
(1911) 03 CAL CK 0030
In the Calcutta High Court

Moulvi Abdul Khoyrat

APPELLANT

Vs

Hem Chandra Roy Choudhry and Others

RESPONDENT

Date of Decision : 20-03-1911

Acts Referred:

Limitation Act, 1963 — Section 26, 28

Citation : 9 Ind. Cas. 846

Hon'ble Judges : Coxe, J

Bench : Single Bench

Judgement

Coxe, J.—This suit relates to two ferries. Originally the plaintiffs' claim covered three ferries but so far as regards those now in suit, it was withdrawn. As regards the other ferry the suit proceeded and terminated in Second Appeal No. 1134 of 1908. The decision in that case, however, is of no assistance in deciding the present appeal, as the parties in it were co-sharers, and no Question of limitation and adverse possession, such as constitute the difficulties of the present appeal, could arise.

2. The case as it has been laid before me is of a somewhat curious character. The plaintiff originally claimed these ferries as appurtenant to Estate No. 5844 but this has been found against him. I must now take it that the plaintiffs' claim stands or falls by the findings of the Court below with respect to his user of the property. These findings are as follows: "I am of opinion that the plaintiffs were in possession of the two ferries in suit not for the first time since 1279; their possession might be and should be legitimately referred back to the time of Mr. Wise once the owner of Estate No. 5844. I am also of opinion that this possession was in assertion of a right of which the Court finds a similar assertion of right in 1844. In these circumstances, I am of opinion that the plaintiffs have succeeded to establish a private ferry-right of which they are proprietors." Later, the learned Subordinate Judge held that the case was governed by the general rule of 12 years' limitation. The peculiarity of the present case is that neither the plaintiff nor the defendant has any interest in the bed or banks of the river over

which the ferries are said to ply, and the plaintiff does not ask for any monopoly, nor claim, in the words of the lower Appellate Court, to stop competition of any kind. He complains of his lessee being turned out nearly 12 years before the suit and asks for establishment of his right to the ferries, for khas possession of the ghats and for an injunction to the defendant not to obstruct him.

3. I do not think that a right of this nature can be said to be an easement within the meaning of the Limitation Act. There is no dominant heritage. In most of the numerous cases dealing with ferries the claimant has owned at least one of the termini. Here the plaintiff owns neither. The fact that he may have a right of fishing in the river does not help him. Reference made to *Chundee Charn Roy v. Shib Chunder Mundul* 5 C. 945 : 6 C.L.R. 269. Therein it was held that by the interpretation clause of the Limitation Act the word "easement" would include profits a prendre and in particular would include a fishery. But clearly the interpretation clause does not show that a ferry is an easement under the Act. And if it were such an easement covered by Section 26 of the Limitation Act the suit is clearly barred. Nor do I think that the plaintiff can be said to have acquired any rights by twelve years adverse possession; a right to ferry passengers across a river without a monopoly might originate in a grant from the owners of the banks, or might be acquired as against them by user. Such a right would apparently be Immovable property, as defined in the General Clauses Act on the ground I suppose that it is benefit arising out of the land at the two termini it is Immovable property a title to it can be acquired by adverse possession u/s 28 of the Limitation Act. But I do not see how it is possible in the present suit, in which the owner of the termini are not parties, to lay down that the plaintiff has acquired a title by adverse possession. As he claims no monopoly his possession has never been adverse to the present defendant. The owner's of the termini are the only persons to whom his use of the ferry can be regarded as adverse and I cannot find in their absence that their title has been extinguished by Section 28 of the Limitation Act. Moreover, if they were parties to this suit, it is difficult to see how the use of their land to embark and disembark passengers, in the absence of a claim to a monopoly, could be regarded as adverse possession, though it might be regarded as an assertion of an easement or quasi easement.

4. I think, however, that the plaintiff may succeed on the ground that he has acquired the ferry right by user of 20 years independently of the Limitation Act. It was held in *Nityahari Roy v. Dunne* 18 C. 652, that no monopoly in a ferry could be acquired by prescription or in any way but by grant from the Crown. But in the case of a ferry where a monopoly was not claimed, it was held in *Lachmeswar Singh v. Manowar Hossein* 19C.253 : 19 I.A. 48 that such a right can be acquired by user over the property of others. And in *Parmeshari Proshad Narain Singh v. Mahomed Syud* 6 C. 608 7 C.L.R. 504, where this right was apparently regarded as not coming under the Limitation Act, it was held that it could be acquired by user of not less than 20 years. This decision indicates to my mind that the right, though not an easement coming under the Limitation Act,

was regarded by the learned Judges as in the nature of an easement, and to be acquired by a corresponding length of user. It is obviously a right in alieno solo.

5. If it is regarded as a right in the nature of an easement though not within the scope of the Limitation Act, I think that the principle laid down in *Rajrup Koer v. Abul Husain* 6 C. 394 : 7 1. A. 240 : 7 C.L.R. 529, should apply and if this view is correct then, in the present case where continued interference is alleged, no question of limitation will arise.

6. Another objection is taken that the lower Appellate, Court was wrong in relying on Exhibit No. 22. But this does not seem to me of any importance; as the learned Subordinate Judge finds, independently of this document, that the plaintiffs were in possession for 23 years and clearly this possession could not be distinguished from user as of right.

7. Finally, it is argued that the lower Appellate Court should not have granted an injunction, prohibiting the defendants from obstructing or interfering with the plaintiff's possession. But I see no objection to this. They are not directed to stop their own ferries or boats, but only not to interfere with the plaintiffs". This seems a perfectly proper direction.

8. Though I do not wholly agree with the learned Subordinate Judge's views, I think his final decision of the case is tight. The appeal will accordingly be dismissed with costs.