APPELLATE CIVIL.

Before Hilton J.

1934

Jan. 24.

RAM SINGH (DEFENDANT) Appellant

versus

RADHA SINGH AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 1917 of 1932.

Common land—Suit by two village proprietors to eject another proprietor from part of the land—whether competent without proof of material and substantial injury.

The defendant, one of the village proprietors reclaimed a part of the common land of the village adjacent to his own proprietary land and brought it under cultivation. The plaintiffs, two other proprietors in the village, sued for ejectment of the defendant. The defendant was found to have taken possession of much less than the area that would correspond to his share of the common land in the event of a partition.

Held, that the defendant cannot be ousted from the land so cultivated by him unless the plaintiffs can show that his possession has caused them such material and substantial injury as cannot be remedied on a partition of the joint land.

Watson & Co. v. *Ram Chand Dutt* (1), relied upon.

Other case law discussed.

Second appeal from the decree of K. S. Sayed *Abdul Haq, Senior Subordinate Judge, Kangra at Dharmsala, dated 9th August, 1932, reversing that of* Mian *Muhammad Abdul Latif, Subordinate Judge, 2nd Class, Kangra, dated 30th November, 1931, and granting the plaintiff a decree for ejectment of defendant.*

JAGAN NATH AGGARWAL, for Appellant.

MEHR CHAND MAHAJAN and JIWAN LAL KAPUR, for Respondents.

(1) (1891) I. L. R. 18 Cal. 10 (P. C.).

1934

RAM SINGH
v.
RADHA SINGH.

HILTON J.

HILTON J.—In village No. 62 of *tahsil* Palampur in the Kangra district there is a bed of a stream described in the revenue papers as *ghairmumkin khadd* which is common land of the village. The defendant Ram Singh, who is one of the village proprietors, has reclaimed seven *marlas* of this land adjacent to his own proprietary land and has put it under cultivation and has built a wall alongside the plot thus reclaimed.

The two plaintiffs, who are also proprietors in the village, after an unsuccessful attempt to persuade the revenue authorities to oust Ram Singh from this plot, presented a plaint on the 29th August, 1930, asking for relief by ejectment of Ram Singh and an injunction against repetition of the encroachment. The suit was dismissed by the trial Judge but the learned Senior Subordinate Judge on appeal by the plaintiffs has decreed the defendant's ejectment and the defendant has now preferred this second appeal.

It was found by the trial Judge and has not been disputed here that the defendant is in possession out of the common land of the village of much less than the area that would correspond to his share in the event of a partition.

A question was raised before me whether the plaintiffs had acquiesced in the encroachment but this point is concluded by a finding of fact of the lower Appellate Court to the effect that the defendant openly occupied the disputed area in 1928 or only one year before the plaintiffs raised the dispute in 1929. There was therefore no acquiescence on their part.

The main subject of debate in this second appeal has been whether, in the circumstances stated, the plaintiffs are entitled to have the defendant ejected.

1934

RAM SINGH
v.
RADHA SINGH.

HILTON J.

Mr. Jagan Nath for the appellant-defendant has contended for the proposition that the defendant cannot be ousted unless the plaintiffs can show that his possession has caused them such material and substantial injury as could not be remedied on a partition of the joint land.

Mr. Mehr Chand Mahajan for the plaintiffs-respondents has argued on the other hand that the stream bed is not partible and that in any case the plaintiffs are not obliged to resort to partition nor to prove material and substantial injury as a condition of ejecting the defendant. He has contended that ejectment is the rule in cases where the encroaching party has not erected expensive buildings and where the challenging party has not been guilty of laches.

The authorities relied on by Mr. Jagan Nath include *Watson & Co.* v. *Ram Chand Dutt* (1), *Lachhmeswar Singh* v. *Manowar Hossein* (2), *Majju* v. *Teja Singh* (3), *Lakhu* v. *Hanwanta* (4), *Kala Singh* v. *Kahna* (5), *Ahmed Gul* v. *Rahim Khan* (6) and *Radha Kanta Pal* v. *Manmohinee Pal* (7).

Mr. Mehr Chand Mahajan has cited *Manji* v. *Ghulam Muhammad* (8), *Manji* v. *Ghulam Muhammad* (9), *Bishna* v. *Sapuran Singh* (10) and *Kunj Lal* v. *Ramji Lal* (11) [quoted in *Manji* v. *Ghulam Muhammad* (8)].

I may say at once that the *wajib-ul-arz* of the village does not appear to support the view that the

(1) (1891) I. L. R. 18 Cal. 10 (P. C.).
(2) (1892) I. L. R. 19 Cal. 253 (P. C.).
(3) 29 P. R. 1918.
(4) 114 P. R. 1918.
(5) (1921) 60 I. C. 531.
(6) (1926) 89 I. C. 331.
(7) (1933) I. L. R. 60 Cal. 292.
(8) (1920) I. L. R. 1 Lah. 249, 258.
(9) (1921) I. L. R. 2 Lah. 73.
(10) (1925) 6 Lah. L. J. 548.
(11) (1927) 102 I. C. 9.

stream bed is not partible. It provides that the pasture land and the resting place of cattle should not be cultivated but otherwise it contemplates the partition of the culturable portions of the *shamilat*. I do not think that the *wajib-ul-arz* can be read as forbidding either the cultivation or the partition of the stream bed. The trial Judge who inspected the spot gave a finding that this land is not pasture land nor used as the resting place of cattle and the Lower Appellate Court did not dissent from this finding.

While, however, the trial Judge thought that the defendant had performed a meritorious act in reclaiming for cultivation a part of this barren stream bed which otherwise would supply nothing but stones, the Lower Appellate Court was influenced by the consideration that " should the other co-sharers also all do what the defendant has done the *khad* will disappear or become narrow and water will run on higher ground and may harm valuable lands and houses."

During his inspection of the spot, however, the trial Judge found a *pakka* paved passage running alongside the wall of the defendant over the highest portion of the stream bed but not passing through the land in dispute. This does not suggest that the normal course of the channel has been interfered with by the defendant's cultivation. Both the Courts mention that other co-sharers have also cultivated other plots out of the common land and I do not think that a partition of the common land including the plot reclaimed by the defendant can therefore be said to be in any way impracticable. In any such partition it could surely be arranged that the normal channel of the stream should, if necessary, be left unobstructed.

1934

RAM SINGH v. RADHA SINGH.

HILTON J.

Thus the point for decision resolves itself into the legal question whether the plaintiffs must show material and substantial injury such as could not be remedied on a partition. The above mentioned authorities cited by Mr. Jagan Nath certainly maintain this principle which follows from the reasoning enunciated by their Lordships of the Privy Council in *Watson* v. *Ram Chand Dutt* (1) where they remarked that " if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons."

It remains, therefore, to examine the authorities relied on by the respondents' learned counsel to ascertain what exceptions to that principle have been recognised. The authorities *Manji* v. *Ghulam Muhammad* (2) and *Manji* v. *Ghulam Muhammad* (3) relate to the same case, the latter being an order in appeal against the former. This case was decided on a different point, namely, the denial by the encroaching proprietors of the title of those who challenged the encroachment and *Watson & Co.* v. *Ram Chand Dutt* (4) was distinguished on that ground. It was, however, doubted whether the principle of a remedy by partition would be applicable to the peculiar circumstances of the *abadi* land, more especially where the vacant land

(1) (1891) I. L. R. 18 Cal. 10 (P. C.).
(2) (1920) I. L. R. 1 Lah. 249.
(3) (1921) I. L. R. 2 Lah. 78.
(4) (1891) I. L. R. 18 Cal. 10.

has already been reduced to a small area barely sufficient for the common purposes of the village. These remarks were based on the impartibility of *abadi* land or at any rate on the impracticability of partitioning it but cannot be applied to such cases as the present where a remedy by partition is not barred nor impracticable.

Similarly, in *Bishna* v. *Sapuran Singh* (1), it was held that to construct a manger on common property would be to use the land in a manner that would affect the rights of all the co-sharers at the time of partition. If an encroachment is such as to affect the rights of all the co-sharers at the time of partition, it is presumably an injury of a material character such as cannot be remedied by partition and this case would not therefore deny the general principle.

In *Kunj Lal* v. *Ramji Lal* (2) it was held that it was not legally necessary in that case to prove special damage and that there was no force in the contention that the plaintiff's remedy was by way of a suit for partition. The authority of *Manji* v. *Ghulam Muhammad* (3) was followed in adopting this view and it is therefore to be understood that what is called the *gore-deh* in this ruling was treated on the same footing as a part of the *abadi* site, an encroachment whereon is held not to be remediable by partition. The same remarks would therefore apply to this authority as in the case of *Manji* v. *Ghulam Muhammad* (3).

Finally, in C. A. No. 2788 of 1917, a well was about to be sunk on common land and the plaintiffs were held not to be obliged to prove material and sub-

(1) (1925) 6 Lah. L. J. 548. (2) (1927) 102 I. C. 9.
(3) (1921) I. L. R. 2 Lah. 73.

1934

RAM SINGH v. RADHA SINGH.

HILTON J.

stantial injury. It seems to me that the sinking of a well is an act which could not be remedied by partition, as the person sinking it could not be expected to forego at the time of partition the advantage secured by him in having appropriated the land in which the well had been sunk. In paragraph 226 of Rattigan's Digest of Customary Law a rule is laid down against the sinking of wells in common lands but the remark under this rule clearly indicates that the said rule is not regarded by the author as covering cases of the cultivation of waste land, which cases are rather regarded as governed by the authority of *Watson & Co.* v. *Ram Chand Dutt* (1).

Thus the exceptions which are found in the authorities cited for the plaintiffs-respondents in respect of the *abadi* land, the *gore-deh* and the sinking of wells do not extend to cases of simple reclamation of waste land such as the present case. It is true that the defendant has constructed a wall alongside the plot reclaimed by him but this I think is a prudent measure of precaution against trespassing cattle and merely subsidiary therefore to his farming operations.

For the above reasons, I disagree with the finding of the learned Senior Subordinate Judge that the plaintiffs are entitled to eject the defendant without showing material and substantial injury such as could not be remedied by a partition. I accept the appeal of the defendant-appellant and setting aside the judgment and decree of the lower Appellate Court, dated the 9th August, 1932, I restore the decree of the trial Court, dated the 30th November, 1931, dismissing the

(1) (1891) I. L. R. 18 Cal 10 (P. C.): 17 I. A. 121.

plaintiffs' suit with costs. The plaintiffs are to pay the defendant's costs here and in the Court of the Senior Subordinate Judge.

1934

RAM SINGH
v.
RADHA SINGH.

HILTON J.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Shadi Lal C.J. and Rangi Lal J.

IQBAL SINGH, MINOR, THROUGH *MST.* RAGHBANS KAUR (PLAINTIFF) Appellant

versus

JASMER SINGH AND OTHERS (DEFENDANTS) Respondents.

1934

Jan. 30.

Civil Appeal No. 1357 of 1928.

Hindu Law—Alienation—by Jat, *resident in Kalsia State — of ancestral property in British India — whether custom applicable—Punjab Laws Act, IV of 1872, section 5—Hindu's power of alienation for antecedent debt—explained.*

The plaintiff, a grandson of J. S. (a permanent resident of the Kalsia State) brought the present suit for a declaration that a mortgage made by J. S. of his ancestral land in *Mauza* Babiani in the Ferozepore district of British India was invalid by custom and should not affect his reversionary rights. The trial Court held that J. S. had unrestricted power to dispose of his property and also that there was both consideration and necessity for the alienation. In the appeal before the High Court the crucial question was whether J. S. had unrestricted power of alienation or could not dispose of his ancestral property except for necessity.

Held, that section 5 of the Punjab Laws Act provides that custom in the Punjab is the first rule of decision in all questions specified therein. But it is nowhere laid down that a presumption arises in favour of the existence of custom to the exclusion of personal law, and it is for the person relying upon a rule of law contrary to his personal law to allege and prove it.