places a done is mentioned as included in the quantity of land. In the amin's sketch map which accompanied the reports the done in question appears to run between Dag. 8 in the 3rd plot and Dag. 15 in the 4th plot, the latter being described as land of Nazirpore. The description of Dag. 15 in the chitta is "north of the lands formed by alluvion after "diluvion of mouzah Kala (worm-eaten), to "which the Appellants Kumla D (worm-eaten), "and others named in the Decree No. (worm-"eaten), are entitled east of Dag. 8, west of the "done to the west of the 5th plot and south "of the lands of Jharna Bhanga chur, 4th "plot." Thus, on the opposite side to where the done in question was situate, we have a done between the 4th and 5th plot given as the boundary, but, on the other side, Dag. 8, and not the done, is given as the boundary, and in the description of Dag. 8 it is said to be west of the 4th plot. In the summary at p. 84 of the land of Nazirpore, the zemindari of Gopal Lal Tagore, the total quantity, including the 4th plot, is given, and of this quantity all the plots, except the first, appear in a column headed "waste land, with done." It appears to their Lordships that in 1842 the whole of the land and water within the ambit of the five plots or churs was measured and released by the Government, and no part of the dones was reserved. The evidence of what was done at that time, instead of rebutting the evidence of the map of 1860, supports it. The finding of the Subordinate Judge, that the part of the done which in 1842 covered the disputed land was not given to any of the parties to whom lands were allotted by Sumbha Nath, is, in their Lordships' opinion, opposed to the evidence.

The Subordinate Judge refused to make a decree against the Secretary of State, and made a

decree, which was unnecessary, that the Appellant should recover possession of the land of which possession was decreed in the former suit. The present Appellant and Moozzam Hossein both appealed to the High Court, the latter having also appealed against the decree in the former suit. The three appeals were heard together. The appeal in the suit of 1881 was dismissed. In the other appeals the High Court did not give any judgement upon the facts. They said the first question was as to the effect of the decree in the suit of 1881; that the claim of the Plaintiff in respect of the portion marked D in the map "was dismissed, that is "to say, the relief prayed for by him in respect "of it was not granted. Whatever were the "reasons which led the Lower Court to take "that course and not to grant the Plaintiff any "relief in respect of that portion of the pro-"perty, the decree as it stands constitutes the "record of the rights of the parties, and is the "source that defines the limits of the estoppel "arising from the proceedings. We cannot look "to the judgement as we were asked to do in "order to qualify the effect of the decree, . . . "it must be treated as a decree binding as "between him and the 2nd Defendant, the effect "being that there is no claim against the De-"fendant in respect of that property." Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the Plaintiff was not then entitled to possession. The law as to estoppel by a judgement is stated in Section 6 of Act XII. of 1879, and Section 13 of Act XIV. of 1882. It is that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided.

In order to see what was in issue in a suit, or what has been heard and decided, the judgement must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgement is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the Plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the Defendant in respect of the property.

Upon the question whether the Plaintiff was entitled to any relief as against the Secretary of State, the High Court having thus decided as to the estoppel considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the Appellant being, in their Lordships' opinion, entitled to more than a declaratory decree. The appeal of the present Appellant to the High Court was dismissed, and that of Moazzam Hossein in this suit was allowed, the result being that the suit was entirely dismissed.

Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the Plaintiff, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to make a decree awarding possession to the Plaintiff of the lands mentioned in the 12th paragraph of the plaint with mesne

profits for three years previous to the institution of the suit, and from that until the delivery of possession, or until the expiration of three years from the date of the decree, whichever first occurs.

As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the Plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason for the costs of this suit in the Subordinate Court not being now awarded to the Plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgement should have been given in his favour. Their Lordships will humbly advise Her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State.