APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

JESANG (ORIGINAL PLAINTIFF), APPELLANT, *v.* A. T. WHITTLE (ORIGINAL DEFENDANT), RESPONDENT.*

1899. *January* 19.

Easement—Right of way—Change of use—Indian Easements Act (V of 1882), Sec. 23—Increase of servitude.

Under section 23 of the Indian Easements Act (V of 1882) a right of way enjoyed for agricultural purposes may be used for the purposes of a factory, provided no additional burden is thereby imposed on the servient heritage.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

Suit for an injunction.

Plaintiff and defendant were owners of two adjoining fields. The defendant had a right of way over plaintiff's field for the purpose of carrying agricultural produce from his field on to the public road.

In 1893 the defendant erected a ginning factory on his land and began to use his right of way over the plaintiff's land for the purpose of conveying goods to and from his (defendant's) factory.

Thereupon the plaintiff brought the present suit to restrain the defendant from using the way across his field for this purpose.

The Court of first instance granted an injunction restraining the defendant from using the right of way over plaintiff's land for any other than agricultural purposes.

In appeal the First Class Subordinate Judge held that the defendant had a right of way over plaintiff's land for all purposes. His reasons were as follows :—

"The lower Court has allowed defendant's way through the disputed land for agricultural purposes only in reference to Survey No. 699. I think section 13 of Act V of 1882, referred to by the lower Court, does not apply to the present case. It is admitted that defendant has set up a ginning factory in Survey No. 699. The lower Court's decree, therefore, denies defendant's right of way for the purpose of the factory. But the Land Revenue Code allows an agricultural land to be used for other than agricultural purposes also. The way to Survey No. 699 should, therefore, be for all purposes allowed by the Land Revenue Code. No

* Second Appeal, No. 448 of 1897.

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additional burden is thrown on plaintiff by using the road for factory purposes. Under section 22 of Act V of 1882 defendant can use the way in the mode least onerous to plaintiff. Plaintiff should determine a part of Survey No. 700 for defendant's way to No. 699, and then defendant under section 23 of the Act can use the way for the factory purposes also."

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

N. G. Chandavarkar for plaintiff:—Defendant had a right of way over plaintiff's land for agricultural purposes only. He has a right to use this way for carrying goods to and from his factory. A right of way for one purpose does not include a right of way for any other purpose—*Wimbledon and Putney Commons Conservators* v. *Dixon*[1]; *Bradburn* v. *Morris*[2].

Ganpat Sadashiv Rao for respondent:—Under section 23 of the Easements Act (V of 1882) a dominant owner can alter the mode of enjoying the easement, provided he does not impose thereby any additional burden on the servient tenement. In this case it is found by the lower Court that no additional burden is thrown on plaintiff's land by using the road for factory purposes. That being so, the injunction sought was rightly refused—*Great Western Railway Co.* v. *Cefn Cribbwr Brick Co.*[3].

PARSONS, J.:—The fact that the Land Revenue Code allows agricultural land to be used for other than agricultural purposes does not, as the Subordinate Judge, A. P., has supposed, permit of a right of way being used for all purposes allowed by the Land Revenue Code. Section 23 of the Indian Easements Act, 1882, is express upon this point, enacting, as it does, that "the dominant owner may, from time time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage." This only follows the law as declared by judicial decisions in the cases of *Wimbledon, &c., Commons Conservators* v. *Dixon*[1] and *Bradburn* v. *Morris*[2], *viz.*, "the rule is that the owner of the dominant tenement cannot, by changing the character of the occupation of the land in respect of which the right of way or easement exists,

(1) (1875) 1 Ch. D., 362. (2) (1876) 3 Ch. D., 812.
(3) (1894) 2 Ch., 157.

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impose a greater servitude upon the owner of the servient tenement." In the present case the defendant has set up a cotton press upon the survey number which before was used for agricultural purposes only, and wishes to employ the previously existing right of way for the purposes of the press. The test to be applied is to see whether any additional burden has or will be imposed on the servient heritage of the plaintiff by the use made or sought to be made of the way by the defendant. There has been no inquiry made upon this point, and an incidental remark only about it is made in the judgment of the lower Court. We ask the Judge of the lower appellate Court to find on the issue embodied in these words after taking evidence, and to certify to this Court his finding thereon within two months.

Issue sent back.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 23.

PURUSHOTTAM AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* ATMARAM JANARDAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partition—Two suits for—First suit for partition of family property—Second suit for partition of property held jointly by famil and others—Vritti—Civil Procedure Code (Act XIV of 1882), *Secs.* 13 *and* 43—*Practice.*

A suit brought by some members of a family against the other members of the same family for partition of the joint family property does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik.

The plaintiffs and the first six defendants were members of the Parashare family, and as such they were joint owners of a certain *vritti*, called the Parashare *vritti*. They also owned jointly with another family, *viz.*, the Khandve family, a certain other *vritti* called the Khandve-Parashare *vritti*.

* Second Appeal, No. 323 of 1898.