

these diseases are to some extent venereal diseases."

To my mind on the evidence quoted above it is impossible to hold that the petitioner has succeeded in proving the case which the law requires him to prove, that is, that the respondent was impotent at the time of the marriage. A question of law may arise which will have to be decided on a future occasion as to whether, when a wife suffers from a disease which might or might not be venereal and the husband has reasonable and well founded apprehension of infection in case he has sexual intercourse with such a wife, in those circumstances the court would be justified to record a finding that the wife was impotent. I agree in the order that the appeal be dismissed with costs.

By THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan.

PANDIT JANG BAHADUR AND ANOTHER (PLAINTIFFS-APPELLANTS) v. WAZIR KHAN AND OTHERS (DEFENDANTS-RESPONDENTS).*

1929
November, 12

Easement—Graveyard—Burial right is a civil right—Land used for long long years for burying the dead—Customary rights, if acquired in the land—Proprietor of the land, whether can stop the practice and take away the right.

The right of a burial is a civil right and where the right has been exercised for long long years a customary right in law is acquired which cannot be taken away by the proprietor of the land. *Kuer Sen v. Mamman* (1), *Mohidin v. Shivlingappa* (2) and *Kooni Meera v. Mahomed Meera* (3), relied on.

*Second Civil Appeal No. 481 of 1928, against the decree of Pandit Shyam Manohar Nath Shargha, First Subordinate Judge of Kheri, dated the 25th of August, 1928, reversing the decree of Babu Tribeni Prasad, Additional Munsif of Kheri at Lakhimpur, dated the 22nd of December, 1927.

(1) (1895) I. L. R., 17 All., 87. (2) (1899) I. L. R., 23 Bom., 666.

(3) (1906) I. L. R., 30 Mad., 15.

1920

PANDIT
JANG
BAHADUR
v.
WAZIR KHAN.

Mr. *Ishuri Prasad*, for the appellants.

Mr. *Mahabir Prasad*, for the respondents.

HASAN, J. :—This is the plaintiffs' appeal from the decree of the First Subordinate Judge of Kheri dated the 25th of August, 1928, reversing the decree of the Munsif of the same place dated the 22nd of December, 1927.

The substance of the relief asked for in the suit, out of which this appeal arises, is that the defendants be estopped by means of a perpetual injunction not to use plots nos. 1011 and 1019 situate in mahal Jang Bahadur, village Karyara, pargana Pasgawan, in the district of Kheri, as a graveyard to bury their dead therein. The defence was that the right to bury the dead had been exercised for long long years before the suit and that there by the defendants had acquired a right in law to continue the practice. Some time this distinct statement of fact raised in the defence was given the legal nomenclature of a prescriptive right, again of a right by easement and finally in the court of appeal it was called a customary right. The lower appellate Court on a consideration of the evidence has come to the conclusion that the defendants had been exercising the right claimed by them at least for the last fifty years—and that therefore they acquired a customary right in law which cannot be taken away from them at the instance of the plaintiffs, who are the proprietors of the plots in question.

The first argument in appeal is that the lower appellate court has made out a new case for the defendants. I am unable to accept the argument. As observed by the learned First Subordinate Judge that so long as the facts given in the pleadings are not altered it is open to a party to contend for the legal consequences arising out of those facts. A party is not bound to plead law. He is bound to plead facts and there is no question in the

case that the facts pleaded embrace the case of a customary right. I, therefore, overrule this argument.

The second argument in support of the appeal is that the customary right is not established. Here again I agree with the Court below that all the elements required in proof of such a right are fully established by the evidence adduced in the case. The law bearing on the subject as to what are the essential elements which constitute such a right and which the law recognizes as such are stated in the case of *Kuer Sen v. Mamman* (1). This decision was followed in *Mohidin v. Shirlingappa* (2). In the case of *Kooni Meera v. Mahomed Meera* (3) the learned Judges who decided that case held that the right of a burial is a civil right and I agree with that view of the learned Judges.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1895) I. L. R., 17 All., 87. (2) (1899) I. L. R., 23 Bom., 666.
 (3) (1906) I. L. R., 30 Mad., 15.

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PANDIT
 JANG
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 WAZIR KHAN.

Hasan, J.