

(1929) 05 PAT CK 0010
In the Patna High Court

Jaigobind Singh

APPELLANT

Vs

Bhawani Singh

RESPONDENT

Date of Decision : 13-05-1929

Acts Referred:

Citation : AIR 1930 Patna 382

Hon'ble Judges : Fazl Ali, J;Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—The plaintiff is the 16 annas malik of mauza Kothia in which there is a river which is Said to be filled up with water in the rainy season and dries up in the month of Pus. The plaintiff's case is that the right of fishery in the said river is enjoyed by him as the proprietor; while the defendant has got no right of fishery, that is, jalkar right, in the said river, but he has got only the right of cultivating the bed of the river when it dries up. It is stated that the bed of the river was merely settled with the defendant at an annual jama of Rs. 9-3-9. On these allegations the plaintiff brought a suit for possession of the jalkar right on a declaration of his title thereto. The suit was resisted by the defendant who claimed the right of fishery in the river. The Additional Munsiff who tried the suit granted a decree in favour of the plaintiff while the suit has been dismissed by the learned Subordinate Judge in appeal.

2. The disputed land has been surveyed as plot No. 2918 in khata No. 804 in the revisional survey and stands recorded in the name of the defendant as kasht kaimi with an annual jama of Rs. 9-3-9. This was plot No. 2653 in the cadastral survey and stood recorded in the name of the defendant as an occupancy raiyat with "batai nisf" as the character of the rental payable. The correctness of these entries is not disputed by the plaintiff appellant.

3. It is, however, contended that there can be no occupancy right in jalkar land and consequently the settlement with the defendant was not of the jalkar right, but only of the bed of the river. It is further urged that the appellate Court has not displaced the finding of the trial Court on the merits.

4. It is settled law that no right of occupancy can be acquired in the respect of a right called jalkar or fishery: *Sham Narain Chaudhry v. Court of Wards* [1875] 23 W.R. 432, *Jagoobandhu v. Pramatha Nath* [1879] 4 Cal. 767 and *Bolliye v. Akram* [1879] 4 Cal. 961, but the question is whether the right of fishary was also settled with the defendant by the plaintiff. The learned Subordinate Judge discusses the evidence adduced on behalf of the plaintiff and comes to the finding that "none of the plaintiff's witnesses prove his case." This amounts to a finding that the plaintiff's case that merely the bed of the river was let out so that the defendant may cultivate it when the water dries up has not been believed by him. In fact he refers to the evidence of plaintiff's witness 2. "Within the last four years the river dried up only last year." and to the further evidence of P.W. 3. "The defendant does not grow on it."

5. This evidence shows that it is not likely in the circumstances that the settlement would be made only of the bed without any jalkar right. Although the judgment might have been more explicit it is clear from what has been said above that the finding of fact is that the plaintiff has failed to prove that only the bed of the river was settled on condition that it would be sown with crops when it dries up. There is an observation in the judgment of the appellate Court that

the plaintiff did not examine any witness to prove that at the time of the settlement the right to fishery was reserved and it was agreed that the defendant would pay rent for the land for possession for all the year round and would depend on cultivating it at the mercy of the winds and the drought.

6. This observation also supports this view that the lower appellate Court did not accept the plaintiff's case on the question of fact.

7. The crucial question in the case is whether the learned Subordinate Judge was correct in the expression of his view that it is for the plaintiff to prove the reservation of the right to the fishery. The case of the plaintiff, as I have already stated, is that there was a settlement of the bed of the river. It has been laid down in *Henry Hill and Co. (Turkaulia) Ltd. and Another Vs. Sheoraj Rai and Others*, that a proprietor can lease out a fishery without giving any right to the soil or the bed upon which the water lies and he can then let out the land subject to the right of the lessees of the fishery. Their Lordships then make the following observation:

If, on the other hand, he lets out the land first, he cannot later claim the right to the water and fish that come upon the land afterwards. A raiyat taking a lease of a fishery only cannot acquire an occupancy right therein, but if he takes a lease of a holding of which part is under water, then his right to the acquisition of occupancy rights in the entire holding, in so far as it relates to the portion which forms the bed of the water, cannot be defeated. The landlord of course may reserve the right of fishery when letting out the land but such a reservation is strictly speaking, a re-grant of the right by the tenant to the landlord.

In this case *Jones v. Davis* [1902] 86 L.T. 477 was quoted with approval. The

headnote runs as follows:

By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, unless expressly reserved to the lessor in the lease, passes to the tenant.

Lord Alverston, C.J. deals with the proposition as follows:

The right of fishery goes to the tenant under the lease, and for the very good reason***that the lessor could not, without express power being reserved, come on the lands or to the banks of the stream to exercise the rights of fishing,

Channel, J. adds.

By an ordinary lease of land; the soil and banks of a river clearly pass to the tenant and that prevents the landlord going there for the purpose of fishing unless there were a reservation in the lease permitting him to go there, and therefore that prevents the landlord from taking the fish.

8. Thus the legal proposition stated by the Court of appeal is supported by authorities, and it may be said that the settlement of land carries with it the right to fish when there is water upon it unless and until the landlord shows that the fishing right was reserved to him. Such being the legal position the issue becomes purely one of fact and having regard to the finding of fact arrived at by the learned Subordinate Judge the appeal must fail. It is accordingly dismissed with costs.

Fazl Ali, J.

I agree.