Privy Council Appeals Nos. 187 *and* 188 *of* 1919.
Bengal Appeals Nos. 18 *to* 20 *and* 21 *of* 1918.

The Secretary of State for India in Council - - - *Appellant*

v.

Maharajadhiraj Sir Bijoy Chand Mahtab Bahadur, Maharaja of Burdwan - - - - - - - - *Respondent.*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondent.*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondent.*

(*Consolidated Appeals.*)

The Secretary of State for India in Council - - - *Appellant*

v.

Raj Narayan Chandradhurja - - - - - *Respondent.*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1921.

Present at the Hearing:

VISCOUNT CAVE.
LORD SHAW.
MR. AMEER ALI.

[*Delivered by* VISCOUNT CAVE.]

These are consolidated appeals from decrees made by the High Court of Judicature at Fort William in Bengal in four suits. Of these suits three were brought by the Maharaja of Burdwan, with whose ancestor the zamindari of Burdwan was permanently settled in the year 1793; and the fourth by the zamindar of Maliara, with whose predecessor that zamindari was similarly

settled in the same year. The causes of action in all the four suits were similar in character. The lands comprised in the zamindari of Burdwan are in part traversed and in part bounded by two rivers, the Damodar and the Darakeshwar; and the Maliara lands are similarly bounded by the first-mentioned river. Since the date of the settlements a large number of *churs* (or sandbanks) and islands have been thrown up in these rivers; and the revenue authorities, purporting to act under Act IX of 1847, recently caused a *deara* survey to be made of these *churs* and islands (hereafter for the sake of brevity referred to as *churs*) and assessed them with revenue, and on the refusal of the zamindars to accept a settlement, settled them with third parties. The zamindars disputed the right of the Government to make such an assessment and claimed to be the owners of the *churs* where they lay opposite to their settled lands and to be entitled to hold them as part of their settled property free from any additional assessment; and it was to establish this claim that these suits were brought. The decision of the Subordinate Judge of Burdwan in the suits brought by the Maharaja was partly for and partly against his claim, while the decree of the District Judge of Bankura in the Maliara suit was wholly against the zamindar. On appeal the High Court decided all the suits in favour of the plaintiffs, and thereupon these appeals were brought by the defendant, the Secretary of State for India in Council.

The evidence in the suits is voluminous, but the material facts may be shortly stated: and for this purpose it will be sufficient to refer to the facts in the first two suits only, viz., those brought by the Maharaja of Burdwan with reference to the *churs* in the river Damodar; for it is common ground that the decision in these two suits must determine the result of the other two suits also.

The Damodar is a river of some width but little depth flowing into the Hooghly near Gurchumbook. For a distance of 53 miles, viz. from Theraut to Basna, it forms the southern boundary of lands belonging to the zamindari of Burdwan; and for the next 91 miles, viz., from Basna to Gurchumbook, it runs through the lands of that zamindari, which accordingly adjoin the river on both banks, except that a few of the riparian mouzahs were some time since sold for arrears of revenue and no longer belong to the zamindari. From Gurchumbook up to Ampta—that is to say, for a distance of about 14 miles—the river is navigable at all seasons of the year; but beyond the last-mentioned point it is navigable at certain seasons only, and for present purposes may be treated as non-navigable. The Maharajas of Burdwan appear to have fishing rights in the river and to own certain private ferries upon it. They also at one time levied tolls on boats passing up and down the river; but these tolls were abolished by the Government in the year 1772—that is to say, before the date of the decennial settlement—and have not since been levied.

For some time before 1791 yearly settlements were effected with the successive Maharajas, and it appears that on the occasion of one of these yearly settlements, viz., that for the year 1772, a deduction was made for *nadi sikasti*, or diluvion by river. The kabuliyat relating to the settlement of 1788 is produced; and by this document Maharaja Tej Chandra, who is therein described as "zamindar of pergunnah Burdwan, etc., in the province of Bengal," accepted the sum of Rs. 40,15,109.2a. as the revenue for the settlement of "the said chuckla," and agreed to cultivate the land and to raise no objection to paying the revenue on the score of inundation, of the lands being washed away by the river, etc. In 1790, when the decennial settlements were introduced, difficulty was experienced in effecting an agreement with the Maharaja, with the result that some mouzahs were sold by Government to raise arrears of revenue: but ultimately in 1791 a settlement for nine years was agreed upon. No sanad or kabuliyat relating to this important settlement has been produced, but its terms are evidenced by a statement headed "Dowl Bundbust or Particular Statement of the Jumma of Pergunnah Burdwan payable yearly by the Zamindar Maharaja Tej Chand Bahadur for nine years from the beginning of the Bengal year 1198 to the end of 1206, or from the 10th April, 1791, to 11th April, 1800." This statement contains the items making up the sum of Rs. 40,15,109.2a. specified in the kabuliyat for the year 1788, and after certain deductions for *sayer* abolished, lands sold for arrears of revenue, and other matters, brings out the total revenue payable by the zamindar during the nine years at Rs. 32,93,892 per annum. No reference is made to the river-bed; and it was found by the Subordinate Judge that, while the income from the fishing and ferrying rights was included in the assessment, no part of the bed was included in any of the settled pergunnahs and mouzahs. Indeed it is plain that in arriving at the revenue for the purposes of this settlement the bed of the river was not taken into account. It is this settlement which was made permanent by Regulation I of 1793.

Upon these and other like materials the Subordinate Judge came to the conclusion that the whole bed of the river where it ran through the zamindari lands, and the bed *ad medium filum aquæ* where it bounded those lands on one side only, was the property of the zamindar, and accordingly that the *churs* formed on these parts of the river-bed belonged to the zamindari; but as to the effect of the permanent settlement he drew a distinction. He held that, the zamindari having been settled as "the said chuckla"—that is to say, as a compact estate—in the year 1788, and (as he assumed) also in the year 1791, the settlement included and covered the river-bed where it was bounded on both sides by the zamindari lands, and that the *churs* formed on this part of the bed could not be the subject of an additional assessment under the Act of 1847; but as to that part of the river which was bounded on one bank only by the zamindari lands, he held

that the bed of the river *ad medium filum*, being included in the adjoining lands by presumption of law only, was not covered by the settlement, and that the *churs* since formed on this part of the bed were liable to assessment as unsettled land. On appeal the High Court, while upholding the findings of the Subordinate Judge as to the proprietary rights of the zamindar in the river-bed and *churs*, rejected the distinction drawn by him as to the effect of the permanent settlement, and held that the zamindar was entitled to hold all the *churs* in dispute as part of his permanently settled lands and free from further assessment. The appeal is therefore brought as to all these *churs*.

In dealing with this appeal their Lordships accept the concurrent findings of the Courts as to the ownership of the bed of the river and of the *churs* formed upon it since the date of the settlement, and the assumption of the Subordinate Judge that the decennial settlement of 1791 (which was made permanent in 1793) was similar to the settlement evidenced by the kabuliyat of 1788 in assessing the zamindari as a whole. They also put aside for the moment the subordinate arguments founded on the facts that some of the riparian mouzahs had been alienated before the settlement, and that the lower part of the river was navigable; and they proceed to consider the important question of law, whether on the facts as found the revenue authorities were entitled to assess the newly formed *churs* to revenue as being "land added to the estate" within the meaning of Section 6 of Act IX of 1847. It has already been decided by the Board in *The Secretary of State for India* v. *Srimati Fahamidunnissa Begum* (1889, L.R. 17, I.A. 40) that the intention and effect of the Act of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed; and accordingly the question raised as to the assessability of the *churs* in dispute must be determined by reference to the pre-existing law and particularly to Regulation II of 1819.

Regulation I of 1793, by which the decennial settlements were made permanent, declared (by Article 3) to the zamindars and other proprietors of land with whom a settlement had been concluded that "at the expiration of the term of settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they, and their heirs and lawful successors, will be allowed to hold their estates at such assessment for ever." The main purpose of this declaration appears from Article 6, which contains the following paragraph:—

> "The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon

them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates."

Regulation XIX of 1793, which deals mainly with alienated lands, contains the following recital showing the origin of the settlements for revenue :—

"By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every begah of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter."

Regulation II of 1819, which is expressed to be passed for (among other things) defining the right of Government to the revenue of lands not included within the limits of estates for which a settlement has been made, contains (in Article 3) the following provisions :—

"*First.*—It is hereby declared and enacted that all lands which, at the period of the decennial settlement, were not included within the limits of any pergunnah, mouzah or other division of estates for which a settlement was concluded with the owners, not being lands for which a distinct settlement may have been made since the period above referred to, nor lands held free of assessment under a valid and legal title of the nature specified in Regulations XIX and XXXVII, 1793, and in the corresponding Regulations subsequently enacted, are and shall be considered liable to assessment in the same maner as other unsettled mehauls, and the revenue assessed on all such lands, whether exceeding one hundred begahs or otherwise, shall belong to Government. . . .

"*Second.*—The foregoing principles shall be deemed applicable not only to tracts of land, such as are described to have been brought into cultivation in the Sunderbuns, but to all *churs* and islands formed since the period of the decennial settlement, and generally to all lands gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks."

Article 31 of the same Regulation saves the rights of the proprietors of permanently settled estates to the full benefit of "all waste lands included within the ascertained boundaries of such estates respectively at the period of the decennial settlement and which have since been or may hereafter be reduced to cultivation," and concludes with the following general declaration :—

"*Second.*—It is further hereby declared and enacted, that all claims by the revenue authorities on behalf of Government to additional revenue from lands which were at the period of the decennial settlement included within the limits of estates for which a permanent settlement has been concluded, whether on the plea of error or fraud, or on any pretext whatever, saving, of course, the case of lands expressly excluded from the operation of the settlement, such as lakheraj and thannadarry lands, shall be and be considered wholly illegal and invalid."

On an analysis of the terms of these Regulations, so far as they are material to the question now under consideration, it

appears that, while lands included in a permanent settlement were carefully excluded from further assessment, this protection was extended only to lands actually in existence at the time of the settlement and specifically included in the estate as settled. The produce of "every begah" of these lands was to be assessed to revenue once for all (Regulation XIX of 1791); and even waste land producing little or no revenue to the proprietor, if "included within the limits of any pergunnah, mouzah or other division of estates for which a settlement was concluded," was to be free from further assessment on being brought into cultivation (Regulation II of 1819, Article 31). But lands not included in the settled pergunnahs and mouzahs were to be considered liable to assessment as unsettled property; and "these principles"—*i.e.* that lands not included within the limits of the settled pergunnahs and mouzahs were to be the subject of additional assessment—were to be deemed applicable to all *churs* and islands formed since the decennial settlement, and generally to all lands gained by alluvion or dereliction since that period (Regulation II of 1819). It appears to their Lordships that the effect of the Regulation last referred to is to declare that *churs* formed after the decennial settlement are to be treated as unsettled; and that this express provision cannot be excluded merely by showing that the river-bed from which the *churs* have been thrown up was at the date of settlement the property of the zamindar, and that the settlement was imposed upon the zamindari as a whole. The ownership of the bed may determine the proprietary rights in the *churs;* but property is one thing and assessability is another. The Regulation declares in terms that new *churs* are to be included in the category of unsettled lands, and contains no exception for *churs* formed upon a river-bed belonging to a settled estate. Such *churs* must therefore be treated as unsettled.

This conclusion is strongly supported by the terms of Regulation XI of 1825, which deals with the rules to be observed in determining claims to lands gained by alluvion or dereliction. The fourth rule laid down in that Regulation, while providing that "in small and shallow rivers, the beds of which, with the julkur right of fishery, may have been heretofore recognised as the property of individuals, any sandbank or *chur* that may be thrown up shall, as hitherto, belong to the proprietor of the bed of the river," adds the words "subject to the provisions stated in the first clause of the present section." These last-mentioned words refer to the proviso to the first clause, which prevents the owner of an increment of land gained from a river or the sea from being exempt from assessment to revenue under Regulation II of 1819; and they show conclusively that the intention of the Regulation was to provide that all *churs* newly formed since the decennial settlement, though upon a river-bed which is "recognised as the property" of the owner of the settled estate, are to be treated as land gained since the settlement, and liable to be assessed accordingly.

There is nothing inequitable in such a construction. Section 5 of Act IX of 1847 provides that, when on inspection of the *deara* survey map it appears that land has been washed away from or lost to any estate paying revenue to Government, a proportionate deduction shall be made from the jumma; and if a deduction is to be made for land washed away, there is no reason why an addition should not be made in respect of land gained by alluvion or dereliction. In the latter case, while it may be that the area nominally belonging to the estate is unaltered, the cultivable area is increased and with it the potential revenue of the estate.

It was suggested in argument that a river-bed might be treated as "waste land" coming within the protection of Article 31 of Regulation II of 1819; but their Lordships are not of that opinion. Indeed the express provision in Article 31 that waste land shall not be the subject of an additional assessment when brought into cultivation, when contrasted with the provisions of Article 3 of the same Regulation as to newly formed *churs* and islands, affords further support to the view that the legislative authority intended to put such *churs* upon a different footing from the waste lands and to make them liable to assessment.

The learned Judges of the High Court appear to have thought that such a construction of the Regulations as is here adopted would be opposed to the decision of this Board in the above cited case of *The Secretary of State for India* v. *Srimati Fahamidunnissa Begum;* but on examination of that case it will appear clearly that the lands there held to be exempt from assesssment were not *churs* formed since the settlement upon land which at the time of settlement had been river-bed, but were lands specifically comprised in the settlement and which, having for a time been covered with water, had afterwards emerged again by reason of alluvion or dereliction. The estate there in question, containing at the date of the decennial settlement 10,042 begahs of land, had become wholly submerged by the action of the Ganges and the Brahmaputra; but an area amounting to 2,000 begahs had recently reappeared above water, and it was this reformed land—which had been specifically included in the decennial settlement and in respect of which the assessed revenue had been paid even during the period of its submergence—which it was sought to assess to additional revenue. The Board, affirming the decision of the High Court in Bengal, decided against this claim, holding that "lands within the limits of settled estates which had become covered with water and afterwards reformed were not lands gained from the river or sea by alluvion or dereliction within the meaning of the legislation of 1847, which is confined to lands so gained since the period of settlement." It is obvious that such a conclusion has no application to a case like the present, where the land in question is new land formed since the settlement was made. Lord Herschell, by whom the judgment of the Board was delivered, insisted more than once

on the circumstance that the land in question was land which had been assessed to revenue at the date of the settlement and had since been inundated and recovered, and that revenue had throughout been paid upon it; and the terms of the judgment indicate that, if the land in question had been formed for the first time since the date of the settlement, the decision would have been the other way.

Lopez v. *Muddun Mohun Thakoor* (1870, 13 Moore, I.A. 467) was referred to; but that case, which dealt with the proprietary right in land reformed after submergence upon the original site and not with assessment to revenue, has no direct bearing on the present case. Reliance was also placed on certain rating cases (*Commissioners of Land Tax for the City of London* v. *Central London Railway Company*, L.R. 1913, A.C. 364; *The Attorney-General for British Columbia* v. *The Attorney-General for Canada*, L.R. 1914, A.C. 158); but those decisions turned on English or Canadian law, and cannot affect the construction of the express provisions of the Bengal Regulations.

In the result their Lordships are satisfied that the *churs* and islands, which since the decennial settlement of the zamindari of Burdwan have been formed in the River Damodar opposite to lands belonging to that zamindari, were liable to assessment under the Act of 1847, and accordingly that the appeals in the first two suits should succeed. Having regard to this conclusion, it is unnecessary to consider the question of the ownership of any *churs* which may have been formed opposite to lands alienated from the zamindari or in the navigable part of the river.

As stated above, the *churs* formed in the River Darakeshwar, which were in question in the third suit, and those formed in the Damodar over against lands of the zamindar of Maliara, which were the subject of the fourth suit, are for present purposes in the same position as the *churs* already discussed. The appeals in these suits also should therefore be allowed, and the decision of the District Judge of Bankura in the fourth suit should be restored.

Their Lordships will humbly advise His Majesty that these appeals should be allowed and the suits dismissed, and that the respondents should pay the costs in all Courts and the costs of these appeals.

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

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SAME

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