APPELLATE CIVIL.

Before R. C. Mitter J.

ZERMAN GOMEZ

v.

MAHIMACHANDRA KAIBARTA.*

1934

Nov. 14, 27.

Fishery—Right of grantee of several fishery in public stream to adjuncts, Extent of.

A private individual, who is a grantee of a several fishery, in a natural stream in a *pargaṇâ* or *pargaṇâs*, can only claim such right over navigable rivers or those portions of the rivers which are navigable and over all adjuncts of the navigable streams formed by natural physical change, but not over such portions as are not navigable, or are formed by an act of man, or by artificial excavation.

Srinath Roy v. *Dinabandhu Sen* (1) distinguished.

Neelanund Singh v. *Teknarain Singh* (2), *Srimantu Bagdi* v. *Bhagwan Jalia* (3), *Khagendra Narain Chowdhry* v. *Matangini Debi* (4), *Indu Bhusan Bose* v. *Sarajubala Debi* (5), *Tarini Churn Sinha* v. *Watson and Co.* (6) and *Grey* v. *Anund Mohan Moitro* (7) referred to.

SECOND APPEAL by the plaintiff.

The material facts of the case are stated in the judgment.

Jateendranath Sanyal for the appellant. Under the proposition laid down in *Srinath Roy* v. *Dinabandhu Sen* (8) my client has fishing rights in all adjuncts, whether navigable or not, of the navigable streams in which he has a several fishery by grant from the Crown. The channel in question being one, through which current flows from his river Golapdi to his river Lohalia, is an adjunct of those streams.

No one for the respondent.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 332 of 1932, against the decree of T. H. Ellis, District Judge of Bakarganj, dated Sep. 5, 1931, confirming the decree of Keshabchandra Sen, First Munsif of Patuakhali, dated May 22, 1931.

(1) (1914) I.L.R. 42 Calc. 489 ; L. R. 41 I. A. 221.
(2) [1862] S.D.A. (Jan. to June) 160.
(3) (1913) 17 C. W. N. 1108.
(4) (1890) I.L.R. 17 Calc. 814 ; L. R. 17 I. A. 62.
(5) (1927) 46 C. L. J. 93.
(6) (1890) I.L.R. 17 Calc. 963.
(7) [1864] W.R. Gap. Vol. (C.R.) 108.
(8) (1914) I. L. R. 42 Calc. 489 (516) ; L. R. 41 I. A. 221 (231).

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MITTER J. The plaintiff, who is the appellant before me, instituted the suit for a declaration that he has 11 annas 11 *gandâs* odd share in a *jalkar* called the Sâtberhia *done*, for possession and damages, in the alternative for rent. The case made by him in the plaint is that he and his co-sharers, the *pro forma* defendants, have a *jalkar mehâl*, recorded as *touzi* No. 1427 of the Bakarganj collectorate, the *jalkar* called Bishandi, and comprises the rivers and *dones* that fall within the boundaries stated in the plaint and that Sâtberhia *done* is a part of the said *jalkar*. He claims an exclusive right to fish therein with his co-sharers by triangular nets. In the evidence it was stated that Sâtberhia *done* is a part of the river system, in which he and his co-sharers have a right of fishery, being a *done* that connects the *Golâpdi* river, the Golâpdi *done* and the Lohâliâ river, which are shown to be big rivers in the settlement map. He does not claim the soil of the said *done* and his first witness admits that the *done* in suit was a shallow one with no current, till the District Board excavated a *khâl* 7 or 8 years before suit, called the Gajâliâ Bharâni *khâl*, and the plaintiff had never attempted to fish there before the District Board made the *khâl*. The defendants, who admit fishing in the *done* in suit, claim the right to fish there on the basis of settlements taken from the riparian proprietors (not made parties), through whose estates the *done* flows. They do not deny that the plaintiff and the *pro forma* defendants have a several fishery named Bishandi, but maintain that the *done* is not a part of the same and is, moreover, not navigable. The plaintiff, to support his claim, relied principally upon Exs. 2, 3 and 4. Ex. 4, which is an order of the *Khâs Mehâl* Deputy Collector, states that proprietors of *touzi* No. 1427 have the right to catch fish in all the rivers comprised in the said mehâl and directs a clause to be inserted in the *kabuliyat* of the *ijârâdâr* of the Government *Khâs Mehâl jalkar*, forbidding him to fish in those rivers. No particulars of the rivers included in *touzi*

No. 1427, are mentioned in this order. Ex. 2 and Ex. 3 are copies of the D Registers in respect of *touzi* No. 1427. In Ex. 3 fourteen rivers and *dones* are mentioned. Sâtberhia is not there, but the Lohâliâ river and possibly Golâpdi river are mentioned therein (the word in Ex. 3 seems to be Gâlpi *done* but I take it that the word is a contraction for Golâpdi). In the body of Ex. 2, which is a part of Ex. 3, there is a statement that the owners of *touzi* No. 1427 (Bishandi *jalkar mehâl*) have a right to fish by triangular nets in 14 dones, which flow through parts of certain *thânas* mentioned there. In the foot-note, however, an order of the Collector is mentioned, by which the word "fourteen" was expunged.

The plaintiff in the courts below urged only one point, namely, that Sâtberhia *done* is a part of the river system of his fishery, apparently on the ground that the current of his river Golâpdi passes through it and falls into river Lohâlia; but before me one other point is urged, namely, that he has a several fishery in all streams which fall within the places mentioned in Ex. 2, which, as the first court points out, would include the whole of Patuakhali subdivision and parts of Pirojpur and Sudder subdivisions of the district.

Both courts have found that the *done* is not navigable, a few years back it was part of a "blind stream" and that it was only when the District Board excavated a *khâl* called the Gajâliâ Bharâni, about seven or eight years before suit, that regular current began to flow through it. On these findings, the plaintiff's suit has been dismissed, both courts holding that the *done* cannot be regarded as included in the river system in which the plaintiff has his fishery rights. The first court remarked that the plaintiff had his fishery in the fourteen rivers mentioned in Ex. 3 (which does mention the Sâtberhia *done*), but the lower appellate court did not

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place much reliance upon this fact. I have pointed out that the words "fourteen rivers", which were originally in Ex. 2, were later on struck out by the Collector's order and I would assume that the plaintiff's *jalkar* rights are not limited to fourteen rivers but extend to all rivers within the places specified in Ex. 2, in which he could in law have a several fishery. In my judgment, the fact that the *done* is not navigable and that it has become connected with the flowing rivers not by natural causes, but by the act of the District Board puts an end to the plaintiff's claim. I would first consider the plaintiff's first contention for the first time advanced here, namely, that the plaintiff has a several fishery in all the rivers falling within the boundaries of his grant as evidenced by Ex. 2. I do not see how he can have any such right in rivers and streams or *dones* which are not navigable. It is well settled that in India the right of fishing in non-navigable rivers is not in the Crown, but is in riparian proprietors. When such a river passess entirely through the estate of one, he has the right of fishing and when it passes in between two estates, the proprietors thereof have the right to the soil according to the principle of *usque and medium filum aquae* and the equal right of fishing in the portions of the river adjacent to their lands: [*Neelanund Singh* v. *Teknarain Singh* (1), *Srimantu Bagdi* v. *Bhagwan Jalia* (2) and *Khagendra Narain Chowdhry* v. *Matangini Debi* (3).] The Government has the right to the fisheries in large navigable rivers only and, as the claim to a several fishery by a private person can only be founded upon a grant from the Crown, either proved or presumed, it would follow that, where a several fishery is claimed by a private individual in the natural streams in a *parganâ* or *parganâs*, the right claimed can be over navigable rivers only, or those portions of a river which are navigable, on the principle that a grantee cannot have a right in what the grantor had not. In any event, such a grant can

(1) [1862] S.D.A. (Jan. to June) 160. (2) (1913) 17 C. W. N. 1108.
(3) (1890) I. L. R. 17 Calc. 814; L. R. 17 I. A. 62.

confer on the person a right to fish only in natural watercourses and not in those made by the hand of man.

Now, to turn to the case of the plaintiff, as presented in the lower courts, the plaintiff claims the *done* as part of his river system. He says that the current of his river (Golâpdi) flows into and through the *done* and passes on to his river Lohâliâ. That he says makes the *done* a part of his river system and the fact that the *done* is not navigable, or that it was connected with his rivers by an artificial channel, namely, the *khâl* excavated by the District Board, are not material facts at all which can affect his claim. His learned advocate refers to page 374 of the Tagore Law Lectures of 1889 (Doss on the Law of Riparian Rights) and to a passage in *Srinath Roy* v. *Dinabandhu Sen* (1), and contends that his client has fishing rights in all "adjuncts of the navigable streams", whether such parts are navigable or not. In examining this contention, it is necessary to bear in mind that the plaintiff's claim is over a new channel, through which a portion of the current of a river, in which he has fishing rights, is now passing. It can be considered, at most, a channel branching from the main river Golâpdi, in which he has the fishing right, the running channel being formed, not by reason of any natural physical change, but by reason of an act of man of a recent date. In my judgment, there is a great difference between the case where a river shifts from its old bed, leaving there sheets of water, which have a regular connection with the new main channel, and the case where a river divides itself, the volume of its waters still flowing down its old bed, and the new channel is a non-navigable channel passing over the lands of private persons or through their *jalkars*. [*Indu Bhusan Bose* v. *Sarajubala Debi* (2).] In the former case, the sheets of water in its old bed, may or may not be shallow. The

(1) (1914) I. L. R. 42 Calc. 489 (516); L. R. 41 I. A. 221 (231).

(2) (1927) 46 C. L. J. 93, 101.

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person, having the several fishery, will still have his right to fish in these sheets, as long as the connection is maintained with the flowing river and that connection is not merely occasional, due to temporary causes, as for instance an exceptional flood due to a very heavy rainfall. The rights of the parties in the last mentioned case, however, must be determined according to the principles which would govern the case when a river changes its bed and takes a new course, for the extra channel formed is after all a new bed. The law in this respect has been elaborately discussed in *Srinath Roy* v. *Dinabandhu Sen* (1) by Lord Sumner. That was also a case where a new channel was formed, which connected two old navigable channels of the river Padma, as the plan would show. Lord Sumner, in the beginning of his judgment, pointed out that the new channel, in respect of which there was the dispute, was both tidal and navigable. An exhaustive examination of the Indian case-law was then made and the following propositions material to this case were laid down: (i) that a several fishery in India as elsewhere must be founded upon a grant from the Government, (ii) that the river need not flow over the land of the Government, the right of the Government to the fishery does not depend upon its ownership of the soil but upon navigability of the stream, (iii) that there is no difference whether the change in the course is gradual or sudden and (iv) that the grantee from the Government can follow the shifting channel of the navigable river and his right to fish therein is not affected by the said channel passing over the lands of a private person. In the course of the judgment the case of *Tarini Churn Sinha* v. *Watson and Co.* (2) is noticed and approved by Lord Sumner and the ratio of that decision, in my judgment, furnishes an answer to the case before me. There the defendants (Watson and Co) had a several fishery in the river Howliâ, a public navigable river, which

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

(2) (1890) I. L. R. 17 Calc. 963, 967.

had changed its course suddenly and passed in part over the plaintiff's (Tarini's) lands. Tarini claimed the right to fish on that portion of the river which flowed over his lands on the ground that he was the owner of the soil. Ameer Ali J. overruled the plaintiff's claim and, in the course of the judgment, after quoting with approval the observations of Norman J. in *Grey* v. *Anund Mohun Moitro* (1), which was a converse case, that—

> the right of the defendants to the fishery in the water in question being merely granted out of, and a part of, the same, the right of the Government to the river can no longer exist where the right of the Government itself is gone,

observed—

> But the principle laid down was—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 held it under a grant from the Government.

If the retention of the right of fishing is dependent on navigability of the river, *a fortiori*, the extension of the right over a new channel must also depend upon the same character. In my judgment, therefore, the riparian proprietors, from whom the defendants claim to have derived the right to fish in the *done* in question, who undoubtedly held the *done*, when a "blind stream", as their territorial fishery, have still their rights unaffected when the *done* was converted into a flowing channel by the act of the District Board, as the flowing channel is a non-navigable one. I also hold that the plaintiff can have also no right in the *done*, as the current from the plaintiff's river was there introduced by an artificial excavation. Certainly the plaintiff can have no right to fish in the Gajâliâ Bharâni *khâl*, which is an entirely artificial channel and which is the connecting link between the plaintiff's river and the natural depression which is called a "blind stream" by the courts below. The change in the course of a river so as to attract the rule laid down

(1) [1864] W. R. Gap. Vol. (C.R.) 108.

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in *Srinath Roy's* case (1) must, in my judgment, be a change by natural causes, or as Lord Sumner puts it "a natural physical change". This is an additional reason which, in my judgment, puts the plaintiffs out of court.

The appeal, accordingly, is dismissed, but without costs, as there is no appearance on behalf of the respondents.

Appeal dismissed.

A. A.

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