

Privy Council Appeals Nos. 49, 50, and 51 of 1914.

Bengal Appeals Nos. 7, 8, 9, 10, and 11 of 1911.

- Haradas Acharjya Chowdhuri, since deceased
(now represented by Saroj Kumar Acharjya
Chowdhuri), and Others - - - Appellants,**
v.
- The Secretary of State for India in Council
and Others - - - Respondents**
- Lokenath Sahu Chowdhuri, since deceased
(now represented by Ramrangini Chowdhurani), and Others - - - Appellants,**
v.
- The Secretary of State for India in Council
and Others - - - Respondents.**
- Bijoy Gopal Mukerji and Others - - - Appellants,**
v.
- The Secretary of State for India in Council
and Others - - - Respondents**
- Kalika Prashad Mukerji and Another - - - Appellants,**
v.
- The Secretary of State for India in Council
and Others - - - Respondents.**

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1917.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

SIR JOHN EDGE.

[*Delivered by* LORD BUCKMASTER.]

The river Ganges in its course through the district of Dacca rests so uneasily in its bed, that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government, though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due, for instance, to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (See Regulation 11 of 1825.) If private property be submerged and subsequently again left bare by the water it belongs to the original owner. (*Lopez v. Muddun Mohun Thakoor and others*, 13 Moore's Ind. App., p. 467.) It is the latter circumstance that the appellants allege has happened in the present case, but the burden of proving the facts necessary to establish the original ownership rests upon them, and it is the difficulty of this proof, rather than the difficulty of applying the law, that has caused the differences of opinion between the Subordinate Judge and the High Court, from whom this appeal is brought.

The appellants are together entitled to two estates in the district of Dacca. The first is the *zemindari* of Patpasha, and is No. 115 on the revenue rolls, and the second is the *taluk* of Char Madhabdia, and was formerly No. 160, and is now No. 4002, on the revenue rolls of Faridpur. These estates bound a branch of the Ganges on each side at the place material to this suit, and the appellants, who are severally interested in certain undivided shares in these estates, claim that a large tract of land formerly under water forms part of their property. This claim has throughout been disputed by the Government, and to establish their rights four suits were instituted by four sets of plaintiffs, who together own the estates, the Secretary of State for India and the three other sets of plaintiffs being defendants in each suit. The Subordinate Judge decreed in favour of the plaintiffs. From this decree the Secretary of State appealed to the High Court, who set aside the decrees of the Subordinate Judge and dismissed the suits. From the judgment of the High Court the present appeals have been brought. They have been consolidated, and in speaking of the appellants their Lordships throughout intend to refer to the parties, who together formed the original plaintiffs and their representatives, and by the respondent they mean only the Secretary of State for India in Council.

Although many witnesses were called, for the purposes

of this appeal, their testimony was of no real consequence; the arguments of counsel both for the appellants and the respondent being rightly confined to the true effect of evidence furnished by three sets of documents, upon which the appellants rely, and upon certain circumstances about which there is no dispute. The first of these documents is a plan referred to throughout as "Rennel's map." This was made by Major Rennel as part of a survey which was conducted by him between the years 1764 and 1773. The respondent gives reasons for suggesting that this particular map relates to a survey made in 1764, and their Lordships, for the purposes of the present appeal, are prepared to accept that date. The map itself does not purport to give the boundaries of different *mouzahs*, nor indeed to define their position with any exactness. It appears that it was prepared rather for the purpose of showing the roads and the waterways than of locating villages, and consequently the description and definition of the different places is only necessary in relation to the rivers and the roads. The next class of documents consists of certain returns known as the Hakikat Chowhuddibandi Papers. The word "Chowhuddibandi" means "boundary," and the papers may, therefore, be properly described as the boundary papers. They appear from their form to have been returns which apparently were required for the year 1799. They were made by the owners of the estates in question and sent in to the Government. Whether they were made for other years is not certain. Only those for 1799 exist. Even the exact purpose for which they were prepared is not clear, but it may be accepted that they were not voluntary. They were made on a Government form in pursuance of a Government request and to afford the Government for their purpose satisfactory information upon the various questions to which they furnish answers; the first of these questions, after a statement of the number of *mouzahs*, being as to their boundaries. The third document is the Government survey that was made in 1859, which, although it does purport to assign boundaries, does not contain such a description of the boundaries of the different *mouzahs* in dispute as to enable these to be traced throughout. This is no doubt due to the fact that, at the time of this survey, the Ganges had overflowed a part of the *mouzahs* mentioned in the returns of 1799, and boundaries had been obliterated. These three sets of documents afford the chief material upon which reliance can be placed. There is no copy of the Sunnud grant at the date of the permanent settlement, nor of the Kabulyat, nor indeed of any intermediate documents affecting the title of any kind, but this is rather the misfortune than the fault of the appellants.

All of the existing documents, including the three classes to which reference has been made, were in the custody and possession of the Government, by whom they had been carefully kept, and certainly regarded as documents of great

importance. There can be no doubt as their admissibility in evidence. The question is not whether they can be admitted to proof, but what it is they prove when they have been admitted. Most information is to be gathered from the boundary papers. These give descriptions of the different *mouzahs* with their different boundaries, and, as there appears to have been no correction whatever made in the statements, and no document is forthcoming from the Government showing that the returns were questioned, they must, in their Lordships' opinion, as between the Government and the *zemindars*, be accepted as *prima facie* accurate, and the boundaries so given, unless shown to be erroneous, ought to be regarded as the boundaries of the *mouzahs* forming part of the estates.

Now it is true that there is nothing to show that the river had at the date of these papers remained steadily in the course where it was shown to flow in Rennel's map, and having regard to its known characteristics there is every reason to think that its channel had not remained constant.

If, therefore, the total estate as disclosed in the boundary papers had had as one of its limits a branch of the river the difficulties in the appellants' way would have been greatly increased. But in fact it is not so, for the effect of these returns is to establish that taking the two *zemindaris* together there was a large estate through which the river ran from east to west, although the exact position of the river may not have been, and cannot now be, confidently located.

Dealing with the descriptions as they are given of the villages, they are said to be on the south and the north of a branch of the Ganges, called the river Padma. Dealing first with the south, these returns show that a *mouzah*, called Hajinagar, ran along the south boundary of the river. said to be on the east of Gopalpur, Lakhipur, and Nasibashi, in *pergunnah* Haveli; eastern boundary, on the west of Talemabad in *nij pergunnah* (i.e., in my *pergunnah*); northern boundary, on the south of the river Padma; and southern boundary, on the north of Tepakhola, Kharkhandi, Mahmudnagar, and Ujankandi, in *nij pergunnah*. The three southern *mouzahs*, Kharkhandi, Mahmudnagar, and Ujankandi are themselves described with their several boundaries. Kharkhandi is stated to be on the south of Hajinagar, on the north of Sadipur, on the west of Maghnagar, and on the east of Tepakola and Bhajdanga. Mahmudnagar again is given by boundaries that agree with the boundaries of Kharkhandi and Hajinagar, and is stated to be on the north of another *mouzah* known as Gadadhardangi. Gadadhardangi has its boundaries also given: western boundary, on the east of Sadipur in *nij pergunnah*; eastern boundary, on the west of of Char Husni; northern boundary, on the south of Mahmudnagar, Ujankandi, and Sadkabad; southern boundary, on the north of Par-Aliabad in *nij pergunnah*. Taking these boundaries alone they show that from the south bank of the river down below Gadadhardangi the *mouzahs* given form a

compact block of separate villages, each one bounded by the other, and without room for any extraneous *mouzahs* to be inserted. This is a matter of extreme importance, for the *mouzah* Gadadhardangi is shown in part upon the map of 1859, but at that time the river had so completely changed its course that it had flowed over all of the *mouzahs* to the north of Gadadhardangi, with the result that it was no longer possible to plot them out on the map. None the less, the map shows that one of the southernmost of all the *mouzahs* was in part outside its course and enables this to be accepted as evidence of the southward extent of the estate. It is quite true that this still leaves the definition of the eastern, the western, and the northern boundaries undetermined, but the eastern and the western limits are also capable of being in like manner ascertained. Hajinagar is said to be bounded on its west by Gopalpur and Lakhipur. Now Lakhipur is in part marked out on the survey map of 1859, and it would appear from the boundaries there given that the western boundary of Hajinagar must in part at least have been beyond the area that is now in dispute. And so again with regard to Kharakhandi, the most westernly of the *mouzahs*, that lay to the south of Hajinagar; this is said to be on the east of Tepakola and Bhajdanga. Now Tepakola, Bhajdanga, and Sadipur are all shown in the survey map of 1859, and, though it is true that in that map Bhajdanga is stated to be south of Sadipur, this does not materially disturb the western boundary of Kharakhandi; for both Tepakola and Bhajdanga and Sadipur are in the *zemindari* in question. This, therefore, builds up a contiguous collection of *mouzahs* to the west, beyond the western boundary of the disputed land. Now on the east the boundary of the easternmost of the three *mouzahs* that lay south of Hajinagar—namely, Ujankandi—is said to be bounded on the east by Sadkabad, and if Sadkabad were identified with another *mouzah* named Hajiganj, or, if the two *mouzahs* together formed the eastern boundary, there would be no difficulty, because Char Hajiganj and Char Husni are both shown in the survey map of 1859. But, even apart from such identification, the boundaries of Sadkabad and Char Husni are consistent only with the view that the former bounded Ujankandi and the latter Gadadhardangi, and just as Gadadhardangi lay to the south of Ujankandi, so Char Husni is said to be south of Sadkabad, and it appears in the statement attached to the Thak map of Char Husni that Hajiganj is also in the *pergunnah* of Patpasha, and that by order dated the 6th March, 1862, Sadkabad has been put with Char Husni without any boundary in the same *pergunnah* of Patpasha.

Without attempting to do what must now be impossible—to define the exact limits of each of these *mouzahs*—this again shows that, whatever their boundaries may be *inter se*, taken altogether they constitute a block that covers the whole of the present disputed land that lies south of whatever was the line of the river in 1799.

Their Lordships have already pointed out that if the evidence went no further than this it would put the appellants in a state of great embarrassment. But when we proceed to look at the description of the other *pergunnah* on the north of the river, the Chowhuddibandi Papers show that there was a *mouzah* Ramkantapur, together with *chak* Shibnathpur and Jhaukandi, whose boundaries are given in the following words: "Western boundary—Ramkantapur in *pergunnah* Nasirsahi; southern boundary—river Padmabati, Par Baghurhat, Par Hajinagar, and Hajiganj, with Bhadrasan on the straight south-east corner; eastern boundary—Char Harpatchar, and *mouzah* Harirampur; northern boundary—Mansurabad and Santoshpur, on the other side of river Bhubaneshwar." This gives the southern boundary again as the river and the northern boundary as Mansurabad and Santoshpur on the other side of the river Bhubaneshwar, another branch of the Ganges. Now in the map of 1859, a *mouzah* described as Mansurabad does in fact lie almost directly north of Hajinagar across the river, though this is very considerably to the west of the Mansurabad which is shown in Rennel's map. Their Lordships however, see no reason why they should assume that a description given of this village in the accurate survey of 1859 does not reproduce the real boundary of Ramkantapur. Further, the survey of 1859 shows another *mouzah* called Rustampur, next to Mansurabad, and in the plaints it is alleged that this name is an alias for Santoshpur, a statement not specifically denied in the defence. Again, witness No. 9 shows the *mouzah* Rustampur on a map and asserts it belongs to the plaintiffs, and there appears to have been no question asked as to its not being identical with Santoshpur. The commissioner to whom the case was referred by the Subordinate Judge for report states in paragraph 88 of his report, dated the 5th November, 1906, that Ramkantapur in *pergunnah* Nasibsahi is an existing *mouzah*, and Harirampur is marked to the east on the map of 1859. This sufficiently identifies Ramkantapur to show that it extended northwards of the river over the disputed land. Taking, therefore, the two estates together, they show a collection of *mouzahs* covering the whole of the disputed land and intersected by the river.

The case thus made is strongly reinforced by circumstances which happened in 1889. The river, which in 1859 had so changed its course as to go south over part of Gadhardhardangi, had once more turned its channel northwards and thus left bare a large tract of land. To this the appellants' predecessors in title laid claim. The foundation of their claim depended upon the evidence to which their Lordships have already referred, and it was disputed by the Government on the same grounds on which they now rely. In the result the Subordinate Judge decided in favour of the appellants' contention and decreed their ownership of a large tract of land which was marked out on a map referred to in the decree.

From this decree the respondent gave notice of appeal, but this appeal was not proceeded with, and the judgment must be accepted as establishing against the respondent, not merely the ownership of the piece of land, but the proof of the essential facts which were in dispute in those proceedings and which were required as a foundation for the judgment.

The answer made by the respondent may be divided under several heads. In the first place, he says that the *mouzahs* ought themselves to be capable of being traced so that it would be possible to show which in fact were the *mouzahs* included in the present claim and that this admittedly has not been done. Secondly, he relies upon a course of dealing that has taken place between the Government and the predecessors in title of the present appellants with regard to certain lands, which, if the present case be right, undoubtedly form part of the appellants' estate, but which have been dealt with from time to time by the Government, either by settlement in favour of the appellants' predecessors in title or of third parties. Thirdly, he contends that the fact that the river Padma, which intersected the estate, is undoubtedly a river varying in position, throws upon the appellants the burden of showing what was the exact boundary of that river in 1793 in order to establish the limits of its bed, which in 1799 were excluded from the plaintiffs' estates. And, finally, he points to the areas given by the different *mouzahs* in the boundary papers, which are obviously insufficient to include the area claimed. Their Lordships do not think that these contentions can prevail. The first has already been dealt with. The boundaries of the *mouzahs*, *inter se*, are not important for the present case, provided they are contiguous and together cover the disputed territory. The evidence as to their contiguity is, in their Lordships' opinion, established by the Chowhuddibandi papers; but apart from this, if in fact there were *mouzahs* forming part of any other *zemindari* that lay between the *mouzahs* to which reference has been made, evidence of this fact ought to be in the possession of the Government, and no such evidence has been produced. The next contention appears to have little weight, unless it can be used as an estoppel, and for this it is clearly not available. If the case depended upon verbal evidence, witnesses on behalf of the appellants would undoubtedly be confronted with the facts as to these previous dispositions of land for the purpose of showing that the conduct of the predecessors in title of the plaintiffs was inconsistent with the claims they set up, but such questions might admit of satisfactory answers, and the contrary cannot be assumed.

It is also urged by the respondent's Counsel that when these grants were made to the appellants' predecessors they must have been in possession of materials satisfying them that their title was insecure. But this is mere conjecture, upon which no reliance can be placed. It is not even shown that the Chowhuddibandi Papers were then accessible, and, even if they were, the conduct of the parties would be quite consistent with

readiness to avoid dispute by accepting a grant of the lands in controversy, rather than embarking upon a tedious and costly litigation.

The question as to the river is more difficult. Pushed to its extreme it would result in this : that whenever a *zemindari* had been the subject of permanent settlement and there was any dispute as to its external boundaries, the *zemindars* would never be able to establish title to any portion of it if it happened to be traversed by a navigable river of variable course, unless they could show what were the exact boundaries of that course at the date of the permanent settlement. Such a conclusion their Lordships wholly reject. The object of the permanent settlement was to confirm the *zemindars* in their holdings at a fixed and immovable rent, and, if assumptions are made, one way or the other, they ought to proceed upon an attempt to justify the title rather than to render it insecure.

Finally, as to the areas, it is true that the Chowluddibandi Papers purported to give exact areas, and that the total area is far less than the area of the land claimed, and indeed less than that which was decreed in the appellants' favour in 1890. It is of course possible that the area given in the returns, which is clearly described either as that of rent-paying lands or of *lakeraj* lands—the cultivated and the waste lands being subdivisions of the rent-paying land—may have been exclusive of large tracts of land then regarded as actually and potentially unproductive. It is not safe to speculate upon this matter. It is sufficient to say that, if in fact the boundaries are proved to include an area far greater than that referred to in the returns, such miscalculation or misrepresentation cannot defeat the title to the estate.

It remains to consider the reasons given in the judgment of the High Court, from which their Lordships feel compelled to differ. The question of the area no doubt had a material influence upon the opinion of the learned Judges. They also appear to have taken the view that it was necessary to give positive evidence by actual definition of boundaries, that all the *mouzahs* constituted a compact block. The difficulties of locating the exact boundaries of each *mouzah* seem to have had considerable weight in determining their judgment. They take as an illustration the boundaries of Char Husni, and it is quite true that it is impossible from that description to fix its exact boundaries. But, as already pointed out, this is a matter that is not material if there are no gaps between the boundaries of the different *mouzahs* ; and their Lordships think that the High Court was wrong in asking that such boundaries should be given, and they have erred in seeking exact information, which, however desirable, is not essential to the determination of the case. The following passage from the judgment illustrates the matter to which their Lordships refer :—

“ Even if some idea could be formed as to the relative situation of one or more *mouzahs*, it is impossible to determine their exact size and positions. The areas, no doubt, are given in the papers, but the lengths of

the different sides are unknown, as also their directions. It is not even known that the different boundaries were straight lines. In fact it would be a matter of surprise if all these numerous *mouzahs* had straight lines for their boundaries. The imaginary map, which was prepared in the Court, and which admittedly is open to criticism, does not profess to represent the sizes of the different *mouzahs*."

These criticisms would have been formidable were the dispute one as between the owners of adjacent *mouzahs*, in which case the definition of the boundaries would be essential, but they lose their weight when once it is established that, however the boundaries run *inter se*, the *mouzahs* together cover the area in dispute. Their Lordships also think that it was unfortunate that, owing to some misapprehension of the value of the map, Counsel for the appellants before the High Court do not appear to have pointed out the confirmation that their case received from the survey map of 1859. This map is, in their Lordships' opinion, of the greatest value. It shows Gadadhardanga and Aliabad, which formed part of the appellants' estate, far south of the land in dispute; it shows Lakhipur again to the west of the land in dispute, and shows Char Husni and Char Hajiganj to the east, with Mansurabad and Rustampur to the north. If Rustampur be the same as Santoshpur—and their Lordships think it must be so regarded—all these are boundaries of different *mouzahs* shown in the Chowhuddibandi Papers, and the map of 1859 is therefore confirmation of an essential part of the appellants' contention, namely, that, whatever may be the internal divisions of other *mouzahs*, taken altogether they cover the disputed land.

There remains the question of what part of this land is to be assigned to the bed of the river, which is the property of the Government. It is a question of great difficulty. Rennel's map is undoubtedly, both owing to its difference in scale, to the different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey was made, a map which it is hard to incorporate into the survey of 1859. And, again, the variability of the river renders reliance upon it difficult. As has been already said, their Lordships are not, however, prepared to dispossess the appellants because of this difficulty. It may be that any assumption that can now be made cannot be exact, but some assumption is necessary. They think upon the whole that the right course to follow is that taken by the surveyor of experience to whom this matter was referred by the Subordinate Judge, namely, to adopt the position of the river as shown on Rennel's map, and to adapt that map as far as possible to the conditions now known to exist.

This view is not contrary to that expressed in *Maharaja Jagadindra Nath Roy Bahadoor v. The Secretary of State for India in Council* (30 Ind. App., p. 44), where it was held by this Board that dry lands shown by Thak or survey maps to have formed at the date of their prepara-

tion part of the bed of a public navigable river cannot be assumed to have been dry in 1793. Their Lordships there state that it is impossible to assume "that in 1793 a state of things existed different from what appears from any evidence before the Court." The respondent relies on this case, but it is, in their Lordships' opinion, of slight assistance to him, for the Chowhuddibandi Papers conclusively show that, wherever the exact course of the river was in 1793, it could not have occupied its site as shown in 1859, and this is the foundation of the judgment given in 1890; on the other hand, the case might be used to support the argument that the land shown to be dry in 1764 cannot, in the absence of evidence, be assumed to have been under water in 1799.

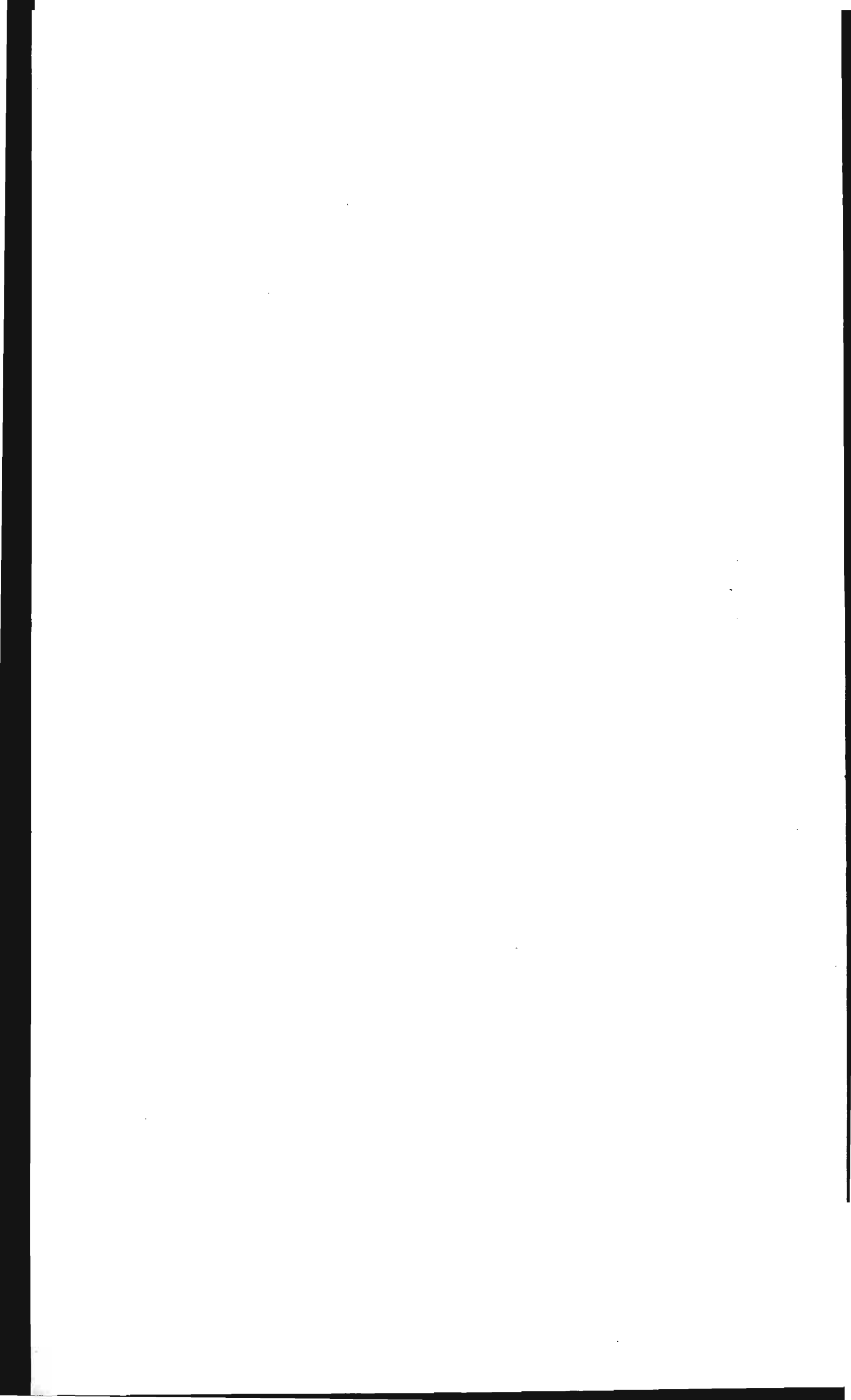
Their Lordships therefore find themselves unable to agree with the judgment of the High Court, but they also are unable to accept the reasoning of the Subordinate Judge which led him to decree the bed of the river as having by accretion become part of the two estates. There is in their opinion no evidence to support this conclusion, and, in the absence of evidence, no circumstance to justify such an assumption.

Subject, therefore, to the declaration that the bed of the river as shown on the map made by the Commissioner is the property of the Government, their Lordships think that the appellants have established their title to all the rest of the disputed land.

From this it follows that the decrees of the Subordinate Judge need only to be varied by excluding from the declaration in favour of the plaintiffs the strip of land which formerly formed the bed of the southern channel of the River Padma according to Rennel's map, as plotted on the map prepared by the Commissioner and filed in the case. Their Lordships have not before them the material that will enable them to make this alteration, and the case must therefore be remitted to the Subordinate Judge that this may be done. It is necessary that this land should be identified by means of a map, which must form part of the Subordinate Judge's decrees. Their Lordships think it right to express their desire that such alteration may be effected as promptly as possible, and that no further time should be lost in concluding a litigation the progress of which has already been too long delayed. It is now seventy years since Lord Macaulay pointed out that the delay in Indian litigation constituted a reproach to our administration, and their Lordships feel with regret that this reproach has not been taken away. A period of fifteen years is needlessly long for the determination of any suit, and more than that period has elapsed since the plaints in these proceedings were issued.

With regard to the costs, the appellants are entitled to them both here and in the Courts below. Up to the time when the consolidation order was made, there will be separate sets, but after that date only one will be allowed.

Their Lordships will humbly advise His Majesty in accordance with this view.



In the Privy Council.

HARADAS ACHARJYA CHOWDHURI,
since deceased (now represented by
SAROJ KUMAR ACHARJYA CHOW-
DHURI), and OTHERS

v.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL and OTHERS.

LOKENATH SAHU CHOWDHURI, since
deceased (now represented by RAM-
RANGINI CHOWDHURANI), and
OTHERS

v.

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IN COUNCIL and OTHERS.

BIJOY GOPAL MUKERJI and OTHERS

v.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL and OTHERS.

KALIKA PRASHAD MUKERJI and
ANOTHER

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IN COUNCIL and OTHERS.

DELIVERED BY LORD BUCKMASTER.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1917.