

(1916) 06 CAL CK 0039
In the Calcutta High Court

Madhab Chandra Mandal and Others

APPELLANT

Vs

Nagendra Nath Sen and Others

RESPONDENT

Date of Decision : 08-06-1916

Acts Referred:

Citation : 34 Ind. Cas. 841

Hon'ble Judges : John Woodroffe, J;Chaudhuri, J

Bench : Division Bench

Judgement

John Woodroffe, J.—In this case the first Court has found the plaintiffs' title and the second Court dismissed the suit, on the ground that the plaintiffs had not shown that they had been in possession of the jalkar within 12 years of the suit. This finding has been impugned, upon the ground that it is not applicable to a case such as this is alleged to be—a case in which there has been, it is said, an assertion of the incorporeal right of fishery and the question at issue properly was whether the defendants had acquired a right by adverse possession, and not whether the plaintiffs had been in possession within 12 years of the date of suit. It is said that the mere exercise of the right of fishery would not affect the plaintiffs, except either to establish easement in favour of the defendants or to establish adverse possession which had not been found. But this is not the case here, where the question is whether the jalkar belongs to the plaintiffs or the defendant as persons claiming to receive rent in respect thereof and which of those parties is entitled to collect the rent. This appears clearly from the fifth and seventh paragraphs of the plaint. The first paragraph of the plaint says that the jalkar of the khal specified in the schedule appertains to Mauza Madra.

2. The defendant's case is that the disputed jalkar is situated in Bisukati. The fifth paragraph of the plaint says: "The defendants Nos. 1 to 6 in collusion with the most influential defendants Nos. 24 to 27 made an attempt to interfere with the plaintiffs' possession by forcibly taking kabuliats from the plaintiffs' tenants." It further says that the defendants Nos. 1 to 6, being emboldened thereby, dispossessed some tenants and made fresh settlements to tenants and

forbade some tenants to pay rent to the plaintiffs and thereby dispossessed the plaintiffs from the disputed jalkar." That is, obviously dispossessed them by receiving rents from the tenants who were in possession of the jalkar. It is then said that the defendants refused to pay rent to the plaintiffs, and the plaintiffs brought this suit for a declaration of their jamai right and right by adverse possession of the jalkar of the khal and for recovery of possession.

3. The first Court which decided in favour of the plaintiffs found as follows:

It is, however, neither party's case, certainly it is not the defendants' case, that during this period any of those proprietors of village Madra actually and personally exercised any fishing right in the disputed jalkars. So in these years either the plaintiffs or the defendants or both these parties were in possession of the disputed jalkars through fishermen tenants.

4. Under these circumstances I think the Subordinate Judge was right in applying the 12 years "rule in the manner in which he has done and that being so, he has found that "the Sen defendants had long possession of the property and that the possession of the plaintiffs was confined to paper alone and that they never succeeded in getting actual possession of the disputed jalkars. It is found that the plaintiffs' lessors Messrs. Daverine and Morris were never in possession of the disputed jalkars and the plaintiffs have failed to prove that they obtained any settlement from the Addy Babus." He further says that a heavy onus lay upon the plaintiffs to prove their possession within 12 years before suit. They have failed to discharge the onus and they are not entitled to disturb the long possession of the Sen defendants, which is proved by some of their own witnesses. The plaintiff having failed to prove their possession at any time within the 12 years before the institution of the suit, the suit must fail."

5. The appeal also, in my opinion, fails and is dismissed with costs.

Chaudhuri, J.

6. I agree.