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If the District Judge be of opinion, after taking such fresh evidence that the said two witnesses signed their respective names in the presence of the testator, the order already passed by him will stand good, otherwise the application for letters of administration will have to be refused.

Costs will abide the ultimate result.

Case remanded.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Tottenham and Mr. Justice Pigot.

18[illegible]
April 10.

HORI DAS MAL (DEFENDANT) APPELLANT *v.* MAHOMED JAKI AND ANOTHER (PLAINTIFFS) RESPONDENTS.*

Julkur rights in tidal navigable rivers, Grant of, by the Crown—Grant, where there is no title by prescription, must be proved—Evidence as to nature and extent of grant.

The exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals. Such a right must ordinarily be proved either by proof of a direct grant from the Crown, or by prescription.

In the absence of title by grant or prescription in persons alleging themselves to be the holders of a *julkur* under an *ijara*, the mere payment of rent by fishermen to former *ijaradars* does not estop such fishermen from disputing the rights of the alleged holders; but such payment for the use of the *julkur* right is strong evidence of the rights of the alleged holders of the *ijara*, and of acquiescence in their title.

In the case of a grant of a *julkur*, in ascertaining what the boundaries of the *julkur* are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in tidal navigable rivers or not, the Courts should be guided by the same rules of evidence as would be applicable for the purpose of determining the nature and extent of any other grant.

Per PRINSEP and PIGOT, JJ.—Unless the boundaries given in a grant of a *julkur* clearly indicate to the contrary, a grant of a *julkur* would not ordinarily include the right of fishery in tidal navigable rivers.

THIS was one of five cases referred to a Full Bench by Mr.

* Full Bench References on Special Appeals Nos. 107 to 110 of 1883, against the decree of R. T. Rampini, Esq., Judge of Dacca, dated the 3rd October 1882, affirming the decree of Baboo Nilmani Nag, the Munsiff of Kaligunj, dated the 27th February 1882.

Justice *Prinsep* and Mr. Justice *Pigot* on the 18th August 1884 The order referring these cases was as follows :—

These are suits for rent of a *julkur* described in the plaint by boundaries or limits therein set forth.

The plaintiffs state that they are holders of an 8-anna share in the *julkur*, under *ijaras* from persons having title to certain shares in it.

They claim the money, the subject-matter of the suits, from the defendants, as rent payable by them for the use of the *julkur*, the sum, Re. 1, being half the amount alleged by plaintiffs to have been paid by the defendants to the *ijaradars* who had *ijaras* in the *julkur*, before the plaintiffs' *ijaras* were granted to them. The plaintiffs have never received any payment from the defendants.

The defendants set up various defences on the facts on which there have been findings against them in the lower Courts.

The defendants contend that the relation of landlord and tenant never existed between themselves and the plaintiffs.

The defendants further deny the right of the plaintiffs' grantors in the *julkur* as that *julkur* is claimed : that is to say, so far as it is alleged to include an exclusive right to the fishery in a tidal navigable river. They allege that the *julkur* claimed by the plaintiffs includes such a right in part of the waters of the Megna, a tidal navigable river or branch of the Bay of Bengal.

They deny that the plaintiffs, or those under whom they claim, ever had any right under any settlement or grant in respect of a *julkur* in the abovementioned waters.

They further deny the right of Government to create, in favor of any individual, an exclusive right to a fishery in such waters, being the waters of a tidal navigable river, or of an arm of the sea.

The Courts below have held against the defendants upon these contentions.

No grant from Government has been put in, conferring in express terms, upon the plaintiffs' grantors, or upon those from whom they derive title, an exclusive right of fishery in the abovementioned waters. But certain proceedings of the Collectors of Dacca and Tipperah (within whose jurisdictions the *julkur*

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claimed extends) from which it would appear that those authorities recognised or sanctioned the boundaries of the *julkur*, nearly, or exactly, as those boundaries are described in the plaint.

Those proceedings were taken in 1860 and 1863; and there can be no doubt that before that time a *julkur* corresponding, in name at least, with that mentioned in these proceedings (whatever may have been lawfully included in it) had been held by the plaintiffs' grantors or by those whom they represent; but held under grants or settlements made from time to time by the revenue officers for limited periods.

In second appeal the questions raised before us were, whether the lower Courts were justified in holding that the plaintiffs had established their exclusive rights, as against the defendants, in the waters included within the boundaries set out in the plaint, so far as they are waters of a tidal navigable river or arm of the sea, as the waters of the Megna at the place in question are admitted to be, and that they had proved the existence of the relation of landlord and tenant as between themselves and the defendants.

A question similar to the first was considered, under somewhat similar circumstances, (and also in second appeal) in *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (1) which is the last reported decision on the subject. There is also a judgment of the Sudder Dewany Adawlut for 1859, page 1357, to the same effect, and in the case of *Baban Mayacha* v. *Nagu Shravucha* (2), where all the authorities up to that date are referred to by *Westropp*, C.J., that case is approved of. But it has been brought to our notice in the course of the argument that in a case of *Hamid Ali* v. *Kristo Mohun Jalia* heard before the Chief Justice and Mr. Justice *Mitter*, in May 1882, upon reference from the Small Cause Court at Bhola, this Court appears to have arrived at a conclusion, not entirely in accordance with the opinion expressed by *Markby*, J., in the above case.

The second question raised seems closely connected with the first.

(1) I. L. R., 4 Calc., 53. (2) I. L. R., 2 Bom., 19.

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We desire, therefore, to refer these cases to a Full Bench, and to submit the following questions:—

Whether exclusive rights of fishery in tidal navigable rivers can be granted to private individuals, or to certain classes of persons by the Crown?

Whether, in the absence of proof of title by prescription, the rights to such a fishery can be established without proof of a direct grant from Government?

Whether when a *julkur* is granted which, in the boundaries assigned to it in the grant, includes waters which are not, and waters which are, part of an arm of the sea or of a tidal navigable river, such grant should not be held to include the former only, unless it be expressly stated in the grant that the latter also are included?

Whether, in the absence of title by grant or prescription in the plaintiffs, payments by the defendants to the former claimants of the *julkur*, or to the plaintiffs, for leave to fish in the above-mentioned tidal navigable waters, should be held to preclude them, either as tenants, or in any other manner, from disputing the plaintiffs' rights therein?

Mr. *Doss* (with him Baboo *Koloda Kinkur Roy*) for the appellants.—There being no law on the subject, the Court should be guided by Roman law which is founded on equity and good conscience. The Institutes of Justinian, Liber II, ch. I, lay down that all rivers, ports, &c., are public property. I contend that the Crown cannot grant such a right, because it would amount to a monopoly; and all monopolies are against the fundamental laws of the British Crown—Coke's Institutes, Part III, ch. 85, p. 181. The case of *Gureeb Hossein Chowdhree* v. *Lamb* (1) lays down that the bed of a navigable river where the tide ebbs and flows must be *primâ facie* regarded as vested in the State, and the fishery in it as open to the public, the Government being merely a trustee for the public. In commenting on the case the Chief Justice of Bombay in *Baban Mayacha* v. *Nagu Shravucha* (2) says "that decision is conformable to English law, and is, I think, sound as Indian law." Evidently being of opinion that there is some principle of law which is

(1) S. D. A., 1859, p. 1357. (2) I. L. R., 2 Bom., 19 (40).

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applicable to both countries, and that principle I submit was the principle of monopoly. [Mr. *Evans*, as *amicus curiæ*, stated that the Isle of Bombay was granted to Charles II under a marriage settlement, and by Charles II to the East India Company as part of the Manor of Greenwich. *See* the Charter of 1669.] The case of *Chunder Jaleah* v. *Ram Churn Mookerjee* (1) has no application to the present case, as a distinction was then drawn by *Glover*, J., between navigable rivers and rivers in which the tide ebbs and flows. In *Bagram* v. *The Collector of Bulloa* (2), although the plaintiff established his right to a private fishery in certain tidal and navigable rivers, the principles laid down in *Chunder Jaleah* v. *Ram Churn Mookerjee* (1) and *Doe d. Seebkristo* v. *E. I. Company*, (3), were adopted and approved.

In *Reg* v. *Kastya Rama* (4) *West*, J., in speaking of the prerogatives of the Crown in India with regard to this question, said: "I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea." In *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (5) *Markby*, J., doubted the power of the Government to make such a grant. As regards the other points referred, I submit the mere use of the word *julkur* in the *robokari* of the Revenue Commissioner would not give the plaintiff the exclusive right of fishery in tidal navigable rivers. The word may be perfectly satisfied by applying it to the right to fish within enclosed waters, and the presumption would be against any such private right. The boundaries given in the plaint do not tally with the boundaries given in the report of the Record-keeper. Nor are there any boundaries given of the disputed *julkur* in the grant, and no specific mention of the *julkur* in the river Megna; the exclusive right of fishing in tidal rivers should not be extended. In the case of the *Collector of Jessore* v. *Beckwith* (6), it was held a settlement Dol includes all that ordinarily passes as assets of the settlement but not what is exclusively reserved as the right of the State, *e.g.*, the right to the *julkur* of large navigable rivers which

(1) 15 W. R., 212.
(2) W. R., 1864, p. 243.
(3) 6 Moo. I. A., 267.
(4) 8 Bom. H. C., 63 (87).
(5) I. L. R., 4 Calc., 53.
(6) 5 W. R., 175.

according to clause 2, s. 4, Reg. XI of 1825, never passed to private individuals with whom Government made settlements.

The *Advocate-General* (Mr. *Paul*) with him Baboo *Durga Mohun Dass* and Baboo *Bussunt Coomar* for the respondents.—Such a fishery is an incorporeal right—See *Baban Mayacha* v. *Nagu Shravucha* (1). The English Common law has not been extended to the mofussil; and the question is what is the territorial law in Bengal. The case of *Campbell* v. *Hall* (2) lays down "that the laws of a conquered country continue in force until "they are altered by the conqueror." So we must go back to the law of the Mahomedans. *Elphinstone* v. *Bedreechund* (3) shows that there is no distinction between the public and private property of an absolute monarch, and that he can dispose of it as he pleases.

The British Government succeeded to the laws of the Mahomedans; the Mahomedan criminal law was in force until the time of the Penal Code. From time out of mind the British Government have let out in settlement these *julkur* rights. The Crown used to grant such rights before the permanent settlement; and I have known of such rights being granted in navigable rivers.

[GARTH, C.J.—If it was only in navigable rivers that these grants were made, it is no proof that the English law does not apply to tidal navigable rivers.] The case of *Bagram* v. *The Collector of Bullooa* (4) shows that a right of fishery can be established in a tidal navigable river. Regulation XI of 1825 recognises the fact that beds of navigable rivers may be in individuals, and that private persons cannot prevent a person using a boat on such river. [PIGOT, J.—Section 5 prevents persons encroaching on such beds, and para. 3 of s. 4 indicates the circumstances under which the Government may step in.] The particular *julkur* in this case is found to be within the limits of my zemindari, and I have a right to fish therein, the public having no such right. [PIGOT, J.—Have you every right over your *julkur*; could not the Government grant the right of navigation over it?] In the Bombay case the Crown did not claim the right as against the subject, the suit was between two fishermen. The

(1) I. L. R., 2 Bom., 19.
(2) Cowp., 204.
(3) 1. Kn. 329 (*note*.)
(4) W. R. 1864, p. 243.

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case of *Chunder Jaleah* v. *Ram Churn Mookerjee* (1) shows that the right to fish in a navigable river does not belong to the public. In these cases the Courts below have found that the grants are made out, and therefore no presumption arises against me. As to the authority in Coke, see *Hall* v. *Campbell*, (2) and *Anstey's* speech in the report of *Ameer Khan's* case.

The area of the *julkur* granted to me includes waters which are, and waters which are not, navigable. [PIGOT, J.—When the right in tidal navigable waters is not expressly granted, do you say that right is granted?] I contend that, unless the right is excluded, it passes. [PIGOT, J.—But *Markby*, J., has held exactly to the contrary.] Here the grant is *julkur parah salami*, and the boundaries are given, and *Markby*, J., says that the boundaries being uncertain if you include the *bheels* and *jheels* that is sufficient, so that judgment does not apply. [GARTH, C. J.—In the case of *Gureeb Hossein Chowdhree* v. *Lamb* (3) the Court was of opinion that such a grant as the present could be made; it is in your favor so far.] Rents have also been paid to me, and *Field*, J., in *Gour Huri Mal* v. *Amirunnessa Khatoon* (4) says that the payment of rent precludes the setting up of the defence that I never had any title at all. [PIGOT, J.—The rents were paid to your lessors, the previous *ijaradars*.] I submit that the Crown has a right to make such a grant, and that Magna Charta does not prevent it; and I also say that the rule which applies to navigable rivers applies to navigable tidal rivers in this country.

Mr. *Doss* in reply contended that in the S. D. A. case, the question was whether the grant of exclusive right of fishing in the Megna was proved or not; and that that case did not decide the question whether the grant could be made.

The opinion of the Full Bench was as follows:—

GARTH, C. J. (MITTER and TOTTENHAM, JJ., concurring.)—This is a reference made to a Full Bench in five different suits, which have come up to this Court on second appeal from the decision of the District Judge of Dacca, affirming the decree of the Munsiff of Kaligunj.

The suits are all brought by the same plaintiffs against different defendants for rent of a *julkur* in the river Megna

(1) 15. W. R., 212.
(2) Cowp., 204.
(3) S. D. A.. 1859. p. 1357.
(4) 11 C. L. R., 9.

and the plaintiffs' case is, that they held the *julkur* in question as tenants from the proprietors under an *ijara* lease for the four years, 1287 to 1290, and that the defendants were their under-tenants of the fishery. The *julkur* is a *mehal* in the river Megna, a tidal navigable river, which is said to have been settled by the Government with the plaintiffs' lessors for a great many years past at a sudder rent of Rs. 287, and let out by them from time to time in *ijara*.

The first and principal question which is referred to us by the Division Bench is:—

(1) Whether exclusive rights of fishery in tidal navigable rivers can be granted to private individuals, or to certain classes of persons, by the Crown?

The Courts below have decided this question in the affirmative, but it has been contended here by the appellants, who are the defendants in the Court below, that this decision is wrong. They say that the Crown has no power in this country to grant such rights; and they found their contention mainly upon the proposition that the law in British India is the same in that respect as the law of England.

They rely also upon an order, which was made by the Bengal Board of Revenue, dated the 6th of November 1868, to the effect that the Government is a mere trustee on behalf of the public in respect of tidal rivers, and that the exclusive right of fishery in such rivers cannot be granted to private individuals.

It appears that this order of the Board of Revenue was confirmed by a Resolution of the Government of Bengal, dated the 29th of April 1869, which stated that it was impossible for the Government to make over the fishery in a tidal river to any individual to the exclusion of the public generally; and that the Government is to take care, as the guardian of the public interest, that it is not monopolised by any single individual or party.

These documents, although of course entitled to all due respect from this Court, can scarcely be regarded as of any judicial authority. We have enquired how they came to be passed, and have ascertained from a perusal of the papers that the order made by the Board of Revenue was founded upon an opinion

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given by Mr. *Cowie*, the then Advocate-General of Bengal, upon a case submitted to him by the Government. Mr. *Cowie* seems to have assumed in giving that opinion that the law in British India, as regards the right of fishery in tidal navigable rivers, was the same as it is in England.

We have now therefore to consider the question, which is undoubtedly a very important one, whether this opinion is well founded.

It may of course be conceded that, by the law of England, the public have the right of fishing in all tidal navigable rivers, and that since the passing of Magna Charta, the Crown has no power to interfere with that right by making exclusive grants to private individuals in derogation of it—*Malcolmson* v. *O'Dea* (1).

Lord Chief Justice *Hale* considers that this right of the public in England was in the nature of a common of piscary for all the King's subjects to fish in the sea, or in the creeks or arms thereof, as part of the Crown wastes. But whatever was the origin of the right, there is no doubt that it exists. The question which we have to decide is, whether the same law prevails in this country.

It seems to have been rather taken for granted by Sir *Michael Westropp*, in the case of *Baban Mayacha* v. *Nagu Shravucha* (2) that the law of England upon the subject prevails in British India; but it was hardly necessary for the purposes of that case to determine the point; and it is worthy of remark that Mr. Justice *Haridas Nanabhai*, who was the other Judge of the Division Bench, expressed no opinion upon it.

That case related to the respective rights of two sets of fishermen with regard to nets laid two miles from land in the open sea; and neither the plaintiffs nor the defendants claimed any exclusive rights in the fishery.

In the case of *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (3), decided by *Markby* and *Prinsep*, JJ., Mr. Justice *Markby* expressed a doubt whether the Crown in this country had the power of granting rights of fishery in public navigable

(1) 10 H. L., 593 (618.) (2) I. L. R., 2 Bom., 19.
(3) I. L. R., 4 Calc., 53.

rivers; but in that case also it was not necessary to decide the point, because the Court were of opinion that, even if such rights could exist at all, they should be clearly established; and that the evidence offered by the plaintiffs in that case was not sufficient for the purpose.

On the other hand, in the case of *Chunder Jaleah* v. *Ram Churn Mookerjee* (1), it was held that the right of fishing in navigable rivers did not belong to the public; and that the Government was not prohibited by any law from granting to individuals exclusive rights of fishing in such rivers.

In that case a ruling of the Sudder Court, *Gureeb Hossein Chowdhree* v. *Lamb* (2) was referred to, as having decided that the right of fishing in navigable rivers is *primâ facie* common to every person; and that if any individual claims an exclusive right in such waters, he must show that it has been acquired either by grant or prescription.

Regulation XI of 1825 was also referred to; but it is noteworthy that the case in the Sudder Court, as well as the Regulation of 1825, had reference apparently to navigable rivers which were not tidal; and so far as they are of any authority at all for our present purpose, they rather tend to show that exclusive rights of fishing in such rivers can be granted to individuals by the Crown.

The latest case upon the subject is one which came up before my brother *Mitter* and myself in a Small Cause Court Reference, No. 8 of 1882, *Hamid Ali* v. *Kristo Mohun Jalia*, in which the question which we have now to determine was directly raised.

We had not the advantage in that case of hearing Counsel on either side, and consequently our judgment was not reported. But as we knew that *julkur* rights in tidal navigable rivers had for a long series of years been constantly made the subject of settlement by the Government with private persons, and as we were not aware of any law in this country which prevented the grant of such rights, we decided in favor of the grantee.

I believe that this present reference is the first occasion upon which the question now before us has been properly argued; and, having had the advantage of hearing Counsel on both sides, I am

(1) 15 W. R., 213. (2) S. D. A., 1859, p. 1357.

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of opinion that the Crown has power in this country to grant such rights.

I find no reason for believing that the English law upon the subject has been introduced here. That law, I conceive, *is a branch of the territorial law of England;* and it has been held here over and over again that the territorial law of England does not prevail in the Indian mofussil.

The view which I take of the question is this :—

Whether the actual proprietary right in the soil of British India 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 or grants for 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 *julkur* rights and of lands covered by water, as of lands not covered by water.

In either case the settlement is made for purposes of revenue, and for the benefit of the public; and undoubtedly the practice of settling these *julkurs,* even in tidal navigable rivers, has existed in several parts of Bengal for a great many years. I have ascertained this fact by a reference to certain papers for the perusal of which I am indebted to the courtesy of the Board of Revenue.

And it is also undoubtedly a fact that the grantees of these *julkur* rights have, for a long series of years, enjoyed the profits of them to the exclusion of the general public, and have been in the habit of sub-letting them by *ijara* and other leases.

It certainly seems to have been taken for granted in some of the authorities to which I have referred that, in the absence of such exclusive grants by the Crown, the public have always been allowed to fish in tidal navigable rivers without let or hindrance; and it is probable that this may be the case.

I have no doubt, also, that the policy which seems to have been pursued by the Government of Bengal since the year 1868 of making no further settlements of *julkurs* with private persons is a wise and beneficent policy.

But, on the other hand, it would seem very unjust to deprive zemindars of any rights which they may have previously acquired under such settlements.

This first question, therefore, as it seems to me, should be answered in favor of the plaintiffs.

The second question referred to us is—

(2) Whether, in the absence of proof of title by prescription, the rights to such a fishery can be established without proof of a direct grant from the Government?

As to this question I think it sufficient to say that, in the generality of cases, and certainly in the particular cases with which we are now dealing, the right to the fishery cannot be established without proof of a grant from the Government.

The third question is—

(3) Whether, when a *julkur* is granted, which in the boundaries assigned to it in the grant includes waters which are not, and waters which are, part of an arm of the sea or of a tidal navigable river, such grant should not be held to include the former only, unless it be expressly stated in the grant that the latter also are included?

As to this question it seems to me very difficult to attempt to lay down any such fixed rule as this question suggests.

The grant of a *julkur*, I consider, should be construed like any other grant. There are no special rules of construction, so far as I know, which are applicable to grants of *julkurs*, as distinguished from other grants; and in ascertaining what the boundaries of a *julkur* are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in a tidal navigable river or not, I think we must be guided by the same rules of evidence, which should guide us in ascertaining the nature and extent of any other grant.

Many of these grants of *julkurs* in tidal navigable rivers are very ancient; and, although at the time when the settlements were made, it is probable, that in each case a *potta* was granted by the Government, I believe there are few of such *pottas* in existence at the present time; and the usual mode of proving such grants in the generality of cases is by secondary evidence of the grant itself, and such proof as can be obtained of the user and extent of the rights which were conveyed by it.

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(4) I think that any payment of rent by the defendants to former *ijaradars* of the fishery *would certainly not estop them* from disputing the plaintiffs' right. But former payments of rent either to the plaintiffs themselves, or to their predecessors in title, by persons in the defendants' position for the use of the *julkur* right which the plaintiffs claim, would certainly amount in my opinion to *strong evidence* against those persons of the existence of that right, and of their acquiescence in the plaintiffs' title.

It is now necessary, as the cases with which we are dealing are second appeals, that we should decide them upon this reference; and it seems to me, that we have no good reason for impugning the judgment of the Court below.

The plaintiffs claim to hold an 8-anna share of the *julkur* in question under an *ijara potta* for four years, from 1287 to 1290. This *potta* has been produced and proved.

Then the title of the zemindars to the *julkur* in question is proved to the satisfaction of the lower Courts by certain proceedings of the Collectors of Dacca and Tipperah, which were admitted without objection in the first Court, and which have satisfied both Courts that the *julkur* was settled by Government with the zemindars, and that it includes the waters, in respect of which the plaintiffs claim rent from the defendants. And, lastly, it is found that the defendants have paid rent to the plaintiffs' predecessors in title for the very right in respect of which the present claim is made.

It seems to me that the proceedings in the Collectorate were properly admitted as evidence in the Courts below. I think that any proceedings, showing the existence and the nature of the original grant of the *julkur*, which would be evidence as between the Crown and the zemindars, would also be evidence in these suits; because one main question between the parties to these suits is, what rights the Crown granted to the zemindars. And having regard also to the fact that the questions with which we are now dealing is one which affects the right of the public, I consider that evidence of reputation is also admissible, and that the proceedings before the Collector are evidence of reputation.

Those proceedings seem to me to be evidence both under s. 13 and s. 42 of the Evidence Act.

The real ground, apparently, upon which these suits were defended in the Courts below, was the supposed disability of the Crown to make settlements of *julkurs* in tidal and navigable waters; and the order of the Board of Revenue of 1868, coupled with the Resolution of the Bengal Government, has been the means of inducing the defendants to contest the plaintiffs' title.

As the defendants have probably been misled by these documents, I think that, although they are wrong in their contention the appeals should be dismissed without costs.

PRINSEP, J. (PIGOT, J., concurring).—This reference relates to two sets of cases—one referred by Mr. Justice *Pigot* and myself, the other* by Mr. Justice *Pigot* and Mr. Justice *Beverley*. The points submitted for decision are the same in all these cases, although the facts giving rise to them and the evidence are somewhat different.

We are all, I believe, agreed in the answers to be given to many of the questions put to us.

First, that exclusive rights of fishery in tidal navigable rivers can be granted to private individuals by the Crown. In fact it is clear that this power has occasionally been exercised, and in my official experience I know that in 1859 this power was extensively exercised by the Government of Bengal, but the grants given were generally withdrawn in consequence of opposition made by various zemindars under the permanent settlement.

Second, that rights to such a fishery should be established by proof of a direct grant from Government or by prescription.

Third, that payments by the defendants to former claimants of the *julkur*, or to the plaintiffs for leave to fish in tidal navigable waters, do not preclude the defendants from disputing the plaintiffs' rights therein, but are merely evidence of the existence of such rights to be taken into consideration in determining those rights.

* Sp. App. Nos. 54, 245 and 248 of 1883.

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As regards the other point referred, I am of opinion that a grant of a fishery in tidal navigable waters should be express in its terms, and that ordinarily the mere grant of a *julkur* would not be sufficient. From the character of such a grant, which is exceptional, I think that the term *julkur* would not ordinarily include it; for, as I understand that term in its usual acceptation, it is used to apply to inland waters, such as *jheels* or *bheels* or small streams: not to arms of the sea, such as are in issue in the suits now before us. Unless, therefore, the boundaries clearly indicate the contrary, I should not be inclined, merely from the use of the term *julkur*, to hold that it included the rights of fishery in tidal navigable waters.

I am not disposed at this stage of the cases to consider the adequacy of evidence on the record to prove these rights. Probably, if objection had been raised at the proper time, the evidence, on which the cases have been decided in favour of the plaintiffs, would not have been admitted, but then the plaintiffs would have had an opportunity of adducing other and better evidence, such as the proceedings at the time of the permanent settlement to which some reference is made in one of the papers on the record. But no such objection was taken, and the cases have gone to trial on that evidence. If it were now held that the evidence was not admissible, and that the plaintiffs had consequently failed to prove the existence of any grant, I should consider that the cases should be retried in order that further evidence might be received.

In the case of *Prosunno Coomar Sircar* v. *Ram Coomar Paroocy* (1), the judgment of the lower Court was affirmed, as Mr. Justice *Markby* and I agreed with it that the plaintiff has failed on somewhat similar evidence to prove the rights of fishery claimed. In the present cases we are asked under the special circumstances indicated by me to hold that the evidence adduced is insufficient. I am not prepared to say that it is no evidence at all, although, if I were sitting as a Judge of fact, I should have much hesitation in accepting it as conclusive.

For these reasons I am of opinion that all these appeals should be dismissed.

Appeals dismissed.

(1) I. L. R. 4 Calc. 53.