

to substitute the present provisions of section 44 of the Dekkhan Agriculturists' Relief Act for the same section as it stood previously to 1895. Such a case as the present could not have occurred had the present provisions of section 44 been in force. The Subordinate Judge would at once have seen, on a scrutiny of the agreement, that Bala, who had joined in the original mortgage, was not a party to the agreement.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

KASHINATH DADA SHIMPI (ORIGINAL PLAINTIFF), APPELLANT, *v.*
NARAYAN VALAD BAPU SHIMPI (ORIGINAL DEFENDANT), RESPONDENT.*

1897.

BALA
v.
BALAJI.

1897.

July 29.

Easement—Easements Act (V of 1882), Sec. 28, Cl. (d)—Right to discharge smoke over a neighbour's land—Acquisition of right by prescription.

A right to discharge smoke over adjoining land can be acquired by prescription. The definition of easement in the Easements Act (V of 1882) is wide enough to embrace such an easement, and section 28, clause (d), expressly recognizes the right to pollute air as a right capable of being acquired by prescription.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, First Class Subordinate Judge of Násik with appellate powers, confirming the decree of Ráo Sáheb G. N. Kelkar, Subordinate Judge of Yeola.

Suit for a declaration that the plaintiff was entitled to have the smoke from his house discharged through certain smoke holes in the east wall of his house over the defendant's land and to restrain the defendant from building on his land so as to interfere with the plaintiff's right.

The Subordinate Judge held (*inter alia*) that no one had a right to send smoke issuing from his house over the land of another. He dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff preferred a second appeal.

Mahadeo V. Bhat for the appellant (plaintiff):—The lower Courts have held that such an easement as the plaintiff claims cannot be recognized at all. That is not correct—Easements Act

* Second Appeal, No. 375 of 1897.

1897.

KASHINATH
v.
NARAYAN.

(V of 1882), section 28, clause (d): Gale on Easements, p. 283 ;
Goddard on Easements, p. 109.

Narayan G. Chandavarkar for the respondent (defendant).

FARRAN, C. J.:—We do not consider that there is any warrant, in law, for the Additional Subordinate Judge, A. P., ruling that a right to discharge smoke through smoke holes in a wall over a neighbour's land cannot be acquired by prescription. If this were so, a person after twenty years' user could block up the apertures in his neighbour's wall by which his kitchen was kept free of smoke. The definition of easement in the Easements Act (V of 1882) is wide enough to embrace such an easement, and section 28, clause (d), expressly recognises the right to pollute air as a right capable of being acquired by prescription.

In *Crump v. Lambert*⁽¹⁾ Lord Romilly, M. R., said: "There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapour or water, or any other gas or fluid. * * * * It is true that by lapse of time if the owner of the adjoining tenement, which, in case of light or water is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour; but until that time has elapsed the owner of the adjoining ... tenement * * * retains his right to have the air that passes over his land pure and unpolluted and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."

We send down the following issues:—

1. Has the plaintiff a present right acquired by prescription to pass smoke through the smoke holes (*dharis*) in his wall over the defendant's premises, or through any or which of such smoke holes (*dharis*)?

2. Does the building erected by the defendant interfere with the free passage of smoke through such smoke holes?

Findings to be certified in a month.

Issues sent down.

(1) L. R., 3 Eq., 409 at p. 413.