APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1923, February 8.

USSAN KASIM SAIT (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF SOUTH MALABAR AT CALICUT (DEFENDANT), RESPONDENT.*

Easement in favour of the public, acquisition of—Proof necessary —Acquisition of easement by public, not equivalent to acquisition by Government.

To a suit by a private person against the Government for a declaration of his ownership of a land, the acquisition of an easement over it by the public is no defence.

Though the public cannot acquire ownership of a land it can acquire over it an easement or profits *a prendre* either by grant or by prescription; *Lutchmeeput Singh* v. *Sadaulla Nushyo* (1883) I.L.R., 9 Cal., 698 and *Attorney-General* v. *Esher Linoleum Company, Limited* [1901] 2 Ch., 647, followed.

If proof of an actual or lost grant is not available what is necessary to prove is not mere user but dedication to the public at large as distinguished from a section of it, inferable from long user. *Poole* v. *Huskinson* (1843) 11 M. & W., 827, and *Muhammad Rustam Ali Khan* v. *Municipal Committee, Karnal* (1920) I.L.R., 1 Lah., 117 (P C.), followed. Acquisition of an easement by the public is not equivalent to an acquisition by the Government.

SECOND APPEAL against the decree of G. H. B. JACKSON, District Judge of South Malabar, in Appeal Suit No. 901 of 1919 preferred against the decree of T. V. KRISHNAN NAYAR, Additional District Munsif of Tirur, in Original Suit No. 405 of 1917.

The facts are given in the Judgment.

The plaintiff, whose suit was dismissed by both the lower Courts, filed this Second Appeal.

* Second Appeal No. 2129 of 1920.

C. V. Anantakrishna Ayyar for appellant.

Government Pleader (*C. Madhavan Nair*) for respondent.

The Court delivered the following

JUDGMENT:—

The property in dispute in this case is a small piece of a vacant ground outside the boundary wall of the plaintiff's premises, those premises having access to it and the adjoining road by a gate.

The suit by plaintiff is for a declaration of his right to the property outside his boundary wall. The Government registered the land as poramboke at the recent survey; and he claims it as his jenm property. Issues were framed as to the sustainability of the suit for mere declaration, the defendant, the Secretary of State, denying the plaintiff's possession, as to the ownership of the property, and as to the title set up by Government by adverse possession.

The first objection to the lower Appellate Court's judgment is that it contains no distinct finding as to title, its discussion of the evidence being confined to a conclusion that the measurements in the plaintiff's documents could not be accurate, although the question whether they could be trusted as to any part of the disputed land was left open. If the measurements could not be trusted, the lower Appellate Court should have considered whether it could not act on the principle that title goes with possession and it should have decided whether the plaintiff had discharged the burden of proof which, in view of his failure to establish his alleged right in connexion with the survey, was, it is not disputed on him. That, however, matters comparatively little. For the lower Appellate Court has, in fact, found in favour of the defendant's possession and against that of the

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plaintiff in connexion with the plea of prescription; and it would presumably have, if it had looked at the case in the manner suggested, applied that finding to support a conclusion in favour of the defendant's title and also against the plaintiff's right to sue only for a declaration.

Its decision on prescription is based on findings that first the public has prescribed, and second, the defendant, Secretary of State, represents the public and can have the benefit of its prescription.

As regards the first of these points, the lower Appellate Court's treatment of the evidence is summary. It mentions only that the land has been used as a cart stand and that the public has occupied it freely, the plaintiff's user by taking goods to his gate-way being no more than any member of the public might have done. The case may really be stronger than appears from the judgment. In fact we have been shown evidence that there was once a pound on the site. But the stronger objections to the lower Appellate Court's findings are that, if the public can prescribe at all, a point which we shall return to, the lower Appellate Court has not referred to any evidence, that those who used the land did so on behalf of the public and not in their individual capacity or to any exclusion of the plaintiff, or anything inconsistent with the continuance of his ownership, subject to a right against him of the description referred to in section 2 (*b*) of the Easements Act V of 1882. And a right of that description is not what defendant claimed, and, if it were claimed, it could be no defence to the suit. These distinctions are exemplified by *Lutchmeeput Singh* v. *Sadaulla Nushyeo* (1) where, however, the form of the plaint prayer admitted of enquiry into the existence of such a right as a defence.

(1) (1883) I.L.R., 9 Calc., 698.

In fact, however, the lower Appellate Court and the parties were wrong in considering the possibility of prescription by the public at all. For the public cannot prescribe. No doubt no authority as regards prescription by it for ownership has been produced. But the principle applicable to such prescription will be the same as that recognized in connexion with prescription for easements or profits *a prendre*. As regards prescription of the latter kind authority is clear; *Smith* v. *Andrews* (1); and *Attorney-General* v. *Esher Linoleum Company, Limited* (2) and this position is assumed in the Indian case last mentioned. As was said in the second English case,

> "it is necessary to remember that the thing to be established is dedication, not user."

What can be proved is that the public has acquired an easement or a profit *a prendre* by a grant, or dedication, actual, if direct evidence of one is available, or to be presumed in case such evidence is not; and in the latter alternative evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or dedication, which is lost, at some time was made. The lower Appellate Court must at the re-hearing, which we are about to direct, bear this in mind. It will also bear in mind the necessity for proof that the dedication, if any, was to the public at large, and not to any section of it. *Poole* v. *Huskinson* (3) and *Muhammad Rustam Ali Khan* v. *Municipal Committee, Karnal* (4).

There will still, however, be one more question for the lower Appellate Court to consider. In its judgment it has assumed that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State. That case was not put forward in the written

(1) [1891] 2 Ch., 678. (2) [1901] 2 Ch., 647.
(3) (1843) 11 M. & W., 827; 152 E.R., 1039.
(4) (1920) I.L.R., 1 Lah., 117 (P.C.).

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statement, and its sustainability is not obvious. For we know that the public or a portion of it sometimes prescribes or attempts to prescribe against Government. The lower Appellate Court has given no particular reasons for this part of its decision, and at the re-hearing we must ask it to consider the matter more fully, if its other findings at the re-hearing render it necessary.

The lower Appellate Court has misconceived the law at every point. We set aside its decision and remand the appeal for re-admission and re-hearing in the light of the foregoing. Costs to date here and in the lower Appellate Court will be costs in the cause and will be provided for in its decree.

Stamp value on the appeal memorandum in this Court will be refunded on application.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

1923, March 6.

SIVASUBRAMANIA PILLAI (FIRST RESPONDENT), APPELLANT,

v.

THEETHIAPPA PILLAI AND TWO OTHERS (PETITIONERS AND RESPONDENTS 2 AND 3), RESPONDENTS.*

Sections 24, 28, 39 *and* 44 *of Provincial Insolvency Act (III of* 1907)—*Adjudication in insolvency and conditional discharge—Decree debt, not barred on date of adjudication—Application to Insolvency Court for recognition of decree debt after conditional discharge—Execution of decree barred on date of application—Admissibility of decree debt.*

Under the Provincial Insolvency Act (III of 1907) any debt whose recovery was not barred by limitation on the date of the adjudication of the debtor as an insolvent can be proved in

* Civil Miscellaneous Appeal No. 106 of 1920.