KONAMMAL v. ANNADANA.

SIR JOHN WALLIS.

v. *Surya Narayana Dhatrazu*(1). In the latter case there had been separate living for no less than seventy years.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingy.

Solicitor for appellant—*H. S. L. Polak.*

Solicitors for respondent—*Douglas Grant* and *Dold.*

A.M.T.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Odgers.

1927, January 31.

GOLI PADDAYYA AND OTHERS (DEFENDANTS 1 TO 14, 16 AND 18 TO 25), APPELLANTS,

v.

CHALIKI KRISHNAMURTHI (SECOND PLAINTIFF), RESPONDENT.*

Customary Easement—Sec. 18 of the Indian Easements Act (V of 1882)—Claim of easement on behalf of some members of a village, maintainability of.

A claim to a customary right of way for men and carts along the field of a person, made not on behalf of a whole village but only on behalf of certain owners of lands in the village is maintainable in India.

Quaere: whether the law in England is different? *Edwards* v. *Jenkins*, [1896] 1 Ch., 308 and *Brocklebank* v. *Thompson*, [1903] 2 Ch., 344, considered.

APPEAL under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice PHILLIPS, in Second Appeal No. 1597 of 1922, preferred against the decree of the Court of the Subordinate Judge of Cocanada,

---

(1) (1897) I.L.R., 20 Mad., 256; L.R., 24 I.A., 118.

* Letters Patent Appeal No. 71 of 1926.

in Appeal Suit No. 20 of 1921 preferred against the decree in Original Suit No. 32 of 1919, on the file of the Principal District Munsif of Cocanada.

The facts are given in the judgment.

S. Varadachari (with *P. Somasundaram*) for appellants contended that the question in Second Appeal was only one of fact and that the decision of the Subordinate Judge on appeal was wrongly reversed by PHILLIPS, J., in Second Appeal. He argued that all ingredients of a customary right had been found in his favour by the Subordinate Judge, viz., that the custom was reasonable in extent and certain in character that it was not permissive; *Mohidin* v. *Shirlingappa*(1). Any temporary restriction does not disprove a customary right; *Ethamukkala Konda Reddi* v. *Singampalli Venkata Subba Row*(2). He referred to sections 2 (*b*) and 18 of the Easements Act.

C. S. Venkatachari (with *N. Rama Rao*) for respondents.—The facts found clearly show that the custom pleaded was neither certain nor reasonable in extent and that it was only permissive. Moreover what is pleaded in this case is not an easement but a customary right and it is not recognizable in law as it is not claimed on behalf of a whole district, parish or village but only on behalf of certain members of a village; *see* Gale on Easements, 10th Edition, pages 3 and 4; *Edwards* v. *Jenkins*(3), *Brocklebank* v. *Thompson*(4), *Krishna* v. *Atul*(5), *Orr* v. *Raman Chetti*(6); though such a right may exist on behalf of a definite section or caste in a village, as in *Palaniandi Tevan* v. *Puthirangonda Nadan*(7).

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—In this case the only question is whether the defendants who are twenty-five in number, owners of certain fields—south of the plaintiffs' field No. 147—are entitled to use the track along the western portion of the plaintiffs' field for the purpose of taking their cattle, men and carts. In the shape in which the question was

(1) (1899) I.L.R., 23 Bom., 666.
(2) (1913) 18 I.C., 85.
(3) [1896] 1 Ch., 308.
(4) [1903] 2 Ch., 344.
(5) (1924) 39 C.L.J., 612.
(6) (1895) I.L.R., 18 Mad., 320.
(7) (1897) I.L.R., 20 Mad., 389.

GOLI PADDAYYA v. KRISHNA-MURTHI.

RAMESAM, J.

finally discussed by the lower Courts, the question was whether there was a customary right to such an easement. Both the District Munsif and the Subordinate Judge found in favour of the defendants. Before the Subordinate Judge, the Munsif's finding was attacked on the ground that the custom pleaded was not reasonable and was not certain. He found "that the extent of the land over which the plaintiffs would be compelled to give up their cultivation was very small." By it what he meant was that the width of the track was very small in comparison with the width of the field. He observed, "At the most the track extended over only $\frac{1}{2}$ to $\frac{3}{4}$ of an acre." In addition to this, the Subordinate Judge also found that the custom was reasonable. The next question discussed by the Subordinate Judge was whether the custom found by the lower Court was certain as to its extent and application. The ground on which the plaintiffs' pleader attacked the finding of the District Munsif was that there were discrepancies in the evidence of the defendants' witnesses, as to the width of the pathway or track. The Subordinate Judge explained the discrepancies by saying that it was due to the witnesses not having clear and definite notions of the measurements. Only two witnesses mentioned 10 yards, one witness mentioned that it was 3 yards. But there is a preponderance of evidence in favour of 5, 6 or 7 yards' width and having regard to this evidence that there was a definite pathway, the District Munsif has found that the pathway, 5 yards in width, would be ample and serve the purpose very reasonably.

The Subordinate Judge also found that the user of the defendants was not permissive. When the matter came up before Mr. Justice PHILLIPS in Second Appeal, the Subordinate Judge's finding on all these three points was attacked. Our brother was not satisfied

with the reasoning of the Subordinate Judge on all the three points. On the question of reasonableness, he refers to the Subordinate Judge's statement in paragraph 5 of his judgment that "the appellants have not raised any ground in their appeal memorandum that the customary right in question is unreasonable," and observes: "It is difficult to understand how the fact that the question is not taken in the grounds of appeal although it was argued before the lower Appellate Court can affect the question of whether it is not reasonable or unreasonable". The omission of a vakil to embody a plea in his pleadings cannot possibly constitute a custom as reasonable or unreasonable. We understand the Subordinate Judge to find that the custom set up is not unreasonable apart from the want of a ground of appeal and gives an additional reason in support of his judgment that there was no ground of appeal on the point. Again PHILLIPS, J. observes: "The fact that the extent is small in comparison with the plaintiff's other lands does not seem to be a very good ground for holding that it is not unreasonable."

On the other hand, I think that a question whether the custom relating to a pathway is reasonable or unreasonable should be considered with reference to its extent relatively to the total extent of lands held by the owners of the servient tenements. In fact where the lower Court takes that fact into consideration in considering the question whether the custom is reasonable or unreasonable I do not think it is open to the Court sitting in Second Appeal to say that the finding of the lower Court is vitiated on account of such considerations. I therefore think that PHILLIPS, J., is not correct in refusing to accept the finding of the Subordinate Judge on this point. The next point discussed by him is with regard to the certainty of that customary right.

GOLI PADDAYYA v. KRISHNA-MURTHI.

RAMESAM, J.

He observes: "When a custom is set up it must be definitely proved and it is not sufficient to show that there is a custom which varies from time to time both in extent and in situation".

Here again I think the Subordinate Judge has been misunderstood by PHILLIPS, J. The Subordinate Judge does find that the custom is definitely proved and it is not as if he finds much variance from time to time both in extent and in situation. The variation is in the statements made by the witnesses describing the width of the pathway. The Subordinate Judge thinks that the discrepancies are only apparent and are explainable. I therefore think that even in this point the Subordinate Judge's finding ought to have been accepted as a finding on a question of fact. Generally, questions whether a custom of this kind, set up by one party and denied by the other in agricultural tracts in this country is reasonable and certain, are eminently questions of fact more of common sense than of any abstract question of law and unless there is a clear misdirection as to the principles of law that ought to be applied, questions for the lower Appellate Court.

The third point discussed is whether the user was permissive or not. On this point PHILLIPS, J., observes: "The question of user as of right, has been dealt with as if it was necessary for the plaintiff to prove that the user was with his actual permission". He also says, "That this finding is arrived at as a result of his conclusion that the plaintiff has not proved that he gave permission, is, I think, clear from the fact that no reference is made in this respect to the admitted interruption of the right, which would have an important bearing on the question, whether the user was permissive or whether it was of right".

On the other hand I think that the burden of proof is on the plaintiffs to show that the user was permissive, the defendants having proved a user for 30 years. The presumption would be *prima facie* that it was as of right. It is for the party who wants to show that it was only permissive to prove it. See the observations in *Kunjammal* v. *Rathinam Pillai*(1). The case of the interruption referred to points to the opposite conclusion than what is suggested by Mr. Justice PHILLIPS. Again I think the learned Judge ought to have accepted the finding of the Subordinate Judge on this point.

Now in Letters Patent Appeal Mr. C. S. Venkatachariar appearing for the respondents raises another question, namely, that as the customary right is claimed not on behalf of the whole village but only on behalf of certain owners of lands in the village it is bad in law, and he relies on the decision in *Edwards* v. *Jenkins*(2). In this case a custom is claimed over three parishes not forming a district. KEKEWICH, J., observes that the plea is bad. The case never went up to a Court of Appeal and it was doubted in Halsbury's Laws of England, Vol. 10, page 230. Even if it is correctly decided it is doubtful whether it helps the respondents' contention. Another case relied on by the learned vakil for the respondents is *Brocklebank* v. *Thompson*(3), and particularly the observation of JOYCE, J., at 353 is relied upon. In that case JOYCE, J., finds

"That there is not any ground for contending that the use of the path in question was or has been at any time limited to any particular class of the parishoners".

Then he observes:

"It is at least doubtful whether a usage, if proved, for the tenants of certain particular tenements in the manor of Irton

(1) (1922) I.L.R., 45 Mad., 633. (2) [1896] 1 Ch., 308.
(3) [1903] 2 Ch., 344.

GOLI PADDAYYA v. KRISHNA-MURTHI.

and those tenements only, to use the disputed way as a church path, would be a good custom in law, those tenements not forming a definite and distinct district known to the law as a manor or a hamlet".

RAMESAM, J.

These observations are no doubt in the respondents' favour but in support of this sentence reference was made to the earlier case of *Edwards* v. *Jenkins* (1), mentioned above. But I doubt if that case supports these observations. The same remark applies to the observation of MUKERJEE, J., in *Krishna* v. *Atul*(2). I do not think that the decision in *Edwards* v. *Jenkins*(1) supports those observations. On the other hand the observations of SHEPHARD and BEST, JJ., in *Orr* v. *Raman Chetti*(3) support the appellant, though the point was not expressly raised or argued there on principle. I do not think there is any reason why in India there may not be customary rights for certain streets in a town or village or for certain portions of a town or village. It may be added that this point was not raised in the three Courts before and is newly raised here. In the result I am of opinion that there is no ground made out in Second Appeal for rejecting the finding of the Subordinate Judge and for sending the case down for a fresh finding. I am of opinion that the Letters Patent Appeal should be allowed. Accordingly I would reverse the judgment of PHILLIPS, J., and restore that of the Subordinate Judge with costs here and in the Court below.

ODGERS, J.

ODGERS, J.—I agree, but, as we are differing from a learned Judge of this Court I will add a few words of my own. The question is whether Mr. Justice PHILLIPS was justified in interfering in Second Appeal with the findings that had been come to by the learned Subordinate Judge. He sent the case down for a finding

(1) [1896] 1 Ch., 308. (2) (1924) 39 C.L.J., 612.
(3) (1895) I.L.R., 18 Mad., 320 at 326.

practically re-opening the whole matter as he was not satisfied with the finding of the first Subordinate Judge on the question of reasonableness, certainty and permissive user. In my opinion the finding of the first Subordinate Judge confirming the judgment of the District Munsif is perfectly definite on all these points. It seems to me that one of the most important questions, if not the most important, in considering whether or not a customary right is reasonable or not, is to see what effect it will have or what will be the extent of the burden on the servient tenement; for, an easement or a right which when exercised obliterates so to say, the servient tenement entirely, is clearly unreasonable. Therefore it seems to me that the learned Subordinate Judge was quite entitled to take into account the extent of this customary cart-track which was claimed, as compared with the whole extent of the plaintiffs' land. I agree with the observations of my learned brother in the judgment just delivered that the observation by the learned Judge in this Court as to this point of unreasonableness not having been expressly taken in the appeal memorandum must be regarded as simply an additional ground why the Subordinate Judge came to the conclusion he did. I therefore think that the observation of the learned Judge that "it is difficult to understand now the fact that the question is not taken in the grounds of appeal although it was argued before the lower Appellate Court can affect the question of whether it is not reasonable or unreasonable" is not correct.

With regard to certainty it seems to me with great respect that the learned Judge has entirely missed the point. That a customary cart-track prevailed in favour of the defendants was clearly found and it was clearly found that it extended from point A to point B so to say, i.e., between two definite points. In my opinion it can

GOLI PADDAYYA v. KRISHNAMURTHI.

ODGERS, J.

make no difference as far as certainty goes, that witnesses gave varying widths for this customary way. Once you find a customary way it seems to me that it is immaterial as to whether one witness says it is 4 or 5 yards or another witness says it is 6 or 7 yards wide. But if it is found on the evidence that it was the whole or say seven-eighths of the width of the plaintiffs' entire lands then you may have a custom bad not for uncertainty but as I have pointed out, for unreasonableness. Why the learned Judge refused to accept the explanation or rather explanations (for there are two or three put forward by the Subordinate Judge, and found also by the Munsif) as to why these agriculturists should disagree as to the width of the pathway I must say I am unable to understand. The learned Subordinate Judge found that they did not understand and had no notions as to measurements. It is said in this connexion that the learned Subordinate Judge had no right to fix 5 yards rather than any other width for this path. I think the learned Subordinate Judge did not mean to fix 5 yards as an arbitrary width. What he intended was to take an average of the widths spoken to by the witnesses and really to find that a customary path existed to the extent of 5 yards' width, which after all is not very unreasonable as it provides for two country carts passing each other.

With regard to the last point, that of permissive user, it seems to me that the following observation in *Kunjammal* v. *Rathinam Pillai*(1) is in point:—

> "Once it is proved that this path has been used for 30 years or thereabouts by the defendant, the onus is on the plaintiff to prove that this user has been permissive".

As far as I gather no attempt was made to prove this point. The learned Judge says "The question of user

(1) (1922) I.L.R., 45 Mad., 633.

as of right has been dealt with as if it was necessary for the plaintiff to prove that the user was with his actual permission". I think this is really a case in which the onus is on the plaintiff to prove permissive user once the defendants had established the fact by evidence of a long course of user by themselves.

Now in this Court and for the first time a question has been raised by Mr. C. S. Venkatachari for the respondents and it is this. He says that here you have 25 owners, those possessing lands, south of the plaintiffs' lands and in whose favour this customary right had been found both by the Munsif and the first Subordinate Judge; but he says they are not a village, they are not a definite part of a village and further they are not a fluctuating body of people such as is permitted by law to prove a customary right in their favour. They are merely a band of individuals each of whom should prove a prescriptive right in his favour if he can. Now it seems to me that no English decision with regard to manors or townships or parishes can hold here. True there is the case decided by Mr. Justice KEKEWICH in *Edwards* v. *Jenkins*(1) to the effect that the inhabitants of several adjoining or contiguous parishes cannot exercise a customary right of recreation over lands situated in one of such parishes. The learned Judge thouggt that the word "district" which occurs in some of the older cases cannot be constructed as meaning two or three contiguous or adjoining parishes and that it must be confined to the particular division known to the law in which the particular property is situate. This case was referred to in *Brocklebank* v. *Thompson*(2) a decision of Mr. Justice JOYCE. The former decision of Mr. Justice KEKEWICH stands with the exception of its

(1) (1896) 1 Ch., 308. (2) [1903] 2 Ch., 344.

GOLI PADDAYYA v. KRISHNA-MURTHI.

ODGERS, J.

being mentioned in the 1908 case entirely by itself. This question appears to be founded on an exceedingly technical view of the law and the question is whether that technical view should be imported into the Indian law. As a case of first impression it seems to me that there is no Indian authority to warrant its introduction. The case of *Edwards* v. *Jenkins*(1) in fact turned on the footing that no manorial custom as it was alleged existed, namely, a custom for the inhabitants of one parish to use the footpath for going to and from the church. I think the learned Judge found that no such manorial custom existed on the evidence. He also found that even if proved it may be doubtful whether it would be good in law, as these tenements do not form a definite and distinct district known to the law as a manor or a hamlet. As pointed out by my learned brother the authority of the earlier case is doubted in Halsbury, Vol. 10, 230. Now we have Madras cases, *Palaniandi Tevan* v. *Puthirangonda Nadan*(2) and *Orr* v. *Raman Chetti*(3). In regard to the latter the learned Judges say,

> "the second objection is that the custom found by the Subordinate Judge is unreasonable since the right claimed is a right to obstruct the whole stream. It is not unusual in this country for each of those who own lands adjacent to streams depending upon them for irrigation to take water by turns either for a certain number of days or hours."

In *Palaniandi Tevan* v. *Puthirangonda Nadan*(2) it was held that no fixed period of enjoyment is necessary in law to establish a customary right and that a customary right to user may exist apart from a dominant heritage. In this case all the residents of a particular village except the Nichars or Pariahs and Pallars had been using the water of a well and it was held that the plaintiffs by possessing houses and

(1) (1896) 1 Ch., 308. (2) (1897) I.L.R., 20 Mad., 389.
(3) (1895) I.L.R., 18 Mad., 320.

becoming residents had acquired a right of easement to use the water of the well. This seems to be a sufficient answer to this question which as I have said has now been raised for the first time. I agree with my learned brother that the Letters Patent Appeal must be allowed and the decree of the first Subordinate Judge restored. I agree with my brother with regard to his order as to costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

BADA KRISTAM NAIDU (PETITIONER), APPELLANT,

v.

DURVADA PATRUDU *alias* JANAKIRAMAYYA AND 2 OTHERS (RESPONDENTS AND PETITIONER), RESPONDENTS.*

1927, May 3.

Sec. 47 (3) *and O. XXI, r.* 16, *Civil Procedure Code (V of* 1908)—*Death of transferee decree-holder—Competency of executing Court to enquire whether the transferee was a benamidar and to allow real owner to execute.*

On the death of a transferee of a decree, it is open to the executing Court under section 47 (3) and Order XXI, Rule 16, Civil Procedure Code, to enquire whether the transferee was really a benamidar for another and to allow the real owner or his legal representatives to execute the decree. *Palaniappa Chettiar* v. *Subramania Chettiar*, (1925) I.L.R., 48 Mad., 553, distinguished.

APPEAL against the order of H. D. C. REILLY, District Judge of Ganjām, in E.P. Nos. 39 and 68 of 1916 in O.S. No. 20 of 1904.

The facts are given in the judgment.

---

* Appeals against Orders Nos. 141 and 64 of 1923.