

**(1910) 07 CAL CK 0018**  
**In the Calcutta High Court**

Radha Kanta Basak and Another

APPELLANT

Vs

Akhoy Chunder Dey and Others

RESPONDENT

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**Date of Decision :** 25-07-1910

**Acts Referred:**

**Citation :** 7 Ind. Cas. 165

**Hon'ble Judges :** Sharf-ud-din, J

**Bench :** Single Bench

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### Judgement

Sharf-ud-din, J.—These two appeals came on for hearing on the 21st July 1910, before Mr. Justice Carnduff who recorded the following order: "The hearing of these analogous appeals was just begun before me, and I have been unable to continue it. They may be retained on the list undisposed of."

2. In these two appeals, the plaintiffs are the appellants. The suits were brought for recovery of two pieces of land situated side by side, from the defendants in each suit and for declaration of the plaintiffs' title. They alleged that they were in possession of the entire plot mentioned in the plaint of which the disputed lands form parts, that the disputed lands appertained to Taluk Gaur Hari Basak, that they were patit lands before, that the defendants have taken possession of them and that they have refused to give up possession or to take settlement from them.

3. The defendants, on the other hand, contended that the disputed lands never appertained to Taluk Gaur Hari Basak but that they appertained to Taluk Ram Prosad Dutt and that they had been in possession for over twelve years.

4. The first Court dismissed both the suits and the plaintiffs, therefore, appealed to the lower appellate Court which has dismissed the appeals.

5. The plaintiffs now appeal to this Court.

6. It appears that on the 21st July 1910, leave was obtained by the plaintiffs under Order XLI, Rule 2, to take a ground which had not been taken in the

memorandum of appeal, namely, that inasmuch as in accordance with the findings of the two Courts below, the lands in dispute were waste lands situated on the borders of two Taluks, the lower appellate Court was in error in throwing the onus of proof of title entirely on the plaintiffs after finding that the disputed lands were low lands covered with jungle and that no one exercised any act of possession till quite within twelve years before the institution of the suits.

7. The whole case rests on the question whether it is not a case in which the onus should be equally divided. There is no doubt that the onus has been entirely thrown by the lower appellate Court on the plaintiffs. From the findings it is quite clear that the lands in question are waste and jungle lands, that they are situated on the borders of the above-named Taluks, that no one has been exercising any act of possession for more than 12 years before the institution of the present suits.

8. In these circumstances, the case of *Lukhi Narain Jugadeb v. Jadu Nath Das* 21 C. 504 : 21 I.A. 39 applies. At page 511 of the Report, their Lordships of the Privy Council observe: "It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the onus incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant as much as of the plaintiff to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement."

9. That being the view taken by their Lordships in a case of waste land on the borders of two Taluks, it is necessary for the lower Court to take into consideration the evidence adduced by both sides.

10. I, therefore, set aside the judgments of the lower appellate Court and remand the cases to that Court for the purpose of a distinct finding on issue No. 4, as framed by first Court, on the evidence adduced by, both sides.

11. Costs will abide the result.