Before Mr. Justice Niamat-ullah and Mr. Justice Collister

1934 *September*, 28

SRI KRISHAN DATT (PLAINTIFF) *v.* AHMADI BIBI AND OTHERS (DEFENDANTS)*

*Alluvion and diluvion—Riparian owners—Gradual accession—Recognizable re-formation on old site and identifiable as land belonging to a particular owner—Bengal Regulation XI of 1825, sections 2, 4—Custom—*Dhar dhura*—Oral evidence of ancient custom—Hearsay—Evidence Act (I of 1872), sections 13, 33—Statement of witnesses in Settlement proceedings—Admissibility in evidence—Limitation Act (IX of 1908), articles 142, 144—Constructive possession—Land submerged under water periodically.*

Under section 4 of Bengal Regulation XI of 1825, as interpreted by the Privy Council, if the land which has gradually accreted to the estate of one of the riparian proprietors can be identified as the land belonging to another such proprietor, the latter shall be deemed to continue to be the owner thereof in spite of the accretion having been gradual. *Maharaja of Dumraon* v. *Secretary of State for India* (1), followed; *Secretary of State for India* v. *Foucar and Co.* (2), distinguished and explained.

A custom of *dhar dhura* (deep stream boundary) will, if established, prevail under section 2 of the Regulation in derogation of the general rule enacted in section 4. Oral evidence, in support of the existence of an ancient custom of this kind, of witnesses who depose to having heard of the custom from their deceased ancestors is admissible in evidence, and oral evidence as regards the remote past must in the nature of things be hearsay.

Proceedings before a Settlement Deputy Collector in connection with a dispute regarding the correct boundary between two villages for fiscal purposes can not be considered to be judicial proceedings within the meaning of section 33 of the Evidence Act; and the statements of witnesses examined in those proceedings, on the question of the existence of a custom of *Jhar dhura* regulating the boundary between the two villages, are not admissible in evidence under section 33 in proof of such custom in a subsequent civil suit between the owners of the villages. At the same time, the statements could be looked into to assess the value of the Settlement Deputy

*First Appeal No. 471 of 1930, from a decree of Mathura Prasad, First Additional Subordinate Judge of Jaunpur, dated the 26th of July, 1930.

(1) (1927) I.L.R., 6 Pat., 481. (2) A.I.R., 1934 P.C., 17; I.L.R., 12 Ran., 136.

Collector's order, which was admissible in evidence under section 13 of the Evidence Act as having recognized the existence of the custom, in order to ascertain whether such recognition was based on substantial evidence.

Where land belonging to the plaintiff was every year submerged under a river for part of the year, and upon re-emergence was taken possession of by the defendant for the rest of the year, it must be deemed that constructive possession of the land reverted to the owner during the period of submergence every year, so that the plaintiff's dispossession was not continuous and his claim could not be barred by limitation.

Messrs. *P. L. Banerji, Gopalji Mehrotra* and *Kalim Jafri,* for the appellant.

Dr. *K. N. Katju* and Mr. *K. Verma,* for the respondents.

NIAMAT-ULLAH and COLLISTER, JJ.:—This is a plaintiff's appeal arising out of a suit for recovery of possession and mesne profits in respect of 78 acres of land, alleged to form part of the plaintiff's mahal in village Birampur Kham in the district of Jaunpur. The defendant No. 1 is a mutwalli of a certain wakf to which villages Gaura and Bhelpur belong. The other defendants, 55 in number, are tenants in cultivating possession of the land in dispute. The suit was dismissed by the lower court, and the plaintiff appeals.

The plaintiff's village Birampur Kham lies on the northern bank of river Gomti. The defendants' villages, Gaura and Bhelpur, lie on the south with a westerly direction. The plaintiff's case, as set out in his plaint, is as follows: The land in dispute lay on the north of river Gomti before 1894, and was an integral part of village Birampur Kham. The river was flooded in the year 1894, and since that year gradually shifted to the north, throwing up land on the south adjoining the defendants' villages Gaura and Bhelpur. This was in course of a number of years, the river slowly receding to the north and throwing up land on the south, with the result that the land in dispute, which was situate before 1894 on the north of the

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river, was thrown up on the south adjacent to villages Gaura and Bhelpur. It is clearly stated in the plaint that the river changed its course slowly and gradually. The plaint does not show how long this process of gradual accession on one side and loss on the other continued; but from other evidence in the case, which will be hereafter mentioned, it appears that it must have continued till, at least, 1906. The plaint goes on to assert that the land in dispute was not culturable, being covered with sand and certain plants of spontaneous growth for a considerable length of time, and the tenants, parts of whose holdings were submerged and were thrown up on the south, surrendered those parts and discontinued paying rent to the plaintiff. According to the plaintiff, the defendants took possession of the lands in dispute in 1921, when a suit relating to the entire estate of the plaintiff was pending, and the plaintiff could not, owing to his preoccupations, institute a suit for possession earlier than he did. The suit was instituted on 2nd July, 1928. On these allegations the plaintiff claimed possession of the entire land which is indicated in a map prepared by the Commissioner, which also shows the present bed of the river and its course in 1894.

Separate written statements were filed by defendant No. 1 and other defendants, but their defences are more or less identical. It was pleaded that the river Gomti had from ancient times been the boundary between the village Birampur on one side and villages Gaura and Bhelpur on the other, and that according to an immemorial custom the southern half of the bed of the river appertained to the defendants' villages and the northern half to the plaintiff's. According to the aforesaid custom, all land lying to the south of the deep stream belongs to villages Gaura and Bhelpur and that on the north of it to the plaintiff's village Birampur. Whenever any land is added by the river changing its course—whether the change is gradual or

sudden—the deep stream continues to be the boundary between the plaintiff's village and the defendants' villages. The defendants also pleaded that the land in dispute had gradually accreted to their villages between the years 1885 and 1910 and that the plaintiff had never been in possession of any part of that land after 1910, since when the defendants had been cultivating the same. On these allegations the defendants put forward two distinct pleas: (1) They claimed the land in dispute to be theirs, as it had been acquired by them by gradual accretion within the meaning of Regulation XI of 1825; and (2) Apart from the aforesaid Regulation, the defendants allege to have become entitled to the land by virtue of the custom above referred to, under which all land to the south of the Gomti and adjacent to villages Gaura and Bhelpur belonged to the proprietor of these villages. The defendants also pleaded limitation and adverse possession.

Three main questions emerge from these pleadings: (1) Whether the land in suit was so added to the defendants' villages by gradual accretion as to become their property under Regulation XI of 1825? (2) Whether the custom, under which all land lying to the south of the river Gomti and adjacent to villages Gaura and Bhelpur belongs to the proprietor of those villages, has been established? (3) Whether the plaintiff's claim is barred by limitation and adverse possession of the defendants?

The learned Subordinate Judge found on evidence that the land in dispute accreted to villages Gaura and Bhelpur slowly and gradually, but that in so far as it can be identified as land once lying to the north of the Gomti and being an integral part of village Birampur, the defendants are not entitled to it under Regulation XI of 1825. On the question of custom the learned Subordinate Judge found in favour of the defendants, basing his decision on oral and documentary

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evidence. On the question of limitation the learned Judge held that land lying north-east of a dotted line appearing in the plan prepared by the Commissioner should be considered to have been in the plaintiff's possession within limitation and as to that land the defendants cannot be considered to have acquired any title by adverse possession. As regards that part of the land in dispute which is shown in the Commissioner's map on the south-west of the dotted line, the finding of the learned Subordinate Judge is that the land has been capable of actual possession for a considerable length of time—at least 20 years before the institution of the suit—and that the defendants have been in actual possession thereof openly and adversely. Accordingly the plaintiff's claim with regard to such land has been held to be barred by limitation and adverse possession of the defendants.

In appeal the above three questions have been argued and the findings of the learned Subordinate Judge have been traversed.

The finding of the learned Subordinate Judge that the land in dispute was thrown up on the south of Gomti gradually and in course of a number of years cannot be seriously challenged. Indeed, it is admitted in the plaint itself that this was so.

* * * * *

But the question arises whether, apart from custom, the defendants can be considered to have acquired a right to the land in dispute, which has been slowly and gradually added to their villages by the action of the river. The answer to this question depends upon section 4, Bengal Regulation XI of 1825, which provides that:

"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zamindar or other superior land-

holder, or as a subordinate tenure by any description of under-tenant whatever. . . ."

"The above rule shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity, and preventing the recognition, of the land so removed"

These rules are subject to section 2, under which any proved custom in derogation of the general rule enacted in section 4 is to prevail. The first part of section 4 creates an impression that in cases of gradual accretion the proprietor, to whose land alluvial land is added, becomes the owner of such land, provided the accretion has been gradual. There is no reference in that part of the rule to the condition that the land should be unidentifiable. The absence of this condition is prominently mentioned in the latter part of the rule which deals with cases of sudden change by which large areas are separated from one estate and added to another. The interpretation which has been placed by their Lordships of the Privy Council on the first part of section 4, however, shows that if the land which has gradually accreted to the estate of one of the riparian proprietors can be identified as the land belonging to another such proprietor, the latter shall be deemed to continue to be the owner thereof in spite of gradual accretion. In a recent case, *Maharaja of Dumraon* v. *Secretary of State for India* (1) it was found as a fact that the process of alluvion by which the land then in suit was formed adjacent to the defendant's land was "slow, gradual and imperceptible." Their Lordships nevertheless held that the lands continued to belong to the former proprietor as they could be recognized by careful measurement. Their Lordships reviewed earlier cases, including the well known case of *Lopez* v. *Muddun Mohun Thakoor* (2).

(1) (1927) I.L.R., 6 Pat., 481. (2) (1870) 13 Moo.I.A., 467.

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They approved certain observations occurring in those cases, one of which is as follows: "We are of opinion that the word "gained" in section 4 of Regulation XI of 1825 does not extend to cases of land washed away and afterwards re-formed upon the old site, which can be clearly recognized . . . In such a case we think the land formed by accretion on the old recognized site remains the property of the owner of the original site. The principle is that where the accretion can be clearly recognized as having been re-formed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner." An argument to the contrary addressed to their Lordships, in which it was contended that the old proprietor lost his proprietary right in consequence of gradual accretion to the proprietor to whose land it accreted, was not accepted. As against this our attention has been drawn to a later case reported in *Secretary of State for India* v. *Foucar and Co.* (1) in which their Lordships are reported to have held that "The principle, that gradual accretion enures to the land which attracts it, is one that has been recognized from very early times. The rule is of general convenience and security and is necessary for the mutual adjustment and protection of property. The general principle of accretion applies even where the former boundaries of the land on the waterfront are known or capable of ascertainment." The case went up in appeal from Burma where Regulation XI of 1825 is not in force. At the same time it must be admitted that their Lordships based their decision on general principles and English cases which are also partly the basis of the decision in *Maharaja of Dumraon* v. *Secretary of State for India* (2), following as it does *Lopez* v. *Muddun Mohun Thakoor* (3) and other similar cases. For the purposes of the case before us, which is governed by Regulation

(1) A.I.R., 1934 P.C., 17; I.L.R., 12 Ran., 136.
(2) (1927) I.L.R., 6 Pat., 181. (3) (1870) 13 Moo. I.A., 467.

XI of 1825, we think that the interpretation placed by their Lordships on section 4 of that Regulation in the *Dumraon case* must be accepted.

A possible mode of reconciling the apparently conflicting observations made by their Lordships of the Privy Council in the two cases above referred to may be found in the fact that the Rangoon case was between the Crown and a subject. In *Lopez* v. *Muddun Mohun Thakoor* (1) their Lordships observed:

"It would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another. In truth, when the whole words are looked at, not merely of that clause but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense—that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable."

Where the bed of the river belongs to the Crown and the land on the one side of it also belongs to the Crown, as in the Rangoon case, any accretion to the land of the proprietor on the other side is at the expense of the State and the consideration mentioned in the above observation may not hold good in such a case.

In view of these authorities we think that the learned Subordinate Judge rightly held that the disputed land having been identified to have been part of Birampur, the defendants cannot claim it only because it has gradually accreted to their villages Gaura and Bhelpur.

The most important point in the case is whether the defendants have succeeded in establishing the custom

(1) (1870) 13 Moo.I.A., 467.

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set up by them. They rely upon the proceedings before the Settlement authorities in 1880 in respect of a certain land which had been transferred from the northern bank of Gomti to the southern bank. It is not disputed that that land had also formed part of the plaintiff's village Birampur and was by the action of the river added to the defendants' villages Gaura and Bhelpur. The case was started on the report of a *sazawal* in the service of the Court of Wards under whose superintendence the plaintiff's estate then was. It was stated in that report that an area of 28 bighas odd which was part of village Birampur had been transferred to the other side of the river and it was prayed that the old boundary be maintained so that part of the plaintiff's village would lie on the southern bank of river Gomti. The *sazawal's* report was confirmed by a report of the patwari of the plaintiff's village. The defendants' village Gaura was at that time held by a lessee who entered appearance and claimed the land for his lessor. Subsequently the latter's karinda also made an application claiming the land to be part of the village Gaura. Both of them rested their claim on the custom under which the deep stream is the constant boundary between the plaintiff's estate and that of the defendants. It was said that half of the bed of the river belongs to Gaura and the other half to Birampur wherever the bed of the river may be. A number of witnesses were examined on behalf of the then proprietor of Gaura. They stated that the deep stream is the constant boundary between the two villages. No witnesses were examined on behalf of the Court of Wards. The Settlement Deputy Collector made a report, dated the 18th October, 1880, which is at one place somewhat obscure, directing that the deep stream of the river should be recognized as the boundary between villages Birampur and Gaura. He also recorded a finding that the land had gradually accreted to the village Gaura since 1273 F. (1865-6). The

Deputy Collector expressly repelled the contention put forward on behalf of the Court of Wards that the boundary should be fixed at the old bed of the river. The record of the case was subsequently laid before the Settlement Officer, who ordered on the 27th November, 1888, that "The river be considered as the boundary and that the case be sent to the court of the Deputy Saheb." It is argued on behalf of the plaintiff appellant that neither in the report of the Deputy Collector nor in the order of the Settlement Officer there is any mention of custom. This is true; but we cannot ignore the fact that the custom had been clearly set up on behalf of the proprietor of Gaura who led evidence in support of it. The order of the Settlement Officer, if not also the report of the Deputy Collector, is consistent only with the hypothesis that the custom set up by the proprietor of village Gaura was found to exist. An accretion of about 28 bighas in course of a few years could not confer any title on the proprietor of Gaura in the absence of a custom.

The learned Subordinate Judge treated the statements of witnesses examined before the Settlement Deputy Collector as evidence in this case. The learned Advocate for the plaintiff appellant contended that those statements are not admissible in evidence. It was replied on behalf of the defendants that the statements are admissible under section 33 of the Evidence Act as the same question was involved on that occasion as in the present case. We do not think that this contention is sound. Section 33 of the Evidence Act makes evidence given by a witness in "a judicial proceeding" admissible in evidence in a subsequent judicial proceeding, where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence, etc. In this case proceedings before the Settlement Deputy Collector cannot be considered to be "judicial proceedings" as the dispute was in respect of the boundary between

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two villages for fiscal purposes, and therefore section 33 of the Evidence Act will not make the statements admissible in proof of the custom now sought to be established by the defendants. At the same time, we do not think that the statements can be excluded altogether. They may not be admissible by themselves as evidence of the custom now in controversy, but they can be looked into to assess the value of the Deputy Collector's report and of the Settlement Officer's order which recognized the existence of the custom now in question. It cannot be doubted that the report and the order are admissible in evidence under section 13 of the Evidence Act as recognizing the custom now in dispute. To ascertain whether the recognition then extended to the custom was based on substantial evidence it is permissible to refer to the evidence on which it was based. The statements are not evidence by their own force on the question of custom but only furnish evidence of the materials on which the Settlement authorities based their view.

It appears that in 1894 some more land was thrown up on the south of the river and the patwari of village Birampur made a report asking for orders as to how the land should be recorded. It does not appear whether any notice was given to the parties. In any case, the order which followed does not show that it was passed in the presence of the parties. The Assistant Collector who passed orders on that report directed that the land should be continued to be recorded as part of village Birampur. The ground on which that order was based is that no custom of *dhar dhura* is recorded in the wajibularz. Great reliance is placed on this order on behalf of the plaintiff appellant. It is contended that it tends to disprove the custom set up by the defendants. While it cannot be denied that the order of the Assistant Collector is a piece of evidence on the question whether the custom exists, its value in our opinion is not great. The Assistant

Collector expressed that opinion only because the wajibularz did not record the custom of *dhar dhura*. If his attention had been drawn to the order of the Settlement Officer passed in 1880, he might have taken a different view. All that the order shows is that the absence of entry as regards custom in the wajibularz was considered to be decisive. We do not think that this is quite correct. As against this, we have the fact that the land to which the order related has been in possession of the defendants and is part of that now in suit. Though it continued to be recorded as part of village Birampur no acts of ownership were exercised by the plaintiff at any time after that order was passed. The defendants on the other hand have all along been in possession. In these circumstances we do not think that the Assistant Collector's order above referred to can afford any rebuttal of the order of the Settlement Officer passed in 1880.

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To sum up the evidence for and against the custom set up by the defendants, we find that it was recognized by the Settlement authorities in 1880 and that recognition was based on the evidence of a number of witnesses; that the custom was not recognized in 1894 by the Assistant Collector who however acted merely on the absence of an entry as to custom in the wajibularz; that there is a mass of oral evidence adduced by the defendants consisting of the statements of witnesses who depose to having heard of the custom from their deceased ancestors; that as against this class of evidence the oral evidence adduced by the plaintiff is unreliable; and lastly the conduct of the plaintiff gives rise to the inference that he always acquiesced in the loss of land, recognizing the river as the constant boundary between his village and those of the defendants. In *Rajendra Narain Dhanj Deo* v. *Gangananda Singh* (1) their Lordships of the Privy Council held that

(1) (1925) I.L.R., 4 Pat., 788.

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an immemorial custom within the meaning of section 2 of Bengal Regulation XI of 1825 was established on the evidence of witnesses who spoke from their personal knowledge of what happened during 20 years and from hearsay as regards the remote past. In the case before us we have oral evidence of that description which is very materially corroborated by documentary evidence and certain circumstances to which we have referred. The learned Subordinate Judge recorded a definite finding on the strength of the evidence mentioned above that the custom set up by the defendants exists. Having carefully considered the entire evidence and the arguments addressed to us on behalf of the plaintiff appellant we do not find any ground for interfering with the well considered finding of the learned Judge of the court below. Accordingly we affirm it and hold that the defendants have established the custom under which the deep stream of the river Gomti is the boundary between the village Birampur and the villages Gaura and Bhelpur.

The only other question that remains to be considered is one of limitation and adverse possession. The learned Subordinate Judge held that article 144 of the Indian Limitation Act is applicable and that the burden lies in the first instance on the defendants to establish their adverse possession. The learned advocate for the defendants respondents has challenged the correctness of this view and has referred us to two recent decisions of this Court. The case of *Kunji* v. *Niaz Husain* (1) was decided by a Division Bench in which it has been held that where the plaintiff sues for recovery of possession on the allegation that he was dispossessed or that his possession discontinued some time before the institution of the suit, the proper article to apply is 142. The same view has been taken in the case of *Bindhyachal Chand* v. *Ram Gharib Chand* (2), decided by a Full Bench. It is pointed out that in

(1) (1933) I.L.R., 56 All., 755. (2) (1934) I.L.R., 57 All., 278.

the present case there is a definite allegation in the plaint that the plaintiff was dispossessed in 1921. Accordingly, it is argued, the burden lies on the plaintiff to show that he was in possession of the land in dispute within 12 years before the institution of the suit. It seems to us that for the purposes of the present case it is immaterial whether article 142 or 144 be applied. The learned Subordinate Judge has divided the land in dispute into two portions. That lying to the north of a dotted line shown in the Commissioner's map has been held to be unaffected by the defendants' adverse possession, as according to the finding of the learned Judge it used to be under water for some time every year. As regards the rest of the land which lies on the south of the dotted line, the finding is that it has been in exclusive possession of the defendants for more than 20 years. If these findings be accepted, the conclusion will be the same whether we apply article 142 or article 144. During the period of submergence the plaintiff—assuming he had the title vested in him—should be deemed to be in constructive possession of the land under water. This state of constructive possession should, on that hypothesis, hold good for some time every year, so that the plaintiff should be deemed to have been in possession every year before the institution of the suit. This view is in accord with *Secretary of State for India* v. *Krishnamoni Gupta* (1) and *Ram Nain Misir* v. *Deoki Misir* (2), which appears to be on all fours with the present case on this point. As regards the other land, it was argued on behalf of the plaintiff that it was not fit for cultivation for a long time and that it has been cultivated for less than 12 years before the institution of the suit. The learned Subordinate Judge has, however, found that practically the whole of the uncultivated portion of the land was overgrown with *babul* and *madar* trees and *sarpat* (reed) and that the

(1) (1902) I.L.R., 29 Cal., 518. (2) (1922) 20 A.L.J., 756.

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defendants have been appropriating such benefit as the *babul* trees and other produce were capable of yielding. We are in agreement with the learned Judge in holding that the defendants' possession of this part of the land was adequate as regards continuity and extent. We have already referred to the evidence which shows that no attempt was ever made on behalf of the plaintiff to take possession of this land and that as any strip of land emerged from water it was taken possession of by some or the other of the defendants. In this view the plaintiff cannot be considered to have been in possession within limitation, and the defendants must be considered to have had adverse possession of the whole of this part of the land in dispute.

The result is that this appeal fails, and is dismissed with costs.

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

1934 *October*, 1

ISHWAR DAYAL (DEFENDANT) *v.* ANNA SAHEB AND OTHERS (PLAINTIFFS)*

*Court fee—Mortgage suit—Prayer for sale subject to an alleged prior mortgage in plaintiff's favour—No relief claimed with respect to the prior mortgage—*Ad valorem *court fee not payable on prior mortgage but a declaratory court fee payable.*

In a suit for sale upon a mortgage the plaintiffs alleged the existence and gave details of another prior mortgage in their favour, and prayed that the mortgaged property be sold subject to the prior mortgage. The plaintiffs claimed no other relief with respect to the prior mortgage, although, no doubt, their object was to have the matter of the prior mortgage settled once for all, as if the defendants did not impugn it they would be barred from challenging it in any subsequent suit: *Held* that the suit should be considered to be one for recovery of money due under the subsequent mortgage, coupled with a declaration in respect of the existence of the prior mortgage, and the plaintiffs were liable to pay a court fee of Rs.10 for the

*Stamp Reference in First Appeal No. 508 of 1930.