APPELLATE CIVIL.

Before Rankin C. J. and C. C Ghose J.

BIPIN BEHARI GHATAK

v.

RAMNATH GHATAK.*

1928

April 25.

Easement—Right of water—Prescriptive right to water running through an artificial channel.

Plaintiffs and defendants occupy lands very near each other, the land of a third party intervening between. Defendants had been taking water, flowing through an artificial channel, into their land, for the purpose of irrigation, for nearly 32 or 35 years, without interruption, every monsoon, through the land of the third person, by cutting the ridge (*ail*) of a plot of land, belonging to the plaintiffs, in one place. Plaintiffs sued for permanent injunction to restrain defendants from cutting the *ail*.

Held, that the defendants had acquired a prescriptive right to take water by cutting the *ail*.

Beeston v. *Weate* (1), followed.

Arkwright v. *Gell* (2) and *Kena Mahomed* v. *Bohatoo Sircar* (3), distinguished.

APPEAL FROM APPELLATE DECREE by the plaintiffs, Bipin Behari Ghatak and another.

This appeal arose out of a suit for a declaration of title of the plaintiffs to the northern *ail* (ridge) of cadastral survey *dag* (plot) No. 3033 of *mouza* Banasuria in district Bankura, for a permanent injunction restraining the defendants from cutting the above *ail*, for a direction to the defendants to fill up the opening made in the *ail* and for recovery of damages.

The plaintiffs' case was that there is a *dahar* (low pathway) on the contiguous east of their *dags* Nos. 3032 and 3033; that during the rainy season, the

* Appeal from Appellate Decree, No. 1602 of 1925, against the decree of M. Iradutullah, District Judge of Bankura, dated April 7, 1925, affirming the decree of M. Hasibuddin Ahmad, Munsif of Bankura, dated July 22, 1924.

(1) (1856) 5 E. & B. 986 ; 119 E. R. 748.
(2) (1839) 5 M. & W. 203 ; 151 E. R. 87.
(3) (1863) Marshall 506.

1928

BIPIN BEHARI GHATAK v. RAMNATH GHATAK.

water of this *dahar* naturally flows towards the west by overflowing their land, viz., dags Nos. 3032 3033; that the water from the *dahar* never passes naturally towards the north; that, in 1328, the defendants cut the northern *ail* (ridge) of dag No. 3033 and took water to their land to the north and thus caused damage to their crop.

The defendants contended *inter alia* that they had a prescriptive right to cut the *ail* in question and take water into their cadastral survey *dag* No. 3057 and other lands towards the north-west of *dag* No. 3033.

The suit was dismissed in the Court of first instance. The appeal before the District Judge by the plaintiffs was unsuccessful.

Hence this appeal.

Mr. Bankim Chandra Mukherji (with him *Babu Nalini Kumar Banerji*), for the appellants. The right claimed by the defendants in the present case is with respect to water that used to accumulate during the rainy season on the *dahar* (pathway). I submit that such a right could not be claimed, as there could be no prescriptive right over the water of a stream which is precarious in its origin. See Goddard on Easements, last edition, p. 317, *Arkwright* v. *Gell* (1) and *Kena Mahomed* v. *Bohatoo Sircar* (2).

In the present case, there is no defined channel along which the water is to be taken over the plaintiffs' land (*dag* No. 3033) to the defendants' land. This also indicates that the defendants could not acquire any right of easement to irrigate their lands by taking water over the plaintiffs' land (*dag* No. 3033).

Babu Sachindra Nath Banerjee, for the respondents, contended that the mere fact that the channel in question was an artificial channel did not prevent the defendants from acquiring a prescriptive right to take water therefrom. The only facts necessary for the defendants to prove in support of the acquisition of such a right were that there had been user

(1) (1839) 5 M. & W. 203; 151 E. R. 87.

(2) (1863) Marshall 506.

for a long series of years for the purpose of irrigating their lands and that such user was not of a temporary nature. These facts have been found in favour of the defendants. That being so, the appeal is concluded by findings of fact.

Mr. Bankim Chandra Mukherji, in reply.

Cur. adv. vult.

GHOSE J. In this case the main contention that has been advanced on behalf of the plaintiffs-appellants is that the defendants have acquired no right of easement by the temporary user of water flowing through an artificial channel and in support of this contention reliance was placed on the case of *Arkwright* v. *Gell* (1) and the case of *Kena Mahomed* v. *Bohatoo Sircar* (2).

Now, the facts involved in this appeal are briefly these :—

The plaintiffs alleged that there was a *dahar* (low sunken pathway) contiguous on the east of their *dags* Nos. 3032 and 3033 and that during the rainy season there is an overflow of the water of this *dahar* over *dags* 3032 and 3033 towards the west, that in 1328 the defendants cut the northern *ail* of *dag* No. 3033 and thereby forced the overflow water to their lands on the north. The plaintiffs alleged that the defendants had no right to take the water in this manner to their lands.

The defendants' case was that, during the rainy season the water from the *dahar* passed into *dag* 3033 through one of the *katans* in the *nala* on the south of it, that the water then passed through a *katan* at station No. 6 in the northern *ail* of 3033 through a *nala* on the western boundary of *dag* 3032 and thence into the land of one Provas Ghose and thereafter into *dag* No. 3057 belonging to the defendants. They contended that they had done this for many years and had acquired a prescriptive right to cut the northern *ail* of *dag* 3033 and take water into their

(1) (1839) 5 M. & W. 203 ; 151 E. R. 87.

(2) (1863) Marhall 506.

1928

BIPIN BEHARI GHATAK v. RAMNATH GHATAK.

GHOSE J.

dag No. 3057 and other lands towards the northwest of *dag* 3033.

The lower appellate Court found, on the evidence adduced in this case, that for nearly 32 or 35 years the defendants had been taking water into their *dag* No. 3057 through a *katan* at station No. 6 into the northern *ail* of *dag* No. 3033 and that this they had done as of right without interruption. The lower appellate Court, accordingly, held that the defendants had acquired a prescriptive right to cut the northern *ail* of the plaintiffs' *dag* No. 3033 and take water into their *dag* 3057.

On appeal before us, it is contended that the *dahar* in question is an artificial channel and that it was only during the monsoon that water could be had and that the temporary user of water through an artificial channel did not ripen into a right of easement.

Having regard to the facts found by the lower appellate Court, it cannot, in my opinion, be said that the user in this case was of a temporary nature. The water which flowed through the *dahar* was available every monsoon, *i.e.*, during all the months of the year when irrigation operations are ordinarily undertaken by agriculturists and there can be no doubt, on the facts in this case, that the water in question was used for a long series of years for the purpose of irrigating the defendants' lands. That being so, it seems to me that this case comes within the principle of the ruling in *Beeston* v. *Weate* (1), where the facts were as follows:—"Plaintiff and "defendant occupied contiguous portions of land "for more than forty years, and as far back as his "living memory went, the occupiers of plaintiff's "land had been in the habit of passing over defend-"ant's land to a brook which lay on the other side "of that land, and of damming up the brook, "when necessary, so as to force the water into "an old, artificial watercourse which ran across "defendant's land to plaintiff's land. They did

(1) (1556) 5 E. & B. 986 ; 119 E. R. 748.

"this, for the purpose of supplying their cattle "with water, whenever they wanted the water, "except when the owners of the defendant's land "used the water, as they did at certain seasons of the "year, for irrigation". It was held by Lord Campbell C. J. that the jury in that case were warranted in inferring a user as of right by the occupiers of the plaintiff's land of the easement on the defendant's land and that for the interruption of such easement the plaintiff might maintain an action against the defendant. Lord Campbell distinguished the case of *Arkwright* v. *Gell* (1) and pointed out that there could be an easement to conduct water across a neighbour's close by an old artificial watercourse. Lord Campbell observed that the direction of the Judge in the case of *Beeston* v. *Weate* (2) that, on the facts, the jury would be justified in returning a verdict for the plaintiffs was correct as such enjoyment and acts, which without the existence of the easement would be tortious, were evidence of the right to the water and the fact of the channel along which the water flowed being artificial did not prevent the right being acquired, there being nothing to show that the artificial channel was made for a mere temporary purpose. See also Carson on Real Property Statutes, 3rd Ed. p. 7. In the present case, having regard to the findings of fact arrived at by the lower appellate Court, there cannot be any doubt that the defendants did acquire a prescriptive right to take water in the manner alleged by them. In this view of the matter, the plaintiffs' suit must fail.

The result, therefore, is that this appeal must be dismissed with costs.

RANKIN C. J. I agree.

S. M.

Appeal dismissed.

(1) (1839) 5 M. & W. 203 ; 151 E. R. 87.

(2) (1856) 5 E. & B. 986 ; 119 E. R. 748.