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of the Court is deemed necessary they may with the proper sanction institute a suit. In the present case directions are clearly necessary, as the defendant disputes his obligations and has mismanaged the property as explained by the District Judge. No objection was taken in argument to the details of the scheme. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

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March 2.

MOHIDIN AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHIVLINGAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

Easement—Customary rights—Custom of burial—Local custom—Right claimed by a certain section of Mahomedans to bury their dead in a certain locality—Right of burial.

Where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a darga in plaintiff's land, and the plaintiff sued for an injunction restraining them from exercising this right in future,

Held, that the right of burial claimed by the defendants was not an easement, but a customary right, which being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.

SECOND appeal from the decision of L. Crump, Assistant Judge of Sholápur-Bijápur.

The plaintiff sued for an injunction restraining a certain division of the Mahomedan community at the village of Bágevádi from burying their dead in his land.

The defendants pleaded that they had been burying their dead in the land in dispute for over a 100 years; and that they had acquired an easement by such continued user.

The Subordinate Judge found that there was a dargá in the land in suit, that there were several tombs round about the dargá, and that the defendants had been exercising the right of burial for a long time beyond the memory of any living man.

* Second Appeal, No. 111 of 1898.

He, therefore, held that the easement claimed by the defendants was proved, and dismissed the suit.

On appeal, the Assistant Judge reversed the first Court's decree. In his judgment he said :—

"I do not, however, think that defendants can be held to have acquired any prescriptive right. The right which they claim is clearly not an easement : in fact, it does not bear the smallest resemblance to an easement, neither can it be said to be a '*profit* a *prendre*.' The reasons which lead me to hold that such a right as defendants claim cannot be acquired by prescription are these : *First*, they do not set any limit whatever to the space which they wish to use as a burial-ground ; they say, 'we are entitled to bury our dead in Survey Nos. 1134 and 1135 ' (for the latter see companion Appeal No. 100 of 1896). It is impossible that any right can have been acquired by immemorial usage to bury corpses in areas which are only modern conventions. There is not the smallest attempt to limit their right in any way, and it is obvious that serious injury must result to plaintiff if the whole of his land is to be used for this purpose.

"*Secondly*, it is perfectly clear that the exercise of this so-called right, if persisted in, will ultimately destroy all the profits to be derived from plaintiff's land, as the whole survey number will, in the course of time, be covered with tomb-stones * * *.

"I find no instance of any similar right being recognized by a Court of Law in India. The case which appears most similar is that of *The Secretary of State for India* v. *Mathurabhai* ((1889) 14 Bom., 213), but the circumstances there are different ; in that case it was held that the inhabitants of a village could acquire a right to graze cattle by prescription as against the Crown. The inhabitants of a village form a corporate unit, and the right of pasture is not one which entirely destroys the produce of the ground. Here we have an undefined number of persons belonging to a particular division of the Mahomedans of the village asserting a prescriptive right which, as I have shown, must eventually destroy plaintiff's profit of his land. In other respects, the case I have quoted is an authority for holding that the plea set up by the defendants is bad on account of its vagueness, as they have entirely failed to point out over how much of the land they have acquired the right which they claim.

"I, therefore reverse the decree of the lower Court and order that a perpetual injunction, issue to defendants, restraining them from burying their dead in the land."

Against this decision defendants preferred a second appeal to the High Court.

R. A. Desai for appellants (defendants) :—It is found as a fact that the defendants have been burying their dead in the land in

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suit from time immemorial. They have thus acquired a right in the nature of a customary easement. That such a right can be acquired by prescription is shown by section 18 of the Easement Act (V of 1882)—*Mamman* v. *Kuar Sen*[1]; *Kuar Sen* v. *Mamman*[2]; *Fitch* v *Rawling*[3]; *Earl of Coventry* v. *Willes*[4]; Mitchell on Easement Act, page 163; Mitra on Limitation and Prescription, pages 100, 401 (3rd edition).

D. P. Kirloskar for respondent (plaintiff):—The right claimed by the defendants cannot be acquired by prescription. It is not a customary right. The alleged custom of burial is both uncertain and unreasonable. The defendants do not set any limit to the space which they want to use as a burial-ground. If such a right were allowed, the whole of our land will in course of time become quite unfit for agricultural purposes. It will be all-covered over with tombs. Such an unreasonable custom will not be recognized in a Court of justice—*Kuar Sen* v. *Mamman*[5]; *Lutchmeeput Singh* v. *Sadaulla*[6].

FULTON, J.: In this case the learned Assistant Judge has found that it is satisfactorily established that a certain division of the Mahomedans of the village (of Bägevädi) have been for many years in the habit of burying their dead, as occasion arose, round about the dargá in the land in dispute. But he has granted the plaintiff's claim for an injunction restraining the defendants from burying their dead in future in any part of Survey No. 1134, first, because the defendants do not set any limit whatever to the space which they wish to use as a burial-ground, and, secondly, because it is perfectly clear that the exercise of this so-called right, if persisted in, will ultimately destroy all the profits to be derived from plaintiff's land, as the whole survey number will, in course of time, be covered with tomb stones.

Now we agree with the Assistant Judge that the right claimed by the defendants is not an easement, as it is not dependent on the possession of any dominant heritage. But by section 26 of Regulation IV of 1827 the Courts are bound, in the absence of

(1) (1893) 16 All., 178.
(2) (1895) 17 All., 87 at p. 91.
(3) (1795) 3 R. R., 425.
(4) (1803) 9 L. T. (N. S.), 384.
(5) (1895) 17 All., 87.
(6) (1882) 9 Cal., 698.

Acts and Regulations, to decide according to the usage of the country, and the validity of customary rights other than easements is preserved by section 2 of the Easements Act. We fully concur in the remarks of the Allahabad High Court in *Kuar Sen* v. *Mamman*[1] on the subject of customary rights. As they appear to state the law very clearly, we think it advisable to quote the passage (p. 91) at length :—

"As such a local custom as is now set up on behalf of the defendants" (the right of using a certain chabutra as a sitting place and during the Moharram of exhibiting thereon the 'tazias' and 'alums' and placing a 'takht' on it) "excludes or limits the operations of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by Statute law, by grant, or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom as that in the present case should be put to strict proof of the custom alleged by them. 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, mohálla 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 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,

(1) (1895) 17 All., 87.

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nor by leave asked from time to time. We cannot in these provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the counsel for the appellant to do, would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed. And in our opinion it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period. In our opinion, a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application."

Now that seems to us a very fair statement of the law on the subject, but when applying the tests of reasonableness and certainty we must look carefully to the circumstances of the case and not be led too easily to hold that a custom is bad because the parties have failed in their pleadings to define it with accuracy. Here the defendants have, it is true, failed to set any limit to the space which they wish to use as a burial ground. But we must not confuse their wishes and their rights. They wish for the privilege of burial all over Survey No. 1131. Their right according to custom as found by Assistant Judge seems to be to bury round about the dargá. Because they fail to prove all they wish, there seems no reason for denying them the rights which they establish. A plaintiff may claim Rs. 1,000, but if the evidence shows that he is only entitled to Rs. 100, he will get a decree for the latter sum albeit his claim as stated is not fully proved. What then is the uncertainty connected with this right of burial? There is no uncertainty as to the class of persons who have been in the habit of burying near the dargá. It is not denied that the defendants belong to that class. There is no uncertainty as to the nature of the custom which is to bury as occasion arises near the dargá—not of course in the tombs

previously occupied—but in the land described by the Assistant Judge as round about the dargá. The only point which can be said to be uncertain relates to the limits within which burials must be made. Those limits have not been defined. But we think that they are sufficiently indicated by the restriction of the right to a limited class and by the obligation to bury near the dargá. As some definition now seems necessary owing to the unreasonable claims set up by the defendants, we think that it can fairly be drawn from considerations of necessity and proximity to the dargá. It is easy, of course, to see that there is no custom of burial at a distance from the dargá. It is equally easy to see that there is a custom of burial near the dargá which the plaintiff is not entitled to disregard. The right then may be defined as that of the burial of members of the class as near the dargá as may be. On this point the remarks of Baron Cleasby in *Hall* v. *Nottingham*[1] seem applicable: "Looking to the nature and origin of such customs it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right. If at the present time the inhabitants all met to discuss and determine such a matter, it would be unreasonable to expect them to be very precise as to the enjoyment which they were to have." In the present case if the elders of the village met, all they could say would be that a certain number of Mahomedan families had long been in the habit of burying near this dargá. But we think that would be enough. It would be unreasonable to expect of the defendants greater certainty. The plaintiff, however, may fairly claim an injunction restraining them from using their right of burial in a manner to do more injury to him than the nature of that right requires, or, in other words, he may ask that they may be compelled to bury as near the dargá as possible.

Next we have to consider the second objection and say whether this custom of burial can be disallowed as unreasonable. We hesitate to arrive at such a conclusion. Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are

(1) (1875) 1 Ex. D., 1.

multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall* v. *Nottingham* the possibility that the custom there set up might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, was not thought a sufficient ground for disallowing it. If a custom which allows all lawful games to be played on another person's land at all times of the year is not an unreasonable custom, it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of "reasonableness" by which the case of *Lutchmeepul Singh* v. *Sadaulla Nasiyo*[1] was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the Bhils of a private owner; but it cannot be extended as a matter of law to all customs; for, as shown in *Hall* v. *Nottingham*, a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. Here the defendants are entitled to claim for a limited class the right of burial in one corner of a field near a dargá. The mere possibility that after many years the number of tombs may have increased so much as to deprive the owner of the use of his field, or of a large portion of it, seems too remote to enable us to describe as unreasonable the custom in dispute.

We, therefore, amend the decree by directing that a perpetual injunction issue to defendants restraining them from burying their dead in Survey No. 1134 otherwise than as authorized by custom, namely, of burying near the dargá. The parties severally to pay their own costs throughout.

Decree amended.

(1) (1882) 9 Cal., 608.