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the terms of s. 58 of the Rent Law so clearly expressed, the Court could have no sufficient reason for passing such an order. The consent of the parties would not affect the operation of the law, as has been held by Peacock, C. J., in the case of *Krishna Kamal Sing* v. *Hiru Sirdar* (1).

I am, therefore, of opinion, that we should read s. 58 of the Rent Law according to the plain sense of the words, it being our duty to expound it as it stands. I would, therefore, set aside the order of the lower Court.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

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April 13.

KOYLASH CHUNDER GHOSE AND OTHERS (PLAINTIFFS) *v.* SONATUN CHUNG BAROOIE AND OTHERS (DEFENDANTS).*

Easement—Right of Way—Prescription—Effect of Illustrations—Limitation Act (XV of 1877), s. 26 and illus. (b).

On the 6th of April 1878, the plaintiffs sued for obstructing a right of way for boats in the rainy season. The defendants admitted the obstruction, but denied the right of way. The plaintiffs proved that the right was peaceably and openly enjoyed, and actually used by them, claiming title thereto as an easement and as of right, without interruption, from before 1855 down to November 1875, since when no actual user of the way by the plaintiffs had taken place. The lower Appellate Court dismissed the suit, on the ground that the plaintiffs had made no actual use of the way within two years previous to the institution of the suit. *Held*, reversing the decision of the Court below, that, notwithstanding Act XV of 1877, s. 26, illus. (*b*), actual user within two years previous to the institution of the suit is not necessary, in order that the right claimed may be acquired under Act XV of 1877, s. 26.

Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer.

THIS was a suit to establish a right of way over the defendants' land. The plaint, which was filed on the 6th of April 1878,

Appeal from Appellate Decree, No. 2832 of 1879, against the decree of Baboo Nobin Chunder Gangooly, Second Subordinate Judge of Dacca, dated the 13th October 1879, reversing the decree of Baboo Brojo Nath Roy, Officiating First Munsif of Moonsheegunge, dated the 28th December 1878.

(1) 4 B. L. R., F. B., 105.

stated that, for upwards of twenty years prior to the institution of the suit, the plaintiffs had enjoyed, during the rainy season, a right of way for boats, to and from their house, through certain channels cut in the defendants' land. That the defendants had, on the 1st of June 1876, obstructed the way by filling up the channels, and they claimed to have their right declared and the obstructions removed. The defendants admitted the obstruction, but denied the right of way. The Court of first instance gave the plaintiffs a decree, which was reversed on appeal, the Subordinate Judge holding that, as the last instance of actual user by the plaintiffs was in the rainy season of 1282 (June to November 1875), the suit was barred by s. 26 of the Limitation Act, XV of 1877. The Subordinate Judge also referred to *Gopee Chand Setia* v. *Bhoohun Mohun Sen* (1) and *Baboo Luchmee Pershad Narain Singh* v. *Tiluckdharee Singh* (2). The plaintiffs appealed to the High Court.

Baboo *Hurry Mohun Chuckerbutty* for the appellants.

Baboo *Gurudas Banerjee* for the respondents.

The judgment of the Court (GARTH, C. J., and MCDONELL, J.) was delivered by

GARTH, C. J.—The plaintiffs in this suit claim a prescriptive right of passage for boats over the defendants' land, when it becomes covered with water during the rainy season.

The first Court found that the plaintiffs had enjoyed this right for upwards of twenty years; and accordingly made a decree for the removal of certain obstructions which were put up by the defendants in June 1876 for the purpose of preventing the plaintiffs from exercising their right.

The lower Appellate Court does not expressly negative the finding of the lower Court upon the facts, although it throws some doubt upon its correctness. But it has decided against the plaintiffs upon the preliminary ground, that as *no actual exercise* of the right had taken place within two years before suit, the plaintiffs are barred by limitation.

(1) 23 W. R., 401. (2) 24 W. R., 295.

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From this judgment the plaintiffs have appealed; and we have, therefore, to consider the true meaning of the last clause of s. 26 of the Limitation Act, more especially when applied to the particular kind of easement with which we are now dealing. And in order to see precisely how the question arises in the present instance, it will be well to take the facts as found by the first Court.

The plaintiffs have enjoyed for upwards of twenty years this right of passage for their boats over the defendants' land, when that land is flooded in the rainy season.

The first interruption of the plaintiffs' right occurred in June 1876, before the rains had commenced; when the defendants, with a view of preventing the plaintiffs from exercising their right, put up the obstructions, which are the subject of complaint.

On the 6th of April 1878, or about one year and ten months after the interruption, this suit was brought.

Now, if the right was enjoyed by the plaintiffs for twenty years before the interruption, and the interruption itself was the first breach of enjoyment, it is obvious that the enjoyment must have continued up to a time within two years before suit, in which case there would be no bar.

But the Subordinate Judge considers that because there was no actual exercise of the right within the two years, the suit is barred.

He relies upon two decisions of this Court,—one in the case of *Baboo Luchmee Pershad Narain Singh* v. *Tiluckdharee Singh* (1), which does not support him at all, as there the alleged right was interrupted more than two years before suit; and the other, the case of *Gopee Chand Setia* v. *Bhoobun Mohun Sen* (2), which only supports him to this extent, that the learned Judge in that case refers to illus. (*b*) of s. 26 as showing that there should be some actual user of the right within two years before suit. It is no doubt, upon the strength of illus. (*b*), that the Subordinate Judge has dismissed the suit, and we cannot blame him; for when the language of a section points to one view of the law, and one of the illustrations of

(1) 24 W. R., 295. (2) 23 W. R., 401.

the section points to another, it is a very difficult thing for the subordinate judiciary to decide which view to adopt.

Indeed it is very difficult for the High Court, whose duty it is to construe recent Acts of the Legislature, to say what precise weight ought to be attached to these illustrations. So far as they merely serve to explain the meaning of the section, we have no doubt that they may often be found useful, especially amongst a class of judicial officers who are not very conversant with the meaning or working of the section itself.

We have already decided, however, more than once in this Court, that the illustrations ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the section in its ordinary sense would confer.

It will be sufficient to say no more than this for our present purpose.

The 26th section of the Limitation Act only renders it necessary, as far as we can see, that the *enjoyment of the right* claimed should have continued till within two years before suit. The section says not a word as to any *actual user* or *exercise* of the right within the two years. It is obvious to us, that the enjoyment intended by the section means something very different from actual user. In order to establish the right, the *enjoyment* of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that *actual user* is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it.

The easement with which we have to deal in the present case affords a remarkable illustration of this.

The right which the plaintiffs claim can only be used by them during the two or three months of the year when the defendants' land is flooded; and if there were a lack of rain, it is probable, that even for twenty or twenty-one months, the right might not be exercised at all; and yet, so long as the plaintiffs' right was not interfered with, whenever they had

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occasion to use it, their enjoyment must, we conceive, be considered as continuing during all the year round.

Unless this were so, a person in the plaintiffs' position, who could only use his right during a short period of the year, could never gain a prescriptive right at all.

Illustration (*b*), therefore, which would seem to make "enjoyment" equivalent to "actual user" must, we think, be rejected, especially as the latter clause, which follows the words "The suit shall be dismissed," is obviously quite unnecessary for the purposes of the illustration.

If the view which we take in this respect is not the right one, the only way for persons in the plaintiffs' position to establish their rights by prescription, would be to claim, not under the Limitation Act, but by immemorial user, and get the Court to presume their rights after a twenty-five or thirty years' enjoyment, unless the defendants could show anything to the contrary. Their Lordships in the Privy Council have lately held, that it is not necessary that such rights should be claimed under the *Limitation Act*; see *Rajrup Koer* v. *Abul Hossein* (1).

The case must, therefore, go back to the lower Appellate Court to try the question, whether the plaintiffs have enjoyed (in the sense which we attribute to the word "enjoy") the right which they claim for twenty years before the obstructions were put up in June 1876.

The costs in this Court and in the Court below will abide the result.

Case remanded.

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