SINNAN CHETTY v. ALAGIRI AIYER.

SCHWABE, C.J.

feeding the title as it is called in *Whitehorn Brothers* v. *Davison*(1), or forwarding the title as it is called by PHILLIMORE, J., in *In re a Debtor, Ex parte Petitioning Creditor*(2), the principle being that if there is a sale or pledge to a bona fide purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title it enures to the benefit of the purchaser or pledgee.

On these grounds I think that the judgments of the District Munsif and VENKATASUBBA RAO, J., are correct and the appeal must be allowed with costs throughout.

OLDFIELD, J. OLDFIELD, J.—I agree.

RAMESAM, J. RAMESAM, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1923, April 23.

THE TALUK BOARD, DINDIGUL, THROUGH ITS PRESIDENT (FIRST DEFENDANT), APPELLANT,

v.

VENKATRAMIER AND FOUR OTHERS—(PLAINTIFFS), RESPONDENTS.*

Customary right—Long use by villagers of village site—Grant by Government of the site for building a school—Legality of.

In the absence of evidence of open and continuous enjoyment as of right, of village sites, by the villagers, establishing in their favour any definite customary right or right by prescription, the Government can assign village sites to any one who applies for them for building purposes. *Collector of Gōdāvari District* v. *Pedda Rengayya* (1908) 4 M.L.T., 440, followed.

SECOND Appeal against the decree of U. GOVINDAN NAYAR, Additional Subordinate Judge of Madura, in

(1) [1911] 1 K.B., 463. (2) (1907) 97 L.T., 140.

* Second Appeal No. 289 of 1921.

Appeal Suit No. 49 of 1920 preferred against the decree of S. NARAYANASWAMI AYYAR, District Munsif of Tirumangalam, in Original Suit No. 417 of 1918.

The facts are given in the judgment.

T. Narasimha Ayyangar with *T. Nallasivam Pillai* for appellant.

K. Bashyam Ayyangar for respondents.

JUDGMENT.

AYLING, J. AYLING, J.—This appeal relates to a plot of land, 14 cents in extent, forming part of S. No. 261-2 F-4 in Solaikurichi village, Madura taluk, which measures 19·28 acres and is registered as nattam (building site) poramboke. Most of the survey number has already been built over, but 2·92 acres are still vacant and of this, Government has granted the suit plot to the Dindigul Taluk Board (first defendant) to build a girls' school upon. The plaintiffs are villagers, who claim that they have a right to use the whole of the vacant land (including the suit site) for various agricultural purposes and plead that the grant to the taluk board is consequently illegal.

The sole question is as to the legality of the grant and on this the two lower Courts have come to opposite conclusions, the Subordinate Judge in first appeal deciding in favour of plaintiffs.

It is not disputed that nattam poramboke may properly be granted for the purpose specified; but plaintiffs claim a right vested in the villagers whom they represent, incompatible with such a grant.

They say in paragraph 5 of the plaint "from time immemorial this kalam poramboke has been in the undisturbed enjoyment of the ryots of the said village and they have been using it as of right for communal purposes as detailed hereunder. That the said site

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from time out of mind has been used and is now being used as a threshing floor for about 500 acres in times of harvest (kodai and kalam), for storing manure and green leaves, for stocking hay-stacks immediately after the harvest, for drying paddy before it is taken to the granaries of the ryots, for allowing their cattle, buffaloes, etc., amounting to 1,000 and more, to stray and remain there before they are taken for grazing, and for other incidental innumerable purposes connected with agricultural operations."

The lower Appellate Court finds as a fact that the villagers have been using the land for purposes mentioned in the plaint and proceeds "The question is whether such enjoyment has given them the right asserted by them in the plaint or whether it was only as a matter of grace that the villagers were permitted such acts of enjoyment." He decides in favour of plaintiffs.

It seems to me that whether the right claimed by the plaintiffs is based on custom or prescription, the enjoyment alleged is of too fugitive and patently permissive a kind to afford support to it. There is probably, no village in the Presidency in which the unoccupied village-site is not used for the purposes indicated. Such user does no harm to any one and is unobjectionable until the land is wanted for its legitimate purpose. I do not propose to labour this point as it is sufficient to quote from the judgment of a Bench of this Court (BENSON and BHASHYAM AYYANGAR, JJ.) dealing with an absolutely similar case, *Collector of Gōdāvari District* v. *Pedda Rengayya*(1). "According to the common law of the country the control of Grama nattam vests in the Revenue authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes."

(1) (1908) 4 M.L.T., 440.

It is suggested as a ground of distinction that the use of the land as a threshing floor, which is not specifically referred to by the learned Judges in that case, though probably included, is a ground of distinction. It seems to me to differ in no way from the other uses set out in the plaint. Any flat hard piece of ground can be utilized as a threshing floor and such user is of just the same character as the others.

Apart from the evidence of user, the only other evidence in plaintiffs' favour to which we are referred is Exhibit A, copy of an order of the Madura Tahsildar in 1902. It appears from this that about that time another portion of the same unoccupied nattam poramboke had been set apart for building police lines and that on the ryots petitioning that this would be "an obstruction to the public use" it was ordered that another locality should be selected and that the place originally chosen should be kept as threshing floor poramboke, etc., for the public use."

I am not prepared to attach much weight to this as evidence of recognition by Government of the rights claimed by plaintiffs; and still less as evidence of a fresh grant for communal purposes other than building site. Exhibit A is merely the order of the Tashildar communicating to the ryots the fact that the Board of Revenue had acceded to their request, and given up the scheme of building police lines on that spot. Neither the petition of the royts nor the orders or reports of the Deputy Collector and Collector nor the Proceedings of the Board (all specifically referred to in Exhibit A) are in evidence and I find it impossible to say from Exhibit A that Government either recognized plaintiffs' rights or made a fresh grant of the land. We do not know the extent of the land required for the police lines or, except by conjecture, the nature of the petitioners' objections, or the

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extent to which the existence of an equally suitable alternative site may have influenced the Board's decision. I cannot agree with the lower Appellate Court that Exhibit A evidenced any acknowledgment of plaintiffs' rights, or was more than a concession to their pleas (or those of their predecessors) on the ground of comparative convenience as estimated at the time.

I would set aside the decree of the lower Appellate Court and restore that of the District Munsif dismissing the suit with costs throughout.

ODGERS, J.

ODGERS, J.—My learned brother has set out the facts and it is unnecessary for me to repeat them. The question is "have the plaintiffs acquired any and what rights in the suit land?". The question falls under two heads (1) have they acquired such rights, if at all, by long enjoyment, (2) or by grant. The land is admittedly building site poramboke and any rights acquired by long enjoyment must have been acquired against Government. The lower Appellate Court has apparently found a customary right in favour of plaintiffs founded on long enjoyment from 28—70 years as spoken to by the witnesses. The nature of the enjoyment is very varied—the user most prominently put forward is kalam (threshing floor) but other alleged user includes "storing manure and green leaves, stocking hay-stacks, drying paddy, allowing cattle, buffaloes, etc., to stray and remain there before they are taken for grazing and for other incidental innumerable purposes connected with agricultural operations. (See plaint paragraph 5.) In the first place it seems clear that no easement in the ordinary sense of the term as defined by section 4 of the Easement Act has been acquired. The right is not set up in respect of a dominant tenement to which the easement is appurtenant over a

servient tenement subject to it; *Ashraf Ali* v. *Jagan Nath*(1). It is true that section 18, Easement Act, recognizes that easements may be acquired by virtue of a local custom and the illustration (*a*) to the section appears to illustrate a customary right rather than an easement though it may be justified by the fact that every cultivator as the owner or possessor of cultivated land has the right to graze his cattle on the common waste. In my opinion the right claimed here must be established if at all as a custom recognized in section 2 (*b*), Easement Acts. The distinction between a customary right and customary easement is seen in *Palaniandi Tevan* v. *Puthirangonda Nadan*(2). No fixed period is laid down by law as necessary to establish the former. In the Madras case quoted above the law as laid down in *Kuar Sen* v. *Mamman*(3) was approved. The learned Judges there held paragraph (2), page 92—

"In our opinion a Court should not decide that a local custom such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned."

Apart from reasonableness, I do not think it can be said in the present case, that the alleged custom is certain as to extent or application. The waste land in question was obviously used for any and all purposes or for several purposes at one or different times. Each user was fugitive or intermittent so much so that as shown by the plaint itself it is extremely difficult if not impossible to say what the customary user sought to be established was. Indiscriminate miscellaneous user of

(1) (1884) I.L.R., 6 All., 497. (2) (1897) I.L.R., 20 Mad., 389
(3) (1895) I.L.R., 17 All., 87

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village waste land cannot, in my opinion, establish the fact that such user "had become a customary law of the place in respect of the persons and things which it concerned." The user here is much too indefinite to do anything of the kind; I do not think the attempt to establish the primary user of the land as kalam can be supported.

In *Collector of Gōdāvari District* v. *Peddu Kengayya*(1) a precisely similar case arose as to the village building site. The learned Judges held that no customary right was established. They said until it (the land) is appropriated in this way to the use of some definite person it is usual for the villagers to make use of it in any way that suits them best.

> "They throw rubbish on it, graze their cattle on it, use it as a latrine, and the like, and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government and that Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes."

There is therefore no sufficient evidence from which I can say that a custom has been established.

There is no direct evidence of any grant, but the lower Appellate Court relies on Exhibit A as an acknowledgment of the rights of the plaintiffs in the suit land. The villagers protested some years ago when it was proposed to erect police lines on the site in question. The Collector's order, Proceedings of the Board of Revenue and Deputy Collector's disposal, though referred to in Exhibit A, are not before us, and Exhibit A is an endorsement signed by the Tahsildar on the petitions of the villagers. The endorsement says "the place shall be kept as threshing floor, poramboke, etc., for the public use." It may be that no undertaking is intended

(1) (1908) 4 M.L.T., 440.

or implied in this that the place shall be so kept for ever; in any case I think it impossible to hold that Government by this endorsement of the Tahsildar either intended or must be held in law to recognize the alleged customary rights of the villagers in the waste. If this were so, it would be reasonable to suppose that this would much more clearly appear from the Proceedings of the Collector or the Board which the respondents have not laid before us. Under the circumstances, I am not prepared to say that Exhibit A is an acknowledgment of these rights of the villagers. Differing from the lower Appellate Court, I therefore hold that the appellants must succeed and that no customary right has been established by the respondents.

N R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

KONTHALATHAMMAL (PETITIONER), APPELLANT,

1923 April 24.

v.

THANGASAMY AND THREE OTHERS (PETITIONERS NOS. 1 TO 3 AND FIRST RESPONDENT), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890) sec. 47—Order refusing to remove testamentary guardian—Appeal against order, maintainability of—Hindu Law—Power of a Hindu father to appoint by will guardian for the person and separate property of his minor children.

A Hindu died leaving a will by which he bequeathed his property to his minor daughter and appointed a guardian for such property and for the person of the minor. On the refusal by the Court of an application to remove such guardian, under section 39 of Guardians and Wards Act,

Held, (1) that no appeal lay to the High Court under the Act from an order refusing to remove the guardian and (2) that

* Civil Miscellaneous Appeal No. 66 of 1923 and Civil Revision Petitions Nos. 289 and 359 of 1923.