APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

NARASAYYA (DEFENDANT No. 1), APPELLANT,

and

SAMI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1888. Aug. 2, 16.

Fishery—Tidal river—Customary right.

Plaintiffs claimed a right to catch fish in a tidal river at a certain place by putting up stake nets across the river. This right was alleged to be based on custom which was not denied by defendants and user for thirty years was proved. The claim was decreed :

Held, that plaintiffs were not bound to prove sixty years' exclusive user to support their claim.

APPEAL from the decree of V. Srinivasacharlu, Subordinate Judge at Cocanada, confirming the decree of C. Rangayyar, District Munsif of Narasapuram, in suit No. 457 of 1885.

The facts necessary for the purpose of this report appear from the judgment.

Anandacharlu for appellant referred to *Viresa* v. *Tataya*(1).

Mr. *Michell* for respondents. The respondents have acquired a right by prescription long before the Easements Act, 1882, was passed. *Ponnusawmi Tevar* v. *The Collector of Madura*(2), *Mullick Kurim Baksh* v. *Harrihar Mandar*(3). In the absence of a specific rule for easements in the Limitation Acts of 1859 and 1871, the twelve years' rule applies.

WILKINSON, J.—The plaintiffs are fishermen residing in the village Kalipatam on the banks of the Upputeru, a river which issues forth from a fresh water lake called Kolleru and empties itself into the sea. The river appears to be throughout its entire course tidal. The plaintiffs claim the exclusive right of fixing stakes and nets for the purpose of catching fish, in other words of putting a *valakattu* at a certain point of the said river and sue for

* Second Appeal No. 1309 of 1887.

(1) I.L.R., 8 Mad., 467.

(2) 5 M.H.C.R., 6.

(3) 5 B.L.R., 174.

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a perpetual injunction to restrain the defendants from interfering with their rights. They also claim damages.

The defendants denied the plaintiffs' exclusive right and asserted that they and their ancestors had long used the said spot.

The Munsif found that the *valakattu* sued for had been used by the plaintiffs for more than thirty years in their own right, and that there existed a custom for the owners of each *valakattu* to make use of a particular spot for putting up their nets. He did not consider the case a proper one for a perpetual injunction, and therefore gave the plaintiffs a decree declaratory of their right to the fifth *valakattu*.

On appeal, the Subordinate Judge upheld the decree of the Munsif.

In this Court it is urged that plaintiffs can have no legal title unless they establish an enjoyment for sixty years. Reliance is placed on the decision reported in *Viresa* v. *Tataya*(1).

The plaintiffs in that case claimed a right by immemorial prescription to place stake nets across the Upputeru and to prevent any other person placing similar nets between their village and the place at which the river issued for the Kolleru lake.

It was held that as an infringement on the general rights of the public, it is clear that the right claimed by the plaintiffs could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown. This is the portion of the judgment which the appellant's pleader relied on in support of this appeal. But it was also added that assuming that the plaintiffs have not established such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by others within a distance which would necessarily injure the exercise of the right by the plaintiffs.

Now it cannot be denied that the plaintiffs have, as members of the public, a right to fish in the Upputeru which, as a tidal river, is open to the public. The defendants undoubtedly have a similar right and that right is conceded by the plaintiffs. What the plaintiffs contended is that, according to a custom which has been in existence from time immemorial, they have been in the habit of putting up stake nets at the spot marked 5, and that

(1) I.L.R., 8 Mad., 467.

in April 1885, the defendants obstructed them. Both the lower Courts have found that the custom has been made out. It appears that there are 28 *valakattus*, the property of different fishermen of Patapadu, and that these *valakattus* are put up every year for certain months in certain recognised places according to an immemorial custom. In breach of that custom the defendants have trespassed upon and interfered with the plaintiffs' *valakattu* and caused damage to them. There being a right, there must be a remedy, and I think this suit lies although the plaintiffs may not have proved enjoyment for sixty years. The defendants were bound to exercise their right of fishing in the Upputeru in a fair and reasonable manner in accordance with the established custom of the village and not so as to impede the plaintiffs from doing the same. Both plaintiffs and defendants are entitled to put up stake nets and catch fish in the Upputeru. But an immemorial custom having been established, according to which the rights of the parties are to be exercised in a particular way, defendants are not at liberty to set that custom at defiance to interfere with plaintiffs' customary exercise of the right. But independently of custom if the conduct of the defendants towards the plaintiffs prevented the latter from a fair exercise of their equal right and special injury thereby accrued to the plaintiffs, the conduct of the defendants is actionable.

There being no grounds for interference, this appeal is dismissed with costs.

MUTTUSAMI AYYAR, J.—The right recognised by the Courts below is a right to catch fish in a tidal stream by fixing stake nets across it at a spot indicated by what is called the fifth *valakat*, and the contention for the appellant is that the user in evidence extends to no more than thirty years, and that unless it is shown to have extended to sixty years, it is not sufficient to support a claim of exclusive right to the fifth *valakat*. On the other hand it is urged for the respondents that thirty years' user is evidence of immemorial enjoyment and consequently of a grant from the Crown unless the evidence discloses a specific period short of sixty years as the origin of the user. Our attention is also drawn to a special custom found by the District Munsif to exist in the village to which the parties to this appeal belong. The facts found by the District Munsif are that the fifth *valakat* was used by the respondents for more than thirty years, and that there was

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a custom in the village as alleged by them, according to which the owners of each *valakat* had a right by usage to use a particular spot in the creek for fixing his stake nets. He also observed that the appellant did not deny the custom. The Subordinate Judge concurred in the opinion of the District Munsif as to the period for which the respondents and there predecessors had used the *valakat* in question, but did not treat the special custom as one of the questions arising for determination; nor did he record a distinct finding in regard to it. It appears, however, from the judgment of the District Munsif that the existence of the custom as a fact was not denied by the appellant. This Court observed in *Viresa* v. *Tataya* that "though the plaintiffs had not established a right to such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by any other persons within a distance which would necessarily injure the exercise of the right by the plaintiffs." Allusion was also made to the judgment in *Baban Mayacha* v. *Nagu Shravucha* (1) in which the learned Chief Justice of Bombay stated that a fishery common to the public might be used subject to such regulations as are essential for its enjoyment by members of the public. If such a regulation is evidenced by a custom obtaining in the village for upwards of thirty years, I see no reason why it should not be enforced as creating an obligation as between the residents of the same village not to interfere with each other's privilege founded upon such custom. As the District Munsif states that the existence of the custom was not denied, I do not consider it necessary to refer an issue. Concurring with my learned colleague, I would also dismiss the second appeal with costs. I do not consider it necessary to express an opinion on the other questions raised by respondents' counsel.

(1) I.L.R., 2 Bom., 19.