APPELLATE CIVIL.

Before Pearson and Chakravarti JJ.

1926

June 23

BHABADEB CHATTERJEE
v.
BHUSAN CHANDRA MUKHERJEE*

Easement—Profit a prendre—Tank—Dedication for public use—Presumption—Bathe and immerse idols, right to—User, long continued—Limitation Act (IX of 1908) ss. 2, 26—Other modes of acquiring easements.

Per PEARSON J. The word "easement" in its use in section 26 of the Indian Limitation Act, as shown by the explanation in section 2, is wider than the meaning of that word in English Law and would include at least a *profit a prendre.*

Bhola Nath Nandi v. *Midnapore Zemindary Company* (1) referred to.

The object of that statute was to make more easy the establishment of rights of this description; but it is remedial, and neither prohibitory nor exhaustive; and it does not exclude or interfere with other modes of acquiring easements.

Rajrup Koer v. *Abul Hossein* (2) referred to.

There is nothing unreasonable in the right claimed, (*viz., inter alia* right to bathe and immerse idols in a tank) which is one without which in this country probably village life could not go on.

From the long continued user, which has been proved in the present case, it is reasonable to presume a dedication of the tank to those uses.

Channanam Pillay v. *Manu Puttur* (3) referred to.

Per CHAKRAVARTI J. When one finds that a tank has existed for a very long time and the public in its neighbourhood have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use.

It is not necessary, therefore, to seek the aid of section 26 of the Limitation Act for the acquisition of such a right.

* Appeals from Appellate Decrees, Nos. 543 and 544 of 1923, against the decree of P. E. Cammiade, District Judge of Burdwan, dated June 10, 1922, affirming the decree of Indu Sekhar Bose, Munsif of Burdwan, dated June 30, 1920.

(1) (1903) I. L. R. 31 Calc. 503. (2) (1880) I. L. R. 6 Calc. 394.
(3) (1891) 1 Mad. L. J. 47.

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SECOND APPEAL by Bhabadeb Chatterjee, the defendant.

The facts of the cases out of which these two appeals arise appear fully in the following judgment of Mr. P. E. Cammiade, District Judge of Burdwan :—

The appellant in both the cases is the first defendant, who is said to be the owner of a tank, known as Benepukur, situated within the Radhanagar quarter of the town of Burdwan. The respondents were plaintiffs in two suits, in which they asserted their right to use the water of the tank for various purposes. Appeal No. 254 arises from suit No. 280, in which the respondent Bhusan Mukherjee, was the sole plaintiff. In suit No. 282, out of which appeal No. 255 arises, there were seven plaintiffs, and that suit has been decreed in favour of four of these plaintiffs. The plaintiffs based their right to the use of the waters of the tank on continuous, peaceful, open user as of right for over 20 years, and they also asserted the existence of a customary right. The defendant denied the existence of the disputed ghat and also denied user by the plaintiffs. His case is that the tank used to be polluted by sweepers, and that for this reason he had closed access to it from the road. The learned Court below found that the present respondents had proved their user of the tank in the manner alleged by them for over 20 years and decreed the suits.

In appeal it is contended, *first*, that the evidence does not establish user for over 20 years, and *secondly* that, as the plaintiffs have adduced no evidence to prove that they are the proprietors of the lands, on which their houses stand, they cannot acquire a right of easement.

As regards the proof of user, I have been taken through the depositions of the witnesses. It is true that there are certain passages in the deposition of the witness Tincouri which speak of Bhusan's and Sidheswar's residence in the locality as dating back from less than 20 years before suit ; but not only are there other statements in Tincouri's deposition proving user by the other plaintiffs for a much longer period, but there are also the depositions of several respectable witnesses who prove user for more than 20 years.

As regards the question of law, it is true that the plaintiffs asserted in the plaint that the easement claimed by them was appurtenant to their homesteads, and that they have failed to adduce evidence of their proprietary rights in those homesteads. Nevertheless, the plaintiffs, having proved user for over 20 years, peacefully, uninterruptedly, openly and as of right, are entitled to a decree declaring the rights to continue to use the waters of the tank in the manner claimed.

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The rights that are claimed are not easements proper as they are understood in English Law, and their enjoyment does not necessitate the existence of a dominant tenement. The majority of the plaintiffs claim to bathe at the ghat, wash their utensils and clothes there and to draw water. The plaintiff, Bhusan, further claims to be entitled to immerse his idols at the ghat after the performance of Lakhi Puja and Jagadhatri Puja and to perform Sasti Puja. None of the rights claimed can be said to be inseparable from land, like an easement of light and air or an easement of support. They are what are known in English Law as rights in gross; but *in India they are also included amongst easements, and they are capable of being acquired by prescription.*

The appeals, therefore, fail and are dismissed with costs."

The defendant thereupon preferred this Appeal to the High Court.

Babu Baranasibasi Mukerjee, for the appellant.
Babu Sarat Kumar Mitra, for the respondent.

Cur. adv. vult.

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

The argument on behalf of the appellant has been rested very largely upon considerations arising upon the English authorities relative to the law of easements prevailing in that country, though it is indeed conceded that the word in its use in section 26 of the Indian Limitation Act, as shown by the explanation in section 2, is wider than the meaning of the word in English Law and would include at least a *profit a prendre.* In cases of this character attention has been directed by the Judicial Committee to the danger of proceeding necessarily upon English authorities. In *Bhola Nath Nundi* v. *Midnapore Zemindary Co*, (1), a case of villagers claiming a right of pasturage Lord Macnaghten said: "It appears to their Lordships "that on proof of the fact of enjoyment from time in-"memorial there could be no difficulty in the way of

(1) (1903) I. L. R. 31 Calc. 503.

"the Court finding a legal origin for the right claimed. "Unfortunately, however, both in the Munsif's Court "and in the Court of the Subordinate Judge the ques-"tion was overlaid, and in some measure obscured, by "copious references to English authorities and by "the application of principles or doctrines more or "less refined, founded on legal conceptions not "altogether in harmony with Eastern notions". I am of opinion that the present case does not in fact fall to be decided upon a question of easement arising under section 26 of the Limitation Act, and it does not follow that, because the plaintiffs may fail to show their right to relief on that ground, they are therefore entitled to no relief and the suit must fail. As pointed out in *Rajrup Koer* v *Abul Hossein* (1), the object of the statute was to make more easy the establishment of rights of this description; but it is remedial and neither prohibitory nor exhaustive, and it does not exclude or interfere with other modes of acquiring easements. Clearly therefore, it is open to the plaintiff to show, if he can, that be is entitled to a right which may be of that nature although not actually within the strict meaning of the term. It is argued that the Court ought not to make out a case for the plaintiff which he has not made himself, and that the plaintiff in this case has grounded his case on easement and must therefore succeed upon that or not at all. From an examination of the plaint, however, which has been placed before us, it is clear that though mention is made of the plaintiff's claim as upon an easement it is also said to be based on customary right, and in any case what the plaintiff has done substantially is to plead the facts and ask for such relief as he may be entitled to. There is nothing unreasonable in the right claimed, which is one without

(1) (1880) I. L. R. 6 Calc. 394.

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which in this country probably village life could not go on. From the long continued user which has been proved in the present case it is reasonable to presume a dedication of the tank to those uses. As pointed out in *Rajrup Koer's* case (1) the upholding of such a right does not mean that the owner is shut out altogether from improving or dealing with his property. An instance where a right of this nature was upheld is to be found in *Channanam Pillay* v. *Manu Puttur* (2).

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

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

The right claimed by the plaintiff is for the use of the water of the tank for bathing and for other domestic purposes. It was clearly stated in the plaint that the claim is based upon user for over 20 years peacefully, uninterruptedly, openly and as of right. The lower Appellate Court has found upon the evidence that such user by the plaintiff has been fully made out. On this finding the lower Appellate Court has granted a decree to the plaintiff and has affirmed the decree of the trial Court.

The main contention of the defendant appellant is that the right which the plaintiff sought to establish was a right of easement and that in the circumstances of this case the plaintiff's claim cannot be based on easement as contemplated in section 26 of the Limitation Act.

It is a well-established proposition now that section 26 of the Limitation Act does not give an

(1) (1880) I. L. R. 6 Calc. 394. (2) (1891) 1 Mad. L. J. 47.

exhaustive description of the right acquired by long user.

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

In a hot country like Bengal necessity for the user of pure water is very great indeed. A good tank largely supplies such a need and it is only a rich man who can find the money necessary for the construction of such a tank but the poor people also need the water which they cannot themselves provide for. In these circumstances it has been an immemorial custom in this country that those who can afford think it an act of great public benefaction to construct tanks for public use. The Hindu Sastras have laid down in numerous texts the high merits which a man acquires by digging a tank and dedicating it for public use. I shall quote one of such texts which when translated runs as follows:—

"As there is no sustaining of life in both worlds "without water consequently the wise man should "always construct a reservoir of water. A well is "equal to the Agnistama Sacrifice, in a desert it equals "the Ashwamedha" Vishnudharmattora. "Again it "promises heaven to the maker of wells and large "tanks". *See* P. N. Saraswati's Tagore Law Lectures pages 192-193. The words by which the dedication is made are these:—"This water has been given by "me to all beings in common; let all beings be satis- "fied by bathing, drinking and immersion". *See* page 205. Whether from religious views or from a sense of public duty many thousands of such tanks were excavated all over Bengal and dedicated for public use.

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In this country therefore where this mode of dedication is so widely known when one finds that a tank exists from a long time past and the public, that is the people of its neighbourhood, have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not necessary therefore to seek the aid of section 26 of the Limitation Act for the acquisition of such a right. It should also be remembered that in this country a large number of tanks do exist which were intended for private use and no dedication to the public was intended, although as a matter of fact the people in the neighbourhood are ordinarily allowed to use the water. The words used in dedicating such a tank are expressive of a limited use. They are these :—" Let the relations in my family that have "come to this world, or will come into existence in "future have satisfaction by means of the water: let "all beings enjoy it by washing, drinking and bath-"ing", (see Raghu Nandan in his treatise on consecration of tank.) Such private tanks are usually found in the compound of a private house. In such cases the user by the neighbours will of course be merely taken to be permissive. The Court shall find in the circumstances of each case whether the tank is a private one, or one in which a dedication in favour of the public may be presumed. The tank in this suit was not shown to be a private one.

S. A. 544 of 1923.

Our Judgment in S. A. 543 of 1923 governs this appeal also. This appeal is therefore dismissed with costs.

Appeal dismissed.

G. S.