

(1920) 08 CAL CK 0072
In the Calcutta High Court

Bhagirath Molo and Others

APPELLANT

Vs

Annada Prosunna Mukhapadhaya and Others

RESPONDENT

Date of Decision : 18-08-1920

Acts Referred:

Citation : 60 Ind. Cas. 778

Hon'ble Judges : Asutosh Mookerjee, Acting C.J.; Earnest Fletcher, J

Bench : Division Bench

Judgement

Asutosh Mookerjee, Acting C.J.

1. This is an appeal by the defendants in a suit for declaration of a patni right to what is described in the plaint as the disputed Sashikhali khal and for recovery of possession on eviction of the defendants.

2. The plaintiff is patnidar of an estate known as Perganna Rangdia, which beara No. 235 on the Revenue Roll of the Jessore collectorate, and No. 163 on the Revenue Roll of the Khalna collectorate. His Base is that the disputed khal was settled with the Zemindar at the time of the Permanent Settlement and that the defendants have unlawfully exercised a right of fishery therein.

3. The defendants repudiated the claim and asserted that the disputed khal was a public navigable river, wherein they had a right to fish, either on the basis of prescription or by immemorial custom.

4. The Trial Court found that the river Sashikhali belongs to the plaintiffs as appertaining to the Perganna Rangdia, and made a decree in his favour for exclusive possession of a portion of the disputed stream. Thereupon, an appeal and a cross-appeal were preferred to the Subordinate Judge. The Subordinate Judge has decreed the claim in full. He has devoted a considerable portion of his judgment to the investigation of the question whether the defendants had established their alleged light to fish in the khal on the basis of either prescription or immemorial custom. His conclusion, that the defendants have acquired no such right. This determination, in our opinion, is not liable to be

challenged in second appeal. but the decision of the Subordinate Judge upon the question of the alleged title of the plaintiff is defective and cannot be supported.

5. The Subordinate Judge refers to the decisions in *Hon Das Mai v. Mohamed Jaki* 11 C. 434 (F.B.) : 5 Ind. Dec. (N.S.) 1049 and *Saicowri Ghosh v. Secretary of State for India* 22 C. 252 : 11 Ind. Dec. (N.S.) 170 as authorities for the proposition that, in certain circumstances, a tidal and navigable river may become private property. But he has not found the nature of the stream in this particular case, which is a matter of vital importance for the determination of the controversy between the parties. If the stream was a public navigable river at the time of the Permanent Settlement, it is extremely improbable, as was pointed out by the Judicial Committee in the case of *Jagadindra Naih Boy v. Secretary of State for India* 30 C. 291 (P.C.) : 30 I.A. 44 : 7 C.W.N. 193 : 5 Bom. L.R. that its bed could have been settled with the Zemindar, as part and parcel of his grant. On the other hand, although the bed may not have been so settled, it is conceivable that a several fishery of a public navigable river which passed through the ambit of his Zamindari might have been granted to him. It is consequently necessary to determine in the first instance, the nature of the stream, whether it was or was not a public navigable river. If the question is answered in the negative, the plaintiff may succeed by proof of a grant of a several fishery. As was pointed out by the Judicial Committee in the case of *Srinath Roy v. Dinabandhu Sen* (1), such a grant of several fishery need not be established by a direct proof of the grant. The Judgment delivered by Lord Sumner in the case just mentioned describes the various kinds of evidence which may be adduced in proof of an original grant of this description. The decision in *Attorney-General v. Emerson* (2) points to the same conclusion; Lord Herschel observed in that case that "the possession of a right of several fishery is evidence of the ownership of the soil over which it is exercised." It has undoubtedly been laid down in more than one case that the ownership of a several fishery raises a presumption that the freehold is in the grantee of the several fishery. And Baron Parks, in delivering the judgment of the Exchequer Chamber in *Holford v. Bailey* (1819) 13 Q. B. D. 426 : 18 L.J.Q.B. 109 : 13 Jur. 278 : 116 E.R. 1325 : 78 R.R. 432., said, "a several fishery is, no doubt, *prima facie*, to be assumed to be in the soil of the defendant." It is consequently necessary for the plaintiff to prove either that there was a grant of the bed itself of the Zemindari at the time of the Permanent Settlement (which would be consistent with the theory that the disputed channel was not a public navigable river but a khal as alleged by the plaintiff) or that, although the channel was a public navigable river, there was in reality a grant of a several fishery in favour of the Zamindar. On this point, evidence furnished by the thak map and the quinquennial papers will be of great value. Their weight must be determined along with such evidence as there may be on the record of exclusive user of a several fishery by the plaintiff or his predecessor. The respondents have urged that the case is concluded by the findings contained in the judgment of the Subordinate Judge on this point, but we are unable to accept that contention as

well founded. On the other hand, there are expressions in the judgment of the Subordinate Judge which indicate that he did not realise the distinction between the different points of view from which the case should be approached.

6. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him to be re-heard in accordance with law. The question of the alleged right of the defendants will not be open for re-consideration, it must be taken to have been finally decided against them ; the only point for consideration will be the title of the plaintiff. Costs will abide the result.

Ernest Fletcher, J.

7. I agree.