Emperor v. *Madar Bakhsh* (1), *Re Sinnu Goundan* (2), *Crown* v. *Acchar Singh* (3).

In my opinion, this Reference should not be entertained and I would accordingly discharge it.

GRAHAM J. I agree.

A. C. R. C. *Reference rejected.*

(1) (1902) I. L. R. 25 All. 128. (2) (1914) I. L. R. 38 Mad. 1028.
(3) (1923) I. L. R. 5 Lah. 16.

1928.

DABIRADDI NASKAR v. SAKAT MOLLA.

MUKERJI J.

APPELLATE CIVIL.

Before Cuming and Mallik JJ.

SITI KANTA PAL,

v.

RADHA GOBINDA SEN.*

1928.

Dec. 21.

Easement—Inchoate right—Prescription, period of, computation of—User—Uninterrupted—Peaceable—Enjoyment as of right—Grant, lost—Limitation Act (IX of 1908), s. 26, sub-sec. (1), *paras. 1 and 2.*

Paragraph 1 of sub-section (1) of section 26 of the Limitation Act, where the absolute and indefeasible character of a right of easement is mentioned, seems to be clearly controlled by the provisions of paragraph 2 of the sub-section, because the latter does nothing but explain how the period of 20 years necessary under the first paragraph is to be computed.

A title to easement is not complete merely upon the effluxion of the period mentioned in the statute, *viz.*, 20 years: however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit; and, until it is so brought in question, the right is inchoate only; and in order to establish it, when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within 2 years of the institution of the suit. Whether the user had been peaceable or not is a pure question of fact.

For the creation of a right of easement by prescription there must not only be a peaceable and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right.

Long user is not sufficient for a finding of an enjoyment as of right. Whether an enjoyment is as of right or not is a pure question of fact, and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

The question whether there was a lost grant or not is a question of fact.

*Appeals from Appellate Decrees, Nos. 2587 of 1926 and 229 of 1927, against the decrees of R. C. Sen, District Judge of Bankura, dated Sep. 17, 1926, modifying the decrees of Amulya Gopal Roy, Munsif of Bankura, dated Aug. 18, 1925.

1928.

SITI KANTA PAL v. RADHA GOBINDA SEN.

SECOND APPEAL by Siti Kanta Pal and another, defendants Nos. 6 and 7.

The plaintiffs' suit was for a declaration of their title to the " Chatta " tank in Bankura town and for a permanent injunction restraining the defendants from using the water thereof. The trial court held that the defendants had a right of easement for drawing water from the plaintiffs' tank to irrigate their lands and dismissed the suit. On appeal, the plaintiffs succeeded in getting a decree against the Pal defendants, who, thereupon, preferred a Second Appeal to the High Court (No. 2587 of 1926): the plaintiffs also preferred a cross appeal (No. 229 of 1927) claiming a decree against the Dubey defendants.

In S. A. No. 2587, *Mr. Bankimchandra Mukherji* and *Mr. Purnachandra Chatterji* for *Mr. Durgadas Ray*, for the appellants.

Mr. Dwarkanath Chakravarti and *Mr. Kalikinkar Chakravarti*, for the respondents.

In S. A. No. 229, *Mr. Dwarkanath Chakravarti* and *Mr. Kalikinkar Chakravarti*, for the appellants.

Mr. Bankimchandra Mukherji, *Mr. Baidyanath Banerji* and *Mr. Purnachandra Chatterji* for *Mr. Durgadas Ray*, for the respondents.

Cur. adv. vult.

MALLIK J. These two appeals are against the same judgment. They arise out of a suit for a declaration of title and issue of a permanent injunction, a declaration that the defendants have no right to irrigate their lands with the water of a certain tank known as " Chatta " tank and an injunction restraining the defendants from drawing water from this tank for that purpose. There were two sets of defendants—the Dubey defendants, who are defendants Nos. 1 to 5, and the Pal defendants, who are defendants Nos. 6 and 7. Plaintiffs' claim was resisted by the defendants on the allegation that the defendants had acquired a right of easement by prescription, as also from a lost grant. The court of first instance found that all the defendants had acquired

a right of easement, and, on that finding, dismissed the plaintiffs' suit. On appeal by the plaintiffs, the lower appellate court modified the decision of the trial Judge, and holding that, while the Pal defendants had not acquired any right of easement, the Dubey defendants had acquired such a right, decreed the plaintiffs' suit in part. Against this decision, the Pal defendants, as well as the plaintiffs, have appealed to this Court, the Pal defendants in Appeal No. 2587 of 1926 and the plaintiffs in Appeal No. 229 of 1927.

It appears that the lower appellate court found as a fact that all the defendants, the Pals and Dubeys, had been using the water of the tank for the purpose of irrigating their lands for a very long time. But, finding that this user was not peaceable from 1325, which was more than two years before the institution of the suit, the learned District Judge held that there could be no acquisition of a right of easement by prescription under section 26 of the Indian Limitation Act. Mr. Mukherji, for the Pal defendants, contended that the learned District Judge was wrong in holding that the user must be for 20 years, up to within two years of the suit. This contention, in my opinion, is not tenable. Paragraph 2 of section 26, sub-section 1 of the Indian Limitation Act lays down that the period of 20 years required for creating a right of easement shall be taken to be a period ending within 2 years next before the institution of the suit, wherein the claim, to which such period relates, is contested. Mr. Mukherji, in support of his contention, drew our attention to the concluding portion of the first paragraph of section 26 (*1*), where it is stated that, where there is a user for 20 years, the right shall be absolute and indefeasible. But paragraph 1 of the sub-section, where the absolute and indefeasible character of the right is mentioned, seems to be clearly controlled by the provisions of paragraph 2 of the sub-section, because the latter does nothing but explain how the period of 20 years, necessary under the first paragraph, is to be computed. It has been authoritatively held that a title to easement

1928.

SITI KANTA PAL v. RADHA GOBINDA SEN.

MALLIK J.

is not complete merely upon the effluxion of the period mentioned in the statute, *viz.*, 20 years and that, however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit; and until it is so brought in question, the right is inchoate only and, in order to establish it when brought in question, the enjoyment relied on must be an enjoyment for 20 years up to within 2 years of the institution of the suit. I am, therefore, of opinion that the learned District Judge was perfectly right in holding, on the facts found by him, *viz.*, that the long user had not been peaceable from 1325, that the defendants had not acquired any right of easement by prescription under section 26 of the Indian Limitation Act.

The finding of the lower appellate court that the user had not been peaceable from 1325 was also assailed before us. Whether the user had been peaceable or not is a pure question of fact and I do not think, the correctness of the finding, that it was peaceable, can be questioned before us in Second Appeal.

The contention of Mr. Mukherji that the finding of the lower appellate court, that there had been user for a very long time, was sufficient for an easement by prescription is untenable on another ground. For the creation of a right of easement by prescription, there must not only be a peaceable and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right. In the present case, there is no finding that the enjoyment was of that character. It was contended on behalf of the Pal defendants that long user was sufficient for a finding of an enjoyment as of right. This is a proposition of law to which I am unable to accede. Whether an enjoyment is as of right or not is, in my opinion, a pure question of fact, and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

Mr. Mukherji next contended that the lower appellate court should have dismissed the plaintiffs'

case against the Pal defendants, when there was a finding in their favour on the question of a lost grant. But, as I read his judgment, the District Judge's finding on the question of lost grant refers to the Dubey defendants only and the learned District Judge never found the point in favour of the Pal defendants as well. In view of what I have stated above, the judgment and decree of the lower appellate court, so far as the Pal defendants are concerned, cannot, in my opinion, be successfully assailed.

I come now to Appeal No. 229 of 1927—the appeal which the plaintiffs have filed against that portion of the decree of the District Judge, whereby the learned District Judge dismissed the plaintiffs' case as against the Dubeys.

The District Judge has found that the Dubeys, although they failed to substantiate their title to easement by prescription, succeeded in establishing it on a lost grant. Mr. Chakravarti, for the plaintiff appellant, contended that long user was by itself not sufficient for a finding of lost grant. That may or may not be so, but a long user was not the only evidence on the point, so far as the Dubeys were concerned. There was, in their case, the further fact that the land of the Dubeys, as also the "Chatta" tank, were held under the same landlords, the Banerjis of Ajodhya. The question whether there was lost grant or not, is a question of fact, and the lower appellate court, in the present case, on a consideration of the fact of long user, coupled with the fact that the lands of the Dubeys and the tank are held under the same landlords, came to the conclusion that, so far as the Dubeys are concerned, the story of a lost grant had been established.

In view of the aforesaid observations, both the appeals, in my opinion, must fail. They are accordingly both dismissed with costs.

CUMING J. I agree.

Appeals dismissed.

G. S.