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It is objected on behalf of the appellants that an execution application for enforcement of the personal liability against the sureties is barred by time. The objection will be considered and decided by the lower Court when the application has been amended by the respondent.

The result is that we allow the appeal with costs, set aside the order of the lower Court and send the case back to the Subordinate Judge of Unao with the directions that he should allow the decree-holder to amend his application and then deal with it according to law.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

MAHMUDUL HAQ KHAN (DEFENDANT-APPELLANT) v.
WAQFUL AULAD (PLAINTIFF-RESPONDENT)*

1934
January 26

Acquiescence—Defendant making road over land belonging to plaintiffs believing bona fide that he had plaintiffs' permission—No protest by plaintiffs during construction or afterwards—Plea of acquiescence, if sustainable.

For a defence of acquiescence to be successful, it is necessary that the defendant should have acted in good faith believing that he had a valid right to do the act in question and that the plaintiff knowing that the defendant was under this mistaken belief, should have abstained from doing anything to prevent his spending money in doing that act. Where, therefore, the defendant constructs a road over land belonging to the plaintiffs with the *bona fide* belief that he had the permission of the plaintiffs to make the road and the plaintiffs raised no protest at the time when the road was under construction or at any time since then during the last 10 years the plea of acquiescence does apply. In such a case no question of ownership of the land arises. It is enough that the defendant believed *bona fide*, albeit wrongly, that he had the necessary permission from the owners of the land to construct the road. *Jagannath v. Din Muhammad* (1), and *Beni Ram v. Kundan Lal* (2), relied on.

*Second Civil Appeal No. 298 of 1932, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Gonda, dated the 17th of November, 1932, reversing the decree of Sh. Mohammad Tufail Ahmad, Munsif, Uraula at Gonda, dated the 19th of August, 1932.

(1) (1921) 8 O.L.J., 474.

(2) (1899) I.L.R., 21 All., 496.

Messrs. *Hyder Husain* and *Mahmud Beg*, for the appellant.

Mr. *M. Wasim*, for the respondent.

SRIVASTAVA, J.:—These two appeals arise out of two suits brought against the defendant-appellant for possession of certain plots of land in villages Rasulpur and Purania Bazid in the Gonda District. The facts which gave rise to these suits are briefly as follows:

There is a public road running from Gonda to Utraula. The defendant constructed a *kachcha* road, branching from the public road just mentioned, to his house in village Purania Bazid. This *kachcha* road passes over the lands forming part of several villages. Muhammad Mousim Khan and Abdus Sattar Khan, plaintiffs in suit No. 362 of 1931, are the co-sharers in village Rasulpur. Mian Baksh, plaintiff in suit No. 94 of 1932, is the *mutawalli* of a private *waqf* in respect of certain lands in village Purania Bazid. The case of the plaintiffs in the two suits was that the defendant had constructed the road in question in 1922 for his personal use without any permission from them and that in constructing it he had dispossessed the plaintiffs in the first mentioned suit of an area of 13½ biswas kham in village Rasulpur and the plaintiff in the other suit of sixteen biswas kham in village Purania.

The suits were contested mainly on the ground that a *rasta* had existed for a long time at the site of the road in dispute and that the defendant had merely widened the said *rasta* in 1918. It was further pleaded that the plaintiffs, having acquiesced in the construction of the road, were estopped from maintaining the suits, and that the suits were barred by limitation.

The Munsif of Utraula dismissed both the suits on the ground that the road had been constructed more than twelve years before the institution of the suits and they were therefore barred by time. On appeal the learned Subordinate Judge of Gonda disagreeing with the lower Court found that the road had been

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constructed within twelve years of the institution of the suit and that the suits were within time. He was also of opinion that no case of acquiescence had been made out against the plaintiffs. In result he allowed the appeals and decreed the plaintiffs' claim for possession in both the suits.

Srivastava, J.

The defendant has come to this Court in appeal. His learned counsel has not questioned the finding of the learned Subordinate Judge about the suits being within time as it is based on a finding of fact relating to the time of the construction of the road which is not open to challenge in second appeal. But I am of opinion that both these appeals must succeed on the plea of acquiescence.

On the finding of the lower appellate Court, which has been accepted by both the parties, the road in question was constructed about ten years before the institution of these suits. The learned counsel for the plaintiffs-respondents is unable to point to any evidence of any protest having been made by the plaintiffs or for the matter of that by anybody else at the time when the road was under construction or at any time before the institution of the suits. The construction of the road was an open act done in broad daylight in the knowledge of all the co-sharers of villages Rasulpur and Purania Bazid. It is also an admitted fact that the road since its construction has been used by the public in general including the plaintiffs. According to the learned Subordinate Judge the defendant in constructing the road raised the level of the *rasta* by about one foot by taking the earth from the adjoining land. The only matter in controversy is whether the defendant in constructing the road acted under a *bona fide* belief of his right to do so. It is admitted by the learned counsel for the plaintiffs-respondents, and has been found by the lower appellate Court, that the defendant before constructing the road had obtained a written permission (exhibit A₃) from Muhammad Zaman Khan, father of Abdus Sattar,

plaintiff No. 2 and uncle of Mousim Khan, plaintiff No. 1 in suit No. 362. The learned Subordinate Judge has observed that the consent given by Muhammad Zaman Khan as guardian of his son is not binding upon the latter as he was a minor when exhibit A₃ was written. It is in evidence that Muhammad Zaman Khan, his son Abdus Sattar and his nephew Muhammad Mousim Khan were living together in the same house and Muhammad Zaman Khan was the senior member of the family. It is also in evidence that when Muhammad Zaman Khan gave his consent, Mousim Khan was present and said nothing. Admittedly Abdus Sattar himself attained majority very soon after the permission was given. Even though the consent given by Muhammad Zaman Khan was not legally binding on the plaintiffs, I think under the circumstances the defendant when he spent large sums of money in constructing the road after getting the consent of Muhammad Zaman Khan, must be held to have been acting *bona fide* in the belief that the permission obtained by him was sufficient. As regards Mian Baksh, plaintiff in the other suit, who it may be pointed out is the own uncle of the defendant, the latter deposed on oath that he had obtained oral permission from Mian Baksh as well as the other co-sharers in Purania Bazid. None of the other co-sharers have raised any objection up to the present day. The learned Subordinate Judge has made no reference to the evidence of the defendant on this point. The learned counsel for the respondents has pointed out that Mian Baksh has denied giving any permission as alleged by the defendant. He has also argued that if such permission had been given there is no reason why it was not taken in writing. I have read the statements of Mian Baksh as well as of the defendant. The defendant is a respectable person paying over Rs. 3,000 as land revenue and holding *thekas* worth over Rs. 4,000. In view of the conduct of Mian Baksh in raising no protest when the road was under construction, I have no

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hesitation in believing the statement of the defendant in preference to that of Mian Baksh. In the course of his cross-examination the defendant stated that he did not think it necessary to take written permission from the co-sharers other than Muhammad Zaman Khan because he trusted them and the road was meant for the benefit of all of them. In my opinion the explanation is quite reasonable. I therefore hold that Mian Baksh had also consented to the construction of the road. At any rate I have no doubt that the defendant when he undertook the construction did so with the *bona fide* belief that he had the permission of the plaintiffs in both the suits to make the road.

The learned Subordinate Judge was of opinion that no question of acquiescence could arise in the case, as one necessary ingredient for its application was that the defendant took possession of the plots "without knowing that they belonged to the plaintiffs" and that the said ingredient was wanting in the case. This view of the lower Court is in my opinion incorrect. In a case like the present, no question of ownership arises. It is enough that the defendant believed *bona fide*, albeit wrongly, that he had the necessary permission from the owners of the land to construct the road. The principles governing a plea of acquiescence have been repeatedly laid down by the Privy Council and by the Courts in this country. In *Jagannath v. Din Muhammad* (1), Mr. Daniels, A. J. C. referring to the decision of their Lordships of the Judicial Committee in *Beni Ram v. Kundan Lal* (2) laid down that for a defence of acquiescence to be successful, it is necessary that the defendant should have acted in good faith believing that he had a valid right to do the act in question and that the plaintiff knowing that the defendant was under this mistaken belief, should have abstained from doing anything to prevent his spending money in doing that act. It is hardly necessary to

(1) (1921) 8 O.L.J., 474.

(2) (1899) I.L.R., 21 All., 496.

multiply authorities on the point. In my opinion the plea of acquiescence is fully applicable to the facts of the case as stated above. The claim of the plaintiffs must fail on this ground. Having come to this conclusion, it is not necessary for me to discuss the other points raised on behalf of the appellant.

The result is that I allow both the appeals and dismiss the two suits with costs in all the courts.

Appeal allowed.

REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty

KING-EMPEROR (COMPLAINANT) *v.* NIAZOO KHAN
(ACCUSED-OPPOSITE PARTY)*

1934
February, 2

Indian Penal Code (Act XLV of 1860), section 188—Criminal Procedure Code (Act V of 1898), section 144—Disobedience of order under section 144, Criminal Procedure Code—Accused's knowledge that disobedience of order was likely to produce harm—No actual breach of peace—Case, whether covered by section 188, Indian Penal Code.

In a case under section 188 of the Indian Penal Code, it is sufficient that the accused knew that his disobedience of the order promulgated under section 144 of the Code of Criminal Procedure was likely to produce harm in the sense of creating a breach of the peace and it is not necessary that the action of the accused led to or caused a breach of the peace. *Rangopal Daw v. Emperor* (1), dissented from.

Assistant Government Advocate (Mr. H. K. Ghosh),
for the Crown.

Mr. Nasirullah Beg, for the accused.

NANAVUTTY, J.—These are two connected references made by the learned Additional Sessions Judge of Hardoi recommending that the conviction and sentence passed upon the accused Niazoo Khan and Raunak Ali Khan be set aside.

*Criminal Reference No. 61 of 1933, made by Mr. G. B. Chatterji, Additional Sessions Judge of Hardoi.

(1) (1905) I.L.R., 32 Cal., 793.