

(1972) 07 CAL CK 0022
In the Calcutta High Court
Case No : Reference No. 1 of 1970

Manindra Nath Bose

APPELLANT

Vs

Balaram Chandra Patni and Others

RESPONDENT

Date of Decision : 28-07-1972

Acts Referred:

Bengal Ferries Act, 1885 — Section 16
Easements Act, 1882 — Section 15, 17

Citation : AIR 1973 Cal 145 : (1973) 1 CALLT 371 : (1973) 2 ILR (Cal) 246

Hon'ble Judges : Sabyasachi Mukharji, J; M.M. Dutt, J; Arun K. Mukherjea, J

Bench : Full Bench

Advocate : Chandra Nath Mukherjee, for the Appellant; Hari Pada Saha, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This appeal has been referred to the Full Bench by a Division Bench of this Court consisting of S. K. Chakravarty and S. K. Datta, JJ., for the decision of the question whether an exclusive right to ferry can be acquired by prescription. The reference has been made under Rule 7, Chapter VII of the Appellate Side Rules.

2. The plaintiffs instituted the suit against the defendants for a declaration of their exclusive right to ferry across the river Kalindi and for a permanent injunction restraining the defendants from interfering with their said right. The defendants were sued in a representative character under Order 1, Rule 8 of the CPC as representing the boatmen community of the village Hingulganj, within P. S. Hasnabad, in the district of 24-Parganas.

3. Kalindi is a public navigable river to the east of Hingulganj market situate at the village Hingulganj. The case of the plaintiffs is that their predecessor-in-interest Ramchand Patni acquired this exclusive right by a grant from the "Ruling Power". The ferry is known as "Ramchand Patni Kheya". It has been alleged by the plaintiffs that from time immemorial they have been exercising an exclusive

right to ferry passengers and goods from Hingulganj market to Basantpur market across the river Kalindi. In January 1954, the defendants Nos. 5 and 6 with the help of defendants Nos. 1 to 4, made an attempt to start a rival ferry at the same place which lead to a proceeding u/s 144, Criminal Procedure Code. Hence, the plaintiffs instituted the suit for the reliefs aforesaid.

4. The case of the defendants is that there is no existence of a ferry between Hingulganj and Basantpur as alleged by the plaintiffs and that in any event, the plaintiffs cannot have an exclusive right of private ferry across the river Kalindi. On the date of the suit Basantpur and half of the river Kalindi belonged to Eastern Pakistan. It was contended by the defendants that as Basantpur and half of the river Kalindi belonged to the Dominion of Pakistan, the plaintiffs could not claim any right to ferry across the territorial waters of another Dominion.

5. The learned Munsif came to the findings that the plaintiffs had no right to any private ferry and that they were not also entitled to this right u/s 16 of the Bengal Ferries Act. The learned Munsif further held that the plaintiffs could not claim any such right over the territorial waters of another Dominion. Upon these findings, the learned Munsif dismissed the suit. On appeal by the plaintiffs, the learned Subordinate Judge held that the plaintiffs had a right to ferry across the river Kalindi from Hingulganj to Basantpur. The learned Subordinate Judge, however, found that the plaintiffs failed to establish that they had an exclusive right to ferry across the river as claimed by them. The learned Subordinate Judge, accordingly, allowed the appeal in part and passed a decree restraining the defendants from disturbing the plaintiffs' right to ferry between Hingulganj and Basantapur. The other relief, namely, declaration of the plaintiffs' exclusive right to ferry was disallowed by the learned Subordinate Judge.

6. Against the judgment and decree of the learned Subordinate Judge the plaintiffs preferred a second appeal to this Court. Niyogi, J., who heard the appeal, came to the finding that the plaintiffs had an exclusive right to ferry across the river Kalindi between Hingulganj and Basantpur. In view of the said finding, Niyogi J. allowed the appeal and granted the declaration as prayed for by the plaintiffs. Niyogi J., however, granted leave to appeal to the defendants under Clause 15 of the Letters Patent. The defendants preferred an appeal to the Division Bench. The Division Bench consisting of Chakravarty and Datta, JJ., was of the view that there was a conflict of decisions of this Court on the question whether an exclusive right to ferry can be acquired by prescription. It was pointed out by the Division Bench that in two Bench decisions in *Kishore Lal Roy v. Gokool Monee Chowdrain* (1871) 16 Suth WR 281 and *parmeshari Proshad Narain Singh v. Mahomed Syud* ILR 1881 Cal 608, it was held that an exclusive right to ferry could be acquired by prescription, but in a subsequent Bench decision in *Nityahari Roy v. Dunne* ILR 1891 Cal 652, a contrary view was taken and it was held that such a right could not be acquired by prescription. In view of the conflict of decisions, the Division Bench referred the matter to the Full Bench.

7. It has been already stated that the learned Subordinate Judge has found the

existence of the ferry between Hingulganj market to Basantapur market across the river Kalindi. There was a dispute between the parties about the location of the ferry ghat at Hingulganj. According to the plaintiffs the ghat is situate on Plot No. 1610, but according to the defendants there is no existence of the ghat on the said plot. The learned Subordinate Judge has found that the ghat is admittedly situate by the side of the Customs Checkposts in C. S. Dag No. 1610. In spite of the said finding the learned Subordinate Judge has held that the ghat is not situate on that plot. Niyogi, J., came to the finding that the ghat was situate on that plot. In our view, the finding of the learned Subordinate Judge that the ghat is not situate on plot No. 1610 cannot be reconciled with its finding that the ghat is admittedly situate by the side of the Customs Check posts in C. S. Plot No. 1610. We are unable to accept the contention of Mr. Mukherjee, the learned Advocate for the appellants that Niyogi, J., was not right in interfering with a finding of fact made by the learned Subordinate Judge.

8. The next point that was argued by Mr. Mukherjee was that Basantapur market having been situated in Eastern Pakistan (now in Bangladesh), the plaintiffs' claim for a right to ferry between Hingulganj and Basantapur should not be declared. We do not, however, accept this contention. A right to ferry does not depend upon the ownership of the landing places on either side of the river. It would be sufficient if it is proved that a person claiming such a right has a right to embark and disembark passengers and goods on the landing places. There is evidence in this case that Government of Eastern Pakistan granted visas to the boatmen of India and under a reciprocal arrangement, the people of one State could carry passengers across the river to the other State. In view of this evidence, which has been accepted by the learned Subordinate Judge, it cannot be said that the plaintiffs' right to ferry cannot be declared on the ground that Basantapur fell within the territory of Eastern Pakistan. Niyogi, J., also took the same view as that of the learned Subordinate Judge. This contention of Mr. Mukherjee, therefore, fails.

9. The most important question which arises for our consideration in this appeal is, whether the plaintiffs have acquired an exclusive right to ferry between these two points, namely, Hingulganj and Basantapur across the river Kalindi. In India, there is no law which prescribes the mode for the acquisition of any private right to ferry across navigable rivers. It is, however, well settled that a right to ferry can be acquired by a grant from the Crown and also by prescription. The bed of a navigable river belongs to the Crown and the Crown is therefore entitled to grant a right to ferry to any person. Under the English Law also, ferry right can be acquired under a grant from the Crown or by prescription. The law on the point has been clearly stated in paragraph 394 at page 235 of Volume 17 of the 3rd Edition of Halsbury's Laws of England, as follows:--

"A ferry is a franchise, and is created by royal grant, or in modern days by Act of Parliament * * * It can be acquired by prescription at common law, which presumes a grant prior to the reign of Richard I (1189) or by proof of facts from

which a modern grant can be inferred.

If there is already an existing ferry between two towns in the hands of any person, the grant of another ferry between the same towns is void."

10. It is clear from the above statement of law that in England a ferry right can be acquired either by an express grant from the Crown or by prescription from which a Crown grant can be presumed. It follows, therefore, that the right can be acquired either by an express or an implied Crown grant. The law of England does not recognise any private right to ferry. In India, however, private rights to ferry have been recognised since a very long time. Bengal Regulations 6 of 1819 and Northern India Ferries Act (Act 17 of 1878) recognise the right to own private ferries.

11. The most important elements of a private right to ferry are the landing places on the two sides of the river. A person claiming a right to ferry across a river must show that he has a right to embark and disembark passengers and goods on either side of the river. He may show that he himself owns the landing places or has acquired the right to the landing places by a grant from the owners thereof or has acquired a right of easement for the purpose by prescription. This right to embark and disembark passengers and goods which he has acquired by prescription cannot be disturbed by any other person. In other words, another person cannot use the particular landing places for the said purpose. If anybody disturbs that right of the person who has acquired the same by prescription, that person can maintain an action for the disturbance of that right. Such a right is, however, confined only to the particular two points on both sides of the river, and the person acquiring such a right cannot prevent any neighbouring land owner from starting a ferry from the land owned by him. What he has acquired by prescription is the right to embark and disembark passengers and goods on the particular two points on both sides of the river. He has not acquired any such right on any other land and he cannot object to the starting of a ferry from an adjacent land by the owner thereof or by any person claiming under the owner. In short, he does not acquire any monopoly right to ferry in the locality.

12. Both under the English law and under the Indian Law when a right to ferry is created by a grant from the Crown the person in whose favour such a right is created acquires a monopoly, so that his right cannot be disturbed by the setting up of a rival ferry in the neighbourhood. In *Hammerton v. Dysart* (1916) 1 AC 57, Lord Haldane observed as follows:--

"He is entitled to a monopoly of his line of ferry, and he has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points * * *." The principle behind the acquisition of such a monopoly right under a grant from the Crown has also been discussed in *Hammerton's* case. Lord Haldane further observed in that case as follows:--

"The right of the ferryman is to carry and to take a toll for carriage, and his right

is coupled with an onerous obligation to maintain the ferry. It may well be that his exclusive right is given to him as consideration for his undertaking this obligation, and that it is thus that he becomes entitled to what has been popularly called a monopoly. The origin of the right is the prerogative of the Crown, which is the guardian of the public interest."

In paragraph 400 at page 238 of Volume 17 of the 3rd Edition of Halsbury's Laws of England, it is stated as follows:--

"A ferry, being a monopoly, is not granted for the benefit of the ferry owner, but for the benefit of the public, so that the public may be certain of finding the means of transit across the river. In return for the monopoly the ferry owner must give attendance at due times, keep a reasonable and sufficient number of men and craft in proper order, and take but reasonable and uniform tolls. He must carry all peaceable wayfarers who are willing to pay. If there is no obligation to give attendance or to keep up boats there is no monopoly of a ferry."

A Bench of the Allahabad High Court consisting of Sulaiman, C. J. and Rachhpal Singh, J., in *Ram Sakal Mullah v. Nageshar Mullah* AIR 1935 AH 481 has held that according to English Law, an exclusive right of ferry can only be claimed by a person holding a grant from the Crown and that the foundation of that right, which is in the nature of a monopoly, is the obligation undertaken by the ferryman to the public and in consideration of that the Crown grants him the exclusive right which cannot be disturbed. It has been further held in that case that in India also an exclusive right of ferry in the nature of a monopoly can be claimed if there is a franchise by the Crown. The monopolistic right arises as the ferryman in whose favour the grant is made has to perform some public duties. In the case of a private ferry the ferryman has no such obligation. A person having a private ferry, runs the ferry across the river without any obligation to anybody. The plying of the ferry depends upon his own sweet will. No one can compel him to run the ferry regularly or to maintain the same in proper order. It is for his own benefit that the ferryman runs the ferry. But when a right to ferry is created by a grant, the grantee does not run the ferry only for his own benefit but also for the benefit of the public; the grantee has to discharge public duties. The profits which he earns is his remuneration and even the Crown cannot impair or interfere with the right created by it by the grant.

13. It has been already stated that in the two aforesaid Bench decisions of this Court, namely, in *Kishoree Lal Roy's* case (1871) 16 Suth WR 281 and in *Parmeshari Prosad's* case ILR 1881 Cal 608 it has been held that an exclusive right to ferry can be acquired by prescription. In neither of these two decisions, the principle underlying the creation of a monopoly in favour of a grantee of the Crown has been considered. In *Kishoree Lal Roy's* case no reason has been given by the learned Judges but it has only been observed that it is recognised that there are proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising there from as would be the results by running a boat, if not exactly on the same line, at least within such a

distance as, for all practical purposes, would be the same as if it were on the same line. In Parmeshari Prasad's case, Garth, C. J., observed that he would have doubted the legality of such an extensive and an exclusive right as claimed by the plaintiff in that case had it not been for the fact that such rights had long been recognised as private property from times anterior to the Permanent Settlement. The later Division Bench in Nityahari Roy's case ILR 1891 Cal 652 have considered the two aforesaid Bench decisions of this Court and came to the conclusion that such an exclusive right could not be acquired by prescription. Most respectfully, we agree with the view expressed in Nityahari Roy's case. In view of the principles of law discussed above, we hold that an exclusive right to ferry cannot be acquired by prescription.

14. The plaintiffs, however, have not founded their case on the basis of acquisition of their right to ferry by prescription. Their case is that their predecessor-in-interest Ramchand Patni acquired this exclusive right to private ferry under a grant from the "Ruling Power", that is, from the Crown. No document has been produced by the plaintiffs to show such a grant. It has, however, been contended by Mr. Saha, the learned Advocate appearing on behalf of the plaintiffs-respondents that in view of the exercise of such a right from time immemorial, a grant by the Crown should be presumed. The plaintiffs have produced a document (Ext. 1) which is an order by the Joint Magistrate of Alipore dated August 15, 1972, whereby the learned Magistrate on the application of Pratap Chand Patni, the father of the plaintiff No. 1 restrained the Government officers from interfering with his right to ferry from the ghat in question. Exts. 3 and 3 (a) are two judgments of civil courts which show that the said Pratap Chand Patni obtained a decree declaring his right to the ferry ghat at Hingulganj and restraining one Durga Charan Patni and others from interfering with his right. There is no dispute that the plaintiffs have been running the ferry in question since time immemorial without interruption by anybody. There is no allegation that anybody else ever exercised any right of ferry at the Hingulganj ghat side by side with the plaintiffs. This right of the plaintiffs was recognised even by the Joint Magistrate who was entrusted with the maintenance of public ferries. Under these circumstances, it will not be unreasonable to presume a Crown grant in favour of the plaintiffs. We therefore, hold that this right of private ferry of the plaintiffs has been created by a grant from the Crown, Niyogi, J., was perfectly justified in declaring the plaintiffs' exclusive right to ferry from Hingulganj ghat. We would, accordingly, uphold the judgment and decree passed by Niyogi, J.

15. In the result, the Letters Patent Appeal No. 29 of 1964 preferred by the defendants-appellants is dismissed, but in the facts and circumstances of the case we do not make any order for costs in this appeal.

Arun K. Mukherjea, J.

16. I agree.

Sabyasachi, Mukharji, J.

17. I agree.