APPELLATE CIVIL

Before Sir C. M. King, Knight, Chief Judge

SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* SHYAM LAL (PLAINTIFF-RESPONDENT)*

1936 *May*, 6

Landlord and tenant—Tenant holding land appurtenant to his dwelling house, when can be ejected—Appurtenant, meaning of—Procedure—Court's duty to apply law if facts stated by plaintiff found proved.

When a piece of land is held by a tenant in Oudh as appurtenant to his dwelling house in the village, he can only be ejected from it when it is established that he has not exercised rights over it for twelve years, or when, if his exercise of rights is less than twelve years, he has not had the permission of the zamindar to occupy it. Where, therefore, a piece of land was utilised by a tenant for more than thirty years for this purpose, he clearly cannot be ejected. User for the purposes required by tenants in agricultural villages when it has been exercised for more than twelve years gives a sufficient possessory title to protect the tenant from ejectment from the land. It is not absolutely necessary that appurtenant land must be actually adjoining the residential house and *prima facie* there is no reason why a tenant should not use land opposite to his house but on the other side of a public way for the purpose of tethering his cattle and why such land should not be regarded as appurtenant to his house.

A plaintiff cannot be held to blame for not pleading the law under which he is entitled to a decree. If he has stated his facts, it is for the Court to apply the law if the facts are found to be proved.

Mr. *S. C. Das* for Mr. *H. S. Gupta* and Mr. J. P. *Saxena*, for the appellants.

Messrs. *Bhagwati Nath Srivastava* and *Krishna Prasad*, for the respondent.

KING, C.J.:—This is a defendant's appeal arising out of a suit for a permanent injunction restraining the

*Second Civil Appeal No. 207 of 1935, against the decree of Babu Gauri Shankar Varma, Additional Subordinate Judge of Gonda, dated the 22nd of February, 1935, reversing the decree of S. Abdul Qasim Zaidi, Munsif of Gonda, dated the 23rd of November, 1934.

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defendant from making any constructions on the plot in suit which is close to the plaintiff's house.

The plaintiff is a tenant in the village and he claims that for more than twenty years he has been using the land in dispute, which is parti land to the south of his house, for the purpose of tethering his cattle and for a passage for the inmates of the house and therefore he claims that he has a right to remain in possession and the defendant should be restrained from making buildings over that land. In the oral pleadings the counsel for the plaintiff stated that he claimed a right of easement as of necessity over the plot in suit. He also stated that by reason of a custom, a *riyaya* is entitled to use land in front of or close to his house for the purposes mentioned.

The trial Court found against the plaintiff on the question whether any right of easement had been established. It also found that no custom as alleged by the plaintiff had been established and therefore dismissed the suit.

The lower appellate Court agreed with the trial Court in respect of the right of easement of necessity but the learned Subordinate Judge found as a fact that the plaintiff had been tethering his cattle on the plot in suit and had been using it as a passage for more than twenty years, so the plot should be regarded as appurtenant to his residential house and he was entitled to a decree restraining the defendants from interference with a portion of the land in dispute, namely, eighteen feet by twenty-six feet.

It has been argued for the appellant that a new case was set up for the plaintiff in the lower appellate Court and that the defendant was prejudiced by the fact that no case of "appurtenance" was set up in the plaint or pleadings in the trial Court. It is further argued that the land in dispute cannot be held to be appurtenant to the plaintiff's residential house because there is a *chabutra* in front of the house and then there is a public

road and the land in dispute lies on the further side of the public road. The learned Advocate claims that a chance should be given to him for meeting the new case on the new question whether the land in dispute is appurtenant to the plaintiff's house.

I do not think it can be held that a new case was set up for the plaintiff. The plaintiff clearly stated the facts upon which he relied. His contention was that the land in dispute had been continually used openly and peaceably for more than twenty years for tethering his cattle and for a passage. It is true that he did not mention that the land was "appurtenant" to his house but he claimed that on the facts alleged he was entitled to restrain the defendant from making constructions upon the plot in suit. I do not think that the plaintiff can be held to blame for not pleading the law under which he was entitled to a decree. The plaintiff has stated his facts and it was for the Court to apply the law if the facts were found to be proved. In my opinion the defendant has not been prejudiced by the form of the pleadings and of the issues.

The nature of the right claimed by the plaintiff is not easy to define. The learned Advocate for the respondent has stated that the right cannot be regarded as an easement but it may be regarded as a convenience. In other words the use of the disputed plot is claimed as a convenience attaching to or appurtenant to the residential house. I think that that case was sufficiently clear from the pleadings.

As regards the law, it seems to me that the Court below has taken the right view. There is ample authority in support of that view and I need only refer to a few rulings *Raj Kishore* v. *Sahab Baksh Singh* (1), *Hulas* v. *Barakatunnisa Begam* (2) and *Kamta Tewari* v. *Sheo Narain* (3). In the first ruling mentioned it was held that when a piece of land is held by a tenant in Oudh

(1) (1926) 3 O.W.N., 937. (2) (1926) I.L.R., 1 Luck., 469.
(3) (1935) All., 123.

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as appurtenant to his dwelling house in the village he can only be ejected from it when it is established that he has not exercised rights over it for twelve years, or when, if his exercise of rights is less than twelve years, he has not had the permission of the zamindar to occupy it. Where therefore a piece of land was utilised by a tenant for more than thirty years for this purpose, he clearly cannot be ejected. The other rulings are to the same effect and they lay down that user for the purposes required by tenants in agricultural villages when it has been exercised for more than twelve years gives a sufficient possessory title to protect the tenant from ejectment from the land.

As the argument that the land in question cannot be treated as appurtenant to the house because there is a public road intervening I do not think there is any force in the contention. No authority has been cited for the view that appurtenant land must be actually adjoining the residential house. *Prima facie* I do not see why a tenant should not use land opposite to his house but on the other side of a public way for the purpose of tethering his cattle and why such land should not be regarded as appurtenant to his house. In the absence of any authority to the contrary, I think it may be held that the land is appurtenant in the present case.

I therefore dismiss the appeal with costs.

Appeal dismissed.