

Case Note: Case concerning existence of exclusive fishing rights in a stream that has become connected to the main river, in which such exclusive fishing rights exist, by an artificial channel. The Court ruled that the stream in question was not navigable and as under Indian law in non-navigable stream rest with the riparian owner and not with the Crown, no exclusive fishing rights could be said to exist.

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AIR1935Cal399

IN THE HIGH COURT OF CALCUTTA

Decided On: 27.11.1934

Zerman Gomez

v.

Mahima Chandra Kaibarta and Ors.

JUDGMENT

Mitter, J.

1. The plaintiff, who is the appellant before me, instituted the suit for a declaration that he has 11 as 11 gds. odd share in a jalkar called the, Sutberia done, for possession and damages; in the alternative for rent. The case made by him in the plaint is that he and his co-sharers, the pro forma defendants, have a jalkar mehal recorded as touzi No. 1427 of the Bakarganj Collectorate. The jalkar is called Bishandi and comprises the rivers and dones that fall within the boundaries stated in the plaint and that Satberia done is a part of the said jalkar. He claims an exclusive right to fish therein with his co-sharers by triangular nets. In the evidence it was stated that Satberia done is a part of the river system in which he and his co-sharers have a right of fishery, being a done that connects the Golapdi River, the Golapdi done and the Lohalia river which are shown to be big rivers in the settlement map. He does not claim the soil of the said done and his first witness admits that the done in suit was a shallow one with no current till the District Board excavated a khal 7 or 8 years before suit, called the Gajalia Bharani Khal, and the plaintiff had never attempted to fish there before the District Board made the khal. The defendants, who admit fishing in the done in suit, claim the right to fish there on the basis of settlements taken from the riparian proprietors (not made parties) through whose estates the done flows. They do not deny that the plaintiff and the pro forma defendants have a several fishery named Bishandi, but maintain that the done is not a part of the same and is moreover not navigable.

2. The plaintiff to support his claim relied principally upon Exs. 2, 3 and 4. Ex. 4 which is an order of the Khas Mahal Deputy Collector states that proprietors of touzi No. 1427 have the right to catch fish in all the rivers comprised in the said Mahal and directs a clause to be inserted in the kabuliat of the ijaradar of the Government Khas Mehal Jalkar

forbidding him to fish in those rivers. No particulars of the rivers included in touzi No. 1427 are mentioned in this order. Exs. 2 and 3 are copies of the D Registers in respect of touzi No. 1427. In Ex. 3 fourteen rivers and clones are mentioned. Satberia is not there, but the Lohalia river and possibly Golapdi river are mentioned therein (The word in Ex. 3 seems to be Golapi done, but I take it that the word is a contraction for Golapdi). In the body of Ex. 2 which vis a part of Ex. 3 there is a statement that the owners of touzi No. 1427 (Bishandi Jalkar Mehal) have a right to fish by triangular nets in 14 dones which flow through parts of certain thanas mentioned there. In the foot-note however an order of the Collector is mentioned by which the word "fourteen" was expunged.

3. The plaintiff in the Courts below urged only one point, namely that Sutberia done is a part of the river system of his fishery, apparently on the ground that the current of his river Golapdi passes through it and falls into river Lohalia; but before me one other point is urged, namely that he has a several fishery in all streams which fall within the places mentioned in Ex. 2, which as the first Court points out would include the whole of Patna khali Subdivision and parts of Ferozpur and Sudder Subdivisions of the District. Both Courts have found that the done is not navigable, a few years back was part of a "blind stream," and that it was only when the District Board excavated a Khal called the Gajalia Bharani about seven or eight years before suit, that regular current began to flow through it. On these findings the plaintiff's suit has been dismissed, both Courts holding that the done cannot be regarded as included in the river system in which the plaintiff has his fishery rights. The first Court remarked that the plaintiff had his fishery in the fourteen rivers mentioned in Ex. 3 (which does mention the Sutberia done), but the lower appellate Court did not place much reliance upon this fact. I have pointed out that the words "fourteen rivers" which were originally in Ex. 2 were later on struck out by the Collector's order and I would assume that the plaintiff's jalkar rights are not limited to fourteen rivers but to all rivers within the places specified in Ex. 2, in which he could in law have a several fishery. In my judgment the fact that the done is not navigable and that it has become connected with the flowing rivers not by natural causes but by the act of the District, Board puts an end to the plaintiff's claim. I would first consider the plaintiff's first contention for the first time advanced here, namely, that the plaintiff has a several fishery in all the rivers falling within the boundaries of his grant as evidenced by Ex. 2. I do not see how he can have any such right in rivers and streams or dones which are not navigable. It is well settled that in India the right of fishing in nonnavigable rivers is not in the Crown, but is in riparian proprietors. When such a river passes entirely through the estate of one he has the right of fishing and when it passes in between two estates the proprietors thereof have the right to the soil according to the principle of *usque ad medium filum aquae* and the equal right of fishing in the portions of the river adjacent to their lands: *Raja Neelanund v. Raja Tek Narain* (1862) Oal SDA Rep 160, *Sreemantu Bagdi v. Nirantar Jelja* (1913) 19 IC 893 and *Khagendra Narain v. Matangini Debi* (1890) 17 Cal 814. The Government has the right to the fisheries in large navigable rivers only and as the claim to a several fishery by a private person can only be founded upon a grant from the Crown, either proved or presumed, it would follow that where a several fishery is claimed by a private individual in the natural streams in a *perganah* or *preganaho* the right claimed can be over navigable rivers only, or those portions of a river which are navigable, on the principle that a grantee cannot have a right in what the grantor had not.

In any event such a grant can confer on the person to fish only in natural watercourses and not in those made by the hand of man.

4. Now to turn to the case of the plaintiff as presented in the lower Courts. The plaintiff claims the done as part of his river system. He says that the current of his river (Golapdi) flows into and through the done and passes on to his river Lohalia. That he says makes the done a part of his river system and the fact that the done is not navigable, or that it was connected with his rivers by an artificial channel, namely the Khal excavated by the District Board are not material facts at all which can affect his claim. His learned Advocate refers to p. 374 of the Tagore Law Lectures of 1889 (Doss on the law of Riparian Rights) and to a passage in *Raja Srinath v. Dinabandhu Sen Roy* 1914 P C48 at p. 816 and contends that his client has fishing rights in all "adjuncts of the navigable streams", whether such parts are navigable or not. In examining this contention it is necessary to bear in mind that the plaintiff's claim is over a new channel through which a portion of the current of a river in which he has fishing rights is now passing. It can be considered at most a channel branching from the main river Golapdi in which he has the fishing right, the running channel being formed not by reason of any natural physical change, but by reason of an act of man of a recent date. In my judgment there is a great difference between the case where a river shifts from its old bed leaving there sheets of water which have a regular connection with the new main channel and the case where a river divides itself, the volume of its waters still flowing down its old bed, and the new channel is a non-navigable channel passing over the lands of private persons or through their jalkars. *Indu Bhusan Bose v. Sarajubala Debi* 1927 Cal 741. In the former case the sheets of water in its old bed may or may not be shallow. The person having the several fishery will still have his right to fish in those sheets as long as the connection is maintained with the flowing river and that Connection is not merely occasional, due to temporary causes, as for instance an exceptional flood due to very heavy rainfall. The rights of the parties in the last mentioned case however must be determined according to the principles which would govern the case when a river changes, its bed and takes a new course, for the extra channel formed is after all a new bed. The law in this respect has been elaborately discussed in *Raja Srinath v. Dinabandhu Sen Roy* 1914 P C48 by Lord Sumner. That was also a case where a new channel was formed which connected two old navigable channels of the river Padma as the plan would show. Lord Sumner in the beginning of his judgment pointed out that the new channel in respect of which there was the dispute was both tidal and navigable. An exhaustive examination of the Indian case law was then made and the following propositions material to this case were laid down: (i) that a several fishery in India as elsewhere must be founded upon a grant from the Government, (ii) that the river need not flow over the land of the Government, the right of the Government to the fishery does not depend upon its ownership of the soil but, upon navigability of the stream, (iii) that there is no difference whether the change in the course is gradual or sudden and (iv) that the grantee from the Government can follow the shifting channel of the navigable river, and his right to fish therein is not affected by the said channel passing over the lands of a private person. In the course of the judgment the case of *Tarini v. Watson & Co.* (1890) 17 Pal 963 is noticed and approved by Lord Sumner and the ratio of that decision in my judgment furnishes an answer to the case before me. There the defendants (*Watson & Co.*) had a several fishery in the river

Howlia, a public navigable river, which had changed its course suddenly and passed in part over the plaintiff's (Tarini's) lands. Tarini claimed the right to fish on that portion of the river which flowed over his lands on the ground that he was the owner of the soil. Ameer Ali, J., overruled the plaintiff's claim and in the course of the judgment, after quoting with approval the observations of Norman, J., in *Grey v. Anund Mohan* (1864) 108 WR 1864, which was a converse case, that the right of the defendant to the fishery in the water in question being merely granted out of and a part of, the right of the Government to the river can no longer exist when the right of the Government is gone, observed:

but the principle laid down was that so long as the river retains its navigable character, it is subject to the right of the public and the right of fishery remains in the person who held it under a grant from the Government.

5. If the retention of the right of fishing is dependent on navigability of the river a fortiori the extension of the right over a new channel must also depend upon the same character. In my judgment therefore the riparian proprietors from whom the defendants, claim to have derived the right to fish in the done in question, who undoubtedly held the done when a "blind stream" as their territorial fishery, have still their rights unaffected when the done was converted into a flowing channel by the act of the District Board, as the flowing channel is a non-navigable one. I also hold that the plaintiff can have also no right in the done as the current from the plaintiff's river was there introduced by an artificial excavation. Certainly the plaintiff can have no right to fish in the Gajalia Bharani Khal which is an entirely artificial channel and which is the connecting link between the plaintiff's river and the natural depression which is called a "blind stream" by the Courts below. The change in the course of a river so as to attract the rule laid down in *Raja Srinath v. Dinabandhu Sen Roy* 1914 P C48 must be a change by natural causes, or as Lord Sumner puts it "a natural physical change." This is an additional reason which puts the plaintiff out of Court. The appeal accordingly is dismissed, but without costs as there is no appearance on behalf of the respondents.

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