

(1926) 07 CAL CK 0019
In the Calcutta High Court

Debendra Lal Khan

APPELLANT

Vs

Secretary of State for India

RESPONDENT

Date of Decision : 30-07-1926

Acts Referred:

Citation : AIR 1927 Cal 403 : 103 Ind. Cas. 13

Judgement

1. This is an appeal by the plaintiff against a decision of the Subordinate Judge of the 1st Court of Midnapur dismissing his suit except as regards that portion of the river, which was in dispute in the suit, which extends from Bhoora Khal to Benasooli Khal.

2. The dispute, relates to the portion of the river Kansabati or Cossye which extends from Kankapati Ghat to Patra, this portion is some 12 miles long. The river rises in the hills of Chota Nagpur and enters the District of Midnapur, and the river is a tributary of the Haldi which flows into the river Hooghly.

3. The plaintiff claims the portion of the river in dispute (except the portion marked A, B, C, D on the map, Ex. 1, and a certain portion 400 ft. to the east and 100 ft. to the west of the Midnapur Anicut) as part of his permanently settled estate, his contention being that it was settled with his predecessors-in-title at the time of the Permanent Settlement, and in support of this claim he relies on the fact that at the time of the thak settlement in 1856 and at the time of the preparation of the thak map the river was not shown as Government property but was included in the permanently settled private estates through which it flows. In the alternative the plaintiff claims the same portion of the river-bed by 60 years' adverse possession against Government, and under the same right, against the private proprietors through whose land the river flows. As a third alternative the plaintiff claims the right of fishery in the river either by adverse possession of 60 years or as an easement or profit a prendre enjoyed openly, peaceably as of right for 20 years.

4. The plaintiff also claims certain pal lands and chur lands under various claims.

5. One of the main questions in issue between the parties is whether the Cossye river was or was not a large navigable river at the time of the Permanent Settlement. The Secretary of State says that it was and that consequently it would not have been included in the permanently settled estate at the time of the Permanent Settlement; the appellant, on the other hand denies that at the time of the Permanent Settlement the river was navigable throughout the year. The Secretary of State contends that this question is *res judicata* by reason of a decision to which I shall presently refer. It will, I think, be convenient to consider the appellant's claim under the following heads:

(1) Was the portion of the river Cossye which is in dispute included in the appellant's permanently settled estate at the time of the Permanent Settlement? And this involves the consideration of two other questions which can conveniently be dealt with under this head, namely - (a) Was the Cossye a large navigable river at the time of the Permanent Settlement? (b) Is the main question under this head barred by reason of the decision in the prior suit (Title Suit No. 265 of 1914)?

(2) If this portion of the river Cossye was not so included has the appellant obtained as against the Secretary of State a title to the river-bed and to the churs and pal lands by adverse possession for 60 years?

(3) If not, has the appellant obtained by the like period of adverse possession an indefeasible title to the fishery in this portion of the river?

(4) If 60 years' adverse possession has not been established by the appellant, has he obtained an easement or profit a prendre to such fishery rights by enjoyment for 20 years? (After dealing with the documentary and oral evidence the judgment continued.) The conclusion I have come to is that upon the construction of Ex. Y the Cossye was not included in the grant and I think there are indications that it was excluded from the expressions "inundation and diluvion" which would not, I think, have occurred had the river been included. Nor do I think that inclusion can be inferred from the thak maps and subsequent events if, as I think, the terms of the grant exclude it.

6. Nor in any case should I infer from the thak maps that it was included, the thak authorities had nothing to do with title or possession *Jogadindra Nath Roy Bahadur v. Secretary of State* [1903] 30 Cal. 291 and *Satcowrie v. Secretary of State* [1895] 22 Cal. 252 and I think no deduction as to title or possession can legitimately be drawn from, them. The other incidents as to payment of compensation and such like cannot be relied on by themselves as establishing the respondent's title.

7. As to the oral evidence, whilst it is not convincing, there is I think evidence upon which the Judge in the Court below could hold as he has done, that the river was a large navigable river.

8. Moreover I think the question of navigability and of the inclusion of the river is

res judicata between the parties by virtue of the decision on Issue No. 5 in Title Suit No. 265 of 1914, dated the 31st May 1916.

9. The parties were the appellant's predecessor and the Secretary of State. The issue was:

Is the river Cossye or that portion of it where the disputed Chur has been thrown up a non-navigable river? Was the bed of the river or that portion of it where the disputed Chur has been thrown up settled with the plaintiff and the predecessors during the Permanent Settlement and does it form part of the permanently settled estate.

10. Ex. 1 in that case was over Ex. Y and it was held that it did not include the river; this was a matter directly in issue as was also the question of navigability and the finding was that that part of the river was navigable and much of the same evidence as is before us was before the Court in that case and I am not prepared to give the decision the very narrow application now sought to be imposed on it. I think therefore it operates as res judicata as regards Ex. Y and on the question of navigability. But even if I am wrong in this, I hold, for the reasons given above, that the Cossye is a navigable river.

11. I now come to the second question, namely, whether the appellant has obtained as against the Secretary of State a title to the river-bed and to the churs and pal barati lands by adverse possession for 60 years.

12. The answer to the question is in the negative. On the evidence before us no such possession has been shown, The acts of possession upon which the appellant relies are almost entirely fishery-leases which were acted upon, receipt and payment of jalkar rents and such like, and whatever may be the effect of such acts as regards the fishery rights I do not think that they are sufficient upon which to found any claim to the river-bed or to the churs and pal barati lands. This claim accordingly fails.

13. This brings us to the third question, namely, whether the appellant by adverse possession for 60 years has obtained by prescription an indefeasible title to the fishery in the disputed portion of the river. There is, I think, no doubt that such a right can be obtained by prescription; see Law of Riparian Rights, Alluvion and Fishery, Doss" Tagore Law Lectures for 1889, pp. 307 and 371 and cases there cited. (The judgment then further discussed the evidence and proceeded). I think the appellant is entitled to claim that he has satisfactorily shown possession of the fishery rights of the portion of the river in dispute for more than 60 years up to the institution of the suit, notoriously and of right, except as to that portion which stretches from the Sadar Ghat at Midnapur to the lock gates as to which no continuous possession has been shown and over which undoubtedly the respondent has exercised rights of ownership. It is said, however, that if, as we hold, that is a public navigable river no title can be acquired by prescription and that such rights as were exercised for the appellant and by his predecessors were exercised by him as a member of the general

public. It is not, however, possible, I think, to refer the acts of possession established to any such origin and I do not see why adverse possession of fishery rights cannot be established in a public navigable river if exclusive acts of possession are shown, as here, for the statutory period. See the authorities already referred to, cited in Doss" Tagore Law Lectures for 1889.

14. Then it is said that there is evidence of other persons fishing in the river without any lease, in some cases it appears permission was obtained but I am not prepared to attach much importance to the isolated and casual acts shown in the evidence in face of the large body of evidence stretching over many years of facts of possession of the fishery shown by the appellant and his predecessors and although I think no claim has been established by these acts to the riverbed I think the plaintiff is entitled to a declaration of his right of fishery acquired by adverse possession over the whole of the disputed portion except the part from the Sadar Ghat at Midnapur to the lock gates. And of, course the portion marked A, B, C, D must be excluded also. In view of the finding at which I have arrived on the third question propounded for consideration it is not necessary to consider the fourth question of casement especially as this does not involve any further findings of fact after the findings at which I have arrived on the third question but only involves a question of law and if necessary I should be prepared to hold that an casement had been acquired by the uses referred to above, and in view of my finding it is not necessary to discuss the legal question which was raised before us, namely, whether prior to the last Limitation Act an casement could be acquired against the Crown by 20 years uses, a point on which some difference of opinion seems to exist. The claim to the chur lands fails as adverse possession has not been shown, the claim to the pal barati lands also fails as they must belong to the riparian owners. This disposes of the appeal but the cross-appeal remains. (The judgment then dealt with the cross-appeal and allowed it except in so far as not to affect the appellants" right to the fishery.)