Case Note: Case concerning the ownership of an inland sheet of water in a deserted riverbed and fishery rights therein. The Court ruled that once a river changes it's course, the old course of the river, if not part of the public domain, must be taken to become private property.

7Ind. Cas.140

IN THE HIGH COURT OF CALCUTTA

Decided On: 28.06.1910

Sarat Chandra Singh
v.
Chandra Mohan Bandopadhya and Ors.

JUDGMENT

1. The subject-matter of the litigation which has given rise to these appeals is an inland sheet of water known as Beel Sonadanga in the deserted bed of the river Bhagirathi. The plaintiff, who is the proprietor of Pergana Bagowan, claims the disputed property as situated within the ambit of his estate. His case is that in 1862 his predecessor-in-interest sued for recovery of possession of this property, but as it was found that the predecessors of the defendants had at that time a right of fishery therein, the suit was dismissed [Pertab Chunder v. Unoda Persaud (1863) Sevestre 754. He now asserts that since then the condition of things in the locality has changed and the beel has been completely isolated from the river so as no longer to form an adjunct or armlet thereof in any sense. Accordingly, he prays for a declaration that the defendants have lost the right of fishery found in their favour in the previous litigation, and that he is entitled to recover possession of the soil as well as the water, together with mesne profits. The defendants are proprietors of Jalkar Kasimpore in Pergana Ukra as also their patnidar and their izaradar under him. The claim has been resisted substantially by the patnidar, and his contention has been that the beel is part of his Jalkar Kasimpore, and that in any event, there has been no such change of the conditions of the locality since 1862 as to render inoperative the decree made in that year. It has further been pleaded in the alternative that if the condition of the locality has changed and the sheet of water has been isolated from the main channel of the river, such isolation took place more than 12 years before the commencement of the suit which is consequently barred by limitation. Upon these pleadings, several issues were raised, among which reference need be made only to three, namely, first, whether the disputed property is situated in the estate of the plaintiff known as Bagowan or within the estate of the defendants known as Ukra; secondly, if the disputed property is not part of Jalkar Kasimpore but is comprised within the estate of Bagowan, whether it has been completely isolated from the main channel of the river; and thirdly, whether the suit is barred by limitation. The learned Subordinate Judge had found upon the first of these issues, only partially in favour of the plaintiff. Upon the

second question he has found against the defendants and has held upon the evidence that the complete isolation of the beel from the channel of the river took place in 1898. In this view he has answered the third question in favour of the plaintiff. The result of his decision, therefore, has been to give the plaintiff a decree for possession of that portion of the beel which is found by the Commissioner to be comprised within his estate. Against this decree, both parties have appealed to this Court. On behalf of the plaintiff, it has been argued that the decision upon the question of the true boundaries of the plaintiff is erroneous, as it is founded upon the Revenue Survey Map of 1855-7, whereas it ought to have been rested upon the map of Major Rennell which was published about the year 1780, although the survey upon which it was based was made by Major Rennell and his coadjutors during the years 1764 to 1773. On behalf of the defendant, the decision of the Subordinate Judge has been assailed on three grounds, namely, first, that the Court below ought to have held upon the evidence that the condition of the locality has not materially altered since 1862 and that the previous decision is still operative between the parties secondly, that if the condition of the locality has changed, the alteration took place more than 12 years before the suit; and, thirdly, that the defendant is entitled to enjoy the right of fishery in the disputed sheet of water which he and his predecessors have exercised for many years past, independently of the question, whether or not the beel has been now completely isolated from the main channel of the river.

2. In so far as the appeal of the plaintiff is concerned, there is clearly no substance in it. His contention is that the rights of the parties ought to have been determined, not with reference to the survey map but on the basis of the map of Major Rennell. As has been pointed out, however, by the Commissioner, there are serious difficulties in connection with the reproduction of the map of Major Rennel and its comparison with the locality. In the first place, there is no permanent land mark within a convenient distance from the disputed locality which might furnish a satisfactory test to determine whether the reproduction is correct or not. In the second place, the exact locality in Calcutta, which was adopted by Major Rennell as his starting point, is not definitely known, and even a small error in the assumption, we make in this respect, may lead to a substantial difference in the result. In the third place, as has been repeatedly pointed out by this Court, the map of Major Rennell was not prepared for revenue purposes, and its chief object was to show the course of rivers and the different routes passing through the country. There is further nothing to show that when the decennial settlement was made in 1789 which was made perpetual in 1793, the survey made by Major Rennell and his associates was adopted as the basis of the settlement. In fact, no evidence is available to show that the condition of the locality might not have changed considerably between 1764-73 when the survey was made, and 1789, when the decennial settlement took place. In the fourth place, the land marked Bugghea on the map of Major Rennell, which is alleged by the plaintiff to correspond to his permanently settled estate, Perganah Bagowan, has no ascertainable boundaries Under these circumstances, we are unable to uphold the contention of the appellant that the map of Major Rennell ought to be accepted as the basis for the determination of boundaries of the estate of the plaintiff. If we were to do so, we would have to use the map for a purpose for which it was never intended to he used: it would not be right to accept as a basis for the determination of the boundaries of permanently settled estates, a survey which had been made 25 years before

for the purpose of showing mainly the courses of river and land routes throughout the country. [Markham on Indian Surveys, published by the order of the Secretary of State in 1878, page 398: Kally Kissen Tagore v. The Secretary of State R.A. No. 105 of 1896. (decided by Ameer Ali and Pratt, JJ. on the 21st June 18.98), Watson v. Sree Sunderi R.A. No. 52 of 1899; (decided by Maclean, C.J., and Banerji, J. on the 30th May 1901); The. Administrator General v. The Secretary of State R.A. No. 335 of 1901, (decided by Brett and Woodrooffe, JJ. on the 9th June 1904]. The proceedings in the Court below, therefore, cannot be successfully challenged. The Commissioner as well as the learned Subordinate Judge have done the best they could with the map of Major Rennell, which has been rightly used to determine the course of the river Bhagirathi before the time of the Permanent Settlement. But the boundaries of the estate of the plaintiff have been determined with reference to the survey map which is practically the only material available for the purpose. No doubt, as observed by their Lordships of the Judicial Committee in Jagadindra Nath Roy v. Secretary of State 30 C. 291 : 5 Bom. L.R. 7 : 7 C.W.N. 193 : 30 I.A. 44, it cannot be presumed as a matter of law that the boundaries of an estate as shewn on the thak or the survey map are identical with the boundaries as they stood at the time of the Permanent Settlement; but it is open to the Court to presume, in the circumstances of a particular case, that the condition of the locality has not changed materially between the date of the Permanent Settlement and the time of the Revenue Survey, [See also Ananda Hari v. Secretary of State 3 C.L.J. 316 and Hemanta Kumari v. Secretary of State 3 C.L.J. 560 : 1 M.L.T. 175]. In fact, in the present case if such presumption was not made, the plaintiff would find it impossible to establish that the disputed property or any portion thereof is situated within the ambit of his permanently settled estate. We must consequently overrule the objection taken by the plaintiff in his appeal.

3. In so far as the appeal of the defendant is concerned, it is in our opinion equally unable. The first ground urged on behalf of the defendant is that the decision in the litigation of 1862 operates as res judicata and that the condition of the locality has not altered since then so as to make that decision inapplicable. It may be conceded that the decision in the suit of 1862 is conclusive upon the question of the then condition of the locality, namely, that the disputed sheet of water was connected at that time with the channel of the flowing river Bhagirathi; but the question of the condition of the disputed property at the time of the commencement of the suit, that is, on the 2nd February 1905, has to be determined upon the evidence. The report of the Commissioner who made the local investigation and the oral evidence of the plaintiff are conclusive upon the point. It has been proved beyond the possibility of dispute that whereas at the date of the previous suit boats used to pass up and down for the greater part of the year over the channel which then connected the flowing river with the disputed property and the water was considered as holy as Ganges water by the people of the neighborhood, at the time when this suit was commenced, to communication remained between the flowing river and the disputed property, and the consequence of this isolation was that the water had lost all sanctity in the estimation of the people of the locality. The evidence adduced on both sides makes it reasonably plain that it is during the high floods only that boat traffic becomes possible and this condition continues only during the exceptional periods when the river practically inundates the surrounding country. In so far, therefore, as the first

ground urged in the appeal of the defendant is concerned, it cannot be sustained, and the disputed sheet of water has been rightly treated by the Court below as completely isolated from the flowing river.

4. In so far as the second ground is concerned, it raises the question of the precise point of time when this isolation took place. It appears from the report and map of the Commissioner that within a few years previous to the institution of the suit, there were three channels of communication between the disputed sheet of water and the river. About 12 or 13 years before the suit, two of these channels which united at a short distance from the river, silted up, and the eastern channel alone was left the sole means of communication between the disputed sheet of water and the river; and the latter also silted up about 1898. There is evidence to show that in the latter year the Magistrate had to take steps to forbid the discharge of water from the beel into the river by means of an opening made between them. In spite of this, there was a similar attempt in 1905 when a number of cultivators applied to the Government for permission to open a passage for the discharge of water from the beel into the river. In the face of this evidence, it is impossible to hold that the complete isolation of the disputed sheet of water from the river took place at any time antecedent to 1898. As the suit has been commenced within 12 years from that date, no question of limitation obviously arises. The second ground urged by the defendant cannot be sustained.

5. In so far as the third point taken on behalf of the defendant is concerned, it is manifestly opposed to principle as well as authority. The argument of the defendant in substance is that as he and his predecessors have exercised right of fishery over the disputed sheet of water which at one time formed part of the channel of flowing river Bhagirathi, he has retained that right even though the river has changed its course and the sheet of water has been completely isolated there from. This position cannot possibly be maintained. It was ruled so far back as 1864 by Mr. Justice Norman in the case of Gray v. Anund Mohuu (1804) W.R. 108, that if a river leaving its natural channel goes in another course, the former belongs to them who are the owners of the soil; in other words, if a river changes its course the old course of the river, if not part of the public domain, must be taken to become private property, and as part of the same, the owner of the soil is entitled to all beels in which water remains but which do not communicate with the river except in times of floods. The learned Judge supported this view by reference to a passage from the Institutes of Justinian (Bk. II. Text. I, Section 23), and observed that it had been recognised so far back as 1808 by the Bengal Sudder Court in the case or Gopianath v. Ram Chunder 1 Macn. Select Report 304 : (New Edition) 228, Sevestre 467. The principle is clearly enunciated in the following passage from Upland, which is quoted in the Digest, 43, 12-17, and is translated in Ware on Roman Water Law, Section 22: "In like manner, if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in the public river, as the bed belongs to the neighbours on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly, the bed ceases to be public. Also the new channel which the river has made, although it was private, begins nevertheless to be public, because it is impossible that the channel of public river should not be public." The same view has been repeatedly confirmed as beyond reasonable dispute, in the cases of

Nubkishen v. Uchchootanund (1856) Beng. S.D.A.R. 878 : Sevestre 465, Hurreehur v. Chundeechurn (1858) Beng. S.D.A.R. 641; Rama Nath v. Ishan (1863) Sevestre 463; Hem Chandra v. Jagadindra 9 C.W.N. 934 and Ishan Chandra v. Upendra Nath 12 C.W.N. 559. It will be observed that the proposition, which we are invited to affirm in answer to the intention of the defendant, does not require us to hold that the right of fishery in a navigable river is not affected by reason of a change in the course of the river, though that proposition also has been maintained in a long series of decisions, sometimes not without considerable doubt and reluctance [Ishur Chund v. Ram Chund (1807) 1 Macn. Select Rep. 295 : 221 (New Edition); Kalee Soondur v. Dwarka Nath 18 W.R. 460; Krishnendro Chowdhry v. Surnomoyee 21 W.R. 27; Tarini Churn v. Watson 17 C. 963; Jogendra Narayan v. Crawford 32 C. 1141 : 2 C.L.J. 569 Hem Chandra v. Jagadindra 9 C.W.N. 934; Ayub Ali v. Day a Bibi 12 C.W.N. 105]; the contrary view was apparently taken in the case of Sibessury Dabec v. Lukhy Dabee 1 W.R. 88, which accords with the decision in Mayor of Carlisle v. Graham (1869) L.R. 4 Ex. 361 : 38 L.J. Ex. 226 : 21 L.T. 133 : 18 W.R. 318, and the doctrine was held inapplicable to cases of gradual and imperceptible change in the course of a non-tidal and non-navigable river in Narendra Chandra v. Suresh Chandra 10 C.W.N. 540 : 4 C.L.J. 51. The two propositions namely, first, that when a tidal and navigable river shifts its course, the fishery rights continue to subsist in the river in its new course, and secondly, that the old dried up bed of the river, if not originally part of the public domain, becomes private property so as to entitle the owner of the soil to all beels left therein completely isolated from the new course of river, are closely related to and complements of each other, but it is not necessary for our present purpose to affirm the former, because the second, if maintained, is sufficient to entitle the plaintiff to a decree. In so far as the first of these propositions is concerned, it may be conceded that there is ample room for divergence of judicial opinion, as is clear from the cases of Mayor of Carlisle v. Graham (1869) L.R. 4 Ex. 361 : 38 L.J. Ex. 226 : 21 L.T. 133 : 18 W.R. 318; Miller v. Little (1878-79) L.R. 2 Ir. 304 : 4 L.R. Ir. 302 [which tend to show that the rule trenches upon one of the universally recognized incidents of territorial proprietorship, namely, that the right of fishery is an inseparable incident of the right to the soil] and St. Louis v. Rutz (1891) 138 U.S. 226 : 34 Law Ed. 911 [which tends to support the view maintained in this Court]; (see also Doss on Riparian Rights, 374, where a weighty destructive criticism is directed against the Rule, and Moore on Fisheries, Chapter XXI, where upon a review of the authorities the rule is restricted to cases of gradual and imperceptible change in the course of a river). But whatever controversy there may be as to the reasonableness of the first proposition, there is no intelligible reason why the second should not be maintained, for even if it be conceded that the effect of a change in the course of a tidal and navigable river is to entitle the owner of a fishery right therein to exercise his right in the new channel to the detriment of the private owner whose property has been submerged, there is no conceivable ground why when the river has again changed its bed, such private owner should not have exclusive enjoyment of what has always remained his property. [Lopez v. Muddun Mohun Thakoor 13 M.I.A. 467 : 5 B.L.R. 521 : 14 W.R. (P.C.) 11 and Secretary of State v. Krishnamoni Gupta 29 C. 518 : 6 C.W.N. 617 : 4 Bom. L.R. 537 : 29 I.A. 104]; and this view is supported by the principle that right of fishery is identified with the soil [O'Neill v. M'Erlaine (1863) 16 Ir. Ch. R. 280]. In fact as the right of fishery ought, in ordinary course, to follow the title to the soil, [Forbes v. Meer Mahomed

Hossein 12 B.L.R. 210 : 20 W.R. 44; Murphy v. Ryan (1868) I.R. 2 Ch. 68 at p. 143 : 16 W.R. 678; Neill v. Devonshire (1882) 8 App. Cas. 135 : 31 W.R. 622],it is difficult to appreciate how a stranger can claim a right of fishery in an inland sheet of water, the bed whereof is in private ownership. Whatever criticism, therefore, may be directed against the first of the two propositions above stated, it is clear that the second is well-founded on principle, and as it is amply supported by a long course of authorities, it cannot be successfully challenged. In any event, if there is any case in which the doctrine of stare decisis should beapplied, it is this, for as Lord Cranworth observed in Young v. Robertson (1862) 4 Mac. H.L. 314 at p. 345, the Courts must be very guarded against shaking the validity of long established decided cases, as otherwise the security of property and titles to land might be endangered. The third ground urged on behalf of the defendant must, therefore, be overruled.

6. There is, however, one minor point upon which the decree of the Court below requires modification. The learned Subordinate Judge has decreed to the plaintiff exclusive possession of a portion of the beel and has granted him joint possession of the remaining portion which is situated partly within the estate of the plaintiff and partly within that of the defendant. This, in oar opinion, is likely to lead to practical inconvenience, and may prove a fruitful source of dispute, when the right of fishery is exercised. It is desirable, as regards the portion of the beel which lies within the properties of both the parties that it should be divided and the boundary between the two estates demarcated. This may easily be done by the appointment of a Commissioner, as the boundary line between the two estates has been depicted on the case map. We accordingly direct that this be done by the Court below in execution of the decree and possession be delivered to the parties, of the separated portions. Subject to this variation, the decree of the Subordinate Judge must be affirmed, and as both the appeals have failed, there will be no order for costs.