
(1961) 03 CAL CK 0032

In the Calcutta High Court

Case No : Civil Revision Case No. 3564 of 1958

Purnendu Bikash Maity

APPELLANT

Vs

Chairman, District Board, Midnapore and Others

RESPONDENT

Date of Decision : 28-03-1961

Acts Referred:

West Bengal Estates Acquisition Act, 1953 — Section 5

Citation : AIR 1963 Cal 74

Hon'ble Judges : G.K. Mitter, J

Bench : Single Bench

Advocate : S.K. Das and Dwijendra Nath Bose, for the Appellant; S.K. Bose, Radhanath Das for Opposite Party No. 1, N.C. Chakravarty and D.N. Basu for Opposite Party No. 8, for the Respondent

Judgement

G.K. Mitter, J.—This is an application under Article 226 of the Constitution for the issue of a writ in the nature of mandamus directing the opposite party No. 2, District Magistrate, Midnapore, to register a number of ferry boats maintained and/or to be maintained by the petitioner for running a private ferry from Bamanchak in the district of Midnapore to different places in the district of 24-Parganas, namely, Kakdwip and other places, for a similar writ directing the opposite parties Nos. 2 and 4 to cancel the order dated June 16, 1958 in Ferry miscellaneous case No. 1 of 1958 and for other reliefs.

2. The respondents are (i) the Chairman, District Board, Midnapore, (2) the District Magistrate, Midnapore, (3) the District Magistrate, 24-Parganas and (4) the State of West Bengal. The petitioner is a citizen of India claiming to be carrying on the business of a private ferry from Bamanchak to Kakdwip on tidal navigable rivers which flow into the Bay of Bengal. He asserts that his grandfather one Gajendra Nath Matty had been plying a similar business for more than 60 years. It is said that the ferry was discontinued after the cyclone in the year 1942 until it was resumed by the petitioner in 1956. On March 26, 1957, the petitioner applied to the District Magistrate, Midnapore, through the

Sub-Divisional Officer, Court for registration of six boats under the Rules framed u/s 22 of the Bengal Ferries Act between certain points in the district of Midnapore and 24 Parganas. A copy of this application is Annexure to the petition marked "B". On the objection of the Chairman, District Board, Midnapore, to the registration applied for, the Ferry miscellaneous case No. 1 of 1958 was started in the court of the Additional District Magistrate, Midnapore. The sub-divisional officer of Contai in the District of Midnapore as well as the sub-divisional officer of Diamond-harbour appeared to have taken the view that there would be no objection to the registration of the boats or their plying between the two Districts as prayed for. Ultimately the Additional District Magistrate, Midnapore by his order dated June 16, 1958 rejected the petitioner's application on the ground that all private ferries had vested in the State u/s 5 of the West Bengal Estates Acquisition Act.

3. The petitioner moved this Court on October 7, 1958 and obtained a rule calling upon the opposite parties to show cause why the writ prayed for should not issue. The delay in making the application is sought to be excused on the ground of illness of the petitioner's father and as no point was made about it by the respondents nothing further need be said on this point. The grounds urged in the application are as follows :

(a) As a citizen of India the petitioner has a fundamental right to ply his boats or to carry on a business of plying boats for hire on tidal navigable rivers without let or hindrance by anybody whatsoever;

(b) The starting point of the petitioner's Ferry is situate on the petitioner's own land held by himself and his family as a raiyat under the State of West Bengal. The said land is recorded in the last settlement records in the name of the petitioner's father Profulla Kumar Maity. The petitioner along with his father and brothers constitute a Hindu Mitakshara joint family and as such the petitioner is an owner of the plot of land which is the starting point of the ferry. The order of the Additional District Magistrate dated June 16, 1958 is misconceived as the petitioner was and is entitled to retain the said plot of land as a raiyat and a ferry business which is to be carried on from such land does not vest in the State of West Bengal.

4. Two affidavits in opposition have been affirmed herein, one by the Chairman, District Board, Midnapore and the other by the Additional District Magistrate, Midnapore. The Additional District Magistrate, Midnapore states in his affidavit :

(1) The petitioner is not the head of an undivided Mitakshara family. The record of rights finally published does not show that late Gajendra Maity along with his son and grandsons formed such a family. In the absence of the other members of the family who are also interested in the said plot of land the application is not maintainable.

(2) There never was nor is there now any private ferry of the description mentioned in the petition. Such ferries must be registered under the Rules

framed u/s 22 of the Bengal Ferries Act, 1885.

(3) If the petitioner is allowed to run his private ferry there will be a competition between it and other public ferries from Talpatti in the district of Midnapore to Kakdwip in the district of 24 Parganas with some intermediate calling stations.

(4) Even if there was a private ferry as claimed by the petitioner, by the operation of Section 5 of the Estates Acquisition Act, 1953 the interest of all intermediaries therein vested in the State and as such the petitioner's right, if any, disappeared.

5. The affidavit-in-opposition on behalf of the Chairman, District Board, Midnapore was affirmed by one Surendra Nath Mondal, special ferry assistant of the said District Board. The deponent denies that there was any private ferry from Bamanchak in Midnapore to different places in 24 Parganas for 60 years as alleged and no record thereof is to be found in the archives of the District Board. The deponent goes on to state that by an order dated June 25, 1946 of the Commissioner of Burdwan Division, a public ferry from Talpatti to Kakdwip was established and directed to be managed by the District Board of Midnapore authorising the stoppage of boats at various places. The life of the said ferry was further extended by notification dated June 20, 1952 published in the Calcutta Gazette of July 3, 1952. The starting point of the petitioner's alleged ferry is within two miles from Talpatti, the starting point of the said public ferry and as such the private ferry cannot be allowed to operate under the provisions of Section 16 of the Bengal Ferries Act.

6. The petitioner affirmed an affidavit-in-reply denying the facts alleged in the two affidavits-in-opposition and disputing the submission made therein.

7. The petitioner's case put shortly is as follows :

Under the law of the land every Indian Citizen is entitled to ply his boats on tidal navigable rivers and carry men, cattle and things thereon for profit. The Bengal Ferries Act of 1885 does not negative the right of a citizen to establish or run a private ferry unless there is a contravention of Section 16 of the Act. u/s 22 of the Act it is open to the commissioner of division to make rules consistent with the Act for the maintenance of order and for the safety of passengers and property, at private ferries situated in his division. The West Bengal Estates Acquisition Act, 1953 has no concern with private ferries over tidal navigable rivers. The petitioner's right to ply a private ferry is not that of an interim-diary under the said Act and the objection of the District Magistrate was based on misconception.

8. The origin of the right of an individual to ply a private ferry in pre-British times is not quite clear. The first piece of legislation with respect to ferries in the presidency of Bengal seems to be Regulation XIX of 1816 passed by the Governor General in Council on August 23, 1816. The preamble to the said Regulation shows that management of the ferries was being entrusted to officers

of Government for the better maintenance of the peace of the country, for the safety and convenience of travellers, for the secure transportation of property and for eventual improvement of public resources. By Clause 2 of the Regulation the Collectors of land revenue were to regulate the assessment of the ferries, the rates of tolls to be levied from passengers, the number of ferries in each district, the number and size of the boats to be maintained at each ferry; as also to let the ferries in farm either separately or collectively. Under Clause 10 the Collectors were to grant licences according to Form No. 1 of the Appendix to all persons engaging to farm the ferries under the provisions of the Regulation as well as to all other persons managing ferries where the boats employed might be used for hire, although such ferries might not be assessed to public revenue; the Collectors were to cause such persons to execute engagements according to the Form No. 2 of the Appendix, to abide by and perform the conditions of their licences. This Regulation does not show that there could not be a private ferry.

9. The above Regulation was rescinded by Regulation VI of 1819. Under Clause 3 of this Regulation Government reserved to itself the power of determining from time to time, what ferries should be deemed to be public ferries. Under Clause 5 a list of all public ferries was to be maintained. Under Clause 6 all such public ferries were exclusively to belong to Government, and no person was to be allowed to employ a ferry boat for hire at or in their immediate vicinity, without previous sanction of the magistrate or joint magistrate : provided that due attention was to be paid to all claims for compensation which might be preferred by individuals for any loss which might be sustained by them in consequence of the extension of the authority of Government to ferries thitherto under their private management and which might not have been let in farm or held khas. This Regulation therefore supports the theory that there was no bar to the plying of boats on private ferries so long as the provisions of the Regulation were not infringed. Bengal Act 1 of 1866 passed on February 26, 1866 recognised the existence of ferries other than public ferries.

10. The Bengal Ferries Act 1 of 1885 repealed Regulation VI of 1819 and Bengal Act 1 of 1866, This Act does not purport to give a comprehensive definition of a ferry but merely provides that "ferry includes a bridge of boats, pontoons or rafts, a swing-bridge, a flying-bridge, a temporary bridge, and a landing stage". It expressly recognises "private ferries"" which include all ferries other than those declared to be public ferries, or established as such, u/s 6 of the Act. Under the last mentioned section it was lawful for the State Government from time to time to declare what ferries should be deemed public ferries, to take possession of a private ferry and declare it to be a public ferry and establish new public ferries. By Section 7 the control of all public ferries was to be vested in the Magistrate of the district, subject to the direction of the Commissioner. Section 16 provided that no person could, except with the sanction of the Magistrate of the district, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry. By Section 22 of the Act, the Commissioner of a division was empowered to make rules consistent with the Act for the

maintenance of order, the safety of passengers and property at private ferries situated in his division.

11. It will thus be seen that from the days of the earliest legislation on the subject, namely in 1816, the right to ply private ferries has been recognised by the Indian Legislature. No attempt was made during the British regime to provide, for the creation of private ferries. Nor does it appear that the Crown ever granted any right of private ferry to anybody. It was not necessary for anybody to approach the Government for the grant of a right in this behalf. It would appear that a person desiring to start a new ferry could do so at his own sweet will subject to the observance of the rules made under the Regulations and the Acts.

12. The right of establishing a private ferry and levying tolls has been recognised by this court from very early times. In *Parmeshari Pro-sad Narain Singh v. Mohomed Syud* ILR 6 Cal 608, Garth, C. J. observed :

"I find that such rights have long been recognised in this country as private property, from times anterior to the Permanent Settlement, and I therefore forbear to throw any doubt upon their legal validity".

In the same case White, J. said

"there appears to be nothing in the law which prevails in the mofussil of this Presidency to prevent any private person from establishing a ferry and levying tolls from those who use the ferry. The existence of such ferries is impliedly recognised in Regulation VI of 1819, and such recognition is affirmed by the late Sudder Dewaay Adawlut in the case of *Rajiblochan Roy v. Kumri Bebee* 1854 S.D.A. 153".

Mitter J. referred to the Regulations of 1816 and 1819 and said that they did not throw any light as to the origin of private ferries. According to the learned Judge "a right of this nature must in some way or other, originate from the sovereign authority". His Lordship however gave no reasons or grounds for this dictum.

13. In *Maharajah Sir Luchmeswar Singh Bahadoor v. Sheik Manowar Hossein* 19 Ind App 48 (PC), there was a dispute with regard to a private ferry plied over the river Bagmati between two private proprietors of a mousa. Delivering judgment of the Judicial Committee Lord Hobhouse observed

"it is recognised law in India that a man may set up a ferry on his own property and take toll from strangers for carrying them across and may acquire such a right by grant or by user over the property of others."

14. In *Chairman, Serajganj Local Board Vs. Budhiswar Patni and Others*, , the question was whether certain persons plying a private ferry without the sanction of the district magistrate within two miles of a public ferry contravened the provisions of Section 16 of the Ferries Act of 1885. In this case a learned Judge of this court was pleased to observe that

"a ferry is a franchise that no one can erect without a licence from the Crown. It is in the nature of a highway and is the exclusive right to carry passengers across a river or stream or arm of the sea. It is publici juris and when a ferry is erected, another cannot be erected without a *ad quod damnum*

With due respect to the learned Judge it may be pointed out that the above observations with regard to a ferry right are based on English law for which there does not seem to be any sanction or precedent in Anglo Indian Law.

15. In *Dhanpat Pandey and Others Vs. Raja Pasput Pratap Singh and Others*, , a division bench of the Allahabad High Court observed that

"there is no statute law in India defining the mode of acquisition of ferry right and the conditions under which it can be exercised. Where there is no conflict of interest between the claimant to a ferry and the holder of a franchise from the Government in that respect, it is recognized law in India that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others. 19 Ind App 48 (PC)". The sovereign authority can however confer a "right of ferry exercisable in a given local area."

16. In England

"a ferry is a franchise, and is created by royal grant, or in modern days by Act of Parliament. It could 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."

(Halsbury's Laws of England, Vol, XVII 3rd Edition, Articles 393 and 394). Further "ferry exists in connection with the use of a right of way. There must be a line of way on land, coming to a landing place on the water's edge, or, where the ferry is from or to a will from or to one or more landing places in the vill..... The right is wholly unconnected with the ownership or occupation of land; and it is not necessary that a ferry owner should have any property in the soil of the river over which he has a right of ferry."

17. The position of ferries is not quite the same in the United States of America although they are controlled by the State.

"It is one of the usual and ordinary functions of the State to provide safe and convenient roads and badges. Ferries are projections of the ordinary highway over streams".

See Hook on Rivers Chapter XI p. 205.

18. The difference between the concept of a franchise in England and in the United States of America was dealt with at large by the Madras High Court in the case of *C.S.S. Motor Service, Tenkasi and Others Vs. The State of Madras and Another*, where V. Aiyar J. observed.

"under the American Law the State Legislatures possess the power to grant monopoly rights in respect of any business treating it as franchise: while in England that power is limited by the prerogatives of the Crown as determined by the common law, it extends in America to whatever matter is declared by the Legislature to be proper subject of monopoly; the right of a citizen to carry on trade is subject to the paramount authority of the Legislature to take it out of his hands and make it a monopoly and he has no such fundamental rights in respect of business as can be set up in opposition to a franchise which may be granted by the State Legislation. In India there could be no franchise in the English sense. The American concept of a franchise is a development peculiar to that jurisprudence and has not been adopted in the Indian Constitution. Article 19(1) (g) does not make any distinction between common law trades which could be carried on by all persons and prerogative trades which could be carried on only under State grants. The right of a citizen to carry on any trade is subject only to the restriction such as would fall within the scope of Article 19(6)."

The learned Judge then pointed out that the First Amendment to the Constitution recognised that except to the extent provided therein the Legislature had no power to create a monopoly or take away the right of a citizen to carry on any trade. He adds

"in this respect the law under Constitution is fundamentally different from that laid down in the American decisions."

These observations met with the approval of the Supreme Court in the case of *Saghir Ahmad Vs. The State of U.P. and Others*, . In *Saghir Ahmad Vs. The State of U.P. and Others*, , the Supreme Court laid down that the right of the public over highways extends to all forms of traffic which have been usual and customary and also to all which are reasonably similar and incidental thereto. Mukherjee, J. who delivered the judgment of the Court observed

"the right of the public to use motor vehicles on the public road cannot, in any sense be regarded as a right created by the Motor Vehicles Act. The right extends anterior to any Legislation on this subject as an incident of public rights over a highway. The State only controls and regulates it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over high-way, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the purpose of trade and business."

In my view both legislation and judicial pronouncement on the subject go to show that even before the Constitution a private ferry in India was not considered as a franchise in the English sense and since January 26, 1950 cannot certainly be so treated.

19. There is yet another point of view from which the question has to be looked at. The right to ply a ferry in this case is claimed over tidal navigable rivers.

Rights in respect of or over such rivers are somewhat different from those in respect of and over ordinary navigable rivers. In *Satcowri Ghosh Mondal v. Secy, of State* ILR 22 Cal 252, it was observed that

"it may be accepted as law on this side of India that the bed of a tidal and navigable river is vested in the Crown; and that the right of jalkar (fishery) in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property; subject of course to the right of navigation and such other rights which the public has in such rivers."

20. In *Srinath Roy v. Dinabandhu Sen* 41 Ind App 2ar : (AIR 1914 PC 48 (2)), a question-as to who had fishery right in a tidal navigable river came up for consideration by the Judicial Committee. The Board approved of the prior decision in *Doe d. Seebkristo Banerjee v. East-India Co.*, 6 Moo. Ind App. 267 (PC) and *Nogeadra Chunder Ghose v. Mahomed Esoff*, 10 Beng LR 406 and said that

"the free-hold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in right of the Crown. Where the bed thus forms part of the public domain the public at large is prima facie entitled to fish."

The Judicial Committee upheld the plaintiff's claim to fish in a new navigable channel of the river on the basis of a grant from Government and noted the difference in this respect between the law in England and that in Bengal.

"That the beds or channels of tidal navigable waters are the property of the Government in right of the Crown"

was laid down in clear terms by the Judicial Committee in AIR 1931 72 (Privy Council) . With regard to the question of the rights of navigation on such rivers the Board saw no reason why the law should be different here from that in England and said (pp. 87-88 of Ind App) : (p. 74 of AIR) :

"the public right of navigation or waterway can only be co-extensive with the right of the Crown or the Government in the bed. The public right to use the water-way would not imply the right to land upon, or to take merchandise on to or over immediately adjacent land under private ownership. Such a right may no doubt be established by custom or prescription, * * * The rights of riparian owners on the banks of tidal navigable waters exist jure naturae, because the land has by nature the advantage of being washed by the stream, but it is essential to the existence of this right that the land should be in contact with the flow of the stream at least at the times of ordinary high tides."

21. The English Law on this subject is summed up in *Coulson and Forbes on Waters and Land Drainage*, 6th edition, pages 100 and 102. The learned authors comment.

"a navigable river is a public high-way navigable by all His Majesty's subjects in a reasonable way and for a reasonable purpose. The public right of free passage extends to the whole of the navigable channels, and includes all such rights as with relation to the circumstances of each river are necessary for the convenient passage of ships such as the right of stopping for a reasonable time to unload and of grounding and anchoring".

With regard to the ownership of the soil of the bed it is said.

"the bed of all tidal rivers where the tide flows and reflows and of all estuaries and arms of the sea is by law vested prima facie in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the right of navigation which belongs by law to the subjects of the realm, or the right of fishery, which is prima facie common to all."

22. So far as the right of fishery is concerned as I have already pointed out there is a difference between that in England and in India, the reasons being historical. But so far as the right of navigation is concerned the law seems to be the same. The surface of a tidal navigable river can therefore in my opinion be used as a high-way and a riparian owner on the bank of a tidal navigable river can not only float his logs to a mill by the water side, as was held in AIR 1931 72 (Privy Council) , but he can also moor his boats along the bank which belongs to him and carry on the business of a ferry from there unless there is some other law to prevent him from doing so. This should follow from the judgment of the Supreme Court in *Saghir Ahmad Vs. The State of U.P. and Others*, treating the surface of a tidal navigable river as a high-way whereon the public has rights to ply vehicles for pleasure or for trade.

23. The objection taken by the District Magistrate that a ferry is a franchise or that it has disappeared because it was an incumbrance within the meaning of the word in West Bengal Estates Acquisition Act, cannot be upheld. A ferry right would be an incumbrance if it was the creation of a Zaminder or a landlord. A right so created would be an incumbrance and a Zaminder could be treated as an intermediary. But that is not the case here. As the law does not seem to impose any absolute fetter on the right of a person to ply a ferry, a person who applies for licensing of his boats under the Ferries Act is entitled to have the same considered on its merit. There is again no substance in the contention put forward on behalf of the Chairman, District Board, Midnapore, that the petitioner is not the head of an undivided mitakshara family and that the application is not maintainable in the absence of the other members. A person who belongs to a Mitakshara Joint Hindu Family is free to use his holding in any manner he likes, subject to any lawful objection on the part of his coparceners. An outsider cannot complain with regard to the user of the holding by one member of the family in a particular way if it is otherwise lawful. It therefore, does not lie in the mouth of the respondents to complain that all the members of the Mitakshara family are not before this court.

24. The Rule therefore, will be made absolute, but without any order as to costs.