

APPELLATE CIVIL.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

1931
March, 24.

DHANPAT PANDREY AND OTHERS (DEFENDANTS) v. PASPUT
PRATAP SINGH AND OTHERS (PLAINTIFFS)*

Ferry—Ferry rights across a river settled by Government with one person—Monopoly—New ferry started by another person—Injunction—Ownership of land on both banks at a spot does not give right to owner to open a ferry there as against the Government grantee.

The general right of the owner of the land on either bank of a river to establish a ferry for profit must give way if it comes in competition with the grantee of the Government who has previously enjoyed a monopoly under his grant.

Where all the ferries on the river Rapti in pargana Bansi were settled by the Government with the plaintiff's ancestor, so that the plaintiff had the franchise of ferries across the river in pargana Bansi, and it appeared that the plaintiff had allowed the defendants, who were proprietors of a village in pargana Bansi, and their ryots to cross the river Rapti, which flowed through the village, on a small boat free of any toll, but that the defendants had recently begun to run a ferry of their own there, it was held that the plaintiff was entitled to restrain the defendants from running the ferry, notwithstanding that they were the owners of the land on both banks of the river at that place.

Messrs. *L. M. Roy, Shiva Prasad Sinha* and *Krishna Bahadur*, for the appellants.

Dr. *K. N. Katju* and Messrs. *Iqbal Ahmad* and *K. K. Verma*, for the respondents.

PULLAN and NIAMAT-ULLAH, JJ. :—The suit which has given rise to this appeal was brought by the Raja of Bansi, plaintiff No. 1, and two of his lessees, plaintiffs Nos. 2 and 3, for a perpetual injunction against sixty two defendants, including the appellants in this Court, restraining them from interfering with the plaintiffs' right of ferry across the river Rapti within

*First Appeal No. 408 of 1927, from a decree of Ram Ugrah Lal Srivastava, Subordinate Judge of Basti, dated the 23rd of June, 1927.

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the boundary of village Gai Ghat, pargana Bansi, in the Basti district.

The plaintiffs' case is that the plaintiff No. 1 has the exclusive right of ferry on the river Rapti in the Basti district, that in pargana Bansi within the boundary of village Ajgara he has a ferry at Tharwaria Ghat for passage of bullock carts, horses, cattle, foot-passengers etc., across the aforesaid river, and that he has another ferry at Berwa Ghat for a similar purpose. The former is leased to the second plaintiff and the latter is leased to the third plaintiff. The defendants are said to be proprietors of village Gai Ghat, through which the river Rapti passes at a point between Tharwaria Ghat and Berwa Ghat above referred to. It is alleged by the plaintiffs that for the convenience of the agricultural population of village Gai Ghat the plaintiff No. 1 allowed the defendants to cross the river on a small boat free of any toll, a concession which has been enjoyed by the people of Gai Ghat for many a year, but that since October, 1925, the defendants have been running a ferry of their own in village Gai Ghat at a place where the land on either side of river Rapti belongs to them, which has materially affected the income accruing from the plaintiffs' ferry at Tharwaria Ghat and Berwa Ghat already referred to.

The suit was resisted by the defendants, who alleged that their ferry in village Gai Ghat had been in existence for over sixty years, and that in any case they were entitled to maintain a ferry of their own, the land on either side of the bank where they run their ferry being theirs. They denied the plaintiffs' exclusive right of ferry on the river Rapti wherever it ran in the Basti district.

The learned Subordinate Judge of Basti who tried the suit decreed it on the finding that plaintiff No. 1 was the owner of the ferry at Gai Ghat, namely that which the defendants claimed to be theirs and which the plaintiffs desired to be discontinued except for the

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limited purpose they mentioned in their plaint. He further found that the ferry at Gai Ghat was started by the defendants recently, as alleged by the plaintiffs, and had not been in existence as alleged by the defendants. On the last finding he held that the plaintiffs were entitled to restrain the defendants from maintaining a ferry at Gai Ghat. Though the decree passed by the learned Subordinate Judge is justified by the evidence, he has not, in our opinion, approached the case from a correct standpoint. The plaintiffs did not claim that they had a ferry at Gai Ghat, and properly no question arose as to whether the ferry which the defendants claimed for themselves is "owned" by the plaintiffs. On the other hand, the plaintiffs' case was that there was no such ferry and that the defendants had encroached on the right of plaintiff No. 1 to have ferries on river Rapti to the exclusion of every body else. In other words, the plaintiffs claim a monopoly in that respect.

To clear the ground, we may briefly state the nature of a ferry as known to the law. "The right is wholly unconnected with the ownership or occupation of land, and it is not necessary that a ferry owner should have any property in the soil of the river over which he has a right of ferry. Nor, again, is it necessary that he should be the owner of the landing places of the ferry, it being sufficient that they are in a public highway or that otherwise he has a right to land upon them. The ferry owner does not occupy the highway over the river, but has merely a right to make a special use of it." (Halsbury's Laws of England, Volume 14, page 556).

"A ferry is created by a Royal grant, or in modern days by Acts of Parliament, or exists by prescription, which implies a Royal grant.

"If there be already an existing ferry between two towns in the hands of any person, the grant of another ferry between the same towns is void.

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“A grant of a ferry may be in more or less extensive terms. A grant of ‘all our ferriages and passages’ over a certain river only applies to existing ferries, and does not confer on the grantee a right to create new ferries over the same river”. (Ibid, page 557).

There is no statute law in India defining the mode of acquisition of ferry right and the conditions under which it can be exercised. Where there is no conflict of interest between the claimant to a ferry and the holder of a franchise from the Government in that respect, “it is recognized law in India that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others”: *Lachmeswar Singh v. Manowar Hossein* (1). The sovereign authority can, however, confer a right of ferry exercisable in a given local area. Accordingly an owner of a ferry granted under a Government settlement, who plied it on hire, could restrain by suit another from running his ferry over the same spot, though that other levied no tolls on his ferry, if he did not use it exclusively for the conveyance of his own servants and ryots: *Luchmessur Singh v. Leelanund Singh* (2).

The general right of the owner of the land on either bank of a river to establish a ferry for profit must give way if it comes in competition with the grantee of the Government who has previously enjoyed a monopoly under his grant.

The documentary evidence adduced by the plaintiffs leaves no room for doubt that plaintiff No. 1 has the exclusive right of ferry on the river Rapti, at least in pargana Bansi. Exhibit 1 is the report dated 28th September, 1889, of the Settlement Officer of Basti to the Commissioner of the Benares Division, and it very

(1) (1891) I.L.R., 19 Cal., 253 (262). (2) (1878) I.L.R., 4 Cal., 599.

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clearly shows that for a considerable length of time the ancestors of plaintiff No. 1 owned all ferries in parganas Bansi and Rasulpur, that all the ferries were formed into a "mahal" styled as Jalkar mahal and settled with the then Raja of Bansi, that the income accruing to the Government from such settlement was termed as *sayar*, that in many instances where ferries were owned by the Raja he was not the owner of the villages connected by the ferries, and that three of the ferries out of sixty nine were for sometime treated as public ferries but subsequently restored to the Raja. It is significant that, according to the report, "Deputy Collectors were directed in each case to inquire from the zamindars of the mauzas within whose bounds the ferry was situated whether they admitted Ram Singh (ancestor of plaintiff No. 1) to be in possession. If they admitted possession, their attestation of the fact was recorded. If they disputed possession, the case was decided like any other dispute on the basis of possession". A list of the ferries thus attested was appended to the report, and all the ferries were made into a 'mahal' and an agreement was subsequently taken from Ram Singh. Exhibit 4 is the *wajib-ul-arz* of village Ajgara, which records Ram Singh's ownership of Ghat Tharwaria. Exhibit 2, which is the *wajib-ul-arz* of village Gai Ghat, under the heading "right to ghats and ferries" records that "one ghat known as Ajgara Ghat of the said river (Bilar) is situate on the opposite side in mauza Ajgara. Ram Singh, rais of Bansi, has right thereto. Apart from this right he has no concern with the possession of land in this village. Having regard to the fact that there was no income from the said ghat, no revenue could be assessed thereon." The aforesaid two *wajib-ul-arzes* were prepared in 1294 F. (1887).

Exhibit 16 is an extract from another document which throws light on the character of Gai Ghat ferry. The year of its preparation is not clear, but it must

have been prepared at one of the settlements long before the present litigation. It is headed as "Copy of list of ghats in possession of Raja Saheb of Bansi". The printed translation does not give the name of the river in the first column. We have, however, ascertained from the certified copy produced in the case that it is the river Rapti. The Raja is recorded as in possession of three ghats, Berwa, Gai Ghat and Tharwaria. As to Gai Ghat, it is noted in the column of remarks that "only one small boat has been kept on the ghat of the zamindars for the tenants to cross the river. The passengers are not allowed to cross the river." In all probability this list was prepared in course of the inquiry mentioned in the Settlement Officer's report, Exhibit 1, already referred to. Reading the report with the *wajib-ul-arzes* and the list Exhibit 16, no doubt is left that all the ferries on river Rapti in *pargana* Bansi were settled by the Government with the Raja of Bansi and that he was recognized as having a right of control as regards Gai Ghat, where no regular ferry existed but with his permission the zamindars of village Gai Ghat could use a small boat (*dongi*) for the private use of their tenants and themselves. An older *wajib-ul-arz* of village Gai Ghat prepared in 1860 contains a declaration of the zamindars of that village that the Raja of Bansi "has right to fishing in respect of Bilar Nala and Ban Ganga river, while we the zamindars have right to fishing in respect of *tal* (tank)". It should be explained that Bilar Nala is a small stream which falls into river Rapti. The entry has no direct bearing on the point which arises in the case before us, but suggests the extent to which Jalkar or water-rights, as they have been called, were conceded to the Raja of Bansi.

The oral evidence in the case has not been referred to before us in detail. Nor has the view of the learned Subordinate Judge as regards the weight of that evidence been in any way impugned.

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Considering the oral and documentary evidence adduced by the parties, we are in agreement with the learned Subordinate Judge that apart from a small boat which the zamindars of Gai Ghat were allowed to use for the convenience of themselves and of their tenants there was no regular ferry at Gai Ghat till a year or so before the institution of the present suit.

We are clearly of opinion that Gai Ghat, which is situate between Tharwaria and Berwa ferries belonging to plaintiff No. 1, has had a ferry for some time before this litigation during which it must have materially reduced the plaintiff's income from Tharwaria and Berwa ferries. The documentary evidence also leads to the conclusion that the plaintiff No. 1 has, at any rate in pargana Bansi, the franchise of ferries, derived from the Government under a settlement in respect of Jalkar Mahal.

The case of *Nityahari Roy v. Dunne* (1) seems to cover the points which arise in the case before us. It was held by a Division Bench of the Calcutta High Court that "the franchise of a ferry is not necessarily an appurtenant to land, but when a right of ferry was claimed as appurtenant to certain villages, the grant of such right by the Crown would not be destroyed by mere non-user without waiver, nor by the running of an opposition ferry. The franchise would continue as long as the grant continued; and until the person who set up an opposition ferry could show a Crown grant, or give evidence from which a Crown grant could be presumed, the cause of action would remain." The defendants do not allege any Crown grant and rely solely on their ownership of landing places.

In the view of the case we take, the decree passed by the learned Subordinate Judge must stand. This appeal is accordingly dismissed with costs.

(1) (1891) I.L.R. 18 Cal., 652.