

Supreme Court of India

Ram Badan Rai And Ors vs Union Of India And Ors on 9 November, 1998

Bench: S.B. Majmudar, M. Jagannadha Rao

CASE NO. :

Appeal (civil) 3782 of 1988

PETITIONER:

RAM BADAN RAI AND ORS.

RESPONDENT:

UNION OF INDIA AND ORS.

DATE OF JUDGMENT: 09/11/1998

BENCH:

S.B. MAJMUDAR & M. JAGANNADHA RAO

JUDGMENT:

JUDGMENT 1998 Supp (2) SCR 583 The Judgment of the Court was delivered by M. JAGANNADHA RAO, J. The river Ganga has been changing its course over a period of years and a dispute has arisen in regard to a large tract of land on the borders of the State of UP and State of Bihar as to whether this land is to be treated as part of the State of Bihar or the State of Uttar Pradesh.

The appeal has arisen out of Civil Misc. Writ Petition No. 10266 of 1986 filed by six persons (appellants) claiming to be the old residents of village Hansnagar, UP as it stood at the time of survey of 1981- 83. The Union of India, the State of U.P. and the State of Bihar were impleaded as respondents Nos. 1 to 3. The Board of Revenue, UP and the Record Officer, Ballia (UP) were impleaded as respondents Nos. 4 and 5. The appellants sought a writ of mandamus restraining the Record Officer, Ballia, UP from carrying on survey and record operations in regard to village Hansnagar, UP otherwise than on the basis that it was always a part of the State of UP and on the basis that it was not transferred territory under the Bihar and UP Alteration of Boundry Act, 1968 (hereinafter called the '1968 Act') and they further required the survey and record operations to be carried out ignoring the directions contained in the Minutes of the meeting of officials dated 19.10.84 and letter of the Board of Revenue dated 10.10.1985. Alternatively; they sought a writ of certiorari quashing the said minutes dated 19.10.1984 and the directions of the Board of Revenue dated 10.10.1985. As the matter concerns a few thousands of acres and there is a large volume of litigation pending in the Court, it has become necessary to go into the matter in considerable detail.

Pleadings in High Court:

The petitioners-appellants, contended in the writ petition that they and certain others were residents of village Hansnagar (now U.P.) as recorded in the survey of 1881-1883, that at the commencement of the Constitution of India on 26.1.1950, the boundaries of Uttar Pradesh and Bihar States were frozen and all land lying to the west of the eastern stream (then the deep stream) formed part of Hansnagar of UP that, after 26.1.1950, despite the change in the course of the river

Ganga, the said land continued in possession of the appellants and was entered in the records of UP for which the appellants continued to pay land revenue. According to them, if one excluded the fictitious records and maps "created" by the officials of the State of Bihar there would be no question of transferring any land as contemplated by the 1968 Act from Bihar to U.P, State this land was in-U.P. from 26.1.1950. The petitioners-appellants also contended that the three villages (i) Nainijbr 1845, (ii) Nainijor Nambrar and (in) Nainijor Diare Paschim which the Bihar Government with the Bihar respondents claimed as existing, were imaginary or ghost villages only recorded in the records prepared by the Bihar officials. The appellants contended that erroneous minutes were issued by the representatives of the two States and the Union of India on 19.10.1984, on the basis of the records Submitted by the Bihar officials. The said minutes read as follows.

"I. The U.P. Government may write to the Bihar Government specifying the basic records required in respect of the lands comprised in the three transferred villages in question and the Bihar Government would comply with their request within a month of receipt of the relevant communication from the U.P. Government. The extent of availability of records the State Governments may endorse copies of their communications to this ministry.

II. The U.P. Government may retain the names of villages as appearing in the records transferred by Bihar Government.

III, Boundary pillars may be Fixed on ground in accordance with the provisions of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968. The U.P, Government may retain the names of villages as appearing in the records transferred by the Bihar Government" The appellants contend that the above minutes wrongly assume such villages existed on Bihar side before 1968 and stood transferred to U.P. after the 1968 Act. The petitioners had received parchis-statement of the Record Officer maintaining that their land was included in the newly-named satellite village of Bihar and they contend that the consequential directions contained in the proceeding of Board of Revenue, UP dated 10.10.1985 were also bad. There are all contrary to the provisions of the Constitution of India as On 26.1.50 and also to the 1968 Act and were ultra-vires.

The Union of India in its counter in the High Court stated that the record of rights proceedings in U.P. were part of judicial process and parties could question the same in appeals and that the maps prepared by the Survey of India department in regard to the transferred territories were relevant and were intended to facilitate the identification of the transferred territories, that, may be the three disputed villages did not figure in the Survey of India map of 1881-83 and so were not included in me Schedule to the 1968 Act but they were shown with reference to revenue records in force at the time of transfer as envisaged in section 3(4) of the 1968 Act The purpose of the meeting of 19.10.1984 was administrative in nature for resolving differences between the two States and there was no question of any notice to the petitioners. The names of the three villages have now been included in the map of the Survey of India in accordance with information given by the Bihar Government.

The State of UP, in its counter in the High Court, stated that the survey and record operations of village Hansnagar of Ballia Dt. (UP) were being carried on in accordance with the UP Land Revenue

Act, 1901 and an agreement was arrived at during the 19.10.1984 meeting and directions were given by Board of Revenue, UP. The UP Government does not dispute that in 1944 the river Ganga changed its course and entire area of village Hansnagar stood transferred to UP by 1950 and that the said village was part of District Ballia in U.P. as mentioned in the Survey map of 1881-83. However, in 1961, the river Ganga changed course again and the entire Hansnagar village went back to Bihar State. Under the 1968 Act, by virtue of the statutory transfer the said land reverted back to UP. The UP State further stated that the Bihar Government handed over record of the three disputed villages covering an area of 2000 acres of Hansnagar and about 475 acres of village Jauhi, UP. The State of UP contended that records of the three disputed villages have been prepared and parchis have been issued. Objections have been filed and are pending before the Assistant Record Officer, Ballia, UP. The directions issued by the UP Board of Revenue were necessary for correcting the double entries prevailing in the revenue records. The petitioners will have opportunity to urge their cases before the various authorities under the UP Land Revenue Act.

The State of Bihar, in its counter in the High Court, stated that the position which existed before 1881-83 was altered after 1881-83, and considerable portion of village Nainijor went over from Bihar to UP side in 1881-83, and that portion was indicated as part of Hansnagar of UP, that portion was incapable of cultivation since it consisted of sandy tracts. After 1881-83, the river started receding in the other direction and as a result land of village Nainijor was again thrown up on Bihar side of the river. A cadastral survey was conducted in the year 1909-1910 by the State of Bihar, but during that survey, the portion which was again thrown on Bihar side of the river was not cadastrally surveyed and included in the village boundary of village Nainijor as this portion was not fully established by then. But after the land of village Nainijor reappeared on the Shahabad side (Bhoj Dt), (Bihar) tenants of village Nainijor took possession of these lands as and when it became fit for agriculture. The Maharaja of Durmrao, the then landlord of the village, also accepted them as tenants. After the vesting consequent to the abolition of Zamindari in Bihar, rent-receipts were regularly granted by the State of Bihar to these tenants who were still in possession of the land. The three villages were real and were neither imaginary nor ghost villages. Till the transfer of records to UP, in 1968, the areas of the three questioned villages were under the revenue control of the Government of Bihar. The State of Bihar reiterated that the river changed its course in 1961 and land reappeared on Nainijor side in Bihar. The UP Government, according to the State of Bihar, never exercised control over these lands in Nainijor from 1927 to 1944, Rather, the area was under the revenue control of the Bihar Government. The deep stream was the boundary. The three villages stood transferred under the 1968 Act to the UP States. The meeting of 19.10.1984 was an administrative one and there was no question of giving notice to rival claimants.

During the pendency of the case in the High Court, Baleshwar Tiwari and 67 others, claiming to be tenants of land on Nainijor side, (Bihar) got impleaded and filed counter affidavit (They were impleaded in this Court also as respondents by order dated 19.10.1989 in CMP No. 11100 of 1989). They raised the plea of res-judicata On account of certain judgments in UP, 8474/85, 8592 of 1986 and 4005/86. They traced the history of village Hansnagar in UP from 1840 and asserted that initially the said village was having a much smaller area. After 1881-83, the river changed its course and a large chunk of land of Hansnagar and other villages went to Bihar side. Village Nainijor 1845, Nainijor Diare Paschim and Nainijor Nambrar came into existence. There was fresh settlement with

the tenants of Bihar side in these three villages. These respondents of Nainijor have been holding the lands in these three villages from the time of their ancestors. They referred to the record maintained by the officials of the UP Government. They also referred to a notification No. U.O.I/IF-72 dated 26.7.73 of the UP Government under which the village of Hansnagar and the three villages Nainijor Diara Paschim, Nainijor Nambrar and Nainijor 1845 were placed by the UP Government under survey and record operations. In the proceedings relating to the description of the villages, Diara Paschim, Nainijor Nambrar and Nainijor 1845 - there were important notes. This notification & the directions therein must be deemed to have been issued under section 234 of the Land Revenue Act and were not challenged. The land was part of Bihar and stood transferred to UP only under the 1968 Act. The other litigations referred to by the writ petitioners did not concern these three villages. They contended that Nainijor village was different from these three villages. They contended that the records maintained by the Bihar Government were correct.

In the High Court, rejoinders were filed by the appellants writ petitioners to contend that these lands were always part of Hansnagar on UP side and that there was no question of their being transferred to UP under the 1968 Act. The three disputed villages never existed in Bihar side and respondents-intervenors have no right to these lands. The minutes of 1984 and the Board's direction of 1985 and the 1973 notification were bad.

A question was argued whether in view of section 26 of the 1968 Act, the UP statutes could be straightway applied to territories transferred from Bihar to UP under the 1968 Act.

High Court Judgment :

On these pleadings, the High Court held as follows: (1) The Judgment referred to by the respondents in writ petitions 8474 of 1986 (Ram Shankar Rai v. UOI); WP No. 4005 of 1986, 8592/80 (Ram Nath Pandey v. Board of Revenue) and in 79656/86 (Bajrangi v Board of Revenue) would not operate as res-judicata against the writ petitioners who were not parties thereto;

(2) The meeting of officials dated 19.10.1984 was held by both States under the aegis of the Central Government. The first part of the letter of the Board of Revenue dated 10.10.1985 was intended to give effect to the said minutes. The contention urged on behalf of the respondents and the intervenors (respondents of Nainijor) that the agreement was an act of State as between the two States did not arise because that States within Union of India were not sovereign (but were subject to the Constitution) and the real question was whether the said minutes and directions were in conformity with the Constitution of India and the 1968 Act;

(3) The contentions of the writ petitioners, namely (i) that the; boundary of UP and Bihar became frozen on 26.1.1950 and this territory went to UP side because the river changed its course in 1944 and the eastern stream became the deep stream as was also the position at the time of survey of 1981-83. (ii) that all land lying to the west of deep eastern stream became part of UP, that no circular or regulation in vogue before 26.1.1950 could have changed the frozen boundary again, that the change of course in 1960 or thereafter was irrelevant- (iii) that even if the western stream became the deep stream the land to its east (i.e. west of the eastern stream which was earlier the deep stream

before 1961) continued to remain with UP by 1968 and the 1968 Act could not transfer any land from UP State to Bihar State-were contentions not acceptable because of the judgment of this Court in *State of West Bengal v. Union of India*, [1964] 1 SCR 371 inasmuch as Parliament has sweeping powers under Article 3 of the Constitution of India;

(4) The contention of the petitioners that the land between the two streams was part of Hansnagar on UP side and the further contention that the record of these villages maintained by the Bihar Government was fictitious and the contention of the counsel for Bihar that these three villages were in existence and that this was borne out by the records- was a matter which "involves probe into questions of fact which need consideration of oral evidence in this regard and opportunities to the parties to lead documentary evidence. The dispute between the parties can be decided in regular proceedings with regard to the disputed land situated between the two streams.";

(5) The contention of the petitioners that the aforesaid area could not be treated as part of the 'transferred territory' under the 1968 Act could not be finally decided in these writ proceedings as the Court was not in a position to conclude whether the disputed land was part and parcel of UP State or it became really a part and parcel of UP State or it became really a part and parcel of Bihar and thereafter stood transferred to State of UP. The High Court observed:

"On the materials before us, we are unable to express concluded opinion on the question whether the disputed land ever formed part of Bihar State and is transferred territory to UP within the meaning of the provisions of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act. Accordingly, we refrain from accepting me contention raised on behalf of the petitioners in this regard".

(6) So far as the validity of the 'boundaries' and 'maps' prepared under the 1968 Act was concerned and the contention that these three villages were the imaginary creation of the Bihar officials- in view of sub-section (2) to (4) of section 3, the 'demarcation of the boundary' by authority approved by the Central Government was sacrosanct but the map prepared under section 3(4) being an official one, raised only a rebuttable presumption of correctness in view of section 114 of the Indian Evidence Act. This point was supported by the note of the Surveyor-General to the effect that he did not verify the topography;

(7) Assuming that the Bihar officials in their records sent names of three villages in contravention on Bihar law and without assigning any Tauzi or Thana number- the actual occupants or tenants of the land of all these three villages could not be deprived of their rights without adjudication of the existence of these villages and of the tenancy rights thereto and such an adjudication could not be made in writ jurisdiction;

(8) The UP Government issued notification in 1973 for survey in respect of the three villages Nainijor Diara Paschim, Nainijor Nambrar and Nainijor 1845, the notification showed Nainijor Diara Paschim covering parts of villages Dabutiel, Bandhoo Chak Haladi Rikni, Chapra, Hansnagar Janhi, Chambey, bel and chauibey bel Ganga barar ; Nainijor Nambrar covering parts of Jaunhi, and Nainijor 1845 covering part of Hansnagar. But this was shown (after) survey. The High Court

observed, it should not be forgotten that in the 1968 Act, boundaries had been fixed with reference to the survey of 1881-83 and if the three villages on survey and physical verification, were found to exist, it would have to be ascertained in which village of UP according to the survey of 1881-83, they lay;

(9) The plea of petitioners that both the minutes of 19.10.1984 and the first part of the letter of the Board of Revenue dated 10.10.1985 and the notification of 26.7.1973 for survey were without jurisdiction was without substance (Para 44);

(10) If in the notices Parchis on specific plots, names of persons and villages of both sides were recorded and notices were sent to both sides, there was nothing illegal or contrary in that action inasmuch as these entries were liable to correction, after adjudication, under section 54(2) of the UP Land Revenue Act. When the entries in the records maintained by UP and Bihar officials were conflicting and mistakes and disputes were apparent, they could be corrected and resolved only in the manner prescribed, as the case might be, under sections 54, 40, 41, 43 of the UP Land Revenue Act, 1901. If the mistakes and disputes could not be resolved by correction (by the Naib Tehsildar), then the records along with objections, should be forwarded to the Assistant Records Officer, who could dispose of the same under section 54 (6), in accordance with sections 40,41, or 43 ;

(11) In the instant case, the dispute involved questions of title because the parties on UP side claimed themselves to be tenants whereas the parties on Bihar side also claimed to be tenants of the same land. When the dispute involved a question of title, the Assistant Record Officer should decide the same after summary inquiry. Such decision was appealable under section 210 and was revisable before the Board of Revenue under section 219;

(12) The survey and record operations were part of judicial process, as seen from Chapter IX (sections 189 to 209) of UP Land Revenue Act. The Assistant Records Officer, constituted a Court. There was no statutory prohibition for appearance of lawyers or for accepting oral evidence to be adduced. The Asstt. Records Officer could not exclude oral evidence though he might not record evidence verbatim ;

(13) The direction in the letter of the Board of Revenue that summary proceedings might be decided without the presence of lawyers and without oral evidence was, therefore, contrary to the provision of the UP Land Revenue Act, 1901 and that part of the 1985 order of the Board of Revenue prohibiting engagement of lawyers or oral evidence was liable to be struck down. The Asst. Records Officer could consolidate cases under section 192-A of the UP Land Revenue Act, 1901 to obviate multiplicity of evidence and hearings;

(14) A seasoned and experienced officer of unquestionable integrity could be appointed by the State Government as the Asst. Records Officer for disposing of these cases under section 54(6);

(15) Rest of the reliefs claimed by the petitioners-appellants were liable to be rejected. That is how the High Court disposed of the matter.

In this appeal, elaborate submissions were made by Shri V.K.S. Chaudhary, senior counsel for appellants, Shri R.K. Khanna for respondent No. 3, Shri Pramod Swarup for respondent Nos. 2, 4 and 5, Shri Kirti N. Raval, Addl. Solicitor General for respondent No. 1 and Shri R.K. Jain, senior counsel for the interveners. The same contentions urged in the High Court were reiterated before us.

The following points arise for consideration:

(1) Whether under Articles 1 (2), 3 and 4 of the Constitution of India, the boundaries between Bihar and State of UP became frozen as on 26.1.1950 and whether there was no question of transfer of territory from Bihar State to UP State under the 1968 Act?

(2) Whether the High Court was right in not deciding issues of title or possession or the dates of changes in the course of the river Ganga or on which side this land lay before the 1968 Act and also as to existence of these three villages or as to whether these three villages stood transferred in 1968 to the state of UP?

(3) Whether the UP statutes could be applied to the territories transferred from Bihar to UP under the 1968 Act and whether they were extended to the transferred territory?

(4) To What relief. Point I:

It is necessary, at the outset, to refer to the historical aspects of the case in relation to the change of course of the river Ganga. The same has been set out in *Radha Krishna Chaube & Anr. v. Rant Janam and Anr.*, [1981] Allahabad L.J. 940 by S.J. Hyder, J. That judgment was no doubt reversed by this Court in *Ram Janam v. Radha Krishna, Chaube*, [1996] 8 SCC 277 on a narrow point.

Period from 1825 to 1950:

The Bengal Alluvion and Diluvion Regulation of 1825 (Regulation No. XI of 1825) states in its preamble as follows:

"In consequence of the frequent changes which take place in the channel of the principal rivers that intersect the territories immediately subject to the presidency of Fort William and the shifting of the sands which lie in the beds of those rivers chars or small islands are often thrown up by the alluvion in the midst of the stream, or near one of the banks and large portions of land are carried away by an encroachment of the river on one side, whilst accession of land are at the same time, or in subsequent years gained by dereliction of the water on the opposite side; similar instances of alluvion, encroachment and dereliction also sometimes occur on the sea coast which borders the Southern and the South-eastern limits of Bengal, the lands gained from the rivers or sea by the means above mentioned are a frequent source of contention and affray, and although the law and custom in the country have established rules applicable to such cases these rules not being generally known, the Courts of Justice have sometimes found it difficult to determine the rights of litigant parties claiming chars or other land gained in the manner above described."

The Regulation, therefore, issued certain guidelines for determining the ownership of the land gained by alluvion or diluvion whenever disputes arose between individuals. The Regulation of 1825 did not concern itself with the boundaries of any geographical areas in Bihar or UP. However, the Governor General issued two notifications in the year 1867 and 1871 which provided that the 'deep stream' of the river Ganga and Ghagra should be considered to be the boundary of the districts of Shahabad and Saran on Bihar side and the district of Ballia on the UP side. Problems relating to boundary arose because sometimes the eastern stream and sometimes the western stream between the two; States-became the deep stream.

Whether boundaries frozen as on 26.1.1950 In the Constitution of India as it stood on 26.1.1950, it was stated in Article 1(2) that the States and territories of India shall be the States and their territories as specified in Parts A, B and C of the First Schedule. In the First Schedule Part A, at serial No. 2 we have the State of Bihar and at serial No. 8, we have the State of United Provinces. It was further stated in the said First Schedule under the heading Territories of States' in para 3 that the territory of each of the States referred to in that para in Part A shall comprise the territories which immediately before the commencement of this Constitution were comprised in the corresponding province (i.e. Bihar Province and United India Province) and the territories which, by virtue of an order made under Section 290 A of the Government of India Act, 1935 were immediately before such commencement being administered as if they formed part of that province.

According to the appellants, the territories comprised in the Part A State of United Provinces as on 26.1.50 stood frozen and that on that day, -by virtue of the then position of the deep stream,-being the eastern stream, these lands were to the west of the said stream and stood physically included in the State of United Provinces. According to the appellants, if subsequently, after 1950 the Western stream became the deep stream, that could not be taken cognizance of because under Article 1(3), the position as on 26.1.50 stood geographically frozen.

This contention, in our view, was rightly rejected by the High Court (Here we are not to be understood as deciding the existence or otherwise of the three disputed villages). In Article 3 of the Constitution, it is stated as follows:

"Article 3: Formation of new States and alteration of areas, boundaries or names of existing States : Parliament may by law-

- (a) form a new State.....
- (b) increase the area of any State,
- (c) diminish the area of any State,
- (d) alter the boundaries of any State;
- (e) alter the name of any State. Provided that.....,"

It is obvious that under sub clause (d) of Article 3, the boundaries as on 26.1.50. between the States were clearly made subject to alteration by Parliamentary legislation.

(i) Constitutional Amendments 1955, 1956 and the Bihar & West Bengal (Alteration of Boundaries) Act, 1956:

By the Constitution (Fifth Amendment) Act, 1955, the proviso to Article 3 was substituted by a new proviso which read as follows: "Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the areas, boundaries or name of any of the States specified in Part A or Part B of the First Schedule, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

the words 'specified in Part A or Part B of the First Schedule, were omitted by the Constitution (Seventh Amendment) Act, 1956. By virtue of the said Seventh Amendment Act, 1956, Article 1(2) was amended as 'The States and Territories thereof shall be as specified in the First Schedule. The First Schedule was also simultaneously amended and so far as serial No. 3, the State of Bihar was concerned, it would comprise of "territories which immediately before the commencement of this Constitution were either comprised in the Province on Bihar or were being administered as if they formed part of that province, but excluding the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956". So far as serial No. 12, me State of Uttar Pradesh is concerned, it was to comprise of the 'territories which immediately before the commencement of the Constitution of India were either comprised in the Province known as the United Provinces or were administered as if they formed part of that province.'

(ii) Arbitration by Shri CM Trivedi, ICS and the 1968 Act: The changes in the deep stream resulted in a meeting of the Chief Ministers of the two States in 1961 and they agreed to refer the dispute to an Arbitrator to be appointed by the Prime Minister and to abide by the decision to be given by the Prime Minister on a consideration of the recommendation of the Arbitrator. Accordingly, Shri C.M. Trivedi, ICS former Governor of the State of Andhra Pradesh was appointed Arbitrator and he submitted his report to the late Prime Minister, Shri Lal Bahadur Shastri on 28.8.1964 recommending a fixed boundary in both the Ganga and Ghagra sectors. The recommendations were accepted by the late Prime Minister Shri Lal Bahadur Shastri arid conveyed to the State Governments. The effect of the recommendations made by Shri C.M. Trivedi was as follows ;

(1) On the basis of the 1963-64 deep stream position, the fixed boundary involves the transfer of an area of about 45 sq. miles from UP to Bihar and about 64 sq. miles from Bihar to UP;

(2) About 85% of the fixed boundary will be on land in the Ganga sector and 75% of it will be on land in the Ghagra sector, whereas the entire land (in 1968) (as stated in the Statement of Objects and Reasons of the 1968 Act) lay in water;

(3) The deep stream of the river Ganga forms the inter-state boundary between Shahabad district (Bihar) and Ballia District (U.P.). Similarly the deep stream of the river Ghagra in the inter-state boundary between the Saran district (Bihar) and Ballia District (U.P.). As the two rivers change their course almost every year, the deep streams do not remain constant with the result that the inter-state boundary continued to fluctuate. Hence the above recommendations in (1) and (2) above have been given.

Accordingly, the Bihar and UP (Alteration of Boundaries) Act, 1968 (Act 24 of 1968) came to be passed by Parliament and as required by Article 3 of the Constitution of India, the Bill was referred by the President of India to the Legislatures of the States of Bihar and UP for their views.

The said Act in Section 2(a) speaks of an 'appointed day' and the transfer of territories under Section 3(a) is to be effective from the 'appointed day'. The 'appointed day' has been fixed as 10.6.1970 (Gazette of India, 3.6.70, Part II Section 3(1), Ext, p. 543 of GSR 901). The Act also defines 'deep stream' in Section 2(c) and 'fixed boundaries' in Section 2(d) as follows:

"Section 2(c): 'deep stream', in relation to the river Ganga or the river Ghagra, means the 'deep stream' thereof as verified and agreed upon by the State Government of Bihar and Uttar Pradesh after the 30th day of September of the year preceding the year in which the appointed day falls and before the 1st day of January of the year in which the appointed day falls and in default of agreement between the State Governments, as determined by such authority as may be specified by the Central Government.

Section 2(d): 'fixed boundary' means the boundary line demarcated under the provisions of sub-section (2) of Section 3 in relation to the river Ganga or the river Ghagra, as the case may be."

The words 'transferred territories' are defined in Section 2(i) as follows:

"Section 2(i): 'transferred territories' means (i) in relation to the State of Bihar, the territories transferred by this Act from that State to the State of Uttar Pradesh and (ii) in relation to the State of Uttar Pradesh, the territories transferred by this Act from that State to the State of Bihar."

and Section 2(i) says that 'any reference to a district of a State shall be contained as a reference to the area physically comprised within the district immediately before the appointed day.

The 1968 Act, in Part II, deals with the 'transfer of territories'. It says as follows:

"Sections. Transfer of Territories:(I) As from the appointed day-

(a) there shall be added to the State of Bihar-

(i).....

(ii).....

and the said territories shall thereupon cease to form part of the State of Uttar Pradesh; and

(b) there shall be added to the State of Uttar Pradesh-

(I) all the territories of Saran district of the State of Bihar lying between the fixed boundary and deep stream of the river Ghagra, and

(ii) all the territories of Shahbad district of the State of Bihar lying between the fixed boundary and the deep stream of the river Ganga."

Thus the various territories mentioned in section 3(1) (b) (ii) were transferred from Bihar to UP. Section 3(2) states that the 'fixed boundary' in relation to each of the river Ganga and Ghagra shall be demarcated by an authority appointed in this behalf by the Central Government so as to be generally in conformity with the Boundary line described in the schedule in relation to that river, provided that in the process of such demarcation, the said authority shall have power to rationalise to the extent considered necessary by him, the boundary alignment between the high banks of the river Ganga or the river Ghagra, as the case may be, and in particular the said authority shall try- (a) to ensure, as far as possible, the stability of the boundary pillars and the recognition of the boundary alignment both during the dry and flood seasons; and (b) to avoid, as far as possible, the splitting up of the existing abadis.

Sub-section (3) of Section 3 states that the demarcation of the said authority on any matter relating to the interpretation of any part of the description of the boundary given in the schedule (including the determination of the relevant record referred to in the Explanatory Note to the Schedule) shall be final; and (b) the said authority shall have power, to determine the location of the points at which the boundary pillars shall be constructed and to specify the State Government which shall be responsible for the construction and maintenance of the boundary pillars or such points and the decision of the authority on these matters shall be final; and (c) the said authority can, for the aforesaid purpose, survey any area in the vicinity of the boundary line etc. Sub-section (4) of Section 3 states that the authority shall also prepare a map of the transferred territories showing.

(a) the deep stream of the river Ghagra or the river Ganga, as the case may be, and the fixed boundary in relation to that river ;

(b) the names and boundaries of the villages in the transferred territories, as indicated by the State Government having jurisdiction over the territories before their transfers, with reference to the relevant records of that Government in force immediately before the preparation of such map, and found such map to the Central Government, who shall cause it to be published in the transferred territories in such manner as it thinks fit Sub-Clause (5) of Section 3 states that as from the appointed day, the State Government of Bihar and UP shall, by orders in the official gazettes provide for the administration of the territories transferred to that State under Section 3(1) by including them or any part of them in such district, sub-division, Police Station or other administrative unit as may be specified in the order.

Section 4 of the Act deals with the 'Amendment of the First Schedule of the Constitution' and states as follows:

'Section 4 : Amendment of the First Schedule to the Constitution : As from the appointed day, in the First Schedule to the Constitution, under the heading "I. THE STATES", (a) for the entry against "3 Bihar", the following shall be substituted namely:-

"the territories which immediately before the commencement of this Constitution were either comprised in the province of Bihar or were being administered as if they formed part of that province and the territories specified in clause (a) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act. 1956, and the territories specified in clause (b) of sub-section (1) of Section 3 of the first mentioned Act.";

(b) for the entry against "13. Uttar Pradesh", the following shall be substituted, namely:-

"The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that province and the territories specified in clause (b) of sub-section (1) of section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968. but excluding the territories specified in clause (a) of sub-section (1) of Section 3 of that Act," the Schedule to the 1968 Act contains an Explanatory Note stating that the village boundaries and names mentioned in the Schedule have reference to boundaries and names as shown in the sheets of large-scale surveys covering relevant areas of Saran and Shahbad Districts of the State of Bihar and Ballia districts of the State of Uttar Pradesh, conducted by the Survey of India during the period 1881-83, and where such sheets are not available, as shown in any other record which the State Governments of Bihar and Uttar Pradesh agree to be relevant, within one month from the commencement of the Act or default of Such agreement, which the authority referred to in sub-section (2) of section 3 may determine to be the relevant record. It is also stated that the Ganga and Ghagra rivers and their high banks wherever mentioned in this Schedule, have reference to the geographical river or high banks positions, as the case may be, as shown in the survey records mentioned above. The Schedule then deals with 'Ganga Sector' in 10 paragraphs and the 'Ghagra Sector' in 8 paragraphs. In para 5 relating to Ganga Sector-we find reference to Nainijor in Bihar and Hansnagar in Uttar Pradesh.

(iii) Effect of the 1968 Act : boundaries not frozen as on 26.1.50 :

Having set out the events leading to the passing of the 1968 Act and having referred to some of the relevant provisions of the Act, we shall now deal with the contention of the learned senior counsel for the appellants that the boundary between Bihar and Uttar Pradesh as on 26.1.1950 should be treated as frozen and that no part of the disputed land must be deemed to have been transferred from State of Bihar to Uttar Pradesh. According to the appellants, the entire area of about 2000 acres was right from 1881-83 part of Hansnagar on UP side and remained so on 26.1.1950 and that the subsequent change in the deep stream in 1961-an event which took place between 1950 and 1968--had to be ignored and, therefore, there was no question of transfer of any land from Bihar

State to UP under section 3 of the 1968 Act as from the 'appointed day'.

This contention of the appellants cannot be accepted. It ignores the clear provisions of the Constitution of India in Article 3. Under that provision, Parliament has been empowered to form new States and alter the areas, boundaries or names of existing States. In 1956, the boundaries between Bihar and West Bengal were adjusted under the Bihar and West Bengal (Transfer of Territories) Act, 1956 and likewise in 1968, the boundaries between Bihar and Uttar Pradesh were adjusted. The provisions of section 3 of the 1968 Act are clear that some territories were transferred from Uttar Pradesh to Bihar while some other territories were transferred from Bihar to UP. It is stated under section 3(1) (b) (ii) that these shall be added to the State of Uttar Pradesh, "all the territories of Shahbad District of the State of Bihar lying between the fixed boundary and the deep stream of the river Ganga."

and thereupon the said territories shall cease to form part of the State of Bihar. It is clear, therefore, that by force of the law made by Parliament, there was indeed a transfer of territory from Shahbad District of Bihar to Uttar Pradesh.

As pointed out in *Re: The Berubari Union and Exchange of Enclaves*, [1960] 3 SCR 250 by this Court, Article 3 deals with the "internal adjustment inter se of the territories of the Constituent States of India". Again in *Babulal Parate v. The State of Bombay and Another*, [1960] 1 SCR 605, it was pointed out that "unlike some other federal legislatures, Parliament, representing the people of India as a whole, has been vested with the exclusive power of admitting or establishing new States, increasing or diminishing the area of an existing State or altering its boundaries, the legislature or legislatures of the States concerned having only the right to an expression of views on the proposals."

It is, therefore, clear that the territories of the States as on 26.1.1950 was not frozen and the Constitution provided for prospective changes including alteration of boundaries. So far as the State of Bihar and Uttar Pradesh were concerned such changes were incorporated in the 1968 Act resulting in some territory in Shahbad District of Bihar lying between the fixed boundary and the deep stream of the river Ganga being transferred from Bihar State to the State of UP.

The High Court was, therefore, clearly right in rejecting the above contention of the appellants and in holding as follows:

"It has to be noted as laid down in *State of West Bengal v. Union of India*, AIR (1963) SC 1241 that under Article 3 of the Constitution, Parliament has sweeping powers. It can form a new State by separation of territory from any State or by uniting two or more States or by uniting any territory to a part of any State, increase the area of any State; diminish the area of any State; alter the boundaries of any State and alter the name of any State."

We, therefore, decide Point 1 against the appellants. Point 2 :

So far as the question whether the land in Hansnagar village of UP was far less in 1840 and land from the three disputed villages of Bihar got added thereto so as to swell to the present extent, whether these three villages were non-existent or ghost villages of Bihar created fictitiously by the officials of the State of Bihar and other related matters-are questions which cannot, as rightly held by the High Court, be decided in writ jurisdiction inasmuch as a lot of oral and documentary evidence is to be adduced and considered by the Courts or authorities under the UP Acts, The High Court did not rightly go into the said questions.

When the High Court had itself felt that these matters could not be dealt with in writ jurisdiction, we would not take upon ourselves the burden or the responsibility of deciding these issues.

(i) Minutes dated 19.10.1984, Board's order dated 10.10.1985 and notification dated 26.7.1973:

So far as the minutes of the meeting dated 19.10.1984 and the direction of the Board of Revenue dated 10.10.1985 and fee notification of the UP Government dated 26.7.1973 issued pursuant thereto, they are administrative in nature and no prior notice to the appellants was necessary, as held by the High Court.

Again, so far as the minutes dated 19.10.1984 are concerned, para 2 refers to a direction by the Patna High Court in CWJC No. 1624 of 1981 whereby the Court directed the two State Governments and the Union of India to sort out the issue relating to the non-inclusion of the three villages in the survey map and consequently in the Schedule of the 1968 Act. The minutes say that the Schedule no doubt reproduced the boundaries as per survey-maps of 1881-83 as recommended by Shri Trivedi's arbitral award but these three villages have now been shown in the map prepared under section 3(4) of the 1968 Act on the information given to them by the Government of Bihar with reference to their service records. The Survey of India produced the relevant map and drew pointed attention to the note therein to that effect. The minutes of 19.10.1984 point out that while the Schedule in the 1968 Act lays down the precise alignment of the fixed boundaries for the purpose of the demarcation thereof on the ground, the map was intended to facilitate identification by the administrative authorities and the people of the transferred territories as existing at the time of transfer and, therefore, the purposes of the Schedule and the maps was different and there was no conflict between them. The minutes say that there was, therefore, no need for amendment of the Schedule and further the Schedule was strictly in conformity with the arbitral award. Any amendment to the Schedule would, according to these minutes, amount to tampering with the very award which had been accepted by both the State Governments. These minutes, it is obvious, do not amount to any final adjudication of the existence of the three disputed villages. That question has to be decided separately. That is why the High Court held in para 44 that these minutes cannot be said to be without jurisdiction but that the matter relating to the existence of the villages etc. is to be adjudicated separately.

In para 3 of the said minutes, it stated that the representative of the Bihar Government observed that the Chief Secretaries of both the State Governments had agreed at a meeting held in the Ministry on 10.7.1970 that the cases where both the States had maintained separate sets of records in respect of the same land, the records maintained by the transferring State should be presumed to

be correct unless proved otherwise in a Court of Competent jurisdiction. The Bihar Government officials pointed out that pursuant to that agreement, the Bihar Government had transferred the records pertaining to the three villages in question but that the UP Government had not accorded recognition to them and the Bihar officials insisted that the rights of tenants should be determined with reference to the position obtaining on 10.6.1970 when the transfer of territories took place and that the Bihar records, in respect of the three villages be given recognition by the UP Government in accordance with the agreement dated 10.7.1970 of the Chief Secretaries. On the other hand, the UP officials contended that the Bihar records of rights (Khatiyans) were incomplete and that the lands comprised in these three villages were now part of Hansnagar since 1881-83 in the absence of separate identity of those villages at that time and that the residents of Hansnagar would, therefore, be having tenancy rights over the land.

Para 3 of the minutes dated 19.10.1984 then states that the UP Government have undertaken survey and settlement operations under the State Land Revenue Act in Ballia District, "which covered the three transferred villages also". The UP officials stated that in the course of those proceedings, parchis would be issued to all persons who either were in actual possession of land or were claiming rights of ownership and cultivation thereon. They further contended that the whole process was a judicial process and that any person aggrieved by the decision of the revenue court had a right of appeal.

On these rival contentions, the minutes dated 19.10.1984 state that it was finally agreed that (1) the UP Government may write to the Bihar government specifying the basic records required in respect of the lands comprised in the three transferred villages in question and the Bihar Government would comply with their requirement within a month of receipt of "the relevant communication from the UP Government, (2) the UP Government may retain the name of the villages as appearing in the records transferred by the Bihar Government.

(3) Boundary pillars may be fixed on ground in accordance with the provisions of the 1968 Act.

The High Court, in our view, rightly held in para 44 that these minutes could not be said to be without jurisdiction. These do not, however, amount any adjudication regarding the existence of the Bihar villages. That question had to be decided separately by the courts of competent jurisdiction.

(ii) Board of Revenue's direction dated 10.10.85 and notification dated 26.7.1973:

Coming to para 1 of the Board of Revenue (UP)'s letter to the Collector dated 10.10.85 regarding preparation of records and maps of areas in UP and the directions (A) to (I), various directions were issued by the Board to the Collector in regard to adjudication of the matter under section 54 of the Act summarily and for getting the process of survey and preparation of records completed as early as possible. Consequently by notification dated 26.7.1973 of the UP Government, the land in the village of Hansnagar and the three villages were placed under survey and record operations. The proceedings of the Board dated 10.10.1985 and the notification were rightly held, in para 44 of the High Court judgment, to be within jurisdiction of the said authorities.

The above proceedings of the Board dated 10.10.1985 and the notification dated 26.7.1973 did not also amount to any adjudication on the merits of the existence of these three villages or as to whether the land in the three villages was part of the land transferred from Bihar to UP under the 1968 Act. The High Court rightly held, in regard to the notification in the 1968 Act, boundaries have been fixed with reference to the survey of 1881-83 and that if the three villages or survey and physical verification were found to exist, it would have to be ascertained in which village of UP, according to the survey of 1881 -83, they lay.

The High Court also rightly held that entries in the records could be scored off or ignored only after notice under section 54(2) of the UP Land Revenue Act. If names found in the records maintained by each of the State were, in regard to same land, different than the correctness of either of the entries had to be determined under or resolved only in the manner prescribed under sections 54, 40, 41 or 43 of the UP Land Revenue Act. The Assistant Records Officer could dispose of the matter under section 54 (6) of the said Act. The decision of the said officer was appealable under section 210 of the UP Land Revenue Act, 1901 and there was also a revision to the Board of Revenue, UP under section 219. The High Court also rightly allowed advocates to appear and the Assistant Records Officer to take oral evidence-even in a summary way-and rightly set aside that part of the orders of the Board of Revenue. The High Court was also right in directing consolidation of the cases under section 192-A of the Act to avoid multiplicity of the evidence/ hearings and in rejecting the rest of the reliefs.

Considerable reliance was placed for the appellants before us upon an order passed in proceedings under section 145 Cr. P. C. by the Sub-Divisional Magistrate, Buxer on 22.8.1928 declaring the second party (the UP parties) to be in possession and raising certain doubts about the existence of certain Bihar villages. It is true that there was such a decision in section 145 Cr. P.C. proceedings but it is well-settled that such an adjudication under Section 145 Cr.P.C. cannot be treated as equal to an adjudication on title by a Civil Court. It will be for the appropriate competent court to consider the relevance and admissibility of the observation made in the said order and adjudicate on the question of title after receiving oral and documentary evidence. Point 2 is decided accordingly, Point 3:

The High Court proceeded on the basis that the UP statutes such as the U.P. Land Revenue Act, 1901 applied to the territories transferred from Bihar to UP under the 1968 Act. We do not decide whether this assumption is correct.

Arguments were, however, advanced before us as to the meaning of section 26 of the 1968 Act That section reads as follows:

"Section 26 : Territorial extent of laws: The provisions of section 3 shall not be deemed to have effected any Change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Bihar or Uttar Pradesh shall, until otherwise provided by a competent legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

The above provision is, it will be noticed, part materia with section 119 of the States Reorganisation Act, 1956, Section 119 of that Act has been interpreted by this Court in several cases. In particular in *Rattan Lal & Co. v. Assessing Authority, Patiala*, [1969] 2 SCR 544, a Constitution Bench of this Court held that the laws in force in the transferred territories before such transfer shall continue to apply to those areas after transfer until altered by the Legislature of the transferee State. This Court stated, in the context of Section 119 as follows: "The scheme of the States Reorganisation Act makes the laws applicable to the new areas until superseded, amended or altered by the appropriate legislature in the new States."

The same principle was reiterated by this Court in *State of Punjab v. Balbir Singh*, [1976] 3 SCC 242 (at p. 248) while dealing with section 88 of the Punjab Reorganisation Act, 1966 which section is again similar to section 26 of the 1968 Act. It was held that mere addition of territory by one State to another State did not result in automatic abrogation of the laws in force in such territory and that until the State to which the territory was transferred, modified the said laws in force by extension of the laws prevailing in the transferee State-to the transferred territory, the previous laws in force in the territory shall continue to operate. *Balbir Singh's* case was followed again recently in *Dhayanand v. Union of India*, [1996] 7 SCC 47.

In other words, the effect of Section 26 of the 1968 Act is that even after the transfer of some territories from Bihar to Uttar Pradesh, the Bihar laws in force in those areas before such transfer shall continue to apply in those territories till the laws of the transferee State of UP are extended to the areas so transferred to UP State.

Now the High Court proceeded on the basis that the UP Land Revenue Act, 1901 was extended to the territories transferred from Bihar to UP under the 1968 Act. Counsel before us proceeded further on the basis that the UP Zamindari & Land Reforms Act, 1950 was also extended to the territories transferred from Bihar to UP. We have not been able to verify this fact and these assumptions will be matters for verification when the matter goes back.

Before we leave the discussion under Point 3, it is necessary to refer to certain observations in the judgment of this Court in *Ram Janam v. Radha Krishan Chaube*. [1996] 8 SCC 277. That Judgment reversed the Judgment of the learned Single Judge of the Allahabad High Court in *Radha Krishan Chaube v. Ram Janam*, [1981] Allahabad L.J. 940 on a narrow point. In that case, the learned Single Judge has set out the history preceding the passing of the 1968 Act. The High Court noticed that the suit under sections 59 & 61 of the UP Tenancy Act, 1939 was filed on 16.11.62 in the Court of the Judicial Magistrate, Ballia, UP but the land in question stood transferred to UP only after the 1968 Act was passed. The learned single Judge held that the plaint was filed in a Court in UP which had no jurisdiction inasmuch as the lands were de jure part of Bihar State as on 16.11.62 and the fact that subsequently, after 1968 the area stood statutorily transferred by section 3 of the 1968 Act to UP State, could not validate the plaint even if, as on the date of decree of the trial court and first appellate court, the area might have come within the territorial jurisdiction of the Court in UP, On that reasoning, the High Court allowed the Second Appeal of 1974 by judgment on 7.5.1981 and dismissed the suit.

This Court in appeal, after referring to the history of the boundary dispute and to section 26 of the Act observed in para 7 that "As on the date of decree, the Boundaries Act had come into force and consequently even the doubtful territorial jurisdiction of the trial court stands rectified on the date when the decree was granted by the trial court. Consequently, the Act applies to the rights claimed thereunder. The appellant, therefore, is entitled to the relief sought for in the suit." This Court restored the decree of the lower courts and set aside the judgment of the High Court, With respect, we agree with this part of the Judgment We are also of the view that the said conclusion of this Court was based upon the assumption that by the date of decree the area stood transferred to UP State by the 1968 Act and also on the further assumption that the UP statute was territorially extended to the area in question by the date of the decree of the trial court. If those assumptions were true, the principle that was applied was, with respect, correct-for if a court in which a suit is filed has no jurisdiction to take up the case on the date of plaint, it is sufficient if it acquires jurisdiction by the date of decree. There can be no dispute about such preposition. That was sufficient for the purpose of allowing the appeal.

There are, however, certain observations in the Judgment that even from 1959 when de facto the land accreted to UP. the UP laws applied. These observations, in our view, were obiter and were not necessary for the case and run counter to the three decisions of this Court cited above and to Rattan Lal's case decided by Constitution Bench of this Court. The law is clear that even after addition of territory the previous Jaws operating on these areas will continue, till the transferee State extends its laws to the transferred territory.

In the case before us, as already stated, the High Court has directed and adjudication of rights relating to possession and title by applying UP Land Revenue Act, '1901., on the assumption that that Act stood extended to the transferred territories, If, in fact, there has been such an extension, the directions of the High Court are correct. The factum of such extension of laws has, as already stated, not placed before us, but will be a matter for verification when the matters relating to possession and title go back for adjudication. Point 3 is decided accordingly.

Point 4 Learned counsel for the parties have, however, pointed out that now record of rights operations are going on.

Question is as to whether any relief other than that granted by the High Court can be given.

We shall briefly refer to the scheme of the DP Land Revenue Act, 1901 Section 32 in Chapter III of the above said Act of 1901 deals with record of rights and sections 39, 40 deal with correction of mistakes and settlement of disputes. Under section 54, for revising maps and records, the Assistant Records Officer shall cause survey, map correction to be made after issue of notice to affected parties. Orders passed by Assistant Records Officer under section 54 (6) are final subject to appeal under section 210 and revision under section 219. Section 40(2) permits the Collector/Tehsildar to decide questions of possession and if he is unable to satisfy himself as to which party is in possession, he shall ascertain by summary inquiry who is the person best entitled to the property and shall put such person in possession. Section 40A, however, say that no order under sections 33, 35, 39, 40, 41 or 54 shall bar any suit in a competent court for relief on the basis of a right in a

holding. Section 57 of the Act also states that entries or decisions shall not affect the right of any person to claim and establish in the 'Civil Court' any interest in land which requires to be recorded in the registers prescribed under section 32. Therefore, discussion on question of title if given under the UP Land Revenue Act, 1901, would not put an end to litigation.

It was, therefore, suggested that suits on title could be filed under the UP Zamindari Abolition and Land Reforms Act, 1950 to prove title and that instead of allowing the matters to start under section 229 of that Act and go up in appeals, the parties might be directed to move the Commissioner directly by fresh suits/applications for proof of title and possession. In other words, the argument is that instead of submitting the parties to one series of litigation under the UP Land Revenue Act, 1901 and a second series of litigation of title under the UP Zamindari Abolition and Land Reforms Act, 1950, directions could be issued by this Court to have representative actions under order Rule 8 CPC on title and possession initiated before the Commissioner (rather than before the lowest authority) under the UP Zamindari Abolition and Land Reforms Act, 1950 as a Court of original jurisdiction so as to avoid delay in litigation from stage to stage. It is true that the disputes between the parties from Bihar side and the UP side are long standing and, several matters are already pending before the Assistant Records Officer under the UP Land Revenue Act, 1901. It is also true that they are all individual matters and not representative actions. No doubt the High Court has ordered consolidation.

The suggestion of counsel that fresh suits could be filed under the UP Zamindari Abolition and Land Reforms Act, 1950 on questions of title and possession, is worth consideration. But we do not, in our jurisdiction under Article 136 of the Constitution of India, propose to decide whether such a course of action under the 1950 Act would be preferable. The feasibility of the suggestion has to be decided upon a full hearing. We would, therefore, think that it would be more appropriate to leave this question to be decided by the High Court of Allahabad.

We, therefore, while affirming the judgment of the High Court, remit the matter to the High Court to find out the feasibility of representative actions being filed under the UP Zamindari Abolition and Land Reforms Act, 1950. If the High Court thinks it feasible to have the disputes decided under the 1950 Act, and at a higher level by the Commissioner or other officer, it will be open to the High Court to issue appropriate directions. If the High Court thinks that such a procedure is not feasible it will be for the High Court to so decide and leave the parties to choose their further remedies after the conclusion of the cases under the UP Land Revenue Act, 1901. The matter is remitted to the High Court on this limited aspect. The High Court will issue notice to the parties and decide this aspect as early as possible.

Subject to the above, the appeal fails and is dismissed but, in the circumstances, without costs,