
(1914) 07 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 65 of 1912

Raja Srinath Roy and others

APPELLANT

Vs

Dinabandhu Sen and others

RESPONDENT

Date of Decision : 16-07-1914

Acts Referred:

Citation : (1914) AIR(PC) 48

Hon'ble Judges : Ameer Ali, John Edge, Parmoor, Sumner, Lords Moulton, JJ.

Advocate : Theodore Bell and Co., Hunter, Watkins, G.R. Lowndes, Dunne, DeGvuyther, for the Appearing Parties.

Judgement

Lord Sumner

In this action the plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree, for possession of an exclusive fishery in a portion of a river channel, of which the principal defendants own both the bed and the banks. They succeeded before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees; sometimes

a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent. Lands so thrown up are called "churs", and it is by churlands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the defendants' churland in question. Though relatively small, even this stream was of considerable size; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river. The plaintiffs claim the exclusive fishery in this new navigable channel as falling within the upstream and down-stream limits of their several fishery, and allege that the defendants are trespassers when they fish in it. The defendants justify their claim to fish in a portion of this channel as part of the rights of owners of the subjacent soil and of persons claiming under them. That the plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescription or adverse possession arises as against themselves; that they are not affected by evidence of prescription against third parties; that even a several fishery, duly created in the main stream by the Government of India in right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it; that the evidence neither establishes such bounds for the alleged exclusive fishery upstream and down-stream as would bring this branch between them, nor shows that in fact any jalkar right was ever created by Government at all. In substance the Trial Judge found for an actual Government creation of the plaintiffs' right, as well as for the boundaries claimed by them. The High Court concluded against the plaintiffs on the question of the extent of their jalkar rights without determining their origin.

The evidence of the origin of the plaintiffs' rights is documentary, and does not depend on the credibility of witnesses. Chur Mukundia is the name of the plaintiffs' pergunnah. They produced among many other documents (i) an ekjai hastbud in respect of it for the year 1790, which showed that it then included a Mahal jalkar; (ii) a hakikat chowhaddibandi of the lands and jamas of that pergunnah for the year 1795, which showed that the name of the jalkar mahal was River Balahanta and Bid Baor with specified boundaries, of which the Kole Churi of Alipur alone can now be traced by name; (iii) dowl kabuliyats of 1793 and 1799, specifying the amount of the dowl-jumma of the jalkar; and (iv) issumnavisi mouzahwari of 1821 mentioning the jalkar in the River Balabanta, as a mouza of pergunnah Chur Mukundia. They put in (v) a robokari of the Court of the Collector of Faridpur, dated 11th January, 1861, by which the Government recognised that this jalkar had been included as a mahal in the zamindari

pergunnah Chur Mukundia (formerly Touzi No. 110 in the Dacca Collectorate, and now No. 4,000 in that of Faridpur), since before the decennial settlement. It named the up-stream and down-stream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma, that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty-years as the Bhubaneshwar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of showing that no grant from the Government was any longer to be found among the papers belonging to the plaintiffs' zamindari, but no point seems to have been made then or since that the proper searches had not been made. Although, on the other hand, when Government has created a separate estate of jalkar at the period in question, it is usual to find some entry of it in the decennial settlement papers yet no evidence was forthcoming to show that jalkar grants made prior to the decennial settlement or that settlements with zamindars made at the time of it must necessarily have taken the form of pottahs or some other muniments which should now be in the zamindar's possession, or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user (Garth, C.J., in *Hori Das Mal v. Mahomed Jaki* 1885 11 Cal. 434 (F.B.)). The Trial Judge was satisfied that the plaintiffs had proved a Government grant or settlement about the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was proved, but that it was not shown to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appurtenant to the plaintiffs' actual pergunnah and was limited by its riverine bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mal v. Mahomed Jaki* (1)) following the English rule in *Fitzwalter's case* 1686 3 Keble 242 = 1 Mod. 105, that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority - the Government of India in right of the Crown - did actually grant to the plaintiffs' predecessors-in-title, or settle with them so as in effect to grant, a jalkar right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring zamindars of pergunnah Bikrampur and persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living patnidars, ijaradars, fishermen, and so on, and the local investigations of an ameen deputed by order of the Court.

The ameen's reports and maps were accepted in both Courts, and by both parties on the present appeal. The plaintiffs' case depended on fixing by means of the above materials, supplemented by a series of maps from 1760 onwards, four points roughly forming a parallelogram within which their alleged jalkar rights lay, the western or up-stream boundary and the eastern or down-stream boundary in each case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneshwar, and the locus in quo of the dispute falling between them. The defendants contended, that in so far as any certain points were proved at all, the materials relied upon only showed that the fishery did not extend into any part of the Padma, but was limited by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur Collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the Collectorate of Dacca, and they argued that the robokari of 1861, which was the strength of the plaintiffs' case, proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essential to the plaintiffs to make good their claim.

A sufficient answer is made by the plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors-in-title and the owners of the Bikrampur zamindari, who claimed some jalkar rights in the main Padma also, and by means of such proceedings in 1797, 1816, and 1843, by means of other similar proceedings in litigation with some of the present defendants in 1894, 1895, and 1897, and also by a long succession of ijara kabuliyats and pottahs, which they put in evidence, they prove de facto possession, as under their jalkar rights, of the whole fishery in both streams between their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneshwar, Krishnapur, Narina, Padma and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded in the robokari of 1861 was appealed to the Commissioner of the division at Dacca, who at that date exercised appellate jurisdiction in such matters over the Collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the jalkar claimed extended over the waters of the Padma, and was a valid jalkar included in the permanent settlement, it may reasonably be inferred that the Commissioner of Dacca took note that the parties entitled to the jalkar, claimed rights within his Collectorate, and finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The Trial Judge, following a long and considerable body of decisions in Bengal, held that, if the plaintiffs' rights in this stream or streams out of which the new branch opened were once established, they would extend to the waters of the

new branch as soon as it was formed, a principle which is conveniently called "the right to follow the river." It does not appear that this current of authority was challenged or doubted either before the Trial Judge or the High Court; certainly its authority was binding upon both. The defendants' case simply was that in fact neither the plaintiffs nor their predecessors-in-title could be shown ever to have enjoyed or to have been entitled to any jalkar right except that lying within the boundaries of their zamindari and appertaining thereto. The High Court appears to have arrived at a conclusion in favour of the defendants' argument mainly in consequence of the view taken of the true meaning of the judgment of 1816, and of the significance of the Thakbast map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it, the plaintiffs' construction of it was right. The Thak map was pressed beyond its legitimate effect. It was concerned only with that portion of the fishery which fell within pergunnah Bikrampur, and was inconclusive."

The question of the effect of deltaic changes in a river's course upon the exclusive right of fishing in it appears in the Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of jalkar rights in the old channel continues to enjoy them in the new one: *Ishurchand Rai v. Ramchand Mokhurji* 1807 1 S. D. A. R. 221 = 1 Morley's Dig. 561. The converse case occurred in the following year. A land-owner sued the owner of jalkar rights in a tidal river for taking possession of a jhil formed on his land by the overflow of the river. The channel of the river had not altered, the jhil formed no part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the plaintiffs' land, had no right to the fishery in waters thus formed upon his lands :

Gopeenath Roy v. Ramchunder Turklunkar 1808 1 Mac. Sel. Rep. 228 = 2 Sevester. 467 note. This assumed some right of following the river and placed a particular limit upon it.

It will be observed so far that whatever may have been the basis for the right of jalkar in the river, the right of fishing in the jhils was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in the jhil did not in itself convey any property in the soil: *Lukhee Dasee v. Khatimah Beebee* 1863 2 S. D. A. R. 51. Why the owner of jalkar right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established

as early as 1808 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopee Nath's Case* (4) the Sudder Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the jhil in question, though formed by the river's overflow, was no longer so connected with it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevestre's note upon them in Vol. 2, p. 467, of his Report is.

"A general right of fishery in a river, when not otherwise defined, is restricted to the channel of the river and water considered to form part of it, not extending to adjacent lakes or other pieces of water occasionally supplied by overflowings of the river but not actually connected with the channel of it."

The rule was so applied in *1856 Nubkishcn Roy v. Uchchootanund Gosain* 1856 12 S. D. A., 878 = 2 Sevester R. 465 note, and in *Ramanath Thakoor v. Eshanchunder Bonnerjee* 1863 2 Sevester 463. In the former it was held that the right of jalkar in the river was confined to the river and streams flowing into or from it, exclusive of jhils not connected with the channel but extending to watercourses which though not immediately within the great channel of the river adjoin or flow into it or are supplied therefrom; "their right consists of the flowing stream and the adjuncts flowing from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to adjacent sheets of water with which the river communicates only when in flood.

"We think", says the Court, "the grant of jalkar must be construed as *prima facie* confined to the rivers and sheets of water communicating therewith to which the plaintiff might get access without trespassing on the land."

It is true that these two decisions do not specifically deal with the case of the changed channel of deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the jalkar right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters which are adjuncts of the navigable stream. They make the right depend on the identity of the river in which it is enjoyed and do not confine it to such waters of that river as are superimposed on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubts. The Court observes in 1859, in *Guereb Hossein Chowdhree v. Lamb* 1859 20 S. D. A. R. 1357.

"The part of the country through which the Megna flows is intersected with innumerable creeks into which the tide from the mam river flows. The right of fishing in these tidal creeks belongs of right to the owner of the property into which they flow."

But this case is explained by the fact that the part of the river in question was almost, if not quite, an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Sibessury Dabee v. Lukhy Dabee* 1864 1 W. R. 88, that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions

of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the jalkar right; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came two somewhat contradictory decisions. The Court in *Nobinchunder Roy Chowdry v. Radha Pearee Debia* 1866 6 W. R. 17, scouted as "preposterous" a claim to follow the diverted waters in which the plaintiff had the fishery, but this was without discussion of the authorities, and the claim was alleged not against the owner of the soil over which the diverted waters flowed but against the owner of the fishery in the waters of another river into which the plaintiff's river had burst and discharged itself. In the second case, *Gobind Chunder Shaha v. Khaja Abdool Gunny* 1866 6 W. R. 41, the plaintiff and defendant, joint owners of land and of a fishery, had made a partition of the land but not of the fishery and the plaintiff sought to oust the defendant from fishing over the land, which now belonged exclusively to him but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in dismissing the suit observes "still the fishery existed in that part of the river out of which the fish was taken, although by a change in the course of the river it ran over the portion of the land which was allotted to the plaintiff under the butwara partition."

Again, in 1873 *Krishnendro Roy Chowdhry v. Maharani Surno Moyee* 1873 21 W. R. 27, the Court somewhat reluctantly followed the rule, which it deemed to be settled, that the owner of the fishery where the river's channel has changed has "a right to follow the current," that he

"may not only follow the river to any channel which it may from time to time cut for itself, but may continue to enjoy together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends."

Upon the facts of that case it is the latter part of this proposition that is directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohan Doss in 1891 in his Tagore Lectures on the law of Riparian Rights, (pages 372 et seq.) who, while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha v. Watson and Co.* 1890 17 Cal. 963. The questions were directly raised :

"Can a right of jalkar in a public navigable river exist apart from the right to the bed of the river, or must it necessarily follow that right.?"

"Do the defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?"

This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision in *Grey v. Anund Mohun Moitro* 1864 W. R. Gap. No. 108, and decided that

"so long as the river retains its navigable character it is subject to the rights of the public, and the fishery remains in the person who was grantee from the Government."

In *Grey's Case* 1864 W. R. Gap. No. 108, a change of channel had left an old bed either dry or containing only pools disconnected with the river, and it was held that what the river had abandoned, albeit part dry land and part jhils, became private property. Thenceforth it belonged to the riparian owners who could claim settlement of it from Government, and the reason given is that "the right of the defendant" (the owner of the fishery), "being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone."

Thus it will be observed that in *Tarini's Case* 1890 17 Cal. 963, the Court conceived itself to be reducing the subject to symmetry by deciding that while on the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river.

In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river where-ever that river might flow, and not as subsisting in the flowing Avater only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the jalkar right in the river extends over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy v. Crawford* 1905 32 Cal. 1141 = 2 C. L. J. 569. The ground of the decision is that such water is still part of the river system and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad v. Jagadindra Nath Rai* 1905 33 Cal. 15 = 9 C.W.N. 934, in the same year the principle is thus expressed

"the jalkar rights were settled with the plaintiffs" predecessor many years ago. The plaintiffs by virtue of the settlements conferred upon them are entitled to exercise the right of fishery in the said river wherever it flows" within the limits prescribed in the settlement itself."

Both these cases purport to follow *Tarini's Case* 1890 17 Cal. 963, which was a case of an advance of the river into a newly formed channel, and the rest of a

long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Their Lordships were strongly and ably pressed to disregard, or at least to qualify these decisions. The points made were (a) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil; (b) that in any case the acquisition of fresh waters can go no further and can proceed no otherwise than the acquisition of fresh soil by alluvion, and therefore that an expansion of waters within which a jalkar right exists can only carry with it an extension of the jalkar right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (c) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him.

In extension of the last point, it was argued that the disputed site in fact covered the sites of former enclosed jhils which belonged to and had been enjoyed by the defendants and that no trespass could be committed as against the plaintiffs in any view by fishing where the defendants had formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on the *Mayor of Carlisle v. Graham* 1869 4 Ex. 361 = 21 L. T. 133 = 38 L. J. Ex. 226 = 18 W.R. 318, where Kelly, C. B., says :

"We are called upon to decide the question which now arises for the first time: Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject, transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if any in what part of it? In the case of *Murphy v. Ryan* 1868 2 Ir. Rep. C. L. 143 = 16 W. R. 678, O'Hagan, J., in delivering the judgment of the Court, says, "but whilst the right of fishing in freshwater rivers in which the soil belongs to the riparian owner is thus exclusive, the right of fishing in the sea its arms and estuaries and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris* and so to belong to all the subjects of the Crown; the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a

trustee for the public. The exclusive right of fishing in the one case and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Sovereign in a public river respectively. And this is the true principle of the law touching a several fishery in a tidal river. If therefore the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belongs not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all right whatsoever in the Crown or in the public."

With this case has to be considered also *Foster v. Wright* 1878 4 C.P.D. 438 = 49 L. J.C. P. 97 = 44 J. P. 7. There the proprietor of a right of fishing in the Lune at that part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over another's land, and the person, to whom the land which came to form its new bed had previously belonged, was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that

"the river had never lost its identity nor its bed its legal owner" (page 446); "he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title."

Mayor of Carlisle v. Graham 1869 4 Ex. 361 = 21 L. T. 133 = 38 L. J. Ex. 226 = 18 W.R. 318, was distinguished on the ground that in that case the river bed was a new bed, not formed by the gradual shifting of the old one but totally new, the old bed remaining recognisable in its old site but deserted. The Eden became a river with two beds; the Lune was at all times a river with only one though an ambulatory one. As counsel in *Foster v. Wright* (19), boldly argued for the right to "follow the river" in its Indian sense saying (page 440), "even a sudden and violent change in its course would not have taken away" the plaintiffs' right, and as the adoption of that a fortiori view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the respondents in the present case. As with the

river Lune so the part of the river Eden which was in question in the *Mayor of Carlisle v. Graham* 1869 4 Ex. 361 = 21 L. T. 133 = 38 L. J. Ex. 226 = 18 W.R. 318, is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter.

The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn, of which Hale writes (*Hargrave's Law Tracts*, p. 16)

"that river which is a wild unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure is the common boundary between the manors on either side, viz., the *filum aquae* or middle of the stream, and this is the custom of the manors contiguous to that river from Gloucester down to Aure."

There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under charters of Henry I, Richard I and John, which must be much more analogous to the *jalkar* in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Ry. Co.* 1839 5 M. and W. 327 = 8 L. J. Ex. 260 = 52 R. R. 733, but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the common law of England as such does not apply in the *mofussil* of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of *jalkar*, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English law of waters. Sometimes their rules are the same; sometimes only similar. *Jalkar* may exist not only as a right attaching to riparian ownership but also "as an incorporeal hereditament, a right to be exercised in the tenement of another" *Forbes v. Meer Mahomed Hossein* 1873 12 B. L. R. 210 = 20 W. R. 44, as a *profit a prendre* in alieno sole *Lukhee Dasee v. Khatimah Beebee* (5). In navigable waters such rights are granted by the Government of India, or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown: *Prosunno Coomar Sircar v. Ram Coomar Parooey* 1878 4 Cal. 53 = 3 Jur 214. The freehold 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 *Doe, dem Seeb Kristo Banerjee v East India Co.* 1856 6 M I. A. 267 = 10 M. P. C. C. 140 = 19 Eng. Rep. 100 = 110 R. R. 21 = 1 Sar 540 (P. C.), *Nogender Chunder Ghose v. Mahomed Esuf* 1872 10 B. L. R. 406 = 18 W. R. 113. Where the bed thus forms

part of the public domain the public at large is prima facie entitled to fish. Thus the English analogy has been closely followed. Again, the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable (that is, capable of being traversed by a boat at all seasons, *Chunder Jaleea v. Ram Chander Mookerjee* 1871 13 W. R. 212, *Mohinee Mohun Doss v. Khajah Ahsanoollah* 1872 17 W.R. 73, the flooded land-owner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None-the-less he remains the owner, and should the waters permanently retire his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that, no matter how those waters may subsequently change their course, while still remaining part of the same river system within the up-stream and downstream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the super-incumbent waters in severalty and quite another to hold that the several fishery when once thus created is for ever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant. "Whether the actual proprietary right in the soil of British India" says Garth, C. J., in the case of *Hori Das Mal* (1) already cited

"is vested in the Crown or not (a point upon which there seems some diversity of opinion) I take it to be clear that the Crown has the power of making settlements and grants for the purposes of revenue of all unsettled and unappropriated lands, and I can see no good reason why they should not have the same power of making settlements of jalkar rights and of lands covered by water as of land not covered by water. In either case the settlement is made for the purpose of revenue and for the benefit of the public." Again, the rights of the Crown are thus stated in *The Collector of Maldah v. Syed Sudurooddeen* 2864 1 W.R. 116.

"The right to resume land is one based on the right of the Government to a portion of the produce of every beegah of the soil as revenue, whereas the claim to possession of the jalkars of rivers not forming portions of settled estates is founded upon a supposed right in Government as trustees of the waterways of the country to possess and to assign the exclusive possession of them to any

individual it chooses on the payment of revenue for them in the shape of a fishery rent."

Hurrehur Mookerjea v. Chundeechurn Dutt 17 S. D.A R. 641, Collector of Rungpore v. Ramjadub Sein 1863 2 Sevester Rep. 373. See, too, Radha Mohan Mundul v. Neel Madhub Mundul 1875 24 W.R 200, and Satcowri Ghosh Mondal v. Secretary of State 1894 22 Cal 252, where the cases are collected and discussed.

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman law, as a right *publici juris*. Whether in his time this was at common law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's the generality of the right of river-fishing, if it ever had been the doctrine of the common law, was such no longer. According to Hale (*De jure maris*, page 1, Chapter 4; Hargrave's Law Tracts, page 11).

"The right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown as the right of depasturing is originally lodged in the owner of the wastes whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . . The King is the owner of this great waste and as a consequence of his propriety has the primary right of fishing in the sea or creeks or arms thereof."

Be it observed that this doctrine may be called essentially insular, and that the proofs of it which Hale adduces are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea which is itself a dissent from that doctrine.

The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil quasi-servitudes of towing, anchoring or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire and Vermont, where the rivers approximated in size and type to the rivers of this country, the

English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe (see Kent's Commentaries, iii, 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson v. Blazer* 1810 2 Binney 477 = 4 Am, Dec. 463.

"the common law principle concerning rivers" (viz., that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), "even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it."

(See too, *Shrunk v. Schuylkill Navigation Co.* 1826 14 Sergeant and Rawle 71. Thirty years later in *Zimmerman v. Union Canal Co.* 1856 1 Watts and Sergeant 351, President Porter observes

"the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this Commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximate to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela," and Sundry other "rivers of Damascus."

A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

In proposing to apply the juristic rules of distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adopted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though their historical origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history, and a special theory of rights, tenures and obligations, condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for the commencement of several fisheries in tidal navigable waters, and know little of their actual origin. In Bengal it is sufficient to say that at the time of the decennial or the permanent settlement, or since, such rights, though possibly descending from remote

antiquity, were settled with the Government of India, whose special position, originating on 12th August, 1765, when the East India Company became receiver-general in perpetuity of the revenues of Bengal, Orissa and Behar, is historically well known. English tenures and Bengal zemindari rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal, change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of the soil is to be delimited? The course of the waters has been in flux for ages : at what date is this ownership to be taken?

As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Ry.* (21) the theoretic basis of which has been variously stated from the time of Blackstone to the present day (see the different theories collected by Farwell, L. J., in *Mercer v. Denne* (1905) 2 Ch. 538 = 70 J. P. 64 = 3 L.G.R. 1293 = 93 L.T. 412 = 74 L.J. Ch. 723 = 54 W. R. 303 = 21 T. L. R. 760 "the principle is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." Take which date you will, the ever-shifting river does not run now where it ran then, and if the ownership of the soil remains as it was, it is sheer guesswork to say in which part of the present waters the grantee of jalkar rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners? Any given section of the river system is in all probability a shifting and irregular patchwork of water flowing over soil which belonged to the Sovereign at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question, and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions?

It was urged that the established rule with regard to alluvion should be applied to rights of jalkar; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachment were gradual, and ought not to be extended to an irruption as sudden and accomplished as rapidly, as was the formation of the channel in question in the defendants' lands. It is to be observed that here too Indian law doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule

established in this country. Where under English conditions the rule applies to "imperceptible" alterations, Regulation XI of 1825, Articles 1 and 4, speak of "gradual accession."

The analogy of the English Rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian rule is established now beyond question, it may perhaps be said without offence of the Indian as of the English Rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materia*. Property in the soil is one thing; enjoyment of a profit a prendre in flowing water may in some respects be another. True, the profit a prendre is to be enjoyed in *alieno solo*; such is its nature. True too that at the time of the grant, the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend; but when the power to grant arises from sovereignty, and has never been decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time, the mere fact that the jalkar right is classified in the language of the English law of real property as a profit a prendre in *alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change. The fish follow the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land, which has vanished from sight, can claim to have still vested in him an equal area of river-bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters, are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the land-owner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The sovereign power lawfully invests its grantee with jalkar rights in part of the river; is it unjust that when that river shifts its course, changing in locality but not in function, the owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is no such proof that one rule is better than the other as would even approach the

conclusion that the rule established should now be set aside.

Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the plaintiffs established their claim at the trial, they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the Trial Judge restored.