

(1878) 01 CAL CK 0015

Calcutta High Court

Case No: None

Parbutty Nath Roy
Chowdhry and Others

APPELLANT

Vs

Mudho Paroe and
Others

RESPONDENT

Date of Decision: Jan. 9, 1878

Acts Referred:

- Limitation Act, 1963 - Article 145, 27

Citation: (1878) ILR (Cal) 276

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

Bench: Division Bench

Judgement

Richard Garth, C.J.

We have felt some difficulty in coming to a conclusion upon this case, partly from the peculiar nature of the rights claimed by the plaintiffs, and partly from there being no provision in the Limitation Act of 1871 which applies to, or contemplates, a suit of this nature.

2. The plaintiff's claim to be entitled to an 8-anna share of a certain jalkar, and they pray for a declaration as against the defendants,--first, that they are entitled to receive rent from them for fishing in their jalkar; or, secondly, that the defendants have no right to fish there without paying them (the plaintiff's) rent; or, in other words, that the plaintiffs are entitled to enjoy their jalkar, rights without the defendants interference.

3. The Munsif very properly dismissed the first portion of the plaintiffs' claim, upon the ground that the defendants were not, and had never claimed to be, the plaintiffs' tenants. But he decreed their claim in the other alternative, declaring in substance that the plaintiffs had a right to the share which they claimed in the jalkar, and that the defendants could not fish there without the plaintiffs'

permission. He holds that the right of fishing claimed by the defendants in the jalkar was at most an easement; that the defendants, therefore, could not become entitled to it by prescription, till they had enjoyed it as of right for twenty years (see Limitation Act of 1871, Section 27), and that their use and enjoyment of it had not been proved for more than eighteen years.

4. The Additional Judge on appeal reversed this decision of the Munsiff. He held that neither the right of fishing claimed by the defendants, nor the jalkar rights claimed by the plaintiff's, were " easement." He apparently considered that the enjoyment of the right of fishing by the defendants was an interference by them with the exclusive right claimed by the plaintiffs, and ultimately decided that as the plaintiff's had not brought their suit to establish such, exclusive right within twelve years of the defendants' first interference, their suit was barred by limitation, and ought to be dismissed.

5. The learned Judge of this Court has approved the finding of the lower Court, and substantially upon the same grounds.

6. It has now been urged before us on appeal from his decision; 1st, that the jalkar which the plaintiff's claim is not in its nature Immovable property, or an interest in such property," within the meaning of the Limitation Act; and that consequently Article 145 of the 2nd Schedule to the Act does not apply; 2nd, that a jalkar is an easement, to which the defendants could only become entitled by twenty years use (Section 27 of the Limitation Act); and 3rd, that the acts of the defendants when fishing in the jalkar were only a series of trespasses or infringements of the plaintiffs' right, each of which was a successive cause of suit; and that therefore the plaintiffs are not barred by limitation.

7. We think, however, that the lower Appellate Courts are right in the view which they have taken. Whatever may be the law under the present Limitation Act a jalkar is clearly not an easement within the meaning of Section 27 of the Act of 1871. An easement is defined by Mr. Gale in his Law of Basements (p. 5) to be "a privilege without profit" which the owner of one tenement may enjoy (as a right of way or of light over the land of another); but "conferring no right to a participation in the profits arising from it."

8. Now a jalkar, on the other hand, is the right to take the profits of a river, lake, or other water on a particular estate or tract of country; and although, as was decided by Justices Jackson and McDonell in the case of Radha Mohun Mundul v. Neel Madhub Mundul 24 W.R. 200 the right to a jalkar may not involve any actual property in the soil over which the water flows, it is still, we think, an interest in Immovable property within the meaning of Article 145 of the Limitation Act.

9. We also agree with the lower Appellate Courts that the acts of the defendants in taking fish from this jalkar for so many years cannot properly be considered as successive acts of trespass. They appear to have been exercised continuously under

a claim of right, and in the only way in which that right could be effectually asserted. Assuming that the plaintiffs' possession of the jalkar consisted of the participation of the profits derivable from it, the enjoyment by the defendants of a partial participation of those profits for a long course of years must be considered (as Mr. Justice Ainslie describes it) as a dispossession by the defendants of the plaintiffs' right pro tanto during that period. The plaintiffs ought, therefore, to have brought their suit within twelve years from the commencement of such dispossession.

10. The appeal is dismissed without costs, no one appearing for respondents.