Supreme Court of India
Ram Kishore Sen And Others vs Union Of India And Others on 11 August, 1965
Equivalent citations: 1966 AIR 644, 1966 SCR (1) 430
Author: P Gajendragadkar
Bench: Gajendragadkar, P.B. (Cj), Wanchoo, K.N., Hidayatullah, M., Shah, J.C., Sikri, S.M.

PETITIONER:
RAM KISHORE SEN AND OTHERS

Vs.

RESPONDENT:
UNION OF INDIA AND OTHERS

DATE OF JUDGMENT:
11/08/1965

BENCH:
GAJENDRAGADKAR, P.B. (CJ)
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GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
HIDAYATULLAH, M.
SHAH, J.C.
SIKRI, S.M.

CITATION:
1966 AIR 644 1966 SCR (1) 430
CITATOR INFO :
R 1968 SC 637 (4)
R 1969 SC 783 (42,86,87)
RF 1970 SC1126 (16)
RF 1971 SC1594 (3)
E 1990 SC1692 (4)

ACT:
Constitution (Ninth Amendment) Act, 1960-Transfer of certain areas to Pakistan in fulfillment of India-Pakistan Agreement -Legality of.

HEADNOTE:
As a result of the 'Indo-Pakistan Agreements' entered into in 1956 between the Prime Ministers of India and Pakistan half of the area known as Barubari Union No. 12, and a portion of Chilahati village admeasuring 512 acres were agreed to be transferred by India to Pakistan. Certain questions arising out of the implementation of the sand Agreements were referred by the President under Art. 143 (1) of the Constitution, to this Court, and were answered by this Court in Special Reference No. 1 of 1959. In

accordance with the answers therein given, Parliament passed the Constitution (Ninth Amendment) Act, 1960. There was provision in the Act for a date, to be appointed by notification in the Official Gazette, for the transfer of the areas in question of Pakistan. In regard to Berubari Union No. 12 the Second Schedule to the Amending Act, inter alia, This will be so divided as to give half the area to Pakistan, the half adjacent to India being retained by India. The division of Berubari Union No. 12 will be horizontal, starting from the north-east comer of Debiganj Thana." The appellants filed a writ petition in the High Court of Calcutta challenging the legality of the proposed transfer of the said areas of Berbubari Union No. 12 and Chilahati village to Pakistan. The language of the Amending Act in regard to Berubari Union No., 12 was, they urged, so confused that it was incapable to implementation. In regard to Chilahati village they urged that it was outside the Radcliffe Award. Reliance was placed by them on an unofficial map, Ext. A-1. The High Court found that Ext. A-1 was inadmissible and unreliable. Relying on the maps produced by the respondents it dismissed the writ petition filed by the appellants who, with certificate, appealed to this Court.

It was urged on behalf of the appellants : (1) If the division of Barubari Union No. 12 was 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-cast corner of Debiganj Thana, so that no part of the said Union could be transferred to Pakistan. (2) The High Court erred in holding that map Ext. A-1 was neither relevant nor accurate. (3) The location of different villages in the various Thanas was a matter within the special knowledge of the respondents and under s. 106 of the Evidence Act the onus of proving the relevant facts was on the respondents. (4) The portion of Chilabati village in question was different from the village of Chilabati which bad gone to Pakistan under the Radcliffe Award, as was shown not only by maps but by certain private documents which described Chilabati as part of Jalpaiguri Thana. (5) Entry 13 in the First Schedule to the Constitution provides, inter alia, that West Bengal means the territories which immediately before the commencement of the Constitution were either comprised in the Province of West Bengal or were being administered 'as if' they formed part of that Province. 'Me portion of Chilahati in question was being administered 'as if' it was a part of the Province of West Bengal and must be deemed to have been included

431

in the territory of West Bengal within the meaning of the First Schedule,, and if that was so, it was a part of the territory of India under Art. 1 of the Constitution. It could not therefore be ceded to Pakistan without following the, procedure laid down by this Court in Special Reference

No. 1 of 1959. (6) In any case Pakistan's title to Chilahati had been lost by adverse possession.

HELD : (i) It had not been proved that Ext. A-1, relied on by the appellants, was generally offered for public sale. The requirements of s. 36 of the Evidence Act were thus not satisfied and Ext. A-1 was irrelevant. Even if the said map was treated as relevant its accuracy had not been established and no presumption as to its accuracy could be made under s. 83 of the Evidence Act, since the requirements laid down in the first part of the section were not satisfied, [440 E-H]

(ii) -Me location of' villages of different Thanas could not be regarded as a matter within the exclusive knowledge of the respondents so as to attract the provisions of s. 106 of the Evidence Act. Both parties had; produced maps, the High Court refused to accept the maps produced by the appellants and treated the maps produced by the respondents as worthy of credence. Under the circumstances no question of onus really arose. [441 G-H]

(iii) The map produced by them having been rejected by the High Court, the appellants were hardly in a position to contend that they had established their plea that the relevant portion of the Constitution Amendment Act was incapable of implementation. [442 D-E]

(iv) When it was said that the division of Berubari Union No. 12. would be 'horizontal' starting from the north-east corner of Debiganj Thana it was not intended that it was to be made by a mathematical line in the manner suggested by the appellants. The provision did not refer to any line as such, it only indicated broadly the point from which the division was to begin--east to west-, and it emphasised that in making the said division what had to be borne in mind was the fact that the Union in question was to be divided half and half. The contentions of the appellants in regard to Berubari Union No. 12 were therefore rightly rejected by the High Court. [442 H--443 D]

(v) The materials on record showed that the contention of the appellants that Chilahati village formed part of Thana Jalpaiguri was incorrect : it clearly lay within Debiganj Thana and under the Radcliffe Award had been allotted to Pakistan. The private documents produced by the appellants for the purpose of showing that a part of Chilahati village lay in jalpaiguri Thana were rightly rejected by the High Court, as in view of the maps produced by !he respondents it was difficult to attach any importance to the recitals by individuals in their respective documents. It was plain that through inadvertence a part of village Chilahati was not delivered to Pakistan on the occasion of the partition which followed the Radcliffe Award. What the respondents proposed to do wag to transfer to Pakistan the area in question which really belonged to her. This conduct of the respondents spoke of their fair and straightforward approach to this matter. [444 E-45 D]

(vi) The clause 'as if' in Entry 13 of the First Schedule to the Constitution was not intended to take in cases of territories which were administered with the full knowledge that they did not belong to West Bengal' and had to be transferred in due course to Pakistan. 'Me said clause was clearly and specifically intended to refer to territories which merged with the adjoining States at the crucial time and so it could not include the part of Chilahati administered by West Bengal. It would be idle to contend
432
that by virtue of the accidental fact that this area had not been transferred to Pakistan, though it should have been, it had constitutionally and validly become a part of West Bengal itself. That being so, there could be no question about the constitutional validity of the proposed transfer of this area to Pakistan. What the respondents were seeking to do was to give to Pakistan what belonged to Pakistan under the Radcliffe Award. [448 A-E]

(vii) The Plea of adverse possession was not raised by the appellants in their writ petition. Besides it was plain that neither the Union of India nor the State of West Bengal, which were impleaded to the present proceedings, made such a claim. It would indeed be surprising that even though the Union of India and the State of West Bengal expressly said that this area belonged to Pakistan under the Radcliffe Award and had to be delivered to Pakistan, the petitioners should intervene and contend that Pakistan's title to this property had been lost because West Bengal had been adversely in possession of it. [448 G-H]

(viii) In Special Reference No. 1 of 1959 it had been inadvertently assumed while discussing the several clauses of Art. 3 that the word 'State' used therein did not include Union Territories. In view of s. 3 (58) (b) of the General Clauses Act (10 of 1897) this assumption was not correct. However the opinion of the Court in that Reference was not based mainly on the above assumption, but on the view that the power to cede a part of national territory and the power to acquire additional territory were the inherent attributes of sovereignty. [438 H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 436 of 1965. Appeal from the judgment and order dated November 17, 1964 of the Calcutta High Court in Civil Rule No. 849(W) of 1963. A. D. Mukherjee, Arun Dutta, S. P. Mukhopadhya, M. Raja- gopalan, D. N. Mukherjee, K. Rajendra Chaudhury and K. R. Chaudhury, for the appellants.

C. K. Daphtary, Attorney-General, B. Sen and B. R. G. K. Achar, for respondents nos. 1 and 2.

B. Sen, S. C. Bose and P. K. Bose, for respondents nos. 3 and 4.

The Judgment of the Court was delivered by 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. 'Me 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. They own ancestral homes and cultivated lands in the said villages, and they live in the homesteads. Appellants Nos. 3 and 4 originally resided in villages in Thana Boda adjoining Thana Jalpaiguri; but when Thana Boda was transferred to Pakistan as a result of the partition in 1947, they came over to the villages of Senpara and Gouranga bazar respectively within the limits of Berubari Union No. 12; since then, they have acquired lands there and built their homesteads in which they live. Appellants Nos. 5 and 6 are the inhabitants of village Chilahati, and according to them, this village is situated in Thana Jalpaiguri. In this village, these two appellants have their ancestral homes and cultivated lands.

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.(1) These three questions were thus formulated :- "(1) is any legislative action necessary for the implementation of the Agreement relating to Berubari Union ?

(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?

(1) Special Reference No I of 1959. In re:

The Berubari Union and Exchange of Enclaves- (1) [1960] 3 S.C.R. 250 at pp. 256, 295-4.

(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 ?"

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

Q. (I ) Yes.

Q. (2) (a) A law of Parliament relatable to Art. 3 of the Constitution would be incompetent;

(b) A law of Parliament relatable to Art.

368 of the Constitution is competent and necessary;

(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 t 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.

Q. (3) Same as answers (a), (b) and (c) to Question 2.

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 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 Debi-ganj 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 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 Beru- bari 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 northeast comer of Debiganj Thana, and so, no portion of the said Union can be transferred to Pakistan. In regard to the village of Chilahati, the appellants' case was that the said village was not covered either by the Indo-Pakistan Agreements or by the Ninth Amendment Act. According to them, this village was a part of West Bengal and it was not competent to the respondents to transfer it to Pakistan without adopting the course indicated in that behalf by the opinion of this Court on the earlier Reference. That is how the appellants claimed the issue of a writ of in the nature of mandamus commanding the respondents to forbear from proceeding any further with the survey and demarcation of the area of Berubari Union No. 12 and Chilahati and from giving effect to their intentions to transfer a part of Berubari Union No. 12 and Chilahati to Pakistan. That is the substance of the petition filed by the appellants before the Calcutta High Court on December 4. 1963. 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 imple-

mentation. It was alleged that the assumption made by the appellants that a strict horizontal line had to be drawn from the north-cast comer 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 respondents intended to do was to transfer to Pakistan a small area of about 512 acres of the said village which had not been delivered over to Pakistan on the earlier occasion when partition was made. That being so, the intended transfer of the said village was fully legal and valid and did not contravene any provisions of the, Constitution. On these pleadings, the parties led evidence in the form of maps, and the case was argued elaborately before the learned trial Judge. The trial Judge has found against the appellants on all the important issues. He has held that the map Ext. A- 1 on which the appellants substantially based their case, was really not admissible under s. 36 of the Indian Evidence Act. Alternatively, he found that the map was not reliable and could not be legitimately utilised for the purpose of determining the merits of the appellants' contention. The learned Judge examined the maps produced by the respondents and came to the conclusion that they were admissible and reliable. On examining these maps, the learned Judge held that Berubari Union No. 12 could be divided half and half as required by the material provisions of the Amendment Act and that the appellants were not justified in contending that the said provision was not capable of implementation. In that behalf, the learned Judge placed considerable reliance on the congregated map Ext. 6. The learned Judge has rejected the contention of the appellants that if a fair partition of Berubari Union No. 12 is made as directed by the Amendment Act, no part of Berubari Union No. 12 would fall to the south and as such, no part of the said Union could be transferred to Pakistan. He was not impressed by the appellants' argument that the division of Berubari Union No. 12 had to be made by a strict horizontal line; in his opinion, the north-east comer of Debiganj Thana mentioned in the relevant provision was not a geometrical point, but it gives some scope for shifting the point of commencement to suit the process of division, when the provision says that the division shall be made horizontal, it only means that it was not to be vertical; it had to be according to the

latitude and not according to the longitude. He observed that the problem presented by the relevant provisions of the Amendment Act was not intended to be solved as a mathematical problem, and that when the appellants contended that the division had to be made by a strict mathematical line, they ignored the fact that the said provision made no reference to any tangential planes or geometrical lines. On these findings, the learned Judge rejected the appellants' prayer for the issue of a writ in respect of the proposed transfer of Berubari Union No. 12.

In regard to the appellants' case about the village of Chilahati, the learned Judge held that Chilahati was a part of Debiganj . Thana and had been allotted to the share of Pakistan under the 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 appellants' prayer for the issue of a writ or order in the nature of mandamus in respect of the said proposed transfer of Chilahati was also disallowed.

It appears to have been urged before the learned Judge that in order to make the transfer of a part of Berubari Union No. 1.2 to Pakistan, it was necessary to make a law relating to Art. 3 of the Constitution. The learned Judge held that 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 valid and justified. That is how the writ petition filed by the appellants came to be dismissed.

The appellants then moved the learned Judge for a certificate, 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 raided 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(1) 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 relation 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, it 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 as an independent Sovereign Republic. While discussing the significance of the several clauses of Art. 3 in that behalf, it ,seems to have been assumed that the Union territories were outside the purview of the, said provisions. In other words,

the opinion proceeded on the basis that the word "State" used in all the said clauses of Art. 3 did not include the Union territories specified in the First Schedule. Apparently, this assumption was based on the distinction made between the two categories of terri- tories by Art. 1(3). In doing so, however, the relevant provisions of the General Clauses Act (Act X of 1897) were inadvertently not taken into account. Under s. 3(58)(b) of the said Act, "State" as respects any period after the commencement of the 'Constitution (Seventh Amendment) Act, 1956, shall mean a 'State as specified in the First Schedule to the Constitution and shall include a Union territory. This provision of the General Clauses Act has to be taken into account in interpreting the word "State" in the respective clauses of Art. 3, because Art. 367(1) specifically provides that unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Art. 372, apply for the interpretation of this Constitution as it applies for 'the interpretation of an Act of the Legislature of the Dominion of India. Therefore, the assumption made in the opinion that Art. 3 in its several clauses does not include the Union territory is misconceived and to that extent, the incidental reason given in support of the main conclusion is not justified. How-ever, the conclusion itself was based primarily on the view that (1) [1960] 3 S.C.R. 250.

the power to cede a part of the national territory and the power to acquire additional territory were the inherent attributes of sovereignty; and if any part of the national territory was intended to be ceded, a law relating to Art. 3 alone would not be enough unless appropriate action was taken by the Indian Parliament under Art. 368. It is common ground that the Ninth Constitution Amendment Act has been passed by Parliament in the manner indicated in the opinion rendered by this Court on the said Reference. 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 appellants 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 comer 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 Berubari Union No. 12 into two halves by the process intended by the Amendment Act.

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 in 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 affi- davit, it was alleged that the said map was one of the numerous maps published by Mr. Shashibhushan Chatterjee and generally offered for public sale. This latter statement was made obviously to meet the requirements of s. 36 of the Evidence Act. Ms statement has been verified by Mr. Gupta as "true to his knowledge". but no statement was made to show bow the deponent came to have personal knowledge in the matter. The map bears no date and no evidence is adduced to show when it was prepared. The learned Judge, therefore, rejected the statement made by M. Gupta.

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 stated 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 ,he 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. lie 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 circumstance,-,, we do not see how the appellants can complain that the respon- dents 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 lie on the appellants to show that what is attempted to be done by the respondents in pursuance of the provisions of the Amendment Act is illegal or unconstitutional; and if they are not able to produce evidence in support of their plea, they cannot require the respondents to show that the plea made by the appellants is untenable. The location of the villages in the different Thanas cannot be regarded as a matter within the exclusive knowledge of the respondents and in any case, it has to be proved by the production of reliable maps. Both parties have produced maps; and the learned trial Judge has refused to accept the maps produced by the appellants as reliable and has treated the maps produced by the respondents as worthy of credence. Under these circumstances, no question of onus really arises.

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 , the learned Judge came to the definite conclusion that the congregated map had been reasonably and accurately drawn and should be relied upon. In fact, the learned Judge has given six different reasons for rejecting the map produced by the appellants, and he found no difficulty in accepting the maps produced by the respondents. The learned Judge thought that the case made out by the appellants was entirely misconceived since it was solely based on an incorrect map. Having regard to the finding 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 Agree- ment 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 has 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 comer 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 emphases that in making the said division, what has to be borne in mind 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 the Agreement in relation to Cooch Behar also gives additional guidance which has to be taken into account in effecting the partition of Berubari Union No. 12. Therefore, the learned Judge was plainly right in rejecting the contention of the appellants that a straight horizontal line has to be drawn from the north-east comer of Debiganj Thana in order to effect the, division of Berubari Union No. 12. So, there is no substance in the contention raised by Mr. Mukerjee before us that the learned Judge should have issued a writ or order in the nature of mandamus prohibiting the division of Berubari Union No. 12.

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 bad 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 on 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 has held that the plea that there are two Chilahatis, 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 to the learned Judge, is a part of Debiganj Police -Station. This finding is substantially based on the affidavit made by Mr. C. S. Jha, Commonwealth Secretary in the Ministry of External Affairs, and the notification filed along with it. This notification which has been issued on July 28, 1925, shows that Chilahati was to form part of Debiganj Police Station. It stated that its serial number in the General Jurisdiction List is 61. The Jurisdiction List relating to Thana Jalpaiguri was also produced. The relevant entry at p. 13 shows the Jurisdiction List No. as 248, and in the last column, the Police Station under which the village of Chilahati is shown to exist is Debiganj; its area is 10,006.75 acres which is equal to roughly 15 to 16 square mile& In fact, the maps Exts. A-7 and A-8 produced by Mr. Mukerjee show that the Jurisdiction List

number of Chilahati is 248, and that, in turn, proves the respondents' case that Chilahati is within the jurisdiction of Police Station Debiganj. The two survey maps produced by the respondents Exts. 8 and 9 also corrobo- rate the same conclusion. When these two maps were put side by side, the learned Judge found that their edges exactly fit into one another.

Mr. Mukerjee very strongly relied on certain private docu- ments 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 relied upon a map of Taluka Chilahati which is in Police Station Debiganj and not Jalpaiguri. Therefore, we see no justification for Mr. Mukerjee contention ,that the learned Judge was in error in rejecting the appellants, -case that a part of Chilahati which is being handed over to Pakistan does not pertain to village Chilahati which is situated in Debiganj Police Station, but is a part of another Chilahati in the district of Jalpaiguri. There is no doubt that if a small portion of land admeasuring about 512 acres which is being transferred to Pakistan is a part of Chilahati situated within the jurisdiction of Debiganj Thana, there can be no valid objection to the proposed transfer. It is common ground that the village of Chilahati in the Debiganj Thana has been allotted to Pakistan; and it appears that through inadvertence, a part of it was not delivered to Pakistan on the occasion of the partition which followed the Radcliffe Award. It is not surprising that in dividing territories under the Radcliffe Award, such a mistake should have occurred; but it is plain that what the respondents now propose to do is to transfer to Pakistan the area in question which really belongs to her. In our opinion, this conduct on the part of the respondents speaks for their fair and straightforward approach in this matter. 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, provides, 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 West Bengal; and so, it must be deemed to have been included in the territory of West Bengal within the meaning of the First Schedule, and if that is so, it is a part of the territory of India under Art. 1 of the Constitution. It is true that since this part of Chilahati was not transferred to Pakistan at the proper time, it has been regarded as part of West Bengal and administered as such. But the question is : does this fact satisfy the requirement of Entry 13 on which the argument is

based ? In other words, what is the meaning of the clause "the territories which were being administered as if they formed part of that 65Sup.CI/65 --14 Province"; what do the words "as if" indicate in the context ? The interpretation of this clause necessarily takes us to its previous history.

First Schedule enumerated Part A States. The territory of the State of West Bengal was one of such States. The Schedule then provided 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 the territory of the State of West Bengal by the Constitution as it was first enacted.

The Constitution (Amendment of the First and Fourth Sche- dules) Order 1950, however, made a change and brought the territory of the State of West Bengal into line with 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:-

(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 by order direct-

(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

(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 Schedules 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 included in the State Merger (West Bengal) Order, 1949.

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. 'Me physical fact of administering the said area was not referable to any Merger at all; it was referable to the accidental circumstance 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 not belong to West Bengal and had to be transferred in due course to Pakistan. The said clause is clearly and specifically intended to refer to territories which merged with the adjoining States at the crucial time, and so, it cannot include a part of Chilahati that was administered by West Bengal under the circumstance to which we have just referred. That is why we think Mr. Mukerjee is not right in contending that by reason of the fact that about 512 acres of Chilahati were not transferred to Pakistan and continued to be administered by the West Bengal Government, that area became a part of West Bengal within the meaning of Entry 13 in Schedule 1. The West Bengal Government knew all the time that it was an area which belonged to Pakistan and which had to be transferred to it. That is, in fact, what the respondents are seeking to do; and so, it would be idle to contend that by virtue of the accidental fact that this area was administered by West Bengal, it has constitutionally and validly become a part of West Bengal itself. That being so, there can be no question about the constitutional validity of the proposed transfer of this area to Pakistan. What the respondents are seeking to do is to give to Pakistan what belongs under the Radcliffe Award.

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 impleded 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 Pakistan's title to this property has been lost because West Bengal had been adversely in possession of it. It is, therefore, unnecessary to examine the point whether a plea of this kind can be made under international Law and if yes, whether it is sustained by any evidence on the record. The result is, the appeal fails and is dismissed. There would be no order as to costs.

Appeal dismissed.