

Bhabadeb Chatterjee Vs Bhusan Chandra Mukherjee and Another

Court: Calcutta High Court

Date of Decision: June 23, 1925

Acts Referred: Limitation Act, 1963 " Section 26

Citation: 91 Ind. Cas. 712

Hon'ble Judges: Pearson, J; Dwarka Nath Chakravarti, J

Bench: Division Bench

Judgement

Pearson, J.

S.A. No. 543 of 1923.

1. The plaintiff claims the use of the water in the defendant's lank for bathing and other purposes. His claim has been upheld.

2. The argument on behalf of the appellant has been rested very largely upon considerations arising upon the English authorities relative to the law

of easements, prevailing in that country, though it is indeed conceded that the word in its use in. 26 of the Indian Limitation Act, as shown by the

explanation in Section 2 is wider than the meaning of the word in English Law and, would include at least a profit a prendre. In cases of this

character-attention has been directed by the Judicial Committee to the danger of proceeding necessarily upon English authorities. In Bhola Nath

Nandi v. Midnapore Zemindary Co 31 C. 503 : 31 I.A. 75 : 8 C.W.N. 425 : 14 M.L.J. 152 : 8 Sar. P.C.J. 611 (P.C.), a case of villagers

claiming a right of pasturage, Lord Macnaghten said: "It appears to their Lordships that on proof of the fact of enjoyment from time immemorial

there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's Court,

and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities

and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern

notions". I am of opinion that the present case does not in fact fall to be decided upon a question of easement arising u/s 26 of the Limitation Act,

and it does not follow that, because the plaintiffs may fail to show their right to relief on that ground, they are, therefore, entitled to no relief and the

suit must fail. As pointed out in Rajrup Koer v. Abul Hossein 6 C. 394 : 7 C.L.R. 529 : 7 I.A. 240 : 4 Shome. L.R. 7 : 4 Sar. P.C.J. 199 : 3 Suth.

P.c.J. 816 : 4 Ind. Jur. 530 : 3 Ind. Dec. 257 (P.C.), the object of the Statute was to make more easy the establishment of rights of this

description; but it is remedial, and neither prohibitory nor exhaustive, and it does not exclude or interfere with other modes of acquiring easements.

Clearly, therefore, it is open to the plaintiff to show, if he can, that he is entitled to a right which may be of that nature although not actually within

the strict meaning of the term. It is argued that the Court ought not to make out a case for the plaintiff which he has not made himself, and that the

plaintiff in this case has grounded his case on easement and must, therefore, succeed upon that or not at all. From an examination of the plaint,

however, which has been placed before us it is clear that though mention is made of the plaintiff's claim as upon an easement, it is also said to be

based on customary right, and in any case what the plaintiff has done substantially is to plead the facts and ask for such relief as he may be entitled

to. There is nothing unreasonable in the right claimed, which is one. without which in this country probably village life could not go on. From the

long continued user which has been proved in the present-case it is reasonable to presume a dedication of the tank to those uses. As pointed out in

Rajrup Koer's case 6 C. 394 : 7 C.L.R. 529 : 7 I.A. 240 : 4 Sho. L.R. 7 : 4 Sar. P.C.J. 199 : 3 Suth. P.c.J. 816 : 4 Ind. Jur. 530 : 3 Ind. Dec.

257 (P.C.) the up-holding of such a right does not mean that the owner is shut out altogether from improving or dealing with his property. An

instance where a right of this nature was upheld is to be found in Channanam Pillay v. Manu Puttur 1 M.L.J. 47.

3. For these reasons I think the appeal must be dismissed with costs.

Chakravarti, J.

4. I agree with the order which my learned brother proposes to make in this case and wish to add a few observations.

5. The right claimed by the plaintiff is for the use of the water of the tank for bathing and for other domestic purposes; it was clearly stated in the

plaint that the claim is based upon user for over 20 years peacefully, uninterruptedly, openly and as of right; The lower Appellate Court has found

upon the evidence that such user by the plaintiff, has been fully made out. On this finding the lower Appellate Court has granted a decree to the

plaintiff and has affirmed the decree of the Trial Court.

6. The main contention of the defendant-appellant is that the right which the plaintiff sought to establish was a right of easement and that in the

circumstances of this case the plaintiff's claim cannot be based on easement as contemplated in Section 26, of the Limitation Act.

7. It is an well-established proposition now that Section 26 of the Limitation Act does not give an exhaustive description of the right acquired by

long user.

8. The right claimed in this case is by the neighbouring residents of an old tank. The water of the tank they say was used for the various purposes

stated in the plaint.

9. In a hot country like Bengal necessity for the user of pure water is very great indeed. A good tank largely supplies such a need and it is only a

rich man who can find the money necessary for the construction of such a tank but the poor people also need the water which they cannot

themselves provide for. In these circumstances it has been an immemorial custom in this country that those who can afford think it an act of great

public benefaction to construct tanks for public use. The Hindu Sastras have laid down in numerous texts the high merits which a man acquires by

digging a tank and dedicating it for public use. I shall quote one of such texts which when translated runs as follows:

As there is no sustaining of life in both worlds without water consequently the wise man should always construct a reservoir of water. A well is

equal to the Agniitama sacrifice, in a desert it equals the Ashwamedha" Vishnudharmattora. Again it "promises, heaven to the maker of wells and

large tanks". See P.N. Saraswati's Tagore Law Lectures, pages 192-193. The word by which the dedication is made are these: "This water has

been given by me to all beings in common; let all beings be satisfied by bathing, drinking and immersion:" see page 205. Whether from religious

views or from a sense of public duty many thousands of such tanks were excavated all over Bengal and dedicated for public use.

10. In this country, therefore, where this mode of dedication is so widely known, when one finds that a tank exists from along time past and the

public, that is the people of its neighbourhood, have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water

of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not

necessary, therefore, to seek the aid of Section 26 of the Limitation Act for the acquisition of such a right. It should also be remembered that in this

country a large number of tanks do exist which were intended for private use and no dedication to the public was intended, although, as a matter of

fact, the people in the neighbourhood are ordinarily allowed to use the water. The words used in dedicating such a tank are expressive of a limited

use. They are these: "Let the relations in my family, that have come to this world, or will come into existence in future have satisfaction by means of

the water: let all beings enjoy it by washing, drinking and bathing"". Raghu Nandan in his treatise on Consecration of Tank. Such private tanks are

usually found in the compound of a private house. In such cases the user by the neighbours will, of course, be merely taken to be permissive. The

Court shall find in the evidence in each case whether the tank is a private one, or one in which a dedication in favour of the public may be

presumed. The tank in this suit was not shown to be a private one.

S.A. No. 544 of 1923.

11. Our judgment in S.A. No. 543 of 1923 governs this appeal also. This appeal is, therefore, dismissed with costs.