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Order XXXVII a provision which says that if leave to defend is not obtained "the allegations in the plaint shall be deemed to be admitted" making it unnecessary to prove them by evidence. The same rule applies under Order VI (*a*), for it adopts the rules of Order XXXVII unless modified by itself. These decisions are therefore of no force now.

We hold that suits on bills of exchange, hundis and promissory notes by or against legal representatives of parties can and must be brought in the High Court in the summary form.

The case will go back to the learned Judge on the Original Side for disposal. The costs of the reference will be costs in the cause.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Krishnan and Mr. Justice Beasley.*

1925, October 27.

SUBBA RAO (DEFENDANT), APPELLANT,

v.

LAKSHMANA RAO AND ANOTHER (PLAINTIFFS), RESPONDENTS. *

Easement by prescription—Assertion of ownership during statutory period—Assertion of ownership during prior legal proceedings—Effect of both on prescriptive easement.

An easement by prescription is capable of being acquired only if the user during the statutory period had been with the *animus* of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same.

* City Civil Court Appeal No. 67 of 1922.

But a mere assertion of ownership in prior legal proceedings while the enjoyment was really as an easement, is not conclusive against a right of easement. The question of *animus* is one of fact. *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*, [1915] A.C., 599, and *Lyell* v. *Hothfield*, [1914] 3 K.B., 911, followed. *Konda Reddi* v. *Ramasami Reddi*, (1915) I.L.R., 38 Mad., 1, overruled.

APPEAL against the decree of PAUL APPASWAMI, City Civil Judge, Madras, in O S. No. 487 of 1921.

The facts are given in the Order of Reference.

This appeal coming on for hearing, the Court (PHILLIPS and ODGERS, JJ.) made the following:—

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—In this case there are two houses, Nos. 19 and 20, adjoining one another and apparently they both originally belonged to the same family For many years past, and certainly for 20 years, the inhabitants of No. 20 have been using a privy situated in No. 19 and for that purpose have been enjoying the right of way over portions of No. 19. The plaintiff in this case originally brought a suit in 1917 for recovery of house No. 19, but that suit was dismissed. He has now brought the present suit for a declaration that he is absolutely entitled to the latrine marked C in the plan and to the use thereof and in the alternative, as a right of easement. Although the plaintiff's suit to recover house No. 19 has been dismissed, yet, in his plaint, he persists in asserting his right to it, inclusive of the latrine marked C, and he pleads in the alternative that he is entitled to the use of the latter as an easement. The learned City Civil Judge has found that this right has been established and has given a decree accordingly, and this decision is in accordance with a decision of this Court in *Konda Reddi* v. *Ramasami Reddi*(1). There it was held that the mere claim of the higher right of ownership would not prevent a person from acquiring a lesser right of easement, provided he can show that he asserted certain right of enjoyment over the land in question for the benefit of another land belonging to him. This case purported

(1) (1915) I L.R., 38 Mad., 1.

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to follow a Full Bench decision in *Narendra Nath Bahari* v. *Abhoy Charan Chattopadhya*(1). A similar view was taken in this Court in *Venkata Varaha Dikshitar* v. *Subbaroya Pillai*(2). It is now urged for the appellants that this view is opposed to the decision of the Judicial Committee in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*(3) and also to decisions in *Jalaluddin* v. *Asad Ali*(4) and *Chunilal Fulchand* v. *Mangaldas Govardhandas*(5), the two latter decisions being under section 26 of the Limitation Act, the Easements Act not being applicable in those provinces. I think it must be conceded that the contention that the decision in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*(3) is opposed to the decisions of this Court is correct. There their Lordships say: "In substance the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted, is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained." The question is not discussed at any length and the case being one from South Nigeria, it is obviously not based upon the provisions of the Indian Easements Act and it is upon the language of section 15 of that Act that this Court based its conclusion. In addition to the decision of the Judicial Committee, we have been referred to a case in *Lyell* v. *Hothfield*(6) which distinguishes two earlier cases, *Earl De La Warr* v. *Miles*(7) and *Dawson* v. *Mc. Groggan*(8). In the former case it was held by BRETT, L.J., that the user having been established, the fact that the user was based upon a right which was found not to exist was not material. COTTON, L.J., came to the same conclusion. Nor do I think that the leading judgment of JAMES, L.J., takes any different view. This case and the Irish case were considered in *Lyell* v. *Hothfield*(6) by a single Judge and were distinguished on the ground that in those cases the acts of user were done in pursuance of an alleged right in *alieno solo* although the claim was made under a mistaken belief, but where the acts were acts

(1) (1907) I.L.R., 34 Calc., 51 (F.B.).
(2) (1911) 1 M.W.N., 95.
(3) [1915] A.C., 599.
(4) (1883) 3 A.W.N., 66.
(5) (1892) I.L.R., 16 Bom., 592.
(6) [1914] 3 K.B., 911.
(7) (1881) 17 Ch. D., 535.
(8) (1903) 1 Ir.R., 92.

attributable to a claim of the ownership of the soil itself there can be no question of obtaining an easement. This is the view taken in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*(1). The question appears to be one of some difficulty, for it is not quite clear to me, why a person using a right of way on another's land as of right uninterruptedly for over 20 years should be allowed to establish a permanent right to the easement, whereas if that same person says that he used this right of way, because he was the owner of the land, he should by that mere assertion be deprived of the right which would otherwise be held to have accrued to him. It must also be observed that if the acts are done in pursuance of a mistaken belief of ownership, and such belief is known to the real owner, an absolute title by prescription would be acquired in 12 years, whereas a lesser right of easement is not acquired even after 20 years of the very same enjoyment. Such a conclusion hardly seems to be logical. As the decision of the question must depend upon the interpretation of section 15 of the Easements Act, I think that possibly the judgment of this Court may have to be modified in view of the decision of the Judicial Committee which was based not on the Indian Easements Act but on the English Law on the point which is very similar. I think therefore that it is desirable to refer to a Full Bench the question whether the decision in *Konda Reddi* v. *Ramasami Peddi*(2) is correct.

ODGERS, J.—In this case the plaintiffs sued as owners of house and ground No. 20, Singarachari Street, Triplicane, and they also alleged that they were the owners of No. 19 in the same street by right of inheritance as reversioners to the last male holder. As to this latter house they had brought a suit C.S. No. 222 of 1917 which was tried on the Original Side of this Court and Mr. Justice COUTTS TROTTER (as he then was) decided that No. 19 was not the property of the plaintiffs but of the defendants and this judgment was confirmed in appeal, O.S. Appeal No. 52 of 1919. The right in dispute in the present case is the right of using a latrine which is in the compound of No. 19 and plaintiff's suit was for a declaration that they are absolutely entitled to "their latrine" marked C in the plan and to the use thereof as hithertofore. They claim user for more than 70 years. The prayer in the plaint was amended on the

(1) [1915] A.C., 599. (2) (1915) I.L.R., 38 Mad., 1.

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25th September 1922, the suit having been begun on the 17th August 1921, by an alternative prayer that they are entitled to the use of the said privy C as hithertofore as a right of easement. The learned City Civil Judge found that the plaintiffs were entitled to an easement, and on appeal to this Court it is contended that no right of easement can be acquired on or over the land which the acquirer believes to be his own. It is perfectly clear from the definition of an easement in section 4 of the Easements Act that no man can acquire an easement in land which is his own. The question is whether the belief or allegation that the land is his own, when it is not really so makes any difference. In other words, has a man under section 15 of the Easements Act to prescribe for an easement with a certain animus or not? The part of the Easements Act which will have to be considered is section 15, paragraph (3): "And where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years." Section 2 of the English Prescription Act, 2 and 3 Will. IV, Ch. 71, which corresponds to section 15 (3) of the Indian Easements Act runs "The right of way must have been actually enjoyed by any person claiming right thereto without interruption." The provisions of this Act have been the subject of many decisions. For instance in *Bright* v. *Walker*(1) the words "as of right"—which section 15 reproduces in the Indian Easements Act have been considered, and it was laid down that under the Prescription Act the claimant must prove enjoyment for statutory period as of right. This would be impossible for instance if there were unity of possession of both the tenements during all or part of the time; compare the remarks of the same Judge (MARTIN, B.) in *Onley* v. *Gardiner*(2). In Gale on Easements, p. 238, it is laid down that one of the essentials for an acquisition of easement is that the enjoyment must have been an enjoyment of the easement in the character of an easement distinct from the enjoyment of the land itself, and in Goddard on Easements, p. 16, the author says that "where a man exercises his right in his capacity as owner of the soil the right he exercises is not an easement but a proprietary right incident to the ownership of the land." In *Gardner* v. *Hodgson's*

(1) (1834) 1 C. M. & R., 211; 149 E.R., 1057.
(2) (1838) 4 M. & W., 496; 150 E.R., 1525.

Kingston Brewery Company(1), Lord LINDLEY says: "I understand the words 'claiming right thereto' and the equivalent words 'as of right' which occur in section 5 (of the Prescription Act) to have the same meaning as the older expression *nec vi, nec clam, nec precario*" and adds "A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained . . . If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established." In *Attorney-General of Southern Nigeria* v. *John Holt & Company*(2) the respondents had built stores and sheds upon certain land reclaimed from the sea and for a long period had used it for purposes of their business and had had exclusive possession. The Crown appealed to the Privy Council against the colonial judgment in so far as it declared that the respondents were entitled to an easement to place stores, etc., on the reclaimed land; and it argued that as the respondents were in exclusive possession of the servient land they could not acquire an easement over it by prescription. Their Lordships held that the respondents thought they were making proper use of their rights as owners of property abutting upon the sea and say "an easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted is the right over the property of that other." They refer to *Lyell* v. *Hothfield*(3). In this case, the learned Judge found that for sixty years there have been disputes between certain bodies of shepherds, each asserting their own rights on the ground that the land belonged to the lord of their own manor and not to the lord of the other manor. The Judge points out that "the feeding of sheep on the part of the manor in question was not done with the consent or acquiescence of Lord HOTHFIELD and it is the consent or acquiescence which lies at the root of a claim for prescription . . . Here the acts were acts attributable to a claim to the ownership of the soil itself." And again at the end of the judgment he says: "Here the enjoyment, such as it was, was attributable to a mistaken

(1) [1903] A.C., 229 at 239. (2) [1915] A.C., 599,
(3) [1914] 3 K.B., 911.

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claim to a right to the soil." As against this body of authority the respondents quote *Konda Reddi* v. *Ramasami Reddi*(1) the decision of SUNDARA AYYAR and SADASIVA AYYAR, JJ., where it is held that "there is no reason why a person who walks along a certain land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription. It is pointed out that in the third paragraph of section 15 of the Easements Acts title need not be claimed as an easement and that the enjoyment is required to possess two properties, viz., (1) that it must be as of right without interruption, and (2) that it must be as an easement. The first quality is intended to show that enjoyment by licence or under a contract which would not amount to a grant of an easement would be ineffectual to create a right by prescription. Then the other quality is that the enjoyment should be as an easement and they quote illustration (*b*) to the section to explain what is meant by the words "as an easement," and they go on to say "that the words mean that unity of title or possession during the period of the twenty years or a portion thereof, makes the possession useless to create a right of easement." The learned Judges in a previous part of their judgment consider what is meant by adverse enjoyment and they say "the *animus possidendi* of the adverse enjoyer would determine the title which he would acquire by prescription. It might be open to the real owner to say that only an easement right was so asserted by the person in adverse enjoyment. . . . It is the adverse enjoyment or enjoyment without a lawful right that gives right to a title by prescription." In considering the case *Narendra Nath Bahari* v. *Abhoy Charn Chattopadhya*(2) the learned Judges say: "It is of course impossible to prove an animus to hold the land as owner and at the same time in virtue of a right of easement." It appears to me therefore that the learned Judges in *Konda Reddi* v. *Ramasami Reddi*(1) must be taken to hold that the animus by or under which a person exercises his right in the case of a prescriptive right must be taken into consideration. The same observation may be made with reference to another case quoted by the respondents, namely, *Venkata Varaha Dikshitar* v.

(1) (1915) I.L.R., 38 Mad., 1. (2) (1907) I.L.R., 34 Calc., 51 (F.B.).

Subbaroya Pillai(1) where it was held that a false belief of ownership does not necessarily preclude the acquisition of a right of easement. The learned Judges in sending down the case for a finding on the question whether the plaintiff has enjoyed the way as an easement as of right for the prescriptive period with reference to the circumstances they adverted to, say: "They are material for determining *quo animo* did the plaintiff enjoy the way." The facts of the case are not reported, but it would appear probable that the right of easement had been established previously and that this right was used to support a claim to ownership.

Another case cited by the respondents was *Earl De La Warr* v. *Miles*(2), and a passage was relied on to the effect that if enjoyment is proved for the time requisite under the Prescription Act as of right and not by permission it does not matter on what ground the claimant rests his alleged title. A careful perusal of the judgment will, I think, show, however, that it is confined to one of the three grounds, custom, grant or prescription. There was, I think, no claim to a right of ownership in the case and it may further be said that this was not a case of easement at all but of a *profit a prendre*, as in the case of *Dawson* v. *Mc. Groggan*(3) where it was held that the defendants were entitled to presume a legal origin for an absolutely uninterrupted assertion of rights to *profits a prendre* extending over seventy years. Reference was made to *Narendra Nath Bahari* v. *Abhoy Charn Chattopadhya*(4) where a Full Bench of the Court held that a suit was not liable to be dismissed *in limine* because it contained alternative claims of ownership and easement. This is a matter of pure pleading and all that the Court held was that they are alternative claims and not so necessarily inconsistent that the plaintiff ran the risk of having his pleading struck out. In this state of the authorities, speaking for myself, I am of opinion that the ruling in *Konda Reddi* v. *Ramasami Reddi*(5), with great deference to the opinion of the two eminent Judges who decided it, is wrong and that if a man exercises a right with the animus or consciousness that he is exercising a proprietary right in his own land and not a right over another's land he cannot acquire a right of easement by prescription. The question in this case is, if that premise is sound, with what animus did the

(1) (1911) 1 M.W.N., 95.
(2) (1881) 17 Ch. D., 535.
(3) (1903) 1 Ir.R., 92.
(4) (1907) I.L.R., 34 Calc., 51 (F.B.)
(5) (1915) I.L.R., 38 Mad., 1.

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plaintiff here assert his right to use the privy (C)? As already pointed out he asserted his ownership to No. 19 in a previous suit which went to appeal. That was in 1917. That was found against in 1920. In 1921 he presented the plaint in the present case insisting on his absolute title to the privy marked C and continued to assert it for 13 months thereafter until he amended his plaint, and even then the claim to an easement is only inserted in the alternative. The state of a man's mind can only be judged by his outward acts and it is certainly a question of fact. If one has to judge the state of the plaintiff's mind in this case, I do not see how the conclusion can be avoided that he persisted in his claim to this latrine as owner. I agree in the order proposed by my learned brother.

ON THIS REFERENCE—

S. Duraiswami Ayyar with *A. Raghunatha Rao* for appellants.—A right to an easement by prescription can be acquired only if the enjoyment during the statutory period had been as such, i.e., as an easement, and not in assertion of any claim of ownership in the enjoyer. A person can acquire a right of easement only on another's property and not on his own; see the definition of 'easement' in the Indian Easement Act, sections 15 of the Easement Act and 26 of the Limitation Act and sections 1, 2 and 5 of the English Prescription Act, which are all alike. The words 'claiming right thereto' in section 15 govern 'easement.' It is the character of the *animus* during the time of enjoyment that determines whether enjoyment was as an easement or in virtue of a claim of ownership. He referred to *Attorney-General of Southern Nigeria* v. *John Holt and Co.*(1), *Lyell* v. *Hothfield*(2), *Bright* v. *Walker*(3), *Jalal-ud-din* v. *Asad Ali*(4), *Chunilal Fulchand* v. *Manjoldas Govardhandas*(5). In this view most of the observations in *Konda Reddi* v. *Ramasami Reddi*(6) are wrong. What was asserted both during the stautory period and also during the previous litigation was only a right of ownership and not easement. He distinguished the other cases quoted in the Order of Reference. He referred to Goddard on Easements, page 243 and Gale, 10th Edition, page 226.

P. Satyanarayana for respondents—Section 15 of the Easement Act and not section 26 of the Limitation Act governs

(1) [1915] A.C., 599.
(2) [1914] 3 K.B., 911.
(3) (1834) 1 C.M. & R., 211; 149 E.R., 1057.
(4) (1883) 3 A.W.N., 66.
(5) (1892) I.L.R., 16 Bom., 592.
(6) (1915) I.L.R., 38 Mad., 1

the matter. It has been held that the above Indian decisions under the latter section do not govern the former section. The two sections are differently worded. *Konda Reddi* v. *Ramasami Reddi*(1) is right and it is followed in *Surendra Nath Singh* v. *Girdhari Singh*(2). These cases and *Onley* v. *Gardiner*(3) imply that the words 'as an easement' in section 15 are useful only to exclude the period during which there is unity of possession of the dominant and servient tenements and not to destroy the acquisition of easement altogether. 'Claiming title thereto' in section 15 do not govern 'easement.' There is a comma, after 'thereto'; see Peacock on Easements, page 432. I rely also in *Narendra Nath Bahari* v. *Abhoy Charn Chattopadhya*(4), *Venkata Varaha Dikshitar* v. *Subbaroya Pillai*(5) and *Sri Ram* v. *Mani Ram*(6). Supposing I had falsely claimed in the prior litigation the higher right as owner, that does not prevent me from asserting now the true character of my enjoyment, i.e., as an easement. I really asserted only a right of easement throughout. *Jalal-ud-din* v. *Asad Ali*(7) is dissented from in *Chadammi Lal* v. *Sahib Charan*(8).

COUTTS TROTTER, C.J.

The OPINION of the Court was delivered by

COUTTS TROTTER, C.J.—We think that some of the expressions of opinion in *Konda Reddi* v. *Ramasami Reddi*(1) cannot be supported. They are clearly in conflict with the English cases of *Lyell* v. *Hothfield*(9), and the *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*(10). There is nothing inconsistent with these two decisions to be found in *Earl De La Warr* v. *Miles*(11), because in that case the right was exercised as a right of a dominant over a servient tenement, even though the owner of the dominant tenement was in error as to the exact origin of the right he possessed and exercised. Though the English cases are of course decisions either under the English

(1) (1915) I L.R., 38 Mad., 1.
(2) (1921) 62 I.C., 633 (Calc.).
(3) (1838) 4 M & W, 496; 150 E.R., 1525.
(4) (1907) I.L.R., 34 Calc., 51.
(5) (1911) 1 M.W.N., 95.
(6) (1923) 74 I.C., 922 (All.).
(7) (1883) 3 A.W.N., 66.
(8) (1905) A.W.N., 18.
(9) [1914] 3 K.B., 911.
(10) [1915] A.C., 599.
(11) (1881) 17 Ch. D., 535.

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Prescription Act or the common law, we are satisfied that their principles apply to section 15 of the Indian Easements Act. It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner, however strongly the making of such a claim might weigh against him. The learned Judges in *Konda Reddi* v. *Ramasami Reddi*(1) seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be ascribed, is one which the Court must answer, and if *Konda Reddi* v. *Ramasami Reddi*(1) implies the contrary we think it is wrongly decided. We agree with the conclusion of SHEARMAN, J., in *Lyell* v. *Hothfield*(2) that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact which must be determined in the light of these observations by the Division Bench to which the case will be sent back.

N.R.

(1) (1915) I.L.R., 38 Mad., 1. (2) [1914] 3 K.B., 911.