Ram Kishore Sen and Others

Vs

Union of India and Others

Civil Appeal No. 436 of 1965

(CJI P. B. Gajendragadkar, M. Hidayatullah, K. N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

11.08.1965

JUDGEMENT

GAJENDRAGADKAR, C.J.

The writ petition from which this appeal arises was filed by the six appellants who reside within the limits of Thana Jalpaiguri in the district of Jalpaiguri. To their petition, they had impleaded as opponents the four respondents, the Union of India, the Secretary of External Affairs, Government of India, the State of West Bengal, and the Collector of Jalpaiguri. The substance of the prayer made by the appellants in their writ petition was that the respondents were attempting or taking steps to transfer a portion of Berubari Union No. 12 and the village of Chilahati to Pakistan and they urged that the said attempted transfer was illegal. That is why the writ petition prayed that appropriate writs or directions should be issued restraining the respondents from taking any action in pursuance of their intention to make the said transfer. Appellants 1 and 2 are the original inhabitants of villages Senpara and Deuniapara respectively which are within the limits of Berubari Union No. 12. The

It is a matter of common knowledge that on September 10, 1956, an agreement was reached between the Prime Ministers of India and Pakistan with a view to settle some of the disputes and problems pending between the two countries. This agreement was set out in the note jointly recorded by the Commonwealth Secretary, Ministry of External Affairs, Government of India, and the Foreign Secretary, Ministry of Foreign Affairs and Commonwealth Relations, Government of Pakistan. After this agreement was entered into, the President of India referred three questions to this Court for consideration and report thereon, under Art. 143(1) of the Constitution, because he took the view that the said questions had arisen and were of such nature and of such importance that it was expedient that the opinion of the Supreme Court of India should be obtained thereon. These three questions were thus formulated :-

> "(1) Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union?
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> (2) If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative?
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> (3) Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the Agreement relating the Exchange of Enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?"

On the above Reference, this Court rendered the following answers :-

> Q. (1) Yes.
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> Q. (2) (a) A law of Parliament relatable to Art. 3 of the Constitution would be incompetent;
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> (b) A law of Parliament relatable to Art. 368 of the Constitution is competent and necessary;
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> (c) A law of Parliament relatable to both Art. 368 and Art. 3 would be necessary only if Parliament chooses first to pass a law amending Art. 3 as indicated above; in that case, Parliament may have to pass a law on those lines under Art. 368 and then follow it up with a law relatable to the amended Art. 3 to implement the Agreement.
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> Q. (3) Same as answers (a), (b) and (c) to Question 2.
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> As a result of the opinion thus rendered, Parliament passed the Constitution (Ninth Amendment) Act, 1960 which came into operation on December 28, 1960. Under this amendment, "appointed day" means such date as the Central Government may, by notification in the Official Gazette, appoint as the date for the transfer of territories to Pakistan in pursuance of the 'Indo-Pakistan Agreements' which means the Agreements dated the 10th September, 1958, the 23rd October, 1959, and the 11th January, 1960 entered into between the Government of India and Pakistan. The relevant extracts from the said Agreements have been set out in the Second Schedule to the Ninth Amendment Act. The material portion of the said Schedule reads as follows :-
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> "(3) Berubari Union No. 12
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> This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The division of Berubari Union No. 12 will be horizontal, starting from the north-east corner of Debiganj Thana.
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> The division should be made in such a manner that the Cooch Behar enclaves between Pachagar thana of East Pakistan and Berubari Union No. 12 of Jalpaiguri thana of West Bengal will remain connected at present with Indian territory and will remain with India. The Cooch Behar enclaves lower down between Boda thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan."

The appellants alleged that it had come to their knowledge that about a month before the date of their petition, officers of the two Governments had gone to the locality to make demarcation by holding a survey and that the respondents intended to effect a partition of Berubari Union No. 12 with a view to transfer the southern part of the said Union to Pakistan. They had also come to know that a similar attempt to transfer village Chilahati was being made. The appellants also alleged that the language of the Amendment Act in question in so far as it relates to Berubari Union No. 12 is involved and confused and is incapable of implementation. In the alternative, it is urged that if the division of Berubari Union No. 12 is made as directed by the said amendment, no portion of Berubari Union No. 12 would fall to the south of the horizontal line starting from the north-east

corner of Debiganj Thana, and so, no portion of the said Union can be transferred to Pakistan. In regard to the village of Chilahati, the app

The respondents disputed the appellants' right to obtain any writ or direction in the nature of mandamus as claimed by them. They urged that the relevant provisions of the Ninth Amendment Act were neither vague nor confused, and were capable of implementation. It was alleged that the assumption made by the appellants that a strict horizontal line had to be drawn from the north-east corner of Debiganj Thana under the provisions of the said Amendment Act, was not valid; and they urged that the said Amendment Act had provided for the partition of Berubari Union No. 12 half and half in the manner indicated by it. The respondents were therefore, justified in giving effect to the material provisions of the said Amendment Act. In regard to the village of Chilahati, the respondents contended that the said village formed part of Debiganj Thana and had been assigned to the share of Pakistan by the Radcliffe Award. All that the respondent intended to do was to transfer to Pakistan a small area of about 512 acres of the

In regard to the appellant's case about the village of Chilahati, the learned Judge held that Chilahati was a part of Debiganj Radcliffe Award. The theory set up by the appellants that the village of Chilahati which was being transferred to Pakistan was different from Chilahati which was a part of the Debiganj Thana, was rejected by the learned Judge; and he found that a small area of 512 acres appertaining to the said village had not been delivered to Pakistan at the time of the partition; and so, when the respondents were attempting to transfer that area to Pakistan, it was merely intended to give to Pakistan what really belonged to her; the said area was not, in law, a part of West Bengal, and no question in relation to the constitutional validity of the said proposed transfer can therefore, arise. The plea of adverse possession which was made by the appellants alternatively in respect of Chilahati was rejected by the learned Judge. In the result, the appellant's prayers for the issue of a writ or order i

It appears to have been urged before the learned Judge that in order to make the transfer of a part of Berubari Union No 12 to Pakistan, it was necessary to make a law relating to Art. 3 of the Constitution. The learned Judge held that the this plea had been rejected by this Court in the opinion rendered by it on the earlier Reference; and so, an attempt made by the respondents to implement the material provisions of the Ninth Amendment Act was fully justified. That is how the writ petition filed by the appellants can be dismissed.

The appellants the moved the learned Judge for a certificated to prefer an appeal to this Court; and after the learned Judge was pleased to grant them the said certificate, they have come to this Court by their present appeal.

Before proceeding to deal with the points which have been raised before us by Mr. Mukherjee on behalf of the appellants, it is necessary to advert to the opinion expressed by this Court in Re : The Berubari Union and Exchange of Enclaves with a view to correct an error which has crept into the opinion through inadvertence. On that occasion, it was urged on behalf of the Union of India that if any legislative action is held to be necessary for the implementation of the Indo-Pakistan Agreement, a law of Parliament relating to Art. 3 of the Constitution would be sufficient for the purpose and that it would not be necessary to take any action under Art. 368. This argument was rejected. In dealing with this contention, if was observed by this Court that the power to acquire new territory and the power to cede a part of the national territory were outside the scope of Art. 3(c) of the Constitution. This Court then took the view that both the powers were the essential attributes of sovereignty and vested in India a

Reverting then to the points urged before us by Mr. Mukerjee, the first question which falls to be considered is whether the learned trial Judge was in error in holding that the map Ext. A-1 on which the appellant had rested their case was neither relevant nor reliable. There is no doubt that the sole basis on which the appellants challenged the validity of the intended transfer of a part of Berubari Union No. 12 was that the division had to be made by a strict horizontal line beginning with the north-east corner of the Debiganj Thana and drawn east-west, and that if such a division is made, no part of Berubari Union No. 12 could go to Pakistan. It is common ground that the intention of the relevant provision is that after Berubari Union No. 12 is divided, its northern portion should remain with India and the southern portion should go to Pakistan. The appellants, urged that if a horizontal line is drawn from the north- east corner of Debiganj Thana from east to west, no part of Berubari Union No. 12 falls to

Now, the 'wall map' Ext. A-1 purports to have been prepared by Shashibhushan Chatterjee, F. R. G. S & Sons, of the District of Jalpaiguri in the scale of 1"=3.8 miles. The learned Judge has pointed out that on the record, there is no material whatever to vouch for the accuracy of the map. It was not stated who Shashibhushan Chatterjee was, and it is plain that the map is not an official map. The sources on which Mr. Chatterjee relied in preparing the map are not indicated; on the other hand, there are intrinsic indications of its shortcomings. The learned Judge has referred to these shortcomings in the course of his judgment. When the questions about the admissibility of this map and its validity were argued before the learned Judge, an attempt was made by the appellants to support their case by filing further affidavit made by Mr. Sunil Gupta, the 'tadbirkar' of the appellants. In this affidavit, it was alleged that the said map was one of the numerous maps published by Mr. Shashibhushan Chatterjee and gene

The question about the admissibility of the map has to be considered in the light of s. 36 of the Evidence Act. The said section provides that :-

> "Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or places made under the authority of the Central Government or any State Government, as to matters usually represented or state in such maps, charts or places, are themselves relevant facts."

The map in question clearly does not fall under the latter category of maps; and so, before it is treated as relevant, it must be shown that it was generally offered for public sale. Since the learned Judge has rejected the statement of Mr. Gupta on this point, this requirement is not satisfied. We see no reason why the view taken by the learned Judge in regard to the credibility of Mr. Gupta's affidavit should be reversed. So, it follows that without proof of the fact that the maps of the kind produced by the appellants were generally offered for public sale, Ext. A-1 would be irrelevant.

It is true that s. 83 of the Evidence Act provides that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate. The presumption of accuracy can thus be drawn only in favour of maps which satisfy the requirements prescribed by the first part of s. 83. Ext. A-1 obviously does not fall under the category of the said maps, and so, there can be no question of drawing any presumption in favour of the accuracy of the said map. In fact, as we have already indicated, the learned Judge has given very good reasons for showing that the map does not appear to be accurate. Therefore, even if the map is held to be relevant, its accuracy is not at all established; that is the conclusion of the learned Judge and Mr. Mukerjee has given us no satisfactory reasons for differing from the said conclusion.

Mr. Mukerjee then contended that in the present case, it should be held that on the allegations made by the appellants and on the evidence such as they have produced, the onus to prove that the relevant portion of the Amendment Act was capable of implementation, had shifted to the respondents. He argues that the location of different villages in different Thanas is a matter within the special knowledge of the respondents, and under s. 106 of the Evidence Act, they should be required to prove the relevant facts by leading adequate evidence. He also attempted to argue that the respondents had deliberately suppressed material evidence from the Court.

The learned Judge was not impressed by these arguments and we think, rightly. It is true that the official maps in regard to the area with which we are concerned are not easy to secure. It is not, however, possible to accept the theory that they have been deliberately withdrawn from the market. In fact, during the course of the hearing of the writ petition, the appellants themselves produced two maps Exts. A-7 and A-8. Besides, as the learned Judge points out, when the case was first argued before him, the learned Attorney-General appearing for the respondents produced most of the maps relied upon by him, and the learned Judge directed that they should be kept on the record to enable the appellants to take their inspection. Under these circumstances, we do not see how the appellants can complain that the respondents have suppressed evidence, or can ask the Court to hold that the onus was on the respondents to prove that the relevant provisions of the Amendment Act can be implemented. The onus must primarily

The respondents have produced eight maps in all. One of them purports to be a congregated map of Police Station Jalpaiguri, Pochagar, Boda and Debiganj made and published under authority of Government dated September, 1930. With regard to the congregated map, the learned Judge has observed : "One has only to see Ext. 2 map of Police Station Jalpaiguri and the congregated map Ext. 6 to find that the north eastern hump of Debiganj is not of the shape shown in the wall map of Sashi Bhushan Chatterjee Ext. A-1. It is wholly different". That is one of the reasons given by the learned Judge for disbelieving the appellants' map Ext. A-1. The learned Judge then proceeded to compare the maps produced by the respondents and the congregated map of the District of Jalpaiguri and found that they tally in all details. Having thus examined the relevant material produced before him, the learned Judge came to the definite conclusion that the congregated map had been reasonably and accurately drawn and should be relied upon. inding made by the learned Judge on these maps, we do not see how the appellants can contend that they have established their plea that the relevant portion of the Constitution Amendment Act is incapable of implementation.

It is true that the appellants contended before the learned Judge that the Agreement in question requires that a geometrical point be fixed at the north eastern extremity of Debiganj and then a geometrical line be drawn in a plane tangential to that geometric point, in the direction east to west, at an angle of 90 to the vertical, and this line should divide Berubari Union No. 12 into two exact equal halves. The learned Judge found no difficulty in rejecting this contention, and we are satisfied that the conclusion of the learned Judge is absolutely right.

It would be recalled that the relevant portion of the Agreement which had been included in the Second Schedule to the Ninth Amendment Act, in substance, provides for the division of Berubari Union No. 12 half and half. This division had to be so made that the southern portion goes to Pakistan and the northern portion which is adjacent to India remains with India. When it is said that the division will be "horizontal", starting from the north-east corner of Debiganj Thana, it is not intended that it should be made by a mathematical line in the manner suggested by the appellants. In fact, the provision does not refer to any line as such; it only indicates broadly the point from which the division has to begin - east to west, and it emphasises that in making the said division, what has

to be borne in mine is the fact that the Union in question should be divided half and half. Even this division half and half cannot, in the very nature of things, be half and half in a mathematical way. The latter provision of th

In the course of his arguments, Mr. Mukerjee no doubt faintly suggested that the Schedule annexed to the Amendment Act should itself have shown how the division had to be made. In other words, the argument was that more details should have been given and specific directions issued by the Ninth Amendment Act itself as to the manner of making the division. This contention is clearly misconceived and must be rejected. All that the relevant provision has done is to record the decision reached by the Prime Ministers of the two countries and make it effective by including it in the Constitution Amendment Act as suggested by this Court in its opinion of the Reference in respect of this case.

That takes us to the case of Chilahati. It was urged before the learned trial Judge that Chilahati admeasuring about 512 acres which is proposed to be transferred to Pakistan is not a part of Debiganj Thana, but is a part of thana Jalpaiguri and as such, is outside the Radcliffe Award. It is common ground that Chilahati which is a part of Debiganj Thana has been allotted to Pakistan by the said Award. But the contention is that what is being transferred now is not a part of the said Chilahati. The learned Judge has rejected this contention broadly on two grounds. He had held that the plea that there are two Chilahati, one situated in Debiganj Thana, and the other in Thana Jalpaiguri, was not clearly made out in the writ petition as it was filed. This plea was introduced by Ram Kishore Sen and Dhaneswar Roy in their affidavit filed on February 7, 1964. The learned Judge has found that this theory is plainly inconsistent with the maps produced in the case. The maps show only one Chilahati and that, according t

Mr. Mukerjee very strongly relied on certain private documents produced by the appellants in the form of transfer deeds. In these documents, no doubt, Chilahati has been referred to as forming part of District Jalpaiguri. These documents range between 1925 A. D. to 1945 A. D. It may well be that a part of this elongated village of Chilahati admeasuring about 15 to 16 square miles may have been described in certain private documents as falling under the district of Jalpaiguri. But, as pointed out by the learned Judge, in view of the maps produced by the respondents it is difficult to attach any importance to the recitals made by individuals in their respective documents which tend to show that Chilahati is a part of Police Station Jalpaiguri. Indeed, no attempt was made to identify the lands concerning the said deeds with the Taluka maps with the object of showing that there was another. Taluka Chilahati away from Berubari Union No. 12. The learned Judge has also referred to the fact that Mr. Mukerjee himself

That takes us to another contention raised by Mr. Mukerjee in respect of the village of Chilahati. He argues that having regard to the provisions contained in Entry 13 in the First Schedule to the Constitution of India, it must be held that even though a portion of Chilahati which is being transferred to Pakistan may have formed part of Chilahati allotted to Pakistan under the Radcliffe Award, it has now become a part of West Bengal and cannot be ceded to Pakistan without following the procedure prescribed by this Court in its opinion on the earlier Reference. Entry 13 in the First Schedule on which this argument is based, provided, inter alia, that West Bengal means the territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province. Mr. Mukerjee's argument is that it is common ground that this portion of Chilahati was being administered as if it was a part of the Province of We

When the Constitution was first adopted, Part A of the First Schedule enumerated Part A States. The territory of the State of West Bengal was one of such States. The Schedule then provided that the territory of the State of West Bengal shall comprise the territory which immediately before the commencement of this Constitution was comprised in the Province of West Bengal. The territory of the State of Assam was differently described; but with the description of the said territory we are not concerned in the present appeal. The territory of each of the other States was, however, described as comprising the territories which immediately before the commencement of this Constitution were comprised in the corresponding Province and the territories which, by virtue of an order made under section 290A of the Government of India Act, 1935, were immediately before such commencement being administered as if they formed part of that Province. It is significant that this descriptive clause was not used while describing t

The Constitution (Amendment of the First and Fourth Schedules) Order 1950, however, made a change and brought the territory of the State of West Bengal into line the territories of the other States covered by the clause which we have just quoted. This Order was passed on January 25, 1950, and it deleted the paragraph relating to the territory of the State of West Bengal, with the result that the last clause of the First Schedule became applicable to it. In other words, as a result of the said Order, the territory of the State of West Bengal must be deemed to have always comprised the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal, as well as the territories which, by virtue of an order made under s. 290A of the Government of India Act, 1935, were immediately before such commencement being administered as if they formed part of West Bengal.

Let us now refer to s. 290A of the Government of India Act, 1935. The said section reads thus :-

> "Administration of certain Acceding States as a Chief Commissioner's Province or as part of a Governor's or Chief Commissioner's Province :-
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> (1) Where full exclusive authority, jurisdiction and powers for and in relation to governance of any Indian State or any group of such States are for the time being exercisable by the Dominion Government, the Governor-General may be order direct -
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> (a) that the State or the group of States shall be administered in all respects as if the State or the group of States were a Chief Commissioner's Province; or
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> (b) that the State or the group of States shall be administered in all respects as if the State or the group of States formed part of a Governor's or a Chief Commissioner's Province specified in the Order."

It will be noticed that the significant and material words with which we are concerned have been used in clauses (a) and (b) of s. 290A and have been reproduced in the relevant clause of the First Schedule to the Constitution. It is well known that at the relevant time, merger of States was taking place on a large scale and the covenants which were being executed in that behalf conformed to the same pattern. The Order No. S. O. 25 made by the Governor-General on July 27, 1949 and published for general information provided by clause 3 that as from the appointed day, the States specified in each of the Schedule shall be administered in all respects as if they formed part of the Province specified in the heading of that Schedule. The effect of this clause was that when any territory merged with a neighbouring State, it came to be administered as if it was a part of the said

State. That is the purport of the relevant clause of the covenants signed on the occasion of such mergers. In fact, a similar clause was in

In view of this constitutional background, the words "as if" have a special significance. They refer to territories which originally did not belong to West Bengal but which became a part of West Bengal by reason of merger agreements. Therefore, it would be impossible to hold that a portion of Chilahati is a territory which was administered as if it was a part of West Bengal. Chilahati may have been administered as a part of West Bengal; but the said administration cannot attract the provisions of Entry 13 in the First Schedule, because it was not administered as if it was a part of West Bengal within the meaning of that Entry. The physical fact of administering the said area was not referable to any merger at all; it was referable to the accidental circumstances that the said area had not been transferred to Pakistan as it should have been. In other words, the clause "as if" is not intended to take in cases of territories which are administered with the full knowledge that they do no belong to West Bengal an

Mr. Dutt, who followed Mr. Mukerjee, attempted to argue that the village of Chilahati has become a part of West Bengal and as such, a part of the Union of India because of adverse possession. He contends that ever since the Radcliffe Award was made and implemented, the possession of West Bengal in respect of this area is adverse; and he argues that by adverse possession. Pakistan's title to this area has been lost. We do not think it is open to the appellants to raise this contention. It has been fairly conceded by Mr. Dutt that no such plea had been raised in the writ petition filed by the appellants. Besides, it is plain that neither the Union of India, nor the State of West Bengal which are impleaded to the present proceedings make such a claim. It would indeed be surprising that even though the Union of India and the State of West Bengal expressly say that this area belongs to Pakistan under the Radcliffe Award and has to be delivered over to Pakistan, the petitioners should intervene and contend that Pa

The result is, the appeal fails and is dismissed. There would be no order as to costs.

Appeal dismissed.

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