

(1917) 01 CAL CK 0042
In the Calcutta High Court

Kalandar Mandal	Vs	APPELLANT
Ajimudee Mandal		RESPONDENT

Date of Decision : 08-01-1917

Acts Referred:

Citation : 40 Ind. Cas. 135

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

Bench : Division Bench

Judgement

Beachcroft, J.—In the suit out of which this appeal arises the plaintiff claimed a right of easement for catching fish in the surface water of some paddy land The plaintiff; has some paddy fields on the lower levels of a tract of paddy land and it has been found as a fact that for over 20 years he has openly, peaceably and uninterruptedly caught fish in an arah or trap which he has been setting on his own land. The defendant, it is alleged, set a similar trap by the side of a tank belonging to him and as he caught some of the fish, which would otherwise have come to plaintiff's trap, the latter brought the suit to establish his right of easement and for damages. The Munsif gave him a decree declaring his right to catch fish to be established, giving him Rs. 4 as damages and ordering issue of a permanent injunction restraining the defendant from catching fish in his trap.

2. The Subordinate Judge on appeal, while finding that plaintiff had been catching fish in his trap for over 20 years, held that plaintiff had no exclusive right to catch all the fish in the tract of paddy land and that the defendant in catching fish on his own land acted within his natural right. He accordingly allowed the appeal and dismissed the suit.

3. It is now argued on appeal by the plaintiff that (in his finding as to user the Subordinate Judge ought to have affirmed the Munsif's decree.

4. If we examine the facts alleged and the prayers in the plaint, it is quite clear that no question of easement arises at all and that no declaratory decree should have been made. The first prayer runs "that the Court be pleased to establish the

plaintiff's right to catch fish which grow spontaneously in the paddy land within the plot specified in Schedule (Kha) and pass with the flowing water, by putting up angti in the place specified in the Schedule (Ga)." Now the land in Schedule (Kha) is the plaintiff's land and the place (Go) is a spot within the plaintiff's land. As it stands, the prayer refers only to fish growing in the plaintiff's own land and passing from it with the flowing water. The case, how ever, appears to have been dealt with on the footing that the plaintiff claimed the exclusive right to catch fish coming from above, which would in the ordinary course of things comedown to his land with the flow of water and it has been argued on that footing before us. The plaintiff would obviously have a right) catch these fish, which are res nullius, while on his land. That right has never been denied by any one and no one is interested to deny it. There was no place then for any declaratory decree. It is also obvious that he could not acquire an easement by catching fish on his own land.

5. The learned Vakil who appeared for the plaintiff admitted at first that the plaintiff's right in the fish commenced only when they reached the plaintiff's land, but seeing where this admission led to, he subsequently modified it by asserting a right in the fish as soon as the water began to overflow from the land on the higher levels. For this assertion he could show neither principle nor authority, and apart from some supposed virtue in the word "easement," I failed to understand on what principle he argued for a position which leads to this that a man, who has exercised the natural right of catching fish in his own property for upwards of 20 years, thereby acquires the right to prevent everybody else holding land in the vicinity from exercising a similar right.

6. The case of Ram Dass Surmah v. Sonatun Goohoo W.R. (1864) 275 which concerned a fishery in a khal, has no application to the case of a man catching fish in the surface water of his own paddy fields.

7. I would dismiss the appeal with costs.

Walmsley, J.

8. I agree.