APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Phillips.

PONMANICHINTUGATH KOYYAMMU AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

KUTTIAMMOO AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

1918, December, 19, 1919, January, 21.

Easements Act, Indian (V of 1882), ss. 15, 16 and 19—Easement of light and air—Acquisition by prescription—Easement for a limited period, whether can be acquired by prescription under the Act—English Common Law and English Prescription Act (2 & 3 Will. 4, c. 71)—Grant of land for maintenance to a tavazhi, whether an interest for life—Demise on kanom—No resistance to easement within three years after expiry of kanom, effect of—Acquisition by prescription of absolute right against owner—Prescription for an easement for a limited period against a tenant, whether possible in law.

Where a tarwad, which was the absolute owner of the suit land, granted it for maintenance to a tavazhi in 1877, and the latter demised it on kanom in 1887 to the defendants who held over possession after its expiry in 1899 and subsequently obtained from the tavazhi a fresh lease for twelve years commencing from 1905, and where the plaintiffs, the owners and occupiers of adjacent lands, claimed to have acquired a right of easement of light and air over the suit land by prescriptive enjoyment since 1877 till a few months before they instituted the present suit in 1913 for an injunction restraining the defendants from interfering with their right of easement :

Held, that the plaintiffs had acquired in law *an absolute* right of easement of light and air *by prescription* for over the statutory period, as, under section 16 of the Indian Easements Act, the plaintiffs' enjoyment of the easement from 1877 was not resisted by the tarwad or the tavazhi within three years after the expiry of the kanom in 1899, and the grant for maintenance to a tavazhi was not in law a grant of an interest for life, and that consequently the plaintiffs were entitled to an injunction against the defendants.

Per ABDUR RAHIM, J.—There cannot be an acquisition by *prescription* of a right of easement for a *limited* period under the Indian Easements Act which follows the English Common Law and the English Prescription Act (2 & 3 Will. 4, c. 71) in this respect.

Wheaton v. *Maples & Co*, (1893) 3 Ch., 48, referred to.

Per PHILLIPS, J., *contra*.—There can be an acquisition by *prescription* of an easement for a *limited* period under the Indian Easements Act, and that consequently the plaintiffs in this case were in any event entitled to a right of easement as against the defendants during the period of the latter's interest in the property.

* Second Appeal No. 368 of 1918.

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SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 2 of 1917, preferred against the decree of T. G. RAMASWAMI AYYAR, the Principal District Munsif of Tellicherry, in Original Suit No. 779 of 1913.

The plaintiffs, who were the owners and occupiers of a warehouse adjacent to the suit land in the possession of the defendants, sued in 1913 for an injunction restraining the latter from erecting a storeyed building on their land and thereby obstructing the access of light and air to certain windows in their warehouse. The suit land was the absolute property of a tarwad which granted it for maintenance to one of its tavazhis in 1877; the latter, after remaining in possession till 1887, demised it on kanom to the defendants who continued in possession without any lease after the expiry of the kanom in 1899 till 1905, when the defendants obtained a lease-deed for twelve years from 1905 from the same tavazhi and continued in possession thereunder until some months before the date of this suit in 1913. It appeared that the plaintiffs had enjoyed the right to light and air ever since 1877 as against the tavazhi until 1887 and against the defendants until a few months before the present suit instituted on the 3rd December 1913. Within three years after the expiry of the kanom of 1887 in 1899, neither the tarwad which was the absolute owner, nor the tavazhi (the grantee for maintenance), nor the defendants who were holding over after the kanom period, offered any resistance to the enjoyment of the easement by the plaintiffs. In August 1913, the defendants made arrangements to build a storeyed house on their own land which would obstruct the access of light and air enjoyed by the plaintiffs, who thereupon brought this suit for injunction against the defendants Nos. 1 to 3, who were in possession as tenants under the lease of 1905, and the fourth defendant who was their sub-tenant, neither the tarwad nor the tavazhi was made a party to this suit. The defendants pleaded that the plaintiffs could not acquire an easement by prescription as the land was subject to an interest for life by reason of the grant in 1877 to the tavazhi for maintenance, which continued to subsist, that no easement could be acquired by prescription for a limited period of the tenancy under the Indian Easements Act, and that the plaintiffs did not acquire any easement by valid prescription for the full statutory period. The

lower Courts passed a decree in favour of the plaintiffs; the defendants preferred this Second Appeal.

K. P. M. Menon and *B. Pocker* for the appellants.

C. Kunhiraman for the respondents.

ABDUR RAHIM, J.—The plaintiffs in this suit claimed an easement of light and air acquired by prescription over the premises in occupation of the defendants. The dominant tenement is a warehouse and the lower Appellate Court has found that with respect to the windows Nos. 11 to 16 in the plan (Exhibit B) the plaintiffs who are in the occupation of the warehouse had been in unobstructed enjoyment of light and air since the year 1877 until the defendants threatened to obstruct the access of such light and air by building a two-storeyed warehouse on their land shortly before the institution of this suit in 1913. From 1877 to 1887 the land was in the possession of a tavazhi to whom the Orakatteri tarwad had made a grant of it for maintenance. In 1887 the defendants obtained the land from the tavazhi on a kanom of twelve years. On its expiry in 1899 they continued in possession without any lease until 1905 when they obtained a fresh kanom for another term of twelve years. Neither the tavazhi, the lessor of the defendants, nor the superior proprietor, the tarwad, has taken any steps to resist the plaintiffs' claim and the question is whether the defendants' possession since 1887 as tenants of the servient heritage is a bar to the maturing of the plaintiffs' prescriptive rights.

On the question whether a prescriptive right to access of light and air can be acquired in the nature of an easement for a limited period, for instance, during the time the servient tenement is in the occupation of a lessee for years, I am of opinion that it cannot. Section 15 of the Easements Act, V of 1882, lays down that

"where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years . . . the right to such access and use of light or air . . . shall be absolute,"

and section 19 says

"provided that, when any land upon, over or from which any easement has been enjoyed . . . has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement

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during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land."

These sections imply that by reason of a prescriptive easement the rights of the owner of the servient tenement are modified or restricted to that extent and not merely those of the lessee for the term of his lease. No doubt an easement may be permanent or for a limited period as stated in section 6. But the question is whether an easement for a limited period can be acquired by prescription. In Chapter II the imposition, acquisition and transfer of an easement are dealt with. Wherever an easement is spoken of as 'imposed' the phrase is used to mean the creation of an easement by a voluntary act of the owner or lessee or of any other person having power to transfer an interest in the servient tenement. This will be apparent from sections 8, 9, 10, 11, 20, 28, 37, 40 and the illustrations appended thereto, especially those to section 9. They show that the imposition of an easement as contemplated is to be by such an act as a grant or a bequest of the owner or occupier of the servient heritage. That a lessee can create or impose an easement by a grant for the period of his term cannot be doubted; see section 11. In contradistinction to such 'imposition' of an easement by the owner or lessee of the servient tenement, the legislature speaks of *acquisition* of an easement by the owner of the dominant heritage by prescription or custom in sections 15, 16, 17, 18 and elsewhere. There are no express words in the Act providing for the acquisition of an easement for a limited time by prescription by the owner or occupier of the dominant heritage, though the Act in various places deals with the *imposition* of an easement by the owner or lessee of the servient tenement. And, in my opinion, without the intention of the legislature being in this connexion expressed in so many words or capable of being inferred from any plain indications in the Act, we should not be justified in recognizing a prescriptive right to light and air by way of easement for a limited period, such as during the occupation of the servient heritage by a lessee, when it is clear that no such right has ever been recognized by the English Law.

The English Law on the subject is clearly stated in *Wheaton* v. *Maple & Co.*(1) by LINDLEY, L.J., in the Court of Appeal:

"The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years,"

and further on, after quoting the words of the English Prescription Act, 2 & 3 Will. 4, c. 71:

"The expression 'absolute and indefeasible' as applied to easements of all kinds . . . shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever on the servient tenement. This view of the statute was clearly expressed soon after it was passed in *Bright* v. *Walker*(2), and although some passage in Baron PARKE'S judgment in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act, viz., by grant or by an agreement enforceable in equity, which, for most purposes, is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact and not be purely fictitious."

It will appear from Gale on Easements, Ninth Edition (pages 210, 211, etc.), that this exposition of the law has been accepted without question or doubt in England. If the Indian Legislature, which must be presumed to have been familiar with the English Law on the subject, intended to alter it on this point, it would have plainly expressed or indicated such intention.

But the plaintiffs have in my opinion nevertheless acquired an absolute title to light and air by prescription as claimed by them by reason of the fact that their claim was not resisted by the owner of the premises within three years of the termination of the period of the defendants' lease in 1899. The clear effect of section 16 is that the time during which the servient premises

(1) (1893) 3 Ch., 48, at p. 63. (2) (1834) 40 R.R., 536.

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have been in occupation for any term of years is to be deducted in computing the period of enjoyment of the easement claimed, only if that claim is resisted within three years next after the termination of the term by the owner of the land. The owner did not resist the plaintiffs' claim for three years and more after 1899 and it follows that the plaintiffs' right acquired by enjoyment for twenty years became absolute within the meaning of section 15 of the Easements Act. The fact that the defendants continued in possession as tenants by holding over after the expiry of the lease for years cannot make any difference.

It was also argued on behalf of the appellant that the tavazhi, whose tenants the defendants were, held the servient premises for life within the meaning of section 16. I have no doubt that the grant for maintenance of the tavazhi can never be called an interest for life as contemplated by the Act unless it can be shown that it was intended for certain definite lives. We have no document to show what the terms of the grant were, supposing there was a grant, and, as the Subordinate Judge finds, the arrangement, such as it was, was capable of being revoked at any time by the tarwad to whom the property belonged. The Appeal therefore fails on all the points argued before us and must be dismissed with costs.

PHILLIPS, J.

PHILLIPS, J.—This suit is brought by the plaintiffs for an injunction restraining the defendants from obstructing the access of light and air to the plaintiffs' warehouse. The warehouse was built in 1877 and the land now in the possession of the defendants was in the possession of its owner from 1877 to 1887. In 1887 the land was demised on kanom for twelve years and was held over until 1905 when there was a fresh renewal for twelve years. The defendants' land belongs to the Orakatteri tarwad and was allotted to a tavazhi for maintenance. The kanom demises were granted by the tavazhi.

Two questions arise for consideration in this appeal: (1) whether an easement right can be acquired by prescription against a tenant for the term of his tenancy, and (2) whether by virtue of section 16 of the Easements Act the owner of the land is prevented from disputing the easement claimed, because he did not resist the easement within three years of the determination of the tenancy from 1887 to 1899.

So far as the second question is concerned, it appears that the plaintiffs enjoyed this easement right from 1877 until the date of suit in 1913, which is a great deal longer than the statutory period of twenty years prescribed for the acquisition, of an easement by prescription. For part of this period, namely, from 1887 to 1899, the land was in the possession of the defendants and their predecessors as tenants under the kanom granted to them for twelve years. This kanom expired in 1899 and it would therefore appear that, unless the owner intervened within three years from 1899, the easement would become absolute.

It is contended for the defendants that the term had not been determined by the landlord and therefore section 16 would not apply. Section 16 is however clear. It says:

"When any land . . . has been held . . . for any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such . . . term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such . . . term, resisted by the person entitled, on such termination, to the said land."

The contention is that the determination of such term means the determination of the tenant's right, and it is argued that inasmuch as the tenants were allowed to hold over for six years and were then confirmed in their right by a renewal deed, there has been no determination of their right. The language of the section is however clear. In the words "determination of such term," "such term" means "any term of years exceeding three years from the granting thereof." In this case a term of twelve years was granted and, when that term expired, it must be held to be a determination of such term. The landlord did not take advantage of his right to intervene within three years of that date and therefore the period of tenancy is not excluded in the computation of the period of twenty years.

A further argument is put forward, namely, that the kanom was not granted by the owner but by the tavazhi, which itself had only a life interest in the land. No evidence has been adduced as to the exact terms on which the tavazhi was in possession of the land, but the kanom deed (exhibit III) merely

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recites that the land has been set apart towards the expenses of Orakatteri house. Even if there had been a grant to the tavazhi, it would not be a grant of a life interest, for there is no one life during which such interest could subsist and the interest would continue so long as the tavazhi existed. It is not however proved that there was any grant to the tavazhi, and I think it must be held that the tavazhi was allowed to enjoy this land under the tarwad and that its possession was nothing more than the possession of the tarwad. In that view, the landlord was really the tarwad acting through its agent, the karnavan of the tavazhi, and section 16 would be applicable. In this case I think that the plaintiffs have made their right absolute by more than twenty years' enjoyment and are entitled to a decree.

The first question is one of greater difficulty, the contention for the appellants being that no easement right can be acquired by prescription against a tenant and this appears to be the principle recognized by the Common Law of England—vide *Wheaton* v. *Maple & Co.*(1) and *Kilgour* v. *Geddes*(2). In an earlier case apparently a contrary view was suggested, *Daniel* v. *Anderson*(3), and in two Irish cases this contrary view was adopted—*Beggan* v. *M'Donald*(4) and *Fahey* v. *Dwyer*(5). The question is whether the Common Law principle has been embodied in the Indian statute, the Easements Act. It is not disputed that a tenant could grant an easement for the period of his tenancy even under English Law. But the possibility of its acquisition by prescription is not recognized on the theory that there can be no presumed grant except from the owner. In the Easements Act, we find in section 6 that an easement may be for a term of years or for other limited period. In section 4 it is defined as a right which the owner or occupier of certain land possesses as such. Again in section 8:

"An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed."

Again in section 11:

"No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take

(1) (1893) 3 Ch., 48.
(2) (1904) 1 K.B., 457.
(3) (1862) 31 L.J. Ch., 610.
(4) (1878) 2 L.R. Ir., 560.
(5) (1874) 4 L.R. Ir., 271.

effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor."

I do not think the word 'impose' in these sections must necessarily mean impose by some act, such as a grant, but it will include "impose by omission to take steps to prevent acquisition by prescription." Similarly in Explanation I to section 15:

"Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease."

Section 37 says:

"When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished."

All these provisions seem to imply the possibility of an easement being acquired against a lessee or other person having a derivative interest in the property, and the only section which throws some doubt is section 7 which says:

"Easements are restrictions of one or other of the following rights (namely):—

(*a*) The exclusive right of every owner of immovable property . . . to enjoy and dispose of the same . . . (*b*) The right of every owner of immovable property . . . to enjoy without disturbance by another the natural advantages arising from its situation."

This section seems to imply that easements can only be acquired against an owner of property. It does not say that the owner must be the absolute owner, and the following section (section 8) is inconsistent with such interpretation of the word, for it says that an easement can be imposed to the extent to which any one may transfer his interest in the heritage, which obviously contemplates the existence of a lesser interest than absolute ownership. I think therefore that the word 'owner' in section 7 cannot be interpreted as meaning necessarily absolute owner. The whole scheme of the Act seems to imply that easements can be acquired even against limited owners. The Act undoubtedly goes further than the

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English Law on the subject of prescription, for section 8 of the English Act (2 & 3 Will. 4, c. 71) which corresponds to section 16 of the Easements Act is restricted to rights of way and water, whereas section 16 of the Indian Act is applicable to all kinds of easements. This is one instance wherein English Law has not directly applied in India, and there being this one instance, it is not so difficult to hold that in other respects also the legislature did not wish to adopt all the provisions of the English Common Law. If that be so, there is no serious objection to reading the sections I have enumerated above in a natural meaning, and understanding them as referring to the acquisition of easements against owners who are not absolute. If that is so, the easement has at any rate been acquired by the plaintiffs against the defendants and for the purpose of this suit to which the owners of the land were not parties the plaintiffs would be entitled to an injunction.

I agree therefore that the Appeal must be dismissed with costs. K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919, January 23.

RAMARAYA SHANBOGUE (PETITIONER), APPELLANT,

v.

SHERBOTT VENKATARAMANAYYA (RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 1—Payment of decree amount into Court—Notice to decree-holder—Cessation of interest, whether from date of deposit or date of service of notice.

Interest does not cease to run in respect of a decree-debt deposited in Court until the decree-holder gets notice of the deposit.

CIVIL MISCELLANEOUS SECOND APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal No. 359 of 1917, preferred against the order of JAGANNATHA RAO S. TAGOT, the District Munsif of Mangalore, in Regular Execution Petition No. 220 of 1917 (in Original Suit No. 502 of 1914).

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* Appeal against Appellate Order No. 48 of 1918.