payment were vested in it, this would be a case, in which that discretion might properly be exercised; and we see no reason for dissent on that point.

The remaining question is accordingly whether the petitioner did, as he alleges in paragraph 3 of his affidavit, come to know of the passing of the decree against him only about two weeks before his petition was filed. On that point the lower Court has recorded no evidence and there is no finding. We must set aside the lower Court's order and remand the petitions for readmission and disposal in the light of the foregoing after enquiry as to whether the petitioner's statement just referred to is true. Costs to date will be costs in the cause and will be provided for in the order to be passed by the lower Court.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

KUNJAMMAL AND THREE OTHERS (APPELLANTS—DEFENDANTS), APPELLANTS,

1921, December 12.

v

RATHINAM PILLAI (PLAINTIFF), RESPONDENT.*

Indian Easements Act (V of 1882), sec. 15—Right of way through another's house—Long user presumed to be as of right.

Where the plaintiff proved that his scavenger was cleaning his privy for the last 30 years and more by passing through the defendants' house,

Held, that the presumption was that the user was of right, and that the plaintiff had acquired a right of way by long user, apart from section 15 of the Easements Act.

* Second Appeal No. 1892 of 1920.

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There is nothing to prevent the acquisition of a right of way through a dwelling house.

The presumption of right from long user is not in India a presumption *de jures et de jure*, but is one which can be rebutted by proof of facts which are inconsistent with or militate against the inference.

SECOND APPEAL against the decree of C. R. VENKATESWARA AYYAR, Additional Subordinate Judge of Trichinopoly, in Appeal Suit No. 344 of 1920 (Appeal Suit No. 172 of 1920 on the file of the District Court, Trichinopoly), preferred against the decree of R. S. SANKARA AYYAR, District Munsif, Trichinopoly, in Original Suit No. 171 of 1918.

The facts are set out in the judgment.

The defendants against whom both the lower Courts granted an injunction preferred this Second Appeal to the High Court.

K. Rajah Ayyar and *R. Ganapati Ayyar* for appellant.

S. Krishnamurti for respondent.

The Court delivered the following JUDGMENT:

This Appeal arises out of a suit by the plaintiff for a permanent injunction restraining the defendants from obstructing the scavenger from passing through the defendants' house and cleaning the plaintiff's privy. The case for the plaintiff is that the scavengers have been cleaning his privy for over 60 years by going through the defendants' doorway marked in the plan, crossing the defendants' privy and then passing by a doorway in the wall to the plaintiff's privy which is adjacent and cleaning it. The first defendant's case was that the right was never exercised. The District Munsif found that the plaintiff's privy was cleaned for over 30 to 40 years by the scavenger passing through the defendants' house as alleged in the plaint and that

he was not obstructed before October 1917. The suit was filed on the 19th of March 1918. On Appeal the Subordinate Judge concurred with the findings of the District Munsif and dismissed the appeal.

It is contended in Second Appeal that section 15 of the Easements Act cannot apply to easements like the present one, that there was no allegation that the right claimed was exercised as a matter of right and to the knowledge of the defendant and that there can be no right in law to a right of way through a dwelling house.

Section 15 of the Easements Act deals with the requisites necessary to acquire a right under the Act but, as pointed out by their Lordships of the Privy Council in *Rajrup Koer* v. *Abul Hossein*(1), other titles and modes of acquiring easements are not excluded or interfered with.

It is argued that in the present case all that both the lower Courts have found is that the privy was cleaned by the scavenger entering through defendants' doorway from between 30 to 40 years but that it has not been shown that this was done as a matter of right and that there is no presumption in such cases that the exercise was of right.

The plaintiff in paragraph 4 of the plaint states that scavengers have had access to the privy in his house through the doorway of the defendants for the past 60 years, and in paragraph 5 it is alleged that owing to misunderstandings between the parties the defendants with a view to prevent the scavenger from cleaning the privy "have locked up the door D on their side, and are obstructing and annoying the plaintiff in various ways contrary to his rights, and that the defendants have no right whatever to prevent the scavengers."

(1) (1881) I.L.R., 6 Calc., 394 (P.C.).

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Paragraph 6 states that the wrongful acts of the defendants have caused a great deal of trouble and loss to the plaintiff and are also likely to give rise to various civil and criminal proceedings and that defendants should be restrained by an injunction. So far therefore as the plaint is concerned, not only is it not alleged that the user was permissive but the allegations show that plaintiff claims it as of right.

The defendants deny that the scavengers passed through their house in order to clean the plaintiff's privy and state that even if the user were true it could not have been as of right.

Four witnesses were examined for the defendants but their evidence is to the effect that the right claimed was never exercised. There is no suggestion of any licence given by the defendants or their predecessors-in-title to the scavenger cleaning plaintiff's privy by entering through their house.

In the case of long enjoyment of the right claimed, a legal origin should, as observed by Lord HERSCHELL in *Philipps* v. *Halliday*(1), be presumed when there has been a long continued assertion of a right if such a legal origin were possible and the Court will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. The presumption of a lost grant in such cases, has been recognized in the leading case of *Goodman* v. *Saltash Corporation*(2). Circumstances, however, should exist which would render the drawing of the presumption reasonable in law and probable in fact, but, as pointed out by FARWELL, J., in *Mercer* v. *Denne*(3), not only would Courts be slow to draw an inference of fact which would defeat a legal right which has been

(1) [1891] A.C., 228. (2) (1882) 7 App. Cas., 633.
(2) [1904] 2 Ch., 534.

exercised for a very long period unless such inference is irresistible but will presume everything that is reasonably possible to presume in favour of such a right.

Where user is proved, the presumption is that it is of right till the contrary is proved. Gale in his valuable treatise on Easements observes:

"The effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement for in such a case the user would not have been had with the intention of acquiring or exercising a right. The presumption, however, is that a party enjoying an easement acted under a claim of right until the contrary is shown." (Page 222, 9th Edition.)

In *Campbell* v. *Wilson*(1), it was held that where there was no evidence to show that the way over another's land had been used by permission such user over 20 years exercised adversely and under a claim of right was sufficient to enable the jury to raise the presumption of a grant. In *Saminatha Mudaly* v. *Velu Mudaly*(2), WALLIS, C.J., observed:

"On the other hand the user of the plaintiffs may be presumed to be as of right and to have a lawful origin, and if a lawful origin of the plaintiff's right can be suggested such an origin can be presumed."

It has been argued for the appellant that the presumption in favour of the exercise being as of right rather than licence does not apply to India, and reference has been made to the cases referred to below.

In *Shaikh Khoda Buksh* v. *Shaikh Tajuddin*(3), BANERJEE, J., was of opinion that it would not be safe to follow the rule of English Law without qualification. He was of opinion that as section 26 of the Limitation Act requires the user to be as of right, the onus will be on the plaintiff to prove it and that having regard to the habits of the people of the country it would not be

(1) (1803) 3 East., 294; 102 E.R., 610. (2) (1916) 4 L.W., 128.
(3) (1903) 8 C.W.N., 359.

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right to draw the same inference from mere user as would be proper and legitimate in a case arising in England. The learned Judge quotes with approval the following passage in Mitra on Limitation :—

"The nature and character of the servient land, the friendship or relationship between the servient and dominant owners and the circumstances under which the user had taken place may induce the Court to hold that the user was not "as of right" although there is no direct proof that the enjoyment was had with the permission of the servient owner."

In *Meser Mullick* v. *Hafizuddi Mullick*(1), PIGOT and RAMPINI, JJ., were of opinion that in questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the circumstances under which the user took place.

In *Saminatha Mudaly* v. *Velu Mudaly*(2), PHILLIPS, J., while referring with approval to the dictum of Lord HERSCHELL on *Phillips* v. *Halliday*(3), and to the rule laid down by Gale, was disposed to draw a difference between a right of way and a right to water. Referring to the observations of BANERJEE, J., in *Shaikh Khoda Buksh* v. *Shaikh Tajuddin*(4), the learned judge observes :

"No doubt, as was remarked by BANERJEE, J., in *Shaikh Khoda Bukshh* v. *Shaikh Tajuddin*(4), that in this country it would not be right to draw the same inference from user as in England but his remarks had reference to a right of way, in respect of which I agree that the observation has considerable force ; but rights to water stand on a different footing, for in this country they are very highly valued and a licence for the use of water gratis is by no means common."

We do not think it can be said that rights of way into and through a private dwelling house in this country are not as highly valued as rights to water.

(1) (1911) 13 C.L.J., 316.
(2) (1916) 4 L.W., 128.
(3) [1891] A.C., 228.
(4) (1903) 8 C.W.N., 359.

In *Muthu Gounden* v. *Anantha Gounden*(1), which related to a right of way, it was found that the plaintiff and his predecessors-in-title were using the path for over 20 years, that though there were objections more than 2 years before suit actual user did not cease till a fence was put up a few days prior to suit. It was held by SADASIVA AYYAR and BAKEWELL, JJ., that the plaintiff was entitled to succeed both under the Easements Act and under the general law. SADASIVA AYYAR, J., held that:

"When open enjoyment has taken place for a long term of years title by prescription was acquired independently of the Statute and a suit to establish that right can be brought within 12 years after the obstruction."

We do not think that the cases cited by the appellant's vakil establish that no presumption should be raised by user and that in this country enjoyment of a right of way should be presumed to be by licence till the contrary is proved. All that they decide is that there are conditions and circumstances to be taken note of in this country before the Court can come to the conclusion that the exercise of a right of way can be held to have been as of right. What the circumstances are which militate against the user being exercised as of right must like any other fact be pleaded, and it is for the Court to consider whether having regard to the existence of all or some of the conditions and considerations referred to by BANERJEE, J., a reasonable presumption can be drawn as to the exercise being of right. The presumption of right from long user is not in this country a presumption *de jure et de jure*. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference which in

(1) (1915) 29 M.L.J., 685.

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the absence of evidence by the defendant would entitle plaintiff to a decree.

It has been argued that there can be no right of way through another person's house. No authority has been cited in support of this proposition. Having regard to the fact that in towns houses without compounds or backyards are contiguous to each other and that very often access through another house may be the only way by which scavengers can have access, it is difficult to see why no right of way can be acquired. The right to use a kitchen of a neighbouring house for washing has been recognized in England (Gale on Easements, page 28). It is no doubt true that the use should not go beyond what is reasonably required for the enjoyment of the dominant tenement but this does not mean that the right itself cannot be acquired where its user may be irksome. All that Mr. Rajah Ayyar was able to urge was the trouble his clients will be put to in having to keep the door of their house open.

We are of opinion that the decrees of the lower Courts are right and dismiss the Second Appeal with costs.

N.R.