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obligor of the bond), and by providing for the payment of the balance as part of the entire amount of the bond. Since the amendment made in section 258 of the Civil Procedure Code by section 27 of Act VII of 1888 such adjustment may be recognized by a Civil Court, except when executing the decree—*Swámiráo Náráyan Deshpânde* v. *Káshináth Krishna*(1). We must, therefore, reverse the decree, and send back the case for a decision on the merits.

Costs to abide the result.

Decree reversed and case sent back.

(1) I. L. R., 15 Bom., at p. 421.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891. *October* 8.

CHUNILA'L FULCHAND AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MANGALDA'S GOVARDHANDA'S, (ORIGINAL DEFENDANT), RESPONDENT.*

Easement—Enjoyment as of right for twenty years—Limitation Act (XV of 1877), Sec. 26—Right of ownership—Right of easement as distinguished from a right of ownership.

In order to acquire an easement under section 26 of the Limitation Act (XV of 1877), the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years. Evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement.

Quære—whether upon a correct construction of section 1 of Regulation V of 1827, which applies to the acquisition of easements, the mere use would be sufficient to establish the right to the easement claimed.

THIS was a second appeal from the decision of Ráo Bahádur Chunilál Máneklál, First Class Subordinate Judge of Ahmedabad with Appellate Powers.

Suit for a perpetual injunction.

This action was instituted by the plaintiffs—(1) Chunilál Fulchand, (2) Maganlál Fulchand, and (3) Shakra *alias* Mansuk Fulchand, a minor, by his next friend, Maganlál Fulchand—against

* Second Appeal, No. 570 of 1890.

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the defendant Mangaldás Govardhandás, for a perpetual injunction restraining the latter from obstructing them in making a new *kothi* (cistern) and a gutter, and in repairing their *nul* (water-pipe). The plaintiffs alleged that at the rear of their house there was a piece of ground which belonged to them, and was in their possession; that the defendant having deprived them of possession thereof they had filed a suit (No. 3244 of 1882) against him, which was decided against them; that on this piece of ground there existed a *nul kothi* and gutter for more than twenty years; that the defendant broke them down, and was fined by the Magistrate for doing so, and that he would not allow the plaintiffs to repair and reconstruct them, and hence the suit.

The defendant, Mangaldás Govardhandás contended *(inter alia)* that the suit was barred by section 13 of the Civil Procedure Code (Act XIV of 1882); that the plaintiffs ought to have alleged their right of easement in the previous suit; that the suit was time-barred; and that the plaintiffs had not used the gutter for twenty years, or upwards, so as to acquire a right of easement.

The Subordinate Judge (Ráo Sáheb Chunilál D. Kavishvar) found that the claim was neither barred by limitation, nor by section 13 of the Civil Procedure Code; that the plaintiffs had not acquired a right of easement in respect of the gutter and *kothi*; and that they were entitled to have an injunction with regard to the *nul*. The Subordinate Judge passed a decree accordingly.

Against the said decree both the parties appealed to the District Court, which reversed it, and rejected the plaintiffs' claim *in toto*.

The plaintiffs appealed to the High Court.

Ráo Sáheb *Vásudev Jagannáth Kirtikar* for the appellants:—We had brought a suit to recover possession of the land, and therein we failed, and now by the present suit we seek to enforce our right of easement. The lower Court held that owing to the former suit the present one cannot lie. We submit that the Court was in error in holding the present suit to be *res judicata* —*Shivláldás* v. *Kikábhái*[1]. Our contention is that, having

(1) P. J. for 1885, p. 76.

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failed to establish our title as owner in the former suit, we are now entitled to bring a suit to establish our right of easement. Our suit for possession being thrown out, it follows that the land belongs to some other person, and we have been using it for certain purposes. The fact that we have been using the land since a very long time is undisputed, and, therefore, our present suit is maintainable, since our right to use it as owner must now be taken to have been disproved—section 15, illustration (*b*) of the Indian Easements Act (V of 1882); *Harbidge* v. *Warwick*(1); Goddard on Easements, (4th Ed.), 244. Supposing that we have been enjoying the right as an easement for a long time, and we bring a suit claiming a much larger right, such as possession of the property itself, and fail therein, still our pretension to the larger right cannot extinguish our right of easement.

Gokuldás Kahándás Párekh for the respondent:—If a right has not been enjoyed "as an easement," there can be no easement—section 26 of the Limitation Act (XV of 1877). The plaintiffs never enjoyed the land with a view to acquire the right of easement. They wanted to enjoy it as owner, and therein they were frustrated. In the former suit the *nul*, gutter and *kóthi* were, no doubt, mentioned, but they were so mentioned for the purpose of proving that the plaintiffs exercised acts of ownership over the land, and not with a view to show that they had acquired any right of easement over it. To acquire an easement there must be two tenements: one dominant and the other servient. These two elements are absent in the present case, because till the time the plaintiffs' suit for possession was decided against them they were enjoying the property as owners. If a man thinks that he is the owner of certain property, and uses it as such, the user cannot give him a right of easement over the property. An easement can only be acquired over property recognised as belonging to some other person.

Ráo Sáheb *Vásudev Jagannáth Kirtikar*, in reply:—The words "as an easement," used in section 26 of the Limitation Act, are relied on, and it is contended that a man cannot acquire a right of easement over his own property; but we submit that, our suit

(1) 3 Exch., 552.

for possession being dismissed, it follows that we were not in possession, and that the property did not belong to us. Further, the words "as an easement" seem to apply to cases where for some reason or other the easement has temporarily ceased to exist.

The right of easement is not necessarily a right acquired under the Limitation Act—*Punja Kuvarji* v. *Bái Kuvar* (1). Under section 1 of Regulation V of 1827 a man can acquire a right of easement by prescription—*Rámbhau Bápushet* v. *Bhái Bábushet* (2); *Anáji* v. *Morushet* (3); *The Secretary of State* v. *Mathurábhái* (4); *Mohanlál* v. *Amratlál* (5); *Maháráni Rajroop Koer* v. *Sayed Abul Hossein* (6).

SARGENT, C. J. :—In order to acquire an easement under section 26 of the Limitation Act, the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years. But it is plain, from the case the plaintiff made in his suit of 1882, that he never claimed the right to use the *nul*, gutter and *kothi* as an easement, but by right of ownership of the land itself, and, therefore, the lower Court of appeal was right in holding that his claim to an easement fails so far as it is based on section 26 of the Limitation Act. It appears, from the judgment of the Subordinate Judge, that the plaintiff's pleader also cited *Punja Kuvarji* v. *Bái Kuvar* to show that the plaintiff might, according to the decision of the Privy Council in *Maháráni Rájroop Koer* v. *Sayed Abul Hossein*, establish his right to the easement by evidence as to immemorial user. But in that case it would be equally necessary for the plaintiff to prove a user of the *nul*, gutter and *kothi* as of right as an easement, as distinguished from a right of ownership. On the hearing of this second appeal it has been contended that the plaintiff is entitled to rely on section 1 of Regulation V of 1827, which by *Anáji* v. *Morushet* and *Mohanlál* v. *Amratlal* has been held to apply to the acquisition of easements, and that the mere use of the *nul*, gutter and *kothi*, as a matter of fact, would be sufficient to establish the right to the easement claimed. Whether that would be so upon the correct construction of that section may

(1) I. L. R., 6 Bom., 20.
(2) 2 Bom. H. C. Rep., A. C. J., 333.
(3) 2 Bom. H. C. Rep., A. C. J., 334.
(4) I. L. R., 14 Bom., 213.
(5) I. L. R., 3 Bom., 174.
(6) L. R., 7 I. A., 240.

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well be doubted, but it is not necessary to express an opinion on the question, as it was no part of the plaintiff's case in either Court that he had acquired the easement under the Regulation by enjoyment for thirty years, and we cannot, therefore, say, on second appeal, that there has been any miscarriage in the lower Court in not considering the plaintiff's claim with reference to the Regulation.

We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

1891. *November* 16.

KESHAVRÁV *ALIAS* RÁO BAHÁDUR RA'VJI TRIMBAK NAGARKAR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANPATRA'O NILKANTH NAGARKAR, DECEASED, (ORIGINAL DEFENDANT), RESPONDENT.*

Saranjám—Lands—Right of management—Pensions Act (XXIII of 1871).

Where a suit was brought in relation to the management of *saranjám* lands,

Held, that the suit was *primâ facie* one not included in the Pensions Act.

THIS was an appeal from the decision of W. H. Crowe, Agent for the Sardárs in the Deccan.

Suit for a declaration and injunction.

The plaintiff, Keshavráv *alias* Ráo Bahádur Rávji Trimbak Nagarkar, alleged that he and the defendant, Ganpatráo Nilkanth Nagarkar, a Third Class Sardár, were cousins; that there were certain "*shetsanadi*" lands situate at the village of Sonegaum, in the Ahmednagar District, which formed part of the property acquired by the ancestors of the parties, and which had been in the joint possession of the plaintiff's father, who died recently, and the defendant since the last forty-seven years; that the leases of the said lands were taken in the names of the fathers of the parties; that after the death of the defendant's father in the names

* Appeal No. 53 of 1890.