

(1923) 07 CAL CK 0061
In the Calcutta High Court

Midnapore Zemindary Co., Ltd.

APPELLANT

Vs

Trailokya Nath Haldar

RESPONDENT

Date of Decision : 03-07-1923

Acts Referred:

Citation : (1924) ILR (Cal) 110

Hon'ble Judges : Rankin, J;B.B. Ghose, J

Bench : Division Bench

Judgement

Rankin, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that, the appeal having been dismissed by an order of Chatterjea and Cuming JJ., dated the 18th December 1922, against some of the respondents, it is not competent as against the others. I am of opinion that there is no substance in this contention and it cannot be sustained. We therefore proceed to bear the appeal on the merits.

2. IN this case, the plaintiff--the Midnapore Zemindary Company--appeals from the decision of the learned District Judge of Murshidabad who has dismissed their suit brought in 1918 against about 120 fishermen. The right of the plaintiff company is that they have a patni and darpatni interest in a certain mehal bearing touzi No. 432 of the Murshidabad Collectorate. They claim to have the exclusive right of fishery in a navigable river, namely, the Ganges over a length of its course approximating to twenty miles; and, as part of this exclusive right of the fishery--although only the navigable channel is in question in this case--they also claim a similar right in the various dobas, bils and jhils which are on the side of the river. Now, it will be desirable to begin by observing that the appeal in this case is a special and limited appeal confined to points of law and that, although a great many documents including some ancient documents have to be canvassed in the course of the case, it is not true that the inferences of fact to be drawn from the numerous documents are themselves to be regarded as inferences of law. It is quite true that it is a part of our duty to see that no document has been misconstrued and also to see that the learned Judge of the Court of Appeal below

has not omitted to take into account all the important and relevant items of evidence. But the case comes before us, not as a case of first appeal like the case of *Raja Srinath, Roy v. Dinabandhu Sen* (1914) 20 C.L.J. 385, 391 which came before the Privy Council, but much more after the manner that would have been applicable if this case had occurred in England and had been tried by a jury at Assizes. Now, applying those principles we have to ask ourselves, what are the points of law on which the judgment of the learned Judge has been challenged?

3. Two points of law have been taken before us on behalf of the appellants. It is said that the learned Judge of the Court of Appeal below has canvassed the earlier documents which are evidence of the plaintiff's title, (such as the *Hudabundi* of 1795) and the documents containing the result of the Revenue Survey of 1853 and other papers, but that he has omitted to consider these documents in the light of certain intermediate documents which would, in fact, have thrown a light on their meaning. That is the first objection and it has special reference to the question of the determination of the boundaries of the fishery right, if any, mentioned in the earlier documents. The second objection is this that whereas on the pleadings there is no dispute as to the identity of the extent of the fishery right, the Judge has entertained a question as to that and has found wrongly against the plaintiffs. Farther questions have been raised by the learned Counsel arguing for the appellants. In particular, he has pointed out that the learned Judge has not purported to found his judgment upon any custom and that, in any case, the defendants are a fluctuating body of persons not from some particular village or villages and the exercise of the alleged fishery right can give them no right in law.

4. Now, it is necessary to refer somewhat shortly to the facts and the documents to see whether there is any substance in these objections. When one looks at the documents one is, I think, entitled to do so with some amount of historical sense. The documents which evidence what took place at the time of the Decennial Settlement show that in respect of certain parts of the water in that locality, the zemindars prior to the Decennial Settlement were in the habit of levying certain tolls from the fishermen. When we come to the document of 1795, we find that in *Huda Shek halipore* which now belongs to the plaintiffs there is a mehal named *Mincoot Juffurabad*. There is no item of money mentioned opposite to that particular entry. But the word "*Mincoot*" is said to mean "an estimate on fish" and to indicate, in some sense of the word, a *jalkar* right. When we come to the document of 1853, we find there an entry with regard to both of the rights of fishery which the plaintiffs set up in this case. We find that there is, first of all, *Juffurabad Mincoot*. This is treated as a *Mouja* in the Revenue paying estate or *Mehal* and the entry opposite to it is this: "This *Mouja* is *Sayer* and there is no land." The column which ordinarily would give the area of the land is blank. In like manner, the other fishery named *Makiapore Gungapath* is said to be "*a Sayer--no land appertaining to it.*" There are some intermediate documents--more than one of the year 1799. But these documents throw no further light upon the nature of the right, though they are important as showing that these

two rights, whatever they may be, were treated at the Decennial Settlement as being part of that which was settled with the zemindars.

5. From the early documents in the case there is not much difficulty in appreciating the fact of the zemindars having been in the habit of levying tolls upon the fishermen. It is to be observed that, at the time of the Decennial Settlement, at any rate, in the two places in question, this was a valuable right and that right is included in what the zemindars had to get for the Jama which they had to pay to the Government when the Mehal was settled. There is nothing whatever to indicate, to my mind, that it was intended by anybody to affirm the right of exclusive fishery in the sense that the Zemindars could refuse to, let anybody fish in any part of this water or to insist upon having the exclusive right of fishing. The zemindars were found in possession of the revenue in the form of a toll on fishermen. That revenue was left to them.

6. Now, the learned Judge having examined these documents deals with the question whether or not they show that by these names it was intended to give the zemindars any right over a navigable water at all. Further whether there is anything to show that they were intended to give any right over the whole of the water comprised in the schedule to the plaint. Upon that question, he comes to the conclusion that the evidence afforded by these documents is vague, uncertain and insufficient. It has been laid down by this Court and by the Privy Council that the evidence upon which a man is to claim an exclusive right of fishing in a navigable river must be plain and clear. It is not doubted that it was in the power of the Government--in right of the Crown as successor to the East India Company--to grant such exclusive right of fishing in a navigable water. Since about 1860, the policy of making such grants has been greatly doubted. But such grants were not uncommon in Bengal in earlier times, and if proved, they are perfectly legal. But they have to be proved. Mere grants of rights to tolls are not rights of exclusive fishery. A mere mention in the Revenue documents that certain classes of revenue are not being interfered with is not to be construed as granting exclusive right in navigable waters, if other adequate and sufficient meaning can be found for them. In the circumstances, taking the earlier documents by themselves, it appears to me that the reasoning of the learned Judge is perfectly good in holding that the documents do not show satisfactorily the grant of an exclusive fishery in a navigable river.

7. The question then arises, "Do these documents show that the right granted, whatever its nature may be, extends over the whole of the waters held by the plaintiffs?" Now, there is nothing at all in the documents themselves or in the names of those two moujas to show that it does extend over the whole of the waters claimed by the plaintiffs. In this connection, there come in now the two objections which Mr. Sen Gupta takes to the judgment of the learned Judge. He says, first, that there was no dispute as to the identity or the extent of this jalkar upon the pleadings or before the learned Judge, and he cites before us what is stated at page 13 of the printed paper-book in the judgment of the trial Court.

The words are these: "Then let us see if the jalkar in suit is included in touzi No. 432: if the plaintiff Company succeed to prove that then the question remains to be seen whether that would give the plaintiff the exclusive right to fish in the said jalkar. In the plaint a full description and designation of the jalkar in suit with its boundaries have been given. There is no dispute as to the identity of the jalkar. The survey maps Ext. 57 and Ext. 57 (1) have been filed by the plaintiff. These show also the full stretch of the river Padma within the limits specified in the plaint. The defendant also do not speak of any other jalkar, neither they assert the right to fish by custom in any other jalkar." Now, that is not in any sense, to be taken as meaning that the jalkars--if they may so be called--which are referred to in the documents of 1853 and 1795 were intended to extend over the whole of the waters claimed by the boundaries mentioned in the plaint. It is a statement to this effect:

8. "The plaintiffs are claiming an exclusive right of fishery in certain water. There is no misunderstanding as to that. The defendants deny such exclusive right of fishery in any part of that water. The custom which the defendants allege applied to that very water, namely, the water described by the boundaries mentioned in the plaint." But there can be no doubt that the plaintiffs have to prove their exclusive right to it. When they produce the documents of 1795 and 1853, they have to show that these documents cover the whole of the water which they claim. As to that, I can see no admission whatever either in the pleadings or elsewhere. In my judgment, the learned Judge was quite right in pointing to the fact that the earlier documents do not necessarily refer to the water claimed by the plaintiffs or, at least, to the whole of it.

9. The next objection comes in much the same way. The position is this: Roughly speaking, the learned Judge takes the plaintiffs' exhibits and deals with them in his judgment beginning with the document of 1795 and going down to 1853. The next point on which he starts is at the other end of the story and he finds that the defendants themselves produced rent receipts which go back to the year 1285, at least. These rent receipts, as the Judge quite fairly points out, were given by the plaintiffs mentioning the names of these two items treated as moujas of the plaintiffs' mehal--Mincoot Juffurabad and Makiapore Gangapath. It is from them alone perfectly clear, says the Judge, that having in their title deeds a right--whatever it may be--to these two moujas, the plaintiffs have since 1295 exacted tolls from all fishermen and put those words in the receipts. That was the ground apparently upon which since 1295 they conceived themselves to be entitled to levy tolls. Now, the learned Judge stated these facts and accepted them. There is no other document which carries the plaintiffs' case any farther and throws any stronger light upon the document of 1853 or of 1795 than is thrown by these rent receipts. Curiously enough, the plaintiffs have produced no evidence of that character taking the matter back earlier than 1295 B.S. But the complaint is now made that between the earlier documents and these transactions beginning with 1295 B.S. there are important intermediate documents--Pattas Ijaras and so forth which, if the learned Judge had attended

to them, would have made a difference in his finding that it was not proved that the earlier documents referred to the whole of the water now claimed. That being the position, I did my best to find out from Mr. Sen Gupta what documents they were and what importance they might have. Having pressed him to show us what they were, beyond a mere reference to a document of 1255 (which has not been printed" in the paper-book) being a Putni Potta to the Raja, I have not been able to find any specific document mentioning the boundaries now in suit and making it easier to say that the early documents must refer to the whole of the water. So far as the Potta of 1255 is concerned, it is not known yet, so far as this Court is concerned, whether it mentions those boundaries or not. In that state of things, it does not appear to me that either of these two objections of law has been sustained. It seems to me that the learned Judge in the end has come to a conclusion in this case that is in substance a correct historical conclusion. That right of levying tolls on all fishermen in this case was exercised before the Permanent Settlement. At the Permanent Settlement it was left to the zemindars as part of the Sayer. So far as we know, fishermen not only from the neighbouring villages but from elsewhere also had been fishing in this water and why? Because it is a public navigable river. Prima facie these waters are publici juris and everybody has a right in India to fish in any navigable water--whether tidal or not. People from anywhere have been exercising that right and, as the learned Judge finds, paying one or other of the two very well-settled and reasonable tolls. This went on during the time of the Raja. Since 1888, the learned Judge finds, there have only been those two kinds of toll. From 1894 to 1900, this Mehal was let out in putni or durputni to Messrs. Jardine Skinner and Company. In 1900, it was assigned to Mr. Crawford. In 1906, it was assigned to the plaintiffs. From the plaintiffs' acquisition in 1906 to 1913, they let out their right to Ijaradars and not only permitted but welcomed fishermen on their paying tolls. Not till the beginning of 1913, as I read the facts of this case, did anybody from the first history of this matter to the last set forth a claim to keep the fishermen off the water altogether and assert that whether the fisherman paid a reasonable and the customary toll or not he would turn them off the water. As I read the documents, such a right as that was in nobody's contemplation, at any time prior to 1913.

10. It has been said that the learned Judge has not relied upon any custom proved on the part of the defendants. "What the learned Judge has done is this. He has taken the practice. He has found as a fact that since the eighties people have not asked for permission to fish but have willingly paid one or other of the two settled tolls, and that these tolls have been collected by going up to the boats at the time of fishing. He has held, moreover, that the Putni Potta under which the plaintiffs hold contains reference to a practice:" abiding by the practice prevailing in Gunga path and the custom existing from time immemorial (you) shall go on enjoying and possessing the said jalkar on payment of the rent fixed." Leaving alone any question whether that phrase gives any right to the defendants, in dealing with the matter, the learned Judge has found a practice

and then he puts to himself the question can I safely connect that practice with the documents at the time of the Permanent Settlement and the Revenue Survey so as to make out that the practice since the eighties is a practice within the bounds and terms of the right which was granted at the time of the Permanent Settlement." He refuses to say that the fact that these tolls have been taken entitled him to find it proved that the right given in 1795 was the right of exclusive fishery throughout the area claimed. His view is, in fact, simply this: That the zemindars are to be allowed to collect tolls from fishermen as doubtless they had done from many years before. Taking the matter on the whole, it seems to me that the learned Judge's conclusion is a perfectly reasonable one and, in no event, can it be said that he has committed an error of law. It is not a question of the defendants proving any custom. If that were the question, undoubtedly, there would have been a good deal to say. Unless the plaintiffs first prove an exclusive right in these navigable waters, anybody whether he comes from Dacca or Murshidabad or any other place has an equal right to fish. All that is necessary in this case is to determine whether these fishermen who are made respondents in the appeal can be prohibited at the will of the plaintiffs from exercising their right of fishing in this water at all. In my judgment, they cannot and it has been so decided by the learned Judge of the Court of Appeal below. The appeal, therefore, fails and must be dismissed with costs.

Ghose, J.

11. I agree. On the findings of fact arrived at by the learned Judge and stated in detail in the judgment of my learned brother, I am of opinion that no question of law arises which can be urged in second appeal. The only point that I should mention is as to the right of the plaintiffs to levy tolls. That question was not raised in the suit and I entertain considerable doubt whether, after the abolition of Sayer, any zemindar has got any right to levy tolls or taxes with regard to the right of fishing by fishermen in a public navigable river. That question does not arise in this case and the observations of the learned Judge were based upon statements made by the defendants in their written statement. The plaintiffs were unable to prove, according to the learned Judge, the right to exclusive fishery set up by them and, upon that finding, their suit for a declaration that the defendants have no right to fish in that part of the river mentioned in the plaint was liable to be dismissed. In my judgment, therefore, the suit has been rightly dismissed and I reserve my opinion with regard to the right of the plaintiffs to levy tolls.