

Kumar Pramatha Nath Ray and others - - - *Appellants*

*v.*

Nani Lal Roy and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM  
IN BENGAL

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 12TH MARCH, 1937.

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*Present at the Hearing :*

LORD ALNESS.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

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The problem in this case is to ascertain the boundary between two fisheries (jalkars) in the River Padma where it flows between the districts of Dacca and Faridpur. The appellants are proprietors of the upper and the contesting respondents of the lower fishery. There is no gap between the two: the upstream limit of the respondents' fishery is the downstream limit of the appellants. In each case the fishery right dates from before the Permanent Settlement, but is now part of a permanently settled estate. The appellants' estate is called Char Mukundia, the respondents' is called Bikrampore. The water in question being a public navigable river the right of fishery is not a mere appurtenance of the adjacent land but is in origin dependent on a grant from Government, and as the river changes its course from time to time the right of fishery follows the river. *Srinath Roy v. Dinabandhu Sin*, (1914) 41 I.A. 221, is a decision on this very water.

From time to time for a hundred years and more disputes over the boundary between the two jalkars have claimed attention from the criminal and civil courts. The dispute which gave rise to the present litigation occurred in 1917, and, in the usual course, resulted in a magisterial order of 31st October, 1918, under section 145 of the Criminal Procedure Code. This order was in favour of the appellants and to the effect that they were entitled to remain in possession of that part of the fishery which was in dispute

until a civil Court should otherwise determine. The Bikram-pore party were thus forced into the position of plaintiffs and on 30th September, 1921, the contesting respondents accordingly brought their suit claiming a declaration that the fishery right of the appellants Char Mukundia estate stopped at a point some seven miles upstream from the limit which the appellants recognised.

The Subordinate Judge at Dacca settled issues in 1922, and in February, 1923, Mr. Anukul Chandra Ghosh, a pleader skilled in survey work and with experience of river surveys, was appointed commissioner to make a local investigation and prepare a case map. This work he carried out in the dry season of 1924-1925, a few days in 1923 being all that could be devoted to it in that year. His report—a highly creditable one—is dated 10th July, 1926 and was accompanied by maps drawn to the scale of four inches to the mile, together with detail maps of certain parts of the locality drawn to a larger scale (16 inches to the mile). The trial began effectively in November, 1927, and the Subordinate Judge on 28th February, 1928, dismissed the suit with costs. On appeal to the High Court at Calcutta, Dwarkanath Mitter and S. K. Ghose JJ. reversed this decision and declared the boundary between the two fisheries to lie at an intermediate point giving rather more than half of the disputed stretch of river to the defendants. The learned Judges have accepted and proceeded upon the map drawn by the commissioner and the line taken by them to show the boundary is drawn from a point (station 160) which represents a pipal tree standing in 1820 in the homestead of one Sadananda Guha of Dheukhali to a point one quarter of a mile north-west of the site of a village called Sabdy Char, appearing in map No. 16 of Rennell's Atlas but no longer in existence.

Upon this appeal, neither party seeks to challenge the title of the other to the jarkar right which is part of each revenue paying estate. Nor is the question any longer complicated by claims that either fishery has been extended to wider limits by reason of adverse possession. It is only too clear that for a century both parties have from time to time exercised rights over the disputed portion of the river and have throughout made conflicting claims. Hence though on boundary disputes possession is not seldom the best test no clear result can be obtained from it in the present instance. It is common ground that the rights of the parties must be discovered from the definition given to them in 1797, 1816, 1820 and 1843 as the result of litigation between their predecessors in title. The appellants by their learned counsel stress the burden which lies upon the plaintiffs to prove that their right extends over the disputed area and maintain, not so much that the appellants have proved the boundary asserted by themselves, as that there are not sufficient materials to identify the boundary as falling anywhere within the seven miles in dispute. The respondents on the other hand maintain that the line drawn by the High Court

can be shown to represent at the present day the result of the decisions above-mentioned. Mr. de Gruyther on their behalf relies upon certain decisions of this Board as corrective of an undue scepticism in such matters. *Rajcoomar Roy v. Gobind Chunder Roy*, (1891) 19 I.A. 140. *Lukhi Narain Jagadib v. Maharaja Jodu Nath Deo*, (1893) 21 I.A. 39. *Monmohini Dibi v. Watson & Co.*, (1899) 27 I.A. 44. *Dinomoni Chowdhrani v. Brojo Mohini Choudhrani*, (1901) 29 I.A. 24 at 34. These cases are called in aid to show that in boundary cases of this type the appellants, in order to set aside the decision of the Court below, should come prepared to show clearly where it is wrong and what other course is right, and that mere lack of precision in the materials does not relieve the Court of the duty of settling a line upon the evidence before it.

The decisive documents are two rubakaris, dated respectively 11th September, 1816 and 28th June, 1843. The former is the decision of the Civil Court at Jalalpur in a proceeding of a summary character under Regulation VI of 1813: the latter is the decision of the Principal Sadar Amin at Dacca in a regular suit.

Regulation XLIX of 1793 made provision for preventing affrays respecting disputed boundaries and its provisions were amended by Regulation VI of 1813. The general effect of this legislation was that the Civil Court should determine summarily upon the basis of actual possession which of the disputants should be maintained in possession subject always to the right of any other to establish his title by a regular suit. In 1816 Mr. Richard Walpole was acting—to use his own words—as “a Summary Court” under Regulation VI in consequence of a dispute about the fishery rights in this part of the Padma. The dispute had been dealt with by a magistrate who had fined the men of Char Mukundia, but his order had been set aside, and on a bond to keep the peace having been given, the matter had been sent for decision under Regulation VI. Mr. Walpole found in effect that two decrees had, under Regulation XLIX of 1793, been granted to the zemindar of Char Mukundia: the writ of possession (amaldari) dated 10th February, 1797 in one case and the amin’s report (roidad) of delivery of possession in the other were filed before him. The effect of these cases had been that the Civil Court had found that the downstream limit of the fishery of Char Mukundia was “Char Shahabuddin” in perguna Jalalpur and had delivered possession down to a line from “Char Shahabuddin” to “the *bari* of Hari Narayan Chakraburty of Harina.” It had already in 1797 rejected the contention which the Bikrampore party persisted in for another hundred and forty years—that the rights of Char Mukundia stopped short at a more northerly line from Narkolberia to Bangaberia near a place called Nawabganj. As no regular suit had been filed to set aside these previous decisions Mr. Walpole in 1816 reaffirmed the boundary which they had laid down.

The Bikrampore party at length brought a regular suit (30th December, 1831), but omitted to implead one Sarkies to whom Char Mukundia had been sold in 1827. This suit having failed they brought another in 1839 and succeeded before the Munsiff. The rubakari of 1843 is the decision on appeal reversing the Munsiff and dismissing this second suit as time barred. From it we learn that Mr. Walpole's decision of 1816 had been confirmed on appeal and had been followed by proceedings for delivery of possession. At first an amin Dharmadas Basu had demarcated the boundary at a point to which the Bikrampore party objected, whereupon the Munsiff of Hajigunge one Kashinath Roy had himself been deputed to mark the boundary by fixing bamboo posts. This he had done on 13th January, 1820, drawing his line east to west from Sadaikhali lying north of Sahebdir Char through Krokerchar to Dheukhali and the old village of Harina ending near to the house of Sadananda Guha at Dheukhali. Both sides objected to this line. Bikrampore approved of its eastern terminus at Sadaikali but said that westwards the line should have been drawn to Amirabad instead of being taken so far south as Dheukhali. Char Mukundia objected that the line was too far north at all points—that it should have run westwards from the river Satar where there is a Khal through Char Dubail and Koshavanga. The zemmindar of Char Mukundia had taken objection to the line laid down by Kashinath but his petition had been dismissed: he was told to bring a regular suit if he wanted to alter the line, but this he had never done.

Their Lordships agree with the learned Judges of the High Court that in view of this history, the line laid down by Kashinath is the correct criterion in the present case and they proceed accordingly to consider whether upon the evidence this line has been ascertained and relaid. A main dispute at the time (1820) was whether the line should have its eastern end to the south or to the north of Sahebdir Char, which by that time had been washed away, and it is plain that Kashinath had decided in favour of the latter view. A careful examination of the commissioner's report in the present case has satisfied their Lordships that the High Court has rightly upheld his view that station 160 on the case map correctly represents the western extremity of the Kashinath line—viz. the house of Sadananda Guha at Dheukhali. The eastern extremity—the place called Sadaikhali north of Sahebdir Char—has been fixed by relaying from Map No. 16 of Rennell's Atlas (published in 1780) the village marked as Sabdy Char and as lying on the eastern or left bank of the river. A fixed point from which to effect this relay has been obtained in Baraikhali Math an old building which still subsists and the correctness of this relay cannot be effectively disputed. The river having moved north and east, the spot which marks the place of Sabdy Char is now on the right bank of the main stream, and the line drawn from Dheukhali to a point one quarter of a mile north-west thereof has to

be prolonged in order to cut across the river and form the dividing line between the jalkars.

Their Lordships are satisfied that the line thus obtained and adopted by the High Court as the boundary has been arrived at by making the best use of the materials now available to identify the line drawn by Kashinath, and do not think that the appellants have been able to show any substantial objection to it. That the Sabdy Char *circa* 1770, might not be the Char Shahabuddin or Sahebdir Char of 1797 is a possibility but little more, and though a time came when it was washed away to reappear years afterwards on the other bank, there is no reason to suppose that the name was given to more than one village or meant different places at different times. For the purpose of defining the boundary between jalkars to fix a spot on the bank of the river by Rennell's map is to make a very proper use of Rennell's map: to show the courses of rivers was the main purpose of his survey. For the exact position of mouzas his map cannot claim equal accuracy and for defining the boundaries of mouzas or estates its accuracy is still less. The village which matters in the present case lay however on the very edge of the river and there is no good ground for rejecting this evidence of its position. The value of Rennell's maps has been not seldom considered by the Courts in Bengal: severe criticism was their lot in *Secretary of State v. Kalika Prosad* (1910) 15 Cal. Law Journal 281, when the question was as to the limit of a permanently settled mouza. In *Secretary of State v. Annada* (1921) 34 Cal. Law Journal 205 they were relied upon in a case where the bank of a river was admittedly the boundary line of the pargana and the Court presumed that the same line existed at the decennial settlement.

In *Haradas v. Secretary of State* (1917) 26 C.L.J. 590 at 603, Lord Buckmaster, after full recognition of the difficulties and imperfections of Rennell's map, relied upon it for the purpose of ascertaining the bed of the river at the time of the Permanent Settlement:

"It may be that any assumption that can now be made cannot be exact, but some assumption is necessary. They think upon the whole that the right course to follow is that taken by the surveyor of experience to whom this matter was referred by the Subordinate Judge, namely, to adopt the position of the river as shown in Rennell's map, and to adapt that map as far as possible to the conditions now known to exist."

In *Naresh Narayan Roy v. Secretary of State* (1923) I.L.R. 50 Cal. 446 at 452, this view was again adopted by the Board. Their Lordships are prepared to uphold the commissioner and the High Court in acting upon Rennell's map in the present case: all the more confidently that it was put forward by the appellants' representatives before the commissioner for the very purpose for which it has been used—viz., to locate the Sahebdir Char of 1797.

In contrast with the line claimed by the appellants, the line drawn by the High Court has the merit of being consistent with the decision of certain suits of 1909 between the

parties. The limits within which the fishery rights were in dispute in 1909 did not extend so far north as to touch the boundary line now drawn by the High Court, but the northern limit of the area then in dispute came far north of the line contended for by the appellants. The suits of 1909 were in 1913 decided by a well known authority on the land laws of Bengal, Mr. Saroda Charan Mitter: acting as arbitrator he gave the whole of the area then in dispute to the Bikrampore party. For the present appellants it was contended that this decision should be ignored because it was given before this Board had, in 1914, decided that the territorial limits of the zemindary were not the measure of the jalkar right [*Srinath Roy's case supra*] but the decision so far from being new doctrine in Bengal was based upon a long course of decisions including e.g. *Tarini Churn Sinha v. Watson & Co.*, (1890) I.L.R. 17 Cal. 963. Moreover their Lordships cannot find that the arbitrator's decision was in conflict therewith. Indeed the grounds of his decision can hardly matter for the present purpose: if the plaintiffs established their right as subsisting in 1909 they cannot have lost it altogether by reason of the river moving to the north and east as they are entitled to "follow the river."

Learned counsel for the appellants suggested, in his reply, that even if the line be rightly drawn from Dheukali to the point north of Sahebdir Char there was some injustice in the boundary arrived at by prolonging the line so as to intersect the present river. The injustice in this case is not apparent to their Lordships and they have not been put in possession of any better method for applying the former boundary to the changed stream nor shown that materials for the purpose exist on the record. The correct test in each case would seem to be that stated in the following passage from the judgment of the Board delivered by Lord Sumner in *Srinath Roy's case*, (1914) 41 I.A. 221 at 235:

"It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment."

The appellants have all along contended, just as the plaintiffs have, for a line to be ascertained by prolonging the previous boundary line and if "the upstream and downstream limits of (the plaintiffs') grant" are to be otherwise determined or applied it was necessary for the appellants to make a proper case to that effect.

It appears to their Lordships that the plaintiffs' original claims in this case are those which were negatived in 1797 and the appellants' those which were rejected in 1820; and that the decision of Munsiff Kashinath which was binding upon both has been correctly interpreted and applied by the decree under appeal. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

From the Journal

1857

In the Privy Council.

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DELIVERED BY SIR GEORGE RANKIN.

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