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Edathil Itti v. *Kópashon Náyar* (1) and *Kumini Ama* v. *Parkam Kolusheri* (2).

The decrees of the lower Courts will be reversed and the suit dismissed. The respondent will bear the costs.

INNES, J.—I agree in the views expressed by the learned Chief Justice so far as they go, but I would go further and say that whenever there is a stipulation of this nature, effect should be given to it. I do not agree in the judgment in the case of *Mashook Ameen Suzzada* v. *Marem Reddy* (3). There appears to me to be no reason why the period for redemption should not be postponed to a fixed date by special agreement. If to construe the stipulation thus, makes it necessary to suppose that it was intended that the land should not only be mortgaged but leased for a fixed term, I see no difficulty in this supposition. All that it means is that the land is leased for a fixed term after which it enures as the security for the re-payment of the money.

I agree in the result that the decrees below should be reversed and the suit dismissed.

Suit dismissed.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Kernan.

1878. October 1.

MORGAN (APPELLANT), DEFENDANT *v.* KIRBY (PLAINTIFF), RESPONDENT.*

Easement—Artificial channel—Water, flow of.

In 1860 R, whom the plaintiff in this suit represented, agreed with Government for the lease of a plot of ground called the D. estate and got possession. In 1865 R took a lease of the estate from Government for 999 years, to enure as a lease from 1860, the time at which he entered upon possession. The defendant's estate adjoined the plaintiff's. Defendant's title, also derived from Government, dated from 1869. A formal lease was granted to his predecessor in 1874 in similar terms to that to plaintiff.

In 1864 R opened an artificial channel for the conveyance of water for the use of his estate. This channel was taken off from a ravine in Government waste land,

(1) 1 Mad. H. C. Rep., 122. (2) 1 Mad. H. C. Rep., 261.
(3) 8 Mad. H. C. Rep., 31.

(*) Second Appeal against the decree of A. McC. Webster, Acting Judicial Commissioner of the Nilgiris, dated 2nd October 1877, confirming the decree of the Acting Assistant Judicial Commissioner of the Nilgiris, dated 14th March 1877.

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and before reaching the plaintiff's estate passed through land which in 1864 belonged to Government, but which subsequently formed portion of the defendant's estate.

When the lease, under which the defendant claimed, was made in 1874, the flow of water through the channel was enjoyed by the plaintiff. The plaintiff sued to restrain the defendant from interfering with and diverting the flow of water in this channel and for damages.

Held that the flow of water in the channel having existed as an apparent and continuous easement in fact at the time of the execution of the lease in 1865, a right to it passed by implication under that lease, and that the plaintiff was accordingly entitled to it; that the defendant, whose lease was subject to that right, was not entitled to interrupt the flow; but that he might use the water in a reasonable manner as it flowed through his land.

THE suit was brought to restrain the defendant from interfering with, and diverting the flow of, water, in a channel alleged to belong to the Dunsandle Tea Estate on the Nílgiris, and for damages and costs.

The following issues were settled—

1. Is the plaintiff entitled to the exclusive use of a channel running through the defendant's Sholúr Estate to the plaintiff's Dunsandle Estate?

2. Has the defendant stopped the flow of water to the plaintiff's estate?

3. What damages, if any, is the plaintiff entitled to receive from the defendant?

The facts of the case were—Mr. H. D. Rae, whom the plaintiff in this suit represented, got possession of the Dunsandle Estate from Government in the year 1860 for the cultivation of tea, and subsequently received a lease from Government of it in 1865. Between the years 1860 and 1865 Mr. Rae opened the channel in dispute to convey water from a stream to the Dunsandle Estate. At the time it was made the channel ran through Government waste land. Mr. Rae subsequently applied for some of this waste land, and obtained possession thereof in 1869, and in 1874, he having died, his widow, Mrs. Rae, obtained a lease of it.

This land is now called the Sholúr Estate, and part of the disputed channel runs through it. The Sholúr Estate is now in possession of defendant (appellant) and this action was brought to restrain him from using the water where it flows through the Sholúr Estate, or from diverting it.

The Assistant Judicial Commissioner found that Mr. Rae, by the grant of 1865 from Government, obtained a right to the

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channel as far as it lay within the limits of Dunsandle, and that the rest of the channel being at the time on Government waste ground, Mr. Rae also obtained a right to the use of it. He, therefore, gave judgment for plaintiff with Rupees 800 damages.

Against this decision defendant appealed on the grounds—

1. That the judgment was bad in law and against the evidence.

2. That the Lower Court had wrongly construed the general words in the original grant of 1865 to be sufficient to create an easement in plaintiff's favor.

3. That Government having, by the grant of 1874, expressly made over to Mrs. Rae the portion of the channel in dispute, where it flows through the Sholúr Estate, the question of the grant of the easement to Mr. Rae by Government in the original grant was raised as between plaintiff and Government, and that Government should, therefore, have been made a party to the suit.

4. That the Lower Court had ordered appellant to pay damages to plaintiff on account of an assumed erroneous act on the part of Government, and that the decision was based upon an *ex parte* judgment on the points at issue between plaintiff and Government, by which (Government not being bound by the judgment) defendant suffered a wrong without any remedy.

5. That the plaintiff had failed to prove an exclusive right to the easement.

6. That damage had not been proved.

The Acting Judicial Commissioner delivered the following judgment:—

"The appellant's pleader stated that Mr. Rae mortgaged the Dunsandle Estate to the Land Mortgage Bank from whom plaintiff (respondent) bought it; and argued that in thus mortgaging Dunsandle Mr. Rae did not give up the right to the channel, and that plaintiff should shew that the right to the channel passed to him; also that in the plan of the Sholúr Estate conveyed by the grant of 1874 the channel was shown and not specially reserved. He contended that the Government should have been made parties as it was necessary to show how far they allowed, in the grant of 1865, Mr. Rae the exclusive right to the channel for Dunsandle Estate. If plaintiff asserts a right to use by permission of

Government he should have obtained special, not tacit, permission, and cannot come into Court to have his alleged tacit permission converted into a right. That as the channel was not originally cut with the sanction of Government, therefore it is to all intents and purposes a public channel and subject to the law as to easements of natural sources of water. He referred to the cases of *Sutcliffe* v. *Booth* (1), *Stockport Water Works Company* v. *Potter* (2), *Mittall* v. *Bracewell* (3). Contended that damages were excessive because plaintiff could have watered his tea-plants from the river and could have sued for increased cost of watering.

Respondent—plaintiff—argued that the channel was entered in the plan attached to the grant of 1865, and right to it passed to Mr. Rae by the grant. That in the plan attached to the second grant of 1874 the supply-channel was entered, and, therefore, Mr. Rae got the land subject to the former right.

From the evidence and the admissions of parties' pleaders it is clear that when the second grant was made the channel was in use for the cultivation of the Dunsandle Estate, the Sholúr Estate not having been cultivated; also that when Mr. Rae mortgaged the Dunsandle Estate to the Land Mortgage Bank the Sholúr Estate was not cultivated, and, therefore, the channel was in use only for the former estate. I am of opinion that Mr. Rae by his mortgage conveyed all rights to water on to the Land Mortgage Bank, and did not reserve any right to the channel. The deed of sale on which appellant bases his claim has not been produced, but as the right to the water for the Dunsandle Estate had been already conveyed by Mr. Rae to the Land Mortgage Bank, it could not be again conveyed to appellant, and, therefore, as between appellant (defendant) and respondent (plaintiff) I consider that the plaintiff (respondent) has made out his claim to the exclusive use of the channel.

Neither party has, however, obtained by prescription a right to the channel as against Government, but I see no reason, therefore, for making Government a party to the suit. Appellant contends that Government should be made a party because they seem to

(1) 32 L. J. Q. B. 136, 139. (2) 3 H. and C., 300.
(3) L. R., 2 Ex., 1.

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have given parts of the channel to both parties. I do not take this view of the case. Government gave both grants to Mr. Rae, and the latter grant as a sort of compensation to him for some uncultivable land in the first grant, and the channel having been in use for the Dunsandle Estate at the time the second grant was made (to the same person) that does not seem to show any necessity for specially reserving that part of the channel that passed through the Sholúr Estate. I also fail to see how Government can be made parties to suits arising out of subsequent transactions. Moreover the channel having been given to Mr. Rae by the two grants, and this gentleman having subsequently conveyed it to the mortgagees of the Dunsandle Estate, appellant's contention that Government should be made a party has no force.

For the above reasons, and because the cutting of the channel through the present Government waste land seems to have been tacitly acquiesced in by Government, I consider that plaintiff has made out his claim to the exclusive use of the channel. I find also that the damages awarded are not excessive and dismiss this appeal with costs."

The defendant appealed against this decree on the following grounds :—

That it was contrary to law, in that,—

I. The plaintiff had not proved any right or prescriptive title to the exclusive use of the channel in dispute.

II. The original grant of 1865 had been misconstrued.

III. There was no evidence as to damages.

Mr. *Wedderburn* for the appellant (defendant).

Mr. *Tarrant* for the respondent (plaintiff).

INNES, J.—Plaintiff seeks to restrain defendant from interfering with and diverting the flow of water in a channel belonging to the Dunsandle Estate. He asks for damages (1,000 Rupees) and costs.

The Court of first instance gave judgment for plaintiff with 800 Rupees damages and costs, and on appeal, that judgment was confirmed and the appeal dismissed.

The case is now before us in Second Appeal. The facts are these. In 1860, Mr. Rae, whom the plaintiff now represents agreed with the Government for a lease of the plot of ground now called the Dunsandle Estate, for the purpose of tea-planting, and

got possession. In 1864, he opened the channel in dispute for the use of the estate. It is in its whole extent an artificial channel. It was taken off from a ravine in Government waste ground and passes through land (which in 1864 belonged to the Government but now belongs to defendant) till it reaches the Dunsandle Estate which it enters and leaves several times in its passage through it. Defendant's estate adjoins plaintiff's, and the stream, as already mentioned, runs through a portion of what is now defendant's land before it reaches plaintiff's. Then after passing through the first portion of plaintiff's estate, it again reaches defendant's estate, passes through it, and again into plaintiff's estate and then again into defendant's. It is from the part of the channel where it passes through this third portion of defendant's estate that the water has been taken by defendant.

In 1865 plaintiff took a formal lease of the estate from Government for 999 years. The lease was to enure as a lease from 1860, the time at which plaintiff entered upon possession. Defendant's title, also derived from Government, dates from 1869. A formal lease was granted in 1874 in similar terms to that to plaintiff.

At the time the channel was opened, the head and source of the water was, as it now is, in Government waste land, and the entire interval between the head of the channel and the place where it enters plaintiff's ground was from the time of his taking possession in 1860 to the date of the lease in 1865, Government waste land.

What plaintiff seeks is a right to the uninterrupted flow of water in a permanent artificial stream, and further to the exclusive right to use the water throughout the length of the stream.

Such rights are easements and may either be acquired by prescription or be the subject of grant or contract.

In the present case, if the right exists at all, it must have come into existence by grant under the lease, or by implication of law arising out of the severance of tenements under the lease. The strict definition of an easement no doubt requires the existence of two separate tenements in the ownership of two distinct persons. A lease for 999 years however differs little from an outright grant, and there is no doubt that a landlord by the contract of letting may convey rights (which though not strictly easements, are in the nature of easements) to enure for the term of the holding.

Such easements may be of three kinds—

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1*st*.—Rights of easements already existing and held by the lessor over the property of neighbouring proprietors which by his lease he passes for the term of the lease to the lessee. But in the present case the land leased to plaintiff was contiguous to no third person's property but surrounded on every side by Government waste, and no such easement could have existed upon which the language used could attach.

2*ndly*.—They may be easements of necessity, such easements arise on severance of tenements when the convenience claimed is one without which the vendee or lessee could not have the use of the tenement then severed off from the main heritage.

During unity of possession no easement strictly so called exists, but a man may, by the general right of property, make one part of his property dependent on another and grant it with this dependence to another person. Where property is conveyed, which is so situated relatively to that from which it has been severed that it cannot be enjoyed without a particular privilege in or over the land of the grantor the privilege is what is called an easement of necessity, and the grant of it is implied and passes even without any express words. It is as it were, brought into existence by the severance of tenements on the principal that together with the property sold, the vendor grants every thing without which it could not be beneficially used.

But the easement of exclusive use now claimed is not of this nature because the plaintiff can use the tenement beneficially without the exclusive use of the water though not perhaps so beneficially as he would be able to do with the exclusive use of it.

3*rdly*.—They may be continuous and apparent easements which have, in fact, been used by the owner during the unity of possession for the purpose of that part of the united tenement which corresponds with the tenement conveyed.

There is a distinction between discontinuous and continuous easements in regard to the circumstances in which they will be held to pass. A grant of a discontinuous easement as a right of way, not being a way of necessity, cannot be implied from the disposition of the severed tenements, and will not pass under a deed of grant of land or lease such as the present without express words showing that it was the intention to pass it along with the property granted.

Such language as that used in the present lease "together with all ways, watercourses, rights, easements, privileges, advantages and appurtenances," without the further words "therewith held, used and enjoyed," or similar words, has been frequently held to be insufficient to show an intention to pass discontinuous conveniences (not being easements of necessity) which were existing in the two tenements during unity of possession, because such privileges cannot be said to have been appurtenant to the property sold prior to and at the time of sale, *i. e.*, the point of time at which the tenement sold first came into existence as a separate tenement. They are simply part and parcel of the entire tenement as it existed before severance.

To use the language of Erle, J., in *Polden* v. *Bastard* (1) which was approved of in *Watts* v. *Kelson* (2)—"there is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shows an intention that they should pass."

The right now claimed, a right in a flowing stream running from the lessor's to and through the lessee's tenement, which existed as a flowing stream prior to the lease, and which was made expressly for the purpose of the tenement leased to Mr. Rae, is undoubtedly a continuous easement requiring no express language to pass it, but which passes by implication of law.

Were it necessary to consider the application of the language used in the lease in its effect in passing the easement claimed, I should hold that the words "together with all ways, watercourses, rights, easements, privileges, advantages and appurtenances" are mere words of art inserted in the lease (which is drawn in legal form) in the place in which such a clause is usually inserted, with the intention of conferring upon the lessee such easements *in alieno solo* as might properly attach to the property leased, but without having in contemplation any specific easement upon which the words could operate.

(1) L.R., 1 Q.B., 156. (2) L.R., 6 Ch., 166.

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It is however unnecessary to construe these words if, as I conceive, the easement, being of a continuous nature, passes without any express words.

Assuming thus that a right arises to this easement by implication of law, what is the extent of it?

It is clear that Rae, in going upon the waste land and cutting a channel through a considerable portion of it including that portion of the property which was ultimately leased to him in 1865, acquired no rights in the land which at and after the date of his lease continued to be Government waste land, or to that portion of the channel passing through such part of the Government waste land.

If his act was not permitted, it was a trespass. If it was permitted, there is no room for inferring that it was not a mere license to dig a channel to conduct the water to the ground which the Government had agreed to lease to him.

There is no correspondence forthcoming to show precisely which of these legal aspects the act bore. But in neither case could Mr. Rae have acquired any right to the water flowing in such portion of the channel as lies within the portion of the Government waste which he was not authorized to occupy.

When, then, the Government leased the property what did Mr. Rae acquire?

He acquired for the term of the lease the lands described in the lease, including the area occupied by the channel and its bed, and a right to the use of the flowing water within the ambit of the property leased to him. Had there existed at the time of the grant any particular purpose for which the water had been and was intended to be be used, that user (had and to be had) might be a test of the user granted. But there was at the date of the lease no special purpose to which the water had been applied, and, from the circumstances, a larger right cannot be inferred than that Mr. Rae was entitled by the grant to a reasonable use of the water, *i.e.*, to use it and pass it on. The land above and lower down the stream which was afterwards leased by Government to the person whom defendant now represents, was necessarily granted subject to this right of plaintiff to the use of the flowing water in his own ground. This right imports that the flow of the water shall not be interrupted, and defendant is not entitled to interrupt

it. But he may use it as it flows through his grounds. Each is entitled to a reasonable use of the flowing water.

It is admitted that defendant has used the water, and the opinion of the Courts below was that he was not entitled to use it at all. This opinion being erroneous, I think that we should require the Court to find whether the use by the defendant was or was not a reasonable use of it, and, if not, whether plaintiff is entitled to any, and what, damages.

KERNAN, J.—The two Lower Courts held that plaintiff had an exclusive right to the flow and user of the water in the channel, running through the defendants land, called the Sholúr estate, and gave Rupees 800 damages, for the diversion (admitted by defendant) of the flow of the water.

The defendant appealed (2nd appeal) alleging as grounds of appeal—

1. That plaintiff had not proved any right or prescriptive title to the exclusive use of the channel.

2. That the grant to plaintiff of 1865 was misconstrued.

3. There was no evidence as to damages.

In the argument before us it was at first contended, by counsel for defendant, that plaintiff was not entitled to any easement in the use of the channel and the flow of the water. But afterwards, as I understood, counsel for the defendant has admitted plaintiff had an easement in the use of the channel and of the water, though not an exclusive easement. Counsel contended that the defendant is entitled equally with plaintiff to the use of the water as it flows through his grounds, counsel put it thus, viz., the defendant might stop the flow in his ground for his use for a fixed time, and then give the full flow to the plaintiffs for a fixed time. It was, however, necessary for us to examine the facts and the law to determine the position of the parties, and as Mr. Justice Innes in his judgment has fully examined them, and as I agree in his conclusion, I will not go further into the matter than to state very shortly what occurs to me partly by way of addition.

The right claimed by plaintiff appears to me to be more extensive than he is entitled to, viz., the right to exclude, from reasonable use, the owner or occupier of land extending (it appears 2 to 3 miles in distance) along the channel, commencing from the Dunsandle Estate. I agree that the easement in the use of the channel

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and flow of water as it existed at the date of the grant or lease of 1865 passed to Rae, and that it is vested in plaintiff. The easement was apparent, and in its nature continuous, and was, in fact, created by Rae before the lease was executed, and with the assent of the Government, then and now the owners of the land occupied under lease by the defendant. The channel and the flow of water in it had been used by Rae before the execution of the lease. Under these circumstances the grantors in the lease of 1865 must be held to have conveyed by implication the easement. But as Rae was also tenant of the lands before and at the time of the execution of the lease, I think that the principle of the case of *Hall* v. *Lund* (1) per Martin, B., would apply, and that the lease would carry all rights then in the enjoyment of the lessee. It is not, I agree, necessary to determine the effect of the general words used in the lease of 1865, but when amongst them is to be found the general word "easement," I am not prepared to say, having regard to "*easement in fact*" (Gale *on Easements*, p. 85, *Plant* v. *James* (2)) existing, when the lease was made, that such easement should not have passed under that express term.

It was stated in argument that there were other streams on plaintiff's ground, and that the use of the flow of the water as claimed was not necessary. But the right now claimed is not one of necessity, it is a right by implication to an open, apparent and continuous easement, *in fact*, existing before and at the time of the grant.

A similar objection was taken in the case of *Watts* v. *Kelson* (3), *supra* (which is not unlike this case to a great extent), and the Court said "that (the watercourse or pipe) was at the date of the conveyance the existing mode by which the premises conveyed were supplied with water, and we think it no answer that if this supply was cut off, possibly some other supply might have been obtained." This observation, I think, is applicable to this case However, there is no finding by the Lower Courts that the other streams in the plaintiff's estate are sufficient for the supply of water. The evidence as to the length of the channel, 2 to 3 miles and the expense it would have cost would lead to the conclusion that the channel and the flow of the water in it, were of great importance, though not perhaps essential.

(1) 1 H. & C., 676. (2) 5 B. & Ad., 791. (3) L. R. 6 Ch., 166.

The defendant represents the interest in a lease (of the estate called Sholúr estate) made by Government, in 1874, to Mrs. Rae, the widow of the lessee in the lease of 1865. It appears that he had got possession of the estate in 1869. When the lease, under which defendant claims, was made in 1874, the flow of water through the channel was enjoyed by the plaintiff, and the lessee must be held to have taken the lease of Sholúr estate, subject to the plaintiff's rights, if any, in that channel. The question is the extent of the plaintiff's right, and I think that what passed to plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises, as it did at the time of the execution of the lease of 1865, and that the defendant should be restrained, by injunction, from obstructing and diverting the stream, so as to prevent it from flowing through defendant's premises to plaintiff's in the course and manner in which it used to flow at the date of the lease of 16th June 1865.

The right of the plaintiff is one arising by implication, and I think the rule as to the extent of such right is well expressed by Wilde, B., in *Ewart* v. *Cochrane* (1) where he says, "it seems to me that in cases of implied grant, the implication must be confined to a reasonable use of the premises for the purpose for which according to the obvious intention of the parties they are demised."

Here the length of the channel is very great, and although the defendant is not entitled to obstruct the channel or diminish the ordinary flow of the water, or to divert it from flowing in its ordinary course to plaintiff's ground, yet short of that, we think that defendant is entitled to use the water as it passes through his ground.

The Court, therefore, referred to the Lower Appellate Court the following issues:—

1. Whether the use by the defendant was a reasonable one, having regard to the principles stated in the judgment of the High Court?

2. If not, whether the plaintiff is entitled to any and what damages?

The Court below found on the 1st issue that the use by the defendant was not a reasonable use: and on the 2nd issue that the plaintiff was entitled to the damages originally awarded him.

(1) 4 Macq. H. L. C.

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Upon this return to the issues sent down the High Court decreed that the decrees of the Lower Appellate Court and Court of First Instance, in so far as they restrained defendant from interfering in the channel which supplied the Dunsandle Estate, and in so far as they awarded Rupees 800 as damages for loss that had accrued to the plaintiff from defendant's use of the channel, be modified by declaring each of the parties herein entitled to a reasonable use of the flowing water, and that defendant, having used the water to an unreasonable extent and thereby caused loss to plaintiff, do pay plaintiff Rupees 800 damages in respect of such loss and that in other respects the decrees appealed against be confirmed, and that each party do bear his own costs of the second appeal.

Decree modified.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

1878. October 16.

SABÁPATHI, A MINOR, (BY HIS MOTHER AND GUARDIAN AMURTHAMMÁL) PETITIONER, *v.* SUBRÁYA AND RÁMANÁDHA, COUNTER-PETITIONERS.*

Review of judgment—High Court

The absence of a formal finding on an issue tried and decided by a High Court of First Instance is not an error calling for review of judgment in the High Court.

A party who not only had an opportunity of raising a question, but who did raise it in appeal and on argument abandoned it, cannot, under ordinary circumstances, be allowed to agitate the question on review.

THIS was an application under Section 376 of Act VIII of 1859 for review of the judgment of the High Court (Appellate Side), dated 30th January 1877, confirming the decree of Holloway, J., made in Original Suit No. 430 of 1875.

The original suit was brought for a declaration that certain properties and lands to which the Yagambara Esvara Sámi temple lay claim, be declared to be the property of the said temple.

That an application should be made to a Judge of the High Court in chambers to decide who were fit persons to be appointed Dharmakartas.

* Civil Miscellaneous Petition No. 8 of 1877, for review of the judgment of the High Court (Appellate Side) dated 30th January 1877.