
(1944) 03 CAL CK 0016
In the Calcutta High Court

Brojendra Kishore

APPELLANT

Vs

Governor-General in Council

RESPONDENT

Date of Decision : 14-03-1944

Acts Referred:

Land Acquisition Act, 1894 — Section 3(a)

Citation : AIR 1944 Cal 315

Judgement

1. The river Jhinai is a natural stream which rises from the river Brahmaputra and falls into the river Yamuna, which is another name for the main branch of the river Brahmaputra. In the past it was navigable throughout the year but lately on account of the formation of a sand bank near its confluence with the river Brahmaputra and by reason of its bed becoming higher in level by deposit of sand and earth it is almost dry for three or four months but is navigable during the remaining eight or nine months of the year. It is admitted, and that is also the finding of the Courts below, that the predecessors-in-interest of defendants 1 to 5 the contesting defendants had a several fishery in the river Jhinai, which was a public navigable river, the bed whereof belonged to the Crown. Whether their fishery right in the waters of the said river now exist or not by reason of the river ceasing to be navigable throughout the year is one of the questions in the appeal. For carrying the railway line of the Singjani-Fulchari branch of the Eastern Bengal Railway (now the Bengal and Assam Railway), which belongs to Government, over the river Jhinai a portion of the bed of the river was acquired under the Land Acquisition Act. The portion so acquired covers Dag Nos. 23 to 27 of mouza Char Banipakuria, also known as Char Palisa. A railway bridge was constructed over the place. Owing to scouring a depression has been formed under the railway bridge. Water remains in that depression throughout the year. A sort of raised bank has been found round this depression. In the dry season for three or four months of the year when the waters of the river Brahmaputra do not flow into the river Jhinai this depression looks like a pond surrounded by dry land on all sides but during the rains and the remaining part of the year it is swallowed by the flowing waters and becomes a part of the river Jhinai which is

then navigable. That is the finding of the Commissioner and of both the lower Courts. The suit concerns this pool of water.

2. On 21st January 1936, before Part 3 of the Government of India Act, 1935, had come into operation the Secretary of State for India in Council instituted the suit in which the appeal arises for a declaration of title to fishing rights in that depression, for possession and for a permanent injunction to restrain the defendants from fishing in that place. Before the suit the railway administration had granted a licence to one Ramjatanal to fish there and the suit was the consequence of the obstructions offered by the defendants to Ramjatanal. After Part 3 of the Government of India Act, 1935, had come into operation an application was moved by the plaintiff for amending the cause title. That application was allowed and in place of the Secretary of State for India in Council the Governor-General in Council was substituted. Many defences were raised. The learned Munsif found that defendants 1 to 5 had a several fishery in the river Jhinai but their right extended to eight annas only and the remaining eight annas was still vested in the Crown, as the Crown had not made a grant of the same to a subject, and the defendants' right had not been destroyed by the land acquisition proceedings. Although he held that the fishery to the extent of eight annas still belonged to the Crown he refused to give the plaintiff either a declaration of title or joint possession with the defendants on the ground that after Part 3, Government of India Act, had come into force, the Province of Bengal only and not the Central Government could bring the suit.

3. On appeal the judgment of the Munsif has been reversed. The learned Subordinate Judge has held: (1) that the defendants' right to fish in the pool had ceased because of the silting up of the river; (2) that the defendants' right to fish in that pool had been extinguished by reason of the land acquisition proceedings, the said right being an encumbrance on the land acquired; and (3) that the Governor-General in Council was entitled to maintain the suit "as the Governor-General is the representative of the Crown" and as the Railway Administration is under the Governor-General in Council." The contesting defendants have preferred this second appeal. In one place of his judgment the learned Subordinate Judge remarked that the disputed pool of water was a closed water but the finding taken along with his other findings mean that during the dry season, for about three or four months of the year, the pool of water is not connected with the flow of the river Jhinai, for in those months the river Jhinai has no flow. The Commissioner's report, on which both the lower Courts have proceeded makes it clear that the river Jhinai has well defined banks. Its bed therefore is what lies within those banks and the pool of water lies between the defined banks and so is within the bed of the river. During the dry weather there is no water in this bed but water remains in the disputed pool which at some places is deep. It looks at that season like a closed pond or doba but during the rest of the year the pool is engulfed in the stream and becomes a part of a flowing navigable river.

4. It is, therefore, not a pool which can be regarded either as an adjunct of the river or a sheet of water outside the river, but it is a part and parcel of the river itself, lying in its existing permanent bed, and the defendants would have a right to fish in it also, if their right to fish in the waters of the river still subsists, although that pool of water is not connected throughout the year with the flowing waters of the stream: *Ahamadi Begum v. Mahasay Taraknath* ("13) 17 C.W.N. 1173 and *Raja Kritanand Singh Bahadur and Others Vs. Secretary of State and Others*, . The question, therefore, is whether the right of the defendants to fish in the waters of the river Jhinai has been extinguished (a) by reason of the river ceasing to be navigable throughout the year, and (b) by reason the land acquisition proceedings by which that portion of the bed in which the pool lies was acquired. Whether in India the public in general have a right to fish in a navigable river or not, it is settled law that the Crown can grant to a subject a several and exclusive fishery in such a river: *Hori Das Mai v. Mahomed Jaki* ("85} 11 Cal. 434 (P.B.) In *Srinath Roy v. Dinabandhu Sen* ("14) 1 AIR 1914 P.C. 48. Lord Sumner dealt with the nature of a several fishery in a navigable river.

5. The propositions of law laid down in that case which are material to the case before us may be summarised thus: (i) that a several fishery must be founded upon a grant from the Crown; and (ii) that the river need not flow over the land of the Government and the right of the Government does not depend upon the ownership of the subjacent soil but upon the navigability of the stream. The second proposition leads to two necessary consequences: (a) that as the right to fish in a several fishery does not depend upon the ownership of the bed of the river and has no connexion with it such a fishery in a navigable river cannot be regarded as mere profits of the soil, and (b) that the right depending as it does on the navigability of the river, would last so long as tht river retains its navigable character. The last mentioned proposition was in express terms formulated in *Tarini Gliaran v. Watson and Co.* 17 Cal. 963. a decision which was approved by Lord Sumncr at page 234 of the report. Though the flux and reflux of tide is prima facie evidence that a river is navigable, as tide helps navigation, it does not necessarily follow that a river is navigable because it is tidal or that it is not navigable because it is non-tidal. There are mighty rivers in India which for its greater length are not tidal though the channels are deep.

6. The question is a question of fact and actual user is the best evidence of navigability. In India to make a river a navigable one it is not necessary that its waters must be very deep. If it allows country boats of ordinary size,-such as arc usually employed for carrying merchandise to paw. ii would be regarded as navigable. In 37 C.W.N. 442"" it was held that a river can only be regarded as navigable if it allows boats of ordinary size employed in commerce to pass throughout the year. That case however concerned a right of navigation and we do not think that for extinguishing a right to a several fishery the test of navigability throughout the year is the correct test. Nor would the observations made in *Mohinee Mohun v. Khajah Assanoollah* ("72) 17 W.R. 73. to the effect that a river is to be regarded a;; navigable only if boats can pass at all seasons

of the year is relevant on the question before us, for that case related to claim to land gained by alluvial accretion and the phrase "large and navigable rivers" used in Rcn. 11 o[1825, were taken to mean big rivers, such as "the Ganges and the Megna upon which navigation can always be carried on," and not small rivers which were merely unfordable at times. The case in Chunder Jaleah v. Ram Chandra ("71) 15 W. R. 212. concerned a fishery but the question was neither raised nor decided and that the river was navigable throughout the year was recited only as a fact in the judgment. The right in a subject in a several fishery would cease if the river loses its navigable character but the question whether the river has lost its navigable character is a question of fact. The fact that its channel is deep for about nine months of the year, not in the rainy season only and that boats used in commerce can navigate it during the greater part of the year are important. From those facts and from the fact that, it is connecting link between two great streams and serves as an important high way we conclude that the river Jhinai has not lost its navigable character although no boats can pass for about three months in [the year. The defendants would therefore have the right to fish in the pool which is the subject-matter of the suit, unless they have lost the right to fish in that part of the river by reason of the acquisition under the Land Acquisition Act.

7. The question before us concerns the river itself, not its adjuncts, nor pools or sheets of water left in the deserted bed of the river, the main channel of which had shifted and which is still navigable, and our observations to the effect that the right of a subject to a several fishery in a navigable river is extinguished on the river losing its navigable character must be taken to be limited to the type of cases which we have before us. For the purpose of constructing the railway line a portion, of the bed, which is now occupied by the pool was acquired after 1894, and compensation for the land was paid, rightly or wrongly to the defendants, but no compensation was awarded for the fishery. We do not think that by the acquisition of the land the fishery in that part was also acquired, for though by the definition in Section 3 (a), Land Acquisition Act, 1894, land includes benefit to arise out of land, a several fishery cannot be taken to be benefit arising out of land. The dictum that fisheries are in their nature mere profits of the soil on which the water stands is true only in regard to territorial fisheries, for there the right to fish arises from the right to the soil, but a several fishery in a navigable river is an incorporeal right. There the right to fish arises not from the right to the soil but from the fact of the navigability of the river: Srinath Roy v. Dinbandhu Sen ("14) 1 A.I.R 1914 P.C. 48. The question then is whether a several fishery in a navigable river can be regarded as an encumbrance on the land that is, on the subjacent soil.

8. On the principles laid down in Srinath Roy v. Dinbandhu Sen ("14) 1 A.I.R 1914 P.C. 48. we do not think it to be so. It would not accordingly be destroyed on a compulsory acquisition by the force of the provisions of Section 16, Land Acquisition Act. Every burden is not an encumbrance. A natural right, for instance of a riparian owner to have an undiminished and unpolluted flow of a

natural stream, is not an encumbrance and is not accordingly destroyed u/s 16, Land Acquisition Act, on a portion of the bed of the stream being acquired under that Act: *Baraset Basirhat Light Railway Co., Ltd. Vs. Nrisingha Charan Nandi Chowdhury*, . An encumbrance on land means a burden or charge which has been created either by the act or omission of the owner of the land and which affects or diminishes the value of the land. A several fishery cannot be regarded as an encumbrance, for it has no connexion with the act or abstention of the owner of the land over which the navigable river flows. This becomes clear from the case of a shifting river. Thus where a navigable river breaks into the land of another and flows through it the person having the right in the several fishery follows the fish in the new channel. His right does not depend upon the act of the owner of the land in which the new bed has been forged, for natural causes brought the river on that land. The right to fish in the new channel does not also arise from the omission or abstention of owner of that land, for by the irresistible force of the current the river forged its new bed and brought the river on to it.

9. Two cases have been cited before us by the learned Assistant Government pleader to support his contention that by the acquisition under the Land Acquisition Act, the land vested absolutely in the Government free from every right and interest therein, of whatever description, possessed by the former proprietor or by other persons. They are *Collector of 24-Parganas v. Nobin Chaunder* (1865) 3 W.R. 27 and *In re H.B. Fenwick* ("70) 14 W.R. 72 Cr. Both those cases concerned a right of way over the acquired land. Both of them proceeded upon the construction of Section 8, Land Acquisition Act of 1857 (6 of 1857). The language of that section is that the land acquired would vest in the Government absolutely "free from other estates, rights, writings and interest." Those words are very comprehensive. The language of Section 16, Land Acquisition Act of 1894, which governs the case before us is quite different and is more limited. We do not therefore regard these cases as authority for the construction of Section 16, Land Acquisition Act of 1894. We accordingly hold that the defendants' right to fish in the disputed pool of water is still subsisting. In view of the frame of the suit and the prayers made therein the suit would fail on the conclusions we have arrived above. We however notice two further contentions. The first is, whether the contesting defendants have only-eight annas share in the fishery in the river Jhinai. The evidence on the record indicates that the defendants' predecessors had the entire sixteen annas. In 1862 Government attempted to resume eight annas share of the fishery. The *robakary* (Ex. K) shows that the resumption proceedings were dropped on the ground that the defendants' predecessors were possessing the fishery on the basis of a grant from the Crown. The lower Courts have misconstrued the said *robakari*. As the point is not material we do not record a definite finding to the effect that the defendants have 16 annas right, but leave the question open. The second point is whether the Governor-General in Council can maintain the suit. The suit was filed in the name of the Secretary of State for India in Council before the Government of India Act, 1935, had come into force. After Part 3 of

that Act had come into force an application for amendment of the plaint was made and allowed. By it the Governor-General in Council was substituted in the place of the Secretary of State for India in Council. That application for amendment was a misconceived one, for by Section 179 (2), Government of India Act, 1935, the Secretary of State for India became automatically substituted in the place of the Secretary or State for India in Council.

10. Besides by Notification No. 1703w published in the Extraordinary issue of the Gazette of India of 1st July 1937, the Governor-General in Council, certified u/s 172 (a), Government of India Act, 1935, that the lands in suit which lie between miles 2 to 4 of the Singjani-Fulchari extension of the Eastern Bengal Railway was retained by the Governor-General in Council. A territorial fishery would be covered by the word "land" used in Section 172, and here the plaintiff claims the pool of water as a territorial fishery. The Governor-General in Council was accordingly competent to maintain the suit. The result is that this appeal is allowed. The suit "is dismissed with costs to the contesting defendants .respondents throughout. We certify u/s 205, Government of India Act, 1935, that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935.