

(1932) 12 CAL CK 0038
In the Calcutta High Court

Lalit Mohan Ray and Others

APPELLANT

Vs

Kali Mohan Saha and Others

RESPONDENT

Date of Decision : 13-12-1932

Acts Referred:

Citation : AIR 1933 Cal 615

Hon'ble Judges : Mukerji, J

Bench : Division Bench

Judgement

Mukerji, J.—The suit which has given rise to this appeal was instituted by the appellants as plaintiffs for a permanent injunction restraining the defendants from constructing a bridge over a watercourse which goes by the name of Haridhoa and for a mandatory injunction ordering the defendants to remove such portions of the bridge as have been already constructed. The appellants have been unsuccessful in both the Courts below. It is not necessary to repeat here the facts of the case which have been set out in detail in the judgments of the Courts below. The plaintiffs' claim is based upon the allegation that the channel in question, or at least the part of it from its mouth on the Meghna river up to the point where the bridge is being constructed, is a public navigable river. The defence case is that the channel is not a river but only a khal which is neither tidal nor navigable all the year round, that for about six months in the year the channel remains fordable and during the remaining months only small boats can pass through it, that the bed of the channel is not the property of the Crown, and the public have no rights of navigation over it.

2. The appellants' contentions, in substance, are (.) that the Court's below, in their endeavour to find out whether the channel is a navigable one or not, have applied to the case a test which is not the real test for determining such a matter; (2) that the District Judge has been in error in supposing that the Court, in the present case, is not at all concerned with an investigation into the past history of the channel but should confine itself to an examination of its actual condition at the present moment; (3) that certain documents from which an

inference in plaintiffs' favour as regards the navigability of the channel and the rights of the public in it might reasonably have been drawn have not been properly construed and their legal effect has been misconceived; and (4) that certain other documents have been ignored or their legal bearing on the question has been overlooked.

3. The findings of the Courts below may be conveniently summarized here. The Munsif after a somewhat elaborate research arrived at the conclusion that the channel Haridhoa, variously stated to be a river or a khal, was at one time a branch of the big river Brahmaputra which had died out at various parts even before the Permanent Settlement; that at the time of Major Rennell's Survey (1764-67) Haridhoa was connected with the river Lakshya by which name a portion of the river Brahmaputra used to be called: that such connexion has Haridhoa had with Lakshya gradually ceased in course of time; that there was positive evidence (Survey Maps of 1911-14) that about the years 1911-14 Haridhoa had no connexion at all with the river Lakshya during the dry season; and that at the present moment the channel Haridhoa is not a channel connecting two navigable streams at its two ends but that it gets its supply of water from the Meghna alone at one of its ends. He then found that the channel follows a serpentine course, meeting with obstructions, natural as well as artificial, at various points, and so only a part of it at its mouth on the river Meghna is under the influence of the tides in that river. On the question of the present condition of the river he was not prepared to accept in its entirety the evidence adduced on either side. There is just a little conflict in the conclusions that he has drawn from the evidence which he was prepared to rely on. But taking the finding which is most in favour of the appellants and overlooking the findings which may detract from it to their disadvantage it runs thus:

The portion of the river from the Meghna to the railway godown is tidal and at low tide in the dry season is navigable for small boats and during high tides for little bigger boats. The portion of the river from the railway godown up to Putia hat is navigable for only very small boats and this portion of the river is not tidal.

4. It may be stated here that the site of the bridge is just beyond the first of these portions and lies in the second portion a little beyond the railway godown towards the Putia side.

5. The District Judge, while agreeing with the Munsif in holding that navigability of the channel has not been established, has recorded his own findings which, if anything, are less in favour of the appellants. His own findings have been expressed thus:

After a careful examination of the evidence I have come to the conclusion that so far as the portion above the bridge is concerned, that is the portion between Putia and the bridge, the river is impassable even for small boats during certain times of the year. So far as the portion between the proposed bridge and the

Meghna is concerned the river is deeper and has more water, but it is impassable for ordinary boats of commerce during the dry season.

6. It is well settled now that a river is not navigable unless it is navigable throughout the year for ordinary boats used for commercial purposes. A much higher test laid down in certain cases that navigability is to be determined with reference to steamers and big boats may perhaps be discarded. On the other hand, small boats of; the description spoken to by the witnesses examined in the case on whose evidence apparently the Courts below have acted would clearly not serve as a test. I have read the evidence which I was asked by the parties to read, but I do not see that any wrong standard has been applied by either of the Courts below. I do not; think that the Courts below while speaking of small boats meant to imply flat bottomed pleasure boats, as has been suggested on behalf of the appellants. Had they done so it might be complained that they had misunderstood the evidence. The appellant's first contention therefore in my judgment is not well founded. As regards the third and the fourth contentions I have examined the several documents in connexion with which these contentions have been pressed but am unable to hold that the appellants have any just cause for complaint. No useful purpose would be served by going into details.

7. The second contention I am bound to say is not without foundation. It is quite true that what the Court is primarily concerned with is the present condition of the channel, but to come to a decision on the question of navigability an investigation into its past history is not without importance. For if it be found that at one time the channel was connected with two navigable streams at its two ends it would not be an unreasonable inference to draw to hold that it at that time formed a part of an entire navigable system. That was indeed the Munsiff's finding. If that finding be correct, then even though that navigability might have partially diminished, the plaintiffs may justly ask that what little is left is yet entitled to protection. But even then what has to be proved on behalf of the plaintiffs in order to entitle them to the reliefs that they have asked for is that at some places within this stretch of the channel the channel is still navigable all the year round. But such a finding being impossible, the omission on the part of the learned Judge to look into the past history has occasioned no real prejudice to the appellants. There is one other point on which the learned Judge's judgment seems to me to be somewhat faulty. He has observed:

A great deal of evidence has been given to prove the navigability of the Haridhoa in its southern portion, that is near its junction with the Meghna. The condition of the river near this side is of not much importance. Its condition near about plots No. 202 (i.e. the railway godown) and No. 183 (i.e. the bridge site) and higher up is what has to be considered.

8. This remark is open to criticism. For even though the channel may not be navigable near the site of the proposed bridge yet if it was navigable at a spot farther down and if the proposed bridge would interfere with the navigability of that portion the plaintiffs could get the reliefs they wanted. But after all, the

evidence relating to that portion also has been considered by the learned Judge and in his view, with which I agree, in no part of the channel has navigability been established. The appeal is dismissed with costs. The application filed on behalf of the respondents is rejected. Leave to appeal has been asked for, but it is rejected.