*Privy Council Appeal No.* 50 *of* 1940

*Oudh Appeal No.* 21 *of* 1936

**Raja Rajgan Maharaja Jagatjit Singh** - - - - - *Appellant*

*v.*

**Raja Partab Bahadur Singh** - - - - - - *Respondent*

FROM

## THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1942

*Present at the Hearing:*

LORD THANKERTON
LORD MACMILLAN
SIR GEORGE RANKIN
SIR CHARLES CLAUSON

*Delivered by* LORD THANKERTON

The dispute in the present appeal relates to the ownership of certain plots of land which lie on the boundary of, or between, the estates owned by the parties in the Kheri district of Oudh. The suit was instituted on the 23rd January, 1933, by the Deputy Commissioner of Kheri as Manager of the Court of Wards Isanagar Estate in the Court of the Additional Subordinate Judge of Kheri against the present appellant, the Maharaja of Kapurthala. The plaintiff prayed for a declaratory decree that he was the rightful proprietor of the lands in suit. After trial, the Subordinate Judge delivered his judgment and dismissed the suit, except in respect of certain small areas of land not contested by the defendant, by decree dated 22nd December, 1933. The plaintiff appealed to the Chief Court, and, while the appeal was pending, the Isanagar Estate was released from the superintendence of the Court of Wards, and the present respondent, the Raja of Isanagar, was substituted as appellant in the Chief Court in place of the original plaintiff. By decree dated the 7th May, 1936, the Chief Court set aside the decree of the Additional Subordinate Judge and decreed the suit. The present appellant appeals from the decree of the Chief Court.

The lands in suit are claimed by the respondent to form part of his villages of Debipurwa and Harsinghpur, while the appellant claims that, with the exception of the areas not contested by him, the lands in suit form part of his villages of Parsa and Binjaha, which lie on the east side of the respondent's villages. The two lists attached to the plaint set out the plots in suit, list " A " consisting of 53 plots measuring 42.97 acres, claimed to form part of Debipurwa, and list " B " consisting of 193 plots measuring 247.63 acres claimed to form part of Harsinghpur. The plots in suit are shewn in red on two maps also attached to the plaint and marked " C " and " D ". The total acreage in suit is thus 290.60 acres, out of which the appellant conceded that eleven small plots and portions of other plots were owned by the respondent. These concessions are shewn in two lists for each of the respondent's two villages, and the total area thus conceded is about 73 bighas out of the 464 bighas in suit, the equivalent of the 290.60 acres already mentioned; in other words, between one-sixth and one-seventh of the area of the lands in suit admittedly belong to the respondent.

There are four important stages in the history of the lands in suit, as to the facts of which there is little dispute between the parties. The first stage relates to the first regular settlement of Kheri District which was made in the year 1865, and was in fact concluded in 1867. There were then disputes between the respondent's predecessor, and Colonel Boileau, the then proprietor of Parsa and Binjaha, and predecessor of the appellant. These disputes were compromised, and the demarcation of the boundary was made upon the agreement of the two adjacent proprietors. It was held by both Courts below, and is agreed by the parties that by the first settlement the title of the parties' predecessors was determined, and that the boundary then demarcated established the title of the respondent's predecessor to the lands now in suit and is the boundary as now claimed by the respondent in his plaint.

The second stage relates to the second settlement, of the Kheri District, which took place during the years 1896-1899. By this time the Maharaja of Kapurthala had succeeded Colonel Boileau, and disputes arose between him and the Raja of Isanagar as to the demarcation of the boundary, and two proceedings were commenced in the Court of the Deputy Collector of Kheri, one in respect of the boundary between Parsa and Debipurwa and the other in respect of the boundary between Parsa and Harsinghpur. After a report from the Amin of the Court, Mr. Habibullah, the then Deputy Collector of Kheri, by a judgment in each proceeding, dated the 8th September, 1899, demarcated the boundaries on a line which varied slightly the boundary line shewn on the map submitted by the Amin. This may be conveniently referred to as the Habibullah boundary line. There is no doubt that Mr. Habibullah had no power to determine questions of title, and that, under section 23 of the Oudh Land Revenue Act (XVII of 1876), his duty was to determine the boundary on the basis of actual possession. Further, the land in suit in the present case is the area which lies between the boundary fixed by the first settlement, and the boundary fixed by Mr. Habibullah, which shifted the boundary westward to the advantage of the Maharajah of Kapurthala and to the disadvantage of the Raja of Isanagar. This was agreed by the parties and found by both Courts below.

The third stage relates to two proceedings before Mr. Fazal Ali in the year 1903. As Deputy Collector of Kheri, Mr. Fazal Ali gave judgment on the 24th November, 1903, in an application by the Maharaja of Kapurthala against the Raja of Isanagar, for demarcation of the boundary between the plaintiff's village Parsa and the defendant's villages Harsinghpur, Debipurwa and Ram Loke, the last-named of which lies immediately to the south of Debipurwa. Under section 41 (1) of the United Provinces Revenue Act (No. III of 1901), all disputes regarding boundaries fell to be decided, as far as possible, on the basis of existing survey maps; but, if that were not possible, the boundaries were to be fixed on the basis of actual possession. Mr. Fazal Ali accepted the boundary line laid down by Mr. Habibullah and declined to allow fresh enquiry regarding possession or inclusion of the land on the basis of possession; he rejected the objections of the Isanagar estate and ordered the erection of boundary pillars. Almost at the same time proceedings were instituted in the Court of Mr. Fazal Ali as Deputy Magistrate of the First Class under section 145 of the Code of Criminal Procedure against the Raja of Isanagar and the Inspector of Kapurthala in connection with the "boundary dispute of village Parsa, Police Station Dhaurahra." On the 17th December, 1903, Mr. Fazal Ali, as Deputy Magistrate, on an application of the same date by the parties charged, made an order in the following terms:—

> "Bhagwan Din, general agent of Kapurthala and Jiwan Sahai, general agent of the Isanagar estate, presented this application and stated that there is no dispute between them; rather the Kapurthala estate has entered into possession of this land according to settlement of boundary line. It is
>
> Ordered
>
> That now there is no need of proceedings under section 145 of the Code of Criminal Procedure. Therefore (the case) be consigned to records and by sending a copy of this order, the police be informed of this agreement."

The application contained the following statement:—

> "The petitioners beg to submit that in the above-noted case notice has been issued from this Court regarding settlement of dispute in respect of boundary of village Parsa against the villages of the Isanagar estate situate on the boundary limit and the date of hearing has been fixed for to-day. Now the parties therein do not desire to get survey made because the case for demarcation of boundary of village Parsa belonging to Kapurthala against the villages of Isanagar situate on the boundary limit, which was pending, has already been decided by this Court on the 24th November, 1903. This land regarding which the decision under section 145 of the Code of Criminal Procedure was sought to be is in possession of the Kapurthala estate. As mutually between the parties at this time, settlement of demarcation has been made according to possession and the boundaries have been separated, therefore submitting this application, it is prayed that this case be consigned to records."

It will be noted that the appellant's village Binjaha is not mentioned in either of these proceedings.

The fourth stage is important as shewing the state of possession of the lands in suit at the date when the present suit was instituted on the 26th January, 1933. In the year 1931 there were two cases—Nos. 39 and 41—under section 145 of the Code of Criminal Procedure in the Court of the Magistrate of the First Class at Kheri, which involved the appellant and respondent in respect of the land now in dispute. In No. 39, on the 4th May, 1931, the Magistrate ordered the case to be filed as the parties had satisfied him that no breach of the peace need be apprehended. But Case No. 41 was commenced on a report by the Sub-Inspector of Police dated the 14th October, 1931, and on the 24th October, 1931, at the same time as he ordered the parties to attend the Court on the 26th November, the Magistrate, considering the case as one of emergency, ordered the plots referred to in the report to be attached pending his decision under section 145, and appointed the Tahsildar, Tahsil Nighasan, District Kheri, as receiver. These plots appear to have been the three small plots, a suit for possession of which by the present appellant had been finally dismissed by the Chief Court by decree dated the 26th November, 1929. These three plots amounting to 1.30 acre are included in the lands presently in suit. By two orders dated the 7th November, 1931, the Magistrate ordered the Tahsildar to take possession of the plots contained in a list attached to the first of these orders, and in addition to these plots, "if you find that there are any other plots in dispute, they should also be attached or taken possession of." It is common ground that the Tahsildar, acting under these orders, took possession of the lands presently in suit on the 23rd February, 1932, and that he was still in possession when the present suit was instituted on the 26th January, 1933. As the result of applications by the parties, who were agreed that, pending the decision of a civil court, the lands should remain attached and that the proceedings should meantime be consigned to records, the lands to be released to the party who succeeded in the civil suit, the Magistrate made an order filing the case meantime dated the 6th April, 1932.

In the first place, their Lordships are clearly of opinion, contrary to the view of the Subordinate Judge, but in agreement with the view of the Chief Court, that it was for the appellant to establish that the title to the lands in suit held by the respondent's predecessor under the first settlement of 1865 had been extinguished under section 28 of the Indian Limitation Act by the adverse possession of the appellant or his predecessors for the appropriate statutory period of limitation, completed prior to the possession taken under attachment on the 23rd February, 1932, by the Tahsildar, who thereafter held for the true owner. Their Lordships are further of opinion that the present suit, which was subsequently instituted, was rightly confined to a mere declaration of title, and was neither in form nor substance a suit for possession of immoveable property.

In the second place, on the question of the errors of procedure of the Subordinate Judge in placing the burden of proving his possession within the limitation period on the respondent and ultimately refusing to allow the respondent to lead evidence in rebuttal of the appellant's evidence of

adverse possession, it is enough to say that the appellant's counsel felt constrained to state that he could not defend the exclusion of evidence by the learned Judge, and that, if otherwise successful in his appeal, he should ask that the case should be remanded in order to give the respondent the opportunity which was so denied to him. The Chief Court held that the appellant had failed to prove adverse possession, and found it unnecessary to remand the case.

With regard to the statutory period of limitation, article 47 of the Act does not apply, as there has been no order for possession by the Magistrate under section 145 of the Code of Criminal Procedure. As the suit is one for a declaration of title, it seems clear that articles 142 and 144 do not apply, and their Lordships agree with the Chief Court that the suit is governed by article 120.

This leaves for consideration the main issue of proof of adverse possession by the appellant and his predecessors, and the appellant is at once faced by a difficulty which proved fatal to his success before the Chief Court, vizt. that unless he can establish adverse possession of the lands in suit as a whole, he is unable, on the evidence, to establish such possession of identified portions of the lands in suit. Before their Lordships, the appellant's counsel conceded that, in order to succeed in the appeal, he must establish adverse possession of the lands in suit as a whole. He further conceded that his case on that point rested either (*a*) on the Habibullah decision of 1899, on which he succeeded before the Subordinate Judge, or (*b*) on the compromised proceedings under section 145 in 1903. He conceded that neither the Habibullah decision nor the boundary proceedings in 1903 amounted to a judicial decision.

The appellant maintained that the Habibullah decision, given under section 23 of the Act of 1876, was good evidence of the state of possession at that time, and of the possession of the whole of the land in dispute by Kapurthala. He maintained that it must be assumed that Mr. Habibullah did his duty and that the decision was based on actual possession; under section 35 of of the Indian Evidence Act it was good evidence of the fact of possession. Unfortunately for this contention, it appears on the face of the judgment that possession was only proved in respect of land under cultivation, and that the boundary line laid down by Mr. Habibullah was largely an arbitrary line, and, at least to that extent, was not based on actual possession by Kapurthala, and it is well established that adverse possession against an existing title must be actual and cannot be constructive. This element in the decision may well have been largely due to the vagaries of the river, for we find, for instance, in exhibit A-19 that the total cultivated area of Parsa was reduced from 1,383 acres of the first settlement to 163 acres in 1896. Mr. Harcourt Butler (afterwards Sir Harcourt Butler), Settlement Officer, remarked in this statement:—

> "Nearly the whole of this village is in the belly of the river. A strip of high land remains with 3 little sites, but that is in danger."

With reference to Binjaha, exhibit A-291 shows that the cultivated area was 753 acres at the first settlement, and 44 acres in 1897. The same Settlement Officer remarks:—

> "The river has cut in and completely spoiled the village since the year of survey. The assets are now inconsiderable."

Their Lordships are of opinion that, on this ground alone, the Habibullah decision does not provide the necessary foundation for the appellant's case.

In 1903 Kapurthala applied for a fresh demarcation of the boundary of his village Parsa with the respondent's villages. Binjaha was not included. As already stated, Mr. Fazal Ali declined to allow fresh enquiry as to possession and ordered erection of boundary pillars on the Habibullah boundary line, and rejected Isanagar's objections, among which was an allegation that he was in possession. That decision adds nothing to the Habibullah decision. But the appellant really rests his case on the proceedings under section 145, and their compromise. The appellant submitted that the terms of the compromise as stated in the application of the 17th December, 1903, and in the order of that date, constitute an admission by Isanagar of the fact of possession by Kapurthala of the whole lands now in suit, and,

further, an admission of title in the sense that Isanagar is estopped from denying Kapurthala's right to possess the whole lands. It may be noted that the second of these contentions is separate from the plea of limitation based on adverse possession. Their Lordships are unable to accept either of these contentions. In the first place, there is no express admission of title, and there is no ground for the necessary implication of such an admission. In the second place, there is no sufficiently clear evidence as to the area of possession which is referred to. The land possessed is referred to in the application as " this land, regarding which the decision under section 145 of the Code of Criminal Procedure was sought " and, in the order as " this land". That land could only be identified by the report of the police, out of which the proceedings arose, and which has not been produced. It seems that it did not refer to Binjaha, and it need not necessarily have referred to the whole of the lands in suit so far as they lie on the Parsa boundary. The appellant's attempt to derive an admission of his possession of the whole lands in suit from the 1903 compromise fails, in the opinion of their Lordships, on the terms and circumstances of the compromise, but, further, any such admission is rendered improbable by reason of certain facts which are either admitted or proved.

In the first place, by the appellant's admission in this suit, he makes no claim to adverse possession of between one-sixth and one-seventh of the lands in suit, and a large part of the remainder claimed by the appellant consists of unidentified portions of plots. Secondly, it is clear that under the decision of the 26th November, 1929, the appellant cannot claim the three small plots, which were the subject of that decision, and are included among the lands presently in suit. In the third place, there is evidence which shows the serious invasion by the river of culturable lands, with serious restriction of the area of land cultivated. The Chief Court have dealt with much of this evidence, and their Lordships find it unnecessary to go into detail in the matter, but it may be noted, incidentally, that the pillars ordered to be erected by Mr. Fazal Ali in 1903, had not—at least as regards 33 of the pillars—been erected by June, 1908, " because the demarcation line lies in the middle of the river." (Exhibit 236.)

Their Lordships are therefore of opinion that the appellant has failed to prove adverse possession of the whole of the lands in suit, and, as he admits that he has no case for identified portions of the lands in dispute, the appeal must fail.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs in this appeal.

(18932) Wt. 8026—151 170 5/42 D.L. G. 338

In the Privy Council

---

RAJA RAJGAN MAHARAJA
JAGATJIT SINGH

*v.*

RAJA PARTAB BAHADUR SINGH

---

[DELIVERED BY LORD THANKERTON]

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1942