

(1955) 03 OHC CK 0016
In the Orissa High Court
Case No : Second Appeal No. 187 of 1951

Bai Behera and Another	Vs	APPELLANT
District Board and Others		RESPONDENT

Date of Decision : 15-03-1955

Acts Referred:

Citation : (1955) 21 CLT 385

Hon'ble Judges : Narasimham, J

Bench : Single Bench

Advocate : G.C. Das, for the Appellant; B.N. Das and P.C. Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, J.—This is Plaintiffs' appeal against the concurrent decisions of the two lower Courts dismissing their suit for an injunction restraining the contesting Defendants from working ferries across a river known as "Kanchi" or "Dhaudia" at any point in its course and for other consequential reliefs.

2. A river known as Bhargsbi flows through the district of Puri and it is intersected at a place known as Janakhdeipur by the Jagannath Trunk Road. At a short distance above the said intersection, river Bharagabi throws out a branch at a place known as Temuhani. There is some controversy as to the name of that branch of the river. According to the Plaintiffs, that branch is known as Kanchi alias Dhaudia river. But according to the Defendants that branch is known only as Kanchi which further down its course bifurcates into two branches in one of which is known as Dhaudia and the other as Kanchi. From the map of Puri district (Ext. E), however, it will be clear that One of the branches takes a south-westerly course and empties itself into "Samag" lake whereas the other branch takes a south-eastern course and empties itself into "Sur" lake. The correct name of the two branches, however, is not very material for the purpose of the present litigation.

3. The Plaintiffs' case is that the whole of the river Kanchi alias Dhaudia from Temuhani where it branches off from the main river Bharagabi till the end of its course was carved out into a separate touzi (No. 268) which was recorded as sub-proprietary interest known as "Maurasi Sarbarkari" in the names of the ancestors of Defendant No. 14 Krushna Behera. The sub-proprietary interest included not only fishery rights in that river but also exclusive ferry rights throughout its course and Defendant No. 14 and his ancestors were exercising that right from time immemorial. The District Board of Puri, however, (Defendant No. 1) without any right or authority set up ferries at two places across the river known as Dasgoba and Kanchi ferries and thereby interfered with the exclusive right of Defendant No. 14. The Plaintiffs claimed to have obtained lease of the ferry rights from Defendant No. 14 by virtue of registered deeds (Ext. 1 and 1-A) dated 8-8-1947. Defendant No. 14 supported the Plaintiffs' case.

4. The main contest was, however, by the District Board of Puri (Defendant No. 1) and its lessees (Defendants 2 to 13). They urged that neither the Plaintiffs nor their lessor (Defendant No. 14) had any ferry right over the river and that on the other hand the disputed ferries were public ferries which were all along under the management of the District Board.

5. Both the lower Courts concurrently held that the Plaintiffs failed to prove that their lessor, (Defendant No. 14) had any ferry right over the river at the disputed places. They also held that the Plaintiffs failed to establish the exercise of the said ferry right of Defendant No. 14 at any time. On the other hand, they held that the District Board was always leasing out the ferry rights at the disputed points for a very long time. Hence, the Plaintiffs' suit was dismissed both on the ground of want of title and also on the ground of failure to establish possession.

6. The law relating to private ferries in India has been recently summarised in a Division Bench decision of this Court reported in Brajaraj Ramanuj Das v. Ajiman Nisa Bibi ILR 1949 Cutt. 465. There it was pointed out that private ferries in India may be of two classes-

(i) Those which originate from proved or presumed Crown grants

(ii) those which originate otherwise than by a Crown grant.

A private ferry which does not originate in a Crown grant may arise in either of the two following ways

(i) the owner of a property may set up a ferry on his own property and take toll from strangers for carrying them across

(ii) a person not the owner of the property may acquire over another man's property, right to ply a ferry and take tolls either by grant or prescription.

But in Ram Sakal Mullah and Another Vs. Nageshar Mullah and Another, it was observed that a person owning a private ferry on his own property or acquiring such right by prescription on another person's property cannot claim an

exclusive right of ferry by way of monopoly unless there is a Crown grant to that effect.

7. In the present case, the Plaintiffs have not claimed ferry rights by prescription. Their case seems to be that the sub-proprietary interest bearing touzi No. 268 included not only fishery rights but also ferry rights over the river and when that right was settled by the Government with Defendant No. 14's ancestors the latter acquired a monopoly by virtue of a grant from the Crown. Hence, the limited question for consideration in the present litigation is whether it has been established that touzi No. 268 includes not only fishery rights over the river but also ferry rights. The Current Settlement Khewats or Khatians have not been produced by the Plaintiffs though their Counsel Mr. G.C. Das was given a special adjournment to enable him to produce these documents even at the second appellate stage. The earliest document bearing on the title of Defendant No. 14's ancestors to this touzi is the Revision Settlement Khewats (Ext. 4 series). In those Khewats the said touzi was recorded as Maurasi Sarbarakari in the names of Gangadhar Behera and Achhut Behera. Defendant No. 14 is the son of Achhut Behera. But in the remarks column of the Khewats it is expressly noted that the right is "Machhadia Sairat" which would ordinarily include only fishery rights. Again, in the Na Dabi deed (Ext. 2) dated 6-8-1912 by which the previous owners of the touzi, namely, Gopinath Sahu and Narayan Sahu relinquished their right in favour of Gangadhar Behera and Achhut Behera there is absolutely no mention of any ferry right in the said touzi. On the other hand, it is expressly mentioned that the rights of the sub-proprietors in the touzi included only fishery rights. Coming to the time of the Current Settlement, though the Khewat has not been produced the Plaintiffs have relied on the Kabuliat (Ext. 3) executed by Defendant no 14 in favour of the Government. In that document, touzi No. 268 is noted as Dhaudia Nadi in which Defendant No. 14 was recorded as having sub-proprietary sarbarakari interest. This document also does not show that the Government recognised ferry rights in the river to be with Defendant No. 14.

8. Thus the three documents of title on which the Plaintiffs based their case do not show that when touzi No. 268 was carved out it included not only fishery rights but also ferry rights over the river Kanchi or Dhaudia. Mr. Das, however, urged that ordinarily a Jalkar Mahal created by the Government would include not only fishery rights but also ferry rights and in support of this argument he relied on para 198 of Dalliel's Settlement Report wherein under the head "Sairat" is included not only fishery income but also income from ferries. This paragraph, however, of Dalliers Settlement Report would not be of much help to the Plaintiffs. It only refers to various classes of miscellaneous income that may be found in a zamindari but on the limited question as to whether when a touzi consists of a river, ferry rights- are included along with fishery rights, that paragraph throws no light. Doubtless, Defendant No. 14 while deposing as P.W. 1 has stated that this Maurasi Sarbarakari interest included not only the products from the river but the river bed and its banks. But the Current Settlement Khewats or the Khatians have not been proved and his bare oral statement to

that effect cannot be accepted. Ordinarily, Jalkar would include the profits from the river but it would not necessarily involve a right- to the soil, see, Radha Mohan Mundal v. Neel Madhan Mundal 24 WR 200 followed in David v. Girish Chunder Guha ILR Cal 183, see, also Amriteswari Dabi v. Secretary of State for India in Counsel ILR 24 Calcutta 504. Doubtless, in ILR 10 Cal 50 it was pointed out that a Jalkar Mahal does not invariably indicate absence of any right to the soil. But this decision will not be of much help to the Plaintiffs. They have produced no evidence whatsoever except the oral statement of Defendant No. 14 to the effect that the touzi included the bed and the banks of the river also. In any case, monopoly of ferry rights cannot be claimed except by way of a grant from the Crown and it was the duty of the Plaintiffs to show the Crown granted ferry rights also to the ancestors of Defendant No. 14 when they settled the touzi with them. There is no evidence at all on this point.

9. On the other hand, the conduct of Defendant No. 14 and the Plaintiffs themselves supports the conclusion that they acted under the belief that Defendant No. 14 had no ferry rights over the river. Thus the District Board has proved a lease deed (Ext. A-8) dated 12-8-30 which was executed by Defendant No. 14 in favour of the District Board agreeing to take lease of the ferry rights at Kanchi and Dasgoba. Doubtless, Defendant No. 14 has denied the execution of such a document. But as rightly pointed out by the lower appellate Court it will be fantastic to say that a public authority like the District Board would, as early as 1930, anticipate the present litigation and fabricate such a document. Again, there is another lease deed (Ext. A) dated 11-7-32 executed by Plaintiff No. 1 in favour of the District Board in respect of Dasgoba ferry thereby clearly admitting that the ferry is under the management of the District Board. This Bai Behera (P.W. 6) has admitted as having executed that lease deed. An attempt was made by the Appellants' Counsel to show that ferries referred to in Exts. A-8 and A are not the disputed ferries inasmuch as they refer to ferries over Bhargabi river whereas the disputed ferries are across 6 tributary of Bhargabi known as Kanchi or Dhaudia. On the other hand, the Defendants' witnesses stated that these documents related to the disputed ferries and any doubt on this question is set at rest by the clear admission of Plaintiff No. 1 (P.W. 6) to the effect that he took lease of the disputed ferries from the District Board. Apparently, in some of the documents of the District Board, a branch of Bhargabi was also referred to in a general way (though somewhat inaccurately, as Bharagabi river. If really, the exclusive ferry rights over the river remained all along with Defendant No. 14 it is not likely that he would have taken lease of the ferries from the District Board in 1930. It is also highly improbable that Plaintiff No. 1 would have taken lease of one of the disputed ferries from the District Board on 11-7-32. I would, therefore, agree with the two lower Courts that the Plaintiffs have failed to prove that their lessor (Defendant No. 14) had any ferry right over the river Kanchi or Dhaudia.

10. On the question of actual exercise of the right of ferry also, the Plaintiffs have led no reliable evidence. If really Defendant No. 814 and his ancestors had

been exercising this right from time immemorial, as stated in the plaint, ample evidence of the settlement of the ferry in successive years with various lessees would have been forthcoming. The Plaintiffs' lease is of the year 1947, a few months before the institution of the suit. On the other hand, on the side of Defendant No. 1 several documents (exts. A series, B series and C series) have been proved to show that ferry rights at the disputed places were settled by public auction. There is absolutely no reason for disturbing the concurrent findings of the two lower Courts to the effect that the Plaintiffs' lessor (Defendant No. 14) has never exercised ferry right over the river. Hence the Plaintiffs' suit must, in any case, fail.

11. I would, therefore, dismiss the appeal with costs.