CALCUTTA HIGH COURT

Ram Kishore Sen

Vs.

Union of India

Civil Revn. No. 849 (W) of 1963

(D.N. Sinha, J.)

17.11.1964

ORDER

D.N. Sinha, J.

1. The petitioners Nos. 1 and 2 state that they are original inhabitants of file villages Senpara and Deuniapara respectively, which are within Berubari Union No. 12 in Thana Jalpaignri. Distrtct of Jalpaiguri, within the State of West Bengal. The petitioners Nos. 3 and 4 state that they were originally inhabitants of villages situate in Thana Boda, adjoining Thana Jalpaiguri. When a portion of Thana Boda was included in Pakistan, they came over and settled in villages Senpara and Gouraagabazar respectively, which are situated within the said Berabari Union No. 12. It is admitted by the respondents that the villages Senpara, Denniapara and Gonranga Bazar are situated within Berahari Union No. 12. It is however contended that the whole of Thana Boda consisting of the Police Thanas Boda, Pachagarh and Debiganj became part of Pakistan under the Radcliff Award. The petitioners Nos. 5 and 6 state that they are original inhabitants of the village Chilahati, of the localities known respectively as Dakerkamath and Burujer Par. They state that it lies within Thana Jalpaiguri, but it is not admitted by the respondents that this village lies within Thana Jalpaiguri. According in them it lies within Thana Debigunge, Revenue Thana Boda and the whole of it has been included in Pakistan under the Radcliff award. It is admitted however that a portion of Chilahati is, for the present, being administered by India. A portion of Berubari Union No. 12 it being demarcated for being made over to Pakistan and it is also contemplated that possession of the aforesaid portion of Chilahati should be made over to its rightful owner, Pakistan. The circumstances under which this is being done will presently be mentioned. The petitioners state that they are being affected thereby and have made this application to prevent the respondents from either making the demarcations or making over possession, to Pakistan of any portion of Berubari Union No. 12 or of the portion of Chilahati mentioned above.

2. As the two areas mentioned above involve separate questions of fact and law, they will have to be considered separately. As regards the demarcation of the Berubari Union No. 12, it has been the subject matter of two previous decisions. The first in point of time is a decision of this Court *Ninnal Bose v. Union of India*[1], The second is a decision of the Supreme Court *In re Berubari Union and Exchange of Enclaves etc*[2].

[1]63 Cal WN 485 : AIR 1959 Cal 506 [2](1960) 3 SCR 250
delivered under its advisory jurisdiction, upon a reference made to it by the President of India under Article 143(1) of the Constitution. All the necessary facts ere set out in these decisions and may be briefly set out here.

3. On February 20, 1947 the British Government announced its intention to transfer power in British India to Indian hands by June 1948. On June 3, 1947 the said Government issued a statement as to the method by which the transfer of power would be effected. On July 18, 1947 the British Parliament passed the Indian Independence Act. 1947. This Act was to come into force from August 15, 1947 which was the 'Appointed day'. As from the appointed day, two independent Dominions came into existence, namely India and Pakistan. Section 2 of the Act provided that, subject to the provisions of Sub-Sections (3) and (4) of Section 2, the territories of India shall be the territories under the sovereignty of His Majesty, which immediately before the appointed day were included in British India, except the territories which under Sub-Section (2) of Section 2 were to be the territories of Pakistan. Section 3 Sub-Section (1) provided, inter alia, that as from the appointed day, the Province of Bengal as constituted under the Government of India Act, 1935 shall cease to exist and there shall be constituted in lieu thereof two new provinces known respectively as East Bengal and West Bengal. Sub-Section (3) of Section 3 provided, inter alia, that the boundaries of the new provinces aforesaid shall be such as may be determined, whether before or after the appointed day, by the award of a Boundary Commission appointed or to be appointed by the Governor-General in that behalf; but until boundaries are so determined, (a) the Bengal Districts specified in the First Schedule of the said Act ..... shall be treated as the territories which were to be comprised as the new province of East Bengal.

> (b) the remainder of the territories comprised in the Province of Bengal are to be comprised in the new Province of West Bengal. The Province of West Bengal has now become the State of West Bengal and the Province of East Bengal has become a part of Pakistan and is now known as East Pakistan.

4. Berubari Union No. 12, with which we are concerned, has an area of 8.75 Sq miles and a population of ten to twelve thousand residents. It is situated in Police Station Jalpaiguri in the District of Jalpaiguri. It has not been specified in the First Schedule of the Independence Act and if the matter had to be considered in the light of the said Schedule, it would be a part of West Bengal. But, as will appear presently, the First Schedule to the Independence Act did not really come into operation at all. On June 30, 1947, the Governor General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a Boundary Commission was appointed, inter alia, for Bengal with Sir Cyril Radcliffe as Chairman. The Commission held its enquiry and made an sward on August 12, 1947 which is known as the 'Radcliffe Award'. It will be noted that the award was made before the 'appointed day', so that the First Schedule to the Independence Act did not come into operation at all.

5. The Constitution of India came into operation on the 26th November, 1949. By Article 394, only specified articles came into force as from that date and the remaining provisions as from 26th January, 1950, the day or the commencement of the Constitution. Article 1 of the Constitution provides, inter alia, that India shall be a Union of States and that the States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First

Schedule. West Bengal was shown as one of the States in Part A and it was provided that the territory of the State of West Bengal shall comprise of the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. In the light of the Radcliffe Award, Berubari Union No. 12 was treated as a part of the province of West Bengal and as such has been treated and governed on that basis.

6. Subsequently, certain boundary disputes arose between India and Pakistan and a tribunal was set up, known as the Indo-Pakistan Boundaries Disputes Tribunal'. An award was made on 26th January, 1950 known as the Bagge Award, but it did not deal with any dispute connected with Berubari Union No. 12. It was two years later, in 1952 that the question of Berubari Union was raised by the Government of Pakistan for the first time. Pakistan alleged that under the Radcliffe Award Berubari Union should really have formed part of Pakistan. The question of certain enclaves, both in India and Pakistan was already engaging the attention of the two Governments. In 1958, it was decided to settle the matter amicably. The matter was considered by the Prime Minister of India Sri Jawaharlal Nehru and the erstwhile Prime Minister of Pakistan, Sir Feroz Khan Noon, who were advised by their Secretaries and Revenue Officers. On September 10, 1958 an agreement was arrived at, inter alia for demarcation of Berubari Union No. 12. The relative part of the agreement relating to Berubari Union No. 12, reads as follows :

"(3) Berubari Union No. 12.

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 cast corner of Debiganj Thana. 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 as 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."

7. I have already mentioned, that disputes arose as to the exact manner in which this agreement would have to be implemented and a reference was made by the President of India to the Supreme Court, under clause (1) of Article 143 of the Constitution to consider and report on three questions. The three questions together with their answers as given by the Supreme Court are given below;

Questions.	Answers.
1. Is any legislative action necessary for the implementation of the Agreement relating to Berubari Union ?	Yes.
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?	(a) A law of Parliament relatable to Article 8 of the Constitution would be incompetent.

(b) A law of Parliament relatable to Article 368 of the Constitution is competent and necessary.

(c) A law of Parliament relatable to both Article 368 and Article 3 would be necessary only if Parliament chooses first to pass a law amending Article 3 as indicated above in that case Parliament may have to pass a law on those lines under Article 388 and then follow it up with a law relatable to the amended Article 3 to implement the agreement.

3. Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the Agreement relating to 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 ?

Same as answers (a),(b) and (c) to question 2.

8. The reasons for giving the above answers are to be found in the opinion of the Supreme Court as delivered by Gajendragadkar, J., (as he then was) and reported in (1960) 3 SCR 250 . I shall refer in more detailed particulars to parts of that opinion, in connection with the issues raised in this application.

9. As a result of the opinion delivered by the Supreme Court, Parliament passed the Constitution (Ninth Amendment) Act 1960 which came into operation on 28th December 1960. By and 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 mean the Agreements dated the 10th day of September 1958, the 23rd day of October 1959 and the 11th day of January 1960, entered into between the Government of India and Pakistan; the relevant extracts of which are set out in the Second Schedule to the Ninth Amendment Act 1960. The relevant part of that Schedule is given below :

"The Second Schedule 1. Extracts from the Note containing the agreement dated the 10th day of September 1958.

(3) Berubari Union No. 12

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 northeast corner of Debiganj thana. 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 as 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 First Schedule to the Constitution was to stand amended from the

appointed day and the territories of the State of West Bengal was to exclude the territories transferred to Pakistan as above. In this back-ground it will be possible now to understand the issues that have been raised in this application.

10. The first point raised is as follows : it is argued that if a horizontal line is drawn from the north-eastern corner of Debiganj Thana, from east to west, no part of Berubari Union No. 12 falls to the south of the horizontal line and therefore it is impossible to divide it into two halves by the process indicated by the Ninth Amendment Act, 1960. Alternatively, if a horizontal line is drawn from a point, forming the north-eastern corner of Debiganj, from east to west, such a line cannot divide the Berubari Union No. 12 into two equal halves because it is mathematically impossible to divide a given area into two equal halves by drawing a line in a horizontal direction from a fixed point. According to this argument, the Ninth Amendment Act may be intra-vires but it is not workable and therefore, what the executive Government is doing is to divide the Berubari Union No. 12 into two unequal halves and are proposing to surrender to Pakistan, a portion not contemplated by the Constitution. Therefore, the respondents should be prevented from doing so. This point is primarily one of fact and should not ordinarily have formed the subject matter of an application under article 226 of the Constitution. However, regard being had to the public importance of the matter, any delay is not practicable and I will have to decide it as best as I can upon the materials placed before me. I shall now proceed to consider the point raised. In respect of Berubari Union No. 12, the only material placed before me on behalf of the petitioners is, what has been described as a 'Wall map' prepared by Sashibhusan Chatterjee F.R.G.S. and Sons, of the District of Jalpaiguri, in the scale of 1" = 3.8 miles. Except that it is indicated that one Sashibhusan Chatterjee, who was a Fellow of the Royal Geographical Society had something to do with it, I have no material to vouch for the accuracy of the map. It is not stated who this gentleman Sashibhusan Chatterjee was and it is obvious that it is not an official map. I do not know what sources this gentleman or his firm had for ensuring the accuracy of the measurements given in the map or the contents thereof. On the other hand, there are inner indications of its shortcomings. It is not an official map. It states that it is which means 'edited', 'prepared' or 'collated', but the sources from which it was so done are not stated. Parts of the map are surrounded by thick red lines and other parts by comparatively thin rod lines, but the key does not state what these lines stand for. The Unions are not indicated. No effort was made to indicate where exactly Berubari Union No. 12 is to be placed in this map. Nor is there any specific mention therein of Thana Debiganj or the boundaries thereof. However, it is said that the south eastern portion at the bottom of District Jalpaiguri constitutes Debiganj Thana. The top of this portion appears like a rectangular blob with two excrescences at the top. The corner of one of these excrescences is taken to be the "northeast comer of Debiganj Thana" as mentioned in the 2nd Schedule to the Ninth Amendment Act. It is said that if you draw a horizontal line from this point, east to west, the whole of Berubari Union No. 12 will be to the north of it. The map does not show it and I do not see how this proposition is established by this map. Considering the fact that even the official maps do not show the unions and the petitioners are not prepared to accept the 'congregated map' which the respondents have caused to be prepared (Exhibit 6), showing the situs of Berubari Union No. 12, I do not understand how they can prove their proposition by production of this map Ex. A(l) alone. This map Ex. A(1) shows that 'Choudhurypara' and 'Manikgunge' are situated to the north of the north-eastern boundary of what is called Debiganj thana and outside it. The official maps show that they ate within the said boundary. This is an aspect of the matter which will have to be further considered presently

11. Before I deal with the official maps, it will be appropriate to mention here that Mr. Mookerjee has strongly relied on Section 36 of the Evidence Act for proving his map. That section runs as follows :

> "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 stated in such maps, charts or places, are themselves relevant facts."

12. In the petition or the affidavits as originally filed, there was no averment that the map Ex. A(1) was a map which was "generally offered for public sale". When Mr. Mookerjee cited Section 36, the learned Attorney General took this objection. Later on, when further affidavits were allowed to be filed, one Sunil Gupta, the 'tadbirkar' of the petitioners introduced a statement that Ex. A(1) was "one of the numerous maps published by Sashibhusan Chatterjee F.R.G.S. and Sons and generally offered for public sale". This has been verified as "true to knowledge", but there is no statement as to how the deponent came to have personal knowledge of it. There is no date given in the map, so that we do not know when it was prepared. If it was prepared by a firm which still exists there could be no difficulty in procuring the best evidence as to when, or the conditions under which, it was prepared. I however apprehend that the map is an old map and the makers are untraceable. The bare statement made by the 'tadbirkar' of the petitioners, at a late stage does not fill me with confidence, I am unable to rely upon it.

13. Section 36 mentions two kinds of maps, viz. (i) published maps or charts generally offered for public sale and (ii) maps or plans made under the authority of Government. The first kind is considered relevant because the publication being accessible to the whole community and open to criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. But it should be observed that the statements made in such a map are merely 'relevant'. There is no presumption as to accuracy. On the other hand, Section 83 of the Evidence Act lays down that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government : it or any State Government were so made and are accurate, but maps or plans made for the purposes of any cause mast be proved to be accurate. Thus, the onus lies upon the petitioners to prove that Ex. A(1) is an accurate map. This onus has not been discharged. The respondents on the other hand have produced various official maps and Mr. Mookerjee himself, at a late stage has produced two such maps (Ex. A7 and Ex. A8). There is a presumption that these maps are correct and I will now. proceed to consider them. But before I do so, I might notice an argument put forward by Mr. Mookerjee. He drew my attention to two decisions of the Privy Council. In *Mt. Bilas Kunwar v. Desraf Ranjit Singh*[3], the question was one of Benami. The plaintiff was the widow of a Hindu Taluqdar of Oudh who purchased a property in the name of his Mahomedan mistress. After his death, the question arose as to whether it was a Benami purchase. The plaintiff did not produce the general account

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books in which there might or might not have been a relevant entry regarding the purchase. The Judicial Committee held that it could not draw an adverse inference from this fact. The books did not necessarily form a part of the plaintiff's case and may not have contained entries which were, in the opinion of the plaintiff, relevant to her case. The Benami nature of the transaction action was upheld. Mr. Mookerjee argues that the Judicial Committee departed from this point of view

ID later case - *Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi*[4], It was held there that in a suit upon a mortgage granted over property of a Math by its Pandara, the onus was upon those representing the mortgage to prove that the debt was a necessary expense of the Institution. What happened was that many years had elapsed since the Pandara originally contracted the debt upon a mortgage of properties belonging to the math and both the lender and the borrower were dead. Under such circumstances it was held that the degree of proof should be modified and if the books of the math which would show the nature of the transaction were withheld from the Court, an inference adverse to the defendants could properly be drawn. Mr. Mookerjee argues that in this case, all the official maps were in the custody of the respondents and they were not available by purchase by members of the public. They had also not given inspection of the same. Hence, it must be presumed that they had suppressed the same. In my opinion, the two decisions of the Privy Council cited above are by no means conflicting, nor do they throw any light on the problem that arises in this case. They depend on their own facts. It is true that official maps are hard to procure. Whether this is due to shortage of printing material, or mere inefficiency of the Survey department I do not know. They are however not unobtainable and Mr. Mookerjee has obtained two maps which he subsequently filed. I cannot assume that there has been a suppression of evidence in this case. Even when this case was first argued In February this year, the learned Attorney General produced most of the maps relied upon by him. By an order dated 11th February, 1964, they were directed to be kept upon the record, to enable parties to have inspection. I am satisfied that the respondents are not guilty of suppressing any material and that, under the circumstances of this case, no adverse inference can be drawn against them upon that ground.

14. The various maps relied upon by the parties are as follows :
By the plaintiffs :

1. A 'Wall map' of District Jalpaiguri. Scale 1"=3.8 miles prepared and published by Sashibhusan Chatterjee F.R. G.S. and Sons, Ex. A(I).
2. Two sheet maps prepared under authority of Government in the year 1910-11 and corrected according to the revised jurisdiction list of 1939-40, of Touzi No. 4, Thak No. 107 Taluk Chilabati Sheet No. 1 and Sheet No. 2, Scale 16"= 1 mile, Exts. A(7) and A(8).
By the Respondents.
1. A map of District Jalpaiguri published under authority of the West Bengal drawing office. Scale 1"=4 miles. It states that the limits of the Police Stations have been corrected upto September 1932 but that the map was 'under revision', Ex. 1.
2. Map of Police Station Jalpaiguri, made and published under the authority of Government dated 5th January 1923. It contains an endorsement - "This map is not final and should not be used for survey purposes, It is issued as an index to the Jurisdiction lists" Scale 1" = 1 mile, Ex. 3.
3. Map of Police Station Pochagar Revenue Thana Boda, Part 1. District Jalpaiguri, made

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and published under authority of Government, dated 21st August 1922 and corrected upto 1939-40 according to revised jurisdiction list. It contains a similar endorsement as item 2. Scale 1"=1 mile, Ex. 3.
4. Map of Police Station Boda-Revenue thana Boda District Jalpaiguri, prepared under authority of Government and corrected upto 1939-40 according to revised jurisdiction list. Similar endorsement as in item 2. Scale 1" = 1 mile, Ex. 4.

5. Map of Police Station Debiganj, Revenue Thana Boda District Jalpaiguri, made and published under authority of Government dated September 1930. Similar endorsement as in item 2. Scale 1" = 1 mile, Ex. 5.
6. Congregated map of Police Station Jalpaiguri, Pochagara, Boda and Debiganj made and published under authority of Government dated September 1930. Similar endorsement as in item 2. Scale 1" = 1 mile, Ex. 6.
This map is supported by an affidavit of Jasoda Gopal Pandey, Deputy Director of Survey Bengal. He says that he has prepared this 'congregated map' and has shown in it, Berubari Union 12 marked in 'red' as per notification. No. 1315 L.S.G. dated 11-4-1929 published in the Calcutta Gazette (Part I) on the 25th April 1929, "as nearly as can be".
7. Mouza map of Taluk Berubari No. 23 Sheet No. 23, Thana Jalpaiguri made and published under authority of Government in 1910-11 corrected upto 1938-39 according to Revised Jurisdiction list Scale 16" = 1 mile, Ex. 8.
8. Mouza map of Taluk Berubari No. 23 Sheet No. 30. Thana Jalpaiguri made and published under authority of Government 1910-11. Corrected upto 1938-39 according to Revised Jurisdiction list. Scale 16" = 1 mile, Ex. 9. It will be observed that in items 7 and 8, there is no such endorsement as in item 2.

15. It will now be necessary to find out how the official maps are prepared. There appear to be two kinds of maps, one "Survey maps" according to villages or mouzas and the other, "Thana (Jurisdiction) Maps". A 'village', or mouza has been defined in Section 3(19) of the Bengal Tenancy Act, 1885 and includes the area defined, surveyed and recorded as a distinct and separate village in any survey made by Government which has been notified in the official Gazette. According to Rule 302 of the Bengal Survey and Settlement Manual (1935 Edn p. 77) the village is to be taken as the unit of survey as far as possible. According to Rule 313 (ibid), the ordinary scale adopted for mapping purpose is 16 inches to the mile. Rule 694 (H 179 ibid), states that Thana (Jurisdiction) Maps and Lists have been prepared according to the revenue unit or thana in several districts including the district of Jalpaiguri. Under Rule 696 (H 179 ibid), first of all the Settlement Officer prepares a thana map on the scale of 4" = 1 mile in accordance with the instructions of the Director of Land Records and eventually the Bengal Drawing Office prepares a map 1" = 1 mile. Ch II of the "Technical Rules and Instructions of the Settlement Department" (1952 Edn. H 19 et seq) deals with "Cadastral Survey" Rule 1 is as follows :

> "1. Purpose of Cadastral Survey - The purpose of Cadastral Survey is to make an accurate plan of the fields in the village or area under survey on the required scale which is ordinarily 16 inches to the mile."

In the "Guide and Glossary to Survey and Settlement Records in Bengal 1917" (Reprinted in 1938) we find that for survey and settlement purposes under Ch. X of the Bengal Tenancy Act, the printed maps are on the scale of 16 inches to the mile and separate maps are prepared for each village. By Notification in the Calcutta Gazette No. 1315 L.S.G. dated 11th April 1929, acting in exercise of powers under Section 5 of the Bengal Village Self-Government Act 1919 certain unions were constituted in the district of Jalpaiguri, consisting of one or more mouzas or part of a mouza. The notification contains the name of the union (with its serial number), the name of mouzas constituting the unions, with their numbers in the Jurisdiction list. There are three entries regarding Berubari. Item No. 10 is Berubari proper. No. 11 is Khariji Berubari and

No. 12 is Berubari South with which we are concerned in this case. The entry with regard to Berubari South No. 12 is as follows :

"Name of Union	Name of Mouza constituting the Unions with their Nos. in the Jurisdiction List.
12 Berubari South	Part of mouza Berubari (Bounded on the North by the Haldibari Road) 23

In my opinion, the note - "Bounded on the North by the Haldibari Road" is of great importance, as it indicates the northern boundary and gives us a clue. It will be remembered that in the Congregated map (Ex. 6) the Berubari Union No. 12 has been superimposed. The fact that the northern boundary is Haldibari Road helps to fix the position in the map accurately. I now go back to the official maps to find out what they do show, upon the matters in issue in this case. Ex. 1 is a thana map of District Jalpaiguri Scale 1"=4 miles. It shows the boundaries of District Jalpaiguri before partition and after partition. It clearly shows the hump on the North-eastern corner of Debigunj which includes the villages Chowdripara and Manikganj. The importance of this will appear presently.

16. The next map Ex. 2, is a map of police Station Jalpaiguri. It is in Scale 1" = 1 mile. One has only to see this map and the congregated map Ex. 6 to find that the north eastern hump of Debigunj is not of the shape shown in the wall map of Sashi Bhusan Chatterjee Ex. A(1). It is wholly different. In the latter, the hump is shown as the head of a rabbit with the two ears sticking out at an angle. In these official maps it is shown as the head of an animal without ears with a flat head (almost horizontal) but with an elongation drooping down in the north western corner, like the snout of a bear. These maps and the congregated map of the District of Jalpaiguri tally in all details. The north eastern corner and the south eastern corner of Berubari Union No. 12 being discernible, in my opinion, the congregated map has been reasonably accurately drawn and should be relied upon. I must notice here, an argument advanced by Mr. Mookerjee. He refers to an annexure to the affidavit of Chandra Sekhar Jha, Commonwealth Secretary in the Ministry of External Affairs being copy of a notification No. 2807 P.L. dated 28th July 1925 published by Government of Bengal in exercise of powers conferred by Section 4(1)(s) of the Coda of Criminal Procedure, stating that certain villages shall be included in police station Debiganj. The list appended to this notification shows the village of Chilahati but not Chowdripara or Manikganj. Mr. Mookerjee argues that the above notification is a complete list of the mouzas or villages included within Police Station Debiganj and as they do not contain these villages the survey maps are all wrong. In my opinion, this argument is without substance. The above notification merely shows that some villages were added to police station Debiganj. It does not purport to be a complete list of all villages included within Police Station Debiganj. It was disclosed simply to show that Chilahati was included within Thana Debiganj and for no other purpose. The above notification is of 1925. The Thana lists are being constantly revised and I cannot hold that the Survey maps are inaccurate merely because this notification issued in 1925 does not contain the name of three villages shown in the Survey maps as included within Debiganj but shown in the wall map of Sashi Bhusan Chatterjee Ex. A(i) as situated outside it. Actually, this seems to be an explanation for the discrepancy in the official maps and Ex. A(i). There is nothing to show when this wall map was prepared and no affidavit has been sworn to that effect. It may have been prepared at a time when these villages were not included within Thana Debiganj or may simply be a defective map which has failed to keep abreast of the changes in the delimitation of the thana boundaries. Upon this background, I will now enumerate

why I cannot accept the wall-map prepared by Sashi Bhusan Chatterjee as a correct map. in comparison with the official maps.

1. The Official maps have been made under authority of Government and prepared by a specialised department under the care of Experts who have under their command, large resources and all relevant records, notifications, rules, instructions are available to them. The complaint made is that the official maps and the materials on which they are based are not available to the petitioners. There is no material to show whether and to what extent they were available to Sashi Bhusan Chatterjee F.R.G.S. and Sons.
2. It is not shown as to who Sashi Bhusan Chatterjee was, or when he made this map. I have already pointed out that there is no reliable evidence to show that this particular map was "generally offered for public sale".
3. The wide variation of the boundaries from the official maps, particularly those on the scale 1" = 1 mile shows that the wall-map was not meant to have great accuracy. It is probably a rough-and-ready compilation made for some local use. As I have pointed out, there is no evidence to show as to what use anybody made of it at any time.
4. This is also borne out by the fact that the hump on the north eastern corner of thana Debiganj has a completely different shape in Ex. A(i) to the official maps. This could not be a matter or accident only. Either it is an ancient map never made up-to-date, or it is merely an inaccurate map, made by a person, not caving to make it up-to-date or not having the resources to do so.
5. The internal evidence shows that Ex. A(1) was not meant to be used for purposes requiring a great deal of accuracy. For example, although heavy and light red lines are introduced, the key does not indicate what they represent.
6. According to Mr. Mookerjee, the notification dated 28-7-25 is a complete list of villages in P.S. Debiganj. A number of these villages do not find any place in Ex. A(i).

17. For the above reasons amongst others, I am unable to rely on the wall map prepared by Sashi Bhushan Chatterjee F.R.G.S. and Sons Ex. A(i) and I am prepared to rely on the congregated map, being Ex. 6. Looking at Ex. 6, it is apparent that if a horizontal line is drawn, east to west, from a point to the north east of Debiganj, then there will be a substantial amount of territory on either side of it. How it will be made equal would appear from a discussion of the second point raised. It is stated that in Ex. A(i) if you draw a horizontal line, cast to west, the whole of Berubari Union No. 12 will be above it. Now, this cannot be demonstrated, because no one expert in survey work has made such superimposition. The map does not show the Berubari Union No. 12 and no attempt has been made to show what would be the borders of that Union if superimposed on the map. It Seems that even if what is stated be true, the fact is that the north eastern hump of Debigunj Union has not been correctly shown in Ex. A(i). If Chowdripara and Manikgunj be included in the hump, the northern boundary of the hump would rise about an inch higher and would approximate to the correct survey (jurisdictional) maps. That explains the predicament of the petitioners. Their mistaken case is attributable to an incorrect map. I now come to the second point. It is argued that the division under the agreement should be mathematically correct. It is said that the agreement requires that a geometrical point be fixed at the north eastern extremity of Debigunj 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 the Berubari Union No. 12 into two exact equal halves. It is argued that you can divide a given area into two exact halves by a straight line in a given direction if the point at which it starts is not fixed. Alternatively, you can achieve the same end by a, straight line

from a fixed point if the direction is not fixed. But, to divide a fixed area, by drawing a line from a fixed point, in a fixed direction is a mathematical impossibility. There is only one point from which a line drawn in a fixed direction would achieve this end. One can fairly presume that no such point was determined by the high contracting parties prior to entering into the agreement. For all intents and purposes, the division is mathematically impossible, if you require absolute mathematical precision. In my opinion however, this is not called for under the facts and circumstances of this case. When the two Prime Ministers were faced with the problem of entering into the agreement, they were faced, not with a mathematical problem, but a human problem. Agreement between India and Pakistan on any problem is difficult to come by. When however, a dispute is settled, there is no time to enter into mathematical computations. The process must be expedited and a quick decision taken. This is what happened in this case. In the text of the speech delivered by the Prime Minister in the Lok Sabha on 29-11-63 and referred to in the petition, we find the following paragraph :

> "Government of India's instructions as to how the line dividing Berubari should be drawn, clearly stated that the line of demarcation was to commence from the northeast corner of Thana Debigunj and then run west-wards almost horizontally upto the western boundary of the Berubari Union No. XII in such a manner as to divide it in the nearest possible approximation to half of 8.75 square miles the total area of Berubari Union XII. These instructions stand and are being implemented by the joint survey teams on the ground".

In my opinion, the agreement incorporated in the Ninth Amendment Act gives effect to this intention. Looking at it, I find no mention of any geometrical point or a geometrical line. It says :

> "The division of Berubari Union No. 12 will be horizontal, starting from the north-east corner of Debigunj thana".

The "north-east comer" is not a geometrical point but gives some scope for shifting the point of commencement, to suit the process of division. When it says that the "division will be horizontal", no mention is made of tangential planes or geometrical lines. There is no question of determining the "true horizon" at an exact angle of 90° to the vertical. When it says that division should be 'horizontal', it means sideways, as opposed to Vertical', meaning upwards. The line should be drawn from east to west so that the two halves may be equal "to the nearest possible approximation". I have already referred to the "congregated map" (Ex. 6) as showing that there is a considerable amount of territory on both sides of a horizontal line. Given the above liberal construction as to the procedure of division, Berubari Union No. 12 can be divided into two equal halves. At least, it is not demonstrated that it cannot be so done. This point therefore fails. The next point to be considered, so far as Berubari Union No. 12 is concerned is a point of law which has been argued by Mr. Dutt. He argues that cession of territory can only be effected by a law made by Parliament under Article 3 of the Constitution and as implementation of the agreement involves cession of territory, there must be a law passed by Parliament under Entry 14 of the List I Schedule VII of the Constitution of India, or else Article 3 should be amended so as to exclude its operation in the case of cession of territory to a foreign power. Now, this very point has been decided by the Supreme Court in (1960) 3 SCR 250; (AIR i960 SC 845) against the contention of Mr. Dutt. He however argues that the decision is wrong and is not binding upon

this Court, being in an advisory Jurisdiction. I will now proceed to state why he argues that the decision of the Supreme Court is wrong. Article 1 of the Constitution declares that India, Bharal, shall be a Union of States. Under Article 1(3) the territory of India shall comprise inter alia of the Union territories specified in the first Schedule. In the abovementioned decision, Gajendragadkar, J., (as he then was) says as follows :

> "It is significant that Article 3 in terms does not refer to the Union territories and so, whether or not they are in the last clause of Article 3(a) there is no doubt that they are outside the purview of Article 3(b), (c), (d) and (e). In other words, if an increase or diminution in the areas of the Union territories is contemplated or the alteration of their boundaries or names is proposed, it cannot be effected by law relatable to Article 3. This position would be of considerable assistance in interpreting Article 3 (c). .. .As we have already indicated Article 3 does not in terms refer to the Union territories and there can be no doubt that Article 3 (c) does not cover them and so, if a part of the Union territories has to be ceded to a Foreign state no law relatable to Article 3 would be competent in respect of such cession. If that be the true position cession of a part of the Union territories would inevitably have to be implemented by legislation relatable to Article 368 and that, in our opinion, strongly supports the construction we are inclined to place on Article 3(c) even in respect of cession of the area of any State in favour of a foreign State. It would be unreasonable, illogical and anomalous to suggest that, whereas the cession of a part of the Union territories has to be implemented by legislation relatable to Article 368, cession of a part of the State territories can be implemented by a legislation under Article 3".

Mr. Dutt argues that the learned Judge overlooked the definition of "State" in the General Clauses Act which is applicable by reason of Article 367, since the expression is not defined in the Constitution itself. The word "State" is defined in Section 3 (58) of the General Clauses Act (Act 10 of 18971 as follows :

> "State-
> (a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act 19,56, shall mean a Part A State, a Part B State or a Part C State and
> (b) as respects any period after such commencement, shall mean a State as specified in the First Schedule to the Constitution and shall include a Union territory".

Under Section 3(62A) the expression "Union territory" is virtually the same as in Article 366(30) of the Constitution.

18. Mr. Dutt argues that in Article 3, the word "State" must be understood in the above manner and Article 3(c) does include Union territories. The learned Attorney General frankly confesses that he cannot find an answer to the argument. This aspect of the matter was probably not brought to the notice of the Supreme Court. But he rightly points out that the decision of Gajendragadkar, J. (as he then was) on Article 3 does not rest on this ground alone, which was only one of a number of grounds cited by the learned Judge in support of the proposition that Article 3 does not apply to the case of a cession of territory belonging to India, to a foreign

power. For example, he holds that it was prima facie unreasonable to suggest that the makers of the Constitution wanted to provide for the cession of national territory under Article 3(c).

> "If the power" says the learned Judge, "to acquire foreign territory which is an essential attribute to sovereignty is not expressly conferred by the Constitution, there Js no reason why the power to cede a part of the national territory which is also an essential attribute of sovereignty should have been provided for by the Constitution". The learned Judge has finally held that Article 3 refers only to inter-state adjustment of territories or may be the carving out of another state, but under no circumstances does it apply to the case of cession of territory belonging to India, to a foreign power.

19. That being so, even if Mr. Dutt is right in his point as to the correct interpretation of the term 'Union territory' the decision stands as a whole. In my opinion, it is also binding on this Court under Article 141 of the Constitution. Mr. Dutt argues that decisions in the advisory jurisdiction are not binding upon anybody. He cites the Federal Court decision, In the matter of Allocation of Lands and Buildings, etc., AIR 1943 FC 13 at p. 20. This was a pre-Constitution decision and the Court merely held that it was "open to serious doubt" whether decisions in the advisory jurisdiction were binding. The matter comes well within the terms of Article 141. The law regarding several important and difficult points arising upon the interpretation of the Constitution has been 'declared'. After all, "declares" means to make clear or manifest and if the Supreme Court was not doing that, I fail to see what it was that it was doing. It may not be binding on others, but it is certainly binding on the Courts in India. In my opinion, this point fails and Article 3 has no application to the facts of this case, as it has been held by Supreme Court to be a case of cession of territories belonging to India, to a foreign power. Therefore, a Parliamentary Statute was not necessary, in addition to the amendment of the first Schedule of the Constitution. The question of amending Article 3 does not arise.

20. The next point to be considered is with regard to Chilahati. This village Chilahati has nothing to do with the Ninth Amendment Act. In the introductory speech delivered in the Lok Sabha on the 29th November, 1963, Prime Minister Nehru, inter alia said as follows :

> "Certain misunderstandings have been created by the report that more territory is being given away to Pakistan in Berubari and adjacent areas and the village of Chilahati has been mentioned in this connection. Actually, Chilahati though adjacent to Berubari is not a part of the Berubari Union. The West Bengal Government had themselves intimated to us in 1957 that 512 acres of Chilahati village of Debigunj Thana were adversely held territory. In the demarcation proceedings now going on in the area the survey staff will determine the status of this area on the basis of the last pre-partition notifications of the various Thanas and carry out the joint demarcations. This question of the status of Chilahati village and of the area of 512 acres of this village adversely held by West Bengal Government since the partition has no connection with the Indo-Pakistan Agreement on the boundary dispute concerning Berubari. The demarcation so far as Chilahati area is concerned, follows the Raddiffe Award, which states that the international boundary in this region shall Then continue along the northern corner of the

Thana Debigunj."

Thus, the case of the respondents is quite clear. Village Chilahati is within thana Debtganj, the whole of which has gone to Pakistan under the Radcliffe Award A portion of it, namely, 512 acres has however continued under the administration of India. It is now proposed to demarcate it and make it over to Pakistan. The case of the petitioners (only the petitioners Nos. 5 and 6 are interested in this question) is as follows. According to them, village Chilahati is not in thana Debiganj but in thana Jalpaigurl and it is this Chilahati, which is well within Indian territory that is being made over to Pakistan. In the affidavit-in-opposition filed by Chandra Sekhar Jha, Commonwealth Secretary, in the Ministry of External Affairs, this has been expressly denied and a notification, dated 28th July, 1925 has been annexed, to which reference has already been made above. This notification states that 'Chilahati' is to form a part of Debiganj Police Station. It is mentioned therein that the serial number in the General Jurisdiction list is No. 61. The learned Attorney General has produced this jurisdiction list relating to Thana Jalpaiguri. The relevant entry is at page 13 as follows :

Jurisdiction List No.	Local name of village	Area in acres	Serial No.	Name of Mouza	Thakbast No.	Revenue Survey No.	Vol. and No. of mile map	page 4?=1	Police Station
248	Chilahati	10,006.75	61	Chilahati	107	180	IX	14	Debiganj

Mr. Mookerjee has himself filed two maps of Taluk Chilahati Ex. A(7) and Ex. A(8). These maps clearly show that the jurisdiction list No. is 248, so that a reference to the above entry clearly shows that it is situated in Police Station Debiganj. The learned Attorney General has filed two survey maps Ex. 8 and Ex. 9. Ex. 8 is of Taluk Berubari Sheet No. 23 and Ex. 9 is of Taluk Berubari, Sheet No. 30. They show clearly that Taluk Chilahati is adjoining and the boundaries in Exs. A(7), A(8) and in Exs. 8 and 9 of Taluk Chilahati exactly tally. Put side by side, the edges would fit into one another. In the affidavit-in-reply affirmed by Ram Kishore Sen and Dhaneswar Roy dated 7th February, 1964, confusion is sought to be created by introducing a new case, as follows :

> "Para 8 (d). There is a Mouza Chilahati in Police Thana Debiganj which is well within the territory of the said Thana and is not at all near the border and does not abut or adjoin either Berubari Union No. 12 or Thana Jalpaiguri and the said Mouza has apparently been referred to in the notification quoted in the said paragraph, there is another village Chilahati referred to in some Revenue papers also as Taluk Chilahati, which adjoins Berubari Union No. 12 and always has been within Thana Jalpaiguri;"

In my opinion, this statement is wholly unacceptable. The maps show only one Chilahati and the Taluk Chilahati, the map of which has been relied upon by the learned Advocate of the petitioners, shows the jurisdiction number and is easily identified as being wholly situated in Police Station Debiganj. The deponent Dhaneswar Roy has relied on certain documents to show that lands belonging to him in village Chilahati have been described as being within thana Jalpaiguri. Firstly this kind of dispute on a question of fact can scarcely be decided satisfactorily in an application in the writ jurisdiction. Secondly, by producing such documents in the affidavit-

in-reply, no opportunity was given to the other side to meet the allegations. Thirdly, statements in these deeds between private parties, to the effect that they were of 'Chilahati, P.S. Jalpaiguri' cannot be evidence upon which I can rely. No effort was made to identify the lands concerned in the Deeds with the Taluka maps so as to show that there was another Taluka Chilahati away from the Berubari Union No. 12. As I have stated above, Mr. Mookerjee himself relied upon a map of Taluka Chilahati which is in Police Station Debiganj and not Jalpaiguri.

21. If there is a village Chilahati which is not in police station Debiganj but in police station Jalpaiguri, away and at a distance from Berubari Union No. 12, that is not being handed over to Pakistan. Only part of the village Chilahati hearing jurisdiction number 248 is being handed over. In my opinion, there is nothing unlawful in doing so. This village is in Police Station Debiganj, the whole of which has gone to Pakistan, under the Radcliffe Award. Somehow or other, India has continued to be in possession for a certain number of years and now proposes to make over possession of it to the rightful owner. This appears to me to be rightful conduct, which an equity Court could never interfere with. Whether Pakistan has been equally ready to abide by such high standards of international behaviour and if not, whether we should pursue a one-sided policy of integrity and honesty, is a matter that cannot be decided by Courts of Law. They relate to executive policy and must be decided administratively.

22. Mr. Dutt, following Mr. Mookerjee, has argued this point as a point of law. According to him, even if Chilahati had gone to Pakistan under the Radcliffe Award, since India has been in 'adverse' possession for a number of years, it has acquired title to it under International Law and making over possession to Pakistan would be tantamount to cession of territory. Before I deal with this point further, certain dates should be considered. On February 20, 1947, the British Government announced its intention to transfer power in British India to Indian hands by June, 1948. On June 3, 1947 the said Government issued a statement as to the method by which the transfer of power would be effected. On July 18, 1947 the British Parliament passed the Indian Independence Act 1947. It came into force from the appointed day August 15, 1947. As from the appointed day, two independent Dominions, it was declared, would be set up in India to be known respectively, as India and Pakistan. The province of Bengal was split up into the province of West Bengal and East Bengal, later on known as East Pakistan. On June 30, 1947 the Governor General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned and a boundary Commission was appointed under the chairmanship of Sir Cyril Radcliffe. The Award of this Commission known as the 'Radcliffe Award' was made on August 12, 1947. Subsequently, certain boundary disputes arose between India and Pakistan and it was agreed at an Inter-dominion Conference held in New Delhi on December 14, 1948 that a Tribunal should be set up, known as Indo-Pakistan Boundaries Disputes Tribunal. This Tribunal gave an award on January 26, 1950 known as the Bagge Award. Neither the Berubari Union No. 12 nor Chilahati formed the subject matter of the award. Two years later, for the first time Pakistan raised the question of the Berubari Union 12. It was in September, 1958 that an agreement was arrived at. The agreements mentioned in the Ninth Amendment Act are dated 10th September, 1958, 23rd October 1959 and 11th January, 1960. The first mention we find of the dispute regarding Chilahati is to be found in the speech of Prime Minister Nehru in the Lok Sabha on November 29, 1963. The relevant part of that speech has been quoted above. It is stated that in 1957, the West Bengal Government had intimated to the Centre that 512 acres of Chilahati village was adversely held. In November 1963 it was admitted that demarcation proceedings were going on to determine its status. An 'adverse' claim for

creating title in land by prescription must, even under municipal law, be open and hostile and at best continue uninterruptedly for twelve years. There must be a public declaration claiming a hostile title and it must be for a substantial period. Here, though the expression 'adversely held' has been used in the speech of the Prime Minister, there is no evidence to show that India ever declared her intention of claiming title to a part of Chilahati, which was in her possession. Disputes as to the border were going on all the time and as regards Chilahati, the Centre was informed about the so called adverse possession only in 1957. Between 1957 and 1963 there must have been mutual negotiations because we find the Prime Minister mentioning in November, 1963 that Chilahati was being demarcated, to consider its status. Under the circumstances, not even the elements necessary for establishing a prescriptive right under the municipal law exists in this case. The matter is still worse under public International Law. Adverse possession under that law, if it exists at all, could only be by the Indian Union. The State of West Bengal has no independent existence in the eye of law for that purpose. Thus, the period before 1957 must be ruled out altogether. Let us see the position of prescription under Public International Law. Oppenheim in his International Law, Vol. I (8th Edn.) pages 575-76 states as follows :

> "Since the existence of a science of the Law of Nations, there has always been opposition to prescription as a mode of acquiring territory. Grotius rejected the usucaption of the Roman Law, yet adopted from the same law 'immemorial' (ital (here into ' ')) prescription for the Law of Nations. But whereas a good many writers still defend that standpoint, others (G.F. Martens, Kluher, Hotzendoiff, Ullmann, Liszt) reject prescription altogether. Again, others (Vattel, Wheaton, Phillimore, Kail, Bluntschli, Padier-Fodere) go beyond Grotius and his followers and do not require possession from time immemorial, hut assert that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time. This opinion seems to be in accordance with practice. There is no doubt that, in international practice, a state is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided that the possessor has been in undisturbed possession for such a length of time as is necessary to create the general conviction that the present condition of things is in conformity with international order.... The basis of prescription in International Law is nothing else than general recognition of a fact, however unlawful in its origin, or part of the States. Prescription in International Law may therefore be defined as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order' (ital (here into ' '))".

If we apply these tests, then the case of prescription fails miserably. Here, there is no question of unlawful taking of possession, because possession was by reasons which are historical. But the essence of prescription is that the lapse of time and the manner of holding possession should be such that the nations of the world should come to consider it as the natural state of things from the, point of view of International order. There is not the slightest vestige of any such evidence.

On the other hand, the historical process of division of territory by mutual negotiations was going on all the time. In partitioning territory as large as India and Pakistan, the historical process cannot be completed in a day. There was at no time any foundation made for claiming title by prescription. Mutual errors were being continuously rectified and no one claimed any territory awarded by the boundary Commission, but not made over accidentally, as its own. Thus, the plea of prescription has not been established.

23. Jennings in his book - "The acquisition of Territory in International Law" states that there are five "orthodox" modes in which territorial sovereignty can be acquired, viz. (1) occupation, of territory not under the sovereignty of anyone. (2) Prescription, by which title flows from an effective possession over a period of time. (3) Cession, or the transfer of territory by a treaty provision. (4) Accession or accretion where the shape of land is changed by the processes of nature and (5) Subjugation, or conquest. He has pointed out that tins list is incomplete because it deals with the civil law modes for the transfer of property inter vivos; it does not provide, therefore, for the situation where a new state conies into existence. The Indian Union and Pakistan came into existence as Independent States, but did not acquire title to their territories by any of the five 'orthodox' means by which title could he acquired. The learned author proceeds to state as follows :

> "A new State is usually born either of an evolution within the sphere of constitutional law or of civil strife. In either event, it is, at least according to traditional international law, a matter solely within the domestic sphere until the moment when recognition in one form or another comes into question. ... .It is recognition which marks the emergence of this complex of law and fact into the international sphere; .... recognition .... is a procedure by which the factual situation is acknowledged as bearing title...." This 'recognition' has a special meaning in international law. It must be recognition by the civilized nations of the world generally. It is based on the principle of international order and stability. In the instant case, we have a few years of border disputes between India and Pakistan. The civilized world has not perhaps even heard of Chilahati, not to speak of recognizing the fact that although it belongs to Pakistan, it became Indian territory by adverse possession. On the facts of the case, the question of acquisition of sovereign right to any territory by prescription scarcely arises at all.

24. Mr. Dutt has referred to The Island of Palmas Case (See International Law through cases, by Green p. 349). The facts in that case were as follows : A controversy arose in 1906' between United States of America and the Netherlands concerning sovereignty over the Island of Palmas or Miangas. The United States maintained that the Island was included in the Phillipine Archipelago ceded by Spain to the United States at the conclusion of the Spanish-American War by the Treaty of 1898. The Netherlands claimed to have exercised a prolonged and undisputed authority over the island. The dispute was referred to the permanent Court of Arbitration at Hague, for settlement, in accordance with the principles of international law. It was found that the Island formed part of Netherland Territory. The facts of that case will, however, show that the tests laid down above were found to have been complied with. The Dutch took possession of the Island, sometimes in 1677. It was found doubtful whether Spain, which purported to cede the Island to the United States by Treaty in 1898, ever acquired title to it. On the other hand, the

Dutch produced evidence to show that Dutch sovereignty was established over the Island as early as in the seventeenth century and that such sovereignty was 'displayed' during the last two centuries. The dispute with the United States only arose in 1906. That there was recognition of this right appears from the following statement in the award :

> "Since. . . .1666. . . .to. .. .1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands.... has been recorded. The peaceful character of the display of Netherlands sovereignly for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the Island by Spain or another power, such as might counterbalance or annihilate the manifestation of Netherlands sovereignty. As to third powers the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the seventeenth century onwards. These circumstances, together with the absence or any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas or Miangas are an indirect proof of the exclusive display of Netherlands sovereignty".

25. The distinction upon facts is apparent and needs little comment. In the Palmas case, the Dutch exercised sovereignty openly and publicly for two centuries and the civilized world recognised it, may be, not by any overt act, but by acquiescence in an established international order. There was no evidence that Spain ever took possession of the Island and none at all that it exercised any acts of sovereignty. Upon these facts it was held, that the title was in the Netherlands. In fact, the Palmas case can scarcely be called an example of acquisition of territorial rights by prescription. It is an answer to the problem whether in international law, a mere paper treaty would create a better title than actual possession and exercise of undisputed sovereign rights for, what the arbitrator says 'a very long period', namely, two centuries. The answer is in the negative and with respect, rightly so.

26. Mr. Dutt has cited another case *Maryland v. West Virginia*[5], which is also distinguishable on facts. In that case, an incorrectly drawn boundary Sine, wrongly

[5](1909) 217 US 1,

allotted to one State a tract of territory. But this boundary line was accepted as correct for a long period and was so recognized by the civilized world. A dispute raised by tine of the States claiming the territory was turned down on the ground that it would disturb international order. The last case cited is *Virginia v. Tennessee*[6], In that case Virginia brought a bill to have the true boundary line between herself and Tennessee determined. The boundary had been determined by a Commission in 3801 and that was confirmed by the legislatures of both States in 1809. The line had been acquiesced by both parties lot a long course of years and had been treated by Congress as the true boundary in its districting for judicial, revenue and federal election purpose. Virginia alleged that the agreement was unconstitutional, having been entered into without the consent of Congress. The claim was negatived by the Supreme Court. Oppenheim says :

> "These examples show why a certain number of years cannot, once for all, be fixed to create the title by prescription. There are indeed immeasurable and imponderable circumstances and influences at work besides the mere lapse of time to create the

> conviction that in the interest of stability and order the present possessor should be considered the rightful owner of a territory. and these circumstances and influences, which are of a political and historical character, differ so much in the different cases that the length of time necessary for prescription must likewise differ."

27. For the reasons abovementioned, I am of the opinion that no case of prescription has been established.

28. For the reasons given above, this application fails and must be dismissed. I might add that I have come to this result without any enthusiasm. To uproot one human being from his hearth and home without his consent is bad enough, but to do so in regard to thousands of people, borders on the tragic. Some day, the united conscience of the civilized world might evolve a better way of solving human problems like these. The Court, however, can only decide a dispute referred to it in accordance with the law. It is not concerned with governmental policies.

29. The rule is discharged, all interim orders are vacated. There will be no order as to costs.

30. Mr. Dutt, on behalf of the petitioner asks for six weeks' time to prefer an appeal. It is granted. The operation of this order will be stayed for six weeks to enable the petitioner to prefer an appeal, but I make it clear that the period will not be extended under any circumstances by me.
Rule discharged.

[6](1892) 148 US 503 : 37 Law Ed 537