
(1925) 04 PAT CK 0034
In the Patna High Court

Babu Kedar Nath Goenka and Others APPELLANT
Vs
Amrit Mandal and Others RESPONDENT

Date of Decision : 06-04-1925

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : 88 Ind. Cas. 676

Hon'ble Judges : Dawson Miller, C.J.;Jwala Prasad, J

Bench : Division Bench

Judgement

Dawson Miller, C.J.—The appellants are the proprietors of taluka Rasulpur Bhatauni together with a fishery known as jalkar Kamri and Dab appurtenant to the taluka. The respondents are some of the proprietors of Mauza Kapsia and certain of their tenants.

2. The plaintiffs instituted the suit out of which this appeal arises in April 1920 against the respondents claiming a declaration that the fishing rights in that part of the river Ghaghri which flows through or adjacent to the respondents mauza are included in jalkar Kamri and Dab and that the defendants have no right to fish therein. They also claimed in the alternative a title by adverse possession.

3. Mauza Kapsia is admittedly outside the plaintiff's taluka and the bed of the river Ghaghri where it flows past Kapsia forming its western and southern boundaries is recorded in the Record of Rights as belonging to the proprietors of that village up to its middle line the other side being apparently the proprietary interest of the riparian owners on the opposite bank in Mauzas Birbaus and Paikant which lie to the westward.

4. The initial difficulty in the way of the appellants and which to my mind is fatal to their case is that the limits of their jalkar have nowhere been clearly defined in their evidence. The eastern or southeastern limit of their jalkar is claimed to be a place called Simaria ghat but this ghat is not shown on the only map produced by them and for aught that appears to the contrary it may be on a tributary or

branch of the Ghaghri river and not on the main stream. It may be assumed that certain phauris or branches of the Ghaghri river and possibly parts of the river itself further to the westward are included in the appellants jalkar which derives its name from two large heels named Kamri and Dab situated in villages to the westward of Kapsia. It should be mentioned that the river Ghaghri runs generally in a southeasterly direction but follows a winding course. It forms the western boundary of Kapsia and then taking a curve through the east to the north flows back again to the southward and eastward thus forming also the southern boundary and part also of the eastern boundary of that village. The southern part of Kapsia thus lies in a roughly formed horse-shoe bounded by the river. The area included within the appellants' jalkar has been defined in certain kabuliyats granted by fishermen tenants of the appellants by reference to the north, south, east and west boundaries. The east boundary has been defined as "up to the boundary limit of Kapsia" and the south boundary as "Mauza Katmara from the boundary limit of Chawtim to Mauza Paikant near ghat Simaria" and the north as "Mauza Uzraha to Mauza, Kapsia." All the villages named including Paikant lie to the westward of Kapsia and the river where it forms the western boundary of Kapsia divides that village from Paikant which is adjacent to the west or south-east. There is also a branch of the river near the south-west corner of Kapsia which turns away suddenly to the westward leaving the main stream and passing through Paikant and from the evidence as to the locality of Simaria ghat it is quite possible that this ghat lies on that branch at or near the place where it joins the main stream. If this is so it would also fit in with the description of the southern limit of the jalkar which is from Mauza Katmara to Mauza Paikant near Simaria ghat which implies that Simaria ghat is in Paikant to the west or south-west of Kapsia. If this is so it would seem that the river itself is excluded for even if Simaria ghat be on the Ghaghri river and not on the branch mentioned it is on that bank of the river which lies in Paikant. Moreover if the eastern limit of the jalkar is up to the boundary limit of Kapsia this is presumably the western boundary limit of Kapsia for it is not suggested that any of the heels in Kapsia itself lie within the plaintiffs' jalkar. The appellants could have produced authentic documents to show the boundaries of their jalkar but they failed to do so. Apart from the verbal evidence which is too vague to be of any value they rely solely on the kabuliyats to which I have referred. Neither the original grant nor their kabala by which they purchased from the previous proprietors nor the batwara khesra or batwara maps when the taluk was partitioned some years ago nor the village notes or other survey records relating to the jalkar have been produced and the kabuliyats are at the best ambiguous. They produced some of their own village papers but these do not show any rents from jalkar rights in Mauza Kapsia.

5. The verbal evidence of the exercise of jalkar rights in the disputed locality is also very unsatisfactory. The appellants, muharrir their, first witness, admittedly knows nothing about it. The next witness Nabi Dbobi said to be a ticcadar at one time of the appellants, does not say definitely that he ever fished in the disputed

part of the river and he, produced no papers to prove that he ever had a lease. The next witness is equally vague and he produced no rent-receipts although he said they existed. The next witness says Simaria ghat is to the south of Kapsia 10 or 15 ranis (500 to 750 yards. If so it is not on the Ghaghri river.... The next witness says the appellants' jalkars are to the west and north of Kapsia. Most of them say the Kapsia maliks do not fish in the river but one of them admits they do. Most of them have, no direct concern with the fishery. Even the plaintiffs' patwari can not give the boundaries of the jalkar. He said they were in the patwara papers but these were not produced.

6. The learned Subordinate Judge considered this evidence too vague and inconclusive to act on and I see no reason after listening to the appellants' argument to take a different view.

7. It is not shown that the appellants were ever in exclusive possession of these disputed waters and their claim to title by adverse possession also fails. Even if their mustajirs committed a few acts of trespass from time to time no title by adverse possession can be presumed from such conduct.

8. It is unnecessary to consider the question of non-joinder of parties which was raised. It is at least clear that any declaration the appellants might be entitled to would not bind those who are not represented in the suit but in the view taken on the main question this point is of secondary importance. It may be added that the evidence adduced by the defendants shows that the maliks of Kapsia through their lessees have exercised fishing rights on the disputed waters for a long time, some of the older witnesses speaking to the exercise of such rights for the last 23 to 25 years. In my opinion no reason has been shown why we should disturb the judgment of the Trial Court and I would dismiss this appeal with costs.

Jwala Prasad, J.

9. This is an appeal from a decision of the Subordinate Judge of Bhagalpur, dated the 30th May 1921, dismissing the plaintiffs' suit. The subject-matter of the litigation is a jalkar or right of fishery. The plaintiffs have indicated the disputed jalkar in yellow colour on the Survey Map filed with the plaint. The jalkar is claimed in respect of that part of nadi Ghaghri which flows between two villages Kapsia and Beerbaus, the bed of which belongs to the proprietors of those two villages as part of their permanently settled estates.

10. The plaintiffs are proprietors of a permanently settled taluka called Rasulpur Bhatauni bearing Touzi Nos. 530 and 5715 and sadir jama Rs. 916. The taluka includes several mauzas and the jalkar mahals of Kamri and Dab together with all phauris and branches thereof. The plaintiffs as proprietors of the taluka are in possession of the, aforesaid jalkars Kamri and Dab including the branches thereof and their names stand registered in the Collectorate with respect to the aforesaid taluka and the jalkar mahals of Kamri and Dab.

11. Briefly speaking the plaintiffs' case is that of the phauris and branches of

jalkars Kamri and Dab there is a jalkar known as jalkar nadi Ghaghri which passes through Mauza Thutharn and other villages in the District of Monghyr and towards east passing by the boundary of Mauza Kapsia Touzi No. 3052, Pargana Chhai, District Bhagalpur, extends up to Simaria ghat and the plaintiffs have been in possession thereof as proprietors of taluka Rasulpur Bhatauni from a long time. During the Survey and Settlement proceedings which began in 1902 and the record of which was finally published in December 1,904, half the bed of river Ghaghri in the vicinity of Mauza Kapsia, bearing Khasra No. 494, was measured Kapsia village. In 1324 the jalkar of the said river Ghaghri was settled by the plaintiffs with the defendants Nos. 1 to 3 second party, but about the fishing season the first party defendants, maliks of Mauza Kapsia, set up defendants second party as their settlement-holders and cause a proceeding to be instituted in March 1917 in the Criminal Court u/s 145 of the Cr.P.C. in respect of the jalkar in question. The proceedings ended with the decision, dated the 18th April 1917, in favour of the defendants proprietors of Mauza Kapsia. A motion to the High Court on behalf of the plaintiffs' mustajirs was rejected on the 24th of July 1917. As a result of the criminal proceedings the plaintiffs were dispossessed of the jalkar from the 18th April 1917 and the defendants first party have been in possession since then. After the decision of the case u/s 145 the defendants third party who were the lessees of the plaintiffs, surrendered their lease and have gone over to the side of the defendants first party. The plaintiffs' case as summed up in para. 6 of the plaint is that, although they have nothing to do with the land situate in the bed of the river Ghaghri bearing Survey No. 494, yet the jalkar of the said river Ghaghri is a branch of the plaintiffs' jalkar Kamri and Dab which was settled with them along with the taluka Rasulpur Bhatauni, and that they have all along been in possession of the disputed jalkar before they were dispossessed as aforesaid in 1917 and that even if they do not possess any right or title to the said jalkar, yet owing to adverse possession for more than 12 years before dispossession they have acquired absolute right to the said jalkar and the defendants first and second parties had no right to oust them from the possession of the jalkar. The plaintiffs further say that although the proceeding u/s 145 of the Cr.P.C. related only to half the jalkar of river Ghaghri the bed of which was measured with in Kapsia in Khasra No. 494, yet the defendants first party being emboldened by the decision of the Criminal Court dispossessed the plaintiffs of the entire jalkar of river Ghaghri including Khasra No 861 situate in Mauza Birbaus, Pargana Phirkia, District Monghyr, opposite Kapsia. Upon these allegations the plaintiffs claim a declaration of their right to the jalkar in dispute and recovery of possession thereof with mesne profits from the date of institution of the suit till recovery of possession.

12. The defendants Nos. 8, 9 and 12 to 14 are the chief contesting defendants. They filed a joint written statement denying the plaintiffs' right, title and possession over the jalkar in question and asserting that the jalkar nadi Ghaghri bearing Survey Khasra No. 494 appertains to their Mauza Kapsia and not to the plaintiffs' jalkar Kamri and Dab and that the defendants and not the plaintiffs,

have been in possession of the jalkar in question. They further state that the circuitous portion of the river Ghaghri towards the west of village Kapsia had entirely separated from nadi Ghaghri in Asin 1324 and from that time nadi Ghaghri has left that course which has become Maro Ghaghri having no longer any connection with the river Ghaghri except during rains, so that even if the plaintiffs have any concern with the river Ghaghri, which the defendants deny, still the plaintiffs have no right to fish in Maro Ghaghri. They also impugn the suit as being bad on account of having left out necessary parties and having impleaded some imaginary persons, such as defendants Nos. 2, 3 and 11. The defendants Nos. 1, 3 to 7 and 10 have filed one written statement and Rikhi Mahto defendant second party filed another written statement. They denied the plaintiffs' claim but did not contest at the trial.

13. Upon the pleadings the Trial Court framed the following issues:

1. Has the suit been overvalued?
2. Have the plaintiffs any cause of action against the defendants?
3. Is the suit bad for non-joinder and mis-joinder of parties as alleged by defendants?
4. Is the suit barred by limitation?
5. Have the plaintiffs any title in the disputed jalkar?
6. Have the plaintiffs acquired title to the jalkar in dispute by adverse possession?
7. Is the plaintiffs' allegation of possession and dispossession true?
8. Are the plaintiffs entitled to recover possession of the jalkar in dispute?
9. Are the plaintiffs entitled to mesne profits if so, to what extent?
10. To what relief, if any, are the plaintiffs entitled?

14. Issue No. 1 does not arise not having been pressed in the Court below or in this Court. The remaining issues have been decided against the plaintiffs, with the result that their suit has been dismissed. The plaintiffs have come to this Court in appeal and impugn the decision of the Subordinate Judge on all the points decided against them.

15. The contest, however, principally centres round Issue No. 5: "Have the plaintiffs any title in the disputed jalkar?" and in fact the decision of the appeal rests entirely upon the decision of this issue.

16. The undisputed facts are that taluka Rasulpur Bhatauni formerly belonged to two brothers Maharaj Singh and Sheo Sabay Singh. They partitioned that mahal among themselves and subsequently by transfer and arrangement among themselves Maharaj Singh became the 16-annas proprietor of the taluka which included jalkar Kamri and Dab. The plaintiffs purchased the said taluka with the

said jalkar from the heirs and representatives of Maharaj Singh, and thus they are now the proprietors of the said taluka including jalkar including Kamri and Dab and their names are recorded in respect thereof in the Collectorate registers. The plain tiffs are thus the proprietors of jalkar Kamri and Dab. The question is whether the disputed jalkar appertains to and is included in the plaintiffs' jalkar Kamri and Dab. It is undisputed, and in fact the plaintiffs admit in para. 6 of their plaint, that the land situate in the bed of the river Ghaghri opposite Mauza Kapsia, bearing Khasra No. 494 belongs to the defendants proprietors of Mauza Kapsia. It is conceded in the argument on behalf of the plaintiffs that there is no document showing the grant of the disputed jalkar to the plaintiffs or their predecessor-in-interest or that the disputed jalkar is a part of the plaintiffs' jalkar Kamri and Dab included in their taluka Rasulpur Bhatauni. No record of the Settlement showing the disputed jalkar as having been settled with the predecessor-in-interest of the plaintiffs as part of their jalkar Kamri and Dab has been produced.

17. The plaintiffs have filed some papers relating to the partition of taluka, Rasulpur Bhatauni among the then proprietors thereof (Exs. 7, 8, 9 and 10 from 1838 to 1854). These papers do not carry the case further than that taluka Rasulpur Bhatauni embraces two jheels or lakes called jalkar Kamri and Dab.

18. Certain judgments and rubakari of the Revenue Authorities of 1869 and 1870 (Exs. 17, 18 and, 11) filed by the plaintiffs only show that the claim of the Government as owner of khas mahal as to the light of fishery in certain pools within the . Government estate of Gowas and Mooras-see was disallowed in favour of the zemindar of Rasulpur Bhatauni who claimed the right of fishery in those pools. These documents are of no assistance in the present case. There is, therefore, a total absence of any documentary evidence to prove that the plaintiffs' jalkar Kamri and Dab included the fishery rights in the part of river Ghaghri adjoining village Kapsia, the bed of which belongs to the Maliks of Kapsia as a part and parcel of their permanently settled estate. In fact, there is no definite evidence to show the extent of the plaintiffs jalkar Kamri and Dab.

19. The plaintiffs, therefore, in support of their claim to the jalkar in the particular spot in dispute in the river Ghaghri rely solely upon their having in the past exercised the right of fishery therein. It is now well-settled that it is not absolutely essential to prove an express grant after a considerable laps of time and the plaintiffs can establish their right by proof of an uninterrupted user of fishery prior to their dispossession; vide *Srinath Roy v. Dinabandhu Sen* 25 Ind. Cas. 467 : 42 C. 489 : 18 C.W.N. 1217 : (1914) M.W.N. 654 : 1 L.W. 733 : 16 M.L.T. 319 : 12 A.L.J. 1193 : 20 C.L.J. 385 : 16 Bom. L.R. 901 : 41 I.A. 221 (P.C.). The evidence, however, must be clear and unambiguous showing the plaintiffs' exercise of the right of fishery over the particular spot in river Ghaghri, particularly when the bed of the part of the river in question belongs to the maliks of Kapsia as part of the village. The recent Survey has admittedly included the bed of the river half in village Kapsia and has allotted a Khasra number to it,

namely, No. 494, and half in village Beerbaus, Khasra No. 861. The bed of the river having been settled with the owners of villages Kapsia and Beerbaus, it has ceased to be the Government property or a public domain, and ordinarily the owners of the bed of the river, namely, the Kapsia and Beerbaus maliks will have the right of fishery unless the plaintiffs established that they have been using the waters of the river in question for the purpose of catching the fish and have been exercising their right of fishery to the exclusion of the owners of the bed of the river. The plaintiffs have tried to prove the exercise of their right of fishery in the disputed spot by means of certain kabuliyats in respect of jalkar rights executed by lease-holders. These kabuliyats do not very much assist the plaintiffs in establishing that their jalkar extended to the spot in question. The kabuliyats 3 (d) of 1871, 3 (c) of 1873, 3 (b) of 1875, 3 (f) of 1880 and 4 of 1903 do not give any description of boundary of the jalkar taken Settlement of by the mustajirs. They do not expressly mention jalkar in the nadi situate in Mauza Kapsia and have not been seriously relied upon by the appellants in course of their arguments.

20. The kabuliyats 3 (e) of 1875, 3 (a) of 1880, 3 (h) of 1882, 3 (i) of 1888, 2 of 1902 and 4 (a) of 1915 attempt to describe the jalkars leased out but it is not possible from the description of the boundaries given therein to say for certain that the jalkar in dispute was included in the Settlement.

21. The plaintiffs rely upon two notes (Exs. 12 and 13) dated the 16th March 1903 and 10th May 1903 respectively, made by the Assistant Settlement Officer and a list of jalkar (Ex. 14) appertaining to the plaintiffs' taluka Rasulpur Bhatauni. Witness No. 12 for the plaintiffs, Ram Chandra Prasad, who was appointed to look after the Survey affairs of the plaintiffs, has been examined to prove that the aforesaid notes and the list were written and signed by Babu Kandhji Sahay, Assistant Settlement Officer. Babu Kandhji Sahay who made inquiries and prepared the notes and the list has not been examined. The witness says: "I had been the village notes of all the villages where jalkars are. I did not see the village notes of Kapsia as it did not belong to the plaintiffs. I saw the village notes of the villages which were in plaintiffs' possession." Further on he says "I went with Babu Kandhji Sahay in his inquiry."

22. "I cannot say about which jalkar there was dispute before Kandhji Sahay. I do not remember in which village Kandhji Sahay had gone to hold inquiry." The witness does not prove that the disputed jalkar has been either the subject of inquiry by the Assistant Settlement Officer or the aforesaid notes and list related to the jalkar in question. Strictly speaking these notes and list have not been properly proved and are not admissible in evidence. It is not known on what basis and upon what evidence they were prepared. The defendants were not parties to the dispute which led to the preparation of the notes and the list. They were prepared at the instance of the plaintiffs and as pointed out by them. They have not been incorporated into the finally published Record of Rights. Therefore they have no evidentiary value against the defendants.

23. Assuming that the list is admissible in evidence, from the description and the boundaries given therein as in the case of those given in the kabuliyats one cannot with certainty say that the disputed jalkar between Kapsia and Birbaus appertains to the plaintiffs' jalkar called Kamri and Dab. The eastern boundary is said to be Kapsia and the northern boundary Usraha. The southern boundary is said to extend from Kathmara to Paikant near ghat Simaria. Ghat Simaria has not been traced on the map, and the plaintiffs have failed to show where this would be. Paikant is to the south-west of Kapsia, according to the evidence, at some distance. River Ghaghri surrounds village Kapsia on three sides. It enters the village on the west and turns towards the south and then goes upwards towards north, and then turns towards the east.

24. Following the course of the jalkar as described in the aforesaid documents it would seem that the disputed portion on the western side of Kapsia is excluded from the plaintiffs' jalkars appertaining to the taluka Rasulpur Bhatauni. The plaintiffs' jalkar are called Kamri and Dab. According to their witness No. 8 Kamri is 1 or 1 1/2 koses away from Dab. Kamri is in village Birbaus, and Dab in village Usraha. P.W. No. 9, plaintiffs' patwari, says that Kamri is a village, and the river opposite it is called Kamri. Dab is near Kathmara and is a big nadi. It is not a kund. Although these witnesses contradict each other as to which of them is a nadi and which is a kund, they agree that both Kamri and Dab are distinct jalkars. Witness No. 10 says "jalkars Kamri and Dab are branches of Ghaghri." He says that the principal jalkar is nadi Ghaghri. All the jalkars are its off-shoots and they take water from Ghaghri. Thus Kamri and Dab are themselves branches of river Ghaghri. The portion of river nadi Ghaghri which passes between Kapsia and Birbaus is geographically outside the limit of Kamri and Dab. The jalkars in Kamri and Dab belong to the plaintiffs as part of their taluka Rasulpur Bhatauni. They have to show that their jalkar right in Kamri and Dab extended beyond its geographical limit to the portion of river Ghaghri in dispute.

25. The plaintiffs' witnesses divide the jalkar into two parts puchwari (western) and purwari (eastern). The disputed jalkar is said to be situated in the purwari patti and Ex. 2 is the kabuliyat with respect thereto. Witness No. 2 says that the puchwari patti extends from Chautham on the west to Itmadi, and the purwari patti from Itmadi to Kapsia. He was the thikadar of purwari patti.

26. This witness states in his evidence "There was no phauri (branch) in village Kapsia which was under my Settlement." His evidence will, therefore, exclude the disputed jalkar in Kapsia from the plaintiffs' jalkars Kamri and Dab, as being its branch or phauri. It is noteworthy that in the kabuliyat (Ex. 4-A) of 1915 the plaintiffs' jalkar with the aforesaid description and boundaries is said to bear Survey Khasra No. 144, whereas the khasra number of the disputed jalkar is No. 494. Therefore the disputed jalkar has nothing to do with the jalkar described in the plaintiffs' kabuliyats or in the list prepared by the Survey Authorities (Ex. 14). Again, the plaintiffs have not filed the village notes nor have they filed the finally published Survey Record to show that the jalkar in dispute has been

recorded in their names. The Court below has found that the village notes produced by the defendants show that they are entitled to get rents of village Kapsia. The plaintiffs do not challenge this finding and in fact have not even printed the village notes produced by the defendants, in order to show that the finding is incorrect. The plaintiffs have not also printed their village papers to dispute the finding of the Court below that those papers do not show that rents were ever realized by them in respect of the jalkar in question. As a matter of fact, the plaintiffs' witness No. 10 admits that the village papers do not show that they relate to the jalkar in suit.

27. The note of the Assistant Settlement Officer, dated the 16th March 1903 (Ex. 12) shows that on behalf of Baijnath Goenka, father of plaintiff No. 1 a map and khasra of jalkars Kamri and Dab were filed before him showing the villages to which their jalkars extended. On the basis of those papers he decided the dispute with regard to jalkar right in several villages. The cases in which the khasra showed the names of the villages in dispute as appertaining to the jalkars Kamri and Dab, were decided in favour of Baijnath Goenka. The plaintiffs are, therefore, in possession of the aforesaid documents. Their failure to produce them in this case raises the presumption against them that the disputed jalkar in Kapsia is not shown in the khasra as appertaining to the plaintiffs' jalkar Kamri and Dab. The plaintiffs have also omitted to produce the batwara khasra of 1854 whereby the jalkars of Kamri and Dab were partitioned among the co-proprietors. The khasra would have shown to whom the disputed jalkar, if at all it appertained to Kamri and Dab, was allotted.

28. The plaintiffs have examined 13 witnesses, out of whom two are formal witnesses and the rest are their servants, dependents and tenants. All of them came unsummoned and were brought by the plaintiffs' man to depose in the case. The plaintiffs have not examined their Mustajirs, and in their place the junior members or relations of the family have been brought.

29. Witness No. 1 is their moharrir since 1311 in village Baltora. He simply proves the execution of kabuliyat (Ex. 1) of 1915. He, however, has no personal knowledge of the jalkar in question, for he admits in cross-examination that he had never been to Kapsia or to Beerbaus. His knowledge is only hearsay.

30. Witness No. 2 is one of the executants of kabuliyat Ex. 2 of February 1902. He is a tenant of the plaintiffs.

31. He admits in his re-examination that there was no phauri in village Kapsia which was under his Settlement.

32. Witness No. 3 says that he had receipts for rents paid for the jalkar in question, but does not produce them. He admits that the northern and southern portions of the jalkar in question have become sandy, and the water which is between them is called Mur or Maro Ghaghri. He says he used to get fish caught through Gorhis on half the share in fish. Apparently this witness has not, therefore, himself fished in the jalkar.

33. Witness No. 4 is an ex-proprietor of village Beerbaus in which half the bed of the river has been included. He is a dependent of the plaintiffs.

34. Witness No. 5 was brought by the plaintiffs" piada to depose in the case. He does not prove that the plaintiffs or their mustajirs fished in the river in question. Saukhi Mahton witness No. 6 also does not prove it. He also admits that the nadi had become Mur Ghaghri since 8 or 9 years and it remains dry for four or five months in the year. Witness No. 7 also was, called by the plaintiffs" man to depose. He says: "Since three or four years no fish is caught near Kapsia. Mur Ghaghri is to the west of Kapsia. The maliks of Kapsia catch fish in it."

35. Witness No. 9 Dahori Lal is the plaintiffs" patwari. He says that the mustajirs used to get receipts with one-anna stamp. These receipts have not been produced and an adverse inference may be drawn against the plaintiffs that the receipts, if produced, would not have shown the disputed jalkar. He says that he does not know if there is phauri nadi Ghaghri. The principal jalkar is nadi Ghaghri. He cannot give the boundaries of the jalkars. He says that in the batwara papers between Maharaj Singh and his brothers all the jalkars were entered. These batwara papers have not been produced.

36. Witness No. 10 says that the jalkars Kamri and Dab are branches of Ghaghri. He admits that no paper has been filed on behalf of the plaintiffs to show that the entire jalkar was in their control. He never went to the locality and he cannot say which phauris are attached to river Ghaghri. His evidence is, therefore, worthless. He says that the disputed jalkars are nowhere shown in any papers of the plaintiffs and it would not appear from those papers that they related to the disputed jalkar. In the seahas and the jamabandis the jalkar in dispute is not separately shown. This witness also is the plaintiffs" servant.

37. Witnesses Nos. 11 and 12 are formal witnesses.

38. Witness No. 13 is a tenant of the plaintiffs and, came to depose without any summons.

39. The defendants have examined 13 witnesses. D.W. No. 1 is a jalkaria or fisherman. He took a lease of the disputed jalkar from the defendants in 1314, caught fish in the river and paid rent and obtained a receipt (Ex. A).

40. D.W. No. 2 is a substantial man and his income, from zemindari as Rs. 6,000 and he purchases fodder in Kapsia. He proves the possession of the Kapsia maliks over the disputed jalkar for the last 15 years. D.W. No. 3 is a substantial cultivator, having 250 bighas of jote land. He proves possession of the Kapsia maliks for the last 20 or 25 years.

41. D.W. No. 4 is a jalkaria or fisherman. He along with his cousin had taken Settlement of the jalkar from Kapsia maliks in 1315 and fished in river. D.W. No. 5 has his house on the side of the jalkar in question. He proves possession of the Kapsia and Beerbaus maliks for the last No. 23 years.

42. D.W. No. 6 has a bath an by the side of the jalkar in question. He proves Settlement of the jalkar by the Kapsia maliks with different lessees and their possession from 1308 to 1324.

43. D.W. No. 7 prove Settlement of the fishery by Kapsia maliks with lessees from 1313 to 1324.

44. D.W. No. 8 proves possession of the Kapsia maliks for the last 22 to 23 years and he actually used to catch fish in the jalkar for the lessee Keri Gorhi.

45. D.W. No. 9 Rekhi Mahton is a jalkaria or fisherman. He verbally took Settlement in 1318 Fasli, and executed a registered kalmliyat in 1324. He paid rent and obtained receipts Ex. C to C (6) from 1318 to 1323. He was lessee for 16-annas of the fishery in 1325 and 1326.

46. D.W. No. 10 proves Settlement of the fishery with his father Prayag and the catching of the fish by him in the jalkar. D.W. No. 11 had taken Settlement in 1316 from the Kapsia maliks. He caught fish in 16 annas of the jalkar.

47. D.W. No. 12 proves possession of Kapsia maliks since his hoshe.

48. D.W. No. 13 proves Settlement with the mustajirs by the Kapsia maliks from 1304 up-to-date. He proves the counterfoils of rent-receipts with respect to the fishery, Exs. E to E (13). He also proves the seahas and jamabandis (Exs. F to F-15 and G to G-14). He also proves that the jamabandis used to contain the names of the jalkarwalas. He himself had granted receipts (Exs. C 8 to C-10).

49. Some of the defendants' witnesses are plaintiffs' tenants and others are disconnected persons. Most of them have directly fished in the river on behalf of the Kapisa maliks. The learned Subordinate Judge has accepted the evidence of the defendants' witnesses as being satisfactory. He has rejected the plaintiffs' evidence.

50. We have carefully perused the evidence and we are convinced that the learned Subordinate Judge has taken a right view of the evidence in the case. The learned Subordinate Judge has accepted the kabuliyats, the rent receipts and the village papers filed on behalf of the defendants as showing their possession for a considerable period over the jalkar in question. The plaintiffs have not challenged the finding of the Subordinate Judge upon this point, inasmuch as they have not even printed the aforesaid papers proved on behalf of the defendants and have made no comment in this Court. The finding of the Subordinate Judge must, therefore, be accepted as correct. We must accept the conclusion to which the learned Subordinate Judge has arrived, namely, the plaintiffs have failed to show that they are the owners, of the jalkar in question as part of their jalkars Kamri and Dab, or that they ever exercised the right of fishery over the jalkar in question.

51. Issues Nos. 2, 4, 6 and 7 must also, be decided against the plaintiffs. They have failed to show that they have ever been in possession of the disputed land

or that they acquired any right of adverse possession.

52. Dealing with issue No. 8 the learned Subordinate Judge has held "the jalkar in dispute has become Maro Ghaghri and both its ends have been closed and the Ghaghri water joins the Maro Ghaghri during floods and rains and it has changed its course." This finding is in accordance with the evidence in the case. The plaintiffs' witnesses have admitted that the river has changed its course and that the disputed portion is disconnected now. Both its ends remain closed for a considerable part of the year and is connected with it only for four months in the year, that is, during the flood season. Upon this finding the learned Subordinate Judge has held that the old dry course of the river must be taken to have become the private property of the defendants", the owners of the bed of the river. In support of his view the learned Subordinate Judge has referred to the case of Sasi Kanta Acharjee v. Kunja Mohan Moitra 41 Ind. Cas. 425 : 22 C.W.N. 6. Against this view the learned Counsel on behalf of the plaintiffs has cited the case of Ahmadi Begum v. Mahasy Taranath Ghosli 21 Ind. Cas. 233 : 17 C.W.N. 1173 : 18 C.L.J. 399. The point does not call for any decision in view of the plaintiffs having lost upon issue No. 5 as to their title or possession over the disputed jalkar. The same remark applies to issue No. 3 under which the learned Subordinate Judge has held that the plaintiffs have not made the maliks of Beerbaus or all the 16-annas maliks of village Kapsia parties to the suit, although the defendants took this objection at the earliest stage.

53. The defendants claim only half the bed of the disputed jalkar which lies in their village Kapsia, Khasra No. 494. They do not claim the western half which lies in village Beerbaus, being Khasra No. 861.

54. The plaintiffs say that on account of the decision in the case u/s 145 of the Cr.P.C, the defendants dispossessed them of the entire 16-annas jalkar. The Beerbaus maliks being not parties to the suit are not bound by the decision in the present case, nor are the maliks of Kapsia who have not been impleaded as defendants in the present case. Upon this view the learned Subordinate Judge holds that the plaintiffs' suit is bad for mis-joinder and non-joinder of parties. Under Order I. Rule 9, C.P.C. the suit could not be defeated on account of defect of parties. The issue, however, does not deserve any serious consideration.

55. The result is that agreeing with the view taken by the learned Subordinate Judge, we dismiss the appeal with costs.