

(1937) 02 CAL CK 0020
In the Calcutta High Court

Chairman, Midnapore District Board

APPELLANT

Vs

Monmotha Nath Mondal and Others

RESPONDENT

Date of Decision : 10-02-1937

Acts Referred:

Bengal Perries Act, 1885 — Section 35, 6

Citation : AIR 1937 Cal 289

Hon'ble Judges : Mukherji, J

Bench : Division Bench

Judgement

Mukherji, J.—The Chairman of the District Board of 24-Parganas and the Chairman of the District Board of Midnapore are the respondents in this appeal. The plaintiffs are proprietors of two plots of Garlai Khas Patit (unculturable waste) being C.S. Plots Nos. 122 and 137 of Mauzah Kagdwip appertaining to their Tauzi No. 2732 of the 24-Parganas Collectorate. This title of the plaintiffs is not denied by the defendants; but the latter claim the right to discharge their passengers and cargo of their ferry boats on the said lands. The plaintiffs prayed in this suit for an injunction restraining the defendants from exercising that right. The Courts below have dismissed the suit. Hence this appeal.

2. C.S. Plot No. 23 of Mauzah Kagdwip is a District Board Road, with a breadth, it is said, of 8 ft. Until about the year 1931 the ferry boats used to land their passengers and cargo at the mouth of that plot, close to the river: that is the plaintiffs' case. Their case also is that since then this right is being exercised at all parts of the two plots in suit. The defendants rely upon a Notification dated 4th October 1916 as conferring on them this right. The Notification defines the limits of the ferry at this place, at any place within half a mile on either side of the District Board Road. The Courts below have held this Notification which was issued u/s 6 of the Perries Act (I.B.C. of 1885) gives the defendants, in whom the management of the ferry is vested by reason of the provision contained in Section 35 of the Act, the right which they have been exercising. Now, "a ferry", as defined by Parke B, is a highway for all the Queen's subjects paying toll:

North and South Shields Ferry Co. v. Barker (1848) 2 Ex 136. Lord Parker of Waddington has said:

A ferry may be regarded as a link between two highways on either side of the water or as part of the continuous highway crossing the water: Hammerton v. Dysart (1916) 1 A C 57.

3. A public ferry is a public highway of a special description and its termination must be in places where the public have rights as towns or vills or highways leading to towns or vills. The right of grantee is in the one case an exclusive right of carrying from one point to the other all who are going to the highway to the nearest town or vill to which the highway leads on the other side: Huzzey v. Field (1835) 2 Cri M & R 432 . In the Act "ferry" has been defined as including a bridge or boats, pontoons or rafts, a swing bridge, a flying bridge, a temporary bridge, and a landing stage: Section 5. Therefore, a landing stage being part of a ferry must be a highway over which the public can exercise their right of way. The ferry is a toll franchise, and at one time it was thought that there can by law be no good franchise of a ferry unless the owner has the property in the soil on both sides of the water, but that proposition was not countenanced in the case Peter v. Kendal (1827) 6 B & C 703. In that case Bayley, J. observed:

I am of opinion that it is not necessary that the owner of a ferry should have the property in the soil on either side. He must have a right to land upon both sides but he need not have the property in the soil on either. It is sufficient if the landing place be in a public highway. This is perfectly consistent with the principle laid down in Saville. That principle is that a ferry is in respect of a landing place, and not of the water. But I cannot agree to what is stated as a conclusion resulting from that principle "that every owner of a ferry must have the land on both sides of the water, for otherwise he cannot land". The reason given for his having the property in the soil is insufficient for he may have a right to land on both shores without having any property in the soil of either. The original owner of the land may have granted the soil of it, and reserved out of the grant to himself, his heirs and assigns, the right of using the land on both sides for the purpose of embarking and disembarking passengers.

4. In the same case Holroyd, J. said:

The owner of the ferry must as incident to the ferry have such right to use the land on both sides, as to enable him to embark or disembark his passengers but he need not for that purpose have any property in the soil. It is sufficient if he has a right to use the land for all the purposes of the ferry. That is a right to use the land of another for a particular purpose and is an incorporeal hereditament.

5. This case as well as several other cases have been cited in Pratt and Mackenzie's Law of Highways, Edn. 16, p. 6, where it is said:

The interests of the public in a ferry are similar to their interests in highways in general. The public have a right to embark and disembark at the landing places

provided such landing places are highways.

6. In *Bourenemouth Swanage Motor Road and Ferry Co. v. Harvey and Sons* (1930) A C 549 it has been held that a ferryman working from a highway is not entitled to land his passengers on private property over which the public have not a right of way. When the Crown grants a ferry and purports to declare the limits within which it is to run, the termini must be on places over which the public may have the right to embark or disembark. And the whole question therefore is whether the Legislature, assuming that it is competent to convert all lands within such limits into highways, has, by what it has said in the Act, expressed any such intention. There is very great difficulty in presuming in favour of any such intention. Such conversion would in effect amount to confiscation of private property without a corresponding award of compensation, would be tantamount to a declaration in favour of the public of an incorporeal hereditament over private property over which no such right accrued under the ordinary laws of the land. Such words as are contained either in the definition of ferry (Section 5) or the defining of the limits (Section 6) do not, in my judgment, express any intention of taking away rights of private individuals or vesting any rights in the public. And unless such intention is very clearly expressed no inference of such intention would in my opinion be permissible. The land if it is to be converted, into a highway, has to be converted under the law as it stands either by obtaining a dedication absolute or restricted or by acquisition voluntary or compulsory. By merely calling a piece of land a ferry or a landing stage the Legislature cannot be taken to have affected private rights of individuals. In England ferries were formerly created by Royal grant and now by Act of Parliament and the right to a ferry may also be claimed by prescription which presumes a grant: *Letton v. Goodden* (1866) 2 Eq 123. In the *Perries* (Acquisition by Local Authorities Act, 1919, 9 & 10 Geo. V.C. 75) the definition of "existing ferry" includes

all boats or other vessels, landing stages, approaches apparatus, plants and other property used in connexion with the ferry.

7. Under a later Special Act of 1923, 13 & 14 Geo. V.C. 78, under which a company was authorized to construct a motor road and ferry for the purpose of providing a more direct communication between two cities B. & S. a case arose in which the point in controversy was very different, but the judgment of Lord Hanworth, M.R. in that case throws considerable light on the present question. The defendants in that case were relying upon their right to ferry across the river. The Master of the Bolls quoted the dictum of Lord Haldane in *Hammerton v. Dysart* (1916) 1 A C 57:

The King's subjects are prima facie entitled to go on the Thames any other public highway from any points on the banks to which they have access and to cross and across it freely and to ferry others across.

8. And then his Lordship observed:

But from the materials before us it does not appear that they have access to this waterway over which they ferried persons as of right. We are told that there is a road passing through the parish of Studland, but the highway as a high way ends in a rough piece of land or morass which belongs to the Bankes family. The dictum therefore of Lord Haldane does not apply to this case because where persons did ferry from one side to the other on this particular side where South Haven is, there was no access to the waterway at all except by the consent or leave or license or acquiescence of the authorities of the Bankes estate. It is not possible to say that the defendants or any other persons held a right of access at this point of the land. There was a lacuna between the ending of the highway and commencement of the waterway. Over that lacuna if and so far as the defendants or anybody else went it was by the leave and license, presumed of the persons who, if they had objected, might have taken the objection that land formed their private property and was subject entirely to private rights and not subject in any way to public rights.

9. That exactly is the position here. If it be held that the fixing of the limits to half a mile on either side of the District Board means that rights of the public are created in derogation of the exclusive rights of the plaintiffs in the lands it either means that all the lands concerned in the suit have been taken away from the plaintiffs or at least that a right of way over the lands, over indeterminate courses and exercisable over every part of them, has been created. I am, therefore, of opinion that the Notification, the whole scope of which was to define the limits of the ferry, taking along with the definition of ferry as including a landing stage, has not conferred any right on the defendants to embark or disembark the passengers and cargo of the ferry so long as the lands to be used as landing stages, have not been made into highways by such means as the law allows. The Additional District Judge has observed in his judgment that the lessees under the defendants-respondents who ply the boats have not been made parties to the suit. The learned Judge intended that this observation of his was to be regarded as an additional ground why the suit should be dismissed. I do not find any issue noted in the judgment of the trial Court specifically raising this question, nor do I find that the trial Court has expressed any opinion upon it. If the defendants desire to rely upon this ground for the purpose of resisting the plaintiff's claim, the question should have been raised in a proper form so that all issue might be framed and the plaintiffs given an opportunity either to make the lessees parties, or if they were so advised and the suit was otherwise maintainable, to proceed with the suit as it was originally framed. In any event, I am not prepared to hold that this omission on the part of the plaintiffs is a ground which should stand in their way in obtaining the injunction I propose to issue in this case.

10. As I propose to give leave to the respondents to prefer an appeal, the operation of this order will be stayed for a month from today within which the respondent will be able to get from the appellate Court such orders as they may stand in need of. In my judgment the appeal should be allowed, and I order

accordingly. The decisions of the Courts below being set aside the injunction asked for by the plaintiffs should issue. Costs to appellants in all the Courts. Leave is granted to the respondents to appeal under Clause 15, Letters Patent.

Letters Patent Appeal No. 14

JUDGMENT

11. This appeal is dismissed subject to this that the injunction granted in favour of the plaintiffs will be altered in this way. It is further ordered and decreed that so long as the plaintiffs or their successors-in-title are in possession of plots No. 137, No. 1 and No. 22, the defendant, the Chairman of the District Board of Midnapore, and/or his successors be restrained from discharging or permitting to be discharged the cargoes or passengers of the ferry boats plying for hire under him on to plot No. 22 except in case of necessity due to floods and from discharging or permitting to be discharged the cargoes and passengers of the said ferry boats on to plots No. 137 and No. 1 except in case of necessity due to danger arising from floods, tides or currents and from otherwise interfering with the plaintiffs' possession of the said plots. There will be no order for costs in this appeal.

L.P. Appeal No. 15

JUDGMENT

12. This appeal of the Chairman of the District Board of 24 Parganas is allowed and the plaintiffs' suit as against him dismissed on the ground that he has no control over this matter. There will be no order for costs in this appeal.