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company, when not subject to limitation by Act of Parliament, may contract itself from all responsibility arising from the acts of its agents or servants. Looking then at the cases already referred to, I think that under the "risk note" in this case the owner undertook all risks of conveyance and loss, however caused by the servants and agents of the Company during the journey, and that the latter is not responsible for the abstraction of the plaintiff's ghee. Under these circumstances, our answer to the learned Subordinate Judge should be that the Railway Company is protected by the risk note in question, and that neither it nor the Traffic Manager is liable unless either one or the other has committed some independent wrong in connection with the property, and as no such allegation has been made, that the suit should be dismissed.

Suit dismissed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Prinsep.

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ARZAN (PLAINTIFF) *v.* RAKHAL CHUNDER ROY CHOWDHRY AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANTS).*

Right of way—Easement—Limitation Act (XV of 1877), s. 26—User as of right—Prescriptive right.

For the purpose of acquiring a right of way or other easement under s. 26 of the Indian Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. In this respect there is a difference between the acquisition of such rights under that Act, and their acquisition under the English Prescription Act.

THIS was a suit to establish a right of way over certain lands rented by the defendant, and to remove a wall obstructing the alleged right of way.

The land over which the alleged way passed belonged originally to one Sherif Hossein, and was, in 1855, sublet by a tenant of Sherif Hossein to the Government on a mokurrari lease for the purpose of opening a burial ground. The entire land so leased was not required for that purpose, and the surplus land, over

* Appeal from Appellate Decree No. 1076 of 1882, against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 27th March 1882, affirming the decree of Baboo Jogendro Nath Ghose, Second Munsiff of Burrisaul, dated the 31st December 1881.

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which the way was claimed, remained unoccupied till 1878, when the Government let it to the defendant for building purposes.

The Munsiff found that the plaintiff had enjoyed the right of way peaceably and without interruption for a period of more than twenty years, but was of opinion that the plaintiffs' enjoyment was not as of right, and that the owner of the servient tenement was not aware of the user, and therefore dismissed the suit.

The plaintiff appealed to the Subordinate Judge of Backergunge, and the latter came to the same conclusion as the Munsiff.

The plaintiff then appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Doorga Mohun Das* for the respondents.

The judgment of the Court (GARTH, C.J., and PRINSEP, J.) was delivered by

GARTH, C.J.—The plaintiff has a dwelling house in Burrisaul, in which he and his family have lived for a great many years; and he claims a right of way in respect of that house to and from the high road which runs from east to west through the village.

On the 2nd of Assin 1285 (17th September 1878), the defendant No. 1 obstructed this right of way by commencing to erect a pucca stable upon the land, whereupon the plaintiff took proceedings in the Criminal Court; but the Magistrate refused to interfere, because he considered it a question to be tried in the Civil Court.

The defendant No. 1, who is the lessee of the land under the Government, denies the plaintiff's right of way, and the Collector who appears for the Secretary of State, the defendant No. 2, also virtually denies it.

It appears that the land over which the alleged way passes belongs to one Sherif Hossein. He let it upwards of thirty years ago to one Ijjutullah, and Ijjutullah, after holding it for some six or seven years, sublet it on mokurrari lease to the Government on the 4th of April 1855, for the purpose of enlarging a burial ground at Burrisaul. The entire land so leased was not, however, required for that purpose, and the surplus land over which the

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way is claimed remained unoccupied until the year 1878, when the Government let it to the defendant for building purposes.

It is necessary to state these facts, in order to understand the nature of the defence, and the ground upon which the lower Courts have based their judgment.

The plaintiff proved to the satisfaction of both Courts that he had used the way in question for some thirty or forty years. Indeed, except by the sufferance of his landlord, he appears to have no other means of access from his house to the public road.

But both Courts have found that, notwithstanding this long user, he has not acquired a right of way under the Indian Limitation Act.

The Munsiff finds that he has enjoyed the way peaceably and openly, and also (after some hesitation, that he has enjoyed it without interruption for upwards of twenty years.

He considers, however, that the plaintiff cannot be said to have enjoyed it *as of right* for three reasons.

First, because the Government, who have been the owners of the servient tenement for twenty years before suit, were not aware of the plaintiff's user of the way; secondly, because the plaintiff submitted to divers encroachments, which the owner of the servient tenement imposed upon him; and thirdly, because many years ago when Sherif Hossein, the then owner in possession, endeavoured to stop the way, the plaintiff did not bring a suit in the Civil Court as for an obstruction to a private right, but proceeded in the Criminal Court as for an obstruction to a public one.

The Munsiff accordingly dismissed the suit, and his decision was confirmed by the Subordinate Judge, apparently on two grounds:

(1.) That a right of way cannot be enjoyed "*as of right*" without the knowledge of the servient owner, and that the Government had no knowledge of the user of this way by the plaintiff; and

(2.) That the interruptions which took place from time to time in the user showed that the plaintiff had never peaceably enjoyed the way "*as of right.*"

These points have been argued before us on appeal; and the first of them gives rise to a very important question; namely whether the principles which govern the acquisition of a right of way in England *by prescription* apply also to the acquisition of such a right *under the Indian Limitation Act.*

Both the lower Courts have relied mainly upon the doctrine laid down in Gale on Easements and other authorities, that a right of way cannot be gained *by prescription* unless with the knowledge of the owner of the servient tenement.

Prescription implies a grant; the user by which a prescriptive right is gained is only evidence of a previous grant; "and therefore, in order that such user may confer an easement, it follows that the owner of the servient tenement must have known that such an easement was being enjoyed, and also have been in a position to interfere with and obstruct its exercise, had he been so disposed. *Contra non valentem agere non currit prescriptio.*" (See Gale on Easements, last edition, page 189.)

It was presumably upon this principle that by the 7th section of the English Act, the 2nd and 3rd William 4th c. 71, the time during which an infant, an insane person, or a married woman is the owner of the servient tenement is excluded from the period, during which a prescriptive right is in course of acquisition.

But there seems to be an important difference between the English and the Indian law in this respect.

The English Act, 2 and 3 William 4th, c. 71, was passed expressly "for shortening the time of prescription in certain cases."

Its object was to remove the difficulties which had previously existed of establishing easements by proof of immemorial user. But the Act did not alter in any way the *nature of the right* to be acquired, and, therefore, the conditions which were generally necessary before the Act to the acquisition of prescriptive rights are still necessary to their acquisition under the Act, though they may be gained by a shorter period of enjoyment.

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But the Act, under which rights of way and other easements are now generally acquired in India, has nothing to do with prescription. It is "an Act for the limitation of suits and other purposes," and s. 26 enables any person to acquire a right of way by a twenty-years user without reference to any grant, express or implied, from the servient owner.

So long as the right of way is enjoyed as an easement peaceably and quietly as of right and without interruption for twenty years by a person claiming right thereto, his right at the end of that time becomes absolute and indefeasible. Nothing is said in the Act as to the knowledge of the servient owner being necessary to the acquisition of the right, and as the right to be acquired is not a prescriptive one, the rule which obtains in England with reference to prescriptive rights seems inapplicable here.

Of course rights of way, as well as other easements, may still be claimed in this country by prescription; see *Rajrup Koer* v. *Abul Hossein* (1): and when they are so claimed, the principles which apply to their acquisition in England will be equally applicable in this country. But those principles do not necessarily apply to the acquisition of easements under the Limitation Act.

And as a proof that this was the view of the Legislature of this country there is no provision in the Indian Limitation Act corresponding with s. 7 of the English Prescription Act, though there is a provision in s. 27, which answers to s. 8 of the Prescription Act, and which protects, under certain conditions, the rights of reversioners.

It is probable that the words "*peaceably and openly*," which are not in the English Act, have been introduced into the Indian Act for the very purpose of preventing these rights being acquired by stealth or by a constantly contested user, although actual knowledge of the user on the part of the servient owner may not be necessary.

We think, therefore, that the main ground upon which the judgment of the lower Courts has proceeded in this case is without foundation; and we would say further that, even if knowledge of the user had been necessary, we think that under the

(1) I. L. R., 6 Calc. 529.

circumstances such knowledge should have been presumed by the lower Courts.

If the personal knowledge of the Collector were necessary in in all cases to the acquisition of rights of way over Government land, such acquisition would be almost an impossibility. There is no reason why Government should be in any better position in this respect than any other land-owner, and there appears to have been abundant evidence in this case, from which the knowledge of the superior Government officers should have been presumed.

The land over which the right was exercised was in the village of Burrisaul, immediately adjoining the high road. The plaintiff had used it day after day for 30 or 40 years. The way itself was in the immediate neighbourhood of a public cemetery; and two Government officers, one the Inspector of Police of the district, and the other the Deputy Magistrate at the station, were called as witnesses for the plaintiff to prove his user of the way for many years.

Then the alleged interruptions of the plaintiff's user of the way amount to no evidence at all which should defeat his right. It is not pretended that there were "interruptions" within the meaning of the explanation of s. 26, and we cannot find that, except on one occasion, anything was done which operated to prevent his user. And as all knowledge of the user of the right has been persistently denied by the defendants, it is clear that the so-called obstructions were not intended to prevent that user. The one occasion to which we allude was when the way was obstructed by Sherif Hossein upwards of 30 years ago; and so far from the circumstances of that obstruction being unfavorable to the plaintiff, we consider that what happened then tends strongly to support his case.

It is clear that at that time he was using the way *as of right*, because he at once resented the obstruction, and went before the Magistrate to assert his claim. The Munsiff, we observe, treats his conduct on this occasion as shewing that he claimed a *public* way, and not a *private* one. But it is not at all likely that people of his class should be able to distinguish between public and private rights, or to know the proper remedy for any invasion

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of those rights. The fact of the plaintiff going before the Magistrate is the strongest possible proof that he at once asserted his right; and the fact of the obstruction being removed, and of the plaintiff's subsequent user of it without further objection by Sherif Hossein, shows plainly that he was successful in the assertion of his claim.

The cutting of the ditch by the Government, which is relied on by the Subordinate Judge in support of his view, might have been a slight inconvenience to the plaintiff, but certainly did not operate to prevent his user. The ditch appears to have been dug not with a view to obstruct the plaintiff, but to mark out the land which the Government had purchased; and it appears that after it was dug the plaintiff used the way as before, merely fixing a pole in the middle of the ditch, that he might swing himself over it more easily.

The case must, therefore, go back to the Court of first instance to consider whether there is any sufficient reason in point of law why the defendant's building should not be pulled down, and the defendant will probably do wisely under the circumstances to come to some reasonable arrangement.

The plaintiff having succeeded in establishing his right of way is entitled to his costs in all the Courts.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

1883 *September* 6.

MINA KUMARI BIBEE (DEFENDANT) v. JAGAT SATTANI BIBEE AND OTHERS (PLAINTIFFS.)*

Sale in execution of decree—Sale afterwards set aside—Execution of decree found to be barred by limitation—Suit to recover the property from purchaser.

A creditor obtained a decree against his debtor, and applied for and obtained an order for execution. This application was unsuccessfully opposed by the judgment-debtor on the ground that execution was barred by limitation. Certain properties of the judgment-debtor were attached and sold in execution of this decree, the judgment-creditor himself becoming the purchaser.

* Appeal from Original Decree No. 127 of 1882, against the decree of Baboo Amrit Lall Chatterjee, Subordinate Judge of Nuddea, dated 20th March 1882.