LETTERS PATENT APPEAL.

Before Nasim Ali and Mukherjea JJ.

SHAHABUDDIN SARKAR

v.

KAFILUDDIN TAPADAR.*

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July 8, 21.

Practice—Amendment of plaint by appeal Court—Alluvion—Accretion—Apportionment—Principle—Bengal Alluvion and Diluvion Regulation (XI of 1825), ss. 4(1), (5).

In determining the method of division to be followed in respect of disputed land gained by alluvial accretions in cases not specially provided for by the Bengal Regulation XI of 1825, the Court is to be guided by the best evidence of any established local usage, or, in its absence, by the general principles of equity and justice as under s. 4(5) of the Bengal Regulation XI of 1825. The Court is to see that each of the riparian owners gets a fair and proportionate share of the new river frontage.

Where in a suit for declaration of title to and for recovery of possession of a parcel of alluvial *char* land formed by the recess of a river on the basis of possession without allegation of any established local usage an application for amendment of the plaint was made by the plaintiff-appellant to the High Court so as to permit evidence of established local usage, *etc.*, to be admitted, the amendment prayed for was under the circumstances of the case allowed and the case was remanded.

LETTERS PATENT APPEAL preferred by the plaintiff against the judgment of R. C. Mitter J.

The material facts of the case and the arguments in the appeal appear sufficiently in the judgment.

Naresh Chandra Sen Gupta and *Jogesh Chandra Singha* for the appellants.

Gunada Charan Sen and *Amalendu Sen* for the respondents.

Ramendra Chandra Ray for the Deputy Registrar.

Cur. adv. vult.

*Letters Patent Appeal, No. 22 of 1936, in Appeal from Appellate Decree, No. 996 of 1934.

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NASIM ALI J. The appellants instituted a suit in the Court of the Munsif at Chandpur for a declaration of title to and for recovery of possession of a parcel of *char* land which is admittedly a part of alluvial lands formed by the recess of the river Meghna towards the east. Their case is that the disputed land is a part of the accretions to C. S. No. 702, while the case of the defendants respondents is that it is a part of the accretion to C. S. No. 717 belonging to them, which lies to the north of the plaintiffs' C. S. No. 702. The trial Court determined the question of title on the basis of actual possession of the *char* lands after their formation and decreed the suit in part. Defendants Nos. 1, 2 and 7 appealed to the Subordinate Judge of Tippera. The Subordinate Judge of Tippera, who heard the appeal, was of opinion that the determination of the question of title to the disputed land depended upon the right method of apportionment of the *char* lands between the two rival riparian owners and that the right method was by drawing a line from the point of intersection of the two riparian estates perpendicularly to the course of the river. Following this method he allowed the appeal in part and the decree of the trial Court was varied by him. The plaintiffs appealed to this Court and as this appeal has been dismissed by Mitter J., the present appeal is under s. 15 of the Letters Patent.

The contention of the appellant is as follows :—

The trial before the Munsif proceeded on the footing that the rights of the riparian tenants to the accretion depended upon the mode of their actual possession of the *char* lands. Since their formation it was the case of both sides before the trial Court that as the *chars* began to form, all the riparian tenants of the village including the parties to the present suit extended their possession eastwards straightway in accordance with the directions of the boundary *hâtâils* of the respective *âsuli* lands. It was never disputed that the method of division of all

the *char* lands in the locality was not in accordance with the local usage or principle of equity and justice. The learned Subordinate Judge was, therefore, wrong in adopting a method for determining the question of title between the parties.

The above contention of the appellants is supported by the following passage in the judgment of the trial Court :—

> It is admitted on both sides in this case that as accretion proceeded, all the tenants extended their possession eastwards straightway in accordance with the direction of the boundary of their respective lands in the *âsuli*.

D. W. No. 2 in his evidence stated as follows :—

> We all possessed the accreted lands up to the river in reference to the line of the pre-existing *hâtâils*.

D. W. No. 1 in his evidence stated that with the receding of the river eastward, all the tenants of the village advanced their possession eastward in reference to their respective boundary *hâtâils* in their *âsuli*. The present suit, however, is a suit for possession on declaration of title. The plaintiffs, therefore, can succeed only if they can show that they have a right to possess. By the fifth clause of s. 4 of Bengal Regulation (XI of 1825), in all cases of disputes respecting land gained by alluvion, which are not specifically provided for by the rules contained in this Regulation, the Courts of justice, in deciding upon such disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or, if not, by general principles of equity and justice. It is true that in the plaint there was no express allegation by the plaintiffs that the method of division adopted by the riparian tenants of the village was in accordance with the principles of equity and justice. This was evidently due to the fact that in the course of the survey of the *char* lands of the locality at the instance of the *khâs mehal* authority in the year 1336 B.S. there was a dispute between the parties to the present suit regarding the land

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which is the subject matter of the present suit and the defendants claimed the disputed land on the basis of their possession after the formation of the *char* lands. This dispute was decided by a revenue officer on December 22, 1929, in favour of the defendants. The present suit was instituted four months after the decision of the revenue-officer. Again, the admitted northern, rather the north-eastern, boundaries of the defendants' *char* lands lend support to the plaintiffs' case. The plaintiffs made an application for amending the plaint in this Court. Regard being had to the peculiar facts and circumstances of this case, we allow this application and set aside the judgment and decree under appeal as well as those of the Courts below and send the case back to the trial Court for rehearing of the suit.

The defendants will be entitled to file the additional written statement and both parties will be entitled to give additional evidence relating to the new issues arising out of the amended plaint as well as the additional written statement, if any, of the defendants. The trial Court, in deciding the dispute between the parties, is to be guided by the best evidence of the local usage that might be obtained and, if no such evidence is available, by the principle of equity and justice.

The principles of equity require that each party of the riparian owners should get a fair and proportionate share of the new river frontage so that he may get a fair share of the future accretion by the river receding further towards the east.

If there be no satisfactory evidence of any established local usage, the trial Court will determine the extent of the new river frontage of the entire accretion to C. S. plots Nos. 717 and 702 and give each party a share in the new frontage by adopting such method as will lead the division of the new river frontage fairly proportionate to the extent of their share of the old frontage.

Parties will bear their own costs in this L. P. Appeal as well as in the Second Appeal No. 996 of 1934.

The decree for costs passed by the lower appellate Court in favour of the defendants will, however, stand.

MUKHERJEA J. I agree with my learned brother in the order of rehearing of the case which has been passed in this case and I would like to give shortly my own reasons in support of the order that has been made.

Section 4, cl. (*1*) of Bengal Regulation XI of 1825 lays down that when the land is gained by gradual accession, whether from the recess of a river or of a sea, it shall be considered to be an increment to the tenure of the person to whose land or estate it is thus annexed. The Regulation does not lay down any rule for division or apportionment of the alluvial accretion when several estates or interests are concerned and the increment has been to more than one riparian estate or tenure. In all such cases the general provision contained in s. 4, cl. (*5*) of the Regulation applies and the Courts are to be guided by the best obtainable evidence of local usage and, failing that, by general principles of equity and justice. Difficulties might arise as to the selection of the method in a particular case, which would apportion the interests in a just and equitable manner. But, in my opinion, it would not be proper to lay down any hard and fast rule on the point. The Court in every case should have in mind the principle upon which the distribution of the accreted lands amongst the littoral owners is to be made and it should be left to it to find out the proper method which, in the particular circumstances, would best give effect to the principle. The priniciple undoubtedly is to secure to each riparian owner a portion of the new water line which is proportionate to his frontage on the old

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water line. As my learned brother Mitter J. pointed out in his judgment, it is a doctrine which has come down to us from the old Roman times and is now accepted by all English and American jurists. The Judicial Committee of the Privy Council expressly affirmed it in the case of *Puhlwan Singh* v. *Moheshur Buksh Singh* (1) in these words :—

> The final result is that there must be a division of the disputed land, each estate taking that which is *ex adverso* its own frontage.

What is to be taken into consideration in making the apportionment is the extent of the old river frontage of each riparian owner. The extent of the land back from the shore or the water line is really immaterial. I am in entire agreement with Mitter J. in holding that it would not be an equitable method of distribution, if boundary lines are to be drawn in the new accretion in continuation of the old boundaries of the riparian proprietors. This might lead to gross injustice specially in cases where the boundaries slope back and meet at an angle. This method does not secure any equality and cannot, therefore, be followed except on the footing of an established local usage. There is also no doubt that when circumstances permit, the division of the accreted lands by lines drawn from the extremities of the estates of the competing frontagers perpendicular to the newly formed coasts may be an equitable and satisfactory solution of the rights of the contending parties. This method, which is the prevalent method in America, was adopted by Lord Chanceller Hatherley in the case of *Crook* v. *Corporation of Seaford* (2) and was followed by the Judicial Committee of the Privy Council in the case of *Puhlwan Singh* v. *Moheshur Buksh Singh* (*supra*). There are, however, certain special features of this case which require consideration before the Court can properly determine the method of division that is to be followed in respect of the disputed lands. The most important fact is that although the plaintiffs

(1) (1871) 16 W. R. (P. C.) 5, 8. (2) (1871) L. R. 6 Ch. 551.

claimed the disputed plot on the basis of a continuation of the old boundary lines, the defendants in their written statement did not challenge this principle of division but simply stated that the boundary lines lay elsewhere. It is on this basis that the local investigation was directed. In their evidence too the defendants stated rather broadly that whenever the river receded to the east and accretion took place, the tenants took possession of the newly formed area according to *hâtâils*. It may be that they spoke of existing possession and not of right to possess according to law or usage. But if as a matter of fact such possession was habitually acquiesced in without dispute by the landlords and adjacent holders of the lands and the rights of the parties were uniformly adjusted on that basis, that would show the existence of an usage in the locality. It is perfectly true, as pointed out by Mitter J., that no local usage was pleaded in the plaint. But it is also true that the defendants in their written statement did not claim accretion on any other basis than that of extension of the original boundary lines. This admission certainly would not preclude them from showing that the principle was neither just nor equitable. At the same time it would be unfair not to give the plaintiffs an opportunity to prove a local usage in support of their case for which there is certainly some foundation in the evidence though not in the pleadings.

I agree, therefore, with my learned brother that the decrees of all the three Courts should be set aside and the case should go back to be tried on the fresh issues framed on the basis of additional pleadings. If an usage is established the Court would certainly determine the rights of the parties in accordance with that usage. In case the plaintiffs fail to establish an usage, it would be the duty of the Court to determine the proper method of division in that case.

A material fact which would require consideration in this connection is that the subject matter of dispute

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in this case is not the entire extent of the alluvial accretion that has formed at the front of the land of the parties to the suit. The land in dispute is only a small portion of the whole accretion and the way in which the rights of the parties have already been adjusted with regard to the rest of the accretion would be an important thing to be taken into consideration by the Court in arriving at the conclusion regarding the method of division to be applied. After all, the Court is to see that each riparian proprietor gets the same portion of the frontage in the new river land as he had in the old and for this purpose he can follow the method of drawing perpendiculars from the intersecting points or such other method as he considers best.

Case remanded.

A. K. D.