

(1881) 04 CAL CK 0001

Calcutta High Court

Case No: None

Koylash Chunder
Ghose and Others

APPELLANT

Vs

Sonatun Chung
Barooie and Others

RESPONDENT

Date of Decision: April 13, 1881

Acts Referred:

- Limitation Act, 1963 - Section 26

Citation: (1881) ILR (Cal) 132

Hon'ble Judges: Richard Garth, C.J; McDonell, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

The plaintiffs in this suit claim a prescriptive right of passage for boats over the defendants' land, when it becomes covered with water during the rainy season.

2. The first Court found that the plaintiff's had enjoyed this right for upwards of twenty years; and accordingly made a decree for the removal of certain obstructions which were put up by the defendants in June 1876 for the purpose of preventing the plaintiffs from exercising their right.

3. The lower Appellate Court does not expressly negative the finding of the lower Court upon the facts, although it throws some doubt upon its correctness. But it has decided against the plaintiffs upon the preliminary ground, that as no actual exercise of the right had taken place within two years before suit, the plaintiffs are barred by limitation.

4. From this judgment the plaintiffs have appealed; and we have, therefore, to consider the true meaning of the last clause of Section 26 of the Limitation Act, more especially when applied to the particular kind of easement with which we are now dealing. And in order to see precisely how the question arises in the present

instance, it will be well to take the facts as found by the first Court.

5. The plaintiffs have enjoyed for upwards of twenty years this right of passage for their boats over the defendants' land, when that land is flooded in the rainy season.

6. The first interruption of the plaintiffs' right occurred in June 1876, before the rains had commenced; when the defendants, with a view of preventing the plaintiffs from exercising their right, put up the obstructions, which are the subject of complaint.

7. On the 6th of April 1878, or about one year and ten months after the interruption, this suit was brought.

8. Now, if the right was enjoyed by the plaintiffs for twenty years before the interruption, and the interruption itself was the first breach of enjoyment, it is obvious that the enjoyment must have continued up to a time within two years, before suit, in which case there would be no bar.

9. But the Subordinate Judge considers that because there was no actual exercise of the right within the two years, the suit is barred.

10. He relies upon two decisions of this Court,--one in the case of Baboo Luchmee Pershad Narain Singh v. Tiluckdharee Singh (24 W. R. 295), which does not support him at all, as there the alleged right was interrupted more than two years before suit; and the other, the case of Goopee Chand Setia defendants admitted the obstruction, but denied the right of way. The Court of first instance gave the plaintiffs a decree, which was reversed on appeal the Subordinate Judge holding that, as the last instance of actual user by the v. Bhoobun Mohun Sen (23 W. R. 401), which only supports him to this extent that the learned Judge in that case refers to illus. (b) of Section 26 as showing that there should be some actual user of the right within two years before suit. It is no doubt, upon the strength of illus. (b) that the Subordinate Judge has dismissed the suit, and we cannot blame him; for when the language of a Section points to one view of the law, and one of the illustrations of [135] the Section points to another, it is a very difficult thing for the subordinate judiciary to decide which view to adopt.

11. Indeed it is very difficult for the High Court, whose duty it is to construe recent Acts of the Legislature, to say what precise weight ought to be attached to these illustrations. So far as they merely serve to explain the meaning of the Section, we have no doubt that they may often be found useful, especially amongst a class of judicial officers who are not very conversant with the meaning or working of the Section itself.

12. We have already decided, however, more than once in this Court, that the illustrations ought never to be allowed to control the plain meaning of the Section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the Section in its ordinary sense would confer.

13. It will be sufficient to say no more than this for our present purpose.

14. The 26th Section of the Limitation Act only renders it necessary, as far as we can see, that the enjoyment of the Tight claimed should have continued till within two years before suit. The Section says not a word as to any actual user or exercise of the right within the two years. It is obvious to us, that the enjoyment intended by the Section means something very different from actual user. In order to establish the right, the enjoyment of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been .in full enjoyment of it.

15. The easement with which we have to deal in the present case affords a remarkable illustration of this.

16. The right which the plaintiffs claim can only be used by them during the two or three months of the year when the defendants' land is flooded; and if there were a lack of rain it is probable, that even for twenty or twenty-one months, the right might not be exercised at all; and yet, so long as the plaintiffs' right was not interfered with, whenever they had [136] occasion to use it, their enjoyment must, we conceive, be considered as continuing during all the year round.

17. Unless this were so, a person in the plaintiff's position, who could only use his right during a short period of the year, could never gain a prescriptive right at all.

18. (sic) such rights should be claimed under the Limitation Act; see *Rajrup Koer v. Abul Hossein* (I. L. R. Cal. 394).

19. The case must, therefore, go back to, the lower Appellate Court to try the question, whether the plaintiffs have enjoyed (in the sense which we attribute to the word "enjoy") the right which they claim for twenty years before the obstructions were put up in June 1876.

20. The costs in this Court and in the Court below will abide the result.