sent one, viz., *Gunganarain Sirkar* v. *Sreenath Banerjee* (1). The learned Judges there held, that the only persons interested in raising the question of shares,—namely, the co-sharers,—having acquiesced in the plaintiff's statement, the tenant-defendant runs no risk of being called upon to pay again any part of the share adjudged to the plaintiff. We think that when the issue of the right of the plaintiff to the share claimed by him has been fairly raised and determined, and the co-sharers have acquiesced in that determination, the present defendant cannot be allowed to avoid his liability to pay the rent due upon such share, on the ground that he has never before recognized such to be the share of the plaintiff. In this view, we set aside the judgment of the lower Court, and restore and affirm that of the first Court, with costs of this Court and of the Court below.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Maclean.

CHUNDEE CHURN ROY (PLAINTIFF) *v.* SHIB CHUNDER MUNDUL (DEFENDANT).*

1880
April 30.

Easement—Fishery—Prescription—Profit à Prendre—Limitation Act (XV of 1877), ss. 3 and 26—User.

The word 'easement,' as used in the Limitation Act 1877, has, by force of the interpretation-clause (s. 3), a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon the land of another. An easement, therefore, under the Indian law, embraces what in English law is called a *profit à prendre*,—that is to say, a right to enjoy a profit out of the land of another.

A prescriptive right of fishery is an 'easement' as defined by s. 3 of the Act, and may be claimed by any one who can prove a 'user' of it,—that is to say, that he has of right claimed and enjoyed it without interruption for a

* Appeal from Appellate Decree, No. 1176 of 1879, against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 1st March 1879, reversing the decree of Baboo Promothonath Banerjee, Munsif of Jehanabad, dated the 15th February 1878.

(1) *Ante*, p. 915.

1880

CHUNDER CHURN ROY v. SHIB CHUNDER MUNDUL.

period of twenty years, although he does not allege, and cannot prove, that he is, or was, in the possession, enjoyment, or occupation of any dominant tenement.

Baboo *Gopeenath Mookerjee* for the appellant.

Baboo *Bepinbeharee Chatterjee* for the respondent.

THE facts of this case appear sufficiently from the judgment of the Court (WHITE and MACLEAN, JJ.), which was delivered by

WHITE, J.—This is an appeal against the decree of the District Judge of Burdwan reversing the decree of the Munsif, which had been passed in favor of the plaintiff, who is the appellant before us.

From the language of his plaint it is dubious whether the plaintiff, who is the appellant before us, claims the ownership of the portion of the khal mentioned in the plaint, or whether his claim is confined to a right of fishing in the water of that portion of the khal. In the course of the proceedings, however, that point was cleared up, for the Munsif says in his judgment that the plaintiff's claim was limited to a prescriptive right of fishery, and it is clear from his grounds of appeal to this Court that the plaintiff accepts that view of his case.

The Munsif, finding that there was upwards of twenty years' enjoyment of the right to fish proved by the plaintiff, passed a decree in his favor.

The learned Judge in the lower Appellate Court, in reversing that decree, makes this observation: "Section 26 of the Limitation Act, and the twenty years' prescription there spoken of, have no application in the present case, which is not a case of an easement, for the simple reason that there is admittedly no dominant tenement. What the plaintiff claims is not a right appurtenant to any property in his possession. He claims a right in gross, a right to fish in a khal, which is admittedly not on his land. He does not say how he came to acquire the right originally. He relies merely upon the alleged fact of having exercised it for a number of years."

Now, in the first place, the judgment overlooked the fact that the word 'easement,' as used in the Indian Limitation Act, has, by force of the interpretation-clause, s. 3, a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon the land of another; an easement therefore under the law embraces what in English law is called a *profit à prendre*,—*i. e.*, a right to enjoy a profit out of the land of another. It is argued that the clause does not extend to a fishery, but I entirely disagree with the argument. The legal meaning of 'land' is not only dry land, but also land covered by water; and I see no reason for holding that the word 'land' as used in s. 3 bears other than the legal meaning which ordinarily attaches to the word. Taking 'land' to have this meaning, fish may properly be said to grow or subsist upon it.

Again, s. 27 of the Act, which contains a proviso applicable to the whole doctrine of the acquisition of easements by possession as laid down in the previous section, expressly mentions water as well as land, and as the word 'easement' has the extended meaning given to it by the interpretation-clause, I think that, if there was any doubt on the subject, the language of the proviso makes it clear that the profit arising from water as well as from land was in the contemplation of the Legislature. It would be attributing a singular oversight to the Legislature if we were to suppose that when dealing with *profits à prendre*, it intended to omit a right of fishery, which is one of the most common classes of property enjoyed in this presidency.

It is true, as the Judge says, that the right claimed by the plaintiff is not a right appurtenant, but a right in gross; still a *profit à prendre*, which is the technical name of the right claimed by the plaintiff, is a right recognized by the law, and may be established by the very same sort of evidence as is used to establish either a *profit à prendre* appurtenant, or an easement in the ordinary sense of the word.

1880

CHUNDER CHURN ROY v. SHIB CHUNDER MUNDUL.

It is clear, therefore, that the Judge, in dealing with the appeal, has fallen into an error of law.

The case must, therefore, go back, in order that the lower Appellate Court may decide upon the evidence of user which the plaintiff has given. Although the Munsif has found in favor of the plaintiff, the defendant (who is the respondent before us) is entitled to have the opinion of the lower Appellate Court upon the question whether the user has been of that duration and of that character which confers the right claimed.

The user necessary for the purpose must, as s. 26 of the Limitation Act provides, be an "enjoyment as of right without interruption, and for twenty years."

The Judge in the latter part of his judgment alludes again to the Limitation Act, and treating it as doubtful whether the right claimed was an interest in immoveable property, goes on to say that, supposing it was such an interest,(1) the plaintiff had not shown that he had exercised the right adversely to the defendant for more than twelve years before suit. This is a misapplication of the law of limitation. What the plaintiff has to prove in order to establish his right is not twelve years' adverse possession, but twenty years' uninterrupted enjoyment of the fishery as of right. If he gives evidence of such a user, and it is not contradicted by trustworthy evidence on the part of the defendant, it is sufficient to establish the right which the plaintiff claims.

The appeal is allowed, and the case remanded to the lower Appellate Court for retrial. That Court, in retrying the case, will have regard to the foregoing observations and directions. The costs will abide the event. The costs of the retrial are left to be dealt with by the lower Appellate Court.

Appeal allowed, and case remanded.

(1) This was the case under Act IX of 1871, s. 27 of which Act was held not to include a right of fishery. See *Parbutty Nath Roy Chowdry* v. *Mudho Puroe*, I. L. R., 3 Calc., 276. *Rep. Note.*