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pay to the plaintiff the amount of Rs.30 a month at the end of each month. The decree was, therefore, capable of execution.

The learned counsel for the appellants further argued that having regard to the fact that the profits of the family property were reduced after the passing of the decree for maintenance, the plaintiff respondent was not entitled to execute the decree with respect to the full amount of maintenance fixed. The short answer to this contention is that an execution court cannot entertain an objection of the present description. The execution court is bound to execute the decree as it stands. It may be that if the allegation about the reduction in the income of the family property is correct the appellants may have the right to get the amount fixed by the decree reduced by means of a separate suit.

In our judgment the decision appealed against is perfectly correct and accordingly the appeal is dismissed with costs.

FULL BENCH

Before Mr. Justice Bennet, Mr. Justice Harries and Mr. Justice Bajpai

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March, 1

ABDUL RASHID AND OTHERS (DEFENDANTS) *v.* BRAHAM SARAN (PLAINTIFF)*

Easement—Right of way and flow of water—Prescription—Landlord and tenant—Acquisition of easement by tenant of one plot as against another plot of the landlord—Lessee of site and owner of the building on it—Whether he can acquire by prescription a right of way or to flow water over other land belonging to the landlord—Easements Act (V of 1882), *sections* 12, 15, 46.

A lessee of land, who is the owner of a building on that land, cannot acquire by prescription an easement of right of

*Second Appeal No. 135 of 1935, from a decree of S. C. Chaturvedi, Additional Civil Judge of Moradabad, dated the 12th of January, 1935, confirming a decree of Mazhar Husain Qizilbash, Munsif of Moradabad, dated the 13th of September, 1934.

way or one to flow water over another land belonging to the lessor. This doctrine of the common law of England was the law applied in this province before the Easements Act of 1882 came into force, and the same rule of law holds good under the Easements Act.

The possession of the tenant being in law the possession of the landlord, the tenant cannot acquire by prescription an easement in favour of his holding, except on behalf of the landlord; this principle is embodied in section 12 of the Easements Act. The acquisition of an easement by the tenant against another land of the landlord, if it were possible, would therefore mean that the same person who was the owner of the leased land would be acquiring an easement in respect of that land against another land belonging to himself. Section 46 of the Easements Act shows that such an easement cannot exist.

In the case of the lessee of a site, who is also the owner of the house which he has built thereon, so far as the use of light or air or support for his building is concerned he is an owner of the building and may under the first two paragraphs of section 15 of the Easements Act acquire such easements, and he would not acquire them for any one except himself under section 12. But when the question arises of a right of way or a right to flow water he comes under the third paragraph of section 15 and anything which he would acquire would be as the person in possession of the land which is his site and he would acquire on behalf and for the benefit of the owner of the site.

Messrs. *A. M. Khwaja* and *Kaleem Jafri*, for the appellants.

Mr. *S. N. Seth*, for the respondent.

BENNET, J.:—This is a second appeal by the defendants who are mutwallis under a deed of wakf of certain land in the city of Moradabad. The facts are as follows. One Nazir Khan built a house fifty years ago with the permission of Abdul Salam who was the owner of the land and Abdul Salam remained the owner of the site. It is also found by the lower appellate court that rent was paid by Nazir Khan to Abdul Salam. The house had a door to the north by which Nazir Khan used to visit the mosque and to say his prayers and apparently used also for general purposes of exit. On the 18th of

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August, 1917, Nazir Khan got permission from the Municipal Board to open a door to the south. On the 30th of January, 1919, Nazir Khan sold the materials of his house to the plaintiff who became the occupier of the site and owner of the materials of the house. In 1925 the plaintiff took a sale deed from Abdul Salam of the site of the plaintiff's house, with no mention of the right of passage or a right to flow water on the land. On the 10th of February, 1934, Abdul Salam and Mst. Ishrat-un-nissa made a wakf of the land remaining to them after the sale to the plaintiff, which lay to the north of the house of the plaintiff, and the defendants were constituted mutwallis of this wakf. The plaintiff claimed that he had a right of easement by right of way and also to flow water over the land to the north of his house across the land which had been made wakf, and he brought his plaint in 1934 for demolition of a wall which the defendants had constructed across the passage used by the plaintiff from his northern door, and asked also for an injunction against the defendants. The defendants denied that plaintiff had acquired any right of way because only one person was the owner of both pieces of land up till 1925. The courts below have both upheld the case for the plaintiff and granted the relief claimed in the plaint. The defendants appealed to the High Court in second appeal and the whole appeal has been referred to a Full Bench. The actual point of law has not been formulated very definitely by the referring Bench but it appears to be: "Can a lessee of the land which he has taken for building purposes acquire a right of way by easement over other land owned by his lessor?" This question first came before this Court in *Udit Singh* v. *Kashi Ram* (1), where the Full Bench of five Judges applied the law before the Easements Act came into force in these provinces. The Easements Act is of 1882 but it was applied to the United Provinces by Act VIII of 1891. In that Full Bench case

(1) (1892) I.L.R. 14 All. 185.

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the plaintiff was a corn dealer who established a market upon a plot of land which he rented from the defendants. To the north of the plot was a piece of waste land belonging to the defendants and access to the market could only be obtained through this land. Such access was afforded by a wide opening between certain buildings on the west and east. The defendants built a wall across the opening and plaintiff brought a suit for demolition of the wall and declaration that he was entitled to an easement by way of prescription through the defendants' waste land to the market. EDGE, C.J., held at page 187: "In my opinion it is contrary to common sense that any such right as is here alleged could possibly have been acquired. Such right could only have been acquired, if at all, in respect of the holding occupied by the plaintiff. That holding is the landlords' holding, and they, the landlords, are in possession of it through their tenant the plaintiff. The plaintiff is not an owner claiming a right in respect of a dominant tenement over another, servient, tenement; he is not claiming this right for or on behalf of his landlords; but he is claiming it adversely to them, although for and on behalf of their own property." He then proceeded to quote the dictum of Lord CAIRNS in *Gayford* v. *Moffatt* (1), from which I may take the following passage: "But the possession of the tenant of the demised close is the possession of his landlord, and it seems to be an utter violation of the first principles of the relation of landlord and tenant to suppose that the tenant, whose occupation of close A was the occupation of his landlord, could by that occupation acquire an easement over close B, also belonging to his landlord." The Full Bench therefore held that under the common law of England as it applied to this province before the Easements Act of 1882 came into force, a tenant could not acquire against the landlord by prescription an easement of way in favour of the land occupied by him as tenant. MAHMOOD, J., at page 189,

(1) (1868) 4 Ch. A. 133.

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considered the question of the effect of the Indian Easements Act of 1882 and he referred specially to the use of the words "owner or occupier of certain land" in section 4 in the definition of the word "easement" and also to section 12 and he stated that neither the definition contained in the former section nor anything in the latter section militates against the view which the learned CHIEF JUSTICE had expressed. The matter came again before the courts in this province in *Bahadur* v. *Khushi Ram* (1), when BANERJI, J., held that a tenant of an ex-proprietary holding cannot acquire a right of easement against several joint owners of a village as he is the tenant of the whole proprietary body, and he applied this dictum of the Full Bench ruling to the case before him although the case before him was governed by the Easements Act of 1882. Reference was also made to *Partap Singh* v. *Nand Kishore* (2), where DALAL, J., distinguished between a customary right and an easement and he held that the occupier of a house might acquire a customary right but not an easement. This ruling does not at all militate against the proposition put forward by the appellants.

For the respondent reference was made to *Ganesh Prasad* v. *Khuda Bakhsh* (3), where LINDSAY, J., as Judicial Commissioner of Oudh held on page 588, column 1, that the owner of a house had a certain claim to an easement but this claim was in his capacity of being an occupier of land under section 4 of the Easements Act and not as an owner under that section.

As regards the English rulings there is no doubt whatever that the proposition put forward by the appellant is correct, that a lessee of land cannot acquire an easement over other land owned by his lessor. In Halsbury's Laws of England, Volume 11, second edition, paragraph 553, page 307, it is laid down that "No easement which can be claimed under section 2 of the Act

(1) (1913) 11 A.L.J. 990. (2) A.I.R. 1928 All. 591.
(3) (1918) 45 Indian Cases, 585.

can be acquired by a tenant of the *quasi*-dominant tenement against his own landlord or another tenant of the latter", and a reference for this proposition is made to *Kilgour* v. *Gaddes* (1) and to *Derry* v. *Sanders* (2). The reference to the Act is to the Prescription Act of 1832 which deals with right of way in section 2 and states: " . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for a full period of twenty years." This language parallels section 15, third paragraph, of the Easements Act which says: "enjoyed by any person claiming title thereto, as an easement, and as of right." Halsbury in the passage quoted continues: "For the tenant's occupation is in the sight of the law that of his landlord, and when the tenant goes on to the adjoining land of that landlord he cannot be said to do so as claiming a right in respect of the supposed dominant tenement on behalf of the freeholder, the supposed servient tenement being the freeholder's own land." For this proposition reference is made to *Gayford* v. *Moffatt* (3) and *Kilgour* v. *Gaddes* (1). Halsbury on page 293, paragraph 533, in the same volume states: "In all prescriptions, except as regards . . . light, the grant which is presumed is a grant by the owner of the fee simple of the servient tenement *to the owner of the fee simple of the dominant tenement* . . . For this reason where an easement is claimed by prescription it must be claimed *in favour of the fee simple of the dominant tenement* as against the fee simple of the servient tenement, and *no easement can be claimed by prescription for an estate or interest less than a perpetual one.*" Reference for this proposition is made to *Kilgour* v. *Gaddes* (1) at pages 466 and 467, and also to *Wheaton* v. *Maple and Co.* (4).

If the Indian Easements Act had intended to depart from this well established doctrine of the English

(1) [1904] 1 K.B. 457(467).
(2) [1919] K.B. 223(239).
(3) (1868) 4 Ch. A. 133.
(4) [1893] 3 Ch. 48.

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common law and the Prescription Act of 1832, we would expect that the alteration would be clearly indicated in the wording of the Easements Act, but no such wording exists. In section 4 of the Act it is stated that an easement is a right which the owner or occupier of certain land possesses as such. Now this definition deals only with land. In the explanation it is stated: "The expression 'land' includes also things permanently attached to the earth." It is only by virtue of this explanation——that "land" includes things attached to the earth——that a house can be brought into the definition. Now the plaintiff had two capacities up to 1925 at the period when the easement in question must have been acquired; that is, he had the capacity of an occupier of the site of the house and of the owner of the materials of the house. Learned counsel for respondent argues that his capacity of owner of the materials of the house would make him an owner within the meaning of section 4, that is, by virtue of the explanation that "land" includes also things permanently attached to the earth. I do not think that that section can be read in this manner. The section deals with owners as the owners of land and merely adds in the explanation that "land" will include things permanently attached to the earth. That is, if an owner is the owner of the land he may also be the owner of things attached to the earth and in regard to those things attached to the earth he may possess an easement. The plaintiff as owner of the materials of the house cannot be considered as an owner of land within section 4, but as occupier of the site of the house he is a person who may possess an easement under that section. Now it is to be noted that the word "possess" is used in section 4 and an easement may be possessed which arises in various ways. One way may be by a grant under section 8 and in that section there is reference to the liability to be "imposed" by the owner of the servient heritage. Section 13 deals with the origin of easements of necessity and *quasi*-easements

and these are said to be easements to which the transferee or legatee shall be "entitled". When we come to the case of "acquiring" easements under section 15, that section falls into three paragraphs. The first paragraph deals with two particular easements, the use of light and the use of air, and these are for any building. There is no provision that they should have been enjoyed as of right but merely that they should have been enjoyed as an easement. The second paragraph deals with another particular easement, that of support from a person's land or things affixed thereto and this is enjoyed by another person's land or by things affixed thereto. A building will come within the definition of "things affixed thereto" the land which enjoys this particular easement of support. When we come to easements generally, the third paragraph provides: "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." Now this is the paragraph which deals with the easement claimed in the present appeal by the respondent. This easement is acquired under section 15 and the division between the use of light and an easement such as the right of way in section 15 is exactly parallel to the division drawn by the English Act, the Prescription Act of 1832, in which right of way and other easements are dealt with in section 2 and must be enjoyed by a person claiming the right, and the easement of the use of light for a dwelling house which comes into section 3. Section 2 of the Prescription Act does not refer to buildings at all but section 3 does. The Easements Act therefore closely follows the English law in this particular. Now the doctrine of the rulings which I have quoted as regards the tenant acquiring an easement on behalf of his landlord is embodied in section 12 of the Easements Act which states: "An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is

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created, or, on his behalf, by any person in possession of the same." That is, either the owner of the immovable property acquires the easement or it is acquired by some one in possession, in which case it must be acquired on behalf of the owner. The use of the words "immovable property" in section 12 may be noted as this expression is introduced to cover the word "building" referred to in section 15, first paragraph, and which may also be included in the second paragraph of section 15. But there is no exception made in section 12 that the occupier of a site who is the owner of a building on it may acquire for himself rights of way over other land of the owner of his site. I find it impossible to hold, as learned counsel for respondent argues, that the plaintiff respondent is in the position of an owner of immovable property under section 12 for the purpose of a right of way. He would no doubt be the owner of immovable property for the purpose of acquiring easement in the first and second paragraphs of section 15 because those paragraphs may include a building and he is the owner of a building. Therefore so far as the use of light or air or support for his building is in question he is an owner of the building and may under section 15 acquire such easements and he would not acquire them for anyone except himself under section 12. But when the case arises of a right of way he comes under the third paragraph of section 15 and anything which he would acquire would be as the person in possession of the land which is his site and he would acquire for the benefit of the owner of the site. Now under the English law the owner of land which is let cannot acquire an easement on behalf of that land against other land of his own. This principle is also followed in the Easements Act as in section 46 it is provided: "An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages." It was therefore impossible for any such easement to arise because section 46 shows that

it cannot exist. Section 49 also treats of the suspension of an easement when the dominant owner becomes entitled to possession of the servient heritage. I may note that in regard to the easement of light the English Courts have distinguished this kind of easement in the same manner as section 15, paragraph 1, of the Easements Act distinguishes it. In *Morgan* v. *Fear* (1) and *Fear* v. *Morgan* (2) this distinction between the use of light was upheld by the House of Lords and it was held that one termor can acquire such an easement against another termor, where there is the same reversioner for both, but it was pointed out that the easement of light was an exception to the general rule that one tenant of an owner of land cannot acquire an easement against another tenant of the same owner, and it is only in the case of the easement of the use of light that such an easement has been held to exist and to be capable of acquisition, by the Courts in England. The distinction between the easement of light has, as I have noted, been carried out in the first paragraph of section 15 of the Easements Act.

I am therefore unable to see that there is any section of the Easements Act which lays down a doctrine different from the doctrine of the English law which was upheld for these provinces in the Full Bench ruling of *Udit Singh* v. *Kashi Ram* (3). For these reasons I consider that the plaintiff in the present case has not acquired any easement of right of way or the right to flow water over the land now held by the defendants as mutwallis of the wakf.

HARRIES, J.:—I agree.

BAJPAI, J.:—I agree.

BY THE COURT:—The appeal of the defendants is allowed and the suit of the plaintiff is dismissed with costs throughout.

(1) [1907] A.C. 425. (2) [1906] 2 Ch. 406.
(3) (1892) I.L.R. 14 All. 185.