

(1931) 05 CAL CK 0033
In the Calcutta High Court

Krishna Nandi

APPELLANT

Vs

Lokenath Mookerjee and Others

RESPONDENT

Date of Decision : 20-05-1931

Acts Referred:

Limitation Act, 1963 — Article 142

Citation : AIR 1932 Cal 300

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—These are two appeals and arise out of the same suit which was commenced by the plaintiff who is appellant in Appeal No. 1841 of 1929 for declaration of his title to a portion of the river known as Kana Nadi. The plaintiff's case is that the river formed part, of a village which he claims both in patni and darpatni right. In para. 3 of the plaint it is stated that the river was being possessed from time immemorial as jalkar, and the plaintiff alleges that these lands form part of the mauza called Naya Chak and that he was in possession of the same through his tenant who is a pro forma defendant in the suit. The plaintiff further alleges that defendant 1 has with the object of creating evidence of title created several collusive documents in concert with other defendants to the suit. A proceeding u/s 145, Criminal P. C, was started between the parties, and the proceeding related both to the river bed and the watery portion of the river. In that proceeding possession was awarded by the Magistrate to defendant 1. The plaintiff consequently seeks in this suit for an injunction restraining that defendant from dispossessing him. It is also prayed in the alternative that if the plaintiff is found to have been dispossessed as a result of Section 145 proceeding or otherwise possession might be given to him. The case set up in defence by defendant 1 is that the river in dispute formed part of two villages of Harishpur and Jala Biswanathpur and his contention is that he has been in possession of this river by letting out the jalkar of this river to tenants. He further alleged that ho exercised possession in respect of the river by collecting tolls from boats when the boatmen plied over the river. He challenged

also the plaintiff's title to the disputed river as forming part of the disputed village Naya Chak. The other defendants raised the same defence as defendant 1. Several issues were framed in the suit. The Court of first instance came to the conclusion that the plaintiff has established his title to the river-bed or to the river in the suit by holding adversely to the plaintiff on the question that defendant 1 has acquired a right in the fishery or a jalkar right. The Munsif has granted a decree to the plaintiff subject to the jalkar right of defendant 1. In other words it is said in that decree that the defendant may possess the right to fish in the river either by himself or through his tenants to the exclusion of the plaintiff or his tenants if any for the same.

2. Against this an appeal was taken to the Court of the Subordinate Judge of Howrah by the plaintiff and. there was also a cross-objection by defendant 1 in so far as the plaintiff's title to the river in the suit was declared. His contention was that the plaintiff's suit should have been dismissed in its entirety. The Subordinate Judge found on the question of title in favour of the plaintiff. He however differed from the Munsif on the question as to whether the plaintiff's suit is barred by limitation under Article 142, Schedule 1, Lim. Act, and he came to the conclusion that defendant 1 has acquired a right by prescription in the jalkar before an obstruction was caused in August 1924 by the plaintiff by the erection of a dam. In this view he affirmed the decision of the Munsif although his reasons with reference to the question of limitation, adverse possession, and prescription are not the same as those of the Munsif.

3. Against this decision two appeals have been preferred one by the plaintiff which is numbered 1841 and the other by defendant 1 which is numbered 2128. Both sides contended respectively that on the findings arrived at by the Subordinate Judge there should have been a decree in favour of the plaintiff in its entirety or that the suit of the plaintiff should have been dismissed in its entirety. This is the extreme contention respectively of the plaintiff and defendant 1 in these two appeals. It will be necessary to deal with the two appeals separately. I take Appeal No. 1811 of 1929 first." In this case a very careful argument has been addressed to me by Mr. Hiralal Chakravarty who appears for the plaintiff-appellant and he has said nothing which does not merit consideration. Nonetheless after hearing his argument and hearing the respondent I have come to the conclusion that this appeal must be dismissed. The main ground upon which there has been controversy before me in this appeal is that on the findings arrived at by the lower appellate Court there has been such an interruption of adverse possession of defendant 1 that the plaintiff's title could not be said to be extinguished by such possession. At one stage of the argument it was conceded by Mr. Hiralal Chakravarty that having regard to the frame of the plaint the proper article applicable to the case is Article 142 and that therefore it was incumbent upon him to prove that he was in possession within 12 years of the institution of the suit. He seeks to discharge the burden of proof which lies on him by showing that on the findings it appears that during the period of 12 years from the date of the institution of the suit he

has erected a dam over the channel in question. It appears however that according to the findings of the lower appellate Court defendant 1 had been in uninterrupted, open and peaceful enjoyment of the right of fishery from 1310 (1903) to 1331 (1924). This continuous possession for more than the statutory period would entitle the defendant to succeed with regard to the right of jalkar in the river if such possession has been a possession of one single person or of the defendant and his predecessor-in-interest.

4. In other words, on this part of the case controversy arose whether possession of defendant 1 would be tacked on to the possession of his ancestor Raja Peary Mohan Mukerji; and it is contended that this property did not pass by the deed of settlement executed by Raja Peary Mohan Mukerji in favour of defendant 1 to which I shall refer later on. If this contention could be established there would undoubtedly be a break in the adverse possession of defendant 1 and such a possession would not defeat the right of the plaintiff. With reference to this branch of the case it has been argued that the deed of settlement only purports to pass to defendant 1 the "gha" schedule properties which include Jala Biswanathpur, and it is said that on a construction of this deed it is not possible for the respondent to contend that the jalkar in question passed by the settlement which refer only to Jalkar Biswanathpur. It appears however from the evidence given in this case that Raja Peary Mohan Mukerji treated the jalkar in question as forming a part of the Mauza Jala Biswanathpur, for he took the kabuliyat in respect of this jalkar from various tenants. This kabuliyat has also been referred to by the Munsif and it goes to show that Raja Peary Mohan Mukerji treated this jalkar as a part of Mauza Jala Biswanathpur. On this point the Courts below have differed. The Munsif was of opinion that the deed of settlement did not pass the jalkar in question. The Munsif said this:

This would have made out a case of adverse possession also, but for the omission in the deed of settlement of the Raja. This much however is clear that the plaintiff was never in possession of the jalkar.

5. The Subordinate Judge however came to a different conclusion and he states that it was not necessary to mention separately the jalkar in the deed of settlement as jalkar appertained to Mauza Jala Biswanathpur which had been allotted to defendant 1 by Raja Peary Mohan Mukerji under the deed of settlement. I think that the decision of the Subordinate Judge with regard to the construction of the deed of settlement is right. This being so it appears clear on the finding that defendant 1 and his predecessor Raja Peary Mohan Mukerji had been in uninterrupted possession from 1310 to 1331 for more than the statutory period of 12 years. The question has next been debated as to whether this exclusive right of fishery under claim is a right in the nature of easement within the meaning of the Limitation Act or it is in the nature of an interest in the immovable property so as to attract the application of Article 144, Schedule 1, Limitation Act.

6. Under the Act of 1871 a jalkar right of fishery was considered as an interest in

the immovable property and not as an easement, and that by that Act adverse possession for more than 12 years was sufficient for the acquisition of that right under Article 145. Reference may be made in this connexion to the cases of Lukhimoni Dasi v. Koruna Kant [1879] 3 C.L.R. 509 and Parbutty Nath v. Mudhu Faroe [1877] 3 Cal. 276. In the Limitation Act, 1871 and of 1908, having regard to the definition of the word easement" u/s 2 of the Act, a jalkar is regarded as an easement, and consequently 20 years" enjoyment is necessary u/s 26, Limitation Act, to acquire any right of fishery. That might be the case where the right is claimed without any exclusion of the owner or in] common with others. A case of exclusive right to fishing would rather seem to fall within the definition of interest in the immovable property under Article 144 and adverse possession of such a right for more than 12 years would by operation of Article 28, Lim. Act, extinguish the right of the lawful owner to that extent. There is some authority for this view. Reference may be made to the decision in the case of Henry Hill & Co. v. Sheoraj Rai AIR 1923 Pat. 58 where it was held by Sir Dawson-Miller, C. J., and Mullick, J., that if it was an exclusive right of fishery it is an interest in the immovable property and can be acquired by adverse possession for more than 12 years involving an ouster of the rightful owner. On this ground having regard to the findings of the Court below I think this appeal should fail. It remains to notice the argument of Mr. Chakravarty that this adverse possession was interrupted by stray acts of the rightful owner in erecting a dam in 1924 within 12 years of the suit or in taking of water. The answer to this contention is that so far as the erection of the dam is concerned this erection was at a time when the right of the plaintiff with reference to the jalkar had already become barred by statute. So this is of no avail, to the plaintiff. With regard to the other acts they did not interfere with defendant 1's right of fishing in the jalkar.

7. It remains now to consider the appeal of defendant 1, namely Appeal No. 2128 of 1929, Brojolah Sastri who appears for him contends that on the findings arrived at by the lower appellate Court plaintiff's suit should have been dismissed in its entirety on the ground that adverse possession was the entire interest as possessed by the plaintiff. For this purpose he has relied on the plaintiff's own case made in para. 3 of the plaint. He contends that para. 3 suggests that according to the plaintiff's case the exercise of the right of fishery was the only mode in which this river was enjoyed by the plaintiff. He asks me to construe para. 3 of the plaint in that way. I am unable however to agree to this contention. It is not suggested in para. 3 that the right of fishery was the only mode in which the river was being enjoyed. On the other hand there are passages in the same paragraph which go to show that there are other modes of enjoyment by the plaintiff. It has been further argued on the question of easement that para. 3 must bear the construction which Mr. Sastri wants to put upon it. The plaintiff having failed to establish the mode of possession suggested, and other modes of possession suggested in para. 3 of the plaint, except possession by exercise of the right of fishery, the plaintiff should not be permitted to take that ground and succeed in the suit. This contention does not

seem to me to be maintainable on a proper reading of para. 3 of the plaint.

8. Before dismissing this appeal it is necessary that I should observe that I do not agree with the Subordinate Judge that defendant 1 had acquired a right of easement by continuous possession for over 20 years. I have already stated while dealing with S.A. No. 1841 of 1929, that the right view to take is with regard to the right of fishery claimed by defendant 1, that this right should be regarded as an interest in the immovable property and that as defendant 1 has been in possession for more than 12 years he has acquired that right by prescription in the sense of adverse possession for more than the statutory period. The result is that both the appeals are dismissed. No order is made as to costs in either appeal.