PRIVY COUNCIL.

1925.

May, 13.

RAJENDRA NARAIN DHANJ DEO

v.

GANGANANDA SINGH.*

Alluvion—River forming boundary of villages—Immemorial custom—Change of course of river caused by action of neighbouring river—Hearsay evidence as to custom—Bengal Alluvion and Diluvion Regulation, 1825 (*Bengal Regulation XI of* 1825), *section* 2.

The river Gandak flowed between two villages, *M* being on the north side and *R* on the south side. In 1899 the Ganges, which flowed at some distance from the Gandak, began to encroach northwards and ultimately joined the Gandak. By the combined action of the two rivers part of *M* was diluviated. On the waters receding land gradually began in 1906 to re-appear to the south of the river, and upon its becoming cultivable the owner of *R* took possession of it on the ground that by immemorial custom the Gandak formed the boundary between the villages. The owner of *M* claimed the land as part of that village. The existence of a local custom was supported by witnesses from their personal knowledge of under twenty years, also by hearsay evidence; it was conceded that the custom did not apply to a sudden change in the course of the river.

Held, (*1*) on the evidence, that an immemorial custom within section 2 of Bengal Regulation XI of 1825 was established, since where the existence of a custom for some years was proved by direct evidence, it could be shown to be immemorial only by hearsay evidence; (*2*) that the custom applied to the circumstances in which the change in the course of the Gandak had taken place; and (*3*) that under the above section the owner of *R* was entitled to the land in dispute.

Judgment of the High Court reversed.

Appeal (no. 126 of 1922) from a decree of the High Court at Patna (March 21st, 1919) varying a decree of the Subordinate Judge (Second Court) of Monghyr.

* PRESENT:—Lord Phillimore, Lord Carson, Sir John Edge and Mr. Ameer Ali.

The suit was brought in 1910 by plaintiffs, now represented by the respondents, to recover possession from one Aguilar, now represented by the appellant and tenants from him, of 709 *bighas* of alluvial land as part of *mauza* Mansi of which the first plaintiff was owner and the other plaintiffs tenants. Aguilar was the owner of *mauza* Rahimpur. The Gandak river, a tributary of the Ganges, had formed the southern boundary of Mansi, and the northern boundary of Rahimpur. The defendant Aguilar by his written statement pleaded as follows:

"This defendant submits that the disputed land is to the south of the present bed of the flowing Gandak, and is either reformation of, or accretion to, *mauza* Rahimpur, or partly accretion and partly reformation, and justly, lawfully, and according to established usage and custom which have the force of law and the customary law of India from time immemorial, appertain to *mauza* Rahimpur, and have all along formed part and parcel of it and has been dealt with as such."

The facts and the terms of section 2 of Bengal Regulation XI of 1825 appear from the judgment of the Judicial Committee.

The Subordinate Judge held on the evidence that the Gandak was not by custom the constant boundary of the two *mauzas*. After a survey of the land by a Commissioner a decree was made for the recovery of 606 *bighas* with mesne profits.

An appeal to the High Court by the first defendant was dismissed, and upon cross-objections by the plaintiffs the area of the land recovered was varied in the plaintiffs' favour. The view of the High Court appears from the present judgment.

1925, March 17.—DeGruyther, K.C., and *Hyam* for the appellant: On the conclusion to which the High Court came as to the existence of a local custom, that Court should have affirmed the decree of the trial Judge dismissing the suit. Section 2 and not section 4 of Bengal Regulation XI of 1825 applies. There was a change in the course of the river within the meaning of section 2; it is not material how that change came about. The custom alleged was the usual custom of the country before the Regulation was

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enacted: *see* Doss "Law of Riparian Rights", page 178. [Reference was made also to *Lopez's Case* (1) and to *Secretary of State for India* v. *Raja of Vizianagram* (2).]

Kenworthy Brown for the respondent: The defendant pleaded a custom whereby the river formed the boundary in whatever circumstances a change in its course took place. The evidence did not support that custom; it was conceded that the custom did not apply to a sudden change. No custom was proved applicable to the particular circumstances of this case. The judgment of the Board in *Lopez's Case*(3) expressly states that the Regulation does not apply so as to effect a gain of territory at the expense of another individual proprietor, but applies only to effect a gain from the public domain. [Reference was made also to *Jagjot Singh* v. *Brijnath*(4) and *Ritraj Singh* v. *Sarfaraz Koer*(5).]

DeGruyther, K. C., replied.

May, 13.—The judgment of their Lordships was delivered by—

LORD CARSON.—The defendant-appellant is the owner of *mauza* Rahimpur and the plaintiffs-respondents are the owners of *mauza* Mansi in *pargana* Farkia. The river Gandak or Bari Gandak flows between the two villages, *mauza* Mansi being situated on its northern side, and *mauza* Rahimpur on its southern side. The river Ganges flows at some distance to the south of the Gandak. In 1899 the Ganges began its encroachment northwards and ultimately joined with the Gandak, and by the combined action of the two rivers certain of the lands which had formed part of the *mauza* Mansi were "diluviated", *i.e.*, the surface soil (the cultivable

(1) 13 Moo. I. A. 467.
(2) (1921) I. L. R. 45 Mad. 207; L. R. 49 I. A. 67.
(3) 13 Moo. I. A. 467, 475.
(4) (1900) I. L. R. 27 Cal. 768; L. R. 27 I. A. 79.
(5) (1905) I. L. R. 27 All. 655; L. R. 32 I. A. 165.

soil) was wholly washed away. In course of time, however, the waters receded and about 589 *bighas* of the land, including the lands in question in this action, gradually reappeared towards the south in 1906, and by degrees the land became hard and firm soil, capable of being cultivated in the usual manner. The appellant took possession of the said lands on the ground that by immemorial custom the middle line of the bed of the Gandak formed the boundary line between Mansi and Rahimpur, and that owing to the change in the course of the Gandak the land which had reappeared was now on the southern side of the bed of the said river and belonged to the appellant as owner of the *mauza* of Rahimpur. Magisterial proceedings ensued, and the possession taken by the appellant was protected by an order made on 14th December, 1908, under the Criminal Procedure Code, 145. An appeal against the said order was rejected on the 21st May, 1909. The present action was then brought by the plaintiffs against the appellant and others who were in possession of the said lands, asking for a declaration that they belonged to *mauza* Mansi and were the property of the plaintiffs. The contention raised by the appellant-defendant is very clearly stated by the Subordinate Judge before whom the suit came for trial:

"The defendant's contention," says the learned judge, "is that whatever alterations may take place in the course of the Gandak and whatever shiftings may occur therein the main channel of the Gandak forms the constant boundary of *mauzas* to its north and south by virtue of a clear, and definite and immemorial usage, custom, or usage. So the disputed land which is just to the south of the present flowing Gandak forms a part and parcel of Rahimpur and becomes the property of the Rahimpur *malik*, the defendant no. 1."

The learned Subordinate Judge found as a fact and his finding has not been challenged that

"the stream to the north of the disputed land is the stream of the Bari Gandak and it is a continuation of the Bari Gandak, which is just to the west of Mansi, and it has fallen into the Ganges near about Gogri after taking a wandering course near the disputed land."

The Subordinate Judge, however, decided upon the evidence, which will be dealt with later, against the

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appellant-defendant upon the question of the custom alleged, holding:

" that the flowing Gandak is not the constant boundary of Mansi and Rahimpur and that no such custom has been proved to exist."

In the result he entered judgment for the plaintiffs for recovery of the said lands.

From this judgment the defendant-appellant appealed to the High Court of Judicature at Patna, who, in the result affirmed the judgment of the Subordinate Judge, making certain modifications and directions with a view to ascertaining the exact area to be delivered up.

The judgment, however, of the High Court was based on entirely different considerations from those put forward by the Subordinate Judge. The learned judges of the High Court did not agree with the Subordinate Judge that no custom or usage had been proved. As some argument has been addressed to the Board to show that the High Court had not found the custom proved, it is necessary to set out the words upon this point used by Roe, J., who delivered the judgment of the Court:

" On a consideration of the Revenue Survey maps of 1837 and 1846, the Gangetic survey of 1865 and the Cadastral survey of 1887, it appears to me to be certain that there is, if not a custom of *pargana* Farkia, at any rate a general usage whereby in lands reformed by a gradual accretion on one bank of the Gandak and cut away from the other bank by diluvion the ownership of the land so accreted goes with the ownership of the bank.

. . . Now we may concede for the purpose of the argument in this case that the custom is precisely stated by Mr. Aguilar, and I myself would go further and say that upon the whole of the evidence of the plaintiff's witnesses it is certain that where lands are washed away and reform gradually there is a general usage upon the banks of the Gandak in this region whereby the inhabitants of one village do not cross the river to cultivate lands upon the other side, etc."

The learned judges, however, held that the establishment of such a custom was no defence to the present suit:

" The lands, " they said, " have not been diluviated by the Gandak and they have not been recovered from the Gandak. They were washed

away by the Ganges, and have been recovered from the Ganges, and this is clearly stated in paragraphs 4, 5 and 6 of the plaint. I cannot see that a custom which regulates only questions of alluvion and diluvion by the Gandak can be applied to alluvion and diluvion by the Ganges."

The defence of the appellant-defendant under the custom was based upon s. 2 of Ben. Reg. XI of 1825, which is in the following terms:

"Whenever any clear and definite usage of shekust pywust respecting the disjunction and junction of land by the encroachment or recess of a river, may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage."

Assuming, as the High Court did, that the custom alleged was proved, their Lordships can see no reason for refusing to give effect to this rule because the conditions which arose in the present case were brought about by the overflow of the Ganges into the Gandak. Whatever may have been the cause of the river Gandak becoming so swollen as to bring about the results already referred to, whether by floods or by the overflow of the Ganges into the Gandak, their Lordships cannot see anything in the regulation quoted which prevents the main stream of the Gandak continuing to be the boundary after the lands had been diluviated, nor do they think that such diluviation can be dissociated from the action of the Gandak.

The real question therefore remains: was the custom proved? Was the Subordinate Judge right in his finding that there was no such custom? Or, was the High Court right in coming to the opposite conclusion, as in their Lordships' opinion they did? Their Lordships, having carefully considered the evidence, have come to the conclusion that the finding of the High Court in this respect was right. It is unnecessary again to refer to the surveys and other documentary evidence already quoted from the judgment of the High Court. As regards the verbal

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evidence, which consisted of a vast array of witnesses upon both sides, whilst as the High Court points out, upon the whole, even the plaintiffs' witnesses support the alleged custom, their Lordships are of opinion that the evidence called for the appellant-defendant establishes it beyond any reasonable doubt.

The Subordinate Judge, who has analysed all the evidence most carefully, quotes the witnesses for the defence who had deposed to changes of land in very many cases, and on both banks of the river, by reason of a change in the course of the bed of the river when alluvial and diluvial occurrences similar to those in the present case had occurred. He then says :—

> "The instances referred to above no doubt afford cogent evidence in proof of the usage. But there is no guarantee that the gaining and the losing proprietors have acquiesced in or recognized the changes, nor is there evidence that such a state of things has continued from time immemorial. The defendant's witnesses have personal knowledge of the custom not extending over 20 years at the most, the rest is based on hearsay evidence."

Their Lordships are of opinion that the Subordinate Judge did not sufficiently consider the fact that if the changes deposed to had not been acquiesced in such want of acquiescence or recognition of the changes deposed to could easily have been tested, but in reality there was no serious challenge of the accuracy of the vast number of instances which were deposed to. It is also to be noted that the Subordinate Judge entirely omits to deal with the admission made as to the custom by the plaintiffs' own witnesses. As to the date from which the custom is said to have prevailed, after the existence of the custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule. It has already been pointed out, and indeed, the contrary has not been urged before the Board, that the Subordinate Judge has found that the lands in question are formed through the changes which have taken place to the south of the river

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Gandak, and that being so, and the custom having been proved, it follows that the claim of the respondents to possession of the lands cannot be sustained.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, with costs, the decrees of both Courts set aside, and that the suit should be dismissed with costs.

Solicitors for appellant: *Barrow, Rogyers, and Nevill.*

Solicitor for respondents: *H S. L. Polak.*

REVISIONAL CRIMINAL.

Before Mullick and Ross, J.J.

SITARAM DAS

v.

KING-EMPEROR.*

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Police Act, 1861 (Act V of 1861), sections 30 and 32, scope of—"issue", meaning and significance of—Procession after application and before issue of licence, whether permissible by law.

After an application for a licence to take out a procession is made under section 30, Police Act, 1861, the applicant is free to take out the procession whether the licence applied for is issued or not. If the licence has been "issued" the licensee is bound to obey the conditions upon which it is granted whether it has been delivered or not; if, on the other hand, it has not been issued, he is only bound to see that the general law is not broken.

Where, therefore, under the orders of the District Superintendent of Police, the petitioner applied for a licence

* Criminal Revision Case no. 82 of 1925, from a decision of N. N. Boyce, Esq., I.C.S., Sessions Judge of Bhagalpur, dated the 19th December, 1924, modifying an order of Rai Brij Bihari Saran, Deputy Magistrate of Bhagalpur, dated the 25th October, 1924.