APPELLATE CIVIL

Before Mr. Justice A. H. deB. Hamilton

GAJRAJ SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* RAM SAHAI SINGH (PLAINTIFF-RESPONDENT)* 1940 *February*, 14

Easements Act (V of 1882), section 15—Enjoyment of easement up to within two years of suit and for twenty years without interruption—Enjoyment does not mean actual user—Burden of proof on person claiming easement—Abandonment, effect of.

Under section 15 of the Easements Act there are two requirements to be fulfilled: first the enjoyment must be up to within two years of the date of suit and secondly up to that time it must have been enjoyed for twenty years and without interruption. The period of enjoyment up to within two years of the suit need not be a period of actual user up to the last moment, provided one can hold that the absence of user does not amount to absence of enjoyment: whether it does or does not, depends on the facts of the particular case. The burden of proof lies on the person claiming an easement to show that there has been enjoyment within two years of the date of suit even if there has been no actual user, that is to say, if the opposite party alleges that there has not been user within two years of the date of suit then the person claiming the easement must show that there nevertheless has been enjoyment. If on the facts of the case there appears to have been not merely non-user but actual abandonment then the person claiming the easement can not succeed. *Sultan Ahmad* v. *Waliullah* (1), *Basdeo Singh* v. *Bhagwant Prasad* (2), and *Gopal Chandra Sen* v. *Bankim Bihari Ray* (3), distinguished. *Partap Singh* v. *Hemraj* (4), *Jogesh Chandra Roy* v. *Sm. Sachchhanda* (5), *Nagarentha Mudaliar* v. *Sami Pillai* (6), *Maharajah of Venkatagiri* v. *Ardhamala Yagadu* (7), and *Rajrup Koer* v. *Abdul Hossein* (8), referred to.

Mr. *D. K. Seth*, for the appellants.

Mr. *Parmatma Saran Dwivedi*, for the respondent.

*Second Civil Appeal No. 204 of 1937 against the order of Pandit Dwarka Prasad Shukla, Additional Civil Judge of Unao, dated the 16th March, 1937.

(1) (1912) 10 A.L.J.R., 227.
(2) (1923) A.I.R., Oudh, 29.
(3) (1919) 51 I.C., 372.
(4) (1929) A.I.R., All., 497.
(5) (1935) A.I.R., Cal., 282.
(6) (1936) A.I.R., Mad., 682.
(7) (1937) A.I.R., Mad., 953.
(8) (1880) I.L.R., 6 Cal., 394.

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HAMILTON, J.:—This is an appeal by defendants against a decision of an Additional Civil Judge who set aside a decision of the trial court and decreed the claim of the plaintiff.

The plaintiff's case is that he had three fields 5078, 5090 and 5091 as an under-proprietor in village Dhanokhar, that these fields had always been irrigated from a certain tank and that for over 20 years he had irrigated these fields by a certain channel and in July, 1935, the defendants had interfered with the use of that channel. This would at first sight mean that right up to July, 1935, the identical channel had been used for over 20 years up to and including the year 1934 and even for the watering of the *rabi* crop which would be cut in about May, 1935.

The trial court found that this particular channel had only been used from the tank up to a certain point, then it was continued northwards till it reached a point due east of field 5090 and then it had gone due west to reach that field. The lower appellate court held that the channel claimed had been used. Both courts, however, held that for five years before this suit was brought the channel ran north beyond the point where according to the defendant it turned west and eventually came down again south-west to reach 5090. To use the letters which appear in the map the three channels are one up to the point *J*. The plaintiff asserts that he has always from *J* had the channel going north to *H* and then west to field 5090. The defendants stated that from *G* the channel ran north to *J* but then turned east to *K*, north-east to *L*, due north to *M* and due west to reach 5090. The finding of the courts is that in the last five years the channel has gone straight from *M* to *O* and then west to *P* and south-west to field 5090. The defendants say that this new way was adopted because a house built by the plaintiff on the edge of field 5090 blocked the channel which coming due west from point *M* came into field 5090 there. The original court

found the channel to run up to point *M* and then due west, that is to say, it agreed with what the defendants said. It found that the plaintiff had abandoned this channel five years before the suit and, therefore, he had no right to easement. The lower appellate court found that there had been a right up to 20 years in the channel claimed by plaintiff and although it had not been exercised for five years before the suit, there had been no discontinuance for 20 years under section 47 of the Easement Act. I will here point out that the actual words used in section 47 are that a discontinuous easement is extinguished when for a like period, i.e. 20 years, it has not been enjoyed as such, and it does not speak of discontinuance.

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The present appellants depend on *Sultan Ahmad* v. *Waliullah* (1) and *Basdeo Singh* v. *Bhagwant Prasad* (2). The learned Judge who decided the second appeal in *Sultan Ahmad* v. *Waliullah* (1) pointed out that the defendants had enjoyed a certain right of way as an easement and as of right for more than 20 years up to within 16 or 17 years of the suit and then abandoned it or at all events abandoned the southern part of it. He held that the fifth paragraph of section 15 of the Easement Act seemed to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto had been contested in a suit. This decision was followed in *Basdeo Singh* v. *Bhagwant Prasad* (2).

The learned counsel for the respondents has referred to certain cases to uphold his contention that failure to exercise a right so that the right is not actually exercised within two years of the filing of the suit is not an interruption and the easement is maintained. The first decision he refers to is *Gopal Chandra Sen* v. *Bankim Bihari Ray* (3). This case does not appear to

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(3) (1919) 51 I.C., 372.

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me to support the case of the respondents on the facts of the present case. It was held in that case that when there had been no obstruction by the defendant and *there was no suggestion that the plaintiff voluntarily abandoned or discontinued the exercise* of a right of way, it was not necessary for the plaintiff to prove affirmatively "actual user" of the way down to a date within two years before the suit. A person may be said to be in "enjoyment" of a right of way during a period of time, though he does not actually "use" the way every moment. Mere non-user for a time of an easement which the owner might, if he pleased, enjoy during every hour of that time, but which, for some good reason, he does not care to enjoy, is not necessarily discontinuance of enjoyment of the right. The cessation of user is not an invariable indication of abeyance of the enjoyment of a right. *Mutatis mutandis* it might be said that in the case of irrigation of a field failure to irrigate it within two years before the suit need not mean discontinuance. Obviously a field is not irrigated every month of the year and owing to unusual rainfall it might be unnecessary in a year to irrigate it at all and in such a case failure to irrigate would not constitute a voluntary abandonment or discontinuance.

The next case quoted is *Partap Singh* v. *Hemraj* (1). This case quotes *Gopal Chandra Sen* v. *Bankim Bihari Ray* (2) and depends on it and must be read subject to what was said in the prior case. On the facts of the case the learned Judge held that the mere fact that for one year the plaintiff irrigated one number from another well did not affect the right of easement.

Jogesh Chandra Roy v. *Sm. Sachchhanda* (3) is a case affecting a pathway and there again it was held that cessation of user is not an invariable indication of the abeyance of enjoyment of a right, that is, it is not incon-

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(3) (1935) A.I.R., Cal., 282.

sistent with the continuance of the enjoyment of the right.

Coming to the facts in the present case, we find that for five years there had been no irrigation by the channel going from *J* to *H* and from *H* westwards to 5090. The original court held that there never had been a use of this channel but of another channel and both courts held that the discontinuance of use of the original channel, whatever that channel was, ceased when the plaintiff built a house on this No. 5090 and a new channel going right up to the point *O* and then down again was used instead of the original channel. Whichever was the original channel, and especially so if the original channel was the one now claimed, the channel first used five years before the institution of the suit was a much longer one and an inconvenient one and replaced the original one. This is not a case, therefore, of the original channel not being used because no irrigation was required but it was deliberately abandoned and replaced by a longer one which could not have been more convenient. This has not been considered by the lower appellate court.

It appears to me that under section 15 of the Easement Act there are two requirements to be fulfilled; first the enjoyment must be up to within two years of the date of suit and secondly that up to that time it must have been enjoyed for twenty years and without interruption. The period of enjoyment up to within two years of the suit need not be a period of actual user up to the last moment, provided one can hold that the absence of user does not amount to absence of enjoyment: whether it does or does not, depends on the facts of the particular case and must be considered which the learned Judge has not done. Section 47 comes in subsequently, that is to say, if there has been no enjoyment for 20 years but no actual abandonment still the right is extinguished, but I do not think that it means that if there has

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been a deliberate abandonment yet the right is not extinguished till the abandonment has lasted for 20 years I think, therefore, the burden of proof lies on the person claiming an easement to show that there has been enjoyment within two years of the date of suit even if there has been no actual user, that is to say, if the opposite party alleges that there has not been user within two years of the date of suit then the person claiming the easement must show that there nevertheless has been enjoyment. If on the facts of the case there appears to have been not merely non-user but actual abandonment then the person claiming the easement cannot succeed. In the present case, as I have stated, it is not a case of mere non-user but a case of abandonment of a particular channel for the use of a different channel. The case of the plaintiff based on section 15 of the Easement Act must fail.

The learned counsel for the respondent then urges that a grant should be presumed and he depends on *Nagarentha Mudaliar* v. *Sami Pillai* (1), *Maharajah of Venkatagiri* v. *Ardhamala Yagadu* (2) and *Rajrup Koer* v. *Abul Hossein* (3). The facts in those cases appear to me, however, to be different. All that the plaintiff alleged here is that irrigation had always been from that particular tank. As regards the channel *JKI* he only asserted irrigation for a period over 20 years, and this is not a case, therefore, that in the case of the particular channel claimed there was a lost grant. I do not think, therefore, that a case of a lost grant has been made out.

The result therefore is that I allow the appeal and setting aside the decision of the lower appellate court, I restore the decision of the trial court with costs throughout.

Appeal allowed.

(1) (1936) A.I.R., Mad., 682. (2) (1937) A.I.R., Mad., 953.
(3) (1880) I.L.R., 6 Cal., 394.