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Privy Council

Case No: None

Maharani Rajroop Koer		APPELLANT
	Vs	
Syed Abul Hossein and others		RESPONDENT

Date of Decision: July 14, 1880

Citation: (1880) 7 IndApp 240

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Montague E. Smith, J.

1. This was a suit brought by Maharajah Bam Kissen Singh Bahadur to establish an asserted right to a pyne or artificial watercourse, arid also to a tal or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the pyne. The Maharani, the present Appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the Statute of Limitations upon two of the obstructions complained of.

2. The facts necessary to raise this question may be shortly stated: The Maharajah and his ancestors were the owners of mehal Sunout Purwurya, in the district of Gya; and the Defendants were the owners of an estate called mouzah Mora. The system of irrigation claimed by the Plaintiff embraces an artificial pyne which is fed by a natural river at a point to the south of the Defendants'' mouzah. The pyne, which runs from the south in a northerly direction, after traversing other estates, enters mouzah Mora, and runs through it, and afterwards through other lands to the Defendants'' mehal. There is, branching from the main pyne, a channel or smaller pyne which helps to feed the tal claimed by the Plaintiff. The tal lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the pyne, and partly by the rainfall from these hills. It appears that there is

another channel in a lower part of the tal which runs from it and joins the pyne at a point near a bridge, described in the Moonsiflf''s map. It is said there were doors or sluices in the bridge by which the flow of the water had been to some extent regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the pyne.

3. The general result of the litigation below is, that the Plaintiff succeeded in establishing his right to the pyne as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish his right to the water in the tal, except to the overflow after the Defendants, as the owners of mouzah Mora, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the Plaintiff.

4. It was found in the Courts below that all the obstructions were unauthorized; and the Plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a khund or channel cut in the side of the pyne at a point below the bridge which has been spoken of. No. 10 is a dhonga, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the pyne for the purpose of irrigating the Defendants'' land. No question arises here as to the fact that those two works are an interruption of the Plaintiff''s right; and ho would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

5. The Moonsiff has found that the statute opposes, a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Moonsiff''s decree. On special appeal to the High Court, the Judges of that Court concurred with the Moonsiff, and, reversing the decree of the Subordinate Judge, affirmed the Moonsiff''s judgment.

6. Before adverting to the statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Moonsiff found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found that the two obstructions were recently made; and it may be inferred, from his disagreeing with the inferences which the Moonsiff drew from certain accounts which were produced, and the comments he made upon the latter''s judgment in dealing with those accounts, that he meant to overrule the finding of the Moonsiff that the obstructions had existed for two years. If they had not existed for that period, no question on the statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Moonsiff on the question of fact, and, therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

7. Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Moonsiff upon the fact of the length of time during which these obstructions had existed; but, assuming the fact to be as the Moonsiff and the High Court have regarded it, namely, that these obstructions had existed for more than two but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the Plaintiff''s right to recover in respect of them.

8. The Limitation Act, No. IX. of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment; The latter provisions are contained in Part 4 of the Act, and are introduced under the heading "Acquisition of Ownership by Possession." They enact a mode of acquiring ownership by possession or enjoyment. Section 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light- or air-way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Moonsiff certainly proceeded; though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

9. On the assumption of fact made by the Moonsiff that these obstructions had existed for more than two years before the suit he might be right in finding that the Plaintiff had not had peaceable enjoyment for twenty years, ending within two years before the institution of the suit, and, therefore, that the Plaintiff had acquired no title by virtue of this statute. The object of the statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that in this case there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Moonsiff and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shews, and the Courts appear to have found, that the pyne was constructed by the ancestors of the Plaintiff a great many years ago, possibly fifty or sixty years---certainly more than twenty years---for the

purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the Defendants, which compensated them for any injury or inconvenience caused by the construction of the pyne." This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the Plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the Plaintiff''s mehal and the Defendants'' land by which the right was created. That being so, the Plaintiff does not require the aid of the statute: and his right, therefore, is not in any degree interfered with by the provision in the 27th Section, upon which the Moonsiff decided.

10. This being their Lordships'' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the clause in the same 27th Section under the head "explanation," which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in Flight v. Thomas 10 Ad. & E. 590; S.C. 8 Clause & F. 231 in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

11. Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the statute which relates to limitation properly so called; namely, on Article 34 of Part V. of the Second Schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the Plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringment took place." If the Judges really meant to apply the limitation of Article 34 above referred to, their decision is clearly wrong; for the obstructions which interfered with the flow of water to the Plaintiff''s mehal were in the nature of continuing nuisances, as to which the cause of action was renewed de die in diem so long as the obstructions causing such interference were allowed to continue. Indeed, Section 24 of the statute contains express provision to that effect. For these reasons their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

12. There remains to be noticed the contention raised as to the tal. Mr. Woodroffe has strongly argued that the findings as to the tal in favour of the Defendants are wrong, and he further endeavoured to shew by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find

that there are distinct judgments of the Moonsiff and of the Subordinate Judge to the effect that the Defendants had a proprietary right in the tal and to the use of the water in the tal, and that the Plaintiff had no right to the tal or to the water in it, except to so much as flows out of it in a natural course to the Plaintiff''s pyne. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the Appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Moonsiff be modified in accordance therewith.

13. Mr. Woodrqffe desired that the language of the Moonsiff''s decree with regard to the enjoyment of the water in the tal should be modified. Their Lordships, having considered what was addressed to them on the subject and the language of the Moonsiff''s decree, are not disposed to interfere with it. The Plaintiff having claimed the whole of the water in the tal, they think that the Moonsiff had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the Plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the Defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Moonsiff having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially, it amounts to a declaration that the Defendants are entitled to use the water of the tal for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

14. Their Lordships having considered the question of costs, and the Plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.