
(1898) 02 CAL CK 0023
In the Calcutta High Court

Dolhin Golab Koer and Others

APPELLANT

Vs

Mangun Jha and Others

RESPONDENT

Date of Decision : 03-02-1898

Acts Referred:

Limitation Act, 1963 — Article 109, 36, 39, 48, 49

Citation : (1898) ILR (Cal) 692

Hon'ble Judges : Trevelyan, J; Rampini, J; Macpherson, J; Ghose, J; Francis W. Maclean, J

Bench : Full Bench

Judgement

Francis W. Maclean, K.C.I.E.C.J.

1. The short point we have to decide is whether the case falls within Article 36 of the Second Schedule of the Limitation Act, or whether it is within some one or other of the articles to which I will refer in a moment. According to the reference, the suit was brought for, amongst other things, damages for cutting and carrying away crops, and it is admitted that, if Article 36 applies, the suit is out of time, but that if Article 39 or Articles 48 or 49 or Article 109, which are the articles upon which the plaintiff relies, apply, then, as the period of three years, which is the period under the latter articles, had not elapsed when the suit was instituted, it was brought within time, and the statute of limitations is not a bar. To my mind Article 36 does not apply to this case. In the first place that section is a general one and only applies when the particular case is not specially provided for in the Act. Again, the words "malfeasance," "misfeasance" or nonfeasance "are scarcely the terms one would ordinarily apply to such a tort as the present. They are terms which more generally, at any rate, I do not say entirely, are applied to some wrongful act committed by persons standing in a fiduciary or quasi-fiduciary character, such as executors, trustees, and directors of companies. But be this as it may, I think this particular case is otherwise specially provided for in the Act. Looking at the pleadings, and the nature of the relief sought, I am by no means satisfied that the case does not come within Article 39, namely,

compensation for trespass upon Immovable property. But assuming that not to be so, I think the case comes "within Article 49, and I agree in the judgment of Mr. Justice Ghose, in the case of *Surat Lall Mondal v. Umar Haji* (1895) ILR 22 Cal. 877. It is difficult to say that, under the circumstances of this case, the crops having been severed from the soil, it was not specific moveable property in respect of which the plaintiff was seeking compensation for the wrongful taking away of the same. Though Immovable in the first place, the crop became moveable property specific in the sense that it was in specie, as soon as it was severed from the soil, and I do not see why, for the purposes of this article, the fact that the severance was a wrongful act on the part of the tortfeasor ought to make any difference. Seeing that the defence is a statutory one, it is for the defendant to show clearly that the case comes within Article 36. However, agreeing as I do with Mr. Justice Ghose's judgment in the case I have referred to, I do not think I can usefully add anything to what he has said.

2. With respect to the question of costs I see no reason whatever for interfering upon that point with the decision of the Court below.

Macpherson, J.

3. I agree. I would only add that I cannot see any real, conflict of opinion in the cases of *Shurnomoye v. Pattari Sirkar* (1878) I. L. R. 4 Cal. 625. and *Pandah Gazi v. Jennuddi* (1878) ILR 4 Cal. 665 or between these cases, and the case of *Surat Lall Mondal v. Umar Haji* (1895) ILR 22 Cal. 877. Mr. Justice Ghose has clearly stated in the latter case the grounds on which he distinguished the case in ILR 4 Cal. 665. Taking the question referred to us in this case to be whether Article (sic) applies to facts of the case as found, I agree with the learned Chief Justice that it does not apply. That article only applies to cases which are not otherwise specifically provided for by the Act. In this case the plaintiff's direct complaint is of an act of trespass on his land coupled with the cutting and carrying away of the crops off his land. Clearly he would be entitled to recover damages for trespass. The plaintiff claimed in addition damages for the crops which the defendants wrongfully cut and carried away, and although standing crops are Immovable property, I do not see on what ground we can hold that crops, after they have been out, do not come under the description of specific moveable property, to which Article 49 or 48 might apply. Possibly also the case might be brought under Article 109, if it is not brought under Article 39. It seems to me immaterial, or of very little importance, under which of the other articles it comes, because the plaintiff would, in any case, have three years from the date of the cause of action within which to bring his suit, and consequently would be in time. On these grounds I think that the appeal must be dismissed.

Trevelyan, J.

4. I entirely agree with the view expressed by the learned Chief Justice. I only wish to add this in regard to what Mr. Justice Macpherson has stated, although for the purposes of this appeal, it seems to me unnecessary to decide it. At the

time of the reference, I thought, and I still think, that there is a distinct conflict of opinion between the decision of the learned Judges in the case reported in ILR 22 Cal. and the decision of Mr. Justice Mitter reported in ILR 4 Cal. 665. I think that the conclusion in the latter case as to Article 40 of the second Schedule of the Limitation Act IX of 1871 is equivalent to a conclusion that Article 36 of the second Schedule of the Limitation Act XV of 1877, which differs only from Article 40 of Act IX of 1871 in the prefixing of the word "wrong" to the words "malfeasance," "misfeasance" and "nonfeasance" would be applicable, whereas the ruling in the case in ILR 22 Cal. is that it is not applicable. But, as I said before, having regard to the facts of this case and the judgment of the learned Chief Justice, it does not really very much matter whether those two cases agree or whether they differ.

Ghose, J.

5. I agree with the Chief Justice in holding that Article 36 of the Limitation Act does not apply, but that Article 49 does apply, to the facts of this case. In the case of *Surat Lal Mondal v. Umar Haji* (1895) ILR 22 Cal. 877 I have fully given my reasons for arriving at the conclusion at which I then did, and at which I do now arrive; and I do not think I should be justified in referring to them again.

6. As regards the case decided by Mr. Justice Mitter and Mr. Justice Maclean reported in ILR 4 Cal. 665 to which reference has been made, it is sufficient to say that for the reasons I gave at page 886 of ILR 22 Cal. I do not think that that case decided the precise point which is raised before us, in this case.

Rampini, J.

7. I regret I am unable to agree with the view taken of this case by the learned Chief Justice and by my learned Colleagues. I am of opinion that Article 36 of the second Schedule of the Limitation Act applies to this case. I may say briefly that my reasons for thinking so are the same as those which I gave in my judgment in the case of *Surat Lal Mondal v. Umar Haji* (1895) ILR 22 Cal. 887. It appears to me that this case is on all fours with that case. The plaintiff in this case seeks to recover damages for the cutting and carrying away of his crops by the defendants, and consequently it appears to me that no other article of the Limitation Act, except Article 36, will apply to such a case. The learned pleader for the respondent has argued that the case comes under either Article 39 or Articles 48 and 49 or Article 109, but it appears to me that none of these articles will apply.

8. Article 39 will not, in my opinion, apply because the suit, as framed, is not one for compensation for trespass upon Immovable property. Articles 48 and 49 will not apply, because this is not a suit for wrongfully misappropriating or injuring specific moveable property or for compensation for taking and determining the same. It is a suit, as is clearly shown from paragraph 5 of plaint, for the cutting and carrying away of standing crops which are Immovable property, whereas Articles 48 and 49 can only apply to moveable property, which is *ab initio*

moveable, and has not been converted from Immovable to moveable property by the act of the tortfeasor. In my opinion Articles 48 and 49 cannot be held applicable unless the first wrongful act committed by the tortfeasors (in many cases, the principal wrong), viz., the conversion of the Immovable into-moveable property, be disregarded. Article 109 will not apply because that article appears to me to refer to a case in which possession of Immovable property has been wrongfully withheld from the plaintiff. That is not the case in the present suit. The defendants disclaim all interest in the land, and it is not alleged that they wrongfully took possession of the land. That this is the correct interpretation of Article 109 is apparent from the language of the article itself, from the definition of mesne profits given in Section 211 of the Code of Civil Procedure, and from the description of "an action for mesne profits" given at page 479 of Wharton's Law Lexicon, 9th edition, where it is said,--"An action for mesne profits is an action of trespass brought to recover profits derived from land whilst the possession of it has been improperly withheld."

9. For these reasons I am of opinion that Article 36 applies, and I am supported in this view by the decision in the case of Pandah Gazi v. Jennuddi (1878) ILR 4 Cal. 665. I may also add that, as a matter of policy, it is a matter of some importance that the period of limitation in such cases should be short. In the case of Essoo Bhayaji v. The Steamship "Savitri" (1886) ILR 11 Bom. 133 Farran, J., says: "There are no cases in which it is more desirable that the evidence by which they are supported or rejected should be promptly given and scrutinized than in actions of tort," and in my opinion this observation is particularly applicable to cases of cutting crops, so common in Bengal. I have only to add that I have no reason to dissent from the judgment of the learned Chief Justice with regard to the costs of this case.

11. It is admitted that the appeals Nos 460, 461, 462 and 463 will be governed by this decision. The same order will be made in those cases also.