

CALCUTTA HIGH COURT

Nityahari Roy

Vs

Dunne

(O'Kinealy, Ameer Ali, JJ.)

29.06.1891

JUDGMENT

O' Kinealy and Ameer Ali, JJ.

1. This is a suit brought to establish a right to a ferry franchise, called the Permutta-Guzarghat-Aglapur ferry, in the neighbourhood of Manikgunge, and to have it declared that the defendants have no right to ply or run the ferry said to have been carried on in the vicinity of the plaintiffs' ferry.

2. The plaintiffs stated that the Permutta-Guzarghat-Aglapur ferry was settled with their predecessors in title with the settlement of a 6-anna share of pergunnah Khalilabad entered in the Government rent-roll as No. 113; and they asserted that from the time of the Permanent Settlement downwards till about 1286 they had been in undisputed possession of this ferry, They further stated that in the year 1286 the defendants set up a rival ferry, and by degrees succeeded in putting an end to their ferry in 1289. In paragraph 3 of the plaint they said: The said ferry-ghat had always remained in the ownership and possession of the plaintiffs Nos. 1 to 15, though its landing places had to be changed in consequence of the changes in the course of the river, and of alluvion and diluvion and other causes. At the present day the ferry-boats have to ply sometimes between chur Parmessarpati, chur Angutia, chur Mohespur, etc., on the eastern bank, and mouzahs Bairajani, Deogram, and Angutia, etc., on the western bank of the river, for the purpose of conveniently carrying men across it, and other reasons. The aforesaid ferry-ghat of the plaintiffs also had existed for more than twenty years at the places aforesaid and their contiguous places on the bank of the river Dhuleswari for the purpose of conveniently carrying men across it, and on account of changes in the course of the river, alluvion, diluvion, and other causes.

3. This is the ferry described by the plaintiffs for which they asked for the declaration in the first prayer in the plaint.

4. In answer, the defendants pleaded that the ferry set up by the plaintiffs had never been plied in

the different places stated by them. They said that even if the claim put forward by the plaintiffs had any substantial basis of truth, yet it was barred, inasmuch as the right had not been used for very many years. Moreover, they claimed a right in themselves to a ferry-ghat called Manickgunge Factory ferry, which, if not on the track of the ferry set up by the plaintiffs, lies within its immediate vicinity. They did not set up an exclusive monopoly of it: but they said that they plied for more than a period of 20 years, and that their ferry was requisite in the interests of their tenants as well as the interests of the public.

5. In this state of the pleadings, the Subordinate Judge fixed eleven issues for trial.

6. It is unnecessary now to refer to the 1st, 2nd and 3rd issues. The real ground of dispute depended upon the decision of the 4th, 5th, 6th and 7th issues, the further relief asked for having depended upon the answer given to the remaining four issues.

7. The 4th issue was, whether the defendants had dispossessed the plaintiffs. That the Subordinate Judge decided in favour of the persons who brought the suit.

8. The 5th issue referred to the plea of limitation. That also the Subordinate Judge decided in favour of the plaintiffs.

9. The 6th issue referred to a matter of pleading, that is to say, whether the plaintiffs were justified in basing their title both upon prescription and upon the grant in the same suit. That also was decided in favour of the plaintiffs.

10. The 7th issue runs as follows: Are the plaintiffs entitled to the ferry right claimed by them on any or all of the grounds stated by them in the plaint?

11. This issue the Subordinate Judge decided in favour of the defendants. He held that a suit to establish a ferry-right over such an extensive reach of the river as is claimed by the plaintiffs was preposterous. The ferry claimed he considered existed from a long time, but the plaintiffs had failed to show that the starting point from the western side of the river was fixed for twenty years, so as to give a good title by prescription. Further still, the plaintiff was unable to show that he possessed any land on the eastern bank of the river where he could land his passengers. Therefore his claim could not be decreed. In addition, the Subordinate Judge held that the plaintiffs had given no evidence to show that the defendants' ferry would have caused them (the plaintiffs) any damage or loss if they plied their own ferry; and, as a consequence flowing from this finding, he decided that, even if the plaintiff's had proved their right to ferry, they could not receive compensation or obtain an injunction. He, therefore, dismissed the suit.

12. The plaintiffs have appealed to this Court. They still assert the right to ferry, covering several villages as described in paragraph 3 of their plaint. But they urge that even if they had been

unable to prove that general right, yet, inasmuch as it is clear that they had a Crown grant acknowledged by the Government from the time of the Permanent Settlement, they should have got a declaration of their more restricted right.

13. The history of the ferry can be traced partly in official documents from the time of the Permanent Settlement, Some of these documents were filed in an inquiry made by the Deputy Survey Collector on the 17th of March 1858.

14. The first is a document of the year 1202, which purports to be a statement of the assets of 6 annas share of pergunnah Khalilabad, and as revenue to be paid to Government on account of it, there is entered in it Rs. 12-14-4 gundas on account of the ferry-ghat of Pearapur-Aglapur.

15. The next document in which reference is made to this ferry-ghat is dated in the year 1217. It is a list of the mehals comprising the zemindari of Radha Nath Rae as entered in the Government rent-roll, and in it there is given, as a source of Government revenue attached to the 6-anna share of pergunnah Khalilabad, the ferry-ghat of Pearapur-Aglapur.

16. Both these documents have been objected to by the respondents. The document of the year 1217 was objected to in the Court below, and the objection was disallowed.

17. We think that these documents are admissible in evidence. In this country the Government has always asserted its paramount right to deal with ferries; and at the time of the Permanent Settlement the proceeds of some of them formed part of the assets upon which the Permanent Settlement was based. Both these documents are copies of originals apparently in the Collector's office. They were put in evidence before the proper Revenue authorities in 1858, when they made inquiries in regard to the existence of this very ferry; and in a village register prepared by them as part of their duty in connection with the survey, the existence of this ferry-ghat is recognized. In that register it is admitted by the officers of Government that there existed a ferry-ghat called Pearapur-Aglapur, which, on inquiry, was found to be appurtenant at that time to villages 3054, 3839 of the thakbast. Thus we have it that in the year 1858-59 the plaintiff's based their claim against Government on the strength of these documents, and the claim was admitted.

18. There is no dispute that the Government is in a position, if it likes, to create a franchise. We think that both the documents and the village register prepared in 1861 by the proper authorities are admissible to show that in the year 1859 the plaintiffs made a claim to the franchise, and, on a proper inquiry made by Government, that claim was admitted.

19. The next acknowledgment made by the Crown of the existence of this ferry is to be found on the face of the thakbast maps of Deogram and Mohespur. In effect it amounts to this, that a summary inquiry, No. 306, having been instituted, it was found that this ghat was appurtenant to the villages of Deogram and Mohespur belonging to Khalilabad, and an endorsement was made on the map to this effect under the orders of Government. We thus see that at two distinct and

separate times, within the last thirty years, namely, in 1861 and in 1876, the Crown has admitted the right of the plaintiffs to hold a ferry, on the basis that it has been permanently settled with them in the same manner as their estate.

20. We think that their claim is amply supported by the other evidence on the record.

21. The plaintiffs have produced a series of kabuliats from 1272 down to 1286, and the oral evidence in support of the existence of the ferry is overwhelming.

22. We are, therefore, of opinion that the Subordinate Judge was right in holding that the plaintiffs have, from time immemorial, had a franchise granted to them by the Crown which enabled them to claim a monopoly of the right to ferry within reasonable limits across the river. The grant itself has not been produced, and Pearapur-Aglapur is at some distance from Deogram. But still in 1859, in 1861, and again in 1876 the monopoly was found by the proper Government officers to be appurtenant to two villages, namely, Deogram and Mohespur, within the pergunnah of Khalilabad. There is still another matter for consideration. It is a general principle that ancient grants may be explained by modern user. In this case the user spoken to by the witnesses, which undoubtedly existed, was in the immediate vicinity, if not from the boundary between those villages as is found by the Subordinate Judge, and must be taken to be a user supported by the right by which it was claimed. Consequently, although we think that the plaintiffs have established a right of ferry appurtenant to Deogram and Mohespur on the left bank of the river, they have not been able to establish anything more; and we agree with the learned Subordinate Judge that their claim, so far as it asserts that right to establish a ferry beyond the purview of those villages, must be rejected.

23. As regards the claim set up by the defendants, we agree with the Subordinate Judge in finding that they have failed to show that their ferry has been in existence for anything like twenty years. They have not been able to show us that the Government ever recognized the existence of such a ferry at the time of the Permanent Settlement, at the time of the survey in 1858-59, or at the time when the village register was prepared by the Survey Authorities in 1861, or in 1876 when the plaintiffs' right was acknowledged. No doubt the defendants are correct in saying that the ferry on the maps of 1858-59 is not described as the Aglapur ferry, but by another name, Manickgunge. But these documents show only one ferry there. The village Aglapur had been swept into the river, and, although the title continued to be described as it was at the time of the Permanent Settlement, the local name seems to have changed with the locality from which the boat started on the west of the river, and this is not unreasonable. That there was only one ferry, and that belonged to plaintiff's, is satisfactorily proved by the oral evidence.

24. Further, it appears from the very accounts which they (the defendants) themselves have put in that no such ferry existed before the year 1286. Thus, in the copies of the accounts kept by the Ghosal family for the year 1286, we find an entry on the 19th Falgun of that year to the following

effect: Expenses incurred in conducting a criminal case between ourselves and Hari and Nandalal Babus of Baliati, arising out of our having established a ferry on the river Dhuleswari, between mouzah Deogram on its western bank and mouzahs Barakul and Chandni on its eastern bank, which (mouzahs) be-long to our zemindari.

25. On the 30th Falgun of the same year a similar entry is made. In the entries, dated the 6th Bysak 1287 and the 12th Assar 1287, the ferry is described as a "new ferry;" and on the 3rd of Assar 1287 there is the following entry:

The patni of the ferry over the river Dhuleswari here used to get from before the sum of Rs. 2 annually as his salary. The said' ferry having this year come into our possession, the patni is paid for his salary for the present year, Rs. 1.

26. It would therefore appear that even without the negative evidence afforded by the non-existence of any entry of a ferry as belonging to the defendants in the Government records, or the oral evidence which is strongly in favour of the plaintiffs, the evidence of the books filed by the Ghosals themselves show beyond the shadow of a doubt that they first succeeded in running a ferry in that locality some time in the year 1287.

27. In answer the respondents have urged that the claim made by the plain-tiff's is entirely novel; and that it is barred. Now a right to keep a ferry is not indissolubly connected with land, and a franchise can be given to a person independently of it. If he is unable to obtain a right of way for the passengers from the land to his boat and from his boat to the land on the opposite shore, the grant is incapable of being put in force for the time being. The respondents, therefore, urge that a right to ferry passengers by itself is not of necessity a right connected with land, or an interest in land, to which the twelve years' rule of limitation would apply, and assert that on any other supposition the claim would be barred. Again, they urge that a right of this nature, a monopoly, can no more be acquired in this country than it can in England, save by a grant from the Crown; and that so far as the plaintiffs' claim is based on prescription it must fail.

28. In order to decide these questions it is necessary for us to give a short history of the law relating to ferries as we think it exists in this country. This portion of the revenue under the Mahomedan rule was called sayer, and is known as such to this very day in the present case it is so described in all the early documents. Sayer consisted of duties and customs levied on goods and persons, and in the Ain Akbari ferries are described in the same paragraphs with import and export duties levied at ports. In it also the duties of the patni or ferryman and the toll that he can levy are fixed by law--[see Gladwin, Part II, page 284].

29. One of the first rules which the Government promulgated in 1772 was to suppress the sayer duties levied in Bengal. On the 11th June 1790 a Regulation was promulgated for the guidance of the Board of Revenue with reference to sayer or internal duties. That Regulation was principally

directed against such sayer duties as were levied in hats or bazars, and the Government, although it expressly declared in it that the imposition and collection of internal duties of any kind were exclusively its own privilege and could not be exercised by any subject without express sanction, yet, in the interest of the land-lords, it adjudged it advisable to interfere as little as possible with the impositions they levied. This, therefore, is an express declaration of Government that the Dewani had never recognized in private individuals the right to levy any tolls of the denomination of sayer, and this is repeated in the preamble to Regulation XXVII of 1793. When the Permanent Decennial Settlement was made, the revenue of such zemindari ghats as were allowed was taken as an item of the assessment and granted to the zemindar. In Regulation XIX of 1816, Section 9, there was a distinct admission of this practice. It enacted that if the profits derived from any resumed ferry may appear to have been included in the permanent assessment of the estate to which it has been heretofore annexed, the Board, or Commissioner, under whose orders the inquiry into the nature of the ferry was conducted, must report the case for the orders of the Governor-General in Council. But whether the profit of the ferry was or was not taken into consideration at the Permanent Settlement, the Legislature of this country never acknowledged any right in the ferry-holder which could be enforced against the Government in the Civil Courts.

30. After the time of the Permanent Settlement the same ferries were established by enactment. The first Regulation is XVIII of 1806, which, dealing with ferries in the same category as tolls on boats passing through canals, enacted that ferries should be established at places convenient for the public within the 24-Pergunnahs, and fixed the rates payable to the ferryman. An exemption was made in favour of persons who could otherwise cross the nalla, and they were freed from toll. In 1816 the Government considered it expedient that all ferries should be placed under the complete control, of the Collectors of Land Revenue. Every owner of a ferry was licensed, and any other person plying a boat for hire was liable to be convicted and fined a hundred rupees, and the boat was to be confiscated. This Regulation continued till 1819, when it was repealed by Regulation VI of that year, and the ferries were then placed under the superintendence of the Magistrate. All important ferries were declared public, and these the Magistrate had the power to resume. Other ferries of an unimportant kind were not interfered with further than was necessary for the maintenance of the police and the safety of passengers and property. But whether we search the law as it was before the acquisition by the British Government, or the Regulations before or after the year 1793, there is no indication that any person was entitled to claim a right of ferry, that is to say, to a monopoly, by prescription or by any means other than a grant from the Crown. Since then the only law under which a person can acquire ownership by prescription is that in Part IV, Act XV of 1877; but that portion of the law we think would hardly apply to a right such as is claimed in the present suit, that is to say, not a right merely to land, or water, or air, nor a right to ask payment for ferrying a traveller across a river, but an additional right, namely, a right to a monopoly, a right to prevent other people from exercising a right which they would ordinarily possess. So far, therefore, as mere prescription is concerned, the inclination of our minds is that the claim must fail unless it is supported by evidence sufficient to justify a jury in holding that there had been a grant from the Crown. It has, no doubt, been argued by the

appellant that the case-law is decisive of the question in his favour. The first case is that of *Sishtee Dhur Ghose v. Shib Kishen Mitter*¹. It is the converse case to that of *Luchmessur Singh v. Leelanund Singh*². The former decided that when the ferry had not been recognised by Government, nor its profits treated as an asset at the time of the Permanent Settlement, and was in the continuation of a highway, no monopoly existed; the latter decided that if the profits of the ferry formed a part of the revenue assessed at the time of the Permanent Settlement, a monopoly existed. So far these decisions are not in favour of the general proposition put forward by the plaintiff. But in *Kishoree Lall Roy v. Gokool Monee Chowdhraim* 16 W.R. 281 it was said that the Legislature recognised proprietary rights in a private ferry of such a nature that another party may not so interfere with the profits arising therefrom as would be the results by running a boat, if not exactly on the same line, at least within such a distance as, for all practical purposes, would be the same as if it were on the same line. No doubt that would be so in case of a Crown grant, but no such distinction of the kind has been made in this case, and the declaration is made without any limitation. There is no authority given for the general proposition, and we do not know of any. The case of 1852 is hardly consistent with it, and the only other case before the *Sudder Dewani Adawlut* was that of *Rajib Lochun Roy v. Kumri Bebee*³ and it has no bearing on the question of the existence of a monopoly. It decided, and decided only, that the lessee of collections made on a bridge erected in place of a ferry must pay the rent specified in his lease. No reference was made in it to the case decided in 1852. But the point was in issue in the case of *Parmeshari Proshad Narain Singh v. Mahomed Syud*⁴. There Garth, C.J. and WHITE.J., held against the opinion of Mltter, J., that a right of exclusive ferry could be acquired by twenty years' user. But the Chief Justice considered that he was bound by the recognition of such rights as private property from times anterior to the Permanent Settlement, and White, J., considered he was equally fettered by the decisions in the cases of *Rajib Lochun Roy v. Kumri Bebee* S.D.A. 1854 153(Supra) and *Kishoree Lall Roy v. Gokool Monee Chowdhraim*⁵. We have already referred to the former case, and the question that arose in it. The latter is, no doubt, in favour of the appellants' contention; but, with the exception of this case, we can find none. No doubt the Dewani and the Regulations recognised ferries in the sense that engagements to pay tolls were not absolutely illegal, and so they did in regard to ground rents in markets; but not in the sense that the owners possessed a monopoly. We have not been able to find the other authorities referred to either in the case of *Parmeshari Proshad Narain Singh v. Mahomed Syud* I.L.R. 6 Cal. 608(Supra) or *Kishoree Lall Roy v. Gokool Monee Chowdhraim* 16 W.R. 281(Supra).

31. This being the conclusion we have arrived at, we should have been compelled to refer the matter to a Full Bench if we considered that a proper decision of the present case depended on the answer which would be given to the point decided in them. But we do not think so. In the present case the evidence of the numerous acknowledgments of the plaintiffs' ferry by Government, who up to the present day receives a portion of the profits as revenue, is amply sufficient to support their claim. And we think, with Mr. Justice L.S. JACKSON in the case of *Luchmessur Singh v. Leelanand Singh* I.L.R. 4 Cal. 599(Supra) that it is now too late in this country to dispute that when the proceeds of a ferry are entered as part of the assets upon which

the Permanent Settlement has been made, the owner has not a franchise. So far, therefore, there seems to us no substantial difference between the law relating to markets and ferries in this country and the law in England.

32. In regard to the question of limitation, although we agree with the respondents that the franchise of a ferry is not necessarily appurtenant to land, yet, looking at the language of Regulation XIX of 1816, it might be a matter for consideration whether this ferry, appurtenant as it is to the villages of Deogram and Mohespur, is not subject to the twelve years' limitation. But whether this is so or not, it seems to us that the plaintiffs' grant is not destroyed by mere non-user, and nothing more. No doubt they can waive their right to exercise the grant, but non-user without waiver is not, we consider, sufficient. Neither does the running of an opposition ferry extinguish the right. The franchise continues as long as their grant continues, and until the person who sets up an opposition ferry can show a Grown grant, or give evidence from which a Grown grant is presumed, the cause of action remains.

33. In England the disturbance of a market, and apparently also of a ferry right, is looked upon more or less in the nature of a nuisance--*Yard v. Ford* 2 Saund. 172. And adopting this view, it would seem to follow that in the case of a violation of a ferry the cause of action is a continuing wrong, falling within Section 23 of Act XV of 1877--*Rameshur Per shad Narain Singh v. Koonj Behari Patuk*⁶

34. All the objections raised by the respondents have failed. We concur in the opinion expressed by the Subordinate Judge that they have not put forward an honest defence, and they have endeavoured by all the means in their power to destroy the grant of the plaintiffs. On the other hand, the plaintiffs have raised unnecessary difficulties by the manner in which they have framed their case. They set up an unreasonable claim and supported it by general evidence. To our minds the position of the ferry on the left bank of the river is definitely settled as appurtenant to Deogram and Mohespur. We do not think that the plaintiffs can be properly bound down to run their ferry on the boundary line of those two villages, because we think that the franchise of a ferry may, like the somewhat analogous case of the franchise of a market, be given within limits; and the owner may change the site of it to any other place within the area to which it is limited, provided he does not interfere with the prescriptive rights of other persons if the grant is subject to this limitation. If this were not so, the franchise of a ferry on many of the large rivers of this country might cease to be available after one rainy season.

35. But in regard to the landing place on the eastern side of the river the evidence is very indefinite. The plaintiffs seem to have unnecessarily limited their case to proving that they had land on the eastern side of the river, and failed. From our point of view, however, the mere failure to prove that they possessed land on the eastern side of the river, does not establish that their franchise may not be enforced. The evidence of the leases filed by the defendants themselves although not believed to be genuine documents, show what view they take of the ferry. In them it

is declared that the ferry is for the purpose of conveying the public across the river. Again, the kabuliats filed on behalf of the plaintiffs, which are undoubtedly genuine, contain a clause requiring the lessees to convey the Government mail over the river in their boats. Manikgunge is a large village, which has greatly increased in later years. In it Civil and Criminal Courts have been established, and a police-station erected. It possesses a large school. Large markets and fairs are held in the immediate neighbourhood, and on the opposite side of the river where the ferry ran, and does still run, hats and markets have been established. For the traffic that must of necessity arise, there is, putting the Jaghir ferry out of consideration, only one ferry, and, so far as we can make out, it is, as one would naturally conclude, a public highway connecting two public highways on land. The general public crossed to these different hats and fairs up to 1286 by the plaintiffs' ferry alone. Since that time no doubt the river has changed its course, and the eastern bank of the river has followed the river and is a trifle more to the west. But, so far as we can see on the record, the public thorough fare runs down to the water's edge, and now, as then, the public pass on a public way between two highways on the banks. On these points there is no difference between the plaintiff and defendant, as a comparison of the evidence of Madhub Patni, Gour Kishore Biswas, on behalf of the latter with the documents P1 to P5, will show.

36. If that be the case, it seems clear to us that the plaintiffs are in a position to use their franchise; and should be allowed to do so.

37. On the other hand, if, owing to the fault of the plaintiffs, we refuse to give them relief in this suit, it may well be, looking at Section 43 of the Civil Procedure Code, that they may find this decision an impediment in their way of ever in the future bringing a suit to assert the franchise to which they are undoubtedly entitled.

38. We think the injury to the appellant from a total dismissal of his suit would be excessive, and that the question is merely one of costs. While therefore on the one hand we dismiss the suit in so far as it relates to damages and asks for an injunction, and direct that the appellants do pay the costs of the respondents in this appeal, yet on the other we consider it necessary for the ends of justice that the following issues should be tried by the Court below: First.--Up to the year 1286-87 or later, when the plaintiffs ceased to ply their ferry, were the passengers landed at a place over which they had a right of way on the eastern bank. Secondly.--If the river has receded since then, has the public right of way followed the river, and have the public still a right of way to the ghat? If so, on what precise locality is the seat of this public right of way?

39. The Subordinate Judge will take such evidence as the parties may wish to produce, and will submit his return to this Court within a month from the date of the receipt by him of the record.

40. The case will continue on the files of this Court.