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subject, and I have no hesitation in stating that in this Presidency such adoptions are common, and not the slightest taint attaches to them on account of such relationship".

Special usages in favour of adoptions of daughter's sons and sister's sons have, moreover, been judicially recognised in some of the Districts of this Presidency. I need only refer to the judgments of Candy J. and Fulton J. in *Manjunath v. Kaveriba*<sup>(1)</sup>.

For these reasons I agree in holding that it is not competent to the plaintiff, who is the widow of Malgauda, to seek to set aside the adoption made by her husband.

*Decree confirmed.*

J. G. R.

(1) (1902) 4 Bom. L. R. 140.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

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February 7.

SHAMA DURGAJI BHOI (ORIGINAL DEFENDANT No. 1), APPELLANT v.  
GANGADHAR NARAYAN MUZUMDAR (ORIGINAL PLAINTIFF No. 2),  
\*RESPONDENT\*.

*Ferry—Ferry rights, infringement of—Immemorial user—Grant not produced—Presumption of grant.*

The plaintiffs were the Inamdars of the village of Bopkhel. Between the village of Bopkhel and Kirkee Bazar, there ran the Mula river which people could cross until a dam was built in 1872. The plaintiffs then began to run a ferry to take people across and they received the income from the ferry until 1915 when defendant No. 1 began to run a rival ferry. The plaintiffs sued for a declaration that they alone had a right to ply a ferry between the two villages. There was no direct grant from Government produced by the plaintiffs but the evidence showed that in 1879 the Collector had made an order that they should ply a private boat in the river within the limits of Mouje Bopkhel.

\* Second Appeal No. 112 of 1921.

*Held*, decreeing the suit, that although it was not possible to presume a grant from immemorial user, still on the facts of the case, a presumption arose that the Government had granted the ferry franchise to the Inamdars.

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SECOND appeal against the decision of K. B. Wasoodew, Joint Judge, Poona, confirming the decree passed by V. N. Sathe, Subordinate Judge at Haveli.

Suit for a declaration.

The plaintiffs were the Inamdars of Bopkhel village in Poona District. On the other side of this village, there was a village called Kirkee, belonging to Government. Between these two villages there ran the river Mula and part of it passed through Bopkhel village.

Prior to 1872 people going from Bopkhel to Kirkee used to cross the river-bed when the river was dry. In 1872 the Government put a dam across the river which prevented the people from crossing the river on foot. From that year the Inamdar of Bopkhel began to ply a ferry between Bopkhel and Kirkee, and between 1873 and 1878 he let the right of ferry to some one else. In 1879 the Collector made an order by which the Inamdar was granted permission to carry on the ferry. In 1912 there was an interference with his right by a third person and by a decree of a civil Court this opposition was removed.

In 1916 the defendant began to ply his ferry with the permission of Superintendent of the Ammunition Factory. The plaintiffs thereupon sued for a declaration that they alone had a right to ply the ferry and for an injunction restraining the defendant from plying a ferry between Bopkhel and Kirkee Bazar.

The Subordinate Judge held that the plaintiffs were the owners of half of the bed of the river Mula on the Bopkhel side and that they alone had the right to ply a ferry between the villages. He, therefore, allowed the plaintiffs' claim.

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On appeal the Joint Judge confirmed the decree. He referred to *Luchmessur v. Leelanund* (1878) 4 Cal. 599; *Kishoree Lall v. Gokool Monee* (1871) 16 W. R. 281; *Parmeshari v. Mahomed* (1881) 6 Cal. 608; *Nityahari v. Dunne* (1891) 18 Cal. 652.

Defendant No. 1 appealed to the High Court.

*D. A. Tuljapurkar*, for the appellant.

*Mehendale* with *P. B. Shingne*, for the respondent.

MACLEOD, C. J. :—The plaintiffs sued for a declaration that they alone had a right to ply a ferry between the village of Bopkhel and Kirkee Bazar, and for an injunction restraining the defendant from plying a ferry between Bopkhel and Kirkee Bazar. The river Mula runs between these two villages, and until a dam was built in 1872 people were able to cross the river except in the rainy season. That has no longer been possible since the building of the dam. The plaintiffs who are Inamdars of the village of Bopkhel then began to run a ferry to take people across, and they were receiving the income from the ferry until 1915, when the 1st defendant began to run a rival ferry under the permission granted by the Superintendent of the Ammunition Factory, ratified by the Collector.

When the plaintiffs objected to the 1st defendant's plying his ferry, an order was passed by the Collector as follows :

"In this office No. L. F. 1/853-3 of 25th March 1916 Shama Durgaji Bhoi of Kirkee was informed that the Collector has no objection to Shama plying his ferry between Kirkee and Kalas. The Collector now understands from an intimation from the Inamdar of Bopkhel that Shama is working his ferry boat between Kirkee and Bopkhel. Shama is therefore informed that he is not entitled to run a ferry between Kirkee and Bopkhel without the permission of the Inamdar of Bopkhel."

Exhibit 22 is the application of the 1st defendant to the Collector from which it would appear that the

limits within which he wished to ply his boat were not definitely stated. The applicant said :

" There is a dam of the river Mula within the limit of the Superintendent of the Ammunition Factory at Kirkee, and he has sanctioned the plying of a boat to convey workmen in the factory. Therefore, I have bought a boat worth Rs. 400. Within the said limit, I have been plying a boat for these four or five months. Hence, I have given a written statement in the office of the Mamlatdar, Haveli, Poona. Your Honour should allow me to ply a boat in the aforesaid limit."

So although the Collector might have sanctioned the plying of a boat by the 1st defendant during the limits of the waters held up by the dam, when the Inamdar of Bopkhel objected to the 1st defendant running a ferry between his village and Kirkee, the 1st defendant was told he could not do that without the permission of the Inamdar.

Both Courts have decreed the plaintiffs' claim, and the question is whether the plaintiffs have established a right to a ferry franchise between these two villages, so that they are entitled to come to Court to ask the Court to restrain the defendant, or any one else, from infringing that right. It may be conceded that such a franchise cannot be acquired by mere prescription, and that there must be facts proved from which, if there is no direct grant from the Government, it could be implied that such grant was actually made. It is not disputed that Government have the right to grant such a franchise ; and we have to consider the evidence in this case and see whether, since no direct grant has been produced, the Courts were entitled to infer that such a grant was actually made. When the dam was built it was obvious that some provision would have to be made for conveying the public from one bank of the river to the other, and that the Government recognised the rights of the Inamdars to a portion of the bed of the river can be seen from the fact that they granted

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compensation to the Inamdar for the loss which he incurred owing to his no longer being able to derive revenue from the melon grounds in the bed of the river. Government were evidently aware that the Inamdars had started plying a ferry between their village and the Kirkee side of the river bank.

Then an order was passed on 28th July 1879 by the Collector which unfortunately is not forthcoming, but the Mamlatdar gave information regarding this order to the Inamdars by Exhibit 71 "Yadi (memorandum) written to the Inamdar of Bopkhel, Taluka Haveli, from Mamlatdar, Taluka Haveli, to the effect that you ply a private boat in the river within the limits of the said Mouje and the revenue received was shown in the record. Proceedings in respect thereof went on and at last the order Inward No. 1072, dated 28th July 1879 was received from the Collector. On its strength it is informed that you ply a boat in the river of private ownership for the convenience of people. It should be understood that it is being plied with the permission of the Government". We think that there is sufficient evidence to presume that the Government had granted the franchise to the Inamdars. In addition we have this fact that the Inamdars have been plying this ferry ever since 1879, and it has never been suggested that any one could ply a ferry in competition with them.

In *Nityahari Roy v. Dunne* <sup>(1)</sup> which was a suit brought to establish a right to a ferry franchise, and to restrain the working of a rival ferry, the law on the question is fully considered, and at p. 657 the learned Judges said :—

"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

(1) (1891) 18 Cal. 652.

made by Government, the claim was admitted. The next acknowledgment made by the Crown of the existence of this ferry is to be found on the face of the *thakbast* maps to 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 . . .

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."

It must be admitted in this case that there was no reason to grant a ferry franchise before the dam was built, and so it is not possible to presume a grant from immemorial user. But such a grant can still be presumed from the evidence in the case. We think, therefore, the Courts below were right in holding that the facts in this case raise a presumption that there was a Government grant in favour of the plaintiffs. The appeal, therefore, fails and must be dismissed with costs.

*Decree confirmed.*