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on revision, according to the rules which are prescribed for the execution of its own decrees: (see section 583). This Court has recently ruled that this principle is to be applied in cases of revision of Mámlatdárs' orders, under Bombay Act III of 1876, where the same difficulty had arisen, (see *Nemava* v. *Devendrappa*[1]); and cases of revision of decrees of Small Cause Courts are analogous. We, therefore, reverse the order of the Small Cause Court refusing execution, and remand the case for it to proceed to execute the order of this Court regarding costs in the same manner as if the order were one passed by itself in the suit.

We make no order as to the costs of this application.

*Order reversed.*

(1) P. J., 1891, p. 105.

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## ORIGINAL CIVIL.

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

1891. *August* 28.

ESUBÁI, WIDOW, AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DÁMODAR ISHVARDÁS, (ORIGINAL PLAINTIFF), RESPONDENT.*

*Lessor and lessee—Fazendári tenure—Encroachment of tenant added to the tenure—Implied grant of right to erect a privy—Right of way—Way of necessity—Grantee entitled to one way of necessity or more—Caste prejudices—Possible modification of English law.*

An encroachment made by a tenant on the property of his landlord—*e. g.* by a person holding under *Fazendári* tenure—should not be presumed to have been made absolutely, for his own benefit, and against his landlord, but should be deemed to be added to the tenure, and to form part thereof.

*Coovoo Doss Roy* v. *Issur Chunder Bose* (1) followed.

A plot of land in the centre of the defendants' oart was granted to plaintiff's predecessor in title on *Fazendári* tenure, to build a dwelling upon. A hut was accordingly built thereon. No privy was built with or attached to the hut, the occupants of the hut using the oart, or neighbouring oarts, for natural purposes. The plaintiff bought the hut, knocked it down, and proceeded to build a substantial dwelling with a privy on the site of the old hut. Defendant denied his right to build a privy, or to have any right of way for sweepers to the said privy when built.

*Held*, that the suitable enjoyment of the hut, when it was originally built, implied the use of a privy, whenever the occupants of the hut should think fit to

* Suit No. 209 of 1890.

(1) 22 W. R., 246.

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build one; and that, therefore, the plaintiff was entitled to build a privy, and consequently also to a way of necessity for a sweeper to have access to the privy when built.

The occupants of the old hut had been allowed, as a way of necessity, and had always used, as a means of access to that portion of the site of the old hut on which the new privy was now being built, a path which went in a straight line from the gate in the outer wall of the oart to the front door of the hut, and thence, skirting the hut, to the site of the new privy. The plaintiff now claimed a right of way for his sweeper in a direct line from the outer gate to the new privy, thus avoiding the front entrance of the house.

*Held*, that, having regard to the class of persons who had lived in the old hut (who were of low caste), there could have arisen, up to the present time, no reasonable necessity for two ways to the site in question, and, therefore, the plaintiff was limited to the old way enjoyed by his predecessor in title.

*Quære*—whether, if the lessees had been persons belonging to one of the higher castes, it would not be right to take into consideration the prejudice entertained by members of such castes against being brought into close proximity with persons following the occupation of a sweeper, and, if necessary, to modify the general principle of English law, which lays down that a grantee is only entitled to one way of necessity.

THE plaintiff sued as owner of a house in Máhim, standing in the centre of an oart belonging to the defendants. The plaintiff purchased the property in 1889, when there was a *kadjan* hut with masonry foundations on the site of the house. The land occupied by the hut measured about 131 square yards, and was acquired in or about 1840 from the then owners of the oart by the plaintiff's predecessors in title, for the purpose of erecting a building thereon to live in. There was no direct evidence as to the character of the original acquisition, but it was assumed on both sides to have been by way of lease, on a *Fazendári* tenure, common in that neighbourhood. The hut was a rectangular building with its front facing northwards. Immediately opposite the front entrance of the hut, and distant some 20 feet from it, was a gate-way, 8 feet wide, in the northern wall of the defendants' oart. On the west of the hut, at the south end, a small wing projected from the main body of the hut. This projection covered an area of about 6 square yards. There was no internal communication between the hut and this wing, but the occupants of the hut used to have access to it from the outside, proceeding from the north door of the hut, round its northern and western sides, over the open ground surrounding the hut. This wing

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was used as a bathing place. There was never at any time any privy inside or attached to the hut; its occupants making use of the oart, or the neighbouring oarts, for natural purposes.

In the oart, at some distance from the hut towards the west, there was a well belonging to the defendants, the owners of the oart, the water of which had always been used by the occupants of the hut for domestic purposes.

Shortly after his purchase, the plaintiff pulled down the hut, and proceeded to erect, on the old foundations, a substantial house with two stories. The main building was all but complete, and the plaintiff was in the course of constructing a privy and cesspool on the site of the south-western projection above mentioned, when the defendants obstructed him and his workmen, and prevented them from proceeding with the construction of the privy and cesspool. The defendants also refused the plaintiff and his workmen all passage over any portion of the oart, except passage in a direct line from the gate in the oart wall to the site of the north door of the old hut; and put up a fence on the west side of the new house, so as to prevent all access to that side of the house, or to the south-west wing, from the outside. The defendants also refused the use of the well water for building purposes.

The plaintiff being thus prevented from completing his house, or constructing the privy and cesspool, sued the defendants for damages and injunction. The plaintiff also sued for a declaration of his right to build the said privy and cesspool, and at the hearing claimed the following rights:—(*a*) A right of passage for men and carts to and from and round his house. (*b*) A right of passage from the gate in the oart wall in a straight line to and from the new privy, for sweepers, &c. (*c*) A right to the use of the well water for all purposes, including those of building.

In their written statement, the defendants claimed the site of the south-west projection to be their own property, and contended that it was an encroachment on their oart. They alleged that the plaintiff's construction of the privy and cesspool was wrongful; and submitted, with respect to the rights of way claimed by him, that he was not entitled to use them for any purposes other

than those for which the site of the hut was originally granted; and in particular they submitted that, seeing that no privy had ever been attached to the hut, the plaintiff was not entitled to use any way over their oart as a passage for sweepers.

At the hearing, the learned Judge (Bayley, J.) found that the site of the south-west projection belonged to the plaintiff; and that the plaintiff was entitled to erect the privy and cesspool thereon for the convenient enjoyment of his house. As to the rights of way, the decree made the following declarations:—that the plaintiff is entitled to a passage to and fro, between the said house and the outer gate, for persons attending the said house; and to and fro between the said privy and the said house for sweepers; and that he is entitled to the water of the well for domestic purposes, and to the free use of the said well, including the passage to and fro between the said house and the said well, without obstruction from the defendants; and the plaintiff is entitled to build the said privy and cesspool, and to make use thereof, without obstruction from the defendants; and that the plaintiff's sweepers are also entitled to a passage to and fro between the said privy and cesspool and the outer gate; and that the defendants do pay to the plaintiff the sum "of Rs. 146 as and for damages, &c."

The defendants appealed from this decree.

*Jardine* and *Robertson* for the appellants:—Whether the site of the privy and cesspool belongs to the plaintiff, or does not, the plaintiff has no right of way to and fro for his sweepers between the gate of the oart and the privy, because no privy existed at the time the close was originally granted to the plaintiff's predecessors in title by the owners of the oart. In any case, the plaintiff can have but one way of necessity for the beneficial use of his house, and that, the evidence shows, must be from the north gate of the oart to the front door of the house. From there he must go by the inside of the house to the privy; or he must contract his house, and leave an open passage outside it for the use of his sweepers. There was no right of way for sweepers before, and he ought not to be allowed to create one now—Goddard on Easements, 4th Ed., 328. Nor

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can he be allowed to use the way in front of his house for carts. At any rate, the width of the way must be defined. The use of water for domestic purposes does not include the right to the use of water for building purposes.

*Vicáji* with *Dhairyaván* for the respondent:—The evidence discloses that the site of the privy belongs to the plaintiff. Though there were no privies before, the construction of them could not have been prevented if the original grantee had thought fit to construct them, and the plaintiff may, therefore, construct them. If the grant contained an implied power to build a privy, if and when convenient, a right of way to and from the privy when built must also be taken to have been implied and granted as a way of necessity. Counsel cited *Corporation of London* v. *Riggs*(1); *Newcomen* v. *Coulson*(2); *Charu Surnokar* v. *Dokouri Chunder Thakoor*(3).

SARGENT, C. J.:—The plaintiff, who is the occupant under *Fazendári* tenure of a house in the defendants' oart, sues defendants for damages for obstructing him in the erection of a privy, in drawing water at defendants' well, and in the right of passage over a strip of land, 10 or 15 feet in width, surrounding the premises, and for an injunction restraining them from so obstructing him. The defendants by their written statement alleged that the site of the intended privy was their property, and denied that the plaintiff was entitled to any right of way other than he had hitherto enjoyed (meaning a passage from the gate in the wall of the oart to the entrance to the hut on the north), and that only for the purposes for which it had hitherto been used and not for a passage for sweepers. They also denied that plaintiff was entitled, as of right, to the use of the well.

At the hearing an issue was raised as to whether the land, on which the plaintiff purposes to erect the privy and cesspool, belongs to the defendants or not; and on this issue it was open to the plaintiff to prove in any manner in his power that it did not so belong. There is no documentary or other evidence in the case to show precisely when the original hut which was

(1) 13 Ch. D., 798. (2) 5 Ch. D., 133.

(3) I. L. R., 8 Calc., 956.

occupied by the plaintiff's vendor or his ancestors was built. However, Colonel Laughton's plan, in 1862, represents the premises as at that time consisting of the hut and an irregular-shaped excrescence on the north-west corner, which, it is admitted, corresponds with the intended site of the privy. Whether the premises as they appear in Colonel Laughton's plan were originally granted by the *Fazendár* of that day, cannot now be ascertained, but in any case the plan shows that, either by original grant or by encroachment, either with or without the assent of the *Fazendár*, the premises, as occupied in 1862, corresponded in shape with the premises, including the site of the privy, as now claimed by the plaintiff.

The new house which the plaintiff has built, has been erected on the same foundations as the old house, and, according to the surveyors on both sides, occupies a space of 117 square yards, exclusive of the eaves. The site of the privy and cesspool is, in area, about 6 square yards, which together would make 123 square yards; but the overhanging eaves of the new house, which are double those of the old house, cover a space of 27 square yards, which with the 123 square yards would make 150 square yards, considerably more than the 131 square yards stated to be the area of the premises in plaintiff's purchase-deed, and which the plaintiff's counsel, Mr. Vicáji, said was all they claimed.

The plaintiff's new house, therefore, with the eaves and the site of the privy, it cannot be doubted, is in excess of the premises sold to him. But as Colonel Laughton's plan, and the evidence of numerous witnesses who speak to its existence, (excepting that of the plaintiff's vendor, who, we do not think, is a reliable witness, owing to his hostility to the plaintiff), can leave no doubt that the erection on the site of the intended privy was of a permanent character, the site would be treated by the owners of the hut as part of the premises occupied by them when they were sold to the plaintiff; and the present excess over the 131 square yards must, we think, be due to the larger eaves of the new house. At the same time, the site of the privy was itself probably an encroachment; but such an encroachment, although made before 1862, would not, according to English law,

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be presumed to have been made by the tenant absolutely for his own benefit and against the landlord, but would be deemed to be added to the tenure and form part thereof—see *Whitmore* v. *Humphries*[1], and such a presumption may, we think, be made in this country, as was the opinion of the Calcutta Court in *Gooroo Doss Roy* v. *Issur Chunder Bose*[2].

Treating the site, therefore, as added to the tenure, as there is no evidence that the premises were originally occupied by Bábulji on any understanding that a privy should not be built on the premises, or that there is anything in the *Fazendári* tenure which forbids it, the plaintiff is entitled to devote the site in question to any purpose he thinks proper, and, therefore, to build a privy on it.

Passing to the question as to the plaintiff's claim to a right of way for a *halálkhor* from the privy, which was not specifically prayed for, but was apparently assumed in argument by both sides to be included in the general relief, it is plain that it can only be claimed as a right of way of necessity. Such a right of way, all the authorities show, rests upon a presumed grant at the time the occupancy rights were granted; but the important question, whether such a right of way is a general right for all purposes, or is limited by the necessity existing at the time of the grant, is one which can scarcely be said to be equally well settled. It is discussed by Lord Cairns in *Gayford* v. *Moffatt*[3] and by Sir G. Jessel in *Corporation of London* v. *Riggs*[4]. In the former case the Lord Chancellor says: "That way" (meaning a way of necessity) "must be a way suitable to the business of a wine and spirit merchant." In the case before Sir G. Jessel the grant was of lands wholly surrounding a close, and the implied grant actually under consideration was of a right of way by the grantee to the grantor to enable him to get to the close; but the question is primarily discussed by the Master of the Rolls as if the grant had been, as here, of the enclosed piece. He considers Lord Cairns' remarks to imply that the way must be "suitable for the user of the premises at the time when the way

(1) L. R., 7 C. P. 1.
(2) 22 W. R., 246.
(3) L. R., 4 Ch., 133.
(4) 13 Ch. D. at pp. 806, 807.

of necessity was created." Further on he says: "All he (*i.e.* the grantee) can be entitled to ask is a right to enable him to enjoy the property granted to him, as it was granted to him. It does not appear to me that the grant of the property gives any greater right;" and the right of way was accordingly limited to agricultural purposes for which the land had been originally used, and not extended to a right of way for the public to a house intended to be built for the sale of refreshments.

Here the land was admittedly granted on *Fazendári* tenure for the express purpose of building a house to be inhabited by the grantee. The evidence shows that there never has been a privy up to the present time, and that the occupants, as would appear to be the very general practice of occupants of houses in the oarts in this locality, performed their natural functions in the oart itself, or in the neighbouring oarts; and the immediate necessity for a privy has undoubtedly arisen from the plaintiff's desire to enlarge the house, and let it out to tenants, which the Municipality refuses to allow, unless a privy is built.

But, although the absolute necessity of a privy did not arise till recently, the evidence of Bháu Pándurang, who was born in the original house, and lived in the oart till twelve months ago, admits that there are old privies in these oarts, and that where there are privies in compounds people do not use the oarts. We think, therefore, that the suitable enjoyment of the hut in question, when it was originally built, admittedly for the purpose of being inhabited by Bábulji Maistry and his family, implied the use of a privy, and the accompanying necessity for sweepers to take away its contents, when the occupants should think proper to erect one.

But it was contended for the defendants that the plaintiff has already one right of way of necessity from the gate in the wall surrounding the oart to the front of the house, and that he can have no other way, on the authority of *Bolton* v. *Bolton*[1], where Mr. Justice Fry considered it was clear, on the authorities, that the grantee was only entitled to one way of necessity, and that the grantor had the right of electing it. Whether it would

(1) 11 Ch. D. at p. 971.

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be right in this country to apply the first part of this ruling under all circumstances, having regard to the prejudice of the higher castes, which prevails in this country, against being brought into proximity with persons whose occupation it is to remove the contents of privies, may be open to doubt. But at any rate, in the present case, having regard to the class of persons living in this hut, there could be no reasonable necessity for two ways up to the present time. In our opinion, therefore, the plaintiff can claim no other way for the sweepers than the road from the front of the house to the gate which has already been granted, presumably, as a way of necessity, and which would, therefore, include all the purposes of a habitable house; also the way which, it was admitted by the defendants, the occupants of the hut have always used, from the front of the house to the site in question, which will suffice to enable the sweeper to reach the road leading to the gate.

We must, therefore, vary the decree by adding, after the words "a passage to and fro between the said privy, cesspool, and the outer gate," the words "by the way hitherto used by the occupants of the house, between the site in dispute and the front of the house to the gate in the wall," leaving the width of that way to be determined in execution if the parties cannot agree.

As to the right of way to, and of drawing water from, the well for domestic purposes which is given by the decree, this was not disputed at the hearing. This would not include a right to take water for building purposes; and, so far as the plaintiff's building *maistry* may have been obliged to go elsewhere for water, it affords no claim for damages.

As to whether the right of way of necessity from the gate to the front of the house was intended for carts, it was admitted that the gate was 8 feet wide, which would *primâ facie* show it was; the evidence also is that it has been used for the general purposes of the house, including the passage of carts to the house when it was first made; and so far, therefore, as the plaintiff was caused expense by the obstruction of the defendants to the passing of his carts with building material, we think he was entitled to damages. We think, therefore, we ought not to interfere with the damages awarded by the Court.

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We must, therefore, confirm the decree with the above variation, reserving the right to the defendants to dispute the plaintiff's right to carry the eaves of his house as far as he has done in the new house.

Parties to pay their own costs of this appeal.

Attorneys for the appellants:—Messrs. *Bicknell and Mervánji.*

Attorney for the respondent:—Mr. *Allan F. Turner.*

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

1892.

*April* 22, 23.

HA'JI ABDUL RAHMA'N ALLA'RAKHIA AND ANOTHER, PLAINTIFFS, *v.* THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, DEFENDANTS.*

*Shipping—Charter-party—Mistake in date—Mistake mutual or unilateral—Rectification or rescission.*

The plaintiffs required a steamer to sail from Jedda "fifteen days after the *Háj*," in order to convey pilgrims returning to Bombay. They chartered a steamer from the defendants in June, 1891, for that purpose. The defendants chartered their steamers by English dates. The date inserted in the charter-party was "the 10th August 1892 (fifteen days after the *Háj*.") "The 10th August, 1892" was given or accepted by the plaintiff, in the belief that it corresponded with the fifteenth day after the *Háj*. The defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892, and not the 10th August, 1892, in fact corresponded with the fifteenth day after the *Háj*. On finding out the mistake in March, 1892, the plaintiff brought this suit for rectification of the charter-party by the insertion of the correct date, the 19th July, 1892, instead of the erroneous date the 10th August, 1892. Meanwhile the defendants had let all their steamers, and could not give the plaintiff one for the 19th July, 1892.

*Held*, that the agreement was one for the 10th August, 1892, and that as that date was a matter materially inducing the agreement, there could be no rectification, but only cancellation, even if both parties were under a mistake.

*Held*, further, that the mistake was not mutual, but on the plaintiffs' part only and, therefore, there could be no rectification.

A plaintiff seeking rectification must show that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that such contract is inaccurately represented in the instrument.

* Suit No. 161 of 1892.