APPELLATE CIVIL.

Before Mitter J.

1931
May 19, 20.

KUMARKRISHNA NANDI CHAUDHURI
v.
LOKENATH MUKHERJI.*

Jalkar—*Fishery—Easement—Dispossession—Indian Limitation Acts (IX of 1871), s. 27, Sch. II, Art. 145 ; (XV of 1877), ss. 3, 26, 28 ; Sch. II, Arts. 142, 144 ; (IX of 1908), ss. 2 (5), 26, 28 ; Sch. I, Arts. 142, 144—Code of Criminal Procedure (Act V of 1898), s. 145.*

Under the Limitation Act of 1871, a *jalkar* right of fishery was considered as an interest in immoveable property and not as an easement ; and adverse possession for more than 12 years was sufficient for the acquisition of that right under Article 145 of Schedule II of that Act.

Sukhimoni Dasi v. *Koruna Kant Moitra* (1) and *Parbutty Nath Roy Chowdhry* v. *Mudho Paroe* (2) referred to.

Where a *jalkar* right of fishery is claimed without an exclusion of the owner or in common with others, such a right is regarded as an "easement" as defined in the Limitation Acts of 1877 and of 1908 ; and, consequently, 20 years enjoyment of the same under section 26 of the said Acts is necessary for its acquisition.

A case of an exclusive right to fishing is an interest in immoveable property under Article 144 of Schedule I of the Limitation Act of 1908 ; and adverse possession of such a right for more than 12 years would, by operation of section 28 of the Limitation Act, extinguish the right of the lawful owner to that extent.

Hill and Company v. *Sheoraj Rai* (3) followed.

The material facts are stated in the judgment.

Brajalal Chakrabarti, Rupendrakumar Mitra and *Bijanbihari Mitra* for the appellants in the appeal No. 2128 of 1929 and for the respondents in the appeal No. 1841 of 1929.

Hiralal Chakrabarti and *Ganeshchandra Bhattacharya* for the respondents in appeal No. 2128 of 1929 and for the appellants in appeal No. 1841 of 1929.

*Appeals from Appellate Decrees, Nos. 1841 and 2128 of 1929, against the decrees of Phanibhushan Banerji, First Subordinate Judge of Howrah, dated March 5, 1929, affirming the decrees of Naranath Mukherji, Third Munsif of Howrah, dated Aug. 15, 1927.

(1) (1878) 3 C. L. R. 509.
(2) (1878) I. L. R. 3 Calc. 276.
(3) (1922) I. L. R. 1 Pat. 674.

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MITTER J. These are two appeals and arise out of the same suit, which was commenced by the plaintiff, who is appellant in Appeal No. 1841 of 1929, for declaration of his title to a portion of the river known as Kânâ Nadi. The plaintiff's case is that the river formed part of a village which he claims both in *patni* and *dar-patni* right. In paragraph 3 of the plaint, it is stated that the river was being possessed from time immemorial as *jalkar*, and the plaintiff alleges that these lands form part of the *mouzâ* called Naya Chak and that he was in possession of the same through his tenant, who is a *pro forma* defendant in the suit. The plaintiff further alleges that defendant No. 1 has, with the object of creating evidence of title, created several collusive documents in concert with other defendants to the suit. A proceeding under section 145 of the Code of Criminal Procedure was started between the parties and the proceeding related both to the river bed and the watery portion of the river. In that proceeding, possession was awarded by the magistrate to defendant No. 1. The plaintiff, consequently, seeks in this suit for an injunction restraining that defendant from dispossessing him. It is also prayed, in the alternative, that, if the plaintiff is found to have been dispossessed as a result of section 145 proceeding or otherwise, possession might be given to him. The case set up in defence by defendant No. 1 is that the river in dispute formed part of two villages of Harishpur and *jalâ* Biswanathpur and his contention is that he has been in possession of this river by letting out the *jalkar* of this river to tenants. He further alleged that he exercised possession in respect of the river by collecting tolls from boats when the boatmen plied over his river. He challenged also the plaintiff's title to the disputed river as forming part of the disputed village Naya Chak. The other defendants raised the same defence as defendant No. 1. Several issues were framed in the suit. The court of

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first instance came to the conclusion that the plaintiff has established his title to the river-bed or to the river in the suit, but, holding adversely to the plaintiff on the question that defendant No. 1 has acquired a right in the fishery or a *jalkar* right, the Munsif has granted a decree to the plaintiff subject to the *jalkar* right of defendant No. 1. In other words, it is said in that decree that the defendant may possess the right to fish in the river either by himself or through his tenants to the exclusion of the plaintiff or his tenants if any for the same.

Against this, an appeal was taken to the court of the Subordinate Judge of Howrah by the plaintiff and there was also a cross-objection by defendant No. 1, in so far as the plaintiff's title to the river in the suit was declared. His contention was that the plaintiff's suit should have been dismissed in its entirety. The Subordinate Judge found on the question of title in favour of the plaintiff. He, however, differed from the Munsif on the question as to whether the plaintiff's suit is barred by limitation under Article 142 of the first schedule to the Limitation Act and he came to the conclusion that defendant No. 1 had acquired a right by prescription in the *jalkar* before an obstruction was caused in August, 1924, by the plaintiff by the erection of a dam. In this view, he affirmed the decision of the Munsif, although his reasons with reference to the question of limitation, adverse possession and prescription are not the same as those of the Munsif.

Against this decision, two appeals have been preferred, one by the plaintiff, which is numbered 1841, and the other by the defendant No. 1, which is numbered 2128. Both sides contended respectively that, on the findings arrived at by the Subordinate Judge, there should have been a decree in favour of the plaintiff in its entirety or that the suit of the plaintiff should have been dismissed in its entirety. This is the extreme contention respectively of the plaintiff and defendant No. 1 in these two appeals.

It will be necessary to deal with the two appeals separately.

I take Appeal No. 1841 of 1929 first. In this case a very careful argument has been addressed to me by Mr. Hiralal Chakrabarti, who appears for the plaintiff appellant, and he has said nothing which does not merit consideration. Nonetheless, after hearing his arguments and hearing the respondent, I have come to the conclusion that this appeal must be dismissed. The main ground upon which there has been controversy before me in this appeal is that, on the findings arrived at by the lower appellate court, there has been such an interruption of adverse possession of defendant No. 1 that the plaintiff's title could not be said to be extinguished by such possession. At one stage of the argument, it was conceded by Mr. Hiralal Chakrabarti that, having regard to the frame of the plaint, the proper Article applicable to the case is Article 142 and that, therefore, it was incumbent upon him to prove that he was in possession within 12 years of the institution of the suit. He seeks to discharge the burden of proof which lies on him by showing that, on the findings it appears that, during the period of 12 years from the date of the institution of the suit, he has erected a dam over the channel in question. It appears, however, that, according to the findings of the lower appellate court, defendant No. 1 had been in uninterrupted, open and peaceful enjoyment of the right of fishery from 1310 (1903) to 1331 (1924). This continuous possession for more than the statutory period would entitle the defendant to succeed with regard to the right of *jalkar* in the river if such possession has been a possession of one single person or of the defendant and his predecessor in interest. In other words, on this part of the case controversy arose whether possession of defendant No. 1 would be tacked on to the possession of his ancestor, Raja Pyarimohan Mukherji, and it is contended that this property did not pass by the

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deed of settlement executed by Raja Pyarimohan Mukherji in favour of defendant No. 1, to which I shall refer later on. If this contention could be established, there would undoubtedly be a break in the adverse possession of defendant No. 1 and such a possession would not defeat the right of the plaintiff. With reference to this branch of the case, it has been argued that the deed of settlement only purports to pass to defendant No. 1 the *gha* schedule properties which include *jalâ* Biswanathpur and it is said that, on a construction of this deed, it is not possible for the respondent to contend that the *jalkar* in question passed by the settlement, which refer only to *jalkar* Biswanathpur. It appears, however, from the evidence given in this case that Raja Pyarimohan Mukherji treated the *jalkar* in question as forming a part of the *mouzâ jalâ* Biswanathpur, for he took the *kabuliyat* in respect of this *jalkar* from the various tenants. This *kabuliyat* has also been referred to by the Munsif and it goes to show that Raja Pyarimohan Mukherji treated this *jalkar* as a part of *mouzâ jalâ* Biswanathpur. On this point the courts below have differed. The Munsif was of opinion that the deed of settlement did not pass the *jalkar* in question. The Munsif said this: "This would have made out a case of adverse "possession also, but for the omission in the deed of "settlement of the Raja. This much, however, is "clear that the plaintiff was never in possession of "the *jalkar*." The Subordinate Judge, however, came to a different conclusion and he states that it was not necessary to mention separately the *jalkar* in the deed of settlement as *jalkar* appertained to *mouzâ jalâ* Biswanathpur which had been allotted to defendant No. 1 by Raja Pyarimohan Mukherji under the deed of settlement. I think that the decision of the Subordinate Judge, with regard to the construction of the deed of settlement, is right. This being so, it appears clear, on the findings, that defendant No. 1 and his predecessor Raja Pyarimohan Mukherji had been in uninterrupted

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possession from 1310 to 1331 for more than the statutory period of 12 years. Question has next been debated as to whether this exclusive right of fishery under claim is a right in the nature of easement within the meaning of the Indian Limitation Act or it is in the nature of an interest in the immoveable property so as to attract the application of Article 144 of the first schedule to the Limitation Act. Under Act IX of 1871, a *jalkar* right of fishery was considered as an interest in the immoveable property and not as an easement and that by that Act adverse possession for more than 12 years was sufficient for the acquisition of that right under Article 145. Reference may be made in this connection to the cases of *Lukhimoni Dasi* v. *Koruna Kant Moitro* (1) and *Parbutty Nath Roy Chowdhry* v. *Mudho Paróe* (2). In the Limitation Act of 1877 and of 1908, having regard to the definition of the word "easement" under section 2 of the Act, a *jalkar* is regarded as an easement and consequently 20 years enjoyment is necessary under section 26 of the Indian Limitation Act to acquire any right of fishery. That might be the case where the right is claimed without any exclusion of the owner or in common with others. A case of exclusive right to fishing would rather seem to fall within the definition of interest in the immoveable property under Article 144 and adverse possession of such a right for more than 12 years would by operation of section 28 of the Indian Limitation Act extinguish the right of the lawful owner to that extent. There is some authority for this view. Reference may be made to the decision in the case of *Hill and Company* v. *Sheoraj Rai* (3), where it was held by Sir Dawson Miller C. J. and Mallik J. that, if it was an exclusive right of fishery, it is an interest in the immoveable property and can be acquired by adverse possession for more than 12 years involving an ouster of the rightful owner. On this ground, having

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regard to the finding of the court below, I think this appeal should fail. It remains to notice the argument of Mr. Chakrabarti that this adverse possession was interrupted by stray acts of the rightful owner in erecting a dam in 1924 within 12 years of the suit or in taking of water. The answer to this contention is that, so far as the erection of the dam is concerned, this erection was at a time when the right of the plaintiff with reference to the *jalkar* had already become barred by statute. So this is of no avail to the plaintiff. With regard to the other acts, they did not interfere with defendant No. 1's right of fishing in the *jalkar*.

It remains now to consider the appeal of defendant No. 1, namely, Appeal No. 2128 of 1929. Mr. Brajalal Chakrabarti Shastri, who appears for him, contends that, on the findings arrived at by the lower appellate court, plaintiff's suit should have been dismissed in its entirety, on the ground that adverse possession was against the entire interest possessed by the plaintiff. For this purpose, he has relied on the plaintiff's own case made in paragraph 3 of the plaint. He contends that paragraph 3 suggests that, according to the plaintiff's case, the exercise of the right of fishery was the only mode in which this river was enjoyed by the plaintiff. He asks me to construe paragraph 3 of the plaint in that way. I am unable, however, to agree to this contention. It is not suggested in paragraph 3 that the right of fishery was the only mode in which the river was being enjoyed. On the other hand, there are passages in the same paragraph which go to show that there are other modes of enjoyment by the plaintiff. It has been further argued, on the question of easement, that paragraph 3 must bear the construction which Mr. Shastri wants to put upon it. The plaintiff, having failed to establish the mode of possession suggested, and other modes of possession suggested in paragraph 3 of the plaint, except possession by exercise of the right of fishery by the plaintiff, should not be permitted to take that

ground and succeed in the suit. This contention does not seem to me to be maintainable on a proper reading of paragraph 3 of the plaint.

Before dismissing this appeal, it is necessary that I should observe that I do not agree with the Subordinate Judge that defendant No. 1 had acquired a right of easement by continuous possession for over 20 years. I have already stated, while dealing with Second Appeal No. 1841 of 1929, that the right view to take is with regard to the right of fishery claimed by the defendant No. 1 that this right should be regarded as an interest in the immoveable property and that, as defendant No. 1 has been in possession for more than 12 years, he has acquired that right by prescription in the sense of adverse possession for more than the statutory period.

The result is that both the appeals are dismissed. No order is made as to costs in either appeal.

A. K. D.

Appeals dismissed.