

(1949) 04 OHC CK 0004

In the Orissa High Court

Case No : Second Appeal No. 34 of 1945

Brajraj Ramanuj Das

APPELLANT

Vs

Ajiman Nisa Bibi

RESPONDENT

Date of Decision : 28-04-1949

Acts Referred:

Citation : AIR 1950 Ori 19

Hon'ble Judges : Narasimham, J; Jagannadhadas, J

Bench : Division Bench

Advocate : S.N. Sen Gupta and S. Misra, for the Appellant; R.N. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—The plaintiff is the appellant in this second appeal. The dispute relates to a ferry right across the river called variously as "Harachandi, Sunnamubi, Kama or Deshi." The river flows through a village called Narasinghpatna in the Sadar Sub-Division of Puri and the ferry claimed is situated in this village. The portion of the river bed in this village is 50 acres and 90 decimals in extent consisting of plot NOS. 63 and 471 in the Anabadi Khata No. 104 of the village. The plaintiff who is the Mahant of Pandit Muth of Puri is the recorded proprietor of the village Narasinghpatna including the two plots Nos. 63 and 471. The defendant is the owner of the Khandayati Jagir of Rendhagarh in which is included the village Sipasurubili which lies to the west of the river adjacent to the plots NOS. 63 and 471. For a few months in the year, that is, during the rainy season and high floods, the river is not fordable at this place and passengers who have to cross from one side to the other have to be ferried across by boat. It is said that this crossing is part of the highway from the Ganjam side to Puri and is in use by the pilgrims from the south to Puri and by the villagers from the Puri side to Chilka area. In the current settlement of 1928, the Khewat part I, dated 12th January 1928, marked as Ex. II shows the plaintiff as the proprietor of plots Nos. 63 and 471 (River) of Anabadi Khata no. 104 with a note against plot No. 63 that Sk.

Md. Asghar ferries across the river by boat during the flood season at the river ghat. Sk. Md. Asghar is the husband of the present defendant. The plaintiff's case is that this settlement entry has been fraudulently obtained and that he himself, as the owner and proprietor of the bed and the banks and the landing ghats on either side of the river, has the right to the ferry and that he and his ancestors have been plying the ferry all along for the convenience of the public. He admits in his plaint that the defendant's ancestor 8k. Md. Asghar was also plying boats across the river at times, but that it was for his own convenience since he was the proprietor of the neighbouring village of Sipasurubili, (implying thereby that 8k, Md. Asghar was not plying boats for the public as such). The plaintiff has accordingly brought this suit for declaring his exclusive right to the ferry across the river in the village Naraainghpatna and for negating any such right in the defendant and for a permanent injunction restraining the defendant from obstructing the plaintiff from the exercise of his right to the ferry. In the alternative he prays that his independent right to ply the ferry may be declared even though the defendant may be proved to have a right. In the trial Court various other questions relating to the locus standi of the plaintiff to maintain the suit and objections based on limitation, estoppel, and a previous decision u/s 145, Criminal P. C., were all raised, but they were not agitated before the lower appellate Court nor are they reiterated by either party before us. Both the trial Court as well as the appellate Court found against the plaintiff on the question of his right to the ferry and have held that the defendant has made out a right to the ferry in question as a Crown grant and therefore to a monopoly for the exercise of this right of ferry at this place. In the lower appellate Court as appears from para. 6 of the judgment of the learned Judge, the ferry right of the defendant does not appear to have been any further assailed, but what was challenged was the alleged right to a monopoly in the exercise of the ferry right so as to prevent the plaintiff from setting up a rival ferry in exercise of his proprietary right in the bed and banks and ghats of the river. In this Court also the only question argued is as to the claim of the defendant to exercise his right to the ferry so as to prevent the plaintiff from setting up a rival ferry.

2. Though both the Courts below have concurrently found as a fact the existence of this right in favour of the defendant, we have heard full arguments, since the question whether on the facts proved, a Crown grant may be presumed so as to exclude the plaintiff from setting up a rival ferry is a question of law.

3. That there has been a regular ferry service during the rainy season of each year across this river at that place for over a hundred years past, appears to be abundantly clear from the evidence and is not seriously disputed. The earliest document on record is EX. c-1 dated 24th May 1872. It is a lease of the ferry right at Nara-singhapatna ghat for five years, executed by one Ananta Mahanti in favour of then Khandayat of Rendhagarh, one Kulamani Routray. Exhibit G is another lease (counterpart) dated 20th July 1877 of the same ferry right for a period of seven years, executed by the Khandayat in favour of one Pani Biswal. Both the leases recite that the ferry-right belongs to the Khandayat and that the

actual exercise of that right for the periods specified therein has been leased out by the Khandayet to the persons specified in the lease at certain annual payments. The next document on record is Ex. D, dated 19th July 1882. It purports to be a parwana issued by the Police Chief to the then Khandayet Kulamani Routray. It notices that it has come to the knowledge of the Police Chief that the Khandayet has appointed certain persons as boatmen to ply the boats for passengers and to take the Dak, etc., across the river at the that at Narasing. patna and orders that he should also be personally present and smoothly perform the work without neglect. There appears to have been some other documentary evidence of earlier period relating to the exercise of this right by the then Khandayet which is now no longer available. Exhibits A-1 and A-2 notice the existence of those earlier documents. Exhibit A-1, a report of the officiating Collector, dated 5th April 1898, shows that there were parwanas of the date 1832, which were marked as EXS. A, E and c before him and which show that orders were issued to the Khandayet by the then Magistrate's office to make suitable arrangements for the crossing at the ferry. The said Ex. A-1, also shows that another document marked Ex. D therein, dated 4th December 1851, recognised the right of the Khandayets to the ferry after a regular judicial inquiry by the then Deputy Collector Nilamani Brahma. The existence of this last document has also been noticed in EX. A-2. Exhibit A-1 states also:

"There can be no question that long before the existence of the Mahants of Narasingbpatna this ferry along with the highway from Ganjarn to Puri used by pilgrims to Jagannath waa placed in charge of the Khandaits and Paiks under him,"

and

"It Is clear that since the British occupation of Orissa the ferry was in the undisputed charge of the Khadaits."

Exhibit A-2 similarly states:

"It appears that since the time of British conquest of the district, the disputed ferry along with the highway from Ganjam to Puri was placed in charge of the Khandayet of Rendha."

There can be no doubt on a consideration of the documents now marked as C and C-1 and D and A, and A-2, corroborated by reference to the old documents noticed in Exs. A-1 and A-a and the statements made therein as set out above, that at least from the year 1832 to the year 1882, the ferry right was recognised as belonging to the Khandayet and that it was being exercised by him. It would appear, however, that there was a break thereafter. For some reason, which is not clear, the ferry was for some time in charge of the Mahant who was the plaintiff's predecessor. This appears from the report, Ex. A-1. In that report the Collector notices that in a register under the Ferries Act, filed before him, an entry under date 22nd October 1888, shows the ferry in the Mahant's name. It would also appear from the said Ex. A-1 that in the year 1883, the Khandayet, Kulamani Routray was punished by the Assistant District Superintendent of Police

for an unlawful assembly in connection with this ferry. Whether as a result of this punishment the Khandayet was superseded and the Mahant placed in charge of the ferry and whether such supersession was temporary or permanent, does not appear clearly. It does appear, however, that sometime between 1883 and 1898, the Khandayati right itself had changed hands and that one Sk. Md. Asghar, the husband of defendant 1 became the Khandayat of Bendaghar. How this came about is not clear from the pleading or the evidence on record. In 1898 by petition dated 1st February 1898, the said Sk. Md. Asghar represented to the Collector about his right to the ferry and complained against the Mahant. The Collector, as appears from the order dated 3rd February 1898, also marked as A (1), was inclined to hold that the ferry belongs to the Khandayet, but ordered the Khasmahal Deputy Collector to report on the representation. Presumably as a result of that order, one Mr. J. N. Gupta, Officiating Collector, enquired officially into the matter and held that since the British occupation of Orissa upto the year 1880 or thereabout, the ferry was in the undisputed charge of the Khandayet and that both as a matter of right and for the public convenience, the ferry should be kept in charge of the Khandayet and his rights entered in the settlement papers. Shortly thereafter, troubles appear to have arisen between the then Mahant and the then Khandayet, Md. Asghar, which led to proceedings u/s 145, Criminal P. C., relating to this ferry. The District Magistrate decided in favour of the Khandayet and declared the Khandayet to be in possession of the ferry and referred the Mahant to a civil suit by his order dated 2nd September 1898, Ex. 2. The Mahant admittedly has not filed any such civil suit until the present suit was filed in 1941 and presumably the Khandayet has been in possession ever since. In the register of private ferries, maintained in the District of Puri, by virtue of rules framed u/s 22, Bengal Ferries Act, an entry under date 26th July 1926 shows the Jagirdar, Md. Asghar as the owner of Narasinghpatna Ghat and the period of the season during which the ferry is to ply every year as June to August or September. When the current settlement proceedings were in progress in the year 1928, an objection was raised by the Jagirdar, Md. Asghar, against the noting of plot NOS. 63 and 471 as belonging to the Mahant. After hearing both parties, the settlement officer allowed the objection of the Jagirdar by adding a note in the remarks column of plot no. 63 that Sk. Md. Asghar is enjoying the right of holding the ferry. This note is found in the settlement Khewat, marked as EX. II as already noticed. Nothing further is heard about the dispute until the year 1940, when again on account of trouble between the Mahant and the successor of Md. Asghar, there was an inquiry by the Sub-Divisional Magistrate and an order by him against the Mahant u/s 144, Criminal P. C. restraining him from plying any boat at the disputed ghat. This suit was accordingly filed on 7th July 1941.

4. From the above narration of facts which may be gathered from the documentary evidence set out, there can be no reasonable doubt that the actual ferrying at this ghat across the river has been exercised by the Khandayet of Randha-ghar at least from the year 1833 right upto the date of suit with some

interruption for a few years in the period from 1882 to 1898. For about 60 years or more prior to 1882, Kulamani Routray and his predecessors were exercising the right. For over 40 years from 1898, Md, Asghar and his successor have been exercising the right. There is no indication or suggestion that during these periods anybody else was also exercising or claiming to exercise the right of ferrying at this ghat, side by side. The Mahant appears to have started the theory of joint right or a competitive right to ply also his own boats in the proceedings which led to the order u/s 144, Criminal P. C. in 1940 as evidenced by Ex. A. He reiterates the same position in his present plaint with the further modification that the defendant's right is confined to ply boats for his own convenience with reference to the ownership of his neighbouring village of Sipisurbali.

5. On these facts which cannot be controverted on the evidence, the Courts below have come to the conclusion that the defendant's right must be presumed to be referable to a crown grant and that therefore the defendant has a right to a monopoly of the ferry right to the exclusion of the plaintiff and everybody else.

6. It is convenient at this stage to notice an objection raised by the counsel for appellants to the use made of the statements in Exs. A-1 and A-2. It is said that A-2 is an order u/s 145, Criminal P. C. and that it is not admissible except for the limited purpose of showing that the successful party thereunder was in possession at the time and that the statements therein are not admissible. *Dinmoni v. Brojo-mohini*, 29 Cal. 187 : 29 I. A. 24 and *Ram Parkash v. Anand Das*, 43 Caluse 707 : AIR 1916 P. C. 256 are cited in support of this position. It is also said that the reference to the old documents in Ex. A-1 is in the nature of secondary evidence of the contents of those documents and hence not admissible and AIR 1930 45 (Privy Council) is cited in Support of it. There can be no doubt, however, that A-1 and A-2 are admissible in evidence under s. 13, Evidence Act as instances in which the right in dispute has been recognised; and that the statements therein relating to the facts relevant to this case are admissible u/s 35, Evidence Act. That the narrative and the statements in official reports are admissible is clearly recognised in *Martand Rao v. Malhar Rao* 55 Cal. 403: A. I.R. 1928 P. C. 10 and that even a statement in a judgment may be brought in u/s 36 is recognised in AIR 1934 167 (Privy Council) . There can, therefore, be no serious objection to the actual use made in this case of Exs, A-1 and A-2 and the statements therein. See also *Baldeo Das v. Gobind Das* 36 ALL. 161 : A. I. R. 1914 ALL. 59.

7. It is now necessary to deal with the main point raised by the appellant in this case, namely, that the facts proved on the above evidence are not enough to raise a presumption of crown grant of the ferry right. Before doing this, however, it is desirable to consider briefly the law relating to ferry rights in India. That law is governed by two Acts, the Bengal Ferries Act (Bengal Act I [13 of 1886) and the Northern India Ferries Act (Central Act XVII [17] of 1878). The Bengal Act applies and continues to apply to North Orisaa. That Act was preceded by

Regulations 19 of 1816 and 6 of 1819 and Bengal Aot 1 [1] of 1866 which have all been repealed. The earlier history has been fully set out in *Nityhari Boy v. Dunne*, 18 Cal. 652 at pp. 660 and 661. The Bengal Ferries Aot of 1885 deals with public ferries, that is, ferries which under the provisions of that Act are run directly by the Government authorities or by lessees from Government. There is no doubt, however, that the customary law in India, unlike that in England, recognises private ferries. This has been noticed in *Laahmeswar Singh v. Manowar Hossein* 19 Gal. 253 : 19 I. A. 48 wherein their Lordships say as follows:

"It is recognised law in India that a man may set up a ferry OD his own property and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others."

8. Private ferries are also recognised though not elaborately provided for in the BengalFerries Act of 1885. Section 22 of the said Act provides thus:

"The Commissioner may from time to time make rules for the maintenance of order and for the safety of passengers and property at private ferries situated in his division."

Under this section, rules have been framed which are published in the Calcutta Gazette, part I B, dated a 1st March 1888, which are still in force. These rules provide for the registration of private ferries and for certain safety regulations. It would appear from the case law on the subject that private ferries may be of two categories: (1) those which originate from proved or presumed crown grants; (2) those which arise otherwise than by a crown grant. In the case of public ferries, Section 16, Bengal Ferries Act enjoins that no rival ferry can be run within a distance of two miles from the limits thereof. In the case of a private ferry which originates in a crown grant and which is known as a ferry franchise, no exact limits are prescribed, but it has been held as follows :

"The grantee is entitled to a monopoly of his line of ferry and has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. The other lice may be such that the circumstances render it in the main little more than a competitive route for those who would naturally proceed by toe old ferry. If so there is a cause of action for disturbance against an; one who abstracts passengers by setting up the second ferry." See *Hammerton, v. Earl of Dysart* (1916) 1 A. C. 57 : 85 L. J. Ch. 83.

A private ferry which does not originate in a crown grant, may arise in one of two ways as indicated by the Privy Council in *Lachmeswar Singh v. Manowar Hossain* 19 Cal. 253 : 19 I. A. 48 (1) The owner of a property may set up a ferry on his own property and take toll from strangers for carrying them across; (a) A person not the owner of the property may acquire over another"s property a right to ply a ferry and take tolls, either by grant or by prescription. That this last kind of right, which is unknown to English law, can be acquired by prescription in India, is well settled, as laid down in *Lachmeswar Singh v. Manowar Hossain* 19 Cal.

263 : 19 I. A. 48 .There has been some doubt whether a private ferry franchise referable to a crown grant can be acquired by prescription. But since the case in *Nityhari Roy v. Dunne* 18 Cal 662 the better and accepted view is that such a right cannot be acquired by prescription : See *Shama Durgaji v. Gangadhar Narayan* 46 Bom. 952 : A. I. R. 1922 Bom. 245 and *In Re: Reference by Junior Secretary Board of Revenue*, and *Abhoy Charan v. Dwaraka Nath* 39 Cal 53 : 11 I. C. 180 and *Abdul Khoyrat v. Hemchandra*, 9 I. C. 846 . In the case of a crown grant-ferry the right to be monopoly has been maintained on the ground that, "the right of ferryman involves an obligation to keep up the services of the ferry for the benefit of the public. The ferry-man has undertaken a public burden in consideration of the crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken" : See *Hammerton v. Earl of Dysart* (1916) 1 A. C. 57 at p. 85 : 85 L. J. Ch. 3.

In the case, however, of the exercise of the right of ferry as part of the right of the proprietor over the bed and banks and the landing places of the water-course, it is no more than an incident of his ownership; and he is free to give it up whenever he chooses. On the other hand, he cannot complain of a neighbouring owner running a rival ferry on his own land in exercise of his own right. This is in accordance with the well known principles recognised in *Bradford Corporation v. Pickles* 1895 A. C. 587 : 64 L. J. Ch. 769 and *T. F. Alien v. W. C. Flood* 1898 A. C. 1 : 67 L. J. Q. B. 119 that the mere exercise of one's proprietary right without infringement of another's right is not actionable. In the case also of a person who obtains a ferry right over the property of another by grant or prescription, it is equally clear that he cannot complain of competition by a neighbouring owner of property. But the question whether the owner of the servient tenement itself or persons deriving title from him can set up a rival ferry in competition is one which so far as I am aware has never been raised or decided. It may as well be contended in such a case that the right of the owner of the ferry being traceable to a proved or presumed grant from the owner of the servient tenement that owner can do nothing to derogate from his own grant and that, therefore, such owner and persons claiming under him can be restrained from competition. The following cases have been cited before us as dealing with the various principles relating to ferry rights. *Kishoree Lall Boy v. Gokoolmanee* 16 W. R. 281; *Lutafut Hossein v. Md. Moonen* 22 W. R. 269; *Luchmessur Singh v. Lelanund Singh* 4 Cal. 599 : 3 C. L. R. 427; *Parmeshari Proshad v. Md. Syud* 6 Cal. 608 : 7 C. L. R. 504; *Nityhari Roy v. Dunne* 18 Cal. 652; *Lachmeshwar Singh y. Manowar Hossein* 19 Cal. 253 : 19 I. A. 48 ; *Jhamman and Others Vs. Emperor* ; *Dhanpat Pan. dey v. Pratap Singh* A. I. R. 1931 ALL : 53 ALL. 764 and *Shama Durgaji v. Gangadhar Narayan* AIR 1922 Bom. 245 : 46 Bom. 952.

9. In the light of the above principles, the plaintiff would not be entitled to the declaration that he claims, if the defendant is able to make out on the evidence that her right is traceable to a crown grant proved or presumed. Admittedly no actual grant is available or is produced and the only question is whether from the

facts, the presumption of a lost crown grant can be reasonably made.

10. It is suggested that since the bed of the river, the banks on either side and the ghats and the landing places relating to this ferry admittedly belong to the plaintiff by virtue of a settlement with the Government, no grant by the Crown of a ferry right in respect of the same, derogating from his title can be presumed. In the first place there is no evidence to show that the settlement with the plaintiff's predecessor granting Naraaingpatna Mouza to him with the bed and banks of the river has been made earlier than the time when the ferry right began to be exercised by the Khandayets and when the ferry right may be presumed to have been granted to him. On the other hand it appears from EX. A-1 that the ferry was in charge of the Khandayet long before the Mahanta of Narasingapatna came into existence. It also appears from Ex. A-2 that in the old settlement measurement papers mark-ed as EX. 3 in those proceedings that the river Kania was measured in cumbers 10, 11 and 22 and an area of 399 mans, 9 gunts and 11 biswas was entered as Nadee Jalkar Government and Zamindar Khandayet and that it was only in respect of the other plots that the Aohari Mahant was noted as being in charge. Tbia would also indicate that the ferry right existed at a time when the river bed did not belong to the Mahant and that the settlement of the river bed with tbe Mahant must have been later. The settlement of Narasingapatna with the Mahant must, therefore, have been subject to the pre-existing rights. In any case, it is no objection in law to the grant of ferry franchise that the land over which the franchise has been granted does not belong to the Crown or to the grantee. From the actual later user of the ferry franchise for a sufficient period an easement right to the use of the ghata and landing places or a dedication of the same to the public may be presumed, (See Nityahari Roy v. Dunne 18 Cal. 652 at pp. 659, 660).

11. It is next suggested that the evidence which is relied upon, will only show that the Khandayet has been working the ferry for the periods specified above not in his own right but on behalf of the Government and that the ferry all along was only a Government ferry and that no ferry franchise was granted to the Khandayet, It has been pointed out that in Ex. A.1, the order of the Collector Mr. Lee dated 3rd February 1898 states "I shall give the ferry to the Khandayet" and that in the same exhibit, the order of the officiating Collector. Mr Gupta dated 5th April 1898, refers to the ferry as "having been placed in charge of the Khandayet and the Paiks under him." in the earlier days and that his own order is that the ferry "should be kept in charge o? the Khandayet." It has also been pointed out that in. Ex. A-2, dated 29th August 1898, in the order of the District Magistrate u/ s 145, Criminal P. C., it is stated that "all the documentary evidence shows that the ferry belongs to the Government" and "is in charge of the Khandayets". It is also pointed out that even if the Collector had the power to grant the ferry as contemplated in his order dated 3rd February 1898, there is no subsequent order at all, showing that there was any such grant. Having regard, however, to the entire documentary evidence in the case, much stress cannot be laid upon the somewhat loose use of the words and phrases above noticed in some of the

documents. It appears from the documentary evidence already noticed that the right of the Khandayet to the ferry has been throughout recognised. As already stated, in a document dated 4th December 1861, the then Deputy Collector, Nilamani Brahma, after a regular judicial inquiry appears to have recognised the right of the Khandayet to the ferry. The leases, EXS. c-and C-I specifically refer to the right of the Khandayet to the ferry and the exercise of that right. Even the documents, Exs. A-1 and A-2, stray passages in which have been seized upon, on behalf of the appellant, when read as a whole, clearly recognise the right of the Khandayet and do not show that he was exercising the right merely as the ad hoc agent of the Government. The very fact that in the year 1926, there is an entry in the ferry register, EX. G. shows that this ferry was not treated as a public ferry belonging to the Government. As the very heading of that document shows, it was a register of private-ferries. Even as early as in 1888, there appears to have been a note about this ferry in the ferry register of 1888, as appears from A-1. Though there is nothing in the record to show that this register was a register of private ferries, it may be presumed to be such, because the rules framed under the Bengal Ferries Act contemplate a register only of private ferries. It, therefore, appears that even as early as 1888 this ferry was not treated as a public ferry belonging to the Government. On the whole in spite of some stray phrases here and there in the documents suggesting otherwise, it is reasonably clear that the ferry in question has been throughout only a private ferry belonging to the Khandayet and not a public ferry belonging to the Government and temporarily placed in charge of the Khandayet as the Government agent from time to time. It must also be noticed that even were it otherwise, the plaintiff would have no right to run a rival ferry within a two mile-limit as provided in Section 16, Bengal Ferries Act.

12. It is next urged that, in view of the break in the exercise of the right of ferry from 1882 to 1898 or some portion thereof, the degree of continuity in the exercise of right which is requisite to give rise to the presumption of a crown grant of the ferry franchise is lacking. It is also further argued that even if a ferry franchise grant in favour of the original Khandayet may be presumed, the same cannot be presumed in favour of the present Khandayets who are not shown to have succeeded to the rights, if any, of the original Khandayets and in whose favour a fresh grant has not been made out.

13. It is no doubt true that there has been some interruption in the exercise of this ferry right by the Khandayet for some time between 1882 to 1898, though as already stated whether this interruption lasted for only a few years in that period or for the whole of the period is not clear. However that may be; if the facts set out are enough to raise a presumption of crown grant, proof of interruption does not, in law, negative it. It has been held that neither a mere non-exercise of the ferry right nor the running of an opposition ferry for some time extinguishes the ferry franchise created by a crown grant. The franchise continues as long as the grant continues and until the person who sets up an opposition ferry can show a crown grant either actual or presumptive in himself

(See *Nityahari v. Dunne* 18 Cal 652 at p. 664). As regards the question whether there has been a continuity of the ferry right from the original Khandayet, Kulamani Kautray to the new Khandayet, Md. Asghar, it is no doubt true that evidence is wanting as to how the right of Kulamani Rau-tray came to be held by Md, Aaghar. If it was by some process of devolution or transfer no difficulty arises. Assuming however that the Kbandaiti right of the original Khandayet was terminated and there was a fresh grant of the Khandayati right by the Government to Md. Asghar, it would equally follow that there must have been a fresh grant of the ferry right also, though probably the ferry right was not either a part of or appurtenant to the Khandayati right (at any rate there is no proof that it is so). The evidence and the history show that the ferry right was granted to the Khandayab because he was the Khandayat. As appears from Maddox Settlement Report, p. 288, the Khandayat held his land on a Jagir tenure with the duty of patrolling the sandy wastes on the foreshore. The ferry in question was the connecting link in the highway on both sides of the river which the Khandayet had the duty to patrol. The defendant in her written statement, para. 13, says that the Kbandayat had the duty of protecting the ghats and the roads and the public from the ravages of pirates and dacoits. The parwana Ex. D, already referred to, corroborates it. Exhibits A-1 and A-2 also indicate the same. Even if, therefore, the Khandayati right of the original Khandayat Kulamani Rau-tray, was terminated and along with it his ferry right, it is reasonable to infer that when the Khandayati right was granted to Md. Asgbar, the ferry right also would have been granted to Sk. Md. Asghar on account of the fact that he was the Khandayat. The ferry right so granted would, in the absence of any indication to the contrary be of the same kind and of the same amplitude as that of the ferry right of the original Khandayat, Kulamani Rau-tray. Indeed, it appears from the order of the Collector, Mr. Lee, dated 3rd February 1898 and of Mr. Gupta, dated 6th April 1898 (EX. A-1) that the right of Md. Asghar, the new Khandayat, was recognised on the ground that the ferry right belonged to the original Khandayat. Whatever the nature of the right of the original Khandayat may have been, the same must be taken to have been either continued or regranted. It therefore appears to me that neither the fact that there has been an interruption in the exercise of the ferry right by the successive Kbandayats, nor the fact that the exact mode of devolution of the right from the one Khandayat to the other has not been made out on the evidence, is any ground for not treating the evidence relating to the exercise of the ferry right from 1832 to 1940 as a whole for the purpose of determining whether or not it is enough to support the presumption of a crown grant.

14. The question then remains whether on this evidence, the presumption drawn by the Courts below of a crown grant of ferry franchise in favour of the Khandayat is justified. It is urged by the learned counsel for the appellants that this long exercise of the right can only support the acquisition of a prescriptive ferry right and not of a ferry franchise which can only be acquired by crown grant. It has been urged that in the entire documentary evidence there is no

suggestion of any Government grant having been ever made, It is pointed out that in *Nityahari v. Dunne* 18 Cal. 652 the inference of a crown grant has been based on the fact that the Government on various occasions have acknowledged the ferry right in the particular case as part of the settlement of the Zamindari right and that, therefore, by virtue of the permanent settlement, the ferry franchise must be deemed to have been a crown grant. It is urged that in the present case, there is no proof that the ferry franchise was comprised in the settlement between the Zamindar and the Khandayat as part of the Khandayati right which was settled upon defendant's husband or his predecessor. As already pointed out, however, though there is no proof that the ferry right was a part of or appurtenant to the Khandayati right, it has invariably accompanied it. The Government officers on two different occasions, when the matter came up for consideration, recognised it on that footing and acknowledged it. The Deputy Collector, Nilamani Brahma, appears to have recognised the right of the original Khandayat by his order dated 4th December 1851, after a regular judicial inquiry as stated in EX. A-1. The Collector, Mr. J. N. Gupta, after a departmental and quasi-judicial enquiry recognised the right of the succeeding Khandayat Md. Asghar by his order dated 5th April 1898. Both these orders separated by 37 years and in favour of two different Khandayats are clear and unequivocal recognition or acknowledgment by responsible Government officials of the right of the Khandayat to the ferry. Having regard to the length of the exercise of the right and the above formal recognition by Government officers in whom by Section 4 of Regn. 6 of 1819 and by Sections 7 and 8, Bengal Ferries Act of 1885, the control of public ferries is vested, it is reasonable to presume a lost crown grant. In *Shama Durgaji v. Gangadhar A.* I R. 1922 Bom. 245 : 46 Bom. 952 the presumption of a crown grant has been drawn from recognition of the right by Government officers.

15. That the grant to be presumed in the circumstances of this case, is a crown grant of : a monopolistic ferry franchise, also follows from , the fact that the evidence shows the exercise of this right to have throughout been burdened with an obligation in favour of the public. The lease deeds, EXS. C and C-1 specifically recite that the people on Government duty and the Government Daka are to be carried across the river free of fare "as usual". The parwana, Ex. d, shows that the Khandayat, in connexion with the exercise of the ferry right, was under the orders of the Police Chief, and the order, Ex. A-1, shows that the ferry right of the Khandayat was recognised "for the public convenience." The oral evidence of D. w. 1 and D. W. 4 shows that even upto date the defendant's ferry is used to carry Dak across free of any charge. As has been pointed out above, the distinction between a proprietary right of ferry acquired by prescription or grant by private individual and a ferry franchise obtained as a crown grant is this that while in the former case the ferry is worked for mere personal profit and may be abandoned at any time at the option of the owner thereof, a ferry franchise is granted and taken for the public convenience and the grantee undertakes a public obligation which he must continue to discharge so long as he holds the

franchise. Since the actual exercise of the ferry right in this case is shown to be in a manner which strongly suggests the existence of a public obligation, this in itself, is a weighty circum-stance to support the presumption of a crown grant.

16. I have, therefore, no doubt in this case that on the facts proved, the presumption drawn by the Courts below of the existence of a ferry franchise relating to the disputed ferry across the river Harchandi in Narasinghpatna, in favour of the first defendant on the basis of a lost crown grant is fully justified. This inference is justified whether the evidence is taken with reference to the entire period from 1832 to 1940, or confined to the later period of 1898 to 1940, but explained with reference to the user of the earlier period. It would, therefore, follow that the plaintiff has no right to carry any ferry at or near the places in question which will have the effect of being a competitive ferry resulting in diminution of defendant 1's income from the exercise of her ferry right.

17. I may also add that even apart from any presumption of lost crown grant giving rise to the inference of a ferry franchise in favour of defendant 1, there can be no doubt on the evidence that at least a right of private ferry in the nature of an easement in favour of defendant 1's husband can be presumed. Such a right would be based on the presumption of a lost grant by the plaintiff or by his predecessors. As already stated, I am unable to see, as at present advised, why in such a case the plaintiff should not be held to be under an obligation not to compete with the grantee and thereby derogate from his own presumed grant. None of the cases cited before us are against the view though they do not deal with it. It is, however, unnecessary to pursue this matter further, since I have come to the clear conclusion in agreement with the Courts below that on the facts of this case, a crown grant can reasonably be presumed.

18. It only remains to consider the suggestion made by learned counsel for the appellant that the plaintiff's right to run a ferry in the exercise of his proprietary right in the bed and banks of the river and for the sole purpose of conveying his own servants and other persons coming on his business should be declared. The case in *Luchmessur Singh v. Lelanund Singh* 4 Cal. 599 : 3 C.L.R. 427 undoubtedly supports him. This, however, is not the prayer in the plaint. The plaintiff has only asked for the declaration to run the ferry either exclusively or competitively, vide plaint para. 11 Ga and Gha, and not for declaration of a right to run the ferry limited to his own personal purposes and uses. We are not called upon in this case either to decide the exact limits of defendant's exercise of the ferry franchise, nor the limits of the plaintiff's right to maintain a ferry for his own personal use. It would, therefore, be unsafe in this litigation to make any positive declarations in respect of either of them. The plaintiff having failed to make out his exclusive or competitive right to run the ferry this appeal fails and the suit must be dismissed with costs throughout.

Narasimham, J.

19. I agree and have nothing to add.