

Calcutta High Court

Fadu Jhala vs Gour Mohun Jhala And Ors. on 21 May, 1892

Equivalent citations: (1892) ILR 19 Cal 544

Author: K W. Petheram

Bench: W C Petheram, Kt., Prinsep, Pigot, O'Kinealy, Ghose

JUDGMENT W. Comer Petheram, Kt., C.J.

1. The question which we have to determine is whether a person who has for a time exercised the exclusive right of fishing in waters which cover land which does not belong to him, and who is forcibly prevented from fishing in such waters, can maintain an action for such prevention under Section 9 of the Specific Relief Act (I of 1877) without proving his own title to the exclusive right which he claims.

2. I agree that a right of fishing in waters which cover land which belongs to another is within the definition of immoveable property in Section 2, Sub-section 5 of the General Clauses Act (I of 1868), and would therefore be included within Section 9 of the Specific Relief Act if there were not, to use the words of Section 2 of the General Clauses Act, "something repugnant in the subject or context." I am of opinion that the whole of Section 9 is repugnant to the idea that immoveable property in that section includes an incorporeal right such as a right of fishing in waters belonging to another. It is, I think, apparent from the section itself read as a whole that the immoveable property, intended to be dealt with by it, is something of which actual physical possession can be given and taken; in other words, some piece of land or something permanently attached to the land, and that the words as they appear in the section cannot include an incorporeal right which must always remain in the possession of its owner, though he may for any reason be prevented from exercising it. I think the answer to the question should be in the negative.

Prinsep, J.

3. The matter referred for the opinion of this Pull Bench is, whether Section 9 of the Specific Relief Act can be applied to fisheries; that is to say, whether a person dispossessed without his consent of a fishery otherwise than in due course of law may sue to recover such possession within six months from the date of the alleged dispossession.

4. Section 9 of the Specific Relief Act (I of 1877) re-enacts Section 15, Act XIV of 1859.

5. It would seem that up to the legislation of 1859 the Civil Courts were not empowered to try possessory actions of a summary character independent of any question of the actual title of the person unlawfully dispossessed. Special provision was, however, made by Act IV of 1840 and previous Regulations which empowered Magistrates to take cognizance of complaints of forcible dispossession from land, premises, water, fisheries, crops or other produce of land, if made within one month from the time of the alleged dispossession, and the Magistrates were empowered to restore possession to any person so ejected from such property. Comparison between Act IV of 1840, Section 4, and Act XIV of 1859, Section 15, will show that the nature of the matters under enquiry is identical with the following exceptions. The Civil Court was, by the legislation of 1859,

given jurisdiction where the Magistrate hitherto alone had summary jurisdiction. The dispossession under the Act of 1840 must have been forcible dispossession, whereas, under the Act of 1859, the dispossession must have been "otherwise than by due course of law," and need not, therefore, have been accompanied by force. The property, the subject of dispossession by the Act of 1840, was described to be "land, premises, water, fisheries, crops or other produce of land." The Act of 1859 describes the property as "any immoveable property." As I have already mentioned, Section 9 of the Specific Relief Act is, in all material respects, identical in its terms with Section 15, Act XIV of 1859. It was not until the General Clauses Act (I of 1868) that any general definition was given of immoveable property, though in other special Acts, such as the Indian Succession Act of 1865, a definition of this term was given applicable only to those Acts, The definition given of the term in the General Clauses Act of 1868 is, however, applicable only to the Specific Relief Act of 1877, and not to Section 15, Act XIV of 1859. But, so far as we can learn, it was not the intention of the Legislature to effect any alteration in the existing law by the enactment of 1877 in this respect. In giving definitions of certain terms, and, amongst them, of immoveable property, the General Clauses Act declares that, unless there be something repugnant in the subject or context of any Act made by the Governor-General in Council thereafter, the terms specified shall have the meanings attached to them. There can be no question that immoveable property, as defined by the General Clauses Act, includes a fishery, being a benefit arising out of land, and, so far as I can see, there is nothing repugnant in the terms of the Specific Relief Act to limit this definition or to make it inapplicable to Section 9. The decisions, however, on this point are in conflict, and this has led to the reference to the Full Bench now under consideration. In *Natabar Parue v. Kubir Pane* I.L.R. 18 Cal 80 it was held that Section 9 of the Specific Relief Act does not refer to a suit for the possession of a jalkar, that is to say, a right of fishery over land belonging to a stranger. It was there held that the plaintiff's had no right to the land, nor were they in possession of the land, but that for certain parts of the year they had power or license to fish, and that consequently their suit for possession of a fishery would not come within Section 9 of the Specific Relief Act. On the other hand, it has been held in *Bhundal Panda v. Pandol Pos Patil* I.L.R. 12 Bom. 221 that such a suit to recover possession of a fishery by exclusive right thereto is cognizable under Section 9 of the Specific Relief Act, and this case has been followed in *Krishna v. Akilanda* I.L.R. 13 Mad. 54 in a suit to obtain possession of a ferry. In both of these cases it was pointed out that suits of this description were not excluded by Section 9 of the Specific Relief Act, whereas such matters were expressly placed out of a Magistrate's jurisdiction by the introduction in Section 145 of the Code of Criminal Procedure, 1882, of the expression "tangible immoveable property" as the property over disputes regarding the possession of which a Magistrate could take summary action. We have been also referred to the case of *The Collector of Thana v. Krishnaanath Govind* I.L.R. 5 Bom. 322 in which the question was raised whether a certain grant was immoveable property within Section 1, Clause 12, Act XIV of 1859.

6. In that case the learned Chief Justice and Mr. Justice Melvill differed. The former held that "immoveable property" not having been defined by law applicable to the Act of 1859, its meaning should be determined by the general law, and that, inasmuch as this grant would be regarded as immoveable property under the Hindu law, it should be dealt with by Section 9, Clause 12, Act XIV of 1859. Mr. Justice MELVILL, on the other hand, held that the terms "immoveable property" and "interest in immoveable property" must be interpreted on general principles of construction with reference to the nature of the thing sued for, and not to the status, race, character, or religion of the

parties to the suit; that the grant not being a charge upon land, would not, according to general principles of construction, be immoveable property; and therefore the case would not come within the terms of Section 1, Clause 12 of the Act of 1859. I do not think that the cases of *Lalla Gobind Suhaye v. Munohur Misser* 1 W.R. 65 *Oodoyessuree v. Huro Kishore Dutt* 4 W.R. 107 *Haro Dyal Bose v. Kristo Gobind Sein* 17 W.R. 70 *Mohunt Deo Surun Poory v. Moonsee Mahomed Ismail* 24 W.R. 300 and *Kalee Chunder Sein v. Adoo Shaikh* 9 W.R. 602 are in point. The first related to a suit for mesne profits, that is to say, a suit for damages, and consequently that would not be an interest in immoveable property, The next three cases relate to easements, and the question raised was not whether they were immoveable property within Section 15, but an interest in immoveable property within the terms of Section 1, Clause 12. The case of *Kalee Chunder Sein v. Adoo Shaikh* 9 W.R. 602. related to a suit under Section 15 regarding the possession of land. I attach no importance to the provision made in Section 1, Clause 12, Act XIV of 1859 for suits for the recovery of immoveable property or of any interest in immoveable property, whereas Section 15 relates only to summary suits for possession of immoveable property, for I do not understand that it was intended to draw any distinction. At that time Magistrates had a summary jurisdiction to determine possession and to restore possession, deprived through force, of not only lands, but water, fisheries, crops and other produce of land, and this jurisdiction existed concurrently with the jurisdiction conferred on Civil Courts by the Act of 1859 until the repeal of Act IV of 1840 by Act XVII of 1862. Act XIV of 1859, it may be stated, did not come into operation until the 1st January 1862, and the Code of Criminal Procedure (Act XXV of 1861) came into force on the same date. That Code re-enacted all the sections of Act IV of 1840, except Section 4 which conferred on Magistrates a jurisdiction similar to that conferred on Civil Courts by Act XIV of 1859, Section 15. The Code, however, repeated the various kinds of property, including fisheries, on the disputed possession of which the Magistrate had jurisdiction to act, but the Act of 1859 gave the Civil Courts summary jurisdiction in cases of illegal dispossession of immoveable property. There is no indication that the Legislature contemplated any change except the transfer of jurisdiction. The term "immoveable property" would include a fishery without any straining of language, and it does include a fishery under the definition contained in the General Clauses Act, 1868. In order to exclude a fishery from the operation of Section 9 of the Specific Relief Act, it is necessary to find that there is something repugnant in the subject or context to prevent the application of the definition as given in the General Clauses Act. I can find nothing repugnant in the Specific Relief Act itself, nor can I find that suits for the recovery of possession of fisheries were excluded by Act XIV of 1859, Section 15, so as to enable us to hold that by the re-enactment of that section in the Specific Relief Act it was intended to alter the previous law, and thus to prevent the application of the definition of immoveable property as given in the General Clauses Act of 1868. Reference has been made to the Objects and Reasons recorded when the Bill which has since become the Specific Relief Act was introduced into the Legislative Council. These reasons show an intention to re-enact Act XIV of 1859, Section 15. But if any such reference to the proceedings of the Legislative Council be legitimate, I think that it would be appropriate to quote the remarks of Sir B. Peacock, who was in charge of the Bill, now Act XIV of 1859, and introduced Section 15 when that Bill was under consideration in the Legislative Council. These were made while the Bill was in committee, and the proceedings in committee in those days were held in public and were published. It is also important to notice that the remarks made by Sir B. Peacock were the only allusion made to Section 15, and that that section was enacted as introduced by him. Sir B. Peacock is reported to have said: "That he had originally intended to provide only for cases of possession

disturbed by force or fraud, but upon the advice of the Honourable Member for the North-Western Provinces, he had made the section general in its application, so that upon proof of dispossession otherwise than by due course of law, the Civil Court would entertain a suit for the recovery of the possession: if a title to the property was set up afterwards, it would not in any way be prejudiced by the decision in the possessory suit."

7. He also "thought that the proposed new section would transfer to the Civil Court cases of the description which, under Act IV of 1840, were now heard by the Magistrate" [Proceedings of the Legislative Council of India, 859 (vol. V). Cols. 60, 61.]

8. That the law even now, contemplates possession of a fishery being given or being maintained is shown by the operation of Regulation VII of 1822, Section 14, Clause 4, and Section 34, which give the Collector summary jurisdiction over disputes regarding such matters when any particular fishery concerns a settlement then being made by him. In the absence, therefore, of any direct authority to the contrary, I am inclined to think that no real alteration in the law except a transfer of jurisdiction was contemplated by the Legislature, and that consequently the term "immoveable property" as used in Section 15 of Act XIV of 1859 should be held to cover the full definition subsequently given by the General Clauses Act; in fact, to include all matters previously dealt with by Magistrates only under Act IV of 1840, Section 4. The Legislature, it seems to me, did not intend to deprive persons dispossessed of fisheries forcibly or, as it was expressed by Act XIV of 1859, without "due course of law," of the summary remedy that they had hitherto enjoyed. If Section 9 of the Specific Relief Act stood alone, and it be read with the definition of "immoveable property" as given in the General Clauses Act, admittedly it would include a fishery as immoveable property within that definition.

9. It has been lastly contended that the Specific Relief Act does not contemplate suits for possession of a fishery, because the relief to be given in such a case would not be one of the reliefs set out in Section 5. I cannot admit the force of this argument. There is nothing either in Section 5 or in the terms of the Code of Civil Procedure regarding the execution of decrees in such a case which would prevent relief being fully given to a successful party in a suit for possession of a fishery as immoveable property.

10. I would therefore answer the question put in the affirmative, Pigot, J.

11. I am of opinion that the answer of the Pull Bench to the questions referred ought to be in the affirmative.

12. I had intended to limit myself to shortly expressing concurrence with the decisions of the High Courts of Madras and Bombay, and had prepared a short judgment expressing" that concurrence. But I think I ought, having regard to the difference of opinion that exists, to state my reasons in greater detail than I had intended to do.

13. The General Clauses Act, in Section 2, Clause (5), enacts that "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. By Section 2 this is the meaning to be attached to the term "in all

Acts made after the General Clauses Act unless there be something repugnant in the subject or context."

14. I take it to be clear that a fishery in alieno solo is within the definition of immoveable property in the General Clauses Act; the words in that definition benefits to arise out of land "include such a fishery, according to familiar legal language; a fishery is a benefit arising out of" land covered by water. "The definition does not, of course, include easements.

15. Section 9 of the Specific Relief Act, is as follows:

If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

16. This provision must apply to a fishery in alieno solo, that being immoveable property within the definition, unless there be such a repugnancy as is contemplated by Section 2 of the General Clauses Act.

17. The section contemplates the case of dispossession otherwise than by due course of law; and provides for the recovery of possession in such a case by a summary suit in which, if the previous possession and the dispossession be established, the plaintiff is entitled to a decree.

18. The first question is: Whether any repugnancy exists in, or arises from, the nature of the property in question, to a construction of the section which shall make it applicable to such property.

19. I understand that the contention with reference to this is, that this section cannot apply to incorporeal immoveable property, but only to some definite part of the earth's surface; to immoveable property which is susceptible of actual physical detention; that property "visible and corporeal," to use the English legal language, or "tangible immoveable property," to use the corresponding expression in Indian law, is alone contemplated by this section.

20. I own that I should have supposed the contention that the section must be held to relate only to corporeal immoveable property to be conclusively negated by the established practice of the Courts in this country. Decrees for the possession of jalkars are perfectly common in title suits brought on dispossession. What difficulty can exist as to the possession in a summary suit, when

there is none in a title suit, I am unable to see. But apart from this consideration, I think this contention ought not to prevail.

21. I think it can only be held to be true, if it be shown, that the terms "possession" and "dispossession" used in the section are necessarily inapplicable to incorporeal property included in the definition enacted in the General Clauses Act. If so, they are inapplicable to the property now in question before us, which is of course incorporeal.

22. Whether or not possession, according to its strict philosophical meaning, can be predicated of incorporeal property, is a question which, I think, does not practically arise before us: it seems to me perfectly immaterial whether or not we should affirm that the term is in India strictly applicable to that species of property: or affirm, on the other hand, that according to Indian law, the term "possession" when applied to incorporeal property, means "quasi possession." One or the other we must, I think, adopt: it is, as it seems to me, a mere question of words. In repeated instances the Indian Legislature has used the terms "possession" and "dispossession" as applicable to the species of property now in question before us without regard to the incorporeal nature of it.

23. Before I refer to Indian legislation, I should notice the argument derived from English law which was addressed to us. Much reliance was placed upon the proposition that the action of ejectment will not lie in respect of a fishery. That is true; but I own that I do not see that it bears upon the question before us. If it did, it might perhaps be thought that it proves too much; for it would be quite as applicable to a suit on title for the possession of a fishery, as to a summary suit founded on possession alone. Yet suits for possession of jalkar property, founded on title, are a familiar mode in which the rights to this sort of property are asserted and maintained. It is also true, as I pointed out during the argument, that the procedure in English law, by a writ of restitution after forcible entry, is not applicable to incorporeal property; the writ can only be awarded for possession of tenements visible and corporeal--see Russell on Crimes, 5th ed., vol. I, p. 414, citing the passage in Hawkins to which I referred during the argument.

24. It is not necessary to discuss the reasons which led the Courts to hold that these forms of procedure were inapplicable to incorporeal property. Even if they were held to be so inapplicable, by reason of there being thought to be incompatibility between this sort of property and possession, as the word is used in English law, they would not furnish an argument applicable in this country, if it be the case, as I shall presently show that it is, that the Indian Legislature has repeatedly acted on the contrary principle.

25. But it is clear that in English Courts of Equity, a possessory suit may well lie in respect of an incorporeal tenement, although, in England, such a suit is rare. Possessory suits are referred to in the judgments of Lord Selborne at page 146, and of Lord O'hagan at page 163, in the case of Neill v. Duke of Devonshire L.R. 8 Ap. Ca. 135 (146, (163) J in which the question before the House of Lords turned chiefly upon the admissibility in evidence of decrees in possessory suits brought in respect of two several fisheries in the river Black-water and in which such decrees were held admissible in evidence as proof of former possession. In that case also the case of Hemphill v. M'Kenna 3 Dr. and War. 183 before Lord Chancellor Sugden, which was a possessory suit with respect to a ferry, is

mentioned: also, of course, relating to a property incorporeal in its nature.

26. It seems to me that a suit such as the possessory suits, the effect of the decrees in which the House of Lords had to consider in that case, is precisely so far as the principle now under consideration goes, the same as that which it is contended cannot possibly lie under Section 9 of the Specific Relief Act. The nature of the property, and the character of the remedy, are the same: it may be, though. I should doubt it, that a less degree of [557] disturbance would justify the interference of the Courts in such a possessory suit than would be required under the Specific Relief Act; and no doubt, to maintain a possessory suit, proof of three years' peaceable possession, was necessary, but neither of these considerations affects the principle.

27. I now refer to some of the enactments of the Indian Legislature which show that according to Indian legal language possession may be had, and may be restored; that "dispossession" may take place of immoveable property of the kind now under consideration. Act IV of 1840 was referred to during the argument by Mr. Justice Prinsep. Section 2 of that Act is as follows:

And it is hereby enacted, that whenever any Magistrate or other officer exercising the powers of a Magistrate may be certified that a dispute likely to induce a breach of the peace exists concerning any land, premises, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding stating the grounds of his being so certified, and shall call on all parties concerned in such dispute (whether proprietors, dependent taluqdars, farmers, under-farmers, raiyats or other persons) to attend his Court in person, or by agent, within a reasonable time, and to give in a written statement of their respective claims as respects the fact of actual possession of the subject of dispute. And the Magistrate or other officer as aforesaid shall without reference to the merits of the claims of any party to a right of possession proceed to enquire what party was in possession of the subject of dispute when the dispute arose, and after satisfying himself upon that point shall record a proceeding declaring the party whom he may decide to have boon in such possession to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time; and, if necessary, the Magistrate or other officer as aforesaid shall put such party into possession, and maintain him in possession until the rights of the parties disputing be determined by a competent Court.

28. Section 4 of that Act enacts "that if any party shall complain to a Magistrate...that he has been without authority of law forcibly dispossessed of any land, premises, water, fisheries, crops, or other produce of lands within the jurisdiction of such Magistrate...whether the same were possessed by such party as proprietor...raiyyat, or otherwise," the Magistrate shall call upon the parties complained against to make defence, and the complaint appears to him to be substantiated, "he shall record a proceeding ordering the party complaining to be put again into possession of the subject of dispute and maintained in possession until the right to possession be determined by a competent Court."

29. Act IV of 1840 was repealed by Act XVII of 1862 from the 1st of January 1862. Section 318 of the Code of Criminal Procedure of 1861 took the place of Section 2 of the Act of 1840, and that section is made applicable to disputes concerning land, premises, water, fisheries, etc., and provision is made for an order relating to possession of the subject-matter of the dispute. Section 530 of the Criminal

Procedure Code of 1872 contains similar provisions still applicable to fisheries amongst other things.. The Code of Criminal Procedure of 1882 in Section 145, substituted for Section 530 of the Code of 1872, restricts for the first time the powers of the Magistrate in such cases to tangible immoveable property. So far as to the criminal law.

30. By Regulation VII of 1822, Section XIV Clause 4, "if any person shall complain to a Collector or other officer making or revising the settlement of any mehal that he has been wrongfully dispossessed from any lands, premises,...fisheries...or that he has been wrongfully disturbed in the possession thereof, it shall be competent to the Collector...to enquire...and to restore or confirm him."--See also Section 34. This Regulation is, of course, still in force. In Bombay similar powers were conferred by Act XVI of 1838 upon the Revenue Courts, and by the Bombay Mamlutdars Act, V of 1864, Section 1, the mamlutdars had power to give immediate possession of all lands, crops, trees, fisheries, etc., to any parties dispossessed of the same or of the profits thereof otherwise than in due course of law.

31. It seems to me clear that the terms possession and "dispossession" are, according to the established use of those terms by the Legislature here, properly applicable to the property in question in this case, and, I would add, to all property which is within the definition of "immoveable" in the General Clauses Act whether such property be "corporeal, or "tangible," or not and that there is nothing in the nature of it repugnant to a construction of Section 9 of the Specific Relief Act, which shall make that section applicable to it.

32. I see no answer to Chief Justice Sargent's observation that had it been the intention of the Legislature to exclude incorporeal rights from the operation of Section 9, we might expect that it would have been done in express terms, or by confining the section to "tangible" immoveable property as is done in Section 145 of the Criminal Procedure Code [I.L.R., 12 Bom., 221 (225)].

33. I know of no decision that Section 15 of Act XIV of 1859 is not applicable to this species of property. The decision in Haro Dyal Bose v. Kristo Gobind Sein 17 W.R. 70 related to a right of way and is of course inapplicable, and were a question similar to the question there decided to arise under the Specific Relief Act, Section 9, it must be decided in the same way, since easements are not within the definition of immoveable property in the General Clauses Act. I do not think, however, that a decision either way under Act XIV of 1859, Section 15, could affect the question before us. We are here construing an Act passed after the General Clauses Act, by the definition in which we are imperatively bound, in the absence of any repugnancy such as is contemplated by Section 2 of that Act.

34. I think I ought to express, with great respect, my dissent from the opinion (not, I think, suggested in argument) that in the language of Act XIV of 1859 a distinction is made between immoveable property, and interests in immoveable property, as different classes of property: I dissent, too, from the opinion that such a distinction was affirmed by judicial decision.

35. Then with regard to any supposed repugnancy arising from the context, that, I think, could only arise if it should appear that the nature of the relief provided by the Act is repugnant to the character

of the property in question, and this, it seems to me, cannot for a moment be contended. In decrees in suits on title for possession of jalkars possession is in practice habitually awarded to the plaintiff, if successful. But even were this not so, the relief in Section 5(b) and (c) is, I think, appropriate to the nature of incorporeal property; it is granted by the issue of an injunction, just as the interdict was issued to protect the quasi-possession of incorporeal rights under the Civil law, a remedy which was by that law given in the case of servitudes including what we call easements: just as a possessory suit has been held [Anonymous (2 Ves. Sen. (4th ed., 1818), p. 415, note),] to apply to water-courses.

36. I have been led to deal with this case at some length. I do not see how that could be avoided if the question was to be gone into at all. It is an important one, if for no other reason, for this that the jalkar property in Bengal is of great extent and value, and it is a question of serious importance whether the possession of such property is or is not within the protection afforded by a summary suit under Section 9. Jalkar rights are, I believe, often settled as separate estates; are sometimes liable to be sold for arrears of revenue, and are habitually treated (as according to the view I take they ought to be) as immoveable property as fully as any property can be. It is a serious matter to the owners of such property if they are, under the law as it now stands, without any summary remedy for dispossession unless when such dispossession is brought about by criminal force, in respect of which a conviction has taken place--see Section 522, Criminal Procedure Code That, I think, must be the result, if the questions referred are answered in the negative.

37. It was proposed to use the Objects and Reasons of the Bill, before it became law, to show that the section had no application here. One of the learned Judges of this Bench holds that this may be done. I have repeatedly known it to be held inadmissible in argument in this Court, both in Full Benches and in Division Benches. The point is not for decision before this Full Bench and cannot be here decided, and I shall say nothing more upon it than that, should it come for decision before any Bench of which I am a member, I shall feel a difficulty in adhering to my own opinion that the Objects and Seasons of a Bill should not be looked at, in the face of the opinion of Chief Justice Sargent and Mr. Justice Bayley, which I of course regard with the utmost deference.

38. I should add, however, that I do not think that, in the present case, there is any ambiguity or difficulty in the terms of the Act which should lead the Court to refer to any proceedings of the Legislature which might, according to whatever the correct practice of the Court may be, be otherwise properly consulted.

39. I would answer the questions referred in the affirmative.

O'Kinealy, J.

40. It appears from the record of this case that Fadu Jhala brought a suit against Gour Mohun Jhala and others in the Court of the Munsif of Netrokona in the district of Mymensingh, under Section 9 of the Specific Relief Act (Act I of 1877), for possession of a jalkar. Admittedly, plaintiff had no right to the soil where the fishery existed, and the Munsif being of opinion that such a suit did not fall within the purview of that section, dismissed it.

41. The plaintiff did not appeal, but he obtained a rule in this Court calling upon the other side to show cause why the judgment of the Munsif should not be set aside on the ground that he had declined to exercise a jurisdiction under which he was competent to try the case. But the Munsif had jurisdiction over the subject-matter of the litigation, he exercised that jurisdiction, tried the case and decided it, and though his decision may be wrong, yet, as pointed out in *In re Bagram* 20 W.R. 10 *Amir Hassan Khan v. Sheo Baksh Singh* I.L.R. 11 Cal. 6 it is not subject to revision.

42. Two views have been taken of the scope of Section 9 of the Specific Relief Act. In the case of *Bhundal Panda v. Pandol Pos Patil* I.L.R. 12 Bom. 221 it was held that the right to fish in another man's land fell within the section; and the principle of that decision was followed in the case of *Krishna v. Akilanda* I.L.R. 13 Mad. 54. On the other hand, in the case of *Natabar Parue v. Kubir Parue* I.L.R. 18 Cal. 80 it was held by a Division Bench of this Court that the right of fishing in land which is the property of another, is not immoveable property within the meaning of that section.

43. In this state of the authorities the Judges of the Division Bench who heard the rule referred the following question for our decision:

Whether a suit for the possession of a right to fish in a khal, the soil of which belongs to a person other than the plaintiff, or does not belong to the plaintiff, comes within the provisions of Section 9 of the Specific Relief Act?

44. In order to arrive at a proper decision of the question, it is necessary to go back to Act XIV of 1859, from the 15th and 17th sections of which Act Section 9 of the Specific Relief Act was taken. Clause 12 of Section 1 of that Act declared that in suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of the Act applied, the period of 12 years from the time of the cause of action was the period of limitation; and Section 15 provided that if any person was dispossessed of immoveable property, he could institute a suit to recover possession of such property within six months from the date of dispossession. There were thus two classes of suits dealt with in the Act separately and distinctly; one class referred to immoveable property only; the other not referring to immoveable property but what was termed an interest in immoveable property.

45. The distinction between these two kinds of property was the subject of several decisions under that Act. One of the most elaborate discussions is to be found in the case of *The Collector of Thana v. Krishnanath Govind* I.L.R. 5 Bom. 322 (335). There Mr. Justice Melvill, referring to Clause 12, Section 1 of Act XIV of 1859, held that "the terms" immoveable property 'and' interest in immoveable property are to be held to include not only lands and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property, properly so called, and, therefore, to use the language of the old English lawyers, 'savour of the realty.' Incorporeal hereditaments, which are of a purely personal nature, and do not savour of the realty, are moveable property. If regard be had only to ordinary principles of construction, it will not generally be difficult to say within which of these two classes the subject-matter of a suit should be placed. Rights of common, rights of way, and other profits in alieno solo, rents, pensions and annuities secured upon land,--all these clearly constitute

an interest in immoveable property. Pensions and annuities not secured upon land, houses, or the like, as clearly do not constitute such an interest."

46. In that case there was a difference of opinion between the Chief Justice and Mr. Justice Melvill as to whether the subject-matter of the suit was an interest in immoveable property. This difference of opinion was decided ultimately in favour of the opinion held by the Chief Justice, but the decision in no way turned upon any distinction between immoveable property and an interest in immoveable property.

47. A similar opinion in regard to the same words was expressed by a Division Bench of this Court in the case of *Lolla Gobind Suhaye v. Munohur Misser* 1 W.R. 65 (66) in which it was held that the words "interest in immoveable property" used in Clause 12, Section 1 of Act XIV of 1859, referred to an estate or interest less than the fee-simple which a party might have in the corpus of any property. It is clear, therefore, that if the principle of these judgments be followed, a right to open a water-course or an easement as was held in *Oodoyessuree v. Huro Kishore Dutt* 4 W.R. 107 and *Mohunt Deo Surun Poory v. Moonshea Mahomed Ismail* 24 W.R. 300 would not be immoveable property, but only an interest in it; and the same conclusion must be drawn in regard to fisheries in the property of another--*Parbutty Nath Roy Chowdhry v. Madho Pane* I.L.R. 3 Cal. 276.

48. The very few decisions which we have in regard to Section 15 of that Act are in favour of the same view. In the case of *Kalee Chunder Sein v. Adoo Shaik* 9 W.R. 602 Mr. Justice Phear in delivering the judgment of the Division Bench, said, in regard to this section,--' We think that it was intended by that section solely to give a special remedy for a particular kind of grievance, supposing the party aggrieved chose to go into Court for the purpose within a very limited time, namely, six months. Were it not for the advantages given by that Act, it might happen that a person in undisturbed possession of landed property might be turned out by a stranger,., and might not be able to get back again without invoking the assistance of a Court of Law." And in the case of *Haro Dyal Bose v. Kristo Gobind Sein* 17 W.R. 70 it was held that a right of way did not fall within the section.

49. Thus we see that, so long as Act XIV of 1859 was in force, the words immoveable property in that Act were never held to include easements and rights in the lands of others.

50. Section 15 of Act XIV of 1859 was repealed by the Specific Relief Act (I of 1877), but re-enacted in almost the same language; and what we have now to decide is, what is the meaning of the words immoveable property in Section 9 of the latter Act? We know that, up to the date of the passing of that Act, they were never held to cover rights of the nature referred to in the present suit. Whether the Legislature intended that the words "immoveable property," which had already had a meaning determined by the Courts of Justice, should be used in that sense or in some other sense, is the question for our decision.

51. Section 5 of the Specific Relief Act provides different kinds of specific relief, and the first is, by taking possession of certain property and delivering it to the claimant; so that we see that the Act did not cover all kinds of property, moveable and immoveable, but only such as were capable of

being taken possession of, and of which possession could be delivered. It is unnecessary, at present, to refer to the other modes of relief given in Section 5. Section 8 shows clearly that a person entitled to possession of specific immoveable property may recover it in the ordinary manner provided by the Code of Civil Procedure. In Section 9 the word "specific" does not appear, but looking, at Section 5 and at Section 8 of the Act, the words "immoveable property" in Section 9 have, in my opinion, the same meaning as the words "specific immoveable property" in Section 8.

52. We find in the Procedure Code the same distinction between immoveable property and an interest in immoveable property as existed in Act XIV of 1859. Section 16 clearly distinguishes between these two classes of suits. The change was introduced in the Code of 1877. During that year there was a general revision of the Codes, and the Acts relating to specific relief, civil procedure, and limitation were passed within a limited period. All these Acts must, if possible, be read as consistent with each other, and we should expect from Sections 50 and 54 of the Code that, as is the case, the distinction between suits for immoveable property and suits for an interest in it referred to in the Limitation Act correspond to a similar distinction in the Code of Civil Procedure.

53. In the same way the further division of immoveable property into two sub-divisions, namely, specific immoveable property and immoveable property (not specific), is found both in the Specific Relief Act and the Code of Civil Procedure, and for the first time. On turning, as directed in Section 8, to the present Code of Civil Procedure, which on this point does not differ from the Code of 1877, to find what property comes under the description "specific immoveable property," we find for the first time, in No. 94 of Schedule IV of that Code, the forms of plaints in suits for specific immoveable property, and they all refer to houses or estates in land. The current of decisions and the legislation in regard to fisheries in the soil of another is in favour of the same view. Before the passing of Act IX of 1871, such fisheries were looked upon by their Lordships of the Privy Council as incorporeal (hereditaments, importing no right to the soil--*Forbes v. Meer Mahomed Hossein* 12 B.L.R. 210; *Baradacant Roy v. Chandra Kumar Roy* 2 B.L.R. P.O. 1; and under Act IX of 1871 they were looked upon as an interest in immoveable property for the purposes of limitation. When this Act was with other Acts recast in 1877, they were reduced to the position of easements--not only for the purpose of limitation, but also in regard to their nature and mode of acquisition--*Chundee Churn Roy v. Shib Chunder Mundul* I.L.R. 5 Cal. 945. If, therefore Section 9 of Act I of 1877 applied to such rights, we should have this anomalous condition of things, that in a possessory action they would be dealt with as specific immoveable property, while in suits on title they would be treated as easements, and in each case the proof would be essentially different. In the possessory action previous possession would suffice, while in an action on title, possession would not enter into the question, and instead of getting a title by 12 years' adverse possession, the plaintiff would be compelled to prove 20 years' "user" of the right--*Chundee Churn Roy v. Shib Chunder Mundul* I.L.R., 5 Cal. 945 *Lachmeswar Singh v. Manowar Hossein* I.L.R. 19 Cal. 253; L.R. 19 I.A. 48. Nor is this anomalous result confined to those Acts. There is another General Act, namely, Act IV of 1882, which deals with the transfers of property. By it property of every kind (moveable and immoveable) may be transferred subject to certain exceptions, and one of them is, that an easement cannot be transferred without the dominant heritage. An easement with which the interest in the present litigation is ranked is consequently an interest of the lowest grade of the weakest kind. But although every kind of immoveable property is, subject to the limitation prescribed by Section 6 of that Act, capable of

being transferred, every kind of immoveable property which is transferable cannot be the subject of a mortgage. The law confines the right of mortgage to "specific immoveable property." If the view contended for by the party who obtained this rule be correct, we are forced to hold that easements, though incapable of transfer, can be the subject-matter of a mortgage. These are the only Acts in which the words specific immoveable property" are found. So far, therefore, as can be gathered from a comparison of these Acts, it would appear that the Legislature in 1877 decided on dividing immoveable property into two classes, "specific immoveable property" and "ordinary immoveable property (not specific)," and described the higher class, namely, specific immoveable property, as land or property in the nature of land, and limited the possessory action given by Section 9, Act I of 1877, to property of this nature.

54. This opinion is strengthened by the second portion of Chapter I, which refers to an action in detinue, namely, the possession of specific moveable property. The nature of this action, which was introduced from the English law, is well known. It would not lie for moveables which were mixed up and not ascertained; nor does it lie now under Section 11 of the Specific Relief Act. It would only lie for some particular article of moveable property capable of being seized and delivered up to the winning party. Moreover, it appears clear that, in regard, at least, to some incorporeal rights, the Legislature of the period did not think that possession under Section 9 of the Specific Relief Act was proper form of relief. Section 54 of that Act refers to injunctions, and under illustration (p) of that it would appear that a declaration and injunction would be the proper form of relief; and if we compare this with the forms in Schedule IV of the Procedure Code, there is reason to conclude that the Legislature of the period intended to afford nothing more than the ordinary relief given by English law for injuries to incorporeal rights, namely, damages for trespass and injunction, but not possession.

55. At the hearing of the case the pleader who showed cause against the rule asked leave to refer to the Statement of Objects and Reasons made by the Legal Member of Council in the Specific Relief Bill which he introduced in the Council. Upon being asked whether he pressed to have the document referred to, he withdrew his request. Perhaps it might be considered from the manner in which it was met, and from the withdrawal of his request, that there is some legal objection to a Judge referring to the document, and it is in order to show that none exists that I refer to the several cases in which the proceedings of the Legislative Council have been referred to.

56. In the case of Shaik Moosa v. Shaik Essa I.L.R. 8 Bom. 241 247 the question as to whether the Objects and Reasons of a Bill could be referred to was raised and decided at page 247. There Sargent, C.J., in delivering the judgment of the Court said: "On the authority of *In re Mew* 31 L.J. Bkcy., 87, I think the objects and reasons may be referred to. I think they may be regarded as in the same position as the documents permitted to be used in that case. I would, however, base my decision on the established practice of this Court, where it has for many years been our "custom, in cases like the present, to refer to the Objects and Reasons presented to the Legislature. Here we are asked to look at them for the purpose of ascertaining the intention of the Legislature in a case in which that intention, so far as appears from the Act itself, appears doubtful. Considering that these Objects and Reasons are really the formal statement made by the Legal Member of Council who introduced the Bill, I think [368] we cannot refuse to allow them to be used. I do not, however, think

we can go further and look at the various forms in which the Bill was brought before the Legislature." Again, in the case of *Yesu Ramji Kalnath v. Balkrishna Lakshman* I.L.R. 15 Bom. 583 the Chief Justice in delivering judgment said: "We may, however, draw attention (as has been frequently done in deciding difficult questions of construction arising on Acts of the Indian Legislature) to the last report of the Special Committee to whom the Bill was referred during the passing of the Act of 1887 through the Legislative Council (see Volume XVI, page 466, of Proceedings of the Legislative Council), which points to the conclusion that the words 'bond fide' were advisedly omitted from the article, to exclude the possible inference that absence of such, notice was necessary to enable the purchaser to avail himself of the article."

57. So far, therefore, as the Bombay Presidency is concerned, reference to some of the proceedings, of the Legislative Council has been allowed from a very long time to be made even by Counsel, and this is the settled practice in that Court.

58. Nor is there much reason to conclude that the question is on a less firm basis in regard to Bengal. So far back as 1883, in the case of *Moothora Kant Shaw v. The India General Steam Navigation Co.* I.L.R. 10 Cal 166 Mr. Justice Prinsep, though considering it then unusual, referred to the Objects and Reasons of the Contract Act in order to find out the intention of the Legislature; and in the case of *Queen-Empress v. Kartik Chunder Das* I.L.R. 14 Cal. 721 the Judges constituting a Pull Bench of this Court, in dealing with the intention of the Legislature, said at page 728: "But we thought it right from the proceedings of the Legislative Council at the time this measure was in preparation to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Courts here in recent times; and in a case of such difficulty and importance as this appeared to be we felt bound to adopt it." Subsequently, after referring to the two reports made by the Legislative Council, the Judges decided the question before them.

59. If the report of these cases are correct, in neither of them was any reference made to the proceedings of the Legislative Assembly during the course of argument.

60. It would, therefore, appear that unless these two Pull Bench decisions are overruled, which cannot be done by any Pull Bench of this Court, like the present, that the right of a Judge to refer to some of the proceedings of the Legislative Council in order to arrive at the intention of the Legislature, cannot now be questioned in this Pull Bench.

61. If then we turn to the Objects and Reasons assigned by Sir Arthur Hobhouse when introducing the Bill for Specific Relief, a Bill which" was carried in the form in which it was introduced, we find in paragraph 4 the following statement: "The chapter relating to the recovery of possession of specific property embodies the English rules as to detinue, and the useful provision of the Indian Act XIV of 1859, Section 15, as to the right of persons informally dispossessed of land to recover possession by a summary suit. Words have been introduced to show expressly that this provision does not apply to lands claimed to belong to Government. This exemption in effect resulted from Section 17 of Act XIV of 1859 {Gazette of India, Dec. 11, 1875, Part V. p. 258}."

62. Here, then, we have an express statement that in the opinion of the Member of Council who introduced the Bill, Act XIV of 1859, Section 15, referred to persons informally dispossessed of land. He did not say it referred to immoveable property in general, and the manner in which he framed the forms in the Procedure Code is opposed to the idea that this was his view. There seems nothing unreasonable in supposing that the Legal Member was as well aware of the General Clauses Act as we are. It was in conformity with this interpretation that he introduced that section into Section 9 of the Specific Relief Act. This intention may be assumed to have been known to all the Members of Council when the Bill was introduced and the section was passed as it stood in the Bill. If the subject-matter under consideration were the intention of parties to an agreement, the evidence would be conclusive, and as it is, it seems almost conclusive as to the intention of the members constituting the Legislative Assembly as to the object of the Act. It would therefore appear that the words "immoveable property" in Section 9 of Act I of 1877, do not include rights of the nature involved in this litigation. The conclusion at which, in my opinion, we should arrive is, that the rule should be discharged.

Ghose, J.

63. I am of opinion that a suit for the possession of a right to fish in a khal, the soil of which belongs to another person, does not come within Section 9 of the Specific Relief Act; but I must confess that it is after some hesitation that I have arrived at this conclusion. The hesitation has been owing chiefly to the fact that a case like this was cognizable by a Criminal Court under Section 4, Act IV of 1840; and Section 15, Act XIV of 1859 (reenacted in Section 9 of the Specific Relief Act) suggests the idea that the Legislature in 'framing that section probably intended to transfer to the Civil Court the summary powers which were then vested in the Criminal Courts in cases mentioned in Section 4, Act IV of 1840--cases relating not only to lands and other immoveable properties of that nature, but also cases of the other descriptions, i.e., fisheries, etc., referred to therein. But I observe that Section A of Act IV of 1810 was not repealed by Act XIV of 1859, and apparently the Criminal Courts, notwithstanding Section 15 of that Act, continued to have the summary powers vested in them by Section 4, Act IV of 1840, until the passing of the Criminal Procedure Code Act, XXV of 1861, when the said powers were practically taken away, there being no section in the Criminal Procedure Code corresponding to Section 4 of Act IV of 1840, and Section 318 of the Code being limited to cases where, in consequence of disputes relating to possession of immoveable property, one of the parties had to be maintained in possession. Act IV of 1840 was not, however, expressly repealed until the passing of Act XVII of 1862. It seems to me, therefore, that it could not be rightly said that the summary powers of restoring a party to possession of lands, fisheries, etc., were transferred from the Criminal Courts to the Civil Courts. It will also be observed that the language of Section 15, Act XIV of 1859, is somewhat different from Section 4, Act IV of 1840. The former uses the words "immoveable property," the latter, 'land, premises, water, fisheries, crops or other produce of land'; and I am not prepared to say that the Legislature, in using the words "immoveable property" in Section 15 meant to refer exactly to the same classes of cases which were mentioned in Section 4, Act IV of 1840.

64. The General Clauses Act was not passed until some years afterwards; and although no doubt a fishery, or a right to fish in another person's property, may be brought within the definition of

"immoveable property," as given in that Act, still the question is whether Section 15, Act XIV of 1859, contemplated, and Section 9 of the Specific Relief Act contemplates, cases where the party aggrieved does not and cannot claim actual or physical possession of the immoveable property, but merely claims a certain "interest in immoveable property," or a right with respect to it. I agree with the Chief Justice and O'kinealy, J., whose judgments I have had the opportunity of reading, in thinking that the section refers only to such properties of which physical possession could be delivered--and this is substantially the view that was expressed in Haro Dyal Base v. Kristo Gobind Sein 17 W.R. 70 a case under Section 15, Act XIV of 1859, and in Tarini Mohun Mozumdar v. Gunga Prosad Chuckerbutty I.L.R. 14 Cal. 649 with reference to Section 9 of the Specific Relief Act. And this view seems to be supported by the objects and reasons given by the then Law Member of the Legislative Council, when he introduced the Bill for Specific Relief. The words which occur therein are:

The chapter relating to the recovery of possession of specific property embodies the English rules as to detinue and the useful provisions of the Indian Act XIV of 1859, Section 15, as to the right of persons informally dispossessed of land to recover possession by a summary suit (Gazette of India, Dec. 11, 1875, Part V, p. 258).

65. The words "recovery of possession of specific property", "informally dispossessed of land", are to my mind significant as indicating the intention of the Legislature. And I might here say that I agree with O'kinealy, J., in thinking that in determining what was the intention of the Legislature, we might properly refer to the objects and reasons.

66. It has been said that, although no actual possession of the property could be delivered to the party aggrieved in a case under Section 9, still specific relief could be given by injunction in one of the two modes (b) and (c) indicated by Section 5 of the Act. These two clauses speak of an "obligation" to do, or to refrain from doing, an act; and they, therefore, presuppose a determination of the question of the legal obligation of the party upon whom an order for specific relief is to be made; but I do not think that the Civil Court in a case under Section 9 could be called upon to determine [as I think it would be bound to determine if an order under Clauses (b) or (c) has to be made the question whether the defendant is under an "obligation" to allow the plaintiff to fish or to refrain from obstructing him to fish. The enquiry under Section 9 is expressly a summary enquiry: it says, "If a person is dispossessed...he may recover possession thereof, notwithstanding any other title that may be set up in such suit." So that the section itself precludes the determination of the question of the "obligation" of the defendant. I am inclined to think that Clause (a) in Section 5 is the only clause which provides for the specific relief contemplated by Section 9 of the Act, viz., "by taking possession of certain property and delivering it to a claimant."

Petheram, C.J.

67. As the opinion of the majority of the Court is that the suit is not maintainable under the Act, the rule will be discharged. We make no order as to costs.