## PRIVY COUNCIL.

P. C.
1923

Jan. 23.

NARESH NARAYAN ROY (PLAINTIFF),

*v.*

SECRETARY OF STATE FOR INDIA (DEFENDANT).

**[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]**

*Diluviation—Re-formation—Permanently settled estate—Change in course of bounding river—Issue whatever land within estate—Evidence—Judgment not inter partes—Subsequent partition with plaintiff.*

The appellant sued the Government for a declaration that certain char land formed by the river Padma was part of his permanently settled estate, and for a return of land revenue paid by him under temporary settlements. His case was that since the permanent settlement the river, which formed the boundary of the estate, had changed its course and that the char land was a re-formation upon the site of land within the estate permanently settled. A co-sharer with the appellant had sued the Government and obtained in 1906 a judgment of the Privy Council that land which included the land in suit was part of the estate. The appellant had not been a party to that suit, but by a partition subsequently made between the co-sharer, the present appellant, and the Government, the land now in suit had been allotted to the appellant being referred to as "settled for periods." The partition deed did not refer to the judgment, but was executed in consequence of it. In the present suit a Commissioner had made a local investigation, and had reported in favour of the appellant's case. The Government had not raised objections to the report but apart from the judgment of 1906 there was little evidence to support its conclusion. The High Court had held that the judgment was not admissible, and that the plaintiff had failed to establish his case :—

*Held*, that, having regard to the partition, the judgment of 1906 was admissible in evidence, and that the report of the Commissioner, coupled with that judgment, sufficed to establish the appellant's case; the words "settled for periods" in the deed could not be regarded as an admission that the temporary settlements were *de jure*.

Decree of the High Court reversed.

* *Present* : LORD BUCKMASTER, LORD PHILLIMORE, SIR JOHN EDGE, SIR LAWRENCE JENKINS AND LORD SALVESEN.

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APPEAL (No. 2 of 1921) from a judgment and decree of the High Court (March 4, 1919) reversing a decree of the Subordinate Judge of Nadia (June 19, 1917).

The suit was brought by the appellant against the Government and related to char lands formed in the river Padma. The plaintiff's case was that the lands were re-formations *in situ* of his permanently settled estate, and that consequently he was entitled to hold them independently of certain settlements entered into with the Government by his adoptive mother and himself in 1891 and 1910 respectively; the plaintiff claimed the return of land revenue paid by him under those settlements. The facts appear from the judgment of the Judicial Committee. The trial Judge made a decree in favour of the appellant, acting on the report of a Commissioner who had been appointed to make a local inquiry, and upon a judgment of the Privy Council delivered in 1906, in circumstances which appear from the judgment of the Judicial Committee.

The High Court (Beachcroft and Greaves JJ.) allowed an appeal by the Government and dismissed the suit. The learned Judges held that the judgment of 1906 was not admissible in evidence, and that the evidence apart from the judgment was not sufficient to discharge the onus upon the plaintiff.

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Nov. 30; Dec. 1, 4.

*Dunne K. C.* and *Wallach*, for the appellant. The result of the local investigation, ordered and made under the Code of Civil Procedure, 1908, s. 75 and Order XXVI, rr. 9, 10, should not have been interfered with except upon clearly defined and sufficient grounds: *Surut Soondree Debea* v. *Prosunno Coomar Tagore* (1). The report was not challenged by the Government, and the grounds upon which its conclusions

(1) (1870) 13 Moo. I. A. 607, 617.

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were rejected were not put to the Commissioner or supported by the evidence. The judgment of the Privy Council in 1906 should not have been excluded. Having regard to the circumstances, more particularly the partition subsequently made, it estopped the Government; if it did not amount to an estoppel it was material evidence in the case. Upon the whole evidence the plaintiff established his case. [Reference was also made to *Secretary of State for India* v. *Maharaja of Burdwan* (1), and *Haradas Acharjya Chowdhuri* v. *Secretary of State for India* (2).]

*De Gruyther K. C.* and *Kenworthy Brown*, for the respondent. The burden of proof was upon the appellant. The judgment of 1906 was not admissible either as raising an estoppel or as evidence. The co-sharer, who sued in that suit did not sue on behalf of the appellant, because his adoptive mother had previously taken a temporary settlement; the appellant himself took one in 1910. When the adoptive mother took a settlement she was in possession as a widow, and her act bound the estate. The former suit arose in different circumstances and was decided upon different evidence. A consideration of the various maps shows that the Commissioner came to a wrong conclusion. [Reference was made to *Jagadindra Nath Roy* v. *Secretary of State* (3).]

*Dunne K. C.* replied.

*Jan.* 23. The judgment of their Lordship was delivered by LORD PHILLIMORE. This action was brought in the year 1912 by the plaintiff, who is a zemindar for a declaration of his proprietary right to certain land in the district of Nadia, and for a declaration that he

(1) (1921) I. L. R. 49 Calc. 103; L. R. 48 I. A. 565.
(2) (1927) 26 C. L. J. 590
(3) (1902) I. L. R. 30 Calc. 291; L. R. 30 I. A. 44, 52.

had been twice assessed for revenue in respect of it, and for a return of the over-paid revenue in past year. He succeeded in the Court of the Subordinate Judge, but that judgment was reversed on appeal, and now he has appealed to His Majesty in Council.

The case made by the plaintiff was that the tract of land in question was within the collection or block or taraf of villages known after the name of its principal village as the taraf Jotashai in the parganah of Laskarpur; his case being that this parganah consists of seven mouzahs or villages described as Jotashai Ramkristopur, Nowsera Ramkrishnapur, Kadirpur, Sadasibpur, Biharajpur (also known as Bahirmadi), and Mallikpur. He did not profess in his pleadings to say in which village the tract was situate, but generally averred that it was within this block or taraf, and that the whole had been settled with his ancestor at the permanent settlement in the year 1793. He said that the tract some time afterwards had become diluviated and now was re-formed *in situ*.

The written statement of the Secretary of State traverses the allegations that the lands were re-formed *in situ*, or that they were in the block Jotashai, or had been settled with the plaintiff's ancestor, and raised certain other defences which will be dealt with later.

Upon this contention being raised, a local investigation was ordered to ascertain whether the disputed lands are re-formations *in situ* of taraf Jotashai in parganah Laskarpur of the Rajshahi Collectorate, and the Commissioner was directed to make a map of the disputed land and to show therein the lines of block Jotashai, as depicted in the maps of Mukunda Narayan Chowdhuri and Purna Chandra Chatterji. He was directed also to ascertain, with the help of Major Rennell's map of the Ganges prepared in 1780, the

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Revenue Survey map, the Diara Survey map and the Thak Survey map of Jotashai, whether the disputed land formed part and parcel of parganah Laskarpur at the time of the decennial settlement; to plot those maps in his map; to plot the lines of the khas mahal map of chur Marichar Diar as prepared by Babu Bijoy Krishna Bose, Deputy Collector, in 1883-84, to which, according to the defence, the disputed land appertained.

The Commissioner found that the land in question was in block Jotashai and was a re-formation *in situ* of land formerly belonging to that block or taraf. He arrived at this finding after a very careful enquiry, making a personal visit to the site and taking much evidence. He also produced a map on which he had plotted the lines of the other maps according to the directions given him. His report having been filed, it was at one time intimated on behalf of the Secretary of State that objections would be raised to it, but no objections were raised, and no application was made to have the report referred back to the Commissioner.

The case then came on for hearing upon this report, some oral evidence on behalf of the plaintiff which did not carry the matter any further and a good deal of documentary evidence, including the proceedings and decrees in former litigation, the relevancy and probative force of which latter have undergone much discussion at their Lordships' bar.

The general nature and character of the plaintiff's case was as follows: The river Ganges called in this part of its course the Padma, has changed its channels frequently and considerably since the date of the decennial settlement in 1783, which was made permanent ten years later, in 1793.

In these circumstances the principles upon which a tribunal should act in a claim of this kind are to be

found in a judgment delivered in 1917 in *Haradas Acharjya Chowdhuri* v. *Secretary of State for India* (1), where it was said by their Lordships:— "The River Ganges rests so uneasily in its bed that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation 11 of 1825.) If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. [*Lopez* v. *Muddun Mohun* (2)]."

This being so, the plaintiff's case was developed as follows:—

The Ganges in this part of its course divides two districts known as Rajashahi on the north and Nadia on the south. Laskarpur was a parganah in Rajashahi; and therefore, to the north of the river; and anything in Laskarpur must be taken to have been north of the river at the time of the permanent settlement. The river, flowing in a general direction from

(1) (1917) 26 C.L. J. 590. (2) (1870) 13 Moo. I. A. 467.

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west to east, but with many deviations and curves to the north and south, has now altered its course some miles to the northward, leaving a bed which can still be traced, where it probably flowed about 1850. In the course of its shift from south to north it diluviated and again set free large portions of the parganah of Laskarpur, The tract in dispute, which was in the southern portion of the parganah, was, as the plaintiff contended, in existence as dry land at the time of the permanent settlement, and was included in it. If so, it must have been diluviated shortly after, first reappeared as an island, and now has become, as indeed land further north of it has also become, a permanent portion of the land on the southern side of the river.

The case for the Secretary of State was that the burden of proof of this averment lay upon the plaintiff, and that he had not made it out, and that for all that could be now traced this land may well have been part of the bed of the river at the time of the permanent settlement, and therefore not part of Laskarpur and never settled for.

The land in dispute, which is roughly of a hatchet shape, and is coloured violet on the Commissioner's map, formed part of an irregular area of considerably larger size coloured yellow, and came to the plaintiff for some estate or interest, the exact nature of which must be hereafter considered, by virtue of a deed of partition on the 13th December, 1909, between the Secretary of State, the widow of a co-sharer, and the Court of Wards acting for the plaintiff who was then an infant.

The oldest map known to be in existence is Major Rennell's survey, prepared in 1780, which the Commissioner or Amin was directed to plot upon the map which he prepared. With regard to this map, in the case already cited, *Haradas Acharjya Chowdhuri* v.

*Secretary of State for India* (1), their Lordships made the following observations:—"Rennell's map is undoubtedly, both owing to its difference in scale, to the "different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey "was made, a map which it is hard to incorporate into "the survey of 1859. And, again, the variability of the "river renders reliance upon it difficult. As has been "already said, their Lordships are not, however, prepared to dispossess the appellants because of this "difficulty. It may be that any assumption that can "now be made cannot be exact, but some assumption is "necessary."

The Commissioner, as directed, plotted Rennell's map upon the one which he prepared. There was one fixed point which could be relied upon. A factory called Harishankara on the south bank was in existence in Rennell's map, and has remained ever since. Taking this point, and reducing the scale as best he could, the Amin plotted the river with a curve sweeping over two-fifths of the south-eastern part of the land in dispute, leaving the rest dry land to the north, which would be so far according to the plaintiff's contention, but putting the two-fifths in the bed of the river. In so doing, however, he put the site of two of the seven villages which constituted the block Jotashai, Sadashibpur and Mallikpur under the bed of the river, and, inasmuch as they must have been at the time of the settlement to the northward of the river, it followed that at some portion of its course over the map, the river must have been more to the southward than it was shown by this plotting, and if the curve retained its outline but was shifted bodily to the southward all except, perhaps, a very small part of the land in dispute would have been dry land on the north

(1) (1917) 26 C. L. J. 590.

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bank. It would have been just possible to shift the river bodily to the southward for this purpose, and yet leave the factory standing. If for some reason the course of the river was a little narrower, it could have been done more easily. But there was apparently no physical reason why the curve should have retained the same outline, and if the north turn began a little more to the westward and nearer the factory the land in dispute would have been under the bed of the river.

The next map which the Commissioner had to deal with was what was called the Diara map, prepared about the year 1850, at which time the Mahalwar register of Laskarpur showed the plaintiff's ancestor and predecessor in title as a proprietor of a great number of mouzahs still in existence, with a number of others noted as missing villages. Some of the seven villages to which the plaintiff referred in his plaint appear in one column, some in other, and some as to part in both.

The river bed, according to its course at that time is still traceable, and flowed apparently through the middle of the land in dispute. About this time appeared a chur called Marichar Diar—Diar meaning land emerging from water—which is said on behalf of the Secretary of State to comprehend the land in dispute. At the time when the Commissioner made his survey the river was two miles to the north and the factory a mile to the south of the land in dispute. He reckoned the area of the tract marked yellow as 20,004 bighas. The tract coloured violet is roughly about one-quarter of the tract coloured yellow.

There has been much previous litigation with regard to the tract coloured yellow and the lands adjacent to it. Their Lordships deem it unnecessary to refer to the earlier cases as they were summarised

in a judgment delivered by this Board on the 21st March 1906, in a case to which reference will now be made.

This was a suit brought by Rani Hemanta Kumari Debi in 1895 against the Secretary of State and Maharaja Jagadindra Nath Bahadur, the Rani claiming to be the proprietor of a zemindari right in a 2 annas 15 gundahs share of a permanently settled estate in Laskarpur, and alleging that the lands claimed by her within the area of block Jotashai had been permanently settled by the Government with her predecessor in title. The lands in which she was claiming her right were the larger block marked yellow in the plan annexed to the present suit, of which the part coloured violet is that for which the present appellant is suing. The Rani succeeded in the Court of first instance; that decision was reversed by the High Court, but restored by the judgment of this Board(1). The result was to decide that the lands in which she claimed a fractional share be ing comprised in block Jotashai lying between the village Jotashai on the north and the southern boundary of the chur are a re-formation *in situ* of lands which before diluviation were comprised in parganah Laskarpur.

This was a recovery by a co-sharer as against the Secretary of State of her right in the lands for which the plaintiff is suing in the present suit. It is not in itself conclusive, because the plaintiff was not a party to that suit. Objection, indeed, was made in that suit by the Secretary of State that the Rani could not sue without making other co-sharers parties; and the answer made by the Court was that it was unnecessary as the judgment would only decide her right, and would not be binding either in favour of or against other co-sharers. It was rejected by the High Court

(1) (1906) 3 C. L. J. 560.

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even as evidence; and this rejection might have been right, if it stood alone. But it was followed by a deed of partition, dated the 13th December 1909, between the Rani, an officer of the Court of Wards acting for the present plaintiff, then an infant, and a representative of the Secretary of State, whereby the tract marked yellow was divided between the three parties according to their several shares or supposed shares. The Rani took a portion, the Secretary of State two other portions, and the plaintiff the portion coloured violet. There is no reference in the deed to the Rani's successful suit, but it is clear that the partition was made in consequence of the decree in that suit and with the view to work it out, and in their Lordships' opinion this introduces the decree in the Rani's suit. Moreover, the deed describes the lands as being "in block Jotashai," which is in itself an important admission.

Mr. Justice Beachcroft, in his judgment in the High Court, after commenting upon the error into which the Subordinate Judge had fallen in treating the judgment in the Rani's case as conclusive proceeded as follows: "The error would not be of much sig- "nificance if we had in this case the evidence which "was given in Rani Hemanta Kumari's case, for it "would then be sufficient to adopt the reasoning used "in that case. But we have not." And he proceeded to refer to certain additional materials mentioned in the judgment in that case. It is satisfactory to their Lordships to think that there was that additional evidence; for in the present case, the evidence, apart from the inference to be drawn from this decision, and from a statement to be hereafter referred to on the map of Ramkristopur, is not very conclusive.

Careful and detailed as is the report of the Commissioner, and careful and detailed as is the judgment

of the Subordinate Judge, very little positive evidence to support the case of the plaintiff can be extracted from the report or the judgment, if the Rani's case and the conclusion arrived at in it be excluded. The comment of the Judges in the High Court that the Commissioner's conclusion appears to depend upon the curve of the river in this part having retained the same outline is a forcible one, as is the argument submitted by counsel for the respondents at their Lordships' bar to the effect that plaintiff cannot show in which one of the seven villages, which formed the taraf of Jotashai, the lands in question were situate at the time of the settlement, accompanied by his analysis of the facts which are known with regard to the boundaries of many of these villages, leaving only a residuum of uncertain area in which this tract could be put if it was dry land at the time of the settlement.

Their Lordships, however, cannot accept his contention that there is a distinction between the taraf and the block. Certainly there was no such distinction in the minds of those who gave judgment in the Rani's case. A perusal of that judgment would show that the words "taraf" and "block" are used interchangeably.

At the same time, their Lordships feel that it is possible to be over-critical of the Commissioner's report, and that among the many physical features which he saw and upon which he reported, there may have been some which pointed to traces of old channels of the river which would have supported his conclusion in a manner not directly apparent upon the face of his report; and they are much impressed by the fact that he was not cross-examined or given any opportunity to meet criticisms upon it.

There is one passage in the report of the Commissioner to which their Lordships' attention was specially

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directed. He has dealt with the boundaries of four of the seven villages in the block, and pointed out that, in his view, the remaining three could not be traced, and he proceeds to say that it would be not impossible that the sites of these three missing villages had been encroached upon by the river at the time of the Revenue Survey—that is about 1850—51, and consequently could not be then surveyed and mapped. His report then proceeds as follows:—

"There is no clear and positive evidence before me to show that the "river site at the time of the Revenue Survey was previously the site of "those three villages. But the fact that the site belonged to parganah "Laskarpur is amply proved by the statement contained in the Revenue "Survey map of Ramkristopur."

For some unexplained reason this map does not form part of the record. It is, therefore, impossible to say with certainty that this statement was of such a kind as to be receivable in the present suit under section 36 of the Indian Evidence Act. But no objection having been taken to the report and the Commissioner not having been examined or cross-examined, their Lordships think that they ought to treat it as admissible evidence, and if so, it adds considerable weight to the material upon which the Commissioner formed his conclusion.

Upon the whole, their Lordships think that the Commissioner's report, coupled with the decree in the Rani's case, was sufficient to turn the scale in favour of the plaintiff. Their Lordships are glad in dealing with a case in which the public interest is involved to be able to reach this conclusion. It would be unfortunate if, with regard to the same land, a decree could be made in favour of one co-sharer and another decree made against another co-sharer upon the same title.

There remain one or two points to be dealt with. In the partition deed which has been much relied

upon, and which is indeed the only link by which it is possible to connect the Rani's judgment with the present case, and in which this land is described as being in block Jotashai, it is stated when the plaintiff's share comes to be set out in the schedule that it was "settled for periods". This, it is contended, is an admission that there was no permanent settlement and an admission upon which the Secretary of State can rely as against the plaintiff. The plaintiff, it is true, repudiated this partition deed, which was effected on his behalf by the Court of Wards during his minority, but only a few days before he attained his majority, and contended that the partition proceedings were not binding upon him; but the Subordinate Judge held the contrary, and gave him a declaratory decree on the footing of the partition proceedings, and in the High Court his counsel accepted this position. But the words in the schedule "settled for periods" may be accepted as a correct description, but not as an admission that the settlement was *de jure*. This question leads their Lordships to consider the points raised in India and by the respondents' case before their Lordships, but not so much insisted upon at the bar, that the plaintiff was bound by a compromise entered into by his mother who was his predecessor in title, and a decree passed in pursuance of that compromise in 1881, or by a settlement which he took with the Government in 1910. The first of these contentions was not accepted by the Subordinate Judge or by the High Court. The Government were not parties to the compromise, or to the decree and as Mr. Justice Greaves in the High Court observed, there is on the record a letter from the Collector of Rajshahi expressly stating that the Government was not a party to that suit.

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As regards the second, the Subordinate Judge held that the plaintiff need not bring a suit for the purpose of having the settlement, which was said to have been forced upon him in 1910, set aside, as his purpose would be equally served by his obtaining a declaration that he was not liable to double assessment for the disputed land.

This objection does not seem to have been deemed by the High Court worthy of further notice. It reappears, however, in the case for the respondents before the Board, but was not much insisted upon in argument, and being rather a point of procedure than of substance is therefore not one on which the Government would be desirous of relying, and their Lordships do not think it should prevail.

The defence of the Limitation Act was dealt with by the High Court, and their Lordships see no reason to differ from the view there taken.

The ground upon which the High Court differed from the Subordinate Judge was not that the evidence showed that this disputed tract had been under the bed of the river, but that the burden of proof lay upon the plaintiff, and that he had not proved with sufficient conclusiveness that it was dry land to the north of the river at the time of the permanent settlement, and the High Court put aside the judgment of this Board in the Rani's suit as not being evidence.

The grounds upon which their Lordships differ from the High Court are that the decree in the Rani's suit, followed by the partition deed, must, in their Lordships' view, be regarded as material, and that the High Court have not attached sufficient weight to the conclusions of the Commissioner, derived from examination on the spot, and his reference to the map of Ramkristopur, unchallenged as his conclusions were by examination and cross-examination.

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Upon the whole, their Lordships will humbly recommend His Majesty that the decree of the High Court be set aside, and the decree of the Subordinate Judge be restored, and that the plaintiff do have his costs in the Court below and of this appeal, these costs to be paid by the Secretary of State.

Solicitor for appellant: *W. W. Box & Co.*

Solicitor for respondent: *Solicitor, India Office.*

## APPELLATE CRIMINAL.

*Before Newbould and Suhrawardy JJ.*

KALI SINGH

*v.*

EMPEROR.*

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*Jan.* 10.

*Criminal Conspiracy—Consent of authorities to prosecution for conspiracy to commit non-cognizable offence—Application for sanction containing particulars required—Omission of the same in the order of sanction—Validity of the sanction—Criminal Procedure Code (Act V of 1898), ss. 195 and 196A.*

Consent in writing of the authorities specified in s. 196A of the Criminal Procedure Code is not necessary to a prosecution for criminal conspiracy to commit a non-cognizable offence when s. 195 (*3*) is applicable. The petition for sanction under section 195 is to be read with the order granting it, and the latter is not bad for want of specification of the particulars required by cl. (*4*) when they are contained in the petition.

*Dullo Singh* v. *Deputy Inspector-General of Police, C. I. D., Bengal* (1), followed.

*Baperam Surma* v. *Gouri Nath Dutt* (2) and *Thaddeus* v. *Janaki Nath Saha* (3), referred to.

* Criminal Appeal, No. 431 of 1922, against the order of A. D. C. Williams, Sessions Judge of Birbhum, dated July 1, 1922.

(1) (1921) I. L. R. 49 Calc. 551. (2) (1892) I. L. R. 20 Calc. 474.
(3) (1912) I. L. R. 40 Calc. 423.