
(1940) 05 PAT CK 0011
In the Patna High Court

Raja Brajasunder Deb

APPELLANT

Vs

Raja Rajendra Narayan Bhanj Deo

RESPONDENT

Date of Decision : 07-05-1940

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 107
Religious Endowments Act, 1863 — Section 22

Citation : AIR 1941 Patna 260

Hon'ble Judges : Fazl Ali, J;Chatterji, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This appeal arises out of a suit relating to certain lands situated in villages Balarampur, Jagulaipara and Olaver in the district of Cuttack. The plaintiffs 1 and 3, who are also appellants 1 and 3, are Hindu deities who have sued through their sebaite-marfatdar Raja Braja Sundar Deb of Aul, who is himself plaintiff 2 (also appellant 2).

2. Plaintiff 1 is the proprietor of certain lakheraj bahel lands including the disputed lands in village Balarampur. These lands are set out in schedules ha and kal and comprise plots Nos. 383, 384, 385, 769, 767 and 768 of the current settlement map with a total area of 4.70 acres. Plaintiff 2 (who will sometimes be referred to hereafter as the Raja of Aul or merely as the Raja) is the proprietor of village Jagulaipara. The lands of that village which are in dispute are set out in schedule kha of the plaint and comprise plot No. 601/2122 with an area of 15 acre. The disputed land of village Olaver is part of certain debuttar lands which are held by plaintiff 3 in isthamurari madhya sarwadhikari right. This land is set out in schedule ga of the plaint and is represented by plot No. 552, its area being 08 acre. It is common ground that on the plots situated in schedules ka, kha and ga there exist at present certain bunds which the defendant claims to have erected for the purpose of protecting the lands of a number of villages belonging to him. The land in Schedule ka I in Balarampur immediately adjoins the bundh in that village on both sides and the defendant's case is that he is entitled to take earth out of the lands for the purpose of repairing the bundh.

3. In the provincial and revisional survey khatian we find no reference to any bundh on the disputed lands in village Jagulaipara and Olaver, these lands being shown merely as waste lands comprised within the estate of plaintiffs 2 and 3 respectively. As to village Balarampur, the old record of rights mentioned a bundh only on plot No. 138 which is now part of current settlement plot No. 384, but there was no record to show that the bundh had been erected by the defendant. During the current settlement a bundh was shown on the disputed plots of village Balarampur and Jagulaipara which are set out in Schedules ka and kha respectively and it was noted in the remarks column that that bundh was repaired by the defendant. No bundh, however, has been shown on the disputed land in Olaver and there is no entry to suggest that the defendant has anything to do with it.

4. The plaintiffs rely on the entries in the provincial and revisional survey papers so far as villages Balarampur and Jagulaipara are concerned and impugn the correctness of the entry in the current settlement khatian in regard to the disputed lands situated in these villages. With regard to the lands of Balarampur their case is a somewhat elaborate one and may be summarized thus: It is stated in the plaint that about 60 years ago the grand-father of plaintiff 2, who was the sebit-marfatdar of plaintiff 1 (the deity), had constructed a bundh on plot No. 138 to protect his lands from inundation. About four miles to the west of village Balarampur there was an embankment known as Deultara bundh constructed by the Public Works Department which being breached at several places in 1896 was abandoned by that department. About 16 years before the institution of the suit, plaintiff 2 with the object of laying out a garden on plots Nos. 96 and 101 erected a new bundh known as bagicha bundh. Some years prior to the institution of the suit, the defendant closed a water channel known as taila jore (which flows out of the river Kharsua) by constructing a new bundh with the result that the flood water flowing through the opening of the Deultara bundh could not freely pass down as before and the crops of several villages belonging to the Raja of Aul were seriously damaged. Thereupon the Raja directed the removal of the bundh on plots Nos. 138 and 96 and accordingly his men proceeded to cut it at several places.

5. The defendant therefore forcibly filled up the gaps and widened the old bundh on plot No. 138 and constructed a new bundh in continuation of the existing bundh belonging to the plaintiff. The Raja accordingly instituted a suit (No. 378 of 1920) for a declaration of title to and recovery of possession of the land covered by the new bundh. During the pendency of the suit, the Court of Wards took over the management of the Aul estate and the manager of the Court of Wards was substituted for the Raja in the suit. This manager fraudulently compromised the suit with the defendant on terms highly detrimental to the Raja. Then followed the current settlement operation in the course of which the entry already referred to was made in favour of the defendant. Taking advantage of this entry the defendant began to widen the old bundh and also erected a new bundh, but he was not able to complete the work as he was opposed by the

Raja's servants. This happened in May 1932 and on 7th June 1932 the plaintiffs brought the present suit.

6. The plaintiffs' case with regard to the lands of village Jagulaipara and Olaver is that the defendant had no right to construct or maintain a bundh on lands belonging to the plaintiff. The plaintiffs accordingly pray in the suit for a declaration of their title to the lands covered by the bundhs in villages Balrampur, Jagulaipara and Olaver and also to the disputed land on either side of the bundh in Balrampur; the restoration of the lands to the condition in which they were before; confirmation of the plaintiffs' possession; a permanent injunction restraining the defendant from constructing or repairing the disputed bundh and compensation for rendering useless the lands in dispute. The defendant who is the proprietor of the Kanika estate resisted the suit on many grounds, but his main defence was that the disputed bunds were merely part of a bundh ten miles in length starting from a place called Chhanohanadia in village Jagulaipara and extending up to village Ayatun. This bundh was alleged to have been constructed in olden times on behalf of the Kanika estate to prevent the flood water of the river Kharsua from destroying the crops and houses of tenants residing in certain villages belonging to that estate. The defendant claimed that no portion of those bundhs ever belonged to or was constructed by the Raja of Aul or any of his ancestors and he relied on the compromise in suit No. 378 of 1920 as well as the survey entry and asserted that the plaintiffs' suit was barred by limitation and that the decree in suit No. 878 of 1920 operated as *res judicata* in regard to the disputed lands of Balrampur.

7. The learned subordinate Judge found (1) that the disputed bundhs were only parts of a continuous bundh or a chain of bundhs which belonged to the defendant and extended over a distance of ten miles beginning from Chhanchanadia in mauza Jagulaipara to mouza Ayatun and that this chain of bundhs was maintained and repaired by the ancestors of the defendant. (2) That though there was no direct evidence to prove that the disputed bundh had been constructed on behalf of the Kanika estate, it was clearly established that the defendant had been maintaining the bundh all along and the circumstances of the ease strongly suggested that in olden times before hostilities began between the two neighbouring landlords, the Rajas of Aul and Kanika, the former must have made a grant of some lands to the latter for the purpose of constructing and maintaining the bundhs in question. (3) That the compromise decree in suit No. 378 was not vitiated by any fraud and was binding on the plaintiff. (4) That the current settlement entries with regard to the disputed lands of Balrampur and Jagulaipara were correct and plaintiffs 1 and 2 had lost their right to the greater portion of the disputed lands on account of the defendants having been in possession thereof for more than 12 years. (5) That the defendant had made some encroachment on the land of plaintiff 1 in village Balrampur. On these findings the learned subordinate Judge decreed the suit in favour of plaintiff 1 in regard to the encroached area only and dismissed the suit as regards the remainder of the disputed lands. The plaintiffs have challenged most of the

findings of the learned subordinate Judge in this appeal.

8. I will first deal with the disputed lands of Balarampur. It appears that a dispute has been going on between the parties with regard to these lands at least since 1919. In that year there were two counter-cases of rioting in the criminal Court against the servants of the Rajas of Aul and Kanika respectively the immediate cause of the riot being the cutting of the bundh in Balarampur at several places by the servants of the Raja of Aul. In these cases the men of the Raja of Kanika were acquitted and those of the Raja of Aul were convicted. In the year 1920 there were several suits between these two Rajas including suit No. 378 of 1920 in which the Raja of Aul in the capacity of a shebait and marfatdar of plaintiff 1 claimed reliefs which were similar to those claimed in the present suit against the Raja of Kanika.

9. On 30th October 1920 the Raja of Aul was arrested in connexion with a criminal case and in June 1921 his estate was placed under the management of the Court of Wards. Within a fortnight of this date the Raja brought a suit against the manager of the Court of Wards and the Collector of the district, alleging that his signature on his application for the estate being placed under the management of the Court of Wards had been obtained under threat and duress and re-claiming the possession of the estate. About this time, a number of civil suits were filed by the tenants of the defendant against the Raja of Aul and he was also involved in an Arms Act case and a case u/s 107, Criminal P.C. On 10th July the suit brought by plaintiff 2 against the manager of the Court of Wards and the Collector was withdrawn and in December 1922 all the civil suits between him and the defendant, including the suit No. 378 of 1920, were compromised. The compromise was entered into between the Raja of Kanika and the manager of the Court of Wards representing the interest of the plaintiff and the compromise decree passed in suit No. 378 was in these terms:

It is ordered and decreed that this suit be decreed in the terms of the compromise petition that all the civil suits pending between the defendant and the plaintiff having been agreed to be settled out of Court and the land in dispute being on the existing embankment covering an area of 1.48 (acres) in the possession of defendant and being necessary to be maintained to save parts of the Kanika estate from inundation by the river Kharsua, the parties agree that the land on which the embankment stands should belong to the plaintiff's estate, but that the plaintiff shall not have the right to remove the embankment and defendant should maintain it and shall be entitled to dig earth from 20 feet of land on either side of the bundh...for the repairing of the bundh.

10. Several years after this compromise the current settlement proceedings began and the estate of plaintiff 1 being still under the management of the Court of Wards, Babu Padma Charan Das, the manager of the estate, filed an objection before the settlement officer in regard to the entry made by the settlement authorities about the bundh in Balarampur. The objection was to the effect that the defendant had violated the terms of the compromise arrived at between the

parties in suit No. 378 of 1920 by extending the bundh beyond 1.48 acres which was then the area covered by the bundh and it was prayed that "the entry about the right of the defendant to repair and maintain this extension should be cancelled." The Assistant Settlement Officer heard the objection, considered the oral and documentary evidence adduced by the parties and ultimately dismissed the objection. He upheld the existing entry with regard to plots Nos. 384 and 768 and directed that a note be made in the remarks column to the effect that the Raja of Kanika takes earth from plots Nos. 383, 385, 767 and 769 for repairing the bundh on plots Nos. 384 and 768. It is to be noted that this objection was decided after the plaintiff's estate had been released from the management of the Court of Wards.

11. Now, it is not disputed that the defendant has built a bundh between Chhades and Ayatun which extends over several miles. This bundh runs through certain mauzas belonging to the defendant and it was admittedly erected for the purpose of protecting a number of villages within his estate from the flood water of the river Kharsua. The evidence further discloses that there is also one continuous bundh or a chain of bundhs between Chhades and the boundary of village Jagulaipara. These bundhs are situated in village Ganja, Balarampur, Govindpur, Santaila and Jagulaipara. Of these Ganja, Govindpur and Santaila are owned by the defendant and it is not disputed that the portions of the bundh which are situated in these villages belong to him. Village Balarampur belongs to three different proprietors, one of them being D.W. 7 Sadanand Santra Mahapatra. It is not disputed that the bundh which is situated within his estate belongs to and is repaired by the defendant. Another part of Balarampur is in possession of one Jagarnath Prasad Das as marfatdar of a deity. The bundh which is situated within this estate consists of survey plots Nos. 572 and 602 and it is recorded in the current settlement khatian that this bundh also is repaired by the defendant.

12. Thus the dispute is confined only to the bundh which lies within the estate of plaintiff I. With regard to it, the plaintiff's case, as I have already stated, is that it consists of two parts which were constructed at different times. One of them which stands on provincial survey plot No. 138 (C.S plots Nos. 767 and 768) is described as the Noona bundh and is said to have been constructed about 60 years ago to keep back the flow of saline water from the river Baitararni which, it is alleged, used to damage the crops of certain villages of the Aul estate.

13. The other part which is described as the bagicha bundh is situated on revisional survey plots Nos. 96 and 101 and is said to have been constructed 16 years before the institution of the present suit to protect an orchard which the Raja of Aul wanted to lay out in the vicinity of these plots. The plaintiff's case in regard to these two bundhs has not been accepted by the learned subordinate Judge on the evidence as it stands and I fully agree with his decision. It is admitted by the witness for the plaintiff that no orchard has yet been laid out by the "Raja, and it seems to me that he was forced to invent the story about the

orchard, as he could not otherwise explain the existence of that portion of the bundh which he calls the bagicha bundh. This bundh is said to have been erected in comparatively recent times, but no papers have been produced to show that it was constructed by the Raja, Again though the plaintiff's witnesses have stated that there are papers to show that the Raja has been maintaining and repairing the bagicha bundh, yet these papers have not been produced.

14. It is true that the costo constructing and repairing the bundhs would be very small, but there must be some documentary evidence to prove whatever small expenses have been incurred. The matter does not rest here. One of the plaintiffs' own witnesses ? P.W. 16, Gopi Nath Patnaik?has stated that "no new bundh has been constructed by the Aul Raja since my discretion (?)" This statement in my opinion disposes of the plaintiff's case in regard to the bagicha bundh.

15. As to the bundh on plot No. 138 also, there is very little reliable evidence on the side of the Raja of Aul to show either that it was constructed by his ancestors or that it has always been repaired on his behalf. It is true, that many of his witnesses have stated that this bundh is repaired by the Raja, but I am not prepared to accept their evidence firstly, because it is not supported by any documentary record and secondly, because, as I shall show presently, the evidence adduced on behalf of the defendant proves that this bundh also used to be repaired and maintained by the defendant. The case of the plaintiffs is that this bundh was erected to protect the Aul villages, but as has been pointed out by the learned sub-ordinate Judge, the plaintiffs have not been able to explain why the Raja of Aul tried to demolish it in 1919. The learned subordinate Judge's comment upon the explanation offered is as follows:

The explanation offered is that the saline water no longer flows upwards owing to the lands being silted. I am not satisfied with this explanation.

16. After reading the evidence carefully, I have come to the same conclusion as the learned subordinate Judge. It is true that the entry in the provincial and revisional settlement papers is in favour of plaintiff 2 but, in my opinion, the evidence which I shall refer to presently conclusively shows that this entry is not correct. It appears that the estate of the defendant was under the management of the Court of Wards from 1862 to March 1902 and during this period the bundhs within the estate used to be repaired from time to time through contractors who submitted their estimates as well as bills for the work actually done together with certain measurement, books. There can be no doubt about the authenticity of these papers, because they were produced in the earlier litigation between the parties as, well as during the current settlement proceedings.

17. In these papers reference is made to the following names which have been clearly established to be local names for portions of the bundh or chain of bundhs which according to the defendant have been constructed by him and his

predecessors. These names are as follows: (1) Sambhu Barik Ghai, (2) Kancha Ghai, (3) Chheliadora Ghai, (4) Bhusurigaria, (5) Dhendugaria, (6) Gourdhari, (7) Ghumamath Ghai That Sambhu Barik Ghai adjoins the disputed portion of the bundh in Balarampur cannot be doubted, because this is admitted by the plaintiff's own manager in Ex. A. As regards the other names, the following extract from the evidence of P.W. 2 will be sufficient to connect them with the disputed bundh:

The portion of the bigger Balarampur embankment which adjoins the busti, is called Sambhu Barik Ghai. Sambhu Barik Ghai is not a portion of the disputed embankment but it adjoins that embankment. At a short distance from Sambhu Barik Ghai there is another ghai known as Kancha Ghai. It is at a distance of 5 or 10 cubits from the disputed embankment. At a short distance from Kancha Ghai there is a tank as Banagari, Chheliadora Ghai is within a short distance from Banagaria. That ghai touches the disputed bigger embankment at Balarampur at some places and at other places it is within a short distance from it. After Chheriadoo comes Bhusurigaria Ghai and then comes Dhendugaria Ghai. They are not in a line. Dhendugaria Ghai belongs to the Kanika Raj, but I cannot say to which mouza it appertains.

18. This statement clearly locates those portions of the bundh which according to the documentary evidence produced by the defendant have been repaired on behalf of Kanika estate for a long time and in these circumstances I have no hesitation in accepting the oral evidence adduced by the defendant to prove that the disputed bundh is repaired and maintained by him. Keference may also be made here to Ex. G which is a letter written by the Officiating Collector of Cuttack to the Commissioner of Orissa Division on 23rd March 1881. This letter gives "an estimate for the repair of embankments during the current season." The important passage in this letter runs as follows:

The embankments West and north of Ganja have been in the course of years allowed to fall into disrepair. The two breaches filled up last year were done effectually, but had there been any serious floods in the Kharsua, the damage of crops from a succession of minor breaches would have been great. The embankment from east of Olaver to Balarampur, etc. northward should always be kept up.

19. We had to refer to a number of maps in order to locate the embankment east of Olaver referred to in this document and the conclusion which we have arrived at is that the embankment referred to in the above passage is not the embankment which runs between Chhades and Ayatun, but the embankment of which the disputed bundh is a part. The description "east of Olaver to Balarampur and northward" applies to this bundh only and is inapplicable to the bundh between Chhades and Ayatun. This document also, in my opinion, strongly supports the case of the defendant that the disputed bundh used to be maintained and repaired on his behalf. References have been made to a bundh running from Chhades to Ayatun in many papers kept by the Court of Wards, but

there are also references to a bundh running between Chhanchanadia and Ayatun.

20. The learned advocate for the appellant at first tried to contend that Chhanchanadia is another name for Chhades. The evidence however as to this place being in Jagulaipara is so overwhelming that he had ultimately to abandon the contention and to proceed on the assumption that Chhanchanadia is in fact in Jagulaipara near its boundary. If that is so, it clearly supports the oral evidence given by the defendant and shows that the chain of bundh which starts at Ayatun extends up to the boundary of Jagulaipara. It is certainly curious that the fact that the proprietors of the Kanika estate used to maintain this bundh in Balarampur and Jagulaipara was mentioned nowhere in the provincial and revisional survey papers. The explanation which has been suggested by the assistant settlement officer who had to deal with this matter during the current settlement proceeding is to be found in the following passage which I quote from his judgment (Ex. K).

The oral evidence goes to show that the embankment in question was a very insignificant one before the riot of 1919, but it was strengthened considerably afterwards. This is the reason why this portion of the bundh was ignored in the revisional survey map; when it was no better than a ridge before, certainly it would not be plotted.

21. This explanation cannot be ignored because it comes from one who knew the practice of; the settlement department, but it may also be that the disputed bundh being admittedly situated within the Aul estate and there being no dispute about it in the course of the settlement proceedings, the settlement authorities recorded it as a part of that estate and did not record any separate note as to who was maintaining and repairing it. However that may be, the current settlement entry carries with it a strong presumption of correctness and it has not been rebutted by the plaintiffs. The defendant's case is further supported by Ex. A. This was a note made by the manager of the Raja of Aul on a report sent to the Sub-divisional Officer of Kendrapara in May 1932 complaining that the Raja of Kanika had encroached on lands belonging to the Raja of Aul in Balarampur and Olaver. In that report it was stated that Balarampur bundh

was constructed by the Kanika estate and was cut down by the Aul estate as it was erected on its land without permission and damaged Aul mauza.

22. It is also stated that "the cut place which is known as Sambhu Barik Ghai has been marked B on the sketch." This report is important for two reasons. It locates Sambhu Barik Ghai and it also states that Balarampur bundh was constructed on behalf of the Kanika estate. It is contended on behalf of the plaintiff that as the manager who wrote this report has not been examined the statements made therein are not admissible in evidence. The defendant on the other hand contends that in sending this report to the Sub-divisional Officer of Kendrapara, the manager purported to act as an agent on behalf of plaintiffs 1

and 2 and having regard to the circumstances under which the report was made, he must be presumed to have been authorized by them to make the statements which are to be found in the document. On the whole I am inclined to agree with the defendant's contention and think that the report is admissible in evidence. Assuming however that this report is not admissible, there are, I think, even apart from it, sufficient materials on the record to support the view that the disputed bundh was originally constructed by and used to be repaired on behalf of the proprietors of the Kanika estate.

23. The learned advocate for the appellant strongly relied on Sakhawat Hussain's Survey and Settlement Report for the Kanika estate which was published in 1895. It appears that before the commencement of the survey and settlement proceedings referred to in the report, the Kanika estate was under the Court of Wards and Sakhawat Hussain was its manager. After some correspondence with the board of revenue, it was settled that there should be a survey of the estate and so the Collector of Cuttack was appointed the Superintendent and Sakhawat Hussain and several other persons were appointed Assistant Superintendents of the survey. The proceedings went on from 1889 to 1894 and the report of Sakhawat Hussain was completed in December 1894. In this report a reference has been made to a number of embankments within the estate at pp. 136 and 137 and one of these is an embankment ten miles long running from Chhades to Ayatun. The point which is raised on behalf of the appellants is that if there had been an embankment extending northward from Chhades to Jugalaipara, it would have been mentioned in this report.

24. The learned Counsel for the respondents contends in reply that the report is inaccurate and inadmissible in evidence and if it had been produced in the trial Court his client would have been in a position to offer convincing evidence to explain the omission. He has also filed a petition asking us to remand the case to the Court below for taking additional evidence in case we feel inclined to rely on the document.

25. The report is a public document, and I think it would have been a strong piece of evidence in support of the appellant's case if there was no reliable evidence to show that there was an old bundh running from Chhanchanadia in Jagulaipara downwards. But as I have already said Ex. G and Exs. D, E and F series contain unmistakable reference to the bundh from Chhanchanadia to Ayatun and these documents being prepared about the same time as this report, it is difficult to hold that no such bundh was in existence. In my opinion the report is not conclusive and there is no necessity for remanding the case or admitting any additional evidence at this stage.

26. I will now deal with the compromise of 1920 and state briefly the grounds on which it is attacked in the appeal. The first point raised on behalf of plaintiff 2 is that he had applied under undue pressure for his estate being placed under the management of the Court of Wards but, in my opinion, it will serve no useful purpose to investigate this side issue especially as it relates to events which

happened many years ago and a good deal of evidence which is material for its decision is not forthcoming. It is sufficient to state that the estate was placed under the management of the Court of Wards on the Raja's own application and it remained under such management till 1926. The learned advocate for the appellant also treated this matter only as a mere side issue and concentrated his argument on the following points: (1) that the compromise is not binding on plaintiff 1, the deity, because no application was ever made on its behalf to the authorities concerned to take over the management of the debuttar estate; (2) that in view of the provisions of the Religious Endowments Act, 20 of 1863, the Court of Wards was incompetent to take possession of a debuttar estate; (3) that plaintiff 2 as a sebaite could not delegate the management of the debuttar estate to the Court of Wards; (4) that the compromise was not for the benefit of the deity who being under a perpetual disability is entitled to challenge it on that ground and (5) that the manager of the Court of Wards, who compromised on behalf of plaintiff 2, was guilty of gross negligence amounting to fraud in not properly prosecuting the suit.

27. The first objection was not pressed because it was shown that the Court of Wards had in fact assumed the charge of the debuttar estate. As to the second objection, it appears to me that Section 22 of Act 20 of 1863 was not applicable to the present case. It was held in *Protap Chandra Misser v. Brojo Nath Misser* (92) 19 Cal. 275, that Act 20 of 1863 does not apply to an endowment which is not a public one, but which is made for the benefit of an ancestral family idol. The observations made by the learned Judges of the Calcutta High Court in that case were as follows:

Act 20 of 1863 as it appears from the preamble of the Act and Sections 1 to 17 applies only to endowment to which Regulation 19 of 1810 was applicable; and that Regulation, as appears from Section 16, had application only to endowment for public purposes.

28. This view is supported by certain observations made by the Judicial Committee of the Privy Council with regard to the Act in *Ashgar Ali v. Delroos Banoo Begam* (78) 3 Cal. 324 and I have no reason to think that the revenue authorities would have sanctioned the management of the estate of plaintiff 2 if the present endowment was one to which the Regulation of 1810 applied. The third objection raises a point of some nicety. There is no doubt that Balarampur belonged to a deity but the deity was under a perpetual disability and its sebaite was also a disqualified person. If he was disqualified to manage the property, some one had to manage it for him and I do not see why in such circumstances the Court of Wards could not take over its management. It is not the plaintiff's case that the Court of Wards did not pay due regard to the objects of the trust or that these objects were frustrated by the mere fact of the management of the property being placed in the hands of the Court of Wards. The plaintiff has raised this point merely to impugn the compromise and the only substantial ground on which the compromise can be impugned is objection No. 4, that is to say that the

terms of the compromise were not for the benefit of the deity. If that is established, the compromise may be held to be bad, but in my opinion the evidence does not justify any such conclusion.

29. It is contended that there being no previous litigation between the deity and the Raja of Kanika, the deity was not in any way benefited by the compromise which merely settled the suits between the Rajas of Aul and Kanika. In my opinion, however, the answer to this contention is a simple one. I have already shown that upon the evidence as it stands, there can be no doubt that the bundh which was the subject-matter of dispute in suit No. 378 used to be maintained by the defendant. If therefore the suit had proceeded, plaintiff 2 might have been involved in unnecessary costs and harassment. This was avoided by the compromise. Besides in that suit the defendant claimed not only that he had the right to maintain the bundh but also that the land on which the embankment stood belonged to him. The last claim was negatived by the compromise and it was recognized that the land on which the bundh stood belonged to the Raja of Aul. In my opinion therefore the compromise cannot be challenged on the ground that it was detrimental to the interest of the deity.

30. On the question of the alleged negligence of the manager of the Court of Wards, it has been pointed out on behalf of the defendant that the plaintiffs did not give any particulars of the alleged negligence in the plaint as is required by Order 6, Rule 4, Civil P.C. It is, however, unnecessary to lay much stress on this point, as the plaintiff concerned has wholly failed to establish the allegations which were made on his behalf in this Court to show that the Manager was negligent in conducting the suit.

31. It was alleged that the manager had not brought to the notice of the Collector or the board of revenue that the entries in the revisional and provincial survey papers were in favour of the plaintiff nor was this fact brought to the notice of the Court. It appears, however, that there is a reference to the entries in the survey papers in the plaint of suit No. 378 itself and Babu Padma Charan Das, who was the manager of the Court of Wards at the time of the compromise has stated in his evidence as follows:

There were discussions regarding the merits of the suits among myself, the Collector and the Government Pleader. On the facts of the case I had to submit reports. The final report for approval of the terms of the compromise was submitted by the Collector to the Hon'ble Board of Revenue through the Commissioner. The Board's sanction was obtained. I was never negligent in looking into the interest of the estate in the matter of those compromises. I had inspected the embankment before the compromises were finally settled. I had made enquiries as to who was maintaining the embankment.

He has further stated:

The facts shown in the settlement papers were reported so far as I remember. The report may be in the Collector's office.

32. These statements have been made by a witness whose veracity has not been challenged and so they must be accepted. In my opinion, therefore, even assuming that the compromise can be collaterally attacked in the present suit on the ground of negligence, no definite act of negligence has been proved. The plaintiff had made certain allegations in the course of the suit against the good faith of the manager and also charged him with fraud. But these allegations were not pressed in this Court as there was hardly any evidence to prove them. I will now pass on to the entries made in the course of the current settlement proceeding.

33. As I have already stated, the settlement entry is to the effect that the Raja of Kanika repairs the bundh. This entry must be read with Ex. K which is the judgment of the assistant settlement officer on the objection filed by the manager of the Court of Wards on behalf of the Raja. The objection made was that the note about the defendant's right of easement should be cancelled from plots Nos. 383, 384, 385, 767, 768 and 769 except in so far as it related to 1.48 acres which was the subject-matter of the compromise between the parties. The assistant settlement officer in dealing with the objection observed as follows:

The objector now states that the defendant has violated this agreement by extending it beyond 1.48 acres agreed upon in the rafa nama and that the entry about the right of the defendant to repair and maintain this extension (plots Nos. 383, 384 and 385) should be cancelled. The defendant denies that he has made any extension since the above civil suit. He claims that this so-called extension is a part of the old embankment and that this portion is mentioned in the rafa nama simply because this did not form any part of the claim.

34. The assistant settlement officer had heard the evidence of several witnesses and examined the documentary evidence produced by the parties and then came to the conclusion that the whole area which was in dispute was the subject-matter of the compromise and dismissed the objection. He directed that the entry with regard to plots Nos. 384 and 768 be confirmed, and that a note be

made against plots Nos. 383 and 385 that the present defendant takes earth from these plots for repairing the bundh from plot No. 384 and that an entry be made against plots Nos. 767 and 769, that the present defendant takes earth from them for repairing the bundh on plot No. 768.

35. This judgment was delivered after the estate had been released from the management of the Court of Wards and after full consideration of the evidence produced on behalf of the Raja of Aul. The effect of the judgment was to confirm the compromise and correct the mistake as to the area of the disputed bundh given in the compromise petition. The importance, however, of the judgment lies in the fact that it helps us in interpreting the entry in the settlement papers. As I have already stated, the entry in the settlement papers is only to the effect that the Raja of Kanika repairs the bundh. This entry as it stands may not at the first sight seem to signify anything. The judgment of the settlement officer, however,

shows that the entry was treated by all the parties concerned as an entry as to a right of easement and it was made as such. Thus the settlement "entry when properly read clearly shows that the Baja of Kanika has a right of easement and it is in consequence of that right of easement that he is entitled to repair and maintain the bundh. The plaintiffs have in their plaint described it as a collusive entry but the evidence does not support their allegation and as I have already said the presumption as to the correctness of this entry has not been rebutted.

36. There is also an entry in the settlement papers to the effect that the defendant has a right to take earth from certain plots adjoining the bundh for the purpose of repairing it. This merely confirms one of the terms of the compromise which is to the effect that the defendant would be entitled to take earth from 20 feet of land on either side of the bundh. This right has been questioned by the plaintiffs in the present case, but there is no sufficient evidence before us to rebut the settlement entry. It has not been shown that the extent of the right which was conceded in the compromise of 1920 and which was affirmed by the decision of the assistant settlement officer, is not a reasonable one. I have therefore no hesitation in dismissing the plaintiff's claim in so far as it challenges the right of the defendant to take earth from the neighbouring lands for the purpose of repairing the bundh. It must, however, be clearly noted that this right does not extend beyond the limits laid down in the compromise petition, that is to say, the defendant is entitled to take earth only from 20 feet of land on either side of the bundh and he has no right to make any encroachment on the plaintiff's land beyond the limits prescribed in the settlement entry.

37. There was some discussion before us as to whether the defendant had merely acquired a right of easement over the disputed land or had become the owner thereof by exercising adverse possession over it for more than twelve years. In my opinion, the compromise of 1920 must be held to be conclusive on this point. It certainly binds the defendant and so he can claim nothing more than a right of easement in regard to the disputed land. The right of easement in the present case consists in the right which the defendant has acquired to maintain a bundh on the land of plaintiff 2. The repair of the bundh is only incidental to the existence of the bundh and so if the defendant has a right to maintain the bundh, he must also have a right to repair it.

38. Again, as this right has been enjoyed for a very long time it must be referred to a legal origin. I think therefore that the learned subordinate Judge was justified in presuming that in old days before hostilities began between the proprietors of Kanika and Aul States, the Aul Raja must have allowed Kanika Raja to construct and maintain a bundh on his land. The view that it would be legitimate to draw this presumption in the circumstances of the present case is supported by the decision of the Judicial Committee in *Rajrup Kuer v. Abdul Hossein* (81) 6 Cal. 394 wherein more than 20 years before the suit the plaintiff's ancestor had constructed and used a pyne or artificial watercourse on the defendant's land and their Lordships in dealing with the matter observed as

follows:

This being an artificial pyne constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstruction complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendant's land by which the right was created.

39. It has been contended on behalf of the plaintiff that there is no positive evidence to show that the predecessors of the present defendant had actually constructed the disputed bundh, but the reply to this contention may be given in the words of Lord Herschell in *Simpson v. Mayor of Godmanchester* (1896) 1 Ch. D 214 which are to the following effect:

Then we will suppose that there is no evidence to show how that easement came into existence. Still it has been exercised, and it can have had a legal origin if the corporation are now and have been during the time that they have been exercising the right the owners and occupiers of lands which can be affected by the fact of these sluices being open or shut. If they have been such owners or occupiers, then those lands may be regarded as the dominant tenements in respect of which that easement was granted by the owner of the servient tenement, and it would be presumed that the grant was made in respect of such tenements owned or occupied by the Corporation as would be affected by the exercise of the right.

40. I will now deal with the lands of Jagulaipara and Olaver. As I have already stated Ghhanchanadia is on the border of Jagulaipara and the entry in the current settlement papers with regard to the plot No. 601/2122 (corresponding to old survey Nos. 399 and 1652) is in the same terms as the entry with regard to the disputed bundh of Balarampur. This entry is fully supported by the evidence adduced on behalf of the defendant to show that the Kanika estate has for a long time been repairing a bundh which runs from Chhanchanadia to Ayatun and that Chhanchanadia is in a place near the boundary of Jagulaipara. In my opinion the decision of the subordinate Judge must be upheld with regard to the lands of Jagulaipara.

41. As regards the land of Olaver, there is no entry in the Record of Rights in favour of the defendant and I am not prepared to uphold the decision of the learned subordinate Judge in regard to this land. The area of the disputed land in this village is 08 acre and this land is situated on the boundary of the village at a place where the three villages meet. These villages are Ganja, Sat Gharia and Olaver Ganja admittedly belongs to the defendant and it seems, to me that the bundh shown in Olaver is an extension of the bundh in Ganja. Even if the defendant's bundh runs within Ganja along its boundary, it will afford adequate

protection to his villages and I do not see how the encroachment on another person's land can be justified in this case. There is also no documentary evidence to show that the defendant had built or maintained any bundh in Olaver. Therefore, I think that the plaintiff's suit must be decreed in respect of the disputed land of Olaver.

42. The result is that with regard to the disputed land in Olaver the appeal must be allowed and the suit decreed except with regard to the prayer for compensation which was not pressed before us. The defendant must remove the bundh from the land in Olaver and restore it to its original condition within three months from this date, failing which plaintiff 3 will be entitled to get the bundh removed through Court at the cost of the defendant by executing the decree. As to the lands of Balarampur and Jagulaipara the appeal must be dismissed. It should, however, be made clear that the defendant has a right of easement only in regard to these lands which are the property of plaintiffs 1 and 2 respectively. As the defendant has acquired a right of easement over these lands, the plaintiff has no right to remove the bundh and the defendant has a right to repair and maintain it. As the appeal in regard to the lands in Balarampur and Jagulaipara fails the respondent must get from appellants 1 and 2 costs in proportion to the value of the reliefs claimed in respect of these lands. Appellant 3 must similarly recover costs from the defendant in proportion to the success with regard to the land in Olaver.

Chatterji J.

I agree.