(1881) 01 CAL CK 0013

Calcutta High Court

Case No: None

Mahomed Syud and Ors		APPELLANT
	Vs	
Parmeshari Proshad Narain Singh		RESPONDENT

Date of Decision: Jan. 13, 1881

Acts Referred:

- Limitation Act, 1963 - Section 27

Citation: (1881) ILR (Cal) 608

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

Bench: Full Bench

Judgement

Richard Garth, C.J.

The plaintiffs in this case claim an exclusive right of ferry across the river Nun, from their own ghat in Mouza Buch on the eastern side of the river, to the ghat of the defendant in Mouza Kistwara Fakir on the western side of the river. They claim not only the right to carry passengers by this ferry, and to take tolls from them, but also to exclude the defendant from interfering with their profits by exercising a similar right of ferry on the western side of the river. This right is claimed by the plaintiffs as a matter of private property, and they say that the defendant has interfered with their alleged right by ferrying passengers across the river in an ekta boat and taking tolls from them.

2. The defendant denies the plaintiffs'' alleged right, and sets up a similar right as belonging to himself: and the issues are intended to raise, and do raise in my opinion, the question, whether the plaintiffs are entitled to the right which they set up.

3. The plaintiffs have produced no grant or other document of title in support of their claim; but they have endeavoured to establish their right by proof of long user,

and have brought forward some purwanas from the Fouzdari Court, which they seek to use as evidence in their favour.

4. The Munsif apparently considered that, as the right claimed was in the nature of an easement, the plaintiffs, u/s 27 of the Limitation Act, were bound to prove a user of the right for twenty years before suit. He found that the plaintiffs had given no evidence of the exercise of the right for twenty years, and consequently he dismissed the suit.

5. The Subordinate Judge considered that Section 27 of the Limitation Act did not apply to the case; and he has found in favour of the plaintiffs, apparently upon the ground that the plaintiffs'' alleged right has been exercised and not interfered with for twelve years, and he has relied in support of his finding upon the proceedings in the Fouzdari Court, which took place at various times between the year 1865 and the commencement of the suit.

6. I confess, if the question had been res integra, I should have doubted whether such an extensive and exclusive right as the plaintiffs claim is not illegal, as being contrary to public policy. But I find that such rights have long been recognized in this country as private property, from times anterior to the Permanent Settlement, and I therefore forbear to throw any doubt upon their legal validity.

7. The only real question in the case then, as it seems to me, is as to the length of user which should justify the Court in presuming the existence of a right of this kind in favour of the plaintiffs. I think that it would clearly be improper and unsafe to leave it open to the subordinate Courts in this country to presume such a right from any number of years'' user according to their own discretion. If this were the law, it would inevitably work unfairly, because different Judges might act upon a different rule according to their own notions upon the subject. It is not only right, as it seems to me, but in conformity with the law, both here and in England, that there should be some definite principle upon which all Civil Courts should act as to the period of prescription in such cases; and as the Indian Legislature, in conformity with the English law, has now prescribed twenty years as the proper period in the case of easements and profits a prendre, I think that, in conformity with that rule, it would be proper to consider twenty years as the shortest period within which a right of ferry can be established by user.

8. As my brother Mitter and myself were not agreed upon this point, the question has been referred to my brother White as a third Judge. We have heard the case argued again, and I am still of opinion that no such right as that which the plaintiffs claim ought to be presumed from a user of less than twenty years. As the Subordinate Judge has not dealt with the case upon this principle, and has apparently considered a twelve years'' user sufficient to establish such a right, I think that the case should be remanded to him to determine whether the plaintiffs have proved an exclusive exercise of the right for at least twenty years.

9. It seems to me very doubtful whether, considering that this is a private right, the purwanas which have been admitted ought to he treated as evidence as against the defendant. We do not know what the purwanas are, or how far they can legally be made evidence; hut as the case is to be remanded, I think it right to direct the attention of the Subordinate Judge, as well of the parties, to that point.

10. My brother WHITE agrees that the costs of both hearings in the High Court, and also of the lower Appellate Court, should abide the ultimate result of the cause.

11. We are informed by the learned pleader for the plaintiffs that, in the Court of first instance, the plaintiff''s were prepared to call eighteen witnesses in support of their case, and that the Munsif only allowed them to call twelve of those witnesses. This seems to have been made one of the plaintiffs'' grounds of appeal to the Subordinate Judge, and Mr. Twidale contends, that, upon the case being remanded, the plaintiffs ought to have the advantage of that ground of appeal if they can make anything of it. If the plaintiffs can satisfy the Subordinate Judge upon affidavit, that the Munsif did really refuse to allow these witnesses to be called, and that their evidence was calculated to support the plaintiffs'' case upon the point which we now direct to be tried, we think that the plaintiff''s ought to have an opportunity of calling those witnesses before the Subordinate Judge. The defendant will, of course, be at liberty to answer upon affidavit any case which the plaintiffs may make as to the Munsif not allowing the witnesses to be called, and the Munsif himself may be referred to, if necessary, to ascertain the truth of the matter.

White, J.

12. I agree that the plaintiffs should have the opportunity of examining their further witnesses, provided they satisfy the Subordinate Judge as regards the particulars mentioned in the judgment of the Chief Justice.

13. The suit out of which this appeal arises is for the disturbance of a ferry claimed by the respondents. The relief sought is a perpetual injunction to restrain future disturbance and damages for past disturbance.

14. The ferry lies between two villages, which are separated by the river Nun. One of the villages, which is on the eastern bank, is called Buch, and belongs to the respondents. The other, which is on the western bank of river, is called Kistwara Fakir, and belongs to the appellant.

15. In their plaint the respondents state that the ferry under the name of Buch Bhudunghat has existed for upwards of a hundred years, and that they and their ancestors have all along been in the enjoyment of the ferry, and by themselves, or their ticcadars, have received the charges for ferrying passengers over the river backwards and forwards between the two villages. The respondents, claim the ferry by virtue of proprietary and prescriptive right. The claim of the respondents thus involves the exclusive right as against the appellant and the rest of the public to levy

tolls from passengers passing from one village to the other by the ferry (Buch Bhudunghat), and also the right as against the appellant to use the western hank of the river for the purpose of embarking and disembarking passengers using the ferry.

16. The ferry is not claimed as a public ferry under Reg. VI of 1819, nor as established by sannad or grant from the ruling authority, but as a private ferry.

17. There appears to be nothing in the law which prevails in the mofussil of this Presidency to prevent any private person from establishing a ferry and levying tolls from those who use the ferry. The existence of such ferries is impliedly recognized in Reg. VI of 1819, and such recognition is affirmed by the late Sudder Dewany Adawlut in the case of Rajiblochun Roy v. Kumri Bebee (S. D. A. 1854 153); see also the case of Kishoree Lall Roy v. Gokool Monee Chowdhrain (16 W. R. 281).

18. Now, as any man may set up a ferry over a river which passes between his own village and that of another riparian owner, no one who works such a ferry can exclude his neighbour from doing the like thing, unless the former has acquired a right of property in the working of his own ferry. This right may be acquired as against his neighbour by proving a grant from him or his predecessors in title, granting the right of embarking and disembarking passengers on his land, or it may be acquired, as against all the world, by proof of long uninterrupted user.

19. The respondents have produced no written or other evidence of a grant from the appellant or the former owners of Kistwara Fakir, but rely solely upon evidence, to the effect that they have, for a certain period of time, by themselves or their ticcadars, used ferry boats and collected the ferry charge on both the eastern and western sides of the river; in other words, they seek to prove what they call their "proprietary and prescriptive right" by long uninterrupted user.

20. The first Court found that there was no evidence of the user beyond sixteen years, and considered such evidence of user as there was to be unsatisfactory; and dismissed the suit, on the ground that the plaintiffs had not proved their right to the ferry. The lower Appellate Court reversed the decision of the first Court, and decreed the relief prayed. The Subordinate Judge finds that the plaintiffs have collected the ferry charge on both sides of the river, and (sic) in exclusive possession for a long time, but he does not find the (sic) of the possession.

21. (sic)The question raised by this appeal is, what must be the duration of the (sic)to give the respondents a right to the relief which they ask? In my opinion it should be not less than twenty years. The respondents'' claim, so far as it involves a right to embark and disembark passengers on the landing place in the appellant''s village, is really a claim to an easement, or a right in the nature of an easement; and the Indian Limitation Act has prescribed for the acquisition of an easement a user of twenty years. Supposing a ferry could by English law be erected by a private person at his own will, and the proof of title to it depended upon long uninterrupted user,

there can be no doubt that a user of twenty years would be required in order to make out title. There is nothing that I am aware of which makes a period of twenty years unsuited to the circumstances of the mofussil of this Presidency or its inhabitants. Long and uninterrupted possession or use by a claimant may be viewed as long continued acquiescence on the part of those who are entitled to interrupt or disturb the claimant. Why twenty years have been fixed by the English law as the period to which the user must extend is not easy to say, and I have not been able to discover; but there is a good reason for a lengthened period to be found in this, that it affords ample time for those interested in preventing the acquisition of a right, to interfere and resist. It also allows for the supineness of individuals, and for the numerous hindrances to interference and disturbance which may arise from minority, absence, and other temporary causes.

22. It has been argued that it should be left to the Judge who presides at the trial to decide from the circumstances of each case whether the user has been of sufficient duration to confer an absolute and indefeasible right; but that course would, besides being at variance with the ordinary principles of law which regulate the acquisition of rights by user, be productive of the greatest uncertainty and inconvenience.

23. It has also been contended that a twelve years'' user should be deemed sufficient, inasmuch as the Indian Legislature has fixed that period as the limit for a suit lo recover Immovable property. But the argument founded on this circumstance fails, for the Legislature has by the same Act prescribed twenty years as the time for the acquisition of easements and certain profits a prendre, and there is a much closer analogy between such rights and the right claimed in this action than between the latter and Immovable property. In fact the mode in which the Legislature has dealt with easements furnishes an affirmative argument in support of the longer limit which I have mentioned.

24. No decision has been cited for the respondents which shows that the right which the respondents claim can be acquired by user within a less period than twenty years.

25. A case, however, has been referred to-Joy Prokash Singh v. Ameer Ally 9 W. R. 91 decided in the year 1868-in which Peacock, C.J., after referring to the English Prescription Act, says,-"That Act, however, does not apply to the mofussil here, and there is no magic in the number 20. I am inclined to think that by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for twelve years would confer a right to it. But it is premature to decide the point in this case. The point has not been argued." This expression of opinion is admittedly an obiter dictum. The Indian Legislature has since definitely fixed the period for the acquisition of an easement at twenty years, and thus adopted the English law on the subject.

26. It is true that there is no magic in the number 20, nor is there indeed in the number 12 or any less number. But some limit of time must be fixed.

27. By the old Roman law a title to Immovable property on Italian soil was acquired by use (usucapione), if held for two years. This was altered by Justinian, who published a constitution, by which, throughout the empire, twenty years in the case of absent parties, and ten years in the case of those present, were fixed as the period of possession that must elapse before the use or possession was clothed with the title (Inst. Justinian Lib. 2, Tit 6). The French Civil Code prescribed thirty years for the acquisition of an easement, as also did the law which prevailed in the mofussil of Bombay before the Indian Limitation Act of 1871; see Anaji Dattushet v. Morushet Bapushet (2 Bom. H. C. Rep. 354). These periods are no doubt more or less arbitrarily fixed. It will not be contended that this Court is to apply Roman or French or any other foreign law. There is no Indian law either legislative or judge-made which meets the case. What period then can this Court declare to be the proper limit except that prescribed by the English law in similar or analogous cases?

28. My brother Mitter, whose judgment I have had the advantage of perusing, is of opinion that the duration of user is not a question which arises in the suit, inasmuch as the existence of a private ferry plying between the respondents'' and appellant''s villages is admitted by the latter. But I cannot agree in this view. The mere existence of a private ferry, though admitted by the appellant, cannot entitle the respondents to the relief prayed, unless the respondents are entitled to prevent the appellant from using his own boats to carry passengers from the landing place in his own village across the river.

29. The respondents cannot be so entitled, unless they themselves have the absolute and indefeasible right to use the landing place in question to the exclusion of the appellant; and to have acquired that right, they must have used the ferry without interruption for so many years as the law declares to be sufficient for the acquisition of the right.

30. The issues also which were framed in the first Court, in my opinion, clearly raise the question of right. Part of the first issue is, what right the plaintiffs have, and part of the second issue is, "whether the plaintiffs are entitled to recover the damages claimed or not?" The judgment too of the first Court, which dismissed the suit, proceeded upon the failure of the plaintiffs to prove a user of sufficient length to establish the right which they claimed.

31. The lower appellate Court in effect narrowed the issues to this one,-"Whether the plaintiffs had collected the ferry charge on both the western and eastern sides of the river, or had only collected the ferry charge of the ghat on the eastern side." In so doing, I think the lower Appellate Court erred. It overlooked the essential point on which the plaintiffs'' claim to relief depended,-viz., the proof of an exclusive and absolute right to the ferry in themselves.

32. On the whole, I am of opinion that the decree of the lower Appellate Court must be reversed; but as the importance of the duration of the user of the ferry escaped the attention of that Court, I am not unwilling that the case should be sent back to the lower Appellate Court with a direction to find specifically on this point, and upon the terms mentioned in the judgment of the Chief Justice.

Mitter, J.

33. The plaintiffs'' case is, that they have the exclusive right of ferry across the river Nun between these villages, and the defendant having interfered with their right by setting up an opposition ferry from his side of the river, the suit has been brought virtually to restrain him (the defendant) from disturbing the plaintiffs'' right.

34. The defendant does not deny that there is a private ferry in existence by which passengers are taken from one mouza to the other, and vice versa; but he alleges that that right belongs to him as the proprietor of Mouza Kistwara Fakir.

35. The Munsif dismissed the suit, but on appeal the Subordinate Judge has awarded a decree in favour of the plaintiffs. The defendant has preferred this appeal, and the first question that has been raised before us is, whether, by the laws of this country, a private individual can claim a right of this nature-a right which entitles him, to the exclusion of the other members of the State, to ferry across a river within a particular area all passengers, receiving tolls from them.

36. Whatever may be the origin of this right, it is clear from the legislative enactments on the subject of "ferry ghats" framed from time to time, that such right exists in this country.

37. The earliest Regulation on the subject is No. XIX of 1816, of which Sections 2, 8, 9, and 15 bear upon the subject under consideration. Section 2 classifies ferries into three divisions,-first, ferries which are to be let in farm; second, ferries held under khas management of the officers of Government; and third, ferries held by private individuals without payment of revenue. Section 8 empowers the Revenue Authorities to reduce or enlarge "the number of ferries of every description, either of their own accord or at the suggestion of the Magistrate." Then Section 9 lays down that "in the event of its appearing that the profits derived from any resumed ferry may have been included in the permanent assessment of the estate to which it has heretofore been annexed, the Board or Commissioner under whose orders the inquiry may be conducted shall report the circumstances, with an opinion on the merits of the claim, for the consideration and orders of the Governor-General in Council; and the Courts of Judicature shall not take cognizance of any claims to deductions or compensation on account of the tolls levied at any ferry or ghat." Section 15 enacted that the employing of a boat for the purposes of ferrying passengers, &c., by an unauthorized person would subject him to a fine, &c.

38. This Regulation was repealed by Reg. VI of 1819, of which Sections 3, 5, 6, and 13 define the distinction between public and private ferries.

39. The latest enactment on the subject is Beng. Act I of 1866, Section 4, which clearly recognizes the right of private ferry; see also the case of Government v. Brij Soondree Dassee (7 Sel. Rep. 497), Rajiblochun Boy v. Kumri Bebee (S. D. A. 1854 153), Kishoree Lall Roy v. Gokool Monee Chowdhrain (16 W. R. 281), and Narain Singh Roy v. Nurendro Narain Boy (22 W. R. 296).

40. But although the enactments referred to above recognise the right of private ferry in this country, they do not throw any light as to its origin.

41. But it seems to me that a right of this nature must, in some way or other, originate from the sovereign authority. In the course of the argument of this appeal, it was contended that, in this case, the right in question is claimed by the plaintiffs on the ground that it was acquired solely by prescriptive user for a certain length of time; and one of the questions raised before us is, what is the shortest period during which the user must be proved to entitle the plaintiffs to a decree? In this case it seems to me that the existence of a private ferry plying between the plaintiffs'' and the defendant''s mouzas is admitted. Therefore the question mentioned above does not really arise. The issue that is raised between the parties is not whether a private ferry does exist in the river Nun between the two mouzas, but whether the recognized pivate ferry, which is in existence there, is the property of the owner of Mouza Buch or of that of Mouza Kistwara Fakir. It is clear from the plaint and the written statement, as well as the evidence given by the contending parties, that the existence of a private ferry in the river Nun between the plaintiffs'' and the defendant''s villages is admitted.

42. The plaintiffs'' witnesses deposed that the tolls from the passengers using this ferry were exclusively collected by the plaintiffs, while those of the defendant deposed they were exclusively received by the latter. The first issue framed, by the Munsif is in these words: "Whether the plaintiffs or the defendant used to take the ferry charge of the ghat on the river Nun? What right the plaintiffs have? If the plaintiffs used to take the ferry charge, whether the defendant can be restrained from taking it or not?" The first branch of this issue raises the only question of fact upon which the parties are disagreed. There is no other question of fact upon which the parties are at issue. The remaining portion of the first issue substantially raises the same question of law which has been first argued before us,-viz., whether the right of private ferry is recognized by the laws of this country. Upon the aforesaid question of fact, the lower Appellate Court came to a finding favourable to the plaintiffs, and it is not disputed that there is evidence on the record to support it. I am, therefore, of opinion that this appeal must fail, and the question of law noticed above, and which has been argued before us, does not really arise. If it did arise, I should be inclined to hold that a right of a private ferry cannot be established as an indefeasible right by long user. Long uninterrupted user may be evidence of a lost

grant or immemorial custom giving rise to the inference that the right had a legal origin. But the influence of the existence of the right from long user is one of fact and not of law; see Bhuban Mohan Banerjee v. J. S. Elliot (6 B. L. R. 85) and the Mayor of Kingston-on-Hull v. Horner (1 Cowp. 102). I may as well cite the observations of Lord Mansfield in the last mentioned case bearing upon this subject. There also a right similar to the one now in dispute was claimed without the production of a grant from the Crown. The plaintiffs in that case had to establish their exclusive rights to certain dues-a right which could only emanate from the sovereign power. He says: "Now, with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, namely, that all evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitation is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."