Case Note: Case concerning the right of the government to assess islands formed in a river which falls entirely within a settled estate for revenue. The court held that the islands could not be assessed for revenues as the river in question was non-navigable and hence the sub-soil could be said to belong to the riparian owner by virtue of the land abutting to the stream.

46Ind. Cas.305

IN THE HIGH COURT OF CALCUTTA

Decided On: 24.05.1918

The Maharaja of Burdwan
v.
The Secretary of State for India in Council

AND

The Secretary of State for India in Council
v.
The Maharaja of Burdwan

AND

Raj Narain
v.
The Secretary of State for India in Council

Hon'ble Judges:
Fletcher and Syed Shamsul Huda, JJ.

JUDGMENT

Fletcher, J.

1. The question involved in these appeals is whether the plaintiff, the Maharaja of Burdwan, is entitled to the Churs that form in the rivers Damodar and Darakeswar without liability of further assessment of Government revenue. The appeals which are preferred by the Secretary of State for India in Council have reference to the portion of the river which lies wholly within the limits of the permanently settled estate of the plaintiff on which the learned Judge in the Court below held that the Government were not entitled to assess further Government revenue. The appeals by the plaintiff refer to the portion of the river of which the plaintiff is the proprietor of the riparian Mouzas on one side of the river only. The learned Judge held with regard to these that by the rule of

"middle thread" the soil in one half of the river was vested in the plaintiff but that he was liable to assessment to further Government revenue in respect of Churs forming in the river. One of the main questions that has been raised in these appeals is whether the river Damodar was a navigable river at the time of the Permanent Settlement. The learned Subordinate Judge found that the Damodar was not navigable at the time of the Permanent Settlement.

2. Now the evidence relied on by the learned Judge on this question is the answers to certain interrogatories in the Appendix to the 5th Report of the Select Committee of the House of Commons on the affairs of the East India Company.

3. The answers of the Judge and Magistrate of Zillah Burdwan are dated the 9th of March 1802--a portion of answer No. 17 is in the following terms: "The commerce has been both much facilitated and extended by the opening of the three grand roads leading to Hooghly, Kalna and Kutwa, which have lately been put into a good state of repair by the labour of the convicts and nothing can more forward the commerce of this district which has not the advantage of inland navigation or more conduce to the general convenience of the inhabitants than good roads."

4. The last sentence of answer No. 29 may also be referred to. The condition of the Damodar as it was in 1876 may be gathered from Hunter's Statistical Account of Bengal, volume IV, page 209, where the author remarks: "In the hot season the river dwindles away into an insignificant stream fordable nearly everywhere and in many places not a foot deep. The only traffic carried on in the rainy season is the transport of coals from Raneegunje to Calcutta."

5. Now in this country the test as to whether a river is navigable is whether it allows of the passage of boats at all times of the year [Chunder Jaleah v. Ram Churn Mookerjee 15 W.R. 212 at p. 214.]

6. In that view the evidence appears to me to show quite clearly that the Damodar was not navigable from 1802 onwards, but then it was argued that the evidence did not show that the river was not navigable at the time of the Permanent Settlement. The answers of the Magistrate and Judge of Burdwan to the interrogatories in the Appendix to the 5th Report of the Select Committee on the affairs of the East India Company do not suggest that in the year 1802 there had been a recent change so that the district had been of recent years deprive of inland navigation. The statement that owing to the construction and improvements of roads, the commerce of the district could be sent to the ports of Hooghly Kutwa and Kalna suggests that before such construction and improvement there was no port at which goods could be shipped. The Secretary of State, however, principally relied on the map of inland navigation taken from Raynell's Memoir, which the learned Judge in the Court below held was not proved. This map, however, appears in Reynell's Atlas published by the authority of the East India Company. No doubt the map shows the Damodar navigable to a point opposite to the Company's Factory at Bardwan. It is, however, to be noted that, as appears from an Article by Major Hirst of the Survey of India with reference to Reynell's Surveys that the surveys took place between the years

1764 and 1777. All these surveys were not made by Major Reynell personally and apparently the survey of Burdwan was not so made at what date the survey of the Damodar was made it is impossible to see on the evidence, but probably having regard to its proximity to Calcutta it was one of the earlier surveys.

7. I think having regard to the answers to interrogatories by the Magistrate and Judge of Burdwan in the Appendix to the 5th Report we ought to agree with the learned Judge that at the date of the Permanent Settlement the river Damodar was not a navigable river.

8. If that be so, what then was settled with the predecessor of the plaintiff.

9. For that purpose it is necessary to state shortly the history of the plaintiff's family and what their position with reference to their estate was down to the time of the Permanent Settlement.

10. As observed by Sir William Hunger in the introduction to "Bengal M.S. Records", page 31: "The 1st class of Bengal Zemindars represented the old Hindu and Mahomedan Rajas of the country previous to the Moghul conquest by the Emperor Akbar in 1576 or persons who claim that status. The 2nd class were Rajas or great landholders most of whom dated from the 17th and 18th centuries and some of whom were either the 1st class de facto rulers in their own estates or territories subject to a tribute or land tax to the representative of the Emperor. These two classes had a social position faintly resembling the feudatory chiefs of the British Indian Empire but that position was enjoyed by them on the basis of custom, not of treaties"

11. Again at page 33 the author states Before the Permanent Settlement it was possible to name 12 traditional Bhuyars or original Zemindars of Bengal who held a hereditary status in their respective territories. There were also half subdued chiefs, sometime of ancestral standing who had not been brought under the administrative system of the Moghul Government in Bengal, such as the Rajas of Tipperah, Cooch Behar and Assam. There were others too powerful to be controlled and who had either been exempted from full subjection like the frontier Rajas of Birbhum, and Bishnupur or who had won for themselves a partial and intermittent exemption by armed resistance like the Raja of Burdwan in the heart of the province and many smaller Zemindars in the outline and frontier Districts. Such Zamindars held princely Courts, maintained their own bodies of armed followers, dispensed justice in these territories or estates and handed down their position from father to son. But all of them paid a tribute or land tax to the Mahomedan Government at Murshidabad and as a rule in cases of death the heir deemed it prudent to obtain from that Government an official acknowledgment of his succession. Such Zamindars had clearly a title to their estates differing from that of mere revenue agent of the ruling power." Now the 1st ferman to the predecessor of the plaintiff is dated in the year 1689 and was granted by the Emperor Alamgir. The office granted by this ferman was that of "Zemindar and Chowdhury of the Pergana." The next ferman was not produced but is mentioned both in Hunter's Statistical Account and District Gazetteer. The 3rd ferman was granted by the Emperor Mahomed Shah to Chitra Sen in 1740 ss. appears from the 5th Report. In the time of Emperor Akbar the Moghul Empire was

divided into provinces. The provinces were divided into Circar and the Circars into Perganas. The province of Bengal consisted of 19 Circars and 682 Perganas. Circars 13, 14 and 5 represent the Zemindari of the plaintiff's ancestor [see Appendix, 5th Report, 17]

12. In the year 1(sic)24 Mir Jafar, the Viceroy of Bengal, altered the 19 Circars into 13 Chaklas and sub divided the 13 Chaklas into 1,660 Perganas. The fourth Chakla was Burdwan (see page 189 of Appendix).

13. In the year 1728 there was a further territorial subdivision by Suja Khan then Nawab of Bengal, under which Bengal was divided into 25 Zamindaris, one of the Zamindaris being Burdwan, but at this re-arrangement Bishnupur and Pachete were separated from Burdwan.

14. It appears, however, that the Zemindari of Burdwan from 1722 was called the Chakla of Burdwan and it is so referred to in the Appendix to the 5th Report, page 410.

15. The evidence shows quite clearly that prior to 1760 the Zemindari or Chakla of Burdwan was settled with the plaintiff's ancestors not by Perganas but as a whole. The suggest on that plaintiff's ancestors were mere collectors of the revenue of a group of Perganas on behalf of the ruling power is not supported by the evidence. The Appendix to the 5th Report shows that the plaintiff's ancestors maintained a considerable army and exercised other rights similar to those of a Sovereign power. In these circumstances it is not all probable that the bed of a non-navigable river, so far as it was wholly included in and flowed through the Zemindari or Chakla, was excluded from the grant to the plaintiff's ancestors. It is highly improbable that the ruling power at the time of the grant to the ancestors of the plaintiff reserved the beds of non navigable rivers to themselves. In these circumstances, I think, the learned Judge was warranted in coming to the conclusion that the river Damodar with its bed as described in the Schedule Ka to the plaint in what is called the Bardwan suit was included within the limits of the Zemindari or Chakla of Burdwan. We next come to the treaty of 1760 under the terms of which Burdwar, Midnapore and Chittagong were ceded to the East India Company. But as appears from the sanad of the 1st of Kartick 1176 B.S. the cession was made subject to the rights of the Zemindars. The treaties of 1763 and 1765 merely confirmed the grant made to the East India Company in 1760.

16. It is quite clear that the cession to the East India Company did not affect the rights of the plaintiff's predecessors, their rights being expressly reserved by the sanad executed to give effect to the treaty which was accepted by the East India Company.

17. In 1762 the East India Company farmed out the revenues of Burdwan by public auction for 3 years. It is said that this put an end to the rights of the plaintiff's predecessors. But that obviously was not so, for as appears from the 5th Report "a scrupulous regard seems to have been paid to his (the then Maharaja's) chartered rights of Muscoorab and Nankar, etc."

18. Other temporary settlements were also subsequently made with other farmers.

19. It appears, however, that a system of farming out the revenues was not successful.

20. From 1776 down to the Decennial Settlement settlement was made with the plaintiff's predecessors. The settlements were annual but renewed at the end of each year.

21. The only provision in the kabuliyats for this period that need be mentioned is one authorising the Government to sell a proportionate part of "your Zemindari" in case of default in payment of the revenue. Under this provision portions of the Zemindari were sold, viz, the Perganas Chitra and Mandalghat Then we come to the kabuliyat of the 21st of Sraban 1195 which formed the basis of the Permanent Settlement. By this kabuliyat the then Muharaja of Bardwan took settlement of the "said Chakla."

22. Now what was the "said Chakla," I think it is quite clear that the said Chakla is the Chakla that the Maharaja's predecessors had held from the Moghul Emperors, except of course the portions that had been sold away by the Government for the arrears of the revenue under the authority granted to them in the former kabuliyats. In my opinion the evidence establishes that at the time of the Permanent Settlement the bed of the river Damodar, in so far as it flowed through the Chakla or Zemindari of Bardwan, formed a portion of the estates permanently settled with the plaintiff's predecessors.

23. There is, moreover, a large body of evidence that goes to confirm this view.

24. First there are the water duties. During the time of Mughal Emperors the plaintiff's predecessors levied duties on goods passing by land or by water through their Zemindari. These duties were levied on goods passing in boats along the Damodar during the rainy season.

25. About 1772 the Government decided to abolish these duties. The farmers who had temporary settlements and the Zemindars obtained reductions of the assessment of Government revenue in respect of such abolition.

26. This is well shown by the Dowl Bundobast for the years 1198 to 1206.

27. The next matter that goes to show the plaintiff's proprietary interest in the river is the fact that all the ferries from Terat to Amta belong to the plaintiff or his patnidars. Not only do they so belong but the plaintiff and his patnidars are under an obligation to keep up these ferries, as appears from a series of kabuliyats executed by the plaintiff's patnidars.

28. That the revenue derived from these ferries entered into the calculation on the basis of which the Government revenue was settled, appears from the fact that in the years 1848 and 1849, when two of these ferries were resumed and declared public ferries, a reduction was made in the amount of the land revenue payable in respect of the estate.

29. Regulation XIX of 1816, Section 9, provides only for compensation being paid not for a reduction of the land revenue.

30. The next point is that the plaintiff has an exclusive right of fishery in the river.

31. In the year 1860, when the Government proposed to resume the right of fishery, the tenants filed petitions opposing the proposed resumption alleging that the river was included in the Decennial Settlement of the Zemindar. The Government withdrew its claim.

32. Now although an exclusive right of fishery does not of itself pass the right to the soil in the bed of the river, still when the terms of a grant are unknown or uncertain it is a matter of importance that the plaintiff has the exclusive right of fishery in the river the bed of which he claims.

34. Further from the year 1842 a large number of Churs which formed in the river have been taken possession of by the plaintiff or his patnidars without objection by the Government and no attempt was made to resume these Churs till 1907.

35. As against this the Government rely on the fact that the plaintiff's predecessors took settlement of certain Churs that were resumed by the Government. But the Government never claimed the bed of the river. Their claim was that as the Chura had formed since the date of the Decennial Settlement the Government were entitled to resume them. This is the main argument also in the present case. A fact much relied on was that the Maharaja had accepted settlement of a few Churs in the Damodar, the last resumption of the Damodar being in the year 1842. The answer to that, however, appears to be that until the judgment of the Privy Council in the case of Lopez v. Muddun Mohun Thaloor 13 M.I.A. 467 at p. 473 : 14 W.R.P.C. 11 : 5 B.L.R. 21 : 2 Suth. P.C.J. 336 : 2 Sar. P.C.J. 594 : 20 E.R. 625, it seems to have been assumed that Churs forming in non-navigable rivers flowing through permanently settled estates were liable to resumption.

36. It is said also that the plaintiff has quite recently taken a settlement of one Chur though not in the Damodar. But this was merely re-settlement of a Chur resumed in 1844. Obviously after that length of time the plaintiff could not set up the case that the Chur had been improperly resumed.

37. A further point was raised against the plaintiff's title, namely, that he has ceased to be the owner of all the riparian Mouzas.

38. The evidence shows that the sales that have taken place were all involuntary sales and none of the independent Talukdars have exercised or claimed to exercise any right in or over a river. In these circumstances many rights that such independent Talukdars might have had are long since barred. The learned Judge was much impressed by the fact that at the time of the Thak Survey the river was measured a separate circuit. I do not think that much force can be placed on this argument either for or against the plaintiff's case. I agree with the conclusion of the learned Judge that the bed of the river Damodar, in so far

as it flowed through the Chakla or Zemindari of Burdwan, was a portion of the property permanently settled with the plaintiff's predecessors. The main argument on behalf of the Government is that Churs that form in the river Damodar are resumable under the provisions of the Bengal Alluvion and Diluvion Regulation of 1825 (Regulation XI of 1825) and that is so even if the river is non-navigable and formed part of the permanently settled estate. That argument, however, is, I think, altogether opposed to the decision of the Privy Council in the case of Secretary of State v. Fahamidannissa Begum 17 C. 690 at pp. 597, 599 : 17 I.A. 40 : 5 Sar. P.C.J. 391 : 8 Ind. Dec. (N.S.) 933 (P.C.). Before there can be a further assessment of Government revenue there must be a "gain" from the public domain. The mere fact that a portion of the permanently settled estate has become more valuable is no ground for altering the assessment. The fact that no amount or only a small amount in respect of a particular piece of property entered into the calculation on the basis of which the Government revenue was permanently settled and that the property has become of much greater value, is no ground for disturbing the Permanent Settlement of the estate [see Kandukari Balasurya Prasudha Row v. Secretary of State 41 Ind. Cas. 98 : 44 I.A. 166 at p. 185 : 40 M. 886 at p. 907 : 33 M.L.J. 144 : 22 M.L.T. 76 : 15 A.L.J. 697 : 21 C.W.N. 1089 : (1917) M.W.N. 536 19 Bom. L.R. 751 : 6 L.W. 340 : 2 P.L.W. 260 : 26 C.L.J. 290 (P.C.).]

39. I think the Secretary of State's appeal with regard to the portion of the river mentioned in the schedule Ka to the plaint in the Burdwan suit should be dismissed.

40. The same order is made in the appeal of the Secretary of State No. 82 of 1914, which arises out of what is known as the Bankura suit.

41. I next come to the appeal of the plaintiff with regard to the lands in Kha in the schedule to the plaint to the Burdwan suit. The plaintiff claims half of the bed of the river that adjoins his riparian Mouzas and that Churs forming in that portion of the bed of the river are not liable to further assessment of Government revenue. The learned Subordinate Judge declared the plaintiff's right to the soil but held that Churs forming in those portions of the river were liable to assessment of Government revenue.

42. Dealing first with the question of the ownership of half of the soil in the bed of the non-navigable river, I think the conclusion arrived at was correct. In the case of Bhageeruttee Dabea v. Greesh Chunder Chowdhry 2 Hay 541, Norman, J., in delivering the judgment of the Court after citing the case of Raja Nilmoney Chunder Singh v. Raja Teknarain Singh Cal. S.D.A. Ref. 1862 p. 166 observed: "By the Common Law of this country the right to the soil of a river, when flowing within the estates of different proprietors belongs to the riparian owners ad medium filum aquæ."

43. Further in the case of Kali Kissen Tagore v. Jodoo Lal Mullick 6 I.A. 190 : 5 C.L.R. 97 : 4 Sar P.C.J. 6I; 3 Suth. P.C.J. 656; Bald 286, the Privy Council observed: "It appears that the plaintiff at all events has not all the rights of a riparian proprietor or he would have been entitled to the bed of the river ad medium filum."

44. Then as regards the right of the Crown to assess further revenue on Churs forming on these portions of the river, I am unable to agree with the conclusion of the learned Judge. In this respect I would refer to two decisions, one being the case of Land Tax Commissioners v. Central London Railway Company (1913) A.C. 364 at pp. 371, 373 and 378 : 82 L.J. Ch. 274 : 108 L.T. 690 : 77 J.P. 289 : 11 L.G.R. 693 : 57 S.J. 403 : 29 T.L.R. 395 and the other being the case of Attorney-General for British Columbia v. Attorney-General for Canada (1914) A.C. 153 at p. 158 : 83 L.J.P.C. 169 : 110 L.T.484 : 30 T.L.R. 144.

45. The effect of these decisions is that where property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or river as the case may be. This principle is too well recognised in our law to be now departed from. If that be so, then the permanently settled estate of the Maharaja included half of the bed of the river we are now considering and the assessment of the Government revenue on the estate was imposed on it just as much as any other portion of the estate. I am unable to distinguish the present case from the decision of the House of Lords above referred to. If the assessment of land tax on a house in the City of London included therein the assessment of one half of the street, I think it follows that the assessment of the Government revenue on the riparian Mouzas in question was imposed not only on the Mouzas but on the adjoining half of the bed of the river.

46. I think we ought to allow the plaintiff's appeal and declare that in respect of the portions of the river in question the Government are not entitled to assess further Government revenue on Churs forming therein The Appeal No. 61 of 1914 raises exactly the same point except that as regards a Chur, Pursha, the learned Judge found that the defendant No. 17 in that suit was entitled thereto. The plaintiff has not pressed the appeal as against the defendant No. 17 and that portion of the appeal will be dismissed. As regards the rest of the appeal the same must be decreed.

47. As regards the Appeal No. 375 of 1914 which is called the Khatnagar appeal: This appeal relates to Churs formed in the bed of the river Darkeswar within the limits of the plaintiff's Mouza Khatnagar--the question raised is exactly the same as that raised in the Burdwan appeal as to the portion of the river Ka in the schedule to the plaint except that it is admitted that the Darkeswar was and is a non-navigable river. For the reason given for dismissing the Secretary of State's appeal with regard to the Burdwan Ka lands, I think this appeal ought to be dismissed Lastly, 1 come to the Second Appeal No. 3180 of 1(sic). This is an appeal by the Guru of the Maharaja of Burdwan against the decision of the District Judge of Bankura reversing the decision of the Subordinate Judge of the same place. The question raised in this appeal is the same as that raised in the Burdwan suit with reference to the property in the schedule Ka. Now the learned Judge in the lower Appellate Court has found that the Damodar is a non-navigable river and that the bed belongs to the plaintiff. He has, however, held that the Government are entitled to assess Government revenue in respect of the Churs formed since the Decennial Settlement. The reasons for which the learned Judge has done so are two fold, first, he holds that as no calculation was made in respect of the bed of the river at the time of the Decennial Settlement when Churs are formed, they are lands gained from the public domain and

secondly, that Regulation II of 1819 gives the Government the right to assess all Churs formed since the period of the Decennial Settlement.

48. For the reasons mentioned above I am unable to agree in the conclusion of the learned District Judge. The present appeal must be allowed.

49. In the result the appeals by the Secretary of State for India in Council must be dismissed with costs to the Maharaja of Burdwan only. The appeals of the plaintiff (except as regards Chur Pursha with which only defendant No 17 in the Bankura suit is concerned) will be allowed with costs. Second Appeal No. 3180 of 1913 will be allowed and the judgment and decree of the District Judge set aside and the judgment of the Subordinate Judge restored with costs both in this and lower Courts. We assess the hearing fee in Appeal No. 375 at one gold mohur.

Shamsul Huda, J.

50. I agree.