APPELLATE CIVIL.

Before Nasim Ali J.

1935

Jan. 18, 23.

CHANDRANATH DAS

v.

PUSHKARCHANDRA DAS.*

Fishery—Exclusive right—Tidal navigable river—Custom—Prescription—Long user—Legal origin—Grant—Owner, injuriously affected.

An exclusive right of fishery in portions of a tidal navigable river can be claimed by prescription, which is evidence of a grant, or by custom, even though the custom set up might have the effect of taking away from the owner the whole use and enjoyment of his property.

A legal origin for the right can be inferred from long user.

Srinath Roy v. *Dinabandhu Sen* (1) referred to.

SECOND APPEAL by the defendants.

The facts of the case and the arguments in the appeal are fully stated in the judgment.

Bhagirathchandra Das for the appellants.

Jogeshchandra Ray and *Shyamaprasanna Deb* for the respondents.

Cur. adv. vult.

NASIM ALI J. This is an appeal by some of the defendants in a suit for a declaration of fishery right of the fishermen of the village Manikpur in four particular places (*kheos*) on the south bank of the tidal navigable river Lohar and for certain consequential reliefs. The plaintiffs' case is that they and their predecessors had been catching fish in those four *kheos* to the exclusion of all others from time immemorial

*Appeal from Appellate Decree, No. 1584 of 1932, against the decree of B. B. Sarkar, District Judge of Tippera, dated Feb. 20, 1932, affirming the decree of Nripendrakumar Ghosh, Second Munsif of Brahmanberia, dated March 14, 1931.

(1) (1914) I. L. R. 42 Calc. 489 ; L. R. 41 I.A. 221.

peacefully and without interruption by placing stake-net, that the defendants, who live in the village Budhanti lying on the north bank of the river, dispossessed them from the first and second *kheos* in the month of *Bhâdra*, 1336 B.S. and were threatening to dispossess them from the other *kheos*. The defence of the defendants is that they have got exclusive right to fish in the disputed *kheos* and that the plaintiffs' story of possession and dispossession was absolutely false. The defendants also stated that the plaintiffs have got no *kheos* in the river Lohar.

The learned Munsif held that the plaintiffs have succeeded in proving their title to the disputed *kheos* and in that view decreed the plaintiffs' suit. On appeal the decree of the trial court has been affirmed by the learned District Judge.

The only point urged in support of this appeal is that an exclusive right of fishery in portions of a tidal navigable river cannot be claimed either by prescription or custom. Reliance was placed by the learned advocate for the appellant on the decision in the case of *Lutchmeeput Singh* v. *Sadaulla Nushyo* (1). The facts of that case, however, are entirely different. In that case fishery right was claimed in certain *beels* against the owner of those *beels* by an unlimited number of tenants of several *parganâs*. Under these circumstances, it was held that such a custom would be unreasonable, for, if the right based on such a custom were declared, the tenants would take away the whole fish stocked in the *beels* and nothing would be left for the owner. The learned Judges in that case relied upon the case of *Lord Rivers* v. *Adams* (2). But in *Hall* v. *Nottingham* (3), the possibility, that the custom there set up might have the effect of taking away from owner the whole use and enjoyment of property, was not thought sufficient ground for disallowing it.

The facts of the present case as stated above are entirely different. Here, both the parties claim exclusive right to fish in the disputed places under a custom.

(1) (1882) I. L. R. 9 Calc. 698. (2) (1878) 3 Ex. D. 361.
(3) (1875) 1 Ex. D. 1.

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The real issue in the suit was whether the plaintiffs or the defendants were entitled to fish in the disputed places exclusively under the admitted custom and the parties led evidence on that issue. The existence or validity of the custom was not denied by either of the parties. The Munsif in this connection has observed as follows:—Both parties claim "exclusive right in "the disputed *kheos* standing upon custom." It was not suggested in the pleadings or in the evidence that the custom was unreasonable, as the plaintiffs would take away all the fish of the river. The right claimed in the present suit is by the fishermen of one village only.

In *Gureeb Hossein Chowdhree* v. *Lamb* (1) the following observations were made:—

> By our Regulation Law—Regulation XI of 1825—which is declaratory of the common law of this country, as well as by the common law of England, the bed of a navigable river is not the property of any individual, and, consequently, the right of fishery in such rivers is not private property, but that right is a right common to every person; and, if any individual claims an exclusive right in navigable waters, he must show that it has been acquired either by grant or by *prescription, which is evidence of a grant.*

A legal origin for the right can be inferred from long user. See *Srinath Roy* v. *Dinabandhu Sen* (2). It was, however, contended by the learned advocate for the appellant that a legal origin for the original claim cannot be inferred in favour of the fishermen of a village. But in the case of *Bhola Nath Nundi* v. *Midnapore Zemindary* (3), in which the question was whether the tenants of nine villages appertaining to a certain *taraf* of a *parganâ* could acquire a right of pasturage over the waste lands of the villages, to which they belonged, Lord Macnaghten observed as follows:—

> On proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's court and in the court of the Subordinate Judge, the question was overlaid, and in some measure obscured by copious references to English authorities, and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions.

(1) [1859] S. D. A. 1357, 1361.
(2) (1914) I. L. R. 42 Calc. 489 (511); L. R. 41 I. A. 221 (227).
(3) (1904) I. L. R. 31 Calc. 503 (509); L. R. 31 I. A. 75 (81).

Again a fishery common to the public might be used subject to such regulations as are essential for its enjoyment by the public. If such a regulation is evidenced by custom obtaining from time immemorial, there is no reason why it should not be enforced as creating an obligation. See *Narasayya* v. *Sami* (1). Again in the case of *Abhoy Charan Jalia* v. *Dwarka Nath Mahto* (2), Coxe J. (Teunon J. concurring) observed as follows :—

> There is authority in the cases of *Bábaji Mayacha* v. *Nágu Shravucha* (3) and *Narasayya* v. *Sami* (1) for the proposition that the method of exercising the common right may be regulated by custom.

It has been concurrently found by the courts below that the plaintiffs and their predecessor had been catching fish in the disputed *kheos* to the exclusion of all others from time immemorial. I have already pointed out that a legal origin for this right can be inferred from immemorial user. This legal origin may be either a grant or a regulation as evidenced by custom, under which fishermen of the village Manikpur have been exclusively catching fish in the disputed *kheos*. The courts below were, therefore, right in decreeing the plaintiffs' suit.

The appeal is, accordingly, dismissed with costs.

Leave to appeal under section 15 of the Letters Patent has been asked for in this case and is refused.

Appeal dismissed.

G. S.

(1) (1888) I. L. R. 12 Mad. 43. (2) (1911) I. L. R. 39 Calc. 53.
(3) (1876) I. L. R. 2 Bom. 19.