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Such are the facts of the case; but it appears to us that, although the plaintiff may have misconceived the cause of action, the equity of the case is on his side, and under these circumstances we will allow the appeal to stand over until Monday next, with a view to consider any application that may be made to us for the amendment of the plaint. We reserve the question of costs.

Subsequently the following order was made:—

The respondent is allowed to amend the plaint as prayed. The case will be sent back to the Court of first instance to be tried *de novo* on the plaint so amended, upon the plaintiffs paying to the defendant the costs incurred by him in all the Courts on the amount claimed, less the sum in respect of which the amendment is allowed.

The costs in regard to the sum as to which the amendment is allowed will abide the result of the trial hereby directed.

Case remanded.

Before Mr. Justice Mitter and Mr. Justice Norris.

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LUTCHMEEPUT SINGH (PLAINTIFF) *v.* SADAULLA NUSHYO AND OTHERS (DEFENDANTS).*

Limitation Act (XV of 1877), s. 26—Dispossession—Fishery—Custom—Suit to restrain fishing in certain Bhils.

In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zemindari, it appeared that the plaintiff had let out some of the bhils to ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zemindari, had acquired a prescriptive right to fish in the bhils. The defendants contended that they had been in possession of the bhils for more than 12 years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zemindari had the right of fishing.

Held, that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation.

* Appeal from Appellate Decree No. 2156 of 1880, against the decree of J. R. Hallett, Esq., Officiating Judge of Rungpore, dated the 25th June 1880, affirming the decree of Baboo Bhugwan Chunder Chuckerbutty, Subordinate Judge of that District, dated the 20th March 1880.

Parbutty Nath Roy Chowdhry v. *Mudho Paroe* (1), distinguished.

Held, also, that no prescriptive right of fishery had been acquired under s. 26 of the Limitation Act, and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid.

Lord Rivers v. *Adams* (2) followed.

Baboo *Rashbehary Ghose* and Baboo *Sreenath Dass* for the appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Hurry Mohun Chuckerbutty* for the respondents.

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

MITTER, J.—The plaintiff is the patnidar of Pergunnah Batasone. The defendants Nos. 1 to 9 are the inhabitants of Roopsi, the defendants Nos. 10 and 11 are the inhabitants of Joroollahpore, and the defendants Nos. 12 and 13 are the inhabitants of Manipore. The villages of Roopsi, Joroollahpore and Manipore appertain to the zemindari of Pergunnah Batasone.

The plaintiff brought this suit praying for an injunction against the defendants to restrain them from fishing in certain bhils set out in the schedule to the plaint, and for a declaration that they had no right of fishing in the aforesaid bhils.

The grounds of action stated in the plaint are, that the bhils in question appertain to the zemindari of Pergunnah Batasone, of which the plaintiff is the patnidar; that the plaintiff is in possession of the fishery right in the said bhils; that out of these bhils, bhils Kendra and others, named in the second paragraph of the plaint, were let out in ijara to Kholie Mahomed and Deve Nushyo for three years, from 1283 to 1285 (1876 to 1878); that during the term of this ijara lease the defendants, in the months of Falgoon and Cheyt 1283, (February and March 1877) without the permission of the ijaradars, having caught and taken away fish from these bhils, the said ijaradars brought a suit for damages against them; that in that suit it was held by the Courts that the defendants, in common with the inhabitants of the villages mentioned above, had a prescriptive right to catch fish in these bhils,

(1) I. L. R., 3 Calc., 276. (2) L. R., 3 Ex. D., 361.

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using for the purpose certain specified fish traps; that the defendants are still continuing to fish in these bhils in the manner stated above; that they have no right of fishing in these bhils, the julkur right in which is owned and held by the plaintiff.

The prayers mentioned above were based upon these allegations.

The defendants in their written statement stated that the plaintiff did not possess any julkur right in these bhils; that neither he nor his predecessor in title ever held the possession of julkur right in them; that the defendants and other tenants of Pergunnah Batasone and the tenants of Pegunnahs Koondi and others had been in possession of the aforesaid julkur right under an adverse title for more than twelve years; that the tenants of these pergunnahs had exercised their right of fishing in these bhils from time immemorial for generation after generation.

Upon these allegations the lower Courts substantially raised the following issues: (*1st*), Is the suit barred by limitation; (*2nd*), Has the plaintiff any right in the disputed julkur; (*3rd*), Have the defendants in common with the tenantry of pergunnahs Batasone, Koondi, &c., any right to fish in the disputed julkur; (*4th*), Whether the defendants, in common with the tenantry of Batasone, Koondi, and other pergunnahs have any prescriptive right to fish in these bhils.

The lower Courts have dismissed the plaintiff's suit. It is clear from the judgments that the plaintiff is the owner of the disputed bhils. This fact was admitted. The lower Courts, however, have laid some stress upon the fact which they find, *viz.*, that the plaintiff does not pay the revenue of these bhils; but the fact that these bhils appertain to his zemindari being admitted, it seems to us incomprehensible how the lower Courts could come to the conclusion that no revenue was being paid for these bhils. The Sub-Judge refers to a Punchsona paper in support of this finding. We have referred to that paper, and it is clear to us that it does not afford any ground whatsoever for the conclusion based upon it. We must, therefore, decide this case, taking it as an admitted fact that the plaintiff is the owner of these bhils. The second issue may be, therefore, dismissed from our consideration.

The lower Courts, it seems to us, have dismissed this suit upon the first and the fourth issues. The Sub-Judge based his decision simply upon the plea of limitation; but the lower Appellate Court, while concurring with the decision of the Sub-Judge on the question of limitation, has based his judgment also upon the ground of the defendants having established their right of fishing by prescription.

We are of opinion that the decisions of the lower Courts upon both these questions are erroneous. In order to determine whether the plaintiff's claim is barred by limitation or not, we must see what the finding of the lower Court upon this point is. The Sub-Judge says:—

"They (the defendants) have examined six witnesses, almost all of whom are aged between 50, 60, and 70 years, and prove beyond doubt that the defendants, including the people of the neighbourhood, have been fishing in the bhils from their infancy, their knowledge extending since they came to sense when they were seven or eight years old. It is also amply in evidence that there are shingadars in some of the villages adjacent to the bhils, who, by the sound of their instruments called shinga, would invite the people in the vicinity, who would then assemble together and join in a body to catch fish in the bhils, which the witnesses in this case have styled in the colloquial language the *bowaet* system of fishery." In order to ascertain clearly what this finding really amounts to, we have referred to the witnesses upon whom the Sub-Judge relies. They, without any special reference to the defendants in this case, prove that the tenants of the pergunnahs mentioned above have been in the habit of fishing in these bhils in the manner stated in the passage cited above. This does not, in our opinion, amount to a dispossession of the plaintiff, the owner of the bhils. It cannot be said that the defendants, upon the facts stated above, are in wrongful possession of the bhils. Unless it can be shown that the acts of misappropriation of the fish were done by a person or defined number of persons, the acts of misappropriation, even if they have the effect of depriving the owner of a property wholly of its profits, would not constitute dispossession of the owner. Suppose from a field belonging to A, B and C

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carry away the crops raised by him in one particular year, D and E in the next year, and so on for any number of years—these acts can be only looked upon as mere trespasses, giving to A a right of action for damages against the successive trespassers, but in the eye of the law, the possession of A is not discontinued, because, it cannot be said that any ascertained persons, *viz.*, B and C or D and E, are in wrongful possession of the property in question at any given time. You cannot say that an owner is out of possession unless you can say that a third party is in wrongful possession.

Moreover, supposing that such a fluctuating body, as the tenants of certain pergunnahs, can be said to be in wrongful possession of a property, still, until it is shown that the owner is excluded from the participation of the enjoyment of it, he cannot be said to be out of possession.

For these reasons we are of opinion that the facts deposed to by the witnesses, upon whom the lower Courts rely, amount only to successive acts of trespass, and do not amount to a complete ouster of the plaintiff.

A question similar to this was raised in *Parbutty Nath Roy Chowdhry* v. *Mudho Paroe* (1); but in that case the defendants were ascertained persons who, under a claim of right, continuously exercised the right of taking fish from a bhil; and it was held that they were in possession for more than twelve years of an interest in land. Accordingly the claim of the plaintiff, who was the owner of the bhil, to restrain the defendants from exercising that right, was held to be barred by limitation. It is obvious that the distinction between that case and the present is,—that in the former some ascertained persons were proved to have been in adverse possession for more than twelve years of an interest in an immovable property; in the present case, it has been already shown that no defined and ascertained persons have been in continuous possession of the fishery right in these bhils. The plaintiffs claim is, therefore, not barred by limitation.

The next question is, whether the defendants have established a prescriptive right to this fishery right. The learned pleader for the respondents upon this point has relied upon s. 26 of the

(1) I. L. R., 3 Calc., 276.

present Limitation Act. That section requires that any easement which is claimed (a right of fishery has been held now to be an easement under the present Limitation Act—see *Chundee Churn Roy* v. *Shib Chunder Mundul* (1) must be shewn to have been peaceably and openly enjoyed by *any person* claiming title thereto, &c., &c. For the reasons given above, it cannot be said that in this case that right was exercised by any person or persons. The section evidently requires that the same person or persons must be shewn to have exercised that right for a particular length of time. Then, again, from the length of user (a fact found by the lower Courts in favor of the defendants), it cannot be presumed that there was a grant by the Sovereign Power. It seems to us that the presumption of a grant is impossible; because in this case it cannot be shewn that there was some ascertained grantee or grantees. The Subordinate Judge was of opinion that the tenants of the several pergunnahs, in whose favor the right in question is claimed, must be considered to constitute a unit, —that is to say, he considers that they form a corporate body. We fail to see any tangible ground for this assumption. For instance, it may be that such a grant may be presumed in favor of a village community if such community be shewn to possess all the essentials of a corporate body; but we do not see any reason suggested by any evidence on the record which can support the conclusion that the tenants of the different pergunnahs, in whose favor the right in question is claimed, form anything like a corporate body. This point in the defence must, therefore, also fail.

This disposes of the grounds upon which the lower Courts' decisions are based. There remains to consider whether the right, set up by the defendants, can have for its basis a valid existing custom. It seems to us that it is unnecessary to enquire whether such a custom, as the one set up by the defendants, has been established by the evidence. Because, supposing that it has been established in our opinion, it cannot be treated as a valid custom on the ground of its unreasonableness. According to the custom set up there is no limitation to the number of persons entitled to enjoy it. The tenantry may increase to any number, so that,

(1) I. L. R. 5 Calc., 945; 6 C. L. R., 269.

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according to this custom, an unlimited number of persons can take away the profits of a private property, and that nothing may be left to the owner. If the defendants are entitled to exercise the right of fishery in the way stated by them, they may take away the whole of the fish stocked in the bhils leaving nothing for the plaintiff, who is admittedly the owner of them. Such a custom as this does not seem to be reasonable. We are, therefore, of opinion that it ought to be rejected as invalid.

Upon these questions of custom and prescriptive right, there is the case of *Lord Rivers* v. *Adams* (1), which is exactly in point. It is true that we are not absolutely bound by the authority of this case, but if the grounds upon which the decision is based be founded upon natural justice, we would be fully justified in following it. On an examination of the reasons given by the Court in that case it will appear that they are not peculiar to any country or any particular state of society, but they are in conformity with the dictates of natural justice.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous and should be reversed. We reverse them accordingly, and decree the plaintiff's suit with costs in all the Courts.

Appeal allowed.

PRIVY COUNCIL.

P. C.* 1882 *November* 28.

OMRAO BEGUM AND ANOTHER (PLAINTIFFS) AND THE GOVERNMENT OF INDIA AND ANOTHER (DEFENDANTS.)

[On appeal from the High Court at Fort William in Bengal.]

Jurisdiction of Commissioners appointed under the Nawab Nazim's Debts' Act (XVII of 1873).

The Commissioners appointed under the Nawab Nazim's Debts' Act XVII of 1873, (2) having ascertained and certified that a certain zemindari was nizamut property, (*i.e.*, held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being), the fact that

* *Present:* LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) L. R. 3 Ex. D., 367.

(2) An Act to provide for the liquidation of the debts of the Nawab Nazim, and for his protection from legal process.