1922

IN THE MATTER OF MUHAMMAD MUZAFFAR ALI.

and not to the word "property." We are confirmed in this view by the authority quoted in the reference before us, reported in Indian Law Reports, 8 Madras, 453. In the present instance there is no "value" set forth in the said instrument. No doubt this is a contravention of section 27 of the Indian Stamp Act, and, if it be found that the omission to state the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument, under section 64 of the Indian Stamp Act. The case seems to us strictly analogous to one which would arise if the executant of a deed of gift chose to set a purely nominal value on the property conveyed and to stamp the instrument accordingly. For the purposes of the Stamp Law the valuation given in the instrument would have to be accepted. If there was an intentional under-valuation, then a prosecution would protect the Government against the attempted fraud. There is no provision in the law authorizing the Collector to do what he has done in the present instance, namely, to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained. Our answer, therefore, to the first question referred to us is that the instrument as it stands does not require any stamp under the Stamp Act. The second question, except in so far as it has been incidentally answered, does not arise, and the third question does not arise at all. Let this answer be returned accordingly.

Reference answered.

APPELLATE CIVIL.

1922

January, 20.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAMESHWAR DAYAL (PLAINTIFF) *v.* MAHARAJ CHARAN AND ANOTHER (DEFENDANTS).*

Act No. V of 1882 *(Indian Easements Act), section* 48—*Easement—Burden on servient owner increased by action of dominant owner—Remedy of servient owner—Easement not necessarily extinguished.*

A, the owner of two adjoining houses, had a privy in one, the water from which flowed into the land of *B*, and as to this there existed an easement in favour of *A*. But *A* built a new privy in the second house, and connected the

* Appeal No. 61 of 1920, under section 10 of the Letters Patent.

1922

RAMESHWAR DAYAL v. MAHARAJ CHARAN.

drains of the two so that the amount of water discharged over *B*'s. land was largely increased. *B* then blocked up the channel through which the water came on to his land.

Held, on suit by *A* to have this obstruction removed, that section 48 of the Indian Easements Act, 1882, did not apply, and the dominant owner did not lose his easement altogether through the action which he had taken, but that the *status quo ante* both could and should be restored. *Harris* v. *Flower and Sons* (1) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case appear clearly from the judgment under appeal, which was as follows :—

"This is a most impudent action, in fact one of the most impudent that I have ever come across. The plaintiff is the owner of two houses which adjoin one another, No. 1, which he occupies himself, and No. 2, which he has let to some tenants. Adjoining No. 2, on the eastern side thereof, is the defendant's house No. 3. The plaintiff's house No. 1 is on the west of No. 2 and the three houses stand in a line. In the north-east corner of No. 2, an old latrine existed, from which water, and also household water, passed through a channel or drain from the plaintiff's house No. 2 to the defendant's house No. 3 through the dividing wall, and the plaintiff had by prescription acquired an easement over this drain, and he made up his mind to utilize it for the purpose of his own house, No. 1, as well as for No. 2. He, having failed in an application to the municipal authorities to make a new construction, but having obviously obtained the consent of his tenants, surreptitiously constructed a latrine for the use of his own house, No. 1, which he cut off from view of the latrine in No. 2, but the water and refuse from which he connected with the channel which carried away the water from the old latrine used by the tenants of No. 2. He altered the construction of the old latrine of No. 2 apparently with the intention of creating an appearance of less user. There is no doubt from the plan that the channel or drain carrying off the water from the new latrine and the old latrine formed a junction on the plaintiff's side of the wall so that the water from both privies passed through one *pacca* drain into the defendant's house. This fact is clearly found by the first court in the

(1) (1905) 91 L. T., 816.

Munsif's description of the drain as he saw it, and it is by implication confirmed by the judgment of the lower appellate court. If the lower appellate court has not found it as a fact, the evidence is all one way, and I find as a fact under section 103, that the new channel carrying the refuse from the two latrines when it reached the defendant's premises at No. 3 was in one channel. Both courts have found, as they were bound to find, that this was imposing an additional burden upon the servient tenement. The plaintiff had no right to construct a new latrine and to connect it with the drain in respect of which he enjoyed an easement, and I am satisfied that he knew that he had no right and that he did it secretly and dishonestly. The position became unbearable to the defendant and he blocked up the channel so as to put an end to the nuisance. This was the only way in which he could prevent it. Thereupon the plaintiff had the impudence to bring this action, complaining of interference and obstruction by the defendant. The attitude taken up by the two lower courts is unintelligible to me. They have given the plaintiff a decree and directed the defendant to remove the work which he had constructed to block up this drain on condition that the plaintiff remove the additional burden which he had wrongfully imposed. This is, in substance, giving judgment in favour of a trespasser on condition that he cease his trespass. It is quite clear that the plaintiff had no case at all. The decision of both the courts is wrong. The suit must be dismissed with costs here and below. But that does not dispose of the case, because a question has been raised in the judgment of the court below as to whether the additional burden which the plaintiff had imposed upon this drain might not be materially reduced, as the person who put it there could undoubtedly have removed it, and, curiously enough, both courts have held, as a matter of fact, that this additional burden could be easily reduced by simply closing the outlet from the newly constructed privy. This finding is wholly immaterial. I am afraid neither of the courts have read the section. The section provides that "where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the

1922

RAMESHWAR DAYAL v. MAHARAJ CHARAN.

lawful enjoyment of the easement, the easement is extinguished." The question obviously is whether the servient owner can reduce the additional burden without interfering with the enjoyment of the original easement. That section is eminently good sense. The servient owner is entitled to take his own steps to prevent a continuation of anything which constitutes a nuisance to himself. He can make an end of it. But if the additional burden is so constructed that he himself can get rid of it without interfering with the original easement, he is not allowed to be vindictive. He is confined to the necessary steps for getting rid of the burden. But, on the other hand, he is not bound to submit to the additional burden, if he cannot remove it without interfering with the original easement, and when he has to do that, the easement is by law extinguished. A dominant owner who does things of this kind takes the risk upon himself and I declare that the plaintiff's conduct in this case has extinguished this easement and that it no longer exists. I direct the first court to send a copy of this judgment to the municipality. It seems to me that steps ought to be taken by the sanitary authorities against the plaintiff."

The Hon'ble *Syed Raza Ali* for the appellant.

Munshi *Iswar Saran* and Munshi *Harnandan Prasad* for the respondents.

MEARS, C. J., and BANERJI, J. :—We are of opinion that the decree of the lower appellate court must be affirmed, because we are unable to see upon what principle it has been decided that the statutory right, which the plaintiff had as owner of house No. 2 to discharge his water into the drain of the defendant's house No. 3, has been extinguished. It is true that the plaintiff was a wrong-doer when, having built on house No. 2 a new privy, he connected that up with the drain which had hitherto carried water from one privy alone in house No. 2 to house No. 3. The method by which he connected up the new privy with the old drain was, in one sense, permanent and, in another sense, not permanent, because it was capable of being blocked or cut away in a very short time. It is clear law that if a man has, for instance, a right to walk across a certain field, he does not lose that right of walking across that field merely

because he commences to drive across it in a carriage, that is, he is not penalized and deprived of his right of using the land by walking over it because he has asserted and wrongfully exercised the right to pass over it in a carriage. The remedy open to the owner of the servient tenement is to proceed against the person who claims the wrongful enlarged user and, on his refusal to desist from his conduct, to take proceedings for an injunction. At one time it was thought that the right to ancient lights could be lost by pulling down a building which had acquired a right to lights and that the newly erected building did not have the privilege attaching to the ancient lights in the previous building. That, however, is not law to-day, and indeed on this question of abandonment of ancient rights there have been several recent cases mainly relating to light and air. The case of *Harris* v. *Flower and Sons* (1) is a case in point on the question of abandonment.

Reliance has been placed upon section 43 of the Indian Easements Act, but we question whether the permanent change referred to in this section does not mean such a change as, for instance, the construction of a building with 12 or 14 large windows in place of 3 or 4 smaller ones. That is a permanent change in the dominant heritage and the owner of the servient tenement cannot reduce the burden without interfering with what undoubtedly was the prior right of the owner of the building, namely, to have light and air to the smaller number of windows. If, therefore, whatever steps the servient tenement can take must necessarily interfere with the lawful enjoyment of the original arrangement and the additional burden cannot be reduced, then his easement is extinguished. Here, however, the burden can be reduced without difficulty to its original limits. The connection between the new privy and the drain from No. 2 that passes into No. 3 can be blocked up or cut away and the parties will, in all respects, be reverted to their original position as it was before the plaintiff wrongfully connected up the new privy with the old drain. We, therefore, think that the decree made by the court of first instance, which was affirmed by the

(1) (1905) 91 L. T., 816.

1922

RAMESHWAR DAYAL v. MAHARAJ CHARAN.

lower appellate court, was a proper decree and this appeal must be allowed. We, accordingly, set aside the decree of the learned Judge of this Court and restore that of the lower appellate court. We direct the parties to bear their own costs.

Appeal allowed.

1922
January, 28.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

BECHAN LAL AND OTHERS (DEFENDANTS) *v.* KISHAN LAL (PLAINTIFF) AND JILLO KUNWAR (DEFENDANT).*

Pre-emption Sale consideration in part cash and in part a mortgage of the property purchased—Mortgage binding on pre-emptor.

A house was sold for a consideration which was partly cash and partly a mortgage upon the house.

Held that a successful pre-emptor would be bound to pay off the mortgage before he was entitled to possession. *Kamta Prasad* v. *Mohan Bhagat* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *S. M. Sulaiman*, Babu *Piari Lal Banerji* and Munshi *Harnandan Prasad* for the appellants.

Dr. *Surendra Nath Sen* for the respondents.

RYVES and GOKUL PRASAD, JJ. :—The facts out of which this appeal arises are as follows :—On the 4th of October, 1914, the plaintiff sold a house to Musammat Jillo, defendant No. 1, for Rs. 1,800. It was stated in the sale-deed that out of the consideration money Rs. 900 was paid in cash and that a mortgage of the house had been given for the balance. It was quite clear that the consideration for the sale was the mortgage plus the balance in cash. On the 5th of October, 1914, Musammat Jillo executed the mortgage. Defendants Nos. 2 and 3, Bechan Singh and Bishnath Singh, appellants here, brought a suit to pre-empt the sale and they made both the plaintiff and Musammat Jillo parties to it. That suit was compromised between Musammat Jillo and the appellants. The mortgagee plaintiff was exempted from the suit. According to that compromise it was agreed that

* Second Appeal No. 127 of 1920, from a decree of O. F. Jenkins, District Judge of Benares, dated the 19th of September, 1919, reversing a decree of P. K. Ray, Additional Subordinate Judge of Benares, dated the 17th of May, 1919.

(1) (1909) I. L. R., 32 All., 45.