QUEEN-EMPRESS v. SINNAI GOUNDAN.

assumes, to "stop the case whenever he liked." He was bound to examine the witnesses tendered by the complainant before acquitting the accused. This the Magistrate admits he did not do.

We must, therefore, set aside the acquittal and order a re-trial.

We observe that the Magistrate, though he issued summonses to the complainant's witnesses, did not examine them, but acquitted the accused on a consideration of the complainant's statement alone. It is not clear why this unusual and illegal procedure was followed. Having regard to it and to the fact that the Magistrate has formed a decided opinion in the case before hearing the evidence for the prosecution, we direct that the District Magistrate do transfer the case for trial to some other Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

PALANIANDI TEVAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

PUTHIRANGONDA NADAN AND OTHERS (PLAINTIFFS NOS. 2 TO 5), RESPONDENTS.*

1897. March 30, 31. September 27.

Easements Act—Act V of 1882, s. 2 (b)—Easement over a well—Customary right to use the well.

No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and a customary right to use a well may exist apart from a dominant heritage.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Appeal Suit No. 422 of 1895, reversing the decree of K. Krishnamachariar, District Munsif of Madura, in Original Suit No. 566 of 1894.

The plaintiffs having obtained leave under Civil Procedure Code, section 30, sued on behalf of themselves and other members of the Shanar caste for a declaration of their right to draw water from a certain well, and for an injunction to restrain the defendants from interfering with their exercise of that right.

The defendants Nos. 1 to 3 claimed that the well belonged to them, and defendants Nos. 4 and 5 stated that they had been

* Second Appeal No. 213 of 1896.

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drawing water from it with the consent of the other defendants. The District Munsif held that the well was on the land of defendants Nos. 1 to 3 and not on poramboke land as alleged by plaintiffs, and that the plaintiffs had no right to make use of it. He accordingly dismissed the suit. The Subordinate Judge reversed his decree and passed a decree in favour of the plaintiffs. He held it to be established, that people of all castes in the village including Shanars had openly and without any obstruction for upwards of thirty years made use of the well in question, and held that the plaintiffs, having in common with other residents of the village enjoyed the well, had acquired a right of customary easement.

The plaintiffs preferred this second appeal.

Desikachariar for appellants.

Mr. *J. Satya Nadar* and *Sundara Ayyar* for respondents.

ORDER.—The case set up in the plaint is that the well was not the private property of the defendants, but was situated in poramboke land and was used by the plaintiffs, and those on whose behalf they sue, as a matter of right for the past ninety years. This would indicate that the plaintiffs claimed what is called a "customary right" such as is referred to in section 2 (*b*) of the "Indian Easements Act, 1882," and in *Channanam Pillay* v. *Manu Pultur*(1). The Subordinate Judge found that the well belonged to the defendants, but that it had been used by the plaintiffs and those on whose behalf they sued, openly and without obstruction, for upwards of thirty years, and he, therefore, held that they had established a customary *easement* over the well. The plaintiffs' claim was not put forward in the plaint as one of *easement*, and there is no allegation or issue or clear finding as to their possession of a dominant heritage entitling them to the easement.

Without a dominant heritage there can be no easement.

We fear that the Subordinate Judge has not clearly distinguished in his mind a customary right from a customary easement.

No fixed period of enjoyment is laid down by law as necessary to establish a customary right. The character and length of enjoyment which are necessary for such purpose have been, in our opinion, correctly laid down in *Kuar Sen* v. *Mamman*(2).

We must, therefore, ask the Subordinate Judge to submit findings on the evidence on record on the following issues, viz. :—

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(1) 1 Mad., L.J., 47. (2) I.L.R., 17 All., 87.

(1) Whether the plaintiffs and those whom they represent have a customary right to use the water of the well as claimed in the plaint.

(2) If not, whether the plaintiffs and those whom they represent are the holders of a dominant heritage in the village and as such have a customary easement (section 18, Easements Act) to use the water of the well as claimed in the plaint.

The Subordinate Judge is requested to submit his findings within a month from the date of the receipt of this order. Seven days will be allowed for filing memorandum of objections after the findings have been posted up in this Court.

[The Subordinate Judge made his return as follows:—

Plaintiffs' vakil gave up the first issue and confined himself to the second issue. He contends that the dominant tenement to which the customary right of easement is attached is the possession of residence by the plaintiffs and those whom they represent. I think the contention must prevail. Since it appears from the evidence of the plaintiffs' witnesses that all the residents of Kokilapuram, except Neechars or Pariahs and Pallars, have been using the water of the well, plaintiffs by possessing houses and becoming residents of Kokilapuram have acquired the right of easement to use the water of the well.

I therefore find the first issue in the negative and the second issue in the affirmative.]

This second appeal coming on for final hearing, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.