

Privy Council Appeal No. 46 of 1930.
Bengal Appeals Nos. 3 of 1927 and 26 of 1928.

The Secretary of State for India in Council - - - *Appellant*

v.

Debendra Lal Khan - - - - - *Respondent*

Debendra Lal Khan - - - - - *Appellant*

v.

The Secretary of State for India in Council - - - *Respondent*

(Consolidated Appeals.)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN
BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1933.

Present at the Hearing :

LORD MACMILLAN.

SIR JOHN WALLIS.

SIR GEORGE LOWNDES.

[*Delivered by LORD MACMILLAN.*]

The only question which has been argued before their Lordships in these consolidated appeals is whether the High Court of Judicature at Calcutta have rightly decided that Debendra Lal Khan, the plaintiff in the suit, "has right by adverse possession to the fishery" in a portion of the river Cossye. The Secretary of State for India in Council (hereinafter referred to as "the Crown"), who is the defendant in the suit, contests in his appeal the soundness of this decision. Debendra Lal Khan (hereinafter referred to as "the plaintiff"), besides supporting the decision of the High Court in his favour, raises in his appeal certain other issues which have been decided against him. His counsel,

however, intimated that in the event of the decision of the High Court with regard to the fishery in question being upheld by their Lordships, the plaintiff did not propose to proceed with his appeal.

The river Cossye, also known as the Kangsabati, rises in the hills of Chota Nagpur, and is a tributary of the Haldi, which flows into the Hoogly. It has been found both by the Subordinate Judge and by the High Court to be a "large navigable river" within the meaning of the Bengal Regulation XI of 1825. *Prima facie*, therefore, the property of the alveus and of the fishery is in the Crown. The dispute relates to the fishery in some twelve to fourteen miles of the river in the District of Midnapore, extending from Kankabati Ferry Ghat eastward and down stream to Pathra Temohani, with the exception of a short stretch of the river in the vicinity of a dam known as the Midnapore Anicut, the fishery in which is admittedly still the property of the Crown.

By Section 28 of the Indian Limitation Act, 1908, it is provided that "at the determination of the period [by the Act] limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." By Article 149 of the First Schedule to the Act the period limited to the Crown for instituting a suit is 60 years from the time when the period of limitation would begin to run under the Act against a like suit by a private person. In the case of a suit by a private person for possession of immovable property, or any interest therein not otherwise specially provided for, the time when the period of limitation would under Article 144 begin to run is the time when the possession of the defendant becomes adverse. By Section 2 (4) "'defendant' includes any person from or through whom a defendant derives his liability to be sued," and by Section 2 (8) "'plaintiff' includes any person from or through whom a plaintiff derives his right to sue."

The effect of this legislation is that if the plaintiff can establish that he and those from or through whom he derives right have for 60 years been in possession adverse to the Crown of the fishery in question, any right of the Crown thereto is extinguished, and the plaintiff is entitled to succeed in his claim. The suit was instituted on the 2nd April, 1919, and the 60 years thus run from the 2nd April, 1859. The question accordingly is whether the fishery has from the 2nd April, 1859, been possessed adversely to the Crown by the plaintiff or those from or through whom he derives right.

As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi v. Collector of Khulna*, 27 I.A. 136 at p. 140, where his Lordship said that "the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor." The

classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. The Limitation Act is indulgent to the Crown in one respect only, namely in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination in the statute between the Crown and the subject as regards the requisites of adverse possession. It may be added that it is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. Though the possession "be not proven to have continued every quarter, month or year, yet ordinary possession will be sufficient *ad victoriam causæ*, albeit it be proponed in the terms of a continual possession, *quia probatis extremis præsumuntur media*, if the distance be not great." (*Stair's Institutions of the Law of Scotland*, IV, 40. 20). "The fact of possession may be continuous though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription" (*Millar on Prescription*, p. 36). The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible. The Crown in the case of a fishery belonging to it exercises its rights by granting leases or licenses to fish; it does not itself fish. Consequently the granting by a person other than the Crown of leases or licenses to fish in the case of a fishery which *prima facie* belongs to the Crown is evidence of the usurpation by that person of the distinctive rights of the Crown and is thus most significant evidence of adverse possession. Where a fishery is claimed in a navigable river which is open to the public for the purposes of navigation, the observations of Lord Watson in *Young v. North British Railway Company* (1887), 12 App. Cas. 544, should be borne in mind. The claimant there sought to establish a prescriptive right to foreshore and Lord Watson (at p. 553) pointed out that "in estimating the character and extent of his possession it must always be kept in view that possession of the foreshore in its natural state can never be in the strict sense of the term exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right."

As regards the admissibility of evidence of acts of possession in parts of a river adjoining the part actually in dispute there is

the high authority of Baron Parke in favour of admitting such evidence provided there is "a common character of locality" (*Jones v. Williams*, (1837) 2 M. & W. 326 at p. 331).

With these preliminary observations their Lordships proceed to examine the evidence in the present case. For this purpose it is necessary to differentiate between on the one hand the fishery in the stretch of the river from Bhura to Benasuli and on the other hand the rest of the fishery claimed.

(1) Between Bhura and Benasuli the river flows at some places through and at other places along the boundary of certain lands known as the zemindary Tappe Dharenda which belonged to Raja Sri Narain Pal and which were purchased from him by the plaintiff's predecessor in 1906. It is not disputed that the plaintiff is entitled to pray in aid any acts of possession of this section of the fishery on the part of his predecessors in title in these lands.

The Subordinate Judge held that this portion of the river, including the fishery rights, formed part of the zemindary Tappe Dharenda which the plaintiff's predecessor had purchased from Raja Sri Narain Pal, and that Raja Sri Narain Pal and his predecessor were in possession of this portion of the river from before 1859 onwards. He therefore declared the plaintiff's zemindary right to this portion of the river. The High Court, on the other hand, negatived the plaintiff's right to this portion of the river as part of his zemindary, but held that he had acquired a right to the fishery by adverse possession. Their Lordships would, in any event, be slow to disturb what is tantamount to a concurrent finding in the plaintiff's favour on the question of the possession of the fishery in this part of the river, but their Lordships have satisfied themselves that the evidence of possession on the part of the plaintiff and his predecessors is adequate. It starts well with a kabulyat of 1856 in favour of the plaintiff's predecessor by ijaradars of the fishery in precisely this stretch of the river, described as within Tappe Dharenda, for a term of seven years, thus extending into the 60 years limitation period. It is true that there are no other kabulyats of early date applicable to this portion of the river, but there is other evidence of possession which has been fully examined below, and which it is unnecessary to discuss again in detail. The criticism which their Lordships have heard of this evidence has failed to convince them of its insufficiency. Their Lordships are accordingly of opinion that the plaintiff by himself and his predecessors has had for the requisite 60 years adverse possession of the fishery in the portion of the river from Bhura to Benasuli, and that he has thereby acquired right to it.

(2) There remains for consideration the question of the fishery in the portions of the river from Kankabati Ferry Ghat to Bhura and from Benasuli to Pathra Temohani (under exception of the fishery in the short stretch at the Midnapore Anicut admittedly belonging to the Crown). Here somewhat different

issues are raised. It was not contested that since 1870 the plaintiff and his predecessors, being proprietors of the lands through or alongside which the river at these parts flows, have granted leases or licenses of the fishery throughout those portions of the river and have drawn revenue therefrom. There is some evidence of members of the general public having fished in the waters in question, but such acts were in no proper sense acts of the Crown. They are characterised in the judgment of the High Court as "isolated and casual," and their Lordships, having regard to the passage above quoted from the judgment of Lord Watson in *Young v. North British Railway Company (cit. sup.)*, are of opinion that they were quite insufficient to deprive the plaintiff's possession of the requisite exclusive character. Their Lordships therefore find that since 1870 the plaintiff and his predecessors have been in adverse possession of the fishery in the whole of these portions of the river.

That being so, the plaintiff starts with the advantage of 49 years' adverse possession to his credit. But he has still to prove adverse possession for the antecedent 11 years from 1859 to 1870. The main contest in the case has centred round this period.

Among the evidence relating to these years there are certain documents to which their Lordships attach special importance. It appears that in April, 1859, the Secretary to the Government of Bengal addressed a letter to the Secretary of the Board of Revenue, Lower Provinces, inquiring if there was "any obstacle or objection to the levying of a tax on the fisheries of navigable rivers such as the Hoogly or Ganges." The Secretary of the Board of Revenue, in his reply of the 2nd August, 1859, reported, *inter alia* that :—

"The zemindars and others have in some way or other usurped the rents of many of the fisheries in the large navigable rivers which run by the borders of or through their estates, but the Board do not consider that they can show any good title and they see no reason why the State should not avail itself of these resources. Doubtless the zemindars will plead prescriptive rights which in many instances they will try to support by documentary and other evidence. . . . The best plan in the opinion of the Board is to divide the fisheries in navigable rivers into convenient sections or blocks and to invite farming tenders for them. By this means the probable value of the fisheries may be ascertained and the objections made by those who have usurped the rents would have to be inquired into by the local officers."

On the 12th September, 1859, the approval of this plan by the Lieutenant Governor is reported in a letter which contains the following passage :—

"If any private person claims a right of fishery in such public waters as are described, his claim will be considered. If he can support it in the opinion of the Revenue authorities, it will be properly respected ; otherwise the Courts will be open to him."

Following upon this an official investigation was made of the position of the fisheries in various rivers including the Cossye,

and there is produced a document of 1861 giving the result of the investigation of the Jalkar Mehal of the river Kangsabati (Cossye) appertaining to the district of Midnapore. This contains a tabulated list of the tenants and ijaradars of particular portions of the river together with the rents paid. Among the sections of the river mentioned in the list it is possible to identify the greater part if not the whole of the portions now in dispute. There is also a report of 1861 showing the state of possession of fisheries in the Cossye in private hands, though this apparently does not include the part of the river with which this case is concerned. At the conclusion of the investigation the Collector of the Midnapore District on the 13th August, 1862, ordered all the cases relating to the jalkar to be struck off "as the members of the Board have ordered that there cannot be any jalkar settlement of any river except the Hoogly and the Bhagirathi."

The fact and the result of this investigation are highly significant. From the documents just quoted it appears that in 1859, a critical year for the plaintiff, the state of possession of the fisheries in the Cossye was officially investigated on the initiative of the Crown, with the result that a whole series of these fisheries including at least the major part if not the whole of those now in dispute were reported to be in private hands. The Crown had been specifically warned that fishing rights were being usurped and that prescriptive claims would be put forward, but so far from taking any steps in the case of the Cossye to challenge the usurpers or to vindicate its rights, the Crown appears to have acquiesced in the existing state of private possession. It is immaterial whether it did so because it was satisfied that private rights had been acquired or because it then took the view that the Cossye was not a large navigable river, and so not Crown property. In point of fact throughout the whole period from 1859 onwards there is no evidence of any attempt by the Crown to assert or exercise any fishery rights in the now disputed portions of the river. In their Lordships' opinion it is highly important that at the very beginning of the limitation period fisheries in the Cossye in the Midnapore District are found to be in private hands to the knowledge of and without challenge by the Crown. This evidence has both a positive and a negative aspect. On the one hand it vouches that private leases were in existence of fisheries in the actual waters in dispute; on the other hand it shows the Crown's acquiescence in the usurpation of its rights, if usurpation it was.

The other documentary evidence applicable to the period from 1859 to 1870 was elaborately examined by the learned judges of the High Court and was again subjected to searching criticism at their Lordships' bar. In the opinion of their Lordships, having regard to the position of matters as officially recorded at the beginning of this period, the subsequent records are sufficient to afford the requisite proof of continued adverse

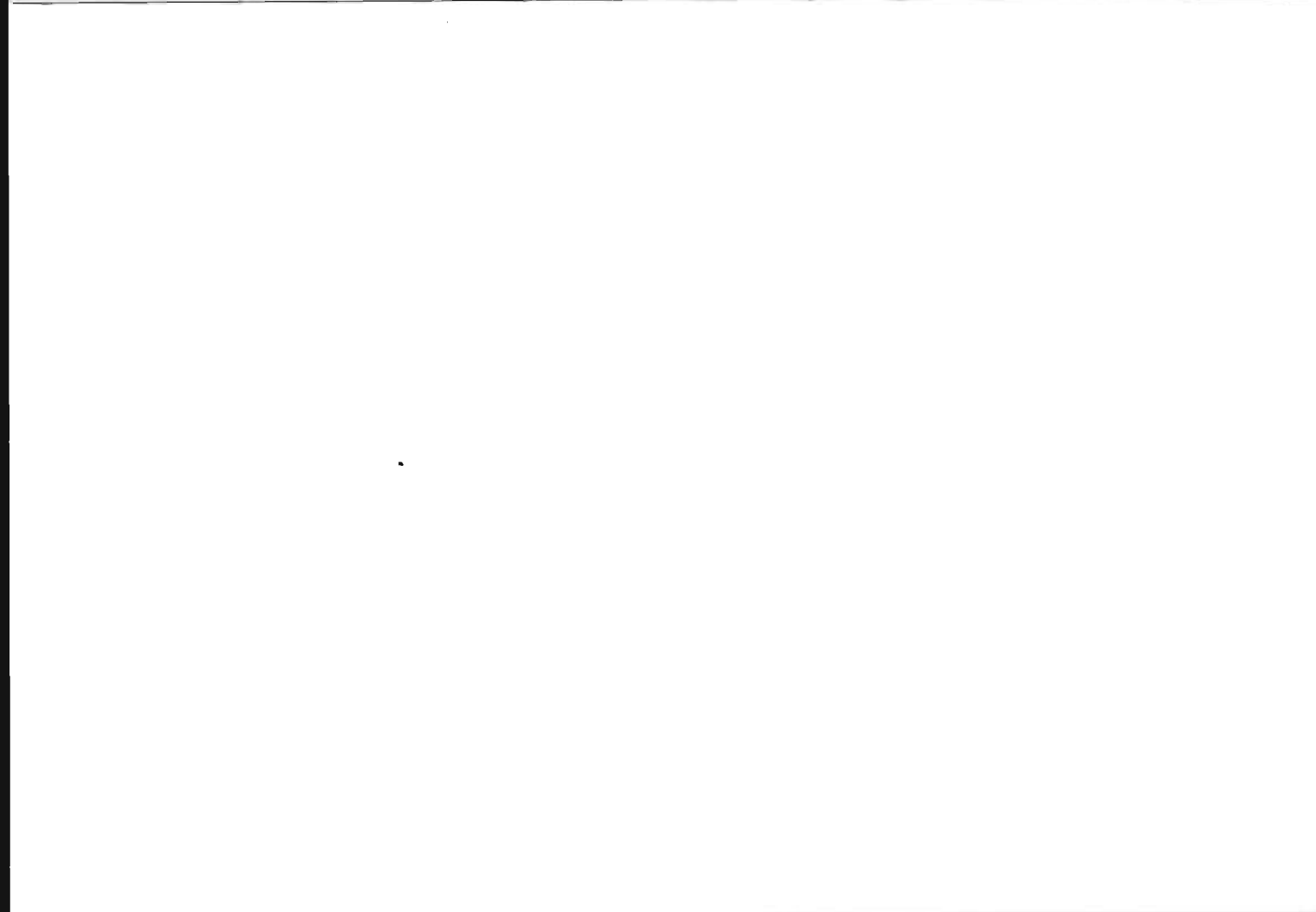
possession of the fisheries in the disputed waters down to 1870.

But the plaintiff before victory is secured has to surmount a further obstacle which the Crown seeks to place in his way. Assuming that there was adverse private possession between 1859 and 1870 of the fisheries in these portions of the river, the Crown argues that the plaintiff cannot legally avail himself of it, on the ground that the plaintiff does not derive his right to sue from or through those who enjoyed that possession. There was, it appears, a complicated episode, extending from about 1847 to 1870, in the title to the plaintiff's lands through or along which these portions of the river extend, as a result of which there was, so the Crown contends, a breach of continuity which precludes the plaintiff from "tacking" the possession had of the fisheries from 1859 to 1870 to the possession subsequently had by the plaintiff and his predecessors from 1870 to 1919. The history of the matter is fully set out in the judgment of the Subordinate Judge and also in the narrative of the report of the case of *Nawab Sidhee Nuzhur Ally Khan v. Rajah Ojoodhyaram Khan* (1866), 10 Moo. I.A. 540. This narrative, as the reporter records, and as their Lordships have verified, is quoted from the judgment delivered by Sir Edward Vaughan Williams on behalf of the Board. What happened may be stated in outline. The plaintiff's ancestor in the 'thirties and 'forties of last century borrowed largely from certain Debs of Calcutta, to whom he mortgaged his Midnapore zemindary which included the lands through or along which the portions of the river in question extend. The Debs in 1847 obtained a foreclosure decree which, as well as the property, they sold to one Abbott who dispossessed the mortgagor. Abbott made a collusive sale of the property to one McArthur, and after a further series of transactions the property was acquired in 1851 by Nazir Ali, who was in possession throughout the critical period from 1859 to 1870. In proceedings instituted in 1848 by the plaintiff's predecessor, the then Raja, the foreclosure decree was set aside as having been irregularly obtained and "the mortgagor was restored to his original and legal relation to the mortgage title." Without further detailing the complicated course of litigation, it is sufficient to state that in 1860 proceedings for redemption and accounts were instituted by the Raja against Nazir Ali, who was then in possession and others, in which the Raja obtained a decree in his favour in 1867. An accounting ensued and it would appear that the Raja ultimately regained possession of the zemindary in 1870. It was argued by the Crown that the present plaintiff was not entitled to connect his possession with that of Nazir Ali, inasmuch as Nazir Ali had been shown to be a mere illegal interloper. It is true that the periods of possession of a series of independent trespassers cannot be added together and utilised by the last possessor to make up the statutory total period of adverse possession. *Dixon v. Gayfere* (1853), 17 Beav. 421.

But Nazir Ali's position was not that of an independent trespasser. Possession acquired under a foreclosure decree is no doubt not in privity with the mortgage title, but when the foreclosure decree was set aside such title as Nazir Ali had was derived from the mortgagor, and he was held to be answerable as mortgagee in a suit for redemption and accounts. The decree pronounced against him proceeded on the footing of his being a mortgagee in possession. There can be no question that a mortgagor for the purposes of the Limitation Act can avail himself of or "tack" on to his own adverse possession the adverse possession of his mortgagee. If then the position of Nazir Ali was not that of an independent stranger but in effect that of a mortgagee, as their Lordships hold, then the plaintiff may add Nazir Ali's adverse possession to that of himself and his predecessors since 1870. On the whole case accordingly the Crown's appeal fails.

The attention of their Lordships was drawn to a slight discrepancy between the judgment pronounced by the High Court and the terms of the formal decree in the matter of the description of the stretch of the river at the Midnapore Anicut, the fishery in which admittedly belongs to the Crown. Counsel for the parties agreed that in the event of the judgment being upheld the decree should be varied by altering the words "except the part from the Saddar Ghat at Midnapur between Stations 138 and 139 to the Lock Gates of Mohunpur" so as to read "except the part from the Saddar Ghat at Sujagunge Midnapur to the Lock Gates of Mohunpur."

Their Lordships will humbly advise His Majesty that the appeal of the Crown be dismissed and the judgment of the High Court affirmed with the variation above stated and that the appeal of the plaintiff be also dismissed. As the appeals were consolidated and the record and cases were common to both appeals, the plaintiff will have his costs in the consolidated appeals subject to a reduction of one-eighth and exclusive of the costs of his petition for special leave to appeal which he must himself bear.



In the Privy Council.

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DELIVERED BY LORD MACMILLAN.

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