APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

MAUNG PWE AND ANOTHER
v.
MAUNG CHAN NYEIN AND OTHERS.*

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Apl. 9.

Easements—Surface water in undefined channel, no right to by way of easement though Easements Act (V of 1882) not applicable in Burma—Easement by prescription over Government land—Period of user—Interruption submitted to for two years bars suit—Limitation Act (IX of 1908), s. 26—Customary easement—Incidents of custom—Catchment area for water in Upper Burma—Government waste land not reserved as catchment area for waterfalls (yegya).

Although the Indian Easements Act does not apply in Burma, it is a general principle of law that no claim can be made either as a natural right or as an easement by prescription to surface water which does not flow in a definite course.

Mussamat Sarban v. *Fludo Sahu*, 2 Pat. 110 ; *Rawstron* v. *Taylor*, [1855] 11 Ex. 369 ; *V. Adinarayana* v. *P. Ramadu*, 37 Mad. 304—*referred to.*

To establish an easement by prescription over Government land it is neccessary to prove enjoyment as of right and without interruption for a period of sixty years. If no suit claiming the easement is filed within two years after there has been an interruption of it for a year, the right would be defeated under the provisions of s. 26 of the Limitation Act.

A customary easement may be established, but the custom must be reasonable, certain and definite.

Kuar Sen v. *Mamman*, 17 All. 87 ; *Mussamat Diyan* v. *Hira Nand* 4 Lah. 202 ; *Ramalakshmi* v. *Sivanantha*, 14 M.I.A. 570—*referred to.*

In the dry zone of Upper Burma where there is an undulating area cultivators would prefer to cultivate the lower portion of their land leaving the higher portion as a catchment area of water. But Government has not reserved its unoccupied waste lands on higher levels as catchment areas, and so on the ground of alleged custom, it would be unreasonable to deprive Government of its right to dispose of those lands for cultivation.

Maung Chan Nyein v. *Maung Pwe*, 6 Ran. 615—*set aside.*

Kale for the appellants.

Ba So for the respondents.

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* Letters Patent Appeal No. 97 of 1928 from the judgment of the High Court in Special Civil Second Appeal No. 707 of 1927.

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MYA BU, J.—This is an appeal preferred under Clause 13 of the Letters Patent from the judgment in Special Civil Second Appeal No. 707 of 1927, which set aside the judgment of the Court of first appeal and restored that of the Court of first instance.*

Three pieces of culturable land known as Holding Nos. 10, 3 and 8 in Kongyaung Kwin, Pettaw Circle, Taungtha Township, Myingyan District, belong respectively to the respondents Chan Nyein, Thu Daw and Po Kyaw. These three pieces together measure 12·69 acres. On the west of these lies Holding No. 8/219 of the same kwin measuring 13·50 acres which is State land worked by the appellants under a permit granted by the Deputy Commissioner of Myingyan District in October 1922. There are situate in a locality of undulating land and are apparently on the same side of a rising ground, the part occupied by Holding No. 8/219 being higher than that occupied by Holding Nos. 10, 3 and 8.

The respondents sued for an injunction restraining the appellants from entering upon and working the Holding No. 8/219 and directing them to remove the *kazins* which the latter had constructed thereon, alleging that they (the respondents) were the owners both of Holding Nos. 13, 3 and 8 which they cultivated and of Holding No. 8/219 which they did not cultivate but from which water ran down to the former three holdings.

In view of the fact that Holding No. 8/219 was State land at the disposal of the Government and that the appellants worked it with the permission of the Deputy Commissioner who undoubtedly has authority to grant the permission, the respondents' assertion of ownership thereto could obviously have possessed

* [Reported at (1928) 6 Ran. 615—*Ed.*]

no strength. The respondents could not prove the alleged ownership and the Township Court dismissed their suit on the 9th June 1926.

The respondents then appealed to the District Court accepting the adverse finding of the Township Court on the question of ownership but changing their ground to one of right to receive the water flowing down from Holding No. 8/219 to their lands. The Additional District Judge observed to the effect that the respondents claimed an easement in respect of surface water flowing from Holding No. 8/219 to their lands, and remanded the suit to the Township Court for trial on the following issues :—

(1) Has the surface water flowed from the disputed land to the plaintiffs' lands adjoining thereto ?

(2) If so, how long have they enjoyed the right to use it ?

(3) Are they entitled to continue the right ?

This order of remand was made on the 21st August 1926.

It is important to note that it was in respect of surface water that the respondents claimed the right and their case was not based on any assertion that the water flowed in a defined channel either natural or artificial.

When the case got back to the Township Court the whole record was lost in a fire to the Court house. The present record of the suit has been reconstructed from copies and such like and does not contain any copy of the depositions of the previous trial. After recording fresh evidence the trial Court answered the first issue in the affirmative. It found on the second issue that the respondents had enjoyed the right of use of the water for more than 25 years, and on the third issue that the

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respondents on account of uninterrupted use of the water flowing from Holding No. 8/219 for more than 20 years had acquired by prescription an absolute and indefeasible right of use of the water flowing from that land. In the result the trial Court passed "a decree as prayed for" by the respondents. The obvious effect of the decree was absolutely to restrain the appellants from entering upon and working the Holding No. 8/219.

The appellants then took the matter up on appeal to the District Court which set aside the decree of the trial Court and ordered the dismissal of the respondents' suit on the ground that the respondents could not in law possibly have acquired a prescriptive right to the use of water not running in a natural or defined or artificial channel. The Additional District Judge took the analogy from section 17 (*c*) of the Indian Easements Act. This Act, however, does not apply to this province.

When the matter came up to this Court, the respondents for the very first time claimed the benefit of an alleged local custom for only the lower ground to be cultivated and for each piece of lower ground to have a catchment area attached to it. This, however, appears to have weighed with the learned judge who disposed of the second appeal and whom the alleged custom struck as a proper one without which there could be no cultivation in the area in question. The learned Judge found this custom proved, and it was principally on this ground that he proceeded to set aside the judgment of the District Court and restore that of the trial Court. Although the judgment contains some expression of the learned Judge's inclination to the view that the water from Holding No. 8/219 might have flowed in a stream, he did not, as far as we can

judge, come to any definite finding to that effect. Even assuming that there was a finding to that effect and that it would have supported an assertion of a prescriptive right to the use of the water, the respondents' claim for a right under section 26 of the Indian Limitation Act would have been defeated on account of the period of user having terminated more than two years before the filing of the suit. There is sufficient evidence to show that the appellants obtained the permit in October 1922 and began to cut and clear the land and started cultivation in the following year. The date of institution of the suit cannot be ascertained from the materials before us but there can be no doubt that the suit was instituted in the early part of 1926. Thus the suit was filed after a lapse of more than two years from the time when the user must have ceased. Further, although the learned Judge emphasised the fact that the Indian Easements Act did not apply in this province, nevertheless he stated that in the ordinary way a right merely to receive surface water would not be recognised by the Courts as an easement. This statement is undoubtedly correct ; for no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage—see *V. Adinarayanna* v. *P. Ramudu* alias *Ramaswamy and three others* (1).

This principle is taken from the English case of *Rawstron* v. *Taylor* (2), where it was held that the plaintiff who claimed the right of easement by prescription had no right to surface water which had no defined course for the plaintiff had no right to water in *alieno solo*. At page 383, Platt, B., very pertinently

(1) (1914) 37 Mad. 304. (2) [1855] 11 Exch. 369.

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observed "the plaintiff could not insist upon the defendant maintaining his fields as a mere water-table."

The same principle underlies the ruling in *Mussammat Sarban* v. *Fhudo Sahu* (1), which as pointed out at page 117, relates to a case to which the Indian Easements Act does not apply and where it is held that every landowner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire.

Therefore even quite apart from the provisions of the Indian Easements Act it is safe to hold as a general principle of law that no claim can be made either as a natural right or as an easement by prescription to water which does not flow in a definite course but which should be regarded as surface water or surface drainage.

Turning now to the question of the respondents' contention of having acquired the easement in virtue of custom it is desirable to bear in mind the ordinary definition of an easement which according to the English Law is a right which a person has in respect of land belonging to him to utilise certain land belonging to another in a particular manner not involving the taking of any part of the natural produce of the latter or of any part of its soil, or to prevent the owner of the latter from utilising his land in a particular manner. This is deducible from the digest of the case law set out in paragraphs 470 and 489 of Halsbury's Laws of England, Volume II. While the Indian Easements Act declares that an easement may be acquired in virtue of a local custom, such easements being called customary easements the English Law also recognises easements existing by

(1) (1922) 2 Pat. 11

custom, see paragraph 492 of Halsbury's Laws of England, Volume II.

Evidence of such custom is relevant under section 13 of the Indian Evidence Act. The learned author of the Law of Evidence, Sir John Woodroffe, points out at pages 167 and 168 of the Eighth Edition of his work that "Custom" as used in the sense of a rule which in a particular district, class, or family has from long usage, obtained the force of law, must be peaceable and acquiesced in; reasonable, certain and definite; compulsory and not optional to every person to follow or not.

In the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1), which was a case relating to a special family custom their Lordships of the Privy Council held that it was esssential that special usages modifying the ordinary law of succession should be established to be so by clear and unambiguous evidence, observing that it was only by means of such evidence that the Courts should be assured of their existence.

In *Kuar Sen* v. *Mamman* (2), it was observed as follows :—

"A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the persons and things which it concerns. 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

(1) 14 M.I.A. 570. (2) (1895) 17 All. 87.

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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."

In *Mussamat Diyan* v. *Hira Nand* (1), a Bench of High Court of Lahore emphasised the necessity to endeavour to ascertain the existence or nature of the custom in cases where the custom is alleged.

The question which now remains for consideration is whether the evidence establishes a local custom which is reasonable and certain and, leading to the conclusion that it has become the local law of the place by virtue of which the respondents derived the right of use of the water flowing from Holding No. 8/219 into their lands. The evidence is to the effect that where the land is undulating only the lower lands are cultivated and almost all such lands have some higher lands as their water resources called in Burmese "*yegya*" which apparently are lands regarded as catchment areas.

The appellant Maung Pwe went as far as to say "we cannot cultivate the place if it is kept as the water resources for fields." This statement, however, is quite insufficient to warrant the belief that all unoccupied lands on higher level from which water runs down to the lower cultivated lands are recognised as having been reserved as catchment areas or water resources. The uncultivated lands on the higher levels are apparently government waste lands as was the Holding No. 8/219 before the appellants' occupation.

Looking at the relative advantages to be gained by lands in higher and lower levels of an undulating area in the dry zone, it is evident that cultivators would

(1) (1923) 4 Lah. 202.

prefer to occupy the lower lands and not the higher ones and it would not be strange to find that most of the higher lands have no occupiers or persons who would think of cultivating them. While they remain vacant, those occupying the lower lands would enjoy the benefits of water much or little which flows down from the higher lands ; and these cultivators would certainly call all the unoccupied higher lands as their catchment areas. In my opinion the evidence does not go further than that.

It is not contended that the unoccupied waste lands on the higher levels have been reserved as catchment areas like, for instance, grazing grounds reserved for the benefit of the cattle of certain localities. The unoccupied state lands are the property of tne government, and it is inconceivable that the government should be considered to have reserved them as catchment areas or permitted the cultivators to reserve them as such merely on account of the fact that the government has, by reason of the absence of cultivators to apply to cultivate them, allowed them to remain unoccupied. There would, of course be nothing to prevent a cultivator to occupy a large area of land and cultivate only the lower part thereof, keeping the higher part as his water resources or catchment area. In such a case the uncultivated area would not be government waste land, and it is not certain that when Maung Pwe spoke of lands kept as water resources he was not referring to such lands as are kept as water resources without being government waste lands. The alleged custom if stretched to the extent to which the respondents attempted at stretching, must necessarily be unreasonable because anybody by cultivating a piece of land in the lower part of a slope in the locality in question would successfully deprive the government of the

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right of disposal of State lands in the higher part of the slope for the purposes of cultivation to those sufficiently enterprising to attempt at cultivating them.

For these reasons I am not satisfied that the alleged custom is reasonable or certain or that it establishes a custom to enjoy the use of the water flowing down from the higher part of the slope as of right. The respondents did not think of setting up such a custom even up to the time when the case went to the District Court for the first time. Nor does it appear that they expressly pleaded the existence of such a custom at any stage before the case reached this Court on second appeal.

In my opinion the respondents' suit failed. I would allow this appeal and direct that the suit be dismissed with costs throughout.

HEALD, J.—Respondents sued for an injunction to restrain appellants from working a certain holding of land. Their case was that appellants' working that holding caused a diminution of the water-supply to their lands, and that therefore they were entitled to prevent appellants from working it.

Respondents' lands adjoin that holding but are on a lower level. Until 1922, when appellants obtained permission from the Revenue Authorities to work that holding the surface water from the higher land of which that holding consists flowed down to respondents' lands and naturally improved their fertility, the rainfall in this neighbourhood, which is known as the dry zone of Burma, being precarious.

The lands which are comprised in appellants' holding are State lands and until permission was given to appellants to occupy them were State waste lands.

Unless respondents could establish that they had a right to the use of the surface water as an easement they would not be entitled to the injunction which they sought. To establish the easement which they claimed they would have to prove enjoyment as of right and without interruption for a period of 60 years ending within two years next before the institution of the suit. Their suit was instituted in 1926 so that they could not succeed if their enjoyment was interrupted before 1924 or if the interruption had been submitted to or acquiesced in for one year after they had notice of it. Since appellants obtained permission to work the land in 1922 it is probable that respondents' enjoyment of the right to the water which they claim was interrupted not later than 1923 and that on this ground, even if they established that they had enjoyed the right for 60 years, which in fact they did not establish, their suit was bound to fail.

There is also another obstacle in the way of their success, and that is that there can be no easement in respect of the use of surface water. My learned brother has considered the law on this subject and I agree with his conclusions.

Respondents doubtless had an opportunity of objecting to appellants' application to the Revenue Authorities for permission to work the land and an appeal to the discretion of those authorities was in my opinion the only way in which they could attempt to prevent the lands being worked. It is not suggested that they took that course, and as I do not think that they have any rights which a Civil Court can enforce, I concur with my learned brother in setting aside the judgment and decree of this Court in Special Civil Appeal No. 707 of 1927 and in dismissing respondents' suit with costs for appellants throughout.