APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Teunon.

ABHOY CHARAN JALIA

v.

DWARKA NATH MAHTO.*

1911

June 15

Fishery—Right to fishery in tidal and navigable river, how acquired—Limitation Act (XV of 1877), s. 26.

To establish an exclusive right of fishery in a tidal and navigable river, it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish.

Baban Mayacha v. *Nagu Shravucha* (1) and *Narasayya* v. *Sami* (2) relied on.

Quære: Whether exclusive right of fishery in such a river can be acquired by proof of mere enjoyment in the manner provided in s. 26 of the Limitation Act of 1877 without a grant from the Crown.

Arzan v. *Rakhal Chunder Roy Chowdhry* (3), referred to.

Viresa v. *Tatayya* (4) not followed.

Secretary of State for India v. *Mathurabhai* (5) and *Nityahari Roy* v. *Dunne* (6), approved.

SECOND APPEAL by the defendants, Abhoy Charan Jalia and another.

The plaintiff sued to establish his prescriptive right to fish in a particular tract of the Daratana river in a particular way by a special sort of net for catching shrimps, and to be allowed to enjoy that right to the exclusion of others, and for mesne profits.

* Appeal from Appellate Decree, No. 1240 of 1908, against the decree of S. C. Ganguli, Subordinate Judge of Khulna, dated March 11, 1908, modifying the decree of Hem Chandra Das Gupta, Munsif of Bagerhat, dated April 30, 1907.

(1) (1876) I. L. R. 2 Bom. 19.
(2) (1888) I. L. R. 12 Mad. 43.
(3) (1883) I. L. R. 10 Calc. 214.
(4) (1885) I. L. R. 8 Mad. 467.
(5) (1889) I. L. R. 14 Bom. 213.
(6) (1891) I. L. R. 18 Calc. 652.

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Defendants Nos. 1, 2 and 7 raised various objections of which the main one, as far as this second appeal was concerned, was that the plaintiff had no such exclusive right to fish in the river.

The Munsif held that the river, which was navigable throughout the year and tidal, belonged to the Government, but that the plaintiff had been catching shrimps with stake-nets for at least 30 or 40 years at the place openly, publicly, peacefully, without interruption and as of right, and the fact that other people fished in the locality in the same river with other kinds of nets did not and could not diminish the plaintiff's right to catch fish with stake-nets, and further that the fact that boats and steamers passed over the net and the plaintiff had to lower the rope sometimes for boats etc., to pass, did not in any way interfere with the acquisition of such right. The Munsif, on his findings, decreed the suit, holding that even if the plaintiff might acquire no right to enforce his prescriptive right against the Government, when the possession was of a shorter period than 60 years, there was no reason why such right should not be enforceable against others simply because the river belonged to Government.

On appeal by the contending defendants, the Subordinate Judge upheld the decision of the Munsif on the point of law, *viz.*, whether the plaintiff had acquired an exclusive prescriptive right to fish in the river.

The defendants, thereupon, appealed to the High Court.

Babu Jadu Nath Kanilal, for the appellants. It being a public river, it is by law subjected to a kind of servitude in favour of all members of the State and no exclusive right can be claimed by the plaintiff: *In re*

Maharana Shri Jaswatsangji Fatesangji (1), *Smith* v. *Andrews* (2), *Luchmiput Singh* v. *Sadatulla Nusso* (3). In such a case no easement can be claimed under section 26 of the Limitation Act. There can be no right of easement in such a case against Government. A prescriptive right claimed against Government must be exercised for a period not less than 60 years: *Viresa* v. *Tatayya* (4), *Narasayya* v. *Sami* (5), *The Secretary of State for India* v. *Mathurabhai* (6).

No exclusive possession is made out, as other people also fished there. The plaintiff cannot therefore claim an exclusive right to fish in the river.

The use of stake-nets is a hindrance to free navigation in a public navigable river. It is a sort of nuisance. No length of time justifies a public nuisance, and no right can be claimed thereunder: *Mott* v. *Shoolbred* (7). See also Pollock on Torts, 8th Ed., p. 431.

Babu Sacheendraprasad Ghose, for the respondent. A right of easement under s. 26 can be claimed in regard to the Government property: *Chundee Churn Roy* v. *Shib Chunder Mundul* (8), *Arzan* v. *Rakhal Chunder Roy Chowdhry* (9).

If Section 26 applies to such a case, then the period must be 20 years and not 60 years. Exclusive possession is made out at least for 40 or 45 years. The findings are clear.

The question of nuisance was not raised in the Courts below. There is no evidence that there has been any public nuisance.

Cur. adv. vult.

(1) (1897) I. L. R. 22 Bom. 988, 993.
(2) (1891) 2 Ch. 678, 696.
(3) (1882) 12 C. L. R. 382.
(4) (1885) I. L. R. 8 Mad. 467.
(5) (1888) I. L. R. 12 Mad. 43.
(6) (1889) I. L. R. 14 Bom., 213.
(7) (1875) L. R. 20 Eq. 22, 24.
(8) (1880) I. L. R. 5 Calc. 945.
(9) (1883) I. L. R. 10 Calc. 214.

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COXE and TEUNON, JJ. The suit out of which this appeal arises was framed as one for the recovery of possession of a certain portion of the river Daratana on establishment of plaintiff's right to fish therein.

A Civil Court *amin* was deputed to locate the site of plaintiff's alleged fishery and the tract of river in dispute, and it was thereupon found that what plaintiff claimed was (i) the exclusive right to fish for shrimps or prawns by means of a stake-net placed across the river and fastened to posts fixed at stations 1 and 13 on the map prepared by the *amin*, and (ii) the right to prevent the defendants and others from placing any similar stake-net across the river at any point between his net and stations 17 and 18, some 600 yards to the north, and stations 3 and 8, a similar distance to the south.

As it appeared that shrimps are caught only at ebb-tide, when the current is from north to south, the plaintiff-respondent's claim in respect of the portion of the river lying to the south of stations 1 and 13 has been dismissed, but the plaintiff has been given a decree declaring his exclusive right to fish by means of a stake-net at stations 1 and 13, and restraining the defendant from placing any stake-net across the river between those stations and stations 17 and 18 to the north.

The findings on which this decree is based are that at the site in question the plaintiff has been catching shrimps by means of stake-nets for the last 30 or 40 years openly, publicly, peacefully, without interruption and as of right.

It has been found that the river Daratana is a tidal and navigable river, and the decree is therefore assailed in appeal substantially on two grounds, viz., (i) that in public waters an exclusive right of fishery cannot be acquired as an easement under section 26

of the Limitation Act (XV of 1877), and (ii) that the user of the plaintiff should have been referred to the general or common right of all members of the public to fish in this tidal and navigable river.

It appears to be now settled that private rights of fishery in public waters may be acquired either by a grant from the Crown or by prescription from which a grant may be presumed: *vide* the cases of *Hori Das Mal* v. *Mahomed Jaki* (1), *Satcowri Ghosh Mondal* v. *Secretary of State* (2), *Viresa* v. *Tatayya* (3). In the present case there is no suggestion of any grant, and the question therefore is whether the exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided in section 26 of the Limitation Act, 1877. In the case of *Arzan* v. *Rakhal Chunder Roy Chowdhry* (4), the point was apparently not taken and it was tacitly assumed that the provisions of the Limitation Act as regards easements were applicable as against the Crown. But in the case of *Viresa* v. *Tayya* (3), the contrary assumption was apparently made, and in the case of *Secretary of State* v. *Mathurabhai* (5), two learned Judges of the High Court of Bombay indicated the opinion, but did not decide that the provisions of section 26 of the Limitation Act were not applicable for the acquisition of easement as against the Crown. This view appears also to find support in the case of *Nityahari Roy* v. *Dunne* (6), where the question was with respect to an exclusive right of ferry. Though, speaking for myself, I am inclined to agree in the reasoning of the learned Judges in the case already cited, from I. L. R. 14 Bom. 213, we do not think it necessary to decide the

(1) (1885) I. L. R. 11 Calc. 434.
(2) (1894) I. L. R. 22 Calc. 252.
(3) (1885) I. L. R. 8 Mad. 467.
(4) (1883) I. L. R. 10 Calc. 214.
(5) (1889) I. L. R. 14 Bom. 213.
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question, as in our opinion the second contention of the appellants must prevail.

As we have stated, no grant of the exclusive right of fishery now claimed has been proved as suggested. It is clear therefore that when the plaintiff first began to fish at the site in question, he did so in the exercise of the common right which he shared with all members of the public. When, if ever, the assertion of this general right developed into an assertion of an exclusive right does not appear. Reliance has been placed on certain criminal proceedings in 1897 and in 1903, when, in the first case, certain persons were bound down to keep the peace, and, in the second case, others were successfully prosecuted for cutting down plaintiff's extended net. But obviously wanton or malicious disturbance of the plaintiff when engaged in the peaceful exercise of his common right renders the wrongdoers liable to punishment, and these cases therefore do not advance his present claim.

There is authority in the case of *Baban Mayacha* v. *Nagu Shravucha* (1) and *Narasayya* v. *Sami* (2), for the proposition that the method of exercising the common right may be regulated by custom, and had the plaintiff's claim been of this nature and been supported by satisfactory evidence, plaintiff might possibly have obtained a certain measure of relief, but in the absence of circumstances indicating that the plaintiff's user was in assertion of a right other and higher than the general right, it can be referred only to such general or common right and his present suit must therefore fail. The appeal is therefore decreed and plaintiff's suit dismissed. Under the circumstances, we think it right that parties should bear their own costs throughout.

S. M. *Appeal allowed.*

(1) (1876) I. L. R. 2 Bom. 19. (2) (1888) I. L. R. 12 Mad. 43.