

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Amriteswari Debr (substituted for Fonindra
Deb Raikat) v. The Secretary of State for
India in Council, from the High Court of
Judicature at Fort William in Bengal;
delivered 6th February 1897.*

Present:

LORD WATSON.

LORD HOBHOUSE.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

Their Lordships think that the various points of controversy which are raised by this Appeal will be rendered more intelligible, if, before noticing the facts of the case, they refer at once to the provisions of Chapter IX. of the Indian Forest Act, No. VII. of 1878. The difficulties which have arisen in the disposal of the case appear to them to have been mainly occasioned by a misconception of the true import of these provisions.

Chapter IX. of the Act runs upon the same lines as the British Act 9 & 10 Vict. cap. 99, the main object of which was to protect the true owners of ships and goods stranded or cast on shore, against depredations by persons having no title, and also against any interference with their rights by landowners having grants from the Crown of wreck of the sea, and of goods jetsam, flotsam, lagan or derelict. That object is effected by the appointment of officials whose duty it is to take charge of such wreck or goods, and, after due notice to all who may have an interest, to

93256. 125.—2/97.

deliver the same to the true owners, and failing them to the Lord of the Manor who can show a valid title, by grant from the Crown.

Chapter IX. of the Indian Act, which is intituled "Of the Collection of Drift and "Stranded Timber" comprises Sections 45 to 51, both inclusive. Section 45 provides that (1) all timber found adrift, beached, stranded or sunk, (2) all wood or timber bearing marks which have not been registered under Section 41 of the Act, or on which the marks have been obliterated altered or defaced, and (3), in such areas as the Local Government directs, all unmarked wood and timber "shall be "deemed to be the property of Government "unless and until any person establishes his "right and title thereto, as provided in this "chapter." The same clause enacts that such timber may be collected by any Forest Officer, or other person duly authorised under Section 51, and taken by him to such depôts as the Forest Officer may from time to time notify as depôts for the reception of drift-timber.

Section 46 makes it the duty of the Forest Officer from time to time to give public notice of timber collected under the preceding section, containing a description of the timber, and requiring any person claiming the same, to present a written statement of his claim, within not less than two months from the date of notice. Section 47 enacts that when such statement is presented to him, the Forest Officer may, after making such inquiry as he thinks fit, either reject the claim (in which case he is bound to record his reasons for so doing), or deliver the timber to the claimant. When there are more than one claimant, the Forest Officer may either deliver to those of the claimants whom he deems entitled, or may refer them to the Civil Courts, retaining the timber pending the receipt of an order from the Court for its disposal. Any

person whose claim has been rejected may, within two months from the date of such rejection, institute a suit to recover possession of the timber claimed by him; but it is expressly provided that no person shall recover any compensation or costs against the Government, or against any Forest Officer, "on account of such rejection, or the detention or removal of any timber, or the delivery thereof to any other person under this section." Lastly it is provided by Section 46, that no such timber shall be subject to process of any Civil, Criminal or Revenue Court, until it has been delivered or a suit brought as therein provided.

Section 48 enacts that if any claimant fails, within due time to avail himself of the remedies prescribed by Section 47, the ownership of the timber shall vest in the Government, or when such timber has been delivered to another person under Section 47, in such person, free from all encumbrance. Section 49 enacts that the Government shall not be responsible for any loss or damage which may occur in respect of any timber collected under Section 45; and that no Forest Officer shall be responsible, unless he causes such loss or damage "negligently, maliciously, or fraudulently."

In their Lordships' opinion, the Act of 1878 has not the effect of taking away from private owners, and vesting in Government, any rights to drift and stranded timber which they possessed before and at the date of its passing, except in so far as these rights may be affected by their failure to prefer their claims, in the manner and within the time prescribed by the Act. The object of the Act is not confiscation, but regulation; and these rights remain as they were, but subject to the important qualification that they can no longer be exercised by proprietors, at their own hand, and at their own discretion. When the timber is collected by the Government officers, it does not at once

become the property of Government, but is held by them for behoof of the person who can show he best title, whether as the true owner who has never abandoned his interest, or as the grantee of a water right to timber which is waste or derelict. Neither of these parties can enforce his claim except against the Government, after it has taken possession through its officers; and if the Government dispute his right, or deliver the timber to an opposing claimant, he can have no redress either against the Government, or against the person to whom delivery has been made, unless he follows the procedure prescribed by the Act. Possession taken by the Government in terms of the Act, and for the purposes of the Act, being lawful and not tortious, can give rise to no claim for mesne profits, even if such a claim were not excluded by Section 49.

In March 1882, the legal guardians of Jagadindra Deb Raikat, then owner of pergunnah Baikuntapore, and mouzah Kharia, in the collectorate of Julpaiguri, to which the Appellant has now succeeded, brought an action against the Secretary of State for India, upon the allegation that the julkur or water-right of the river Teesta within the boundaries of his zemindari belonged to him, and had been possessed by his predecessors from before the time of the Decennial Settlement. The plaint further alleged that his father and predecessor, Jogendra Deb Raikat, had been illegally dispossessed of said julkur by the Government, and prayed (1) for a decree of his right to the julkur claimed, and (2) for a decree for three years' mesne profits of the same. A written statement was lodged for the Defendant, which consisted in a denial of all the material averments of the Plaintiff, and made no reference whatever to the Indian Forest Act of 1878. It is clear that, at that time, the Government, to whom the right would have belonged, in the alleged absence of any title

in the Plaintiff, was asserting an exclusive claim to the disputed julkur.

Issues were adjusted by the Subordinate Judge of Rungpore, the issues upon the merits of the action being:—"Is the julkur in dispute
 "a part of the zemindari of which permanent
 "settlement was made with the ancestors of the
 "Plaintiff? And, were the ancestors of the
 "Plaintiff in adverse possession of the same for
 "sixty years before the date of dispossession?
 "Is the Plaintiff entitled to any mesne profits,
 "and to how much?" The learned Judge, after hearing and recording evidence, found for the Plaintiff upon all of these issues, and, on the 18th December 1882, gave him decree for possession of the julkur of the river Teesta within certain specified limits, and also for a sum of mesne profits.

In the foregoing suit, neither the prayer of the plaint nor the final decree of the Subordinate Judge contain any enumeration of the different items which were meant to be comprised in the term "julkur." But their Lordships are satisfied that the term is a general one, signifying "water-rights,"—a proposition which was not disputed by counsel for the Respondent in this appeal,—and might therefore aptly include the right to drift and stranded timber, as well as the right to fishings, or any other interest of a similar kind in the produce of the river.

In February 1890, the present suit was brought by Fonindra Deb, the proprietor of pergunnah Baikuntpore and mouzah Kharia, against the Secretary of State for India in Council, and is now insisted in by his widow and executrix, who is the guardian of his minor son. The plaint narrates the proceedings in the suit of 1882; and, on the allegation that the local officers of the Government "will not allow the Plaintiff to take the
 "drift wood of the said river Teesta, and the
 "wood sunk in the water, and found in the

“bed of the river, and stranded on the chur,” it prays (1) a decree declaring the Plaintiff’s right to such wood, and (2) decree for mesne profits. The limits of the julkur right thus claimed are the same with those assigned by the decree of the Subordinate Judge in the previous suit. In his written statement, the Defendant averred that, in said suit, “a decree was passed in favour of the Plaintiff’s predecessor, only for the julkur right (fishery right) *i.e.*, right to fish, with mesne profits. “No issue was raised with regard to drift wood, “or wood sunk and stranded in the said river, “and there was no adjudication of any title to “such wood.” The Defendant also alleged and pleaded that, under Section 45, Act VII. of 1878, the right to take all kinds of wood found sunk and adrift in the river, or stranded on the bank, side, bed or chur belonged to the Defendant alone, and that the Defendant had consequently acted in the legal exercise of his own right. Mr. Justice W. Macpherson, one of the learned Judges of the High Court, has observed in this case, that “there is certainly “no evidence that the timber was taken to a “notified depôt, and there is no evidence “that the public notice prescribed by Section 46 was given; two of the witnesses, “indeed, say that there were no notices.” Their Lordships see no reason to doubt that the observation is well-founded. It appears to them that the Defendant, and his officials or advisers, laboured under the misapprehension that Section 45 transferred to the Government and divested private owners of the right of property in drift and stranded timber which they previously possessed. The provisions of the Act do not affect the right of the Government to take possession of and dispose of drift or stranded timber of which it is the undisputed owner; but it is clear beyond a doubt, that, under these

provisions, the Government has no title given it to collect timber which may possibly be claimed either by the true owner, or by a riparian proprietor having a julkur right, except upon the condition of its storing such timber, and of giving the notices required by the Act. In cases where it neglects to follow that procedure, and treats the timber as its own property, the Government, in the event of its being found that the property does not belong to it, is in no better position than any other trespasser.

The pleadings of the parties make it abundantly clear that the only substantial controversy betwixt them, in the present case, related to the legal import of the decree which had been obtained by the Appellant's ancestor in the suit of 1882. So far as it goes, that decree, being *inter eosdem*, is *res judicata*, and binding upon both parties to this litigation.

The officiating additional Subordinate Judge dismissed the suit with costs. He held that the decree in the previous suit established beyond question the proprietary right of the Plaintiff's predecessor in that part of the river Teesta which is referred to in the plaint; but that no question arose in that suit, or was therein decided, as to the title to collect the wood and timber found adrift within its limits. He was of opinion that, but for the provisions of Act VII. of 1878, the Plaintiff would be entitled to all drift wood and timber; but he held that under the provisions of Section 45, such wood and timber are to be deemed the property of Government until any person establishes his right thereto, as provided in Chapter IX.; and that to declare the Plaintiff's title as prayed would be directly to contravene the provisions of the Act. The learned Judge had obviously failed to apprehend that the Government had not collected the timber under the Act, and had given no notice of its having done so, with the view of delivery

being made to the true owner; but had taken possession, in the assertion of its own exclusive right, and was impeaching the Plaintiff's julkur title, which the learned Judge held, apart from the provisions of the Act, to be unquestionable.

The case was carried to the High Court at Fort William, who dismissed the appeal. The Court, consisting of Norris and Macpherson, J.J., were of opinion that, inasmuch as the right to drift timber was not expressly claimed in the suit of 1882, or referred to in the pleadings, issues or judgment, the right was not conferred by the decree which does not make express mention of it. Mr. Justice Macpherson, who delivered the opinion of the Court, said, "The Government is empowered to collect and hold the timber as presumptive owner until some person makes good his right to it. *Primâ facie* its title as true owner is as good as that of the Plaintiff; the latter would still have to prove his ownership." In one sense these statements may be correct, but they are imperfect. They omit all notice of the fact that the Government's statutory title to collect is coupled with duty of giving notice of what it has collected to the public, in order that the true owner of the timber, whether he be the person from whom it has escaped, or a riparian proprietor, may have the opportunity of reclaiming his property in the manner prescribed by the Act, and that such title is made dependent upon the performance of that duty. The true owner can have no such opportunity in cases where the Government takes possession of timber, as in its own absolute right, and neither conveys it to a depôt, nor gives notice to the public. Their Lordships are of opinion that, when such a case does occur, there is no provision in the Act of 1878 which can hinder the true owner from having his remedy, by a direct action, against the Government. The

so-called presumptive ownership of the Government does not, in their opinion, exist, save in those cases where the Government collects and holds for the true owner in the first instance, and subject to the statutory duty of giving him due notice.

Their Lordships would, if it were necessary, be disposed to hold that the decree pronounced in the suit of 1882, must *prima facie*, and in the absence of anything calculated to limit its effect, be held to include every right and interest, which is in the nature of a water-right. That it was meant to embrace and did embrace the right to drift and stranded timber is, in their opinion, clearly shown by an examination of the record; and they cannot avoid the observation that, in the Court below, sufficient attention has not been paid to the rule that, in case where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause. All the witnesses for the Plaintiffs in the suit of 1882 speak to the possession of drift wood by him and his predecessors; and, with two exceptions, all of them were cross-examined on that point by the Defendant. Again, in his judgment, the Subordinate Judge, after finding for the Plaintiff upon the issue with respect to mesne profits, goes on to say, "It appears from the written statement of the defendant, and from No. 72, cash book of the Forest Department, and No. 73 abstract account of revenue received on account of drift timber from the Teesta river, that the mesne profits for the three years preceding suit have been Rs. 7,181. 13. 6." Accordingly, for that sum the learned Judge gave decree against the Defendant; and, in the opinion of their Lordships, there could hardly be more satisfactory and intrinsic evidence, that the question of right to drift and stranded timber

was a matter in controversy before him, and that he meant to include that right in the julkur which he decreed. Their Lordships agree with the learned Judges of the High Court in thinking that such extrinsic evidence as correspondence and orders by officers of the Government, of dates subsequent to the decree, cannot be received as aids to its construction.

Their Lordships, for these reasons, are of opinion that the Appellant is entitled to a decree affirming that the right of the minor to drift and stranded timber is included in the decree obtained by his predecessor, that being the only relief for which her Counsel insisted. An order in these terms will have the effect of ousting the claim of the Government to take possession of such timber, within the limits specified in the decree, upon the footing that it has an absolute right of property therein; and will not hinder the Government from collecting and storing the timber, if it thinks fit, in terms of the Act, for behoof of the Appellant, or of any other person who can show a better title.

Their Lordships will humbly advise Her Majesty to reverse the judgments appealed from; to find and declare that the right to drift and stranded timber is included in the julkur which was decreed to the predecessor of the minor by the Subordinate Judge of Rungpore, on the 18th December 1882, and to find the Appellant entitled to her costs in both Courts below. The Respondent must pay to the Appellant her costs of this appeal.
