

(1913) 03 CAL CK 0011

In the Calcutta High Court

Case No : Letters Patent Appeal No. 1 of 1909 in Appeal From Original Decree No. 333 of 1906

Mussamut Bibi Ahmodi Begum and others

APPELLANT

Vs

Mahasay Taraknath Ghose and others

RESPONDENT

Date of Decision : 18-03-1913

Acts Referred:

Citation : (1913) 03 CAL CK 0011

Judgement

Jenkins, C.J.—The subject-matter of this litigation is a jalkar or right of fishery in certain bhsels named in the plaint as Khans Rajghat, Darhihal, Dagar, Ghormora, Burhia, Bhoorang, Khirkiria, Chaprela, Perdhanian and Singhia. It is the Plaintiff's case that these bheels are situated in Mouzah Kakarghat, Khizirpore, Imamnagore, and Harinkola, all in Tuppa Madhuban.

2. The Plaintiffs 1 to 33 together own Tuppa Madhuban, while Plaintiff 36 is its mustagir or lessee.

3. On the strength of this proprietorship the Plaintiffs claim to be exclusively entitled to the fishery right in these bheels which are, so far as they are the subject-matter of this suit, wholly within Tuppa Madhuban.

4. The first three Defendants claim to be entitled to this fishery as the grantees under the Government of jalkar Maksudpur. Defendant No. 4 is their lessee. They also claim to be entitled on the strength of long enjoyment. The Plaintiffs allege dispossession from the beginning of May 1892 to July 1894, and by their plaint in this suit, they pray for judgment as follows:

(1) That it may be held by the Court that jalkats Khana Rajghat, Darhihal, Dagar, Ghormora, Burhia, Bhoorang, Khirkiria, Dakhli Burhia, Bhoorang, Chaprela, Perdhanian, and Singhia, together with branches and Dhars, and all other sotas, Dobs, Khatas, Cheri, Bhata and Jamta, being part of Tuppa Madhuban, are the Milkiat of the Plaintiffs; and that the Plaintiffs and former proprietors of Tuppa Madhuban have for a long time, that is over 12 years, been in possession as

proprietors and holding adverse possession of all the aforesaid jalkars together with other jalears state within Tuppa Madhuban, and with Halka of the aforesaid Tuppa, by means of Khas Tashil and through mustajirs, Dermustajirs.

(2) That it may be held by the Court that the Defendants 1st and 2nd party neither had, nor have any right whatever to the jalkars in dispute or any of them situate within Tuppa Madhuban, nor were they ever in possession of the jalkars in dispute or any of these before the accrual of the cause of action in this suit, and that they had and have no right in respect of any of the jalkars aforesaid.

(3) That a decree may be passed by the Court in favour of the Plaintiffs awarding them possession over the jalkars in dispute aforesaid as proprietors and Mustajirs thereof by dispossessing the Defendants 1st and 2nd party and permanent injunction may be issued against the Defendants with these directions that the Defendants 1st and 2nd party or any of them should not interfere with the right of fishing of the proprietors or the Mustajirs the Plaintiffs: and that they should abstain from fishing in or exercising any power tantamount to possession of the jalkars in dispute, and that wasilat of the estate from the year 1308 to date of recovery of possession may be awarded to Plaintiffs, and that amount of the same may be ascertained in the execution-of-decree-department.

5. The suit was heard by the Additional Subordinate Judge at Bhagal pore who dismissed it with costs. The Plaintiffs preferred an appeal to the High Court which was heard by Doss, J., and Richardson, J. They were divided in opinion, Doss, J., being for reversing, and Richardson, J., for affirming, the decree of the Suboroinate Judge. The decree accordingly was confirmed, and the present appeal has been preferred under cl. 15 of the Letters Patent.

6. It is common ground that the bheels in suit lie within the limits of Tuppa Madhuban, and that the Plaintiffs together are entitled to that Tuppa; they claim to be equally entitled to all fishery-rights over the bheels within its limits.

7. The Defendants rest their claim on their ownership of the fishery known as jalkar Muksud pore in which, they maintain, are included the bheels now in suit.

8. The original grant on which this ownership of the jalkar rests is not produced, but it is said, though not proved, to have been made as far back as the 17th century. As evidence of this grant reliance has been placed on certain documents and on long user.

[His Lordship discussed these documents and held as follows :]

9. That there was a grant of jalkar Muksud pore is, I think, clearly established : The question is what passed to the grantees and what is now vested in the Defendants who claim under them. The grant certainly passed a right to fish in the River Ganges from Mayagunge eastwards : this indeed is not disputed. For the Defendants it is contended that the jalkar extends eastwards as far as a place called Peerpainti, a distance of 40 miles or so in all. For the Plaintiffs it has been contended before us, though somewhat faintly, that the fishery terminated

at a point short of this. It would seem from the judgment of Richardson, J., that no dispute was raised as to this eastern boundary by the Plaintiffs when the appeal was before him and Doss, J. But however that may be, I am satisfied that the Defendants' contention is well-founded, and that Peerpainti is the easternmost limit of the fishery. In this part of the Ganges there are three distinct jalkars running from west to east. The first runs from Ruhooknullah in Monghyr to Mayagunge in Bhagal pore, and is known as jalkar Gungaputtee, the 2nd named jalkar Muksud pore runs from Mayagunge to Peerpainti and the 3rd from Peerpainti to Soonti (see Exs. Z and K). This bears out the Defendants' contention which, in my opinion, is not negatived by the 4th answer in the Kanungoe's report of 1799 (Ext. 2).

10. The Defendants' view has been accepted by all three Judges before whom the case has already come, and without further labouring the point I hold that jalkar Muksud pore runs eastward as far as Peerpainti.

11. Treating the river as flowing from west to east the next problem is to ascertain its northern and southern boundaries. One would ordinarily say that these boundaries are its northern and southern banks, and, for what it may be worth, this is the indication furnished by the Kanungoe's report (Ext. 2.).

12. It would have been more satisfactory had there been evidence of the position of the northern boundary but there is none beyond such as would justify us in holding that it must be somewhere to the north of the dry weather stream of the Ganges.

13. So far the case is fairly simple; the real difficulty is as to whether the jalkars in suit lie between the two banks of the river or, in other words, in the bed of the river. This is substantially a question of fact and it will be a help towards its solution to have a menial picture of the river as it flows eastwards from Bhagal pore to Peerpainti.

14. It possibly is, because the Court, the pleaders and the witnesses at Bhagal pore were dealing with matters and scenes familiar to them and illustrated probably by conditions within actual view of the Court house, that the evidence as recorded may appear to be lacking in clearness, for much, doubtless, was taken for granted that is not obvious to those unacquainted with the locality. From Bhagal pore the main stream of the Ganges flows in a southeasterly direction towards Colgong where it is diverted northwards for a few miles. It then takes a bend towards the east and so reaches the neighbourhood of Peerpainti. This is very clearly shown by the maps in the case.

15. The bheels now in dispute lie to the south-west of Peerpainti and are in no sense a part of the present dry weather stream of the Ganges, but are at a distance of some miles from it. But when the annual rains are established this dry weather stream extends on its southern side as far as that which the Defendants describe as the southern high bank of the Ganges, thus covering the bheels in suit which lie to the north of the bank.

16. It is contended for the Defendants that this bank is in truth the southern bank of the river Ganges, and that what lies to the north of it, including the bheels, is a part of the river-bed. As supporting the view that this is the southern high bank of the river the Defendants point to its position and configuration, to its height in relation to the wide level stretch of low lying land to its north, to the contrast between the soil and growth on it and on the land to the north, and to the apparent marks of towing cords to which the Commissioner's Report refers. Insisting then that this still is the permanent south bank of the Ganges, the Defendants maintain that these bheels lie in the bed of the river and so are included in their falkar grant.

17. The Plaintiffs hotly contest this: they argued that this wide tract of land cannot be regarded as the bed of the river Ganges and this argument they seek to support by the fact that its width is 10 miles or more, that there are inhabited villages on it, that when the waters recede the soil is cultivated and bears crops, and that the land has actually been settled by the Government.

18. These, no doubt, are matters to be taken into consideration and duly weighed but their proper significance cannot be realised unless the character of the river in this part of its course be kept in mind.

19. To change from a stream, a mile or so in width, to an expanse of water 10 miles across is remarkable, but it is nothing unusual in this part of the river Ganges : it is of regular annual occurrence. Nor is the increase in volume so transient as to be negligible for the purpose of considering whether the flood stream is a part of the river : it lasts each year for a couple of months and notwithstanding its expanse there is a current in it from west to east, though naturally not a strong one.

20. This increased volume of water, extending as far as the southern high bank, is not an inundation, it is the normal flood stream of the Ganges and an integral part of the river. Much has been made of the presence of villages on this tract of land but this does not show that it is not the bed of the river. The character of the structures which go to make up the village must be borne in mind. And that there is nothing impossible involved in the idea of a village in the bed of the river is shewn by the fact that at Bhagal pore, within sight, we are told, of the Courthouse, the village of Shankar pore stands in the bed of the Ganges, (see witness No. 4 for the Plaintiff) nor can I regard the cultivation of winter crops as in any way conclusive against the Defendants. Here too regard must be had to all the circumstances. The silt brought down by the Ganges and deposited on this area in the rains forms a soil of high fertility and the opportunity of cultivating it is eagerly sought. Hunter in his Statistical Account of the Bhagal pore District speaks of a caste called Gungauntas whom he describes as numerous and as being fishermen who cultivate the islands and banks newly formed in the bed of the Ganges (Vol. XIV, p. 76) It is only for a portion of the year that the tract is culturable, and only crops suited to such cultivation that can be grown. There is no permanency, it merely happens that the soil carried in suspension by the flood

stream and deposited on this tract is capable of this immediate limited use rendering intermittent and periodic cultivation of the land possible.

21. It is pressed on us that the settlement by the Government of this tract is inconsistent with its being a river-bed. But I fail to see that. The peculiar properties of the deposited silt permit of cultivation and the mere fact that for a brief period in every year, the land can be used for purposes which make settlement practicable cannot prevent the land being a part of the bed of the river. This then is how matters stand: though the dry weather stream is at a considerable distance from the bheels, yet the flood stream of the rains covers them extending even beyond them right up to that which is the southern permanent bank of the Ganges and in the sense that it still serves to contain the river on the south in its greatest normal flow. So far I have dealt principally with the physical aspect of things, but beyond that there is much that supports the view that this bank is the river's southern bank and that the depression to the north is still the river-bed.

[His Lordship after discussing the evidence on this point proceeded as follows :]

22. Their (the Defendants') right is by virtue of their jalkar in the Ganges. But these bheels are not permanently connected with the dry weather stream of the Ganges, but only with its flood stream, as are the bheels in suit.

23. I need not refer in detail to all the bheels as to which this class of evidence has been given; it will suffice for me to mention three jilkars, Darhial, Digraha, and Deori. All three are connected with one or other of the jilkars in suit, they are all three circumstanced precisely as are those in suit, the Defendants' enjoyment of these three jalkars is undisputed, and the Defendants' right to them can only rest, as does their right to those in suit, on their being in the bed of the river Ganges.

24. Finally, the Defendants have in my opinion satisfactorily proved their long possession of the jalkars in suit. No doubt at one time these bheels were permanently connected with the main stream of the Ganges, and so long as that was so their jalkar rights over them could not be questioned. But it is the Plaintiffs' case that this connection was closed up about 25 years prior to 1904 (plaint, para. 12), and so it becomes important to ascertain who since that date have enjoyed the jalkar rights. The Plaintiffs and the Defendants each claim that possession has been with them. To prove their rival claims each side has adduced both oral and documentary evidence.

[His Lordship discussed this evidence and then went on as follows :]

25. The conclusion to which I come is that the Defendants are entitled to jalkar Muksud pore, that this jalkar extends from Mayagunge to Peerpanti, and that the bheels in suit are in the bed of the Ganges between those two points. As the case was placed before us prior to reply, these findings would have been conclusive in the Defendants' favour, for it appeared to be conceded on behalf of

the Appellants that if the Defendants were able to show that the bheels were in the bed of the Ganges, then their right to fish in them would follow. In reply, however, the learned Vakil for the Appellants contended for the first time that even if the bheels were held to be in the bed of the Ganges, still the Defendants would have no jalkar rights over them as they were disconnected with the main stream, during a part of every year. We were assured that it never was intended to make the concession which appears to have been made, and there can be no question as to the correctness of this assurance.

26. I must therefore deal with this point though it is to be regretted that it was not made at an earlier stage. Reliance was placed on several cases, but I am not aware of one which negatives the Defendants' claim now that it has been found that the bheels lie between the banks of the Ganges and in the bed of the river. The cases cited to us on behalf of the Appellants were *Ramanath v. Eshan Chandra* 2 Sevea. 463 (1863), *Grey v. Annund Mohun* [1864] W.R. 108 and *Satat Chandra Singh v. Khitish Chandra Roy* 12 C.L.J. 216 (1910).

27. In none of those cases did the facts really resemble the present, for in none was the bheel actually in the bed of the river, over which the claimant had jalkar rights. On the other hand, the decision as to jalkat Muksud pore to which I have already alluded and the case of *Jagendto Narayan Roy v. Crawford* ILR 32 Cal. 1141 (1905) sanction the view that in circumstances like the present jalkar rights of a river extend to waters in the river-bed though they are not connected with the waters of the flowing stream throughout the year. Each case must depend on its own peculiar circumstances. Where the right of fishery is in a river then the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river. In this case I think it may fairly and reasonably be said that the bheels in suit are throughout the year a part of the river Ganges. They certainly are such during a part of each year and they lie in that which throughout has been and still continues to be a part of the river-bed. The water of these bheels is the water of the Ganges and that is the source of the fish they contain. In the circumstances I hold that the temporary disconnection from the flowing stream occasioned by the fall of the waders cannot at any time deprive the bheels of their character of being a part of the Ganges. It was suggested for the Plaintiffs that the Defendants could only have access to the bheels by trespassing over the land of the Plaintiffs. This case, however, was not suggested in the pleadings or issues or at any stage prior to the argument in reply on this appeal. This is obviously too late. In my opinion, therefore, the Defendants have established their title to fish in the bheels, so that it is unnecessary to discuss their contention that the Plaintiffs have failed to prove that the jalkars in suit formed part of the asses upon which the settlement of *Tuppa Madhuban* was made with them. [Cf. *Forbes v. Meer Mohammed Hussein* 2 Suth P.C. 865; 12 B.L.R. 210; 20 W.H. 44 (1573)].

28. The result then is that (in my opinion) this Appeal should be dismissed and

the decree confirmed with costs.

Harington, J.

29. [After briefly stating the pleadings and the substance of judgment of the lower Court His Lordship proceeded as follows:

That a fishery known as jalkar Muksud pore has existed for very many years in the Ganges between Bhagal pore and Peerpainti there can be no doubt. It is mentioned in documents as old as the eighteenth century-it bears a separate Touji number-and is assessed as a separate revenue-paying mahal. That the Defendants are proprietors of this jalkar Muksud pore is not disputed.

30. The first question to be solved is, of what did jalkar Muksud pore consist ? Was it an exclusive right of taking fish in the flowing stream of the Ganges-and in such arms or inlets as were permanently connected with the river-or was it a right to take fish to the exclusion of all others in the waters of the Ganges lying between the North and South banks ? In other words, was it a right to take fish in the bed of the Ganges, as distinguished from a right to take fish only in the permanent stream of the Ganges ?

31. If the right was to take fish in the bed of the Ganges then the decision of the case depends on the question whether the jalkars in suit were in the bed of the Ganges. If, on the other hand, the grant was only of a right to take fish in the stream of the Ganges, the question whether the right could be exercised in the arms of the Ganges which during the dry weather are unconnected with the stream has to be considered.

32. In my view the answer to this question must depend on what were the terms of the grant and I do not think that much assistance can be got from cases referring to other fisheries created by other grants.

33. In this case the grant has not been produced but there is evidence as to the extent of the rights which the Defendant acquired. This evidence consists of old documentary evidence having a direct reference to the extent of the grant-and evidence of the extent to which for many years past the Defendants have exercised the right of fishery under the grant.

[After discussing this evidence His Lordship proceeded as follows :]

34. Now both Peerpainti and Muksud pore are marked in the revenue map which has been produced, and it is to be observed that according to that map each of these places is at a considerable distance south of the permanent stream of the Ganges as shewn on the map. Muksud pore lies roughly W.S.W. of Peerpainti; if a straight line were drawn joining these two places on the map. The waters in dispute would lie about that line, some to the north and some to the south of it.

35. The Defendants' case is that the permanent south bank of the Ganges curves southward from Peerpainti coming again north to Muksud pore in the form of a crescent and it is this high bank which forms the south boundary of his

fishery. Considerable light is thrown on this question by the litigation which took place in 1866 when the question arose as to a fishery in a deara which formed in the river. It seems that when the jalkat in the deara closed up and became severed from the waters of the river, the zemindar laid claim to it but it was held in the lower Courts and in this Court to be within Plaintiffs' fishery Mouzah Muksud pore. The learned Judges of this Court lay particular stress on the letter September 1799 and say that the Plaintiffs' right was not only to fish in the Ganges itself but was a general right of fishery within certain limits-these limits being on the north and south banks of the Ganges-and that the right expressly included stagnant as well as running water.

36. The Plaintiffs contend that this case has no bearing on the question in dispute because the deara was an island, surrounded by the flowing stream of the Ganges, so that in any case it must have been between the banks of the Ganges whether these banks are taken at the high or low water season.

37. The evidence shows that the river Ganges has at this spot, where the fisheries in dispute lie, a great but regular yearly change in its breadth. In the hot weather when the waters are low, the river is from 1 to 2 miles in breadth. In the rains when the waters are high it is some 8 to 10 miles in breadth.

38. On the south of the land in which the disputed jalkars are, is a railway line. The Commissioner describes the southern bank of the river which is a short way to the north of the railway line, as a bank nearly in a crescent form. The Commissioner saw the place in the rainy season. At that time the water came right up to the high bank which the Defendants contend is their southern boundary-the jalkars in dispute were all covered and formed one sheet of water with the Ganges. On one side it is said that this large area containing several miles of land cannot be regarded as the bed of the Ganges because during certain months of the year it is under cultivation and rabbi crops are grown on it-and moreover there are villages on it, while on the other hand it is contended that as the land in question is regularly covered by the river it is part of the river bed.

39. The question as to what constituted the bed of a river was discussed by A. L. Smith, L.J., in the case of *The Thames Conservatory v. Smeed Dean & Co.* [1897] 2 Q.B. 334 at p. 338, and he describes it as that portion of the river which in the ordinary and regular course of nature is covered by the waters of a river. It need not be constantly covered if in the ordinary course of things it is habitually covered. He adopts this definition-"the bed of the river is that portion of its soil which is alternately covered and left bare as there may be an increase or diminution of the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter or spring-or the extreme droughts of the summer or autumn." If this definition which was originally given in reference to an American river and applied by A.L. Smith, L.J, in the case of the Thames can be applicable in the case of a river so unlike the Thames as the Ganges is, then

the site of the jalkars in suit must be within the bed of the river for they are regularly and habitually covered by the river for some two months in the year during the rains and they lie within defined banks. Extraordinary floods may make the river overflow the banks and cause inundation but in the absence of extraordinary floods, the river regularly, year by year, comes up to but does not extend beyond this bank in the ordinary course of nature.

40. The fact that in the tract situated between the banks, there are villages which are surrounded by water for a couple of months in the year, when the river is full, does not seem to me, to affect the question whether the tract is the bed of the river. I think the tract is the bed of the river because it is habitually and regularly covered by the river for a substantial portion of the year in the ordinary course of nature.

41. In para 12 of the plaint the Plaintiffs allege that no branch of the Ganges was connected with the jalkar in dispute for 25 years before the suit-i.e., since about 1879. Prior to that date therefore on the Plaintiffs' own showing the jalkars in dispute were part of the Ganges-but nevertheless there is produced a kabuliyat executed in favour of the Kapaljauru concern by one Gokul, the lessee of the Plaintiffs, in respect of a jalkar Mehal which apparently includes some of the waters now in dispute and this looks like an endeavour to disturb the Defendants' possession when even on the Plaintiffs' own showing the waters remained connected with the Ganges. On the other hand, it is possible that the lease refers to other waters outside the banks of the Ganges for the Defendants lay no claim to any fisheries in the mouzah which lie outside the banks of the Ganges. But from whichever point of view it is looked at it does not help the Plaintiffs. If it purports to deal with the waters in dispute, it is inconsistent with the plaint : if it deals with waters outside the banks of the Ganges it is irrelevant.

42. But an attempt was made by Gokul in 1892 to interfere with the Defendants' fishing and a riot took place between the persons who had been licensed to fish by the Defendants' lessee and Gokul who had obtained a settlement of all the jalkars in Tuppa Madhuban from the zemindars.

43. Some time before this riot, viz., in October 1891, Gokul had presented a petition complaining of an obstruction to his fishing by men acting on behalf of the zemindar of jalkar Muksud pore but the Magistrate made no order on the ground that he considered the case one for a Civil Court. Instead however of going to the Civil Court, Gokul had recourse to violence which resulted in his being convicted and sentenced to 6 months' rigorous imprisonment under sec. 147, I.P.C. The result of this proceeding is to show that the Plaintiffs had not possession of the fishery in dispute in 1892-and yet no recourse is had to the Civil Court until 1904.

44. There are on the other hand a number of leases granted by the lessees of the Defendants to various fishermen of which the earliest is dated 1859 and the latest 1898-but though these relate to fishing in jalkar Muksud pore they do not

generally speaking refer to the waters in dispute by name. Some, however, do give details of the water and expressly refer to waters lying within Mouzah Madhuban.

45. There is oral evidence too to show that the lessees of the Defendants caught fish in the disputed water-and even the Plaintiffs' witnesses concede that the western portion of some of the Dhars in dispute which lies westward of the boundary of Madhuban are fished by the lessees of the Defendants and not by the lessees of the proprietor of the zamindari within whose boundaries they lie.

46. Without going in detail into this mass of evidence, I think that the conclusion to be drawn from the oral and documentary evidence is that the Defendants continued to exercise the right of fishing in the waters in dispute after they had ceased to be part of the permanent stream of the Ganges and that the only efforts which the Plaintiffs made to oust them from this fishery were unsuccessful.

47. There was a further point which was pressed by the Plaintiff.

48. He contended that an examination of the accounts shewed that after the time he alleged that the Defendants ousted him from the fishery his income fell, while the revenue the Defendants got from the fishery rose.

49. Even if this were established it would be at the best very indirect evidence-but it is sufficient to say that an examination of the accounts does not establish that there was in fact a rise in the revenue that portion of the jalkar in which the waters in dispute are situated.

50. There is then the point which was taken in reply, viz., that any rights the Defendants might have had in the waters in dispute came to an end when these waters ceased to be permanently connected with the river Ganges.

51. In support of the proposition reliance is placed on the cases of Ramanath v. Eshan Chandra 2 Sevres. 463 (1863) and Gopeenath Roy v. Ram Chandra Tarkalunkar 1 Mac. Sel. Rep 304; 2 Seves. 467n. (1808), and Sarat Chandra Singh v. Khitish Chandra Roy 12 C.L.J. 216 (1910).

52. In tire last of these cases the facts were dissimilar from those of the present case : because in that case the subject of dispute was a bheel which was permanently severed from the river-and remained in a state of isolation from the river except when unseal floods made the river inundate the entire country.

53. The first case tells against the Appellant for there it was laid down that the grant of fishery must be prima facie confined to the river and sheets of water communicating therewith-and the Judges intimate that if the right of fishery had been exercised from the time of the settlement over the piece of water in dispute or over pieces of water similarly circumstanced that might show that the fishery at that time had extended to that piece of water.

54. The other case, viz., Gopeenath Roy v. Ram Chundra Tarkalunkar 1 Mac Sel. Rep. 304; 2 Seves. 467n. (1803) is also distinguishable in point of fact because it

was there found that the jheel in question did no. form any part of the river channel.

55. These cases do not establish as a matter of law that when a fishery is granted in a river the grant can only include the right of fishing in the back waters of the river as long as they are permanently connected with the stream. Here such evidence as we have of the terms of the grant shows that it was a grant to fish in all the wars of the Ganges stagnant or flowing between the banks. For reasons I have given I think the banks mean the permanent high bulks which mark the boundary of the river when it is at its highest in the ordinary course and if that is so it is difficult to imagine what the word "stagnant" refers to unless it refers to those pieces of water which are one with the river when it is high but are cut off and become stagnant when it is low The water in such stagnant pools is the water of the Ganges and the fish in them are the fish of the Ganges. It does not seem to me that it can well be said that they are not included in a grant of the fishery even where that fishery includes stagnant as well as running water.

56. Two other cases were referred to, one of which is directly against the Plaintiffs' contention. In Jagendro Narayan v. Crawford ILR 32 Oal. 1141 (1905), it was held that the fishery remained in the waters in dispute notwithstanding that they were temporarily severed from the river in which the fishery was granted. In the second, Ishan Chandra Das v. Upendta Nath Ghosh 12 C.W.N. 559 (1908), in which it was held that the right of fishery had been lost, the grant was of a jalkar in the flowing stream of the Padma, while the water in dispute had been permanently severed from the Padma for many years.

57. In my view therefore the last contention raised by the Plaintiffs is unsustainable, and inasmuch as the Defendants' jalkar extended from bank to bank, and these disputed waters lie between the banks of the Ganges, the Plaintiffs' suit must fail.

Mookerjee, J.

58. I am in full agreement with the conclusions set out in the judgment delivered by the learned Chief Justice. But I propose to review the circumstances of the litigation very briefly, as the two members of this Court who heard the appeal from the decision of the Subordinate Judge took divergent views on the subject.

59. The questions which emerge for consideration from the elaborate arguments addressed to us lie in a narrow compass.

[After briefly stating the pleadings His Lordship proceeded as follows:]

60. Two questions, accordingly require examination, first, limitation and, secondly, title.

61. It is plain that no question of limitation really arises in the case. The suit has no doubt been framed as primarily a suit for possession, but it is in essence a

suit for an injunction to restrain the Defendants from committing what must be deemed a continuing wrong if they fail to establish their alleged title. The Defendants do not claim any title to the soil covered by the waters in which they set up a right to fish. They claim fishery-rights under a grant from the Crown; if they establish this grant, the suit must be dismissed on the merits. If the Defendants fail to establish the grant and rely upon possession, they must show that they have acquired a statutory right of easement, because, as pointed out in *Chundeecharan v. Shib* ILR 5 Cal. 945 (1880) and *Loke Nath v. Jahania* 14 C.L.J. 572 (1911), a profit a prendre, such as a right of fishing in another's waters is an easement. within the meaning of that term as defined in sec. 3 of the Indian Limitation Act, 1877, though it is worthy of note that the case of *Abhoy Chatan v. Dwatkanath* ILR 39 Cal. 53 (1911) raises the question whether an exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided in the statute without a grant from the Crown. In any view, as a trespasser cannot by the very act of trespass immediately and without acquiescence on the part of the owner, become possessed of the property upon which he has trespassed till the statutory period has elapsed, the wrongful act of the Defendants can only be deemed acts of trespass, and as provided in sec. 23 of the Indian Limitation Act, in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the wrong continues. Consequently, the problems of which solution must be sought is that of the title alleged by the Defendants.

62. The Plaintiffs, it is not disputed, are proprietors of the permanently settled estate Tuppa Madhuban; prima facie, therefore, they are proprietors of the territorial fisheries comprised within the ambit of their estate. But it is open to the Defendants to put the Plaintiffs to the proof of the fact that the jalkars, at the time of the permanent settlement, formed part of the assets of their zamindari, *Forbes v. Meer Mohammed Hussain* 2 Suth. P.C. 865; 12 B.L.R. 210; 20 W.R. 44 (1873) and the question would have been of vital importance, if it had been proved that the predecessors of the Defendants were, as in the case before the Judicial Committee, in possession of the jalkars at or before the decennial settlement. This aspect of the case, however, though suggested in the written statement of the Defendants in the primary Court and pressed by their learned Counsel in this Court, does not appear to have been clearly developed at the trial, and need not be further examined in view of our conclusion on the other points in the case.

63. It has not been disputed in this Court that the Defendants are owners of fishery-rights in the river Ganges comprised in jalkar Muksud pore. This, indeed, is established by unimpeachable documentary evidence, though the original, grant has not been produced. It may be stated here that reference was made to a passage from Hunter's Statistical Account of Bengal to show that jalkar Muksud pore was granted in the time of the Mohammedan ruler of the country and has been in existence from the 17th century. I am not prepared to hold that

reference can legitimately be made to statements in Hunter's Statistical Account for the purpose of establishing the existence of private rights, though I am not unmindful of the decision in *Achal Ram v. Kazim Hussain* L.K. 32 I.A. 113 : s.c. ILR 27 All. 271 (1904), where the question does not appear to have been argued. The point, however, is not of vital importance whether or not the jalkar Muksud pore has been in existence from pre-British times. What is really relevant is the grant as recognised at the time of the Permanent Settlement. That grant, as already stated, has not been produced, but the existence of jalkar Muksud pore is conclusively established by means of recitals in documents very nearly contemporaneous with the Permanent Settlement. The name is mentioned in a paper which is apparently a list of jalkars in Pergana Kahalgaon in 1791. It is mentioned again in a Register of 1794 of revenue-paying estates in Bhagal pore. It was, we also find, the subject of correspondence in 1799 between the Collector of Bhagal pore and the Board of Revenue at Calcutta. This last document indicates that originally, at the time of the Permanent Settlement, the jalkar asset was included in the permanently settled estate, but when the estate fell into arrears, a portion thereof only, inclusive of the jalkar, was sold on the 27th September 1796, at the instance of the Collector for realization of the revenue. This possibly explains how the fishery-right came to be separated from the land, and may furnish an answer to the objection forcibly urged by the Appellants, that if the fisheries claimed by the Defendants were comprised in the bed of the river, it is extremely unlikely that the river-bed should have been included within the ambit of their permanently settled estate Tuppa Madhuban.

64. We start, then, with the well established fact that the Defendants are owners of jalkar Muksud pore in the river Ganges. The substantial point in controversy is what are the boundaries of this jalkar. Upon a careful examination of the proceedings in the Court below, as also of the arguments addressed to the learned Judges who heard the appeal in the first instance, it is fairly clear that no question was raised as to the eastern and western boundaries. The documentary evidence shows that in the stretch of the river between Monghyr on the west and Sooner in the east, there are three jalkars, first from Rahuknalal in Monghyr to Mayagunge in Bahagalpore, another from Mayagunge to Peerpainti and a third from Peerpainti to Soontee. We are concerned in the present litigation with the second of these jalkars and the case has been tried on the assumption that it extended from Mayagunge on the west to Peerpainti on the east. Some difficulty may possibly be created by the fourth answer of the Kanungoe appended to the letter, dated the 9th September 1799, but the point was not really in controversy in the Court below, and this appeal must be determined on the footing that the western boundary of jalkar Muksud pore is Mayagunge and the eastern boundary is Peerpainti. The controversy has centred round the question, where are the northern and southern boundaries, of jalkar Muksud pore. The Appellants contend that the southern limit of the jalkar is the southern edge of the dry weather stream of the river Ganges. The Respondents contend, on the other hand, that the southern boundary is the high bank which forms the southern limit of the

stream when it is full during the rains. If the contention of the Appellants prevails, the disputed jalkars must be deemed outside the bed of the river Ganges. If the contention of the Respondents is established, the jalkars are in the bed of the river itself. In other words, the question in controversy reduces to this; what is the southern limit of the bed of the river in that part of the country ? A similar question would be involved in the determination of the northern boundary of the jalkar, if the investigation of that question were necessary for the purposes of this litigation. It is fairly clear upon the evidence that during the hot weather when the stream shrinks to its minimum size, the river is from one to two miles broad, while during the rains when the river is full the breadth of the stream is as much as ten miles in some places. Consequently the question may be put as follows :-Is the river-bed from one to two miles in width or is it ten miles in width ? Or, if the question is considered from a somewhat different standpoint, it may be asked, when the stream expands during the rains and attains a breadth of ten miles is that expanse of water still the flowing river or is it merely flood or inundation ? The elements which support the view that the expanded stream is really the river at its fullest are these :- first, the height of what is called as the southern high bank above the lowland to the north stretching towards the stream when it is narrowest; secondly, the alluvial character of the soil of this lowland; thirdly, the nature of the vegetation grown on it; fourthly, the annual recurrence of the phenomenon of the expansion of the stream; fifthly, the length of time during which the expanded stream continues to retain its maximum size; sixthly, the existence of currents at the southern extremity of the expanded stream, and, seventhly, the presence of marks of towing ropes on what is called the southern high bank, indicating that at some time or other the river must have extended as far south as the high bank. On the other hand, the elements upon which the Appellants rely to support their theory that the stream as it exists during dry weather is the real river Ganges, which inundates the surrounding country during the rains as the stream can no longer be contained within its narrow bed, are as follows :- first, the distance between what is called the southern high bank and the southern edge of the stream in dry weather, namely, from five to six miles; secondly, the fact that there are groups of villages inhabited by cultivators on this long stretch of land; thirdly, the fact that when the water subsides the land is regularly cultivated and winter-crops are grown. In my opinion the inference to be drawn from all these circumstances is that what is described as the southern high bank is the southern bank of the river. This view is confirmed by the remarkable fact that the Appellants themselves realised the full effect of some of the circumstances already mentioned, specially, the regular recurrence of the expansion of the stream, the length of the period of time during which the expanded stream is maintained at its maximum size, and finally the existence of currents therein; the witnesses for the Appellants endeavoured, though unsuccessfully, either to deny altogether the existence of these facts or to minimise them as far as practicable. But it has been strenuously argued on behalf of the Appellants that the bed of the river is the channel in which the water flows continuously

throughout the year. This contention cannot possibly be supported. It is indisputable that, in the words of the Digest, "That is considered to be the bank which contains the river when fullest" (Digest 43, 12, 3). Ware on Roman Water Law, sec. 41. Consequently, the bed of the river is understood to be the whole of what contains its waters when most swollen, in whatever time of the year, without leaving its channel and overflowing its banks. When the river is at its full flow, be that by the daily flow of the tide or by the natural increase of its waters occasioned by rain or the like cause filling its natural bed to its highest reach of flow, it marks its high water while its diminished range of flow by summer heats shows its low water mark. In other words, as Grotius puts it, (War and peace, 2, 8, 9), "the bank is the outermost part of the bed in which the river naturally flows at its fullest." On this passage Vinnius comments, "this signifies that that space next to the bank which is some time not occupied by the river, when reduced by heats in the summer season, is not a part of the bank." This justifies the statement of Houck (Navigable Revets, page 6), that the bed of a river is the space between the banks occupied by the river at its fullest flow, so that the bank of a river is no part of its bed for the bank ends at the line to which the water rises at its highest flow, and though the space next below it is sometimes uncovered by the river when reduced to its lowest flow, yet the space so uncovered is not a part of the bank but of the bed of the river; the bank is thus the border of the bed within which the river flows when in its fullest state naturally, that is to say, when not temporarily overflowed by extraordinary rains. The subject was lucidly discussed by Mr. Justice Curtis in delivering the judgment of the Supreme Court of the United States in *Howard v. Ingersoll* 13 Howard 831 (427); 54 U.S. 381. The banks of a river are those elevations of land which confine the waters when they rise out of the bed, and the bed is that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation or both, produced by the common presence and action of flowing water. But neither the line of ordinary high water mark nor of ordinary low water mark nor the middle stage of the water can be assumed as the line dividing the bed from the banks. The line is to be found by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line, between the bed and the banks, will be found above or below or at a middle stage of water, must depend on the character of the stream. The height of a stream during much the larger part of the year, may be above or below a middle point between the highest and the lowest flow. Something may also depend upon the rapidity of the stream and other circumstances. But, in all cases, the bed of a river is a natural object, and is to be sought for not merely by the application of any abstract rules but as other natural objects are sought for and found by the distinctive appearance they present, the banks being fast land on which vegetation appropriate to such land in the particular locality grows wherever the bank is not too steep to permit such growth and the bed being soil

of a different character, and having no vegetation, or only such as exist when commonly submerged in water." To the same effect is the statement in *Alabama v. Georgia* 28 Howard 505, 516; 64 U.S. 505. "It is the running water of the river that makes its bed, for it is that and that only which leaves its indelible mark to be readily traced by the eye, and wherever that mark is left there is the river's bed; it may not be there to-day, but it was there yesterday and when the occasion comes it must and will, unobstructed again, fill its own natural bed." This view was substantially accepted in *Hindson v. Ashby* [1896] 1 Ch. 78 (84) (1895); on app. [1896] 2 Ch. 1 (25), *The Thames Conservatory v. Smeed & Co.* [1897] 2 Q.B. 334. Judged from this point of view, the contention of the Appellants cannot be accepted as sound. It is indisputable upon the evidence that from year to year during the rains the river attains a breach which varies from 8 to 10 miles, and this state of things continues during a period of at least two months. There is no room for suggestion that this is an accidental phenomenon, a flood or an inundation, a temporary overflow due to extraordinary rains or some similar exceptional cause. The evidence consequently tends to support the view that the disputed jalkars stand on land which is included in and is part of the river-bed. It has been suggested, however, that this view, if carried to its logical conclusion, may create difficulties in the application of the law of accretion, and, reference has, in this connection, been made to the judgment of the Judicial Committee in the case of *Lopez v. Muddan Mohan Thakur* 13 M.I.A. 467 (475) (1870), where James, L.J., described the bed of the sea or public river belonging to the State as "public domain not usable in the ordinary sense." Reference has also been made to observations in the cases of *Narayan Kumari v. Nawab Nazim of Bengal* 4 W.R. 41 (1865), *Nabin Kishore Roy v. Joges Prosad Ganguli* 14 W.R. 352 (1870), *Kanta Prosad Hazari v. Abdul jamir* 8 C.W.N. 676 (1904) and *Seeb Kristo v. East India Co.* 6 M.I.A. 267 (1856). I do not feel pressed by the difficulty suggested. It may show at best that the principle which must be applied to the solution of the question raised in the present case should not be extended and carried to what may seem to be its logical sequence. Consequently the only inference legitimately deductible from the facts clearly established in the evidence is that the jalkars stand on the river-bed. This view is fortified when the evidence of possession is examined. On this part of the case, there is no reason why the oral evidence on the side of the Defendants should be rejected. That evidence has been believed by the Subordinate Judge and sufficient reasons have not been made out to support the contrary view. At one stage of the argument much stress was laid on the assertion that the accounts produced by both the parties indicate that the increase in the income of the Defendants synchronises with the increase of the income of the Plaintiffs and that this began in the year 1891 when the Plaintiffs allege that they were dispossessed. Upon a closer examination of the accounts, however this theory was completely negatived. On the other hand, the kabuliyats produced by the Defendants, in so far as the jalkars mentioned therein can be identified, tend to support their allegation of possession. But I do not attach very great importance to the kabuliyats on either side, because the description of the

properties demised are vague, and an additional difficulty is created by the fact that different jalkars are in the locality called by the same name, while the same jalkar has different names given to it by different people. Considerable weight, however, must be attached to another remarkable circumstance, namely, the undoubted fact that the Defendants have been in occupation of other jalkars in respect of which their possession would be wrongful except on the theory that those jalkars, similarly situated to the jalkars now in controversy, covered land forming part of the bed of the river. In respect of one of these jalkars, the Government challenged the title of the Defendants but subsequently recognised the validity of their claim. In respect of another jalkar which lies within the estate of the thirty-sixth Plaintiff, it is noteworthy that the title of the Defendants has not even been contested. On the whole therefore the conclusion becomes irresistible that the jalkats in dispute form part of the river-bed and that the Defendants have been in occupation thereof as comprised in their jalkar Muksud pore. It has finally been argued on behalf of the Appellants that even if the disputed fisheries be deemed to be situated in the bed of the river Ganges, the Defendants as owners of jalkar Muksud pore are not entitled to them inasmuch as they are during at least a part of the year disconnected from the continuous flowing stream. In support of this proposition, reliance has been placed on the cases of *Grey v. Annunda Mohun* [1864] W.R. 108, *Ramanath v. Eshan Chandra Seves* 463 (1863) and *Sarat Chandra Singh v. Khitish Chandra Roy* 12 C.L.J. 216 (1910). Reference has also been made to the cases of *jagendro Natayan v. Crawford* 2 C.L.J. 569 s.c. ILR 32 Cal. 1141 (19, *Pertab v. Unnoda* 2 Seves. 754 (1863) and *Hanbury v. Jenkins* [1901] 2 Ch. 401. The cases relied upon do not really assist the contention of the Appellant. The case of *Sarat Chandra v. Khitish Chandra* 12 C.L.J. 216 (1910) shows that a grant of fishery right in a river does not give to the grantee a title to fish in sheets of water adjacent to the river with which the river communicates only in the time of floods. This principle, however, has no application to jalkars situated in the bed of the river itself; the grantee of fishery right in the river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular sheet of water may, during part of the year, be disconnected from the flowing stream or permanent current does not affect the rights of the grantee. A jalkar so situated in the river-bed is essentially part of the river, and the fish contained therein may properly be deemed fish of the liver. Consequently, the Defendants must be taken to have established their jalkar right in the disputed sheets of water which are situated in the bed of the river Ganges within its banks and are accordingly parts of the river itself. On these grounds, I agree that the decree of the Subordinate Judge must be affirmed.