Privy Council Appeal No. 7 *of* 1927.

Patna Appeal No. 10 *of* 1926.

Maharajadhiraj Sir Rameshwar Singh and another - - *Appellants*

v.

Bajit Lal Pathak and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY, 1929.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD SHAW.
LORD BLANESBURGH.
SIR JOHN WALLIS.

[*Delivered by* LORD BLANESBURGH.]

The question at issue in this suit is as to the ownership of some 44 *bighas* 8 *kathas* of agricultural land lying within the ambit of the *mauza* of Bela Pemo in the *zemindari* of the Maharajah of Darbangha. The lands constitute the bulk of a single well-defined block of three *jotes* having a total area described throughout the proceedings as of 59 *bighas* and 8 *kathas*. The remaining 15 *bighas* 4 *kathas* occupy a central position in the block, being surrounded by the 44 *bighas*. The whole area has been claimed by Bajit Lal Pathak, the first respondent. But it is his claim to the 44 *bighas* which is alone in question in this suit. His claim to the 15 *bighas* has been dealt with in a separate suit to which, with its result, reference will later on be made.

The history of the lands is voluminous ; but as it has been detailed with much care and precision in the judgments below, it need not be again elaborated here.

The plaintiff's case—and by the term "plaintiff" their Lordships when they use it will refer to the first respondent, who in all proceedings has been the real contestant on one side, just as when they use the term "defendant" they will refer to the first appellant, the Maharajah of Darbangha, who has in all proceedings been the real contestant on the other side; the plaintiff's case has been that the lands formed three hereditary *jotes* held by his ancestors with occupancy rights and enjoyed by himself and his tenants until the time when, shortly before this action was brought, he was displaced from possession.

In this suit, in which the plaintiff seeks to recover the lands of which he was so dispossessed, many issues were raised by the defendant. Some of these must be referred to, not because they remain active, but because the fact that the defendant raised them and failed, may have a bearing on the question which still remains for decision. That is the single question whether the 44 *bighas* claimed by the plaintiff or any of them form part of his three *jotes*. It is a mere question of identity of parcels. The doubt upon it—one raised by the defendant very late in the day—is occasioned by some kind of change which 30 or more years ago took place in the course of the River Kosi, flowing through or near the village. What then actually happened has been differently described by the defendant at different stages of the dispute, and to this specific matter their Lordships must for a special reason return later. It suffices to say now that for a period of 12 or more years, between 1895 and 1907 and as a result of the visitation, whatever was its nature, much of the land of the village fell out of cultivation, and, when ultimately deliverance came and the lands were in process of restoration to husbandry, it was found that the plaintiff on the one hand and the defendant on the other were ranged as rival claimants for the whole block.

There was at this time, and for long after, no question as to the particular lands claimed by each side. Both parties had got *kabuliats* from their own respective tenants with whom the lands had already been settled, and the terms of these *kabuliats* sufficiently show that the contestants, if they were agreed on nothing else, were at one as to the identity of the land they were each claiming: the defendant asserting his right thereto as Parti of the Raj, which he might settle with whom he pleased; the plaintiff's claim being that already stated. Nor was this question of identity raised when the contest as to these lands first became acute. This was in 1916. The plaintiff had erected on the lands a *kamatghar*. A body of men acting, as it was alleged, at the instigation of the Raj, broke in and almost demolished it. Only the thatch was left hanging on two poles, and the other materials were scattered and destroyed. In the criminal proceedings under section 145 of the Criminal Procedure Code which ensued, the question who was in *de facto* possession of the lands on which the *kamatghar* was placed had to be determined, and in view of the case which the defendant

has set up in these proceedings and of the issue which alone survives, it is relevant to see what were the allegations of fact upon which his defence was then rested. These were that the *mauza* was inhabited and cultivated up to 1895. About that time, owing to a change in the course of the river, there was deposit of sand and growth of jungle in the village, which consequently became unfit for cultivation. The tenants left the place and settled elsewhere. The plaintiff also left and made no arrangement for payment of rent. As the whole *mauza* practically was deserted, the defendant was entitled to treat the lands as abandoned, and he did. After some years the condition of the village improved and the Raj got the lands surveyed. This took place in 1909–1911. The plaintiff having abandoned his lands, these survey papers contain no mention of them as being in his family. The plaintiff's efforts to get back his old lands, by depositing the rent thereof in Court, by taking *kabuliats* after settlement, were all subsequent. Such was the case of the defendant as appears from the judgments in the criminal proceedings. It was no part of that case, it will be seen, that the *jotes* of the plaintiff were not well known and recognised. The contention was that they had been abandoned. Nor was any doubt thrown on the identity of these *jotes* with the lands then claimed by the plaintiff. No case, indeed, other than one of abandonment was made, and the abandonment was said to have been occasioned by a deposit of sand and growth of jungle resulting from a change in the course of the river. There is no reference to any flood.

The details of these criminal proceedings, and of further proceedings of a like kind with reference to the lands, are fully described in the judgments below. They resulted in a final order of July 21st, 1920, whereby the plaintiff was left in *de facto* possession of the 15 *bighas*, and the defendant in possession of the 44 *bighas*. This led to the institution of two suits. The first is the present suit, in which the plaintiff claims possession of the 44 *bighas* in regard to which the Criminal Court had found against him; the second was that already referred to, in which it was claimed that the Maharajah of Darbangha and his lessees were entitled to possession of the 15 *bighas*. In this second suit the Maharajah has failed. The Munsif decided against him on the 31st March, 1924, and his decision was affirmed on appeal by the District Judge of Purnea and by the High Court on second appeal on the 4th January, 1926. The result is that it has been finally decided that the 15 *bighas* appertain to and are included in the ancestral *jotes* of the plaintiff, and this land, as has already been stated, is in the centre of the block, the remaining 44 *bighas* of which are the subject matter of the present suit. That suit was dismissed by the Subordinate Judge of Purnea by a decree of the 20th February, 1922, but on appeal the suit was decreed by the High Court of Judicature at Patna on the 4th of January,

1926. It is from that decree that the Maharajah and his tenant now appeal to the Board.

The answer to the plaintiff's claim in the suit, made by the written statement of the defendant, was in striking conflict with the defences relied upon in the criminal proceedings. The plaintiff, it is there alleged, had no *jote* land at all in *mauza* Bela Pemo with right of occupancy either ancestral or self-acquired; his predecessor in interest had no *jote* land in Bela Pemo which was heritable. The lands in suit never formed part or parcel of any *jote* land of the plaintiff, and the land claimed was Raj Parti land belonging to the defendant. Almost the entire *mauza* Bela Pemo having been inundated by the River Kosi, became, it was alleged, absolutely unfit for cultivation in the year 1895, and it remained in that condition till the year 1907, when the lands of the *mauza* began gradually to be reclaimed. It was then that the plaintiff, who is a shrewd and designing man, began to make documents in respect of the lands. Such was the defence to this suit. As will be observed, the allegation prominently made that the lands in suit formed no part of any *jote* land of the plaintiff is coupled with the allegation, equally emphatic, that the plaintiff had no *jote* land at all in the village, and that his predecessor had none which was heritable. And the further allegation is that it was owing to an inundation by the river that, for a period extending over 12 years, the village lands were lost. A defendant with access to the papers, maps and surveys of a well-ordered *zemindari* cannot disclaim responsibility for these new and inconsistent statements. And they fared badly.

The new allegation that the plaintiff had no *jote* lands in the *mauza*, either ancestral or self-acquired, was soon abandoned. Before the Subordinate Judge the defendant's *vakil* was constrained to admit the existence in the *mauza* of three *jotes* in respect of which the plaintiff paid rent from time to time, and in the High Court the learned Judges, after a careful examination of the receipts and documents produced, declared their conclusion to be that the finding of the Subordinate Judge that the plaintiff's ancestors and thereafter the plaintiff held the *jotes* in the village, aggregating 59 *bighas* 14 *kathas*, as claimed by them, was not based only upon the admission made on behalf of the defendant in the Court below, but rested upon the overwhelming documents in the case. And this finding was in no way canvassed before their Lordships.

No question accordingly now remains except one of identity of parcels. Has the plaintiff proved that these 44 *bighas* definitely and specifically claimed by him during so many years are indeed part of the three *jotes* of 59 *bighas* the existence and his ownership of which have now been proved? That the 59 *bighas* formed one block is not disputed; that the 15 *bighas* in the centre of the block in suit formed part of the plaintiff's *jotes* has been finally established. In these circumstances very little further evidence to show the identity of the residuary 44 *bighas* is required. And

in the opinion of the High Court that evidence is forthcoming in the testimony of the plaintiff himself and one of his witnesses who definitely depose to the fact, the evidence of witnesses on behalf of the defendant being silent as to the condition of the lands and their ownership before the visitation to which reference has so often been made.

In these circumstances the real question for their Lordships to determine is whether the High Court was entitled, differing in this from the Subordinate Judge, to reach its conclusion of fact. On this it is contended that the plaintiff's evidence should be entirely rejected because of the assertion which he certainly did make that there had to his knowledge been no inundation in *mauza* Bela Pemo as was sworn to by the defendant's witnesses and accepted by both Courts. But is it so certain that the visitation which undoubtedly continued over a long period of years took the form of an inundation? It was not apparently noticed in either Court below that there was no reference to any such inundation by the defendant's witnesses in the criminal proceedings; the visitation as there described took, as has already been stated, the form of a deposit of sand and growth of jungle. Their Lordships, indeed, on the whole evidence are left in doubt whether in truth there was ever any inundation at all. They certainly cannot take the responsibility of discrediting the plaintiff for making a statement which, so far as it goes, is in accord with the defendant's own case only a few years before.

The divergent finding of the Subordinate Judge on this question of identity is mainly based on a hypothesis which is shown by the High Court to have been mistaken. The learned Judge largely rested his finding against the plaintiff on the terms of a schedule to a summons in one of the criminal proceedings (Exhibit 9), in which in 1917 the 15 *bighas* are described as being bounded on the south, east and west by the property of the Raj, instead of being described as bounded by the property of the plaintiff or his tenants, as they should have been if his case as to the 44 *bighas* is correct. The learned Judge attributes this statement of boundaries to the plaintiff or his agent and describes it as knocking at the head of his case. But, as was pointed out in the High Court, the boundaries given in the schedule to the summons are presumably those given to the Magistrate by a Police Officer apprehending a breach of the peace and for his views on such a subject neither party is responsible. The stated boundaries upon which in the ensuing proceedings, as the learned Judges point out, the Magistrate acted, were the boundaries shown by a *kabuliat* put in by the plaintiff, in which the boundaries given in no way indicate that the 44 *bighas* were then regarded as the property of the Raj.

But the finding of the High Court on this point was further confirmed by the view the learned Judges there took of the attitude of the defendant in this matter. They were deeply impressed by the fact that his case had been altered; they were even more

impressed by the fact that the best evidence in his possession which would have clearly helped the Court in identifying the land in dispute had been withheld. Neither village papers nor measurement *khasras* were produced, and the learned Judges say that when called for before them the defendant took time to produce them and failed to do so. In the change of attitude on the part of the defence and in its failure to produce documents presumably available and probably decisive one way or another if examined, the learned Judges saw a design on the part of the defendant to take advantage of the abstract doctrine of the burden of proof upon a plaintiff in ejectment.

Their Lordships, in agreement with the High Court, consider that the excuses made by the defendant for the non-production of these documents are unsatisfactory and unreliable, and, like the learned Judges of the High Court, they consider that their non-production is due to the fear that, if produced, they would either establish the plaintiff's claim, or, in view of the defendant's admission as to the existence somewhere within the village of three *jotes* of the plaintiff of the area assigned would lead to a successful claim, albeit in another suit, which would be more serious for the defendant than that made in this suit. Their Lordships would refer to the views of the Board on this subject expressed by Lord Shaw when delivering the judgment of the Board in the case of *Murugesami Pillai* v. *Manickavasaka Pandara*, I.L.R. 40 Mad. 402, 408, and would again endorse them. In their Lordships' judgment the learned Judges of the High Court were well warranted in finding further confirmation of the plaintiff's evidence in the defendant's reticence and inconsistency. On the whole case they can find no ground for interfering with the decree of the High Court. In their judgment that decree ought to be affirmed and this appeal therefrom be dismissed with costs.

And they will humbly advise His Majesty accordingly.

In the Privy Council.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH
AND ANOTHER

v.

BAJIT LAL PATHAK AND OTHERS.

DELIVERED BY LORD BLANESBURGH

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1929.