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documentary evidence is necessary because in the extracts filed by the plaintiff of the khewat the plaintiff has omitted to file that portion of the khewat which would show the name of the mahal to which the extracts refer. It is to remedy this omission that the further documentary evidence is necessary.

Some further argument was made that no Letters Patent appeal lay. But learned counsel did not attempt to justify his argument by any reference to the provisions of section 10 of the Letters Patent. On the other hand his argument was by reference to various sections of the Civil Procedure Code. That Code has no bearing on the right of Letters Patent appeal and the argument therefore does not convince us.

Under these circumstances we allow this Letters Patent appeal and restore the order of remand of the lower appellate court. The appellant Kuber Singh will have his costs in both proceedings in this Court from the plaintiffs.

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

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RAM KALI AND ANOTHER (DEFENDANTS) *v.* MUNNA LAL AND OTHERS (PLAINTIFFS)*

Easement—Customary right—Right of way claimed by a section of the public—User, long continued—Presumption of legal origin—Lost grant, doctrine of—Civil Procedure Code, order I, rule 8—Numerous persons having same interest in subject of suit—Suit by one or more such persons in their own right—Maintainability—Civil Procedure Code, section 91—No bar to suit by some persons in respect of a right of way which is not a public highway.

On the principle of the doctrine of lost grant, when a right has been exercised by a person or persons for a sufficiently long time openly, uninterruptedly and peaceably it can safely be presumed that it had a legal origin.

*Second Appeal No. 795 of 1936, from a decree of S. C. Chaturvedi, Civil Judge of Bareilly dated the 29th of January, 1936, confirming a decree of Mithan Lal, Addit'onal Munsif of Bareilly, dated the 7th of August, 1934.

Where it was found that a certain passage had been used openly, uninterruptedly and peaceably for about fifty years by the Hindu residents near a temple, it was presumed that this section of the public had a right of way over the passage.

There are three distinct classes of rights of way. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of the city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the King's subjects; and the source of these is ordinarily dedication.

The right of way claimed in the present suit was one which fell under the second class mentioned above, and for such a case dedication in favour of the whole public was not necessary. A customary right of way by which the residents, or any section of them, of a particular district, city, village or place are entitled to pass over land not belonging to or occupied by them will be established by evidence of long continued user of such right openly, uninterruptedly and peaceably.

The present suit for an injunction to restrain the defendants from interfering with the plaintiffs' right of way had not been brought by the plaintiffs in a representative capacity, but had been brought by them in their personal capacity for a personal relief. Such a suit was not barred by order I, rule 8, of the Civil Procedure Code, which was an enabling section and did not debar some of the members of a community from maintaining a suit in their own right.

The suit was not barred by section 91 of the Civil Procedure Code. Section 91 applied to public nuisances which affected public rights, such as a public highway, which was not the case here. In the present case the plaintiffs being entitled, in their personal right, to the use of the passage had a personal cause of action to bring the suit, and by sub-section (2) of section 91 such right of suit, which existed independently of the section, would not be affected by the section.

Mr. *Vishwa Mitra*, for the appellants.

Mr. *G. S. Pathak*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—This is a defendants' appeal and arises out of a suit brought against them

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by the plaintiffs respondents for an injunction to restrain the defendants from interfering with them in their right of way over a passage described in the plaint. The plaintiffs' case was that this passage had been in use more than 50 years and they as residents near the temple were entitled to use it. The defendants contended that they had no right of way and the suit was not maintainable. Both the lower courts have concurrently found that the passage has existed for about 50 years and has been used by the Hindu public in general for this period. They decreed the suit.

It has been argued by the learned counsel for the appellants that a right of way, such as is claimed in this suit, cannot be acquired by a section of the public. His argument is that a public way can only be acquired by dedication, which should be made to the whole public This argument is without force because the present suit does not relate to a public highway for which the dedication to the whole of the public is necessary. "There are three distinct classes of rights of way and other similar rights. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of the city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly there are public rights in the full sense of the term which exist for the benefit of all the King's subjects; and the source of these is ordinarily dedication.": *Chuni Lall* v. *Ram Kishen Sahu* (1). It is the third class of rights of ways for which the dedication in favour of the whole public is necessary. The right of way claimed in the suit is one which falls under the second class.

(1) (1888) I.L.R. 15 Cal. 460 (464).

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The concurrent findings of the lower courts are that the passage in dispute has existed and has been used by the Hindu public for about 50 years. The question that arises for consideration is whether from this long user any right in favour of the plaintiffs to use this passage can be inferred. In *Kuar Sen* v. *Mamman* (1) it was observed (page 91): "Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them acts which, if there was no such custom, would be acts of trespass, the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has by agreement or otherwise become the local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would otherwise be acts of trespass on the property of another the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time." This case was followed in *Mohidin* v. *Shivlingappa* (2).

On the principle of the doctrine of lost grant, when a right has been exercised by a person or persons for a sufficiently long time openly, uninterruptedly and peaceably it can safely be presumed that it had a legal origin. In *Derry* v. *Sanders* (3) BANKES, L.J., observed as follows: "In view of the rule that a legal origin must be presumed, if such an origin is possible, I think that the length of user in the present case of the disputed way is sufficient to found the presumption that the necessary custom existed in the manor of Longdon."

In *East Stonehouse Urban Council* v. *Willoughby Brothers* (4) CHANNELL, J., observed: "I should be glad to be able to decide the case by the doctrine commonly referred to as that of a lost grant, that is, the rule

(1) (1895) I.L.R. 17 All. 87.
(2) (1899) I.L.R. 23 Bom. 666.
(3) [1919] 1 K.B. 223 (233).
(4) [1902] 1 K.B. 318 (332).

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which says that on long continued user or possession being proved anything requisite to give that user and possession a legal origin ought to be presumed by the court. This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly. It is, in my opinion, a most useful doctrine and enables the court to avoid interfering with user and possession in cases not covered by the statutes of prescription and limitation. though within the mischief which these statutes were intended to remedy."

Gale, in his book on Easements, eleventh edition, page 202 says: "The gist of the principle upon which a lost grant is presumed is that the state of affairs is otherwise unexplained. 'When the court finds an open and uninterrupted enjoyment of property for a long period unexplained, *omnia presumuntur rite esse acta,* and the court will, if reasonably possible, find a lawful origin for the right in question.' . . .The practical distinction between prescription at common law and the doctrine of lost grant was that, where the claim was by prescription, the length of enjoyment constituted a title; where, on the other hand, the right was claimed by 'lost grant', the long enjoyment afforded but a presumption of title."

As stated above the findings of the lower courts are that this passage has been used openly, uninterruptedly and peaceably by people for about 50 years. It can therefore, be presumed that this right had a legal origin, and the people of the locality had a right to use this passage.

It was urged by the learned counsel for the appellants that the suit was barred by order I, rule 8. The suit has not been brought by the plaintiffs in a representative capacity, but has been brought by them in their personal capacity for a personal relief. As held in *Gulba* v. *Basanta* (1), order I. rule 8 is an enabling

(1) (1910) I.L.R. 32 All. 284.

section and does not debar some of the members of a community from maintaining a suit in their own right. The plaintiffs therefore have a right to bring the present suit. It will not affect persons who are no parties to it.

It was further contended by the appellants that the suit was barred by section 91 of the Code of Civil Procedure. Section 91 applies to public nuisances which affect public rights, such as a public highway, which come under the third class referred to above. The right of way which is in dispute in the present suit is not such. It is a right of way which is claimed by only a section of the public and belongs to the second class described above.

In *Brocklebank* v. *Thompson* (1), it was observed: "Where there is the intention to allow not the public generally, but merely visitors to or traders with the people of the village, or ways allowed to be used by villagers to go to church or market or the common fields of a village, such ways are not regarded as public ways but private ways."

Under section 91 of the Code of Civil Procedure, in the case of a public nuisance two or more persons who have obtained the consent of the Advocate-General in writing may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. According to clause (2), nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. In the present case the plaintiffs being entitled, in their personal right, to the use of the passage have a personal cause of action to bring the suit. In a similar case in *Harish Chandra Saha* v. *Harish Chandra Chuckerbutty* (2) it was observed: "In our opinion, there can be no question that the suit was for the enforcement of a way of the second class, namely,

(1) [1903] 2 Ch. 344. (2) (1923) 80 Indian Cases, 195.

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a village pathway, and had no reference to a way of the third class, namely, a public highway. This distinction has been overlooked, not infrequently, and Sir LAWRENCE JENKINS, C. J., had occasion to emphasise it again in *Kali Charan Naskar* v. *Ram Kumar Sardar* (1). It is only in the case of a public highway that the question of special damage arises: where the case is one of a village path, there is no question of special damage." The way in dispute is not a public highway, and section 91 of the Code of Civil Procedure does not bar the suit.

There is no force in the appeal, and it is therefore ordered that it be dismissed with costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

NOOR MUHAMMAD AND OTHERS (PLAINTIFFS) *v.* LALLOO AND OTHERS (DEFENDANTS)*.

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April, 19

Agra Tenancy Act (Local Act III of 1926), section 3(4)—Sayar —Weighment dues—Suit to recover zamindars' share of the weighment charges realised by weighmen in a village market —Jurisdiction—Civil and revenue courts.

A share, claimed by the zamindars as payable to them, of the weighment dues realised by weighmen who by the license of the zamindars attend and do their business at a village market held on land belonging to the zamindars comes within the definition of "sayar" in section 3(4) of the Agra Tenancy Act, and a suit by the zamindars for realisation of such share is a suit for "rent" and is therefore cognizable by the revenue court.

Messrs. *Mushtaq Ahmad* and *Mahboob Alam*, for the appellants.

Messrs. *P. L. Banerji* and *S. N. Katju*, for the respondents.

BENNET and VERMA, JJ.:—This is a first appeal by a lambardar and 18 other plaintiffs who have brought a suit against 22 defendants. The court below has held that the suit does not lie in the civil court but in the revenue

*First Appeal No. 220 of 1937, from an order of Tufail Ahmad, Civil Judge of Banda, dated the 14th of May, 1937.

(1) (1912) 18 Indian Cases, 67.