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landlord and tenant would be established, and it might then be well presumed that that relation has continued to exist, unless it be proved that the defendant had, more than 12 years antecedent to suit, set up to the knowledge of the zomindar an adverse right to hold the land as *lakhiraj*, and has been holding it as such during that period. If, again, it is shewn that the land had been held as part of the *mal* estate within the last 12 years, before it was taken possession of by the defendant, the suit would be equally within time.

We have already said that the judgment of the Revenue Court does not operate as *res judicata*. The Subordinate Judge has not found, as he ought to have found in this case, whether the land is *mal* or *lakhiraj*, and his decision upon the question of limitation is wrong or otherwise defective.

We therefore think it necessary to remand the case to the lower Appellate Court for retrial with reference to the remarks we have made. Costs to abide the result.

Appeal allowed and case remanded.

J. V. W.

Before Mr. Justice Ghose and Mr. Justice Gordon.

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May 17.

SATCOWRI GHOSH MONDAL (PLAINTIFF) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS.)*

Fishery, Right of—Right of fishery in tidal navigable river—Right of Government in navigable rivers and fishery therein—Grant by Government of right to private individuals.

As regards this side of India the bed of a tidal navigable river is vested in the Crown; and the right of fishery in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property subject to the right of navigation and such other rights as the public has in such rivers—*Doe d. Seebkristo* v. *East India Co.* (1); *Gureeb Hossein Chowdhree* v. *Lamb* (2); *Bagram* v. *Collector of Bhulloa* (3); *Chunder Juleah* v. *Ram Churn*

* Appeal from Appellate Decree No. 95 of 1893 against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of Burdwan, dated the 9th of December 1892, reversing the decree of Babu Jadupati Banerjee, Munsif of Kulna, dated 28th of March 1892.

(1) 6 Moo. I. A., 267. (2) S. D. A., 1859, p. 1357.

(3) Gap. No. W. R. (1864), p. 243.

Mookerjee (1) ; *Bahan Mayacha* v. *Nagu Shravucha* (2) ; *Prosunno Coomar Sircar* v. *Ram Coomar Paroee* (3) ; and *Hori Das Mal* v. *Mahomed Jaki* (4) referred to.

Value as evidence of the *thakbast* map, in such a case, discussed.—*Syam Lal Sahu* v. *Luchman Chowdhry* (5) ; and *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (6) referred to.

THE plaintiff in this case was *se-putnidar* of *mehal* Dhoba contained in *towji* No. 1 in the Collectorate of *zillah* Burdwan. The suit was brought for possession of a portion of the river Khari which runs by the side of the *mehal*, the plaintiff alleging that the portion of the river in dispute formed part of his *mehal*. He also set up a title derived by adverse possession during twelve years. He stated that he became owner of the *mehal* on 15th August 1881 by right of his purchase of it at an auction sale, and that he had since then held possession of it, until the Collector, on behalf of the Government, made an *ijara* settlement of it with the second defendant, a *karmachari* of the third defendant. The plaintiff also stated that his predecessor in estate held possession of the *jalkar* as part of the *mehal*.

The first defendant (the Secretary of State) claimed the right to the bed of the river and to the *jalkar*, and denied that the plaintiff or his predecessors ever had them. He disputed the plaintiff's title by adverse possession, and contended that the river being deep and navigable was the property of Government. The second defendant supported the pleas set up by the Secretary of State, and alleged that the third defendant had no interest in the matter. The third defendant alleged that he had no interest in the dispute, and asked for costs as having been unnecessarily made a defendant.

The Munsif found that the river was a tidal navigable river, but that the survey maps showed that the portion of the river in suit was within the plaintiff's *mehal*. He gave the plaintiff a decree.

The Subordinate Judge on appeal was of opinion that the fact that the survey maps showed the portion of the river in dispute

(1) 15 W. R., 212.
(2) I. L. R., 2 Bom., 19.
(3) I. L. R., 4 Calc., 53.
(4) I. L. R., 11 Calc., 434.
(5) I. L. R., 15 Calc., 353.
(6) I. L. R., 16 Calc., 186.

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to be within the plaintiff's *mehal*, did not prove that either the bed of the river (being a tidal and navigable one) or the right of fishery therein, belonged to the plaintiff. He held that the bed of the river and the fishery were the right of the Government. He therefore allowed the appeal and dismissed the suit.

From this decision the plaintiff appealed.

Babu *Nalini Ranjan Chatterjee* for the appellant.

The *Senior Government Pleader* (Babu *Hem Chunder Banerjee*) and Babu *Ram Churn Mitter* for the Secretary of State.

Babu *Josoda Nandan Pramanick* for the other respondents.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

The dispute in this case relates to a portion of the river Khari. The plaintiff, as the *se-putnidar* of a property Dhoba, a revenue-paying estate, claims it as a part of his property. The defendants to the suit are the Secretary of State, and certain other individuals with whom the Collector of Burdwan has made a settlement of the *jalkar* of the said river. Their defence is that the river is tidal and navigable and is Government property ; that the Government have always exercised proprietary right in it, and that therefore the plaintiff can have no claim to it. The Court of first instance gave a decree to the plaintiff, being of opinion that the portion of the river in question is a part of the permanently settled property Dhoba, and in coming to this conclusion relied especially upon the *thakbust* map of Dhoba in 1855.

On appeal, the Subordinate Judge has reversed the decree of the Court of first instance upon the ground that the bed of the river, it being tidal and navigable, belongs to the Crown, but that no grant from Government has been put in, conferring in express terms a right to this river or to the right of fishery in it, nor has any title by prescription been proved, and that the evidence as to the enjoyment of the right of fishery is meagre and unsatisfactory. On referring, however, to the *thakbust* map produced by the plaintiff, he expresses himself as follows : "But it is to be observed that this *thakbust* demarcation is best proof of possession in the time of the *thak*, but it is no evidence of title. The mere fact that the river was demarcated appertaining

to the *mouza* Dhoba raises no presumption that it was let out to the proprietor of *towji* No. 1, as part and parcel of that estate at the Permanent Settlement."

At first sight, it might appear that the Subordinate Judge has come to a finding of fact which cannot be interfered with in second appeal. But it seems to us that he has committed an error in law in dealing with the matter before him.

In the course of the argument that we have had in this case, it was contended by the learned Government pleader that the river Khari being tidal and navigable, it was a part of the public domain, and therefore the plaintiff could not claim any right in it. Having regard to this contention it may be useful in the first place to refer shortly to the law on the subject of ownership in tidal and navigable rivers in this country, as it has been expounded from time to time.

In *Doe d. Seebkristo* v. *East India Co.* (1), the Judicial Committee of the Privy Council hold that the East India Company, as representing the India Government, has a freehold in the bed of a navigable river and in the land between high and low water marks. In *Gureeb Hossein Chowdhree* v. *Lamb* (2), it was held by the Sudder Dewani Adalut, that the bed of a tidal navigable river is not the property of any individual, but of the public, and that if any person claims an exclusive right in such river, he must shew that it has been acquired either by grant or by prescription, which is evidence of a grant from Government. The learned Judges there treated the Government as trustee for the public. In *Bagram* v. *Collector of Bhulloa* (3) a Division Bench of this Court expressed the opinion that the beds or channels of navigable rivers are ordinarily the property of Government, and that subject to the right of navigation, and such other rights, such rivers, and the soil over which they flow, belong to the State; but they held at the same time that the *jalkar* rights in such rivers may exist as private property, and that what was once common to all, or was the property of the State, may become the exclusive property of individuals."

(1) 6 Moo. I. A., 267. (2) S. D. A., 1859., p. 1357.
(3) Gap. No. W. R., 1864, p. 243.

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In *Chunder Jaleah* v. *Ram Churn Mookerjee* (1), it was held that the right of fishing in navigable rivers does not belong to the public, and the Government is not prohibited by any law from granting to individuals exclusive right of fishing in such rivers.

In *Baban Mayacha* v. *Nagu Shravucha* (2), Westropp, C.J., agreed with the law as laid down in *Gureeb Hossein Chowdhree* v. *Lamb*, and expressed the opinion that the beds of tidal rivers in British India are, like those of rivers of Great Britain, *primâ facie* regarded as vested in the Crown.

In *Prosunno Coomar Sircar* v. *Ram Coomar Paroee* (3), Markby, J., without expressing any opinion as to whether a right of fishery in tidal and navigable rivers could exist, held that if it did exist at all, it must be derived from the Crown.

In *Hori Das Mal* v. *Mahomed Joki* (4), it was held by a Full Bench of this Court that the exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals, and that such right must in the generality of cases be proved either by proof of direct grant from the Crown or by prescription. Garth, C.J., in delivering the judgment of the Court, or at any rate of the majority of the Court, observed as follows: "Whether 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 *jalkar* 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 *jalkars*, 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." Referring to the mode in which a grant by Govern-

(1) 15 W. R., 212.
(2) I. L. R., 4 Calc., 53.
(3) I. L. R., 2 Bom., 19.
(4) I. L. R., 11 Calc., 434.

ment may be proved, he thus expressed himself: "Many of these grants of *jalkars* 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 *patta* was granted by the Government, I believe there are few of such *pattas* 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 by the user and extent of the rights which were conveyed by it."

Upon the cases that we have just referred to, it may be accepted as law on this side of India that the bed of a tidal and navigable river is vested in the Crown; and that the right of *jalkar* (fishery) in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property, subject of course to the right of navigation and such other rights which the public has in such rivers.

In the present case, the plaintiff claims the disputed portion of the river Khari under right derived from Government, his case being that it is part of estate No. 1, which was settled with the zemindars at the time of the Permanent Settlement.

The Munsif, in order to enable himself to decide the question whether the river was a part of the permanently settled estate, requested the Collector of Burdwan to send the papers connected with the permanent settlement of the estate, but that officer wrote back to say (as the Munsif states) that the *doul* and other papers contained no specification of the *mouzas* comprised in the *touji* No. 1. He did not send the papers which the Munsif required. The Munsif, however, was of opinion from the *thakbust* map and the other evidence in the cause that the river in question did really appertain to the permanently settled *mehal* Dhoba.

The *thakbust* map is an important piece of evidence in the case. The *thakbust* operations, we may take it, were conducted by responsible officers of Government, and it may therefore fairly be presumed that in demarcating this portion of the river as a part of *mehal* Dhoba, they satisfied themselves that it was a part of the

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permanently settled estate. On referring to the rules framed by the Board of Revenue in connection with the preparation of *thakbust* records, we find it laid down in the year 1850 that the "*thakbust* is in future to embrace, besides the village boundaries, the demarcation of the boundaries of each *mehal* in a village. The Superintendent will in the first place lay down the village boundaries and then demarcate on his *thakbust* maps the boundaries of all important *mehals* having lands in that village. Every "*thakbust* map and *misl* must be examined and countersigned by the Superintendent himself before it is transferred to the surveyor." And referring to what may be the properties which should be considered as independent *mehals* entitled to distinct entry in the *thakbust* maps, we find "independent *mehals* paying revenue to Government," being mentioned, among others, as such properties. (See Young's Revenue Hand-book, App. No. 10, pp. 67 and 74). We find it also stated in the "Revenue Law and the Practice of the Revenue Department," compiled by Mr. Whinfield in 1874, that "the design of the survey is to ascertain the position, boundaries and area of estates and villages" (p. 210).

The *thakbust* operations in 1855 having been conducted, as we presume, under the rules thus laid down by the Board of Revenue, and the portion of the river now in dispute having been demarcated by responsible Government officers as part of the estate *towji* No. 1, the *thakbust* map becomes an important piece of evidence in favour of the plaintiff [see in this connection *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (1), as also an unreported case, Appeal from original decree No. 5 of 1890 decided on the 1st September 1890 by Macpherson and Ameer Ali, JJ.] No doubt, as has been observed by the Subordinate Judge, such maps are evidence of possession at the time; but he forgets that as such evidence of possession they are also evidence of title, as has been laid down in several cases in this Court (see the cases noted in Field's Law of Evidence, p. 220, and the cases *Syam Lal Sahu* v. *Luchman Chowdhry* (2) and *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (1).

We observe that in this case the Government does not set up

(1) I. L. R., 16 Calc., 186. (2) I. L. R., 15 Calc., 353.

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any right of the public, either in the bed of the river or in the *jalkar*, and it would appear upon the pleadings that the Government have recently been dealing with this river as their own property. The question then being between the plaintiff as the owner of the permanently settled property Dhoba, and the Government claiming this property as their own, we need not in this case determine what may be the rights of the public in the river.

The only question that ought to be determined in the case is whether the property in dispute is a part of *towji* No. 1 Dhoba or not.

The plaintiff is evidently not in a position to prove any express grant by Government, but the Munsif asked the Collector to send him the papers in connection with the permanent settlement of the estate. These papers, if produced, might have thrown some light on the question.

We consider it, therefore, right and proper to send the case back to the Subordinate Judge, with a direction that he will send for the papers in connection with the permanent settlement of Dhoba, and reconsider the case with reference to the remarks we have already made. Costs to abide the final result.

J. V. W. *Case remanded.*

ORIGINAL CIVIL.

Before Mr. Justice Sale.

CHANDMULL AND OTHERS *v.* RANEE SOONDERY DOSSEE AND OTHERS.*

1894
August 28.

Representative of deceased person—Representative of insolvent debtor—Civil Procedure Code, 1882, section 252—Suit against widow of insolvent as his legal representative parties—Official Assignee—Form of decree.

The husband of the defendant was adjudicated an insolvent in 1891, and the usual order was made vesting his estate in the Official Assignee. He subsequently died without having filed his schedule and no schedule had ever been filed. After his death a suit was brought by a credit or

* Application in the Original Civil Jurisdiction under section 622 of the Civil Procedure Code, in the matter of Act XV of 1882 and of suit No. 11457 in the Calcutta Court of Small Causes.