APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1914

May 26.

JIBANANDA CHAKRABARTY

v.

KALIDAS MALIK.*

Easement—Prescriptive right to take water by means of definite mode of access—Whether owner of servient tenement may substitute some other means of access.

When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access: the servient owner, at his own discretion, may not substitute for his use some other means of access.

SECOND APPEAL by Jibananda Chakrabarty and others, the defendants.

The facts of this case are briefly as follows. The defendants owned a tank standing on their land. The plaintiffs, who were neighbours residing at some distance towards the east of the tank, had, together with the members of their family, used the water of this tank for more than 20 years and claimed title thereto as an easement. The plaintiffs used to obtain access to the water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the defendants re-excavated the tank, repairing the slopes on all sides and built a flight of masonry

* Appeal from Appellate Decree, No. 3840 of 1912, against the decree of Asutosh Banerjee, Subordinate Judge of Burdwan, dated Sept. 2, 1912, affirming the decree of Narayan Chandra Ghosh, Munsif, Burdwan, dated April 8, 1911.

steps on the northern slope. Since then the defendants had prevented the plaintiffs from having access to the water in the accustomed manner. The defendants, however, did not deny that the plaintiffs had acquired a right of easement in the water of the tank, and were agreeable to their using the water by means of a new flight of steps built on the northern slopes. The plaintiffs thereupon filed a suit in the Court of the Munsif of Burdwan for a declaration of their prescriptive right to take water from the tank, for removal of the obstruction erected by the defendants to the exercise of such right, and for an injunction to restrain interference in future. On the 8th April 1911, the learned Munsif decreed the plaintiffs' suit, and on appeal by the defendants the learned Subordinate Judge of Burdwan dismissed their appeal on the 2nd September 1912. The defendants appealed to the High Court.

Babu Bepin Behari Ghose (with him *Babu Ramani Mohan Chatterjee*), for the appellants. I submit that the plaintiff respondent could have acquired no right of easement by taking water from accidental breaks in the embankment of the tank and as all such breaks were filled up after re-excavation of the tank, the plaintiff could not force the defendants (who are the new purchasers of the tank) to open a ghat for the plaintiff. The defendants after purchase repaired all breaches in the embankment of the tank and erected a fence for preventing other people including the plaintiff from opening, "*hanas*" or breaks in the embankment. The plaintiffs instituted criminal proceedings for removal of the fence, and being unsuccessful they instituted the present suit for declaration of their right to draw water from the defendant's tank from a particular "*hana*" to be made. This

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suit must therefore be dismissed, as the right claimed by the defendants cannot be allowed.

Babu Gour Chandra Pal, for the respondents. My contention is that the plaintiffs used to draw water from a particular ghat, and it matters little whether it was a "*hana*' or a regular ghat. They acquired the right to draw water, having done so for over the statutory period, and the defendants on the plea of re-excavating the tank cannot obliterate that ghat. And, further, the erection of the fence by the defendants showed their malicious intention to illegally restrain the plaintiffs from exercising their just rights. Though they were invited to draw water from the masonry ghat on the north bank of the tank yet that proposal cannot take away their right of drawing water from the particular ghat or "*hana*" on the eastern bank. The appeal should, therefore, be dismissed.

Babu Bepin Behari Ghose, in reply.

Cur. ad. vult.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the defendants in a suit for declaration of the prescriptive right of the plaintiffs to take water from a tank, for removal of the obstruction erected by the defendants to the exercise of such right, and for an injunction to restrain interference in future. The facts are not in controversy at this stage and may be briefly narrated. The defendants are the owners of a tank which stands on their land. The plaintiffs are neighbours and have their residence at some distance towards the east of the tank. They and the members of their family have, for more than 20 years, peaceably and openly, as of right and without interruption, used the water of the tank, and claiming title thereto as an easement. They used to obtain access to the

water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the defendants re-excavated the tank, repaired the slopes on all sides and built a flight of masonry steps on the northern slope. Since then, the defendants have prevented the plaintiffs from access to the water in the accustomed manner by what has been described as the eastern ghat. The defendants, however, do not deny that the plaintiffs have acquired a right of easement in the water of the tank, and they are agreeable to the use of the water by them by means of the new flight of steps built on the northern slope. But the plaintiffs are not satisfied with this and insist on their right to reach the water by what formed the eastern ghat and has now been obliterated by the defendants. The question consequently arises, whether when the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access, or, may the servient owner, at his own discretion, substitute for his use some other means of access. No authority directly in point has been placed before us by either the appellants or the respondents in support of their respective contentions. But we are of opinion that on principle the question must be answered in favour of the dominant owner.

It is plain, as was pointed out by Lord Campbell C. J. in *Race* v. *Ward* (1), that water as it issues on excavation of a well or a tank, is not to be considered as produce of the soil, and that a right to enter on land and to take such water may be acquired as an

(1) (1855) 4 E. & B. 702 ; 99 R. R. 702.

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easement: *Manning* v. *Wasdale* (1), *Constable* v. *Nicholson* (2), *Macnaghten* v. *Baird* (3), *Gardner* v. *Hodgson*(4). This right it is obvious, may be analysed into two constituent elements, namely, a right to go on the land of the servient owner and a right to take the water which stands on his land, and so long as it stands there, is his property. The two constituent rights are acquired simultaneously, but each must nevertheless be acquired in conformity with the statute. Now, in so far as a right of way is concerned, it is clear that to establish a private right of way by prescription it is necessary that in going across the land to any particular point or for any particular purpose a particular route must be used. As Morton J. puts it on behalf of the Full Bench in *Hyot* v. *Kennedy* (5), "to establish a way by prescription, the use must be not only open, adverse, uninterrupted, peaceable, continuous, and under a claim of right, but must be confined substantially to the same route and to substantially the same purpose for which the way was designed originally, unless the way is one for all purposes." This is plain, for a way imports of necessity a right of passing along a particular route between certain termini: *Jones* v. *Percival*(6), *Holmes* v. *Seely*(7), *Rogers* v. *Duncan*(8). On this principle it has been ruled that the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been

(1) (1836) 5 A. & E. 764; 44 R. R. 576.
(2) (1863) 14 C. B. N. S. 230.
(3) [1903] 2 I. R. 731.
(4) [1901] 2 Ch. 148.
(5) (1898) 170 Mass. 54.
(6) (1827) 5 Pick. 485.
(7) (1828) 19 Wendell. 507.
(8) (1890) 18 Can. Sup. Ct. 710.

accustomed to pass from the field to the way and to make a new entrance at a fresh place: *Woodyer* v. *Haddon* (1), *Beridge* v. *Ward*(2), *Marshall* v. *Ullswater S. N. Co.*(3). The rule is based on obvious good sense, for though the servient owner may not object to a person entering his land at a particular spot, for that may not cause him any inconvenience, it may be very much against his inclination, and it may be detrimental to his property that the dominant owner should enter it at any other place. But the position is clearly mutual, and if the right of way has been acquired from one point to another in a particular direction, the servient owner cannot, at his choice, substitute another way between the same points but by a different route, which might be less convenient to the dominant owner. It is for the protection as well of the dominant as of the servient owner that the right acquired should be limited to the part of the area of the servient tenement over which it has been actually exercised: *Clifford* v. *Hoare* (4), *Wood* v. *Stourbridge Ry. Co.* (5), *Strick & Co.* v. *City Officers Co.* (6). To put the matter briefly, the extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period: or, as Lord Watson stated it in *MacIntyre Brothers* v. *McGavin* (7), a prescriptive right to take water in a particular way and at a particular place infers no right to take the supply of water in any other way and at any other place: *Blackburne* v. *Sommers* (8), *Hussain Rowther* v. *Abubakar* (9). We are not here concerned with the

(1) (1813) 5 Taunt. 126, 132.
(2) (1860) 2 Fos. & Fin. 208, affirmed in (1861) 10 C. B. N. S. 400.
(3) (1871) L. R. 7 Q. B. 166.
(4) (1874) L. R. 9 C. P. 362.
(5) (1864) 16 C. B. N. S. 222.
(6) (1906) 22 T. L. R. 667.
(7) [1893] A. C. 268, 277.
(8) (1879) L. R. 5 Ir. 1.
(9) (1909) 20 Mad. L. J. 699.

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question of the alteration of the mode of enjoyment of a right of easement by mutual consent of parties, nor are we called upon to examine the question of the right of the dominant owner to deviate from the way acquired by prescription, when such way has been obstructed by the servient owner himself: *Selby* v. *Nettlefield* (1), *Hawkins* v. *Carbines* (2). The general rule is that when a right of way by a particular track has been acquired by a dominant owner, the servient owner, cannot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his discretion, take recourse to a different path. Tested in the light of this principle, the claim of the plaintiffs is un-answerable. They have proved to the satisfaction of the Courts below, that, for much longer than the statutory period, they have had free access to the water of the tank of the defendants by a track across the eastern bank and by a flight of steps down the eastern slope. The prescriptive right they have acquired has become indefeasible and the defendants were not entitled to improve the tank so as to interrupt and make impossible the exercise of the right of the defendants in the particular mode they had adopted for many years. The position might have been different if the plaintiffs had merely proved that they had appropriated the water of the tank for the statutory period and had failed to show that they had used a definite means of access to reach the water; in such a contingency, while the plaintiffs would have acquired a prescriptive right to use the water, they could not have claimed access to the tank by a particular path; they would have had no ground for complaint so long as the defendants allowed them reasonable facilities of approach to the tank. In the case before us, however,

(1) (1873) L. R. 9 Ch. App. 111, 114. (2) (1857) 27 L. J. Ex. 44.

the plaintiffs, as we have seen, stand in a position of much greater advantage; they have acquired a right to reach the water by a definite path and also a right to use the water. We may add that the conduct of the plaintiffs is really not quite so unreasonable as has been characterised by the defendants. The access to the water of the tank by way of the flight of new masonry steps on the northern slope involves the use of a longer and more circuitous way and what is more important, a loss of privacy, to which so much importance is attached by females in this country. But it is immaterial what motive animates the plaintiffs, for, as Lord Halsbury, L. C. said in *Mayor of Bradford* v. *Pickless*(1), no use of property which would be legal if due to a proper motive, can become illegal, because it is prompted by a motive which is improper or even malicious. We are of opinion that as the plaintiffs have acquired a right, not merely to the use of the water of the tank of the defendants but also to have access to the water in a particular mode, the Court of first instance rightly decreed the suit; and as that decree has been confirmed by the Subordinate Judge, this appeal must be dismissed with costs.

G. S. *Appeal dismissed.*

(1) [1895] A. C. 587.