

(1932) 03 CAL CK 0033
In the Calcutta High Court

Nanda Lal Roy and Others

APPELLANT

Vs

Pramatha Nath Roy and Others

RESPONDENT

Date of Decision : 14-03-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Criminal Procedure Code, 1898 (CrPC) — Section 144, 145

Citation : AIR 1933 Cal 222

Hon'ble Judges : S.K. Ghose, J;Mitter, J

Bench : Full Bench

Judgement

Mitter, J.—Four main questions fall for determination in this appeal by the plaintiffs: (1) whether the plaintiffs have established their title to the fishery known as the Bikrampur Jalkar in the tidal and navigable river Pudma; (2) what is the boundary between their jalkar and the respondents" (defendants 1 to 5) fishery known as the Mukundia Jalkar; (3) whether the plaintiffs have lost their title by adverse possession of the defendants to the portion of the fishery now in dispute and (4) what is the legal effect of the proceedings of 1816, 1843 and of the award of the arbitrator in certain suits instituted in 1909. The principal contestants to the appeal are Raja Janaki Nath Roy, a gentleman possessed of considerable wealth and his nephews.

2. In this action plaintiffs claimed a decree for recovery of joint possession with their co-sharers to the extent of their three annas two gandas one kara one kranti one danti shares in that portion of the fishery which is described in Sch. 2 to the plaint after declaration of their title as proprietors to the fishery described in Sch. 1 to the plaint of which the property in Sch. 2 is claimed as forming a part. The plaintiffs also rested their claim to the disputed portion of the fishery on the ground of adverse possession for more than the statutory period of 12 years. In the alternative they claimed that if the right to the disputed fishery (jalkar) be not established on the ground of their title as proprietors or on the ground of adverse possession they may be given a declaration that they have acquired

a right of easement and prescriptive right on the ground that they have been holding possession of the said right in succession to their predecessors for upwards of 60 years openly, peaceably, uninterruptedly and as of right.

3. They also claimed a decree for the sum of Rs. 536-10-3 as their share of the profits of the disputed jalkar during the pendency of the proceedings u/s 145, Criminal P.C, which had been withdrawn by the defendants and also claimed tentatively the sum of Rs. 1,600 as mesne profits. The plaintiffs failed before the Subordinate Judge of Dacca. Hence this appeal to this Court.

4. The case as stated in the plaint is that there is a jalkar mehal described in Sch. 1 to the plaint known by the names of Nadi Padmabati, Balabanta Narhi Korha and others, that this jalkar mehal was in very ancient times an independent jalkar, that it was subsequently incorporated in zamindari 1 of the touzi of the Collectorate of Dacca and the Sadar jama of the said zamindari was fixed at Rs. 1,222-8-4 that the boundaries of the jalkar portion now in dispute is given in Sch. 2 of the plaint; that one-third of the jalkar formed the howla of Shamdas Pal within the said zamindari and the remaining two-thirds of the jalkar remained in the khas possession of the maliks; that the zamindari stood in the name of Raj Krishna Roy; that it was sold for arrears of Government revenue on 24th August 1832 (Bhadra 1239 B.S.) and was purchased in the name of Prem. Chand Roy, father of Raja Sreenath Roy, defendant 1, who died pending this action and Raja Janaki Nath Roy (defendant 2) and grandfather of defendants 3 and 4, Jadu Nath Roy and Priya Nath Roy and Iswar Chand Desmukhya in equal shares; that the eight annas purchased by Prem Chand was for the benefit of himself and his three uterine brothers Guru Prosad Roy, Hari Prosad Roy and Chaitanya Das Roy, that Iswar Chandra sold his eight annas share of the zamindari to Trilochan Chatterjee who in turn sold the eight annas to the Pal Choudhurys of; that the Pal Choudhurys and others dispossessed the Roy Choudhurys from a portion of the jalkar described in Sch. 1 and a suit was instituted by Prem Chand Roy for recovery of joint possession of the disputed portion of the jalkar and was fought up to the Saddar Dewany Adawlut and was decreed with mesne profits; that the plaintiffs as well as defendants 1 to 5 are descendants of the Roy Chowdhurys and plaintiffs have got certain shares in the jalkar which are detailed in paras. 13, 14 and 15 of the plaint.

5. The plaint proceeds to refer to several proceedings in support of their title and possession, viz., Suit No. 22 of 1851, in the Court of the Principal Sudder Amin of Dacca, the resumption proceedings of 1861, Suit No. 374 of 1864 in the Court of the Munsif of Narayangunge against the Government and the ijaradars of the Government, and rely on the principle of equitable estoppel against defendants 1 to 5 on the basis of what transpired in the course of these suits and proceedings. It is not necessary to refer to the history of these suits and proceedings now, as they will have to be referred to in detail hereafter. In para. 7 of the plaint the plaintiffs refer to certain demarcation proceedings under Act 5 of 1875 and refer to important admissions alleged to have been made by the principal defendants

or their predecessors in the petition of objection as to the description of the upstream limit of the plaintiffs' jalkar now in dispute. The plaintiffs then proceed to state that with regard to a portion of the jalkar described in Sch. 1, to the plaint which is marked as A, B, C, D in the sketch map attached to the plaint and which lay within the district of Faridpur proceedings u/s 145, Criminal P.C, were started and the first party to the said proceedings were the principal defendants 1 and 2 and Roy Sitanath Roy father of defendants 3 and 4 and the principal defendant 6 and some other persons and plaintiff 7 and the predecessor of some of the plaintiffs and some co-sharer pro forma defendants were the second party to the said proceedings and the jalkar was attached u/s 146, Criminal P.C,

6. The plaint further states that in those proceedings the first party described the portion marked A, B, C, D in the annexed map as included in mehal char Mukundia bearing Touzi No. 4,000 of the Faridpore Collectorate and the second party described the said portion of the jalkar as included in Sch. 1, and appertaining to Zamindary No. 1, Raj Krishna Roy; that aggrieved by the order of attachment three title suits were instituted, one by some of the principal defendants (which includes some of their predecessors), the second by some of the present plaintiffs (which term includes their predecessors as well) and the third by the Pal defendants in different Courts in Faridpur and all these were referred to the arbitration of Mr. Sarada Charan Mitra, formerly a Judge of the High Court of Calcutta, who after taking evidence given an award, that by the said award he decided that the ujan (upstream) simana (limit) of the jalkar described in Sch. 1, of this plaint was the ujan simana and was represented by the line EF as in the map annexed to the plaint and held that the plaintiffs and the co-sharer defendants were entitled to the portion of the jalkar marked A, B, C, D in the annexed map and the Court ordered a decree to be made on the said award and the appeal against the said award was dismissed, that the principal defendants are bound by the decision in the title suits and are estopped from questioning the findings in the said suit by reason of the rule of res judicata. The plaint next alleges that in the year 1917 another proceeding was started u/s 145, Criminal P.C, in respect of the jalkar now in dispute in which the plaintiffs pro forma defendants 15 to 94 were the first party and the principal defendants were the second party and the Magistrate decided that the second party were entitled to the possession of the same by his order dated 31st October 1918, that during the pendency of the 145 case the disputed jalkar was attached and Rs. 2750 was collected from the said Mehal by making settlement by auction and this sum was deposited in the Dacca criminal Court and was unjustly withdrawn by the defendants.

7. The order of the criminal Court has given rise to the cause of action for the suit which was brought on 30th September 1921 within three years from the date of the order u/s 145 of the Code. In para 10 of the plaint the plaintiffs say that they and their predecessors in interest have been in adverse possession of the jalkar for upwards of 70 years and have also acquired a right by adverse possession. In para 11 of the plaint the plaintiffs alleged that plaintiffs and their

predecessors have continued to hold possession of the jalkar as of right, peacefully, unobstructedly without any interruption for 70 years on receiving rents, kabuliats and fish from the dealers in fish, by granting ijara settlements for a term fixed to them, and by holding the same in khas possession and they have acquired a prescriptive right and right by easement therein. On these allegations plaintiffs ask for the reliefs mentioned in the beginning of the judgment. Nothing further need be said about plaintiffs' claim based on "prescriptive right and right by easement" as the claim on this basis has been abandoned in this Court. Several of the defendants filed their written defences but as they generally follow the same lines it is sufficient to set forth the defence raised in the written statement of the principal defendants 1 to 4.

8. These defendants contend (1) that the suit is barred by limitation; (2) they admit that the plaintiffs, defendants 1 to 5, the defendant 15 and defendants 16 to 35 have got Zamindary right in Zamindary 1, Raj Krishna Roy and defendants 16 to 94 have got howla right in one-third share of the Howla Shamdas Pal but they deny that the jalkar (fishery) described as lying within the boundaries mentioned in Sch. 1, in its entirety and the jalkar described in Sch. 2 are included in the said Zamindary. I on the Howla Shyamdas Pal; (3) they deny all knowledge of the revenue sale of the Zamindary 1, Raj Krishna Roy in the month of Bhadra 1239 B.S. They deny the possession of Prem Chand and Desmukhya in the disputed jalkar, on the other hand they say that the Zamindar of Char Mukundia had been in possession of the disputed jalkar even from before the permanent settlement and the maliks of Zamindary 1 had not been in possession; (4) they contend that they are not bound by the decision in Suit No. 22 of 1851, by the resumption proceedings of 1861 as the proprietors of Char Mukundia (their predecessors) were no party to the said two decisions; (5) they contend that they are not bound by the decision in the suit brought by their ancestor Prem Chand Roy against Pal Babus and Gopi Mohan Sen inasmuch as the owner of char Mukundia, the predecessor-in-interest of the defendants were no parties to the suit and this decision is no evidence against them; (6) they contend that neither the decision in Suit No. 22 of 1851 nor the statements of the plaintiff's in the said suit can be used as evidence against them as the owner of Char Mukundia was not party to the said suit; (7) they contend that the statements of plaintiffs predecessors cannot be used in their favour; (8) they say that in the demarcation proceedings of 1903 neither defendants 1 and 2 nor the father of defendants 3 and 4 made any statements or sign any papers and that the statements were made by the ijmal officers who acted under the direction of the plaintiffs; (9) they do not admit the accuracy of the map filed with the plaint; (10) they say that the arbitrator did not decide the question of the boundary between the two jalkars and allege that the subject matter of the dispute in respect of which the award was given became dry chur immediately after the decision of the proceedings u/s 145 which gave rise to the three title suits which culminated in the award; they contend that the award cannot operate as res judicata on the question of boundary.

(11) They contend further that neither the maliks of zamindary No. 1 nor those of Howla Shamdas Pal ever acquired any indefeasible right by adverse possession to the disputed jalkar. They next raise the defence that the plaintiffs the proforma defendants and the principal defendants 1 to 5 jointly own and possess the jalkar as lying within the boundaries of Sch. 1 excluding therefrom the boundaries of the Sch. 2 and the jalkar lying to the south thereof. These defendants then proceed to set forth their own title to the jalkar of Char Mukundia. There was a zamindari Char Mukundia and others Sarkar Fyzabad and others and there was a several fishery called Nadi Balabanta Bil Baor in the public tidal navigable river Padma, Padmabati or Ganges. These two separate mehals carried separate jamas; afterwards they were incorporated into one Touzi, viz., 110 at the time of the permanent settlement which has become touzi 4000 of the Faridpur Collectorate. It carries a Sadar jama of Rs. 3,142-10-3. The devolution of the zamindary from Maharaja Ram Krishna Roy to Mr. J.P. Wise is shown in the following chart.

Maharaja Ramkrishna | Jiban Krishna (his son) by inheritance | =J.C. Sarkies (by auction purchase) =Maharam Khatun _____|_____
 | | Gareib Hossain Ramgam Khatun 12 annas 4 annas =Mr. Wise (by sold to Mahommad Fazal purchase) =sold to Abdul Gani =sold to Mr. Wise 9. Mr. Wise on whom the zamindary devolved eventually granted a Patni settlement in respect of the jalkar mehal to Girish Chandra Guha in 1279 B.S.-1872 A.D. Girish Chandra had 10 annas 8 pies share in the patni. Bepin had the remaining 5 annas 4 pies in the same. Girish mortgaged his 10 annas 8 pies share of the patni to Raja Sreenath Roy, Raja Janaki Nath Roy and Rai Sita Nath Roy Bahadur, father of defendants 3 and 4, and in execution of the mortgage decree the mortgagees purchased the 10 annas 8 pies share of Girish in the patni in the year 1882 and took possession of the same in the same year and the remaining 5 annas 4 pies share are in ownership and possession of defendants 5 to 9. Mr. Wise sold the zamindary interest and the jalkar right to one Mr. David and defendants 1 and 2 and father of defendants 3 and 4 purchased the same from the Administrator General when David's estate had been in his hands in the year 1301 B.S.=1894 A.D.

10. Defendants 1 and 4 give in a schedule attached to the written statement the boundaries of their jalkar which is known as Nadi Balawanta a local name for river Badma. They contend that the allegation that upstream of the jalkar claimed by the plaintiffs was Bangabaria and Narikelberia is false. They refer to a case under Regn. 49 of 1793 between plaintiff's" and defendants" predecessor by which it was decided that the downstream limit of their jalkar extended upto the south of Char Sahebdi, they contend that decree of 1816 inter partes operates as res judicata on the question of boundaries between the two jalkars. The upstream limit of the Bikrampur Jalkar they say has never been on the upstream side of the southern boundary of the said Char Sahebdi. They contend that they are not bound by the proceedings in the suit between Prem Chand Roy, their ancestor, as owner of the Bikrampur Jalkar and his co-sharer the Pal Babus

and Gopi Mohan Sen. They insist that the plaintiffs have no right to the jalkar claimed by them on the upstream side of the mouth of river Satar. They contend that they have been in adverse possession of the jalkar described in Sch. 2 to the plaint for more than hundred years and have acquired a title by adverse possession. They say that the father of the defendants 1 and 2 or the grandfather of defendants 3 and 4 had no right to the Mukundia Jalkar before their purchase of the patni right and whatever right they had to the jalkar mentioned in Sch. 2 of the plaint as co-sharers of the plaintiffs in the Bikrampore Jalkar have been extinguished by adverse possession for 100 years and knowing this these defendants purchased on 17th Aswin 1289 B.S. (1882 A.D.) 10 annas and 8 pies share of the patni right of Girish Guha under the owner of Char Mukundia and subsequently purchased the entire maliki right in 1301= 1894 and have been in adverse possession in both the said patni and zamindari rights for upwards of 12 years against the owners of the Bikrampore Jalkar. Defendants 6 to 9 take the same line of defence except that they deny the title of the plaintiffs to the Bikrampore Jalkar. On these pleadings several issues were framed.

11. They are to be found at p. 161, BK A. It will not be necessary to refer in detail to all the issues as the controversy has been considerably narrowed down before the Court. I will deal first with the question of the title of the plaintiffs to the Bikrampore Jalkar. The first part of issue 20 is as follows: Have the plaintiffs any independent or several fishery in the Padma ? On this issue the Subordinate Judge decided against the plaintiffs and he seems to be of opinion that the plaintiffs must fail as they have not produced a grant from the Crown or have proved a lost grant. The burden is undoubtedly on the plaintiffs to show that the Bikrampore fishery has come to them under a valid and effectual grant from the Crown which has been sustained by the continuous use and employment of themselves, and their co-sharers and their predecessors. It is now well settled that title to an exclusive fishery in a tidal, navigable river can be established by proving an express grant or by giving evidence that a grant though not capable of being produced will be presumed. Bearing this in mind we proceed to discuss whether plaintiffs have established the title to the fishery which, they describe in their plaint. They say, as has been stated already, that their jalkar was an independent jalkar and was included in zamindari of touzi No. 1 of the Collectorate of the district of Dacca and the Sudder jama of the said zamindari No. 1 along with the said jalkar was fixed at Rs. 1,222-8-4. A one-third share of the jalkar formed the Howla Shamdus Pal for which a fixed jama was payable to the maliks of the said zamindari and the remaining two-thirds share was held in khas possession by the maliks who used to enjoy the same by granting leases to fishermen. This is not now disputed by the defendants-respondents.

12. This zamindari, the plaintiffs allege, was sold at auction for arrears of Government revenue in Bhadra 1239 B.S. 1832, when it was purchased in the names of Prem Chand Roy Choudhury and Iswar Chandra Das Mukhya in equal shares. The purchase is not disputed but what is disputed is that the purchase was not at a revenue sale, a matter to which we shall return hereafter. The

purchase by Premchand in respect of the eight annas share is not disputed. It is not disputed that the purchase was for the benefit of Premchand and his three brothers, the predecessor of the plaintiffs and defendant 5. The following genealogical tree shows the relationship between plaintiffs and defendants 1 to 5.

— | | | Premchand Guruprosad Hariproaad Chaitanya Chandra _____ |
 _____ | | | | | Heirs Harilal Some of the Raja Sree Raja
 Sitanath some of the adopted son. plaintiffs. Nath, original Janakinath | plaintiffs
 | defendant 1. Roy, | Harendralal D-5. | plaintiff 2. | | _____ |
 _____ | | | Kumar Pramatha Jadunath, Priyanath, Nath Roy. D-3.
 D-4. 13. It appears that plaintiffs and defendants 1 to 5 jointly owned the 8
 annas share of the jalkar which was settled with touzi No. 1. There is no dispute
 as to shares of the plaintiffs in the jalkar whatever the limits of the jalkar are
 determined to be and therefore we have not thought it necessary to detail the
 shares of the plaintiffs and defendants respectively in the said jalkar. In this case
 it is true that no grants from the Government in the shape of pattas have been
 produced. But that fact will not affect plaintiffs' title if circumstances exist from
 which such a grant can be inferred. In dealing with this question it is important
 to remember what has been said by their Lordships of the Judicial Committee of
 the Privy Council in the case of Sreenath Boy v. Dinabandhu Sen AIR 1914 PC
 48, where the title of the defendants in the Mukundia Jalkar was challenged by
 the Sens. At p. 227 (of 41 I. A) their Lordships said this: "Although, on the other
 hand, when Government has created a separate estate of jalkar at the period in
 question it is usual to find some entry of it in the decennial settlement papers, no
 evidence was forthcoming to show that jalkar grants made prior to the decennial
 settlement or that settlements with zamindars made at the time of it must
 necessarily have taken the form of pattas or some other muniments which
 should now be in the zamindar's possession, or be recorded in the Government
 archives still in existence. In practice such original grants are but rarely
 forthcoming now, and resort must be had to secondary evidence of them, or to
 the inference of a legal origin to be drawn from long user: Garth, C.J., in Haridas
 Mal v. Mahommad Jaki (1885) 11 Cal 484."

14. In the case before us such secondary evidence exists and it is of such a character that we have no hesitation in saying that such a grant should be inferred. Indeed such a grant was recognized by the Government. In a proceeding between the Government and the proprietors of the Bikrampore Jalkar Government recognized that the Bikrampore Jalkar whose upstream limit was Deokhali belonged to the predecessors of the present plaintiffs and had been in existence from before 1195 B.S., prior to the date of the permanent settlement of 1793. It appears that in the year 1861 the Government assessed rent in respect of that portion of the Bikrampore jalkar from Bagra to Khaliya Bagra, a portion downstream of the portion of the jalkar now in dispute and Premchand Boy, predecessor of defendants 1 to 4 and Haralal Roy predecessor of defendant 5, as well as the plaintiffs' predecessors objected to the assessment

and claimed that their jalkar whose upstream limit was the peepul tree or aswatha tree in the house of Kaimuddi Chakladar of Jonojat on the northern bank of the river and the house of Sadananda Guha of Deokhali on the southern bank and the downstream limit was Dadpur and Matibhanga, etc., was their jalkar from before the date of the permanent settlement and should be released from assessment and their objection was allowed. The Deputy Collector was satisfied from the papers which consisted of decrees of Courts and a certain kobala of the year 1195 B.S., that Nadi Padmabati of defendants 1 to 9 which included Premchand Roy was not excluded in the decennial settlement from the Bikrampore zamindary No. 1 Raj Krishna Roy which admittedly belong to the plaintiffs and defendants 1 to 5: see B.K. B/188 Rubakari Ex. 17 (c). This decision was affirmed by the Commissioner on 24th April 1862.

15. Apart from this there was dispute between the proprietors of Bikrampore Jalkar and the Mukundia Jalkar regarding the boundaries between the two jalkars so far back as the year 1197 B.S., as will appear from the Rubakari of civil Court of District Jalalpur, Ex. HBK B, p. 54 and this is undoubted evidence that the right of the proprietors of the Bikrampore zamindari was recognized by the proprietors of Char Mukundia zamindari and the dispute was as to the boundaries: see BL B, p. 55 1 to 10. Indeed it is admitted before us by Mr. Dwarkanath Chakravarty who appears for the Raja defendants that the Bikrampore zamindars had a jalkar downstream of the Mukundia Jalkar and the same admission is made before us by Mr. Guna" da Charan Sen who appears for defendants 5 to 9. Plaintiff's predecessor as well as the brothers of Premchand the predecessor of defendants 1 to 4 purchased the Bikrampore fishery at a revenue sale in the year 1832=1239 B.S. The defendants while admitting the purchase of the Bikrampore Jalkar by Premchand for himself and his brothers deny that the purchase was made at a sale for arrears of Government Revenue. Indeed it is too late now to raise the contention for it appears from a decision of the year 1852 of the Principal Sudder Amin of Dacca in which Premchand Roy was the plaintiff and the Collector of Dacca on behalf of the Government was the defendant it was asserted by Premchand Roy that he had along with Desmukhya defendant purchased the Bikrampore zamindari at a revenue sale in the month of Bhadra 1239 B.S., corresponding to 1832: see Ex. 16 dated 15th June 1852 Book B-87 (bottom) and that position was accepted by the Court and the plaintiff obtained a decree against the Government. It is certain that this is good evidence of the assertion by Premchand of his purchase at a revenue sale. If Premchand was not a revenue sale purchaser the fact would at once have been challenged by the Government. Indeed the denial of defendants 1 to 4 in this behalf is very evasive for they say in para. 4 of the written statement that they are not aware of the revenue purchase. It is difficult indeed for defendants 1 to 4 to say that their ancestor Premchand was making an untrue assertion in this respect in 1852, and the written statement is therefore put in that evasive form. The Subordinate Judge says that the decree Ex. 16 of 1852 where there is recital about the revenue purchase by Premchand Roy is not admissible in evidence against the

owners of Mukundia Jalkar as they were no parties to the said suit. That decree Ex. 16 although not inter partes is admissible in evidence as evidence of a transaction within the meaning of Section 13, Evidence Act. It is too late now to contend after the decision of their Lordships of the Judicial Committee of the Privy Council in the case of Ramranjan Chakravarty v. Ram Narain Singh (1895) 22 Cal 533 that the decree is not admissible in evidence against the defendants. We are unable to follow the reasoning of the Subordinate Judge:

that the recital is in first part of the decree and the defendants rightly question its binding effect: see B.K.A., p. 520, 1.15.

16. In the absence of any evidence to the contrary and having regard to the fact that the recital is to be found in a very ancient document (1852) by the ancestor of defendants 1 to 4 and having regard to the evasive nature of the written statements of defendants 1 to 4, we are of opinion that plaintiffs have proved the purchase of the Bikrampore Jalkar by Premchand at the revenue sale.

17. Mr. Jogesh Chandra Roy appearing for the plaintiffs-appellants have admitted the title of defendants 1 to 4 in the Char Mukundia Jalkar and have admitted that the said jalkar appertains to Touzi No. 4,000 of the Collectorate of the District of Faridpur.

18. The question of boundaries is the more difficult. This dispute regarding boundaries between the two jalkars commenced in very ancient times. The proceedings of those times are fortunately on the record of this case. We are of opinion that the decision of the years 1816 and 1843, Ex. H (B/54) and Ex. C BBK B-68 should form the basis of our decision on the question of boundaries. (His Lordship then considered the evidence and proceeded.) It is very difficult to say at this distance of time that possession of the fishery was exercised up to that limit and it seems less consistent with probabilities that after the defeat of the plaintiff's predecessor in the suit of 1843 the Mukundia Zamindars would allow the Bikrampore Zamindars to exercise possession on that portion of the fishery from which they have been dispossessed by the decree of 1816 and the delivery of possession by the Munsif Kashi Nath. As pointed out by Lord O'Hagan in the Scotch case of Lord Advocate v. Lord Lovat (1880) 5 AC 273 the course of conduct which the proprietor might be expected to follow with regard to his own interests must be taken into account in determining the sufficiency of a possession of the fishery. (His Lordship then considered the leases granted by the proprietors and proceeded.) Repeated assertions of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute a prima facie title: see Bristow v. R. Cormican (1878) 3 AC 641.

19. For the purpose of establishing title to the upstream of the Sahebdi line up to which plaintiffs' title has been established it becomes incumbent on the plaintiffs to establish by clear and convincing evidence that actual possession was in accordance with their assertion. We are of opinion that such evidence is

lacking in the present case. We do not see any reason to doubt the authenticity of these leases and kabulyats or counter parts of leases. The plaintiffs were certainly entitled to grant leases up to the Deokhali Sahebdi line up to which their upstream limit had been determined and they actually granted these leases but in doing so they made assertions of a larger boundary of their Jalkar than they were entitled to.

20. In dealing with these ancient leases and kabulyats we are not unmindful of what was said by the House of Lords in the case just cited, *Bristow v. Cormican* (1878) 3 AC 641, Lord Chancellor Cairns in delivering his speech said that these old leases have always been considered to be admissible as being evidence of acts of ownership. I understand this to rest on the principle that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself as lessor for title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it, admitting his landlord's title to it these circumstances are themselves admissible as evidence of title. They are real transactions between man and man, not intelligible except on the footing of title or at least an honest belief in title. The payment of rent under such a lease is a further and additional fact also admissible as evidence on the same principle: p. 652-3 (Appeal cases). But the matter in controversy before us is whether plaintiffs had made out such a possessory title to the fishing in that part of the fishery which lies upstream of the Deokhali-Sahebdi limit as to entitle them to sue the defendants for trespass to that part of the Jalkar. (His Lordship then again considered the evidence of leases and holding that it was insufficient proceeded.) It is next argued for the plaintiffs that the defendants are precluded from contending that the upstream limit of their Jalkar was not on the northern bank, the peepul tree standing at the Bari of Keamuddi Chakladar of Janajat, and the same having been diluviated the Khal of Debinagore in the same line with the above, on the southern bank of the river, the peepul tree on the south of the Bari of Sada Nanda Guha of Deokhali by reason of the award of Mr. Sarada Charan Mitra C. 267 which was given in Suits Nos. 37 of 1909 and 51 of 1909 and No. 8 of 1909 which were inter partes on the principle of *res judicata*. The award was made part of the decrees in those suits. It becomes necessary therefore to examine the decision and the pleadings in those cases and the circumstances which led to the reference to arbitration which resulted in the award. A proceeding u/s 145, Criminal P.C, was started on 15th July 1905 in respect of the portion of the Jalkar which lay within the boundaries ABC D as shown in the sketch map attached to the plaint: see Vol. E, Map 1,. The boundaries of ABC D are North. The line drawn from Bari of Arjan Khan Munshi of Nanda Dulalpur and Char Amirabad on the west bank of the river towards the Rast up to the main current. South, the line drawn from the Bari of Habib Ulla Ukil on the western bank of the river towards the East up to main current in the same line. East, main current. West, from the Bari of Arjan Khan Munshi of Char Amirabad Nandalpur up to the Bari Habibulla. See plaint of Raja in Suit No. 8 (C

181). The plaintiffs and the defendants and their ijaradars were parties to these proceedings. The Magistrate was unable to find out which of the parties were in actual possession and attached the portion of the Jalkar within these boundaries till a competent civil Court decided between the rights of the parties. The Raja defendants instituted Suit No. 8 of 20th February 1908 in the Court of Subordinate Judge of Paridpur alleging the downstream limit of their Jalkar to be the Koshabhanga and Satar line see plaint (C-174 181) whereas the plaintiffs brought Suit No. 37 alleging their upstream limit the Janajat (which after diluviation had become the site of Debinagar Khal) and Deokhali line: see (C. 279 290) and Chandra Benode Pal and others instituted Suit No. 51. The issues in Title Suit No. 8 of 1909 in which the Raja defendants were plaintiffs were nine in number. Issue 8 ran as follows:

Whether the disputed Jalkar is within the limits of plaintiffs (Rajas) Mahal Char Mukundia. If not can the plaintiffs get any relief?

21. All the matters in dispute were referred with the consent of all parties to the arbitration of Mr. Sarada Charan Mitra a former Judge of the High Court after he had resigned office and he gave an award declaring that the

Jalkar in dispute in the three cases was part and parcel of the zamindari known as Bikrampur belonging to all the landlord parties a claimed in Suit No. 37 of 1909 (present plaintiff's suit) and not a part of the Zamindary Char Mukundia as claimed by the plaintiffs in Suit No. 8 of 1909. No objection was taken in time by the Raja defendants to this award and the award was confirmed and decrees followed on this award: see BKC p. 259, The Raja defendants preferred appeals to the Court of the District Judge of Faridpur and the learned District Judge (the late Mr. Garlick) in dismissing the appeal used rather hard expressions and said that the appeal was "an immoral appeal" and that the making of the appeal was a dishonest breach of a binding agreement.

22. The result was that the decrees on the award became final. It is contended for the plaintiffs that these decrees operate as res judicata and bar the defence that the down-stream limit of the Mukundia Jalkar was the Koshabhanga Satar line or as has been put by the plaintiffs" learned advocate they discredit the Koshabhanga line. The portion of the fishery, the subject-matter of the suits is not included in the portion now in dispute. The rule of res judicata as embodied in Section 11, Civil P.C, 1908, does not depend upon the identity of the subject-matter but it depends on the identity of the issues. The difficulty in arriving at a conclusion on this part of the case is that the learned arbitrator has not recorded his finding on the issue as to what was the downstream limit of the defendant's Jalkar. If he had done so, the matter undoubtedly would have been res judicata. It is contended for the plaintiffs that no decision would have been given for the plaintiffs unless the learned Judge was of opinion that the Koshabhanga line was not the downstream limit of the defendant's Jalkar or which comes to the same thing, the upstream limit of the plaintiff's" Jalkar. In order to consider whether a previous decision is res judicata or not the substantial effect of what has been

decided in the case has to be considered. It seems to me that the decrees are conclusive to this extent that the downstream limit of the defendant's Jalkar must be above the line where the line DC in the sketch map cuts the river, but it is not *res judicata* on the question that any portion above that line is the upstream limit of the plaintiff's Jalkar. (His Lordship then considered the evidence and holding that the plaintiff had failed to prove adverse possession beyond Deokhali-Sahebdi line proceeded to consider the commissioner's map.) It is argued for defendants 6 to 9 that the location of Sabdy char by the commissioner is obviously incorrect on the face of Rennel's map G-13 for it comes between Bowbapur and Nasseyapur but it is shown by the commissioner on the north of Nasipur.

23. Not a single question was put to the commissioner in cross-examination in this behalf and it is easy to propound riddles before the Court of appeal. Rennel's map indicated correctly the course of rivers but it cannot be regarded as giving correctly the direction of villages for the method adopted for ascertaining village was by gun and sound, an extremely unscientific method, which makes reliance upon it difficult for the purpose of ascertaining true direction of villages. It is next argued that the river in 1819 at the time of delivery of possession by Kashi Nath was flowing north to south and Sahebdi char was to the east of Deokhali and in a line with Deokhali, Chaudharasi and Harina as appears from the statement of the plaintiffs in the suit which led to the rubakari of 1843, and then it is said that we know the positions of the three villages there can be no escape from the position that Sabdy chur must be to the east of Deokhali and not towards its north-east. For what was once in the east of a particular village must always remain towards the east however the course of the river may change. But we are not troubled with this consideration seeing that between 1819 and 1840, when the suit was filed by plaintiff's predecessor, the river was flowing east to west and we have the relative positions of Deokhali and Sahebdi with the changed course of the river, one to the south of the other. We have got the relative position of the Villages with reference to the changed course of the river from the statements made by the Mukundia Zamindars at a time much nearer their ken, and it transpires from their statement that Sahebdi char was on the northern bank of the river in 1843, while Deokhali was on the southern bank. There is no substance in the argument that Sahebdi was on the eastern bank at the time of the delivery of possession by Kashi Nath in 1819=1226 B.S. Whatever the relative position was in 1819 we have got this: that in 1843 when the river was flowing east to west Sahebdi char was on the north of Deokhali and that is the present position as shown in the Commissioner's map. If therefore we join point No 160 of the Commissioner's map which is the site of Asawtha tree to a point slightly to the north of the northernmost Sabdy char shown in burnt-sienna colour in the Commissioner's map and produce it towards the river we find the line cuts a point between stations 7 and 8 on the southern bank and station No. 28 on the northern bank of the present flowing river Padma and we think that the upstream limit of the plaintiff's jalkar is the line which

joins a point between stations 7 and 8 to station No. 28 on the opposite bank of the river. Plaintiffs will be entitled to get a decree for recovery of joint possession provided their right has not been lost by adverse possession of the defendants for more than the statutory period of 12 years, or by ouster by the defendants for more than the statutory period.

24. We therefore proceed to discuss the question of ouster or adverse possession. In considering this question of adverse possession it is important to bear in mind the distinction between the elements necessary to constitute adverse possession when Mukundia Zamindari had not passed into the hands of defendants 1 to 4 who are co-sharers in the Bikrampore Jalkar and the period after 1882 when it passed into their hands. It is conceded on behalf of the appellants that if there had been good evidence of adverse possession of the jalkar up to the Koshabhanga Satar line between 1867 and 1882 plaintiffs' title must be held to be extinguished. On 26th April 1867 Mr. Wise accepted a kabuliyat from one Kali Kumar De where the assertion was made that the downstream limit was Koshabhanga to Satar line: see Ex. B, p. 202. On 20th November 1872 Mr. Wise grants a patni patta (Ex. 5) to Girish Chandra Guha in which the same downstream limit of the Mukundia Jalkar is asserted, B 226 and on 17th January 1873 the corresponding patni kabuliyat is executed by Girish Chendra Guha. But after the execution of this patta and kabuliyat we have got no evidence of possession of the jalkar Within the Koshabhanga Satar line for nearly eight years when an ex parte decree for rent obtained by Girish Chandra on 24th November 1882 for some portion of the fishery near the mouth of the Satar river. This decree which was obtained by Guha is certainly evidence of Guha's possession, but its probative value is very small. The weight to be attached to it must be very small seeing that it is not shown that the decree was executed and rent realized: see *Neil v. Duke of Devonshire* (1882) 8 AC 135.

25. It is an important circumstance that there is no assertion by the Mukundia Zamindar of his right to the jalkar up to the Koshabhanga Satar line after the decree of 1816 and 1843 which defeated his claim up to that limit up to the year 1867 when for the first time Mr. Wise accepted the kabuliyat from Kali Kumar De alleging the upstream limit to be Koshabhanga and Satar line. In order to establish title by adverse possession more convincing evidence beyond solitary ex parte decree for rent should have been forthcoming. Girish Chandra mortgaged his two-thirds share in the patni to the Raja brothers and two-thirds share of the patni in the Mukundia Jalkar was purchased by the Raja and his brothers on 20th March 1882 [see Ex. G-B-245] and the peon's report of delivery of possession is dated 11th July 1882. This evidence is in our opinion not sufficient to establish actual adverse possession of the stretch of water extending up to Koshabhanga Satar line. It is not likely that the plaintiffs' predecessors-in-title would allow possession to be wrested from them beyond the Deokhali and Sadaikhali limit when they were able to keep Prithipati Rarn Krishna Roy the earlier Mukundia Zamindar out of possession even after the decree of 1816. The Guhas have not produced a single kabuliyat or patta from fishermen showing

their possession of the jalkar up to the Koshabhanga Satar line between 1872 to 1880 although Purna Chandra Guha deposes in (B K 478 A 20 to 30) that he saw registered kabuliyats in his grandfather's time; and on this evidence they cannot certainly found their title by adverse possession.

26. After 1882 when the Raja defendants 1 to 4 became the owners of the Mukundia Jalkar they were also co-sharers of the Bikrampore Jalkar possessing the portion of the fishery downstream of the Mukundia Jalkar. When granting leases to fishermen up to Koshabhanga limit they might be exercising the right both as owners of Mukundia Jalkar and owners of the Bikrampore Jalkar. The question to be determined with reference to this part of the case is when did they give notice to the plaintiffs, their co-sharers, in the Bikrampur Jalkar that they were granting the leases up to Koshabhanga Satar line in their capacity as owners and patnidars of the Mukundia Jalkar and not as the co-sharers of the Bikrampore Jalkar. The numerous pattas and kabuliyats (S series) which are undoubtedly genuine documents were executed in favour of or by fishermen for large sums of rent, on the assertion that the fishery up to Koshabhanga-Satar line belong to them in their right as Mukundia Zamindars; but it does not appear that plaintiffs had any notice of the assertion of this hostile title till within 12 years of suit. Mere participation of the rent and profits of a jalkar without more by the Raja co-sharers even for a long period of time is not sufficient to constitute ouster: see *Corea v. Appuhamy* (1912) AC 230 and *Hardit Singh v. Gurmukh Singh* AIR 1918 PC 1. (After further considering evidence re: adverse possession by the defendants the judgment proceeded). It is to be served that these leases after the institution of the suit of 1909 are of very little use after they as they were given after the dispute had arisen. It is to be observed that between 1906-18 both parties were trying to enlarge their respective rights in the jalkar and it cannot be said that the defendants were in uninterrupted and exclusive adverse possession of the portion of the fishery to which plaintiffs have established their title.

27. Reference has been made to the case of *Raja Sree Nath v. Dina Bandu Sen* AIR 1914 PC 48 and it is said that the defendants openly asserted in that suit that their downstream boundary was the Koshabhanga-Satar line. The present plaintiffs were no parties to the said suit and the portion in dispute in that case was admittedly above the portion of the fishery now in dispute. Great stress was laid by the learned advocate for defendants 1 to 4 on the following passage in the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Sreenath v. Dinabandhu* AIR 1914 PC 48.

and by means of such proceedings in 1797, 1816, 1843 by means of similar proceedings in litigation with some of the present defendants and by a long succession of ijara pattas and kabuliyats which they put in evidence, they prove de facto possession, asunder their jalkar rights of the whole fishery in both streams between their upper and their lower limits.

28. But as the present plaintiffs were no parties to the suit this finding is not

strictly evidence against them. The question of adverse possession by the defendants loses much force as it appears that there were disputes prior to 1917 regarding the collection of rent from the disputed portion of the jalkar between plaintiff's" and defendants" lessees which led to proceedings u/s 144, Criminal P.C, and the matter was compromised, see Ex. 15 C, Vol. 1 p. 1] and the order u/s 144 was rescinded. Indeed it is very frankly admitted by the learned advocate for defendants 6 to 9 that the decision of the case should depend on the decision on the question of title and not on the assertions and counter-assertions regarding the upstream limit of the plaintiffs and downstream limit of the defendant's jalkar in the numerous leases and kabuliyats. We are on the whole of opinion that the real dispute with regard to the portion of the fishery now in dispute arose with the action of Sadar Ali Bepari, one of the fishermen lessees of the Raja defendants whose looting of the fish from the disputed portion resulted in the 145 proceedings which terminated on 31st October 1918 in favour of the defendants. The present suit has been brought within three years from that date and is well within time. We are of opinion that plaintiff's title to the portion to which he has established their title has not been lost by adverse possession of the defendants. (The remaining portion of the judgment is not necessary for reporting-Ed).

S.K. Ghose, J.

29. I agree.