

(1919) 02 CAL CK 0059
In the Calcutta High Court

Banwari Bullav Roy

APPELLANT

Vs

Rash Behary Roy

RESPONDENT

Date of Decision : 27-02-1919

Acts Referred:

Citation : AIR 1919 Cal 59(1) : 50 Ind. Cas. 933

Hon'ble Judges : Walmsley, J;Newbould, J

Bench : Division Bench

Judgement

Walmsley, J.—The plaintiff brought the suit out of which this appeal arises for a declaration of his right to irrigate eer. tain lands from a lark belonging to the defendant. He claimed the right by prescription under the Indian Limitation Act and in the alternative on the ground of lost grant. The first Court found that no right had been made out under the Indian Limitation Act but found that the plaintiff had the right by custom. The defendant appealed and the learned Subordinate Judge agreed with the first Court regarding the claim by prescription and negated the case of custom. He found, however, in favour of the plaintiff on the ground of lost grant. The defendant has appealed to this Court.

2. It is urged that the case is one to which the doctrine of lost grant cannot apply. It appears that the plaintiff was a part owner of the tank until May 1896 when the defendant bought his interest, so that a period of only 18 years elapsed before the institution of the suit. It is well established that the doctrine of lost grant only applies where the enjoyment cannot otherwise be accounted for.

3. In the present case, however, the plaintiff took the water until 1896 as owner of the tank and the grant, if any, must have been made since that date. The plaintiff and the defendant are the actual vendor and purchaser, so if there was ever a grant it must have been by the defendant to the plaintiff. It seems to me absurd to hold under such conditions that the user cannot be accounted for on any ground except that of lost grant. A much more obvious and simple explanation is that the plaintiff used the water by permission from the defendant.

4. In my opinion, the appeal must be decreed and the suit dismissed with costs in all Courts.

Newbould, J.

5. I agree.