

### III. RIGHT TO FERRY AND NAVIGATION

In this part of the paper we will discuss first with right to ferry and then with right to transportation in waterways.

#### (a) Right to Ferry

##### 1. General

Ferries have been plied from ancient times between the banks of rivers. In common parlance ferry means an arrangement made for taking persons, animals or goods across a waterway. The conveyance may either be by means of vessels which include ship, barge, rafts, boats, timber, bamboos or floating material propelled in any manner or by means of bridges like bridge of boats, pontoons swing-bridge, flying bridge or any other temporary bridge. The word ferry ordinarily does not include a pucca bridge over which vehicles and persons may pass in order to cross a river. Generally a fee is charged for conveying persons, animals or goods across the river. Called ferry toll, it is a good source of livelihood for a large number of ferrymen.

The right to ferry is wholly unconnected with the ownership or occupation of the land; it is not necessary that a ferry-owner should have any property in the soil of the river over which he has a right to ferry,

or should be the owner of the landing places of the ferry. It is sufficient that they are in a public highway, or that otherwise he had a right to land upon them. The ferry-owner does not occupy the highway over the river, but has merely a right<sup>57</sup> to make a special use of it.

2. Classification of ferries and nature of ferry rights

Ferries can be classified as 'private' and 'public'. Public ferries are those which are declared to be so under law and are vested in the government and managed by its authorities or by lessee. Ferries which are not vested in the government are private. Right to own private ferries has been recognized in India since very long. There is statutory law in India regarding public ferries, but none defining the mode of acquisition of ferry rights relating to private ferries. In certain laws and judicial precedents existence of private ferry rights have, of course, been recognized.

Private ferries may be of two categories:

- (i) those which originates from proved or presumed state grants; and (ii) those which arise otherwise than by a state grant.

The owner of right of private ferry originating from state grant (known as ferry-franchise) has the exclusive right to ferry and is entitled to a monopoly of his line of ferry. He has a cause of action against anyone who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. He can restrain his rival who set up a new ferry and carry passengers gratuitously if he did not use it exclusively for carrying his own family and servants. An exclusive right to ply a ferry enables the holder thereof to prevent a person from setting up a rival ferry even if he owns land on either side of the river. The right to restrain competition has been maintained on the ground that:

"The right of ferry man involves an obligation to keep the services of the ferry for the benefit of the public. The ferryman has undertaken a public burden in consideration<sup>of</sup> the crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken." <sup>61</sup>

The franchise of ferry could not be acquired by prescription and could not be evidenced by long user. There must be facts proved from which, if there be no direct grant from government, it could be implied that such grant was actually made.<sup>62</sup> Once the right is acquired by state grant, it could not be destroyed by mere non-user without waiver,<sup>or</sup> by running of a rival ferry, unless the rival could himself produce a state grant.<sup>63</sup> As stated by the Privy Council in Lachmesswar Singh v. Manowar Hussain<sup>64</sup> a private ferry which does not originate in state grant may arise in one of the two ways

- (i) owner of a property may set up a ferry on his own property and take toll from strangers for carrying them across,
- (ii) a person not being owner of property may acquire over another's property a right to ply a ferry and take tolls, either by grant, or by long user or prescription.

In the first case the right of ferry is a part of an incident of proprietary right - in the second case it is a right in the nature of easement and can be acquired by the same user as would suffice to acquire an easement [i.e., twenty years continuous use].<sup>65</sup>

In both the cases the owner does not acquire an exclusive right to ferry and is not entitled to restrain competition. He cannot complain of a neighbouring owner running a rival ferry on his own land in exercise of his own right.<sup>66</sup>

### 3. Statutory Law Relating to Ferry Rights

#### (i) The Acts

In India, the ferry rights are regulated by various local Acts including (i) Bengal Ferries Act 1885,<sup>67</sup> (ii). Northern India Ferries Act 1878,<sup>68</sup> (iii) Bombay Ferries and Inland Vessels Act 1868<sup>69</sup> (iv) Madras Canal and Public Ferries Act 1890, (v) Andhra Pradesh (Telangana Area) Ferries Act 1314F, (vi) Cochin Ferries and Tolls Act 1907, (vii) Rewa State Ferries Act 1935, and (viii) Madhya Bharat Ferries Act 1950.

The aforesaid <sup>Bengal</sup> Act of 1885 was preceded by local Regulations xviii of 1806, xix of 1816 and vi of 1819 and Act I of 1866.

The 1806 Regulation enacted that ferries should be established at places convenient for public and fixed rates payable to ferryman. Regulation xix of 1816 classified ferries into three divisions; viz.:

Ferries which are to be let in farm, ferries held under khas management of the officers of government, and ferries held by private individuals without payment of revenue (section 2). It placed all ferries under the complete control of the collector of land revenue, (section 8). Every owner of the ferry was to be licenced and any other person plying a boat for hire was liable to be convicted (section 15). The Regulation of 1819 stated the distinction between public and private ferries and placed ferries under the superintendence of a Magistrate. All important ferries were declared to be public. Other ferries of an unimportant kind were not interferred with more than was necessary for the maintenance of police and safety of passengers and property. These Regulations had taken away rights of the ferrymen (to some extent) to ply ferry freely and authorised the government to declare ferries public. These regulations were repealed by the 1885 Act of the Bengal, which is still in force.

(ii) Ferry defined

The word "ferry " has not been properly defined by any of the Ferry Acts. Madras Act 1890 and Cochin

Act 1907 define ferry as a place at which goods, animals or passengers are conveyed across a channel by means of vessels. The Acts of Bombay, Northern India, Bengal, Rewa and Madhya Bharat merely say that it includes a bridge of boats, pontoons, rafts, swing-bridge, flying bridge, temporary bridge and the approaches to and landing places of a ferry. The Telangana Act applies the term to boats and quays. Generally, all the Acts recognise two types of ferries-public and private. The Madhya Bharat <sup>Act</sup> also recognised a third type of ferry called 'personnel ferry', meaning those ferries which are not public or private and are meant exclusively for entertainment purposes and not for carrying passengers and goods.

(iii) Declaration, establishment etc. of public Ferry

The Acts of Bengal, Northern India, Telangana, Rewa and Madhya Bharat authorise the state government to declare by notification in the official gazette what ferries shall be deemed to be public ferries, take possession of private ferries and declare them to be public one, establish new public ferries, define the limit and change the course of any public ferry and discontinue any public ferry. The Bombay Act empowers the commissioner to declare, establish and discontinue

a public ferry. The Madras Act empowers provincial government to declare, define the limit and discontinue any public ferry but it gives no right to establish new public ferries. The Cochin Act empowers the Diwan to establish, define the limit of, and maintain public ferries. The Acts provides for the payment of compensation to such persons whose ferries are taken over by the government. Under the Bengal Act the District Magistrate has the power to establish as many subsidiary ferries as he likes, provided they are within two miles from the public ferry. Such subsidiary ferries are not public ferries.<sup>70</sup>

(iv) Management and Control of Public Ferry

Under local legislation immediate superintendance of public ferries vests in the state government or in any other person authorised by the state government/District Magistrate (Bengal, Northern India), Commissioner (Bombay), Public Works Department (Cochin), Collector (Andhra Pradesh), Deputy Commissioner (Rewa State), District Ferries Officer (Madhya-Bharat). The state government may, if it so desires transfer management and control of public ferries to the local bodies, municipalities, district boards, district councils and zilla parishads, etc. However, the Rewa Act and Madhya Bharat Act do not specifically allow vesting of ferry rights with the local bodies.



Proprietary rights in the ferry continue to remain vested with the state government even where its limited management is transferred to the local bodies- local bodies are only the managers of the ferry on behalf of the state government.<sup>71</sup>

(v) Tolls of Public Ferries and their leasing

Tolls of a public ferry are required to be fixed by the state government or by the person authorised by the government; and it is to be levied on all persons, animals, vehicles and other things crossing any river by a public ferry (except those specifically exempted by the government) and collected by the person in charge of the ferry. Tables of tolls legibly written or printed in the local language and in English are required to be affixed or hung up at some conspicuous place near the ferry. The government can compound the tolls which when once paid will entitle any person to use a public ferry for a fixed period.

Tolls of public ferry can be leased out under various Acts. The public ferry remains in the possession of public authorities and all that is let is a right to collect the tolls of that public ferry. Lease may be given by public authority or otherwise. The government

has to make rules for regulating the time and manner at, the terms on which, and the persons by whom, the tolls of such ferries are to be leased.

Acts

Under the Bengal and Telangana/lease can be given only by public auction. Under the Bombay, Northern India, Rewa and Madhya Bharat Acts lease can either be by public auction or otherwise. The law of Northern India provides that the tolls can be leased by public auction for a term not exceeding 5 years with the approval of commissioner or by public auction or otherwise for any term with the sanction of state government (section 8). This section was interpreted by Assam and Allahabad High Courts in some cases. The former court has held in one case that the general principle laid down by section 8 seems to be that for any period lesser than 5 years, the settlement of tolls of any public ferry should normally be by public auction subject to approval of the commissioner or the chief engineer. But in the case of some emergency or for special reasons, the government might take the case out of the general rule of settlement by public auction. The government should decide earlier the method of proposed settlement, and the procedure should be sanc-

tioned by it in advance. It was held that the State Government exercises only a power of approval or superintendence under certain cases either before or after the settlement; it is not competent to exercise power of direct settlement unless it is so provided by any rule framed under the Act.

73

High

In another case the Allahabad/Court has

held that the limitation of letting out by public auction and that too for a term not exceeding 5 years is in cases where the commissioner is the approving authority. Where the state government in the approving authority letting can be <sup>by</sup> public <sub>be for</sub> auction or otherwise and may/years,

The Assam High Court has held that although the government initially has a right to choose the procedure by which it would settle the right it cannot after having chosen the method once change its <sup>74</sup> mind and adopt a new procedure.

The Acts of Bengal, Northern India, Rewa, and Madhya Bharat authorise the officer conducting the sale for sufficient reasons to be recorded in writing, not to accept the highest bid and to accept any other bid or to withdraw the tolls from auction. Rules enacted

under Northern India Act 1878 give discretion to disapprove the highest bid, for sufficient reasons to be recorded in writing, to the approving authority. Various courts in a number of cases have decided that this discretion of the officer conducting the sale is not absolute but subject to rules if he refuses to accept the highest bid he must put down the reasons in writing. If the reasons are not recorded than the order can be quashed by the court under article 226 of the Constitution, and where the reasons are recorded they may be examined by the court under article 226 of the constitution.  
75

The lessee of the tolls is required to execute a contract setting forth the conditions on which the tolls of such ferry are to be held and he has to give security for his good conduct and punctual payment of ferry rent. The lessee and his servants are bound to follow all the rules made for management and control of the government ferry. The rent paid by the lessee form part of the revenue of the state and arrears due from lessee of the tolls can be recovered as arrears of land revenue even though they may be payable to the public body to which the management is transferred.  
76

entitled to

to any lease being granted, the lessee is entitled to abatement of rent payable in respect of lease.<sup>77</sup>

The lease of tolls of public ferry can be surrendered by the lessee and can also be cancelled by the government after giving notice in writing of the intention to surrender or cancel and paying a reasonable compensation. The notice is not a mere formality. It must clearly express intention of the government to cancel the lease and must be conveyed either by government itself or an officer duly authorised on its behalf.<sup>78</sup> The lease can also be cancelled even without notice in case the lessee contravened any of the condition of lease or the Rules made for the management of ferry.

The government may take possession, either permanently on payment of fair price, or temporarily on payment of reasonable sum to the owner, of all boats and appliances used by the lessee in working of the ferry on surrender or cancellation of lease and also in any emergency.

(iv) Rule Making Power for Public Ferries

Under the local Ferries Acts state governments have made Rules for control and management of, regulating traffic at and letting out tolls of public ferries. In cases where a bridge, etc. is used for communication, Rules provide for regulating the time and manner at and in which such bridge shall be constructed, maintained and opened for passage of vessels and rafts. In cases where a boat is used for conveyance, some Rules provide for regulating the number of and kind of boats and their dimension and equipment, the number of crew to be kept by the lessee for each boat, maintenance of boats in good condition, the hours and intervals within which lessee is bound to ply ferry and the number of passengers, animals and vehicles, etc. that can be carried in each type of boat in one trip.

Notably, there is no provision in the Ferries Acts and the Rules made thereunder to give preferential right to lease to the traditional ferrymen or to those belonging to schedule caste or schedule tribes or co-operative societies. There is no provision also that the lessee has to employ local ferrymen. In other words, no welfare provision for these poor people is made by law.

(vii) Private Ferries under the Acts

No law relating to establishment, management and control of private ferries is generally found in the local Ferries Acts. Only the Madhya Bharat Act empowers the state government to declare, establish, define the limit, change the course or discontinue any private ferry. Under this Act a person can own a private ferry only under a licence granted by the government. All other Acts merely restrict the right to private ferry by declaring that private ferries cannot be established within a specified limit of the public ferry. This limit is two miles in the Acts of Bengal, Northern India, Andhra Pradesh and Rewa. No tolls higher than those fixed for public ferry can be charged at private ferries. However, under these Acts the government has power to make rules for the maintenance of order, and for safety of passengers and property at the private ferries. Any rule which does not come within these two classes is beyond the power of government. It cannot, e.g., make a rule prohibiting the establishment of another private ferry. In Madhya Bharat these rules may also provide for granting licences to the private ferries.