tract which formed no subject of inquiry in the suit, and could not form the subject of inquiry in execution of decree." It is equally clear that section 258, as now worded, is no bar to the Court's taking cognizance of such suit, for it is only the Court executing the decree which is precluded from recognizing the payment. A contract whereby a decree-holder engages not to execute a decree seems valid; and I can see no reason why, if it has been broken, the injured party should not be entitled to sue for compensation in respect of any loss which he has suffered in consequence. I would, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

SUNDRABAI (ORIGINAL DEFENDANT), APPELLANT, *v.* JAYAWANT (ORIGINAL PLAINTIFF), RESPONDENT.*

1898. *August* 23.

*License—Easement—Indian Easements Act (V of* 1882), *Secs.* 4 *and* 52—*Right of growing rice plants in another's land to be afterwards transplanted to his own.*

A 'license' as defined by section 52 of the Indian Easements Act (V of 1882) is not, as in the case of an 'easement', connected with the ownership of any land, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements once established follow the property.

The plaintiff claimed and proved a prescriptive right of using certain land belonging to the defendant's mortgagor for a part of every year for raising rice plants to be afterwards transplanted to his own land.

*Held*, that the right was clearly enjoyed by the plaintiff as owner of some land to which the young rice plants were transplanted, and that such a right, so attached to plaintiff's land, was not a license but an easement of the nature of *profits a prendre*.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum.

The plaintiff sued to establish his right to grow *malak* or young rice plants in a certain field, to be afterwards transplanted to his own land.

* Second Appeal, No. 218 of 1898.

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Plaintiff alleged that this right had been enjoyed from time immemorial; that it had been acknowledged and confirmed to him in 1864 by a grant from one Bapu, the owner of the field in question, who had agreed to allow him in perpetuity the use of the land for the purpose of raising *malak* during a certain time of each year, and to pay him compensation in case of obstruction.

The cause of action was alleged to have accrued in 1894, when plaintiff was obstructed by defendant, who was in possession of the field as a mortgagee under Bapu.

Defendant denied the plaintiff's right and pleaded limitation.

The Subordinate Judge found that in the village of Halkarni, where the parties resided, only a small portion of land was capable of producing *malak* being low ground, and that the young plants raised thereon were afterwards transplanted to other land; that without the help of the low-lying land this other land would not yield any rice crops; and that it was this fact which originated the practice of raising rice shoots in another's land for subsequent transplantation elsewhere.

The Subordinate Judge further found that the plaintiff had acquired the right he claimed by prescription, he having been in enjoyment of it for more than fifty years prior to 1864, in which year it was admitted and confirmed by a grant executed by Bapu in plaintiff's favour. He, therefore, awarded the plaintiff's claim.

This decision was upheld, on appeal, by the District Judge, who held that the right was in the nature of an easement. His reasons were as follows:—

"It appears that for many years, certainly since 1814 A.D., plaintiff has enjoyed the right of sowing rice in the land. It is afterwards transplanted to his own land, which lies higher. If he could not raise the young shoots in the land in suit, he could not use his own land for rice crops. Viewed in this light, it may, I think, fairly be held that there are dominant and servient *prædia*."

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

*Branson* (with him *V. G. Bhandarkar*), for the appellant (defendant):—The question is, what is the nature of the right

claimed by plaintiff? Is it a license, or is it an easement? We submit it is a license as defined by section 52 of Act V of 1882. The terms of the grant relied on by plaintiff show that it is nothing more than a license. The grant confers on the plaintiff personally the use of the land in order to raise rice plants for a certain part of the year. The grantor, moreover, agrees to pay damages in case of obstruction. The grant does not refer to any land in respect of which the right is conceded. There is thus no dominant tenement to which the right in question attaches And this is confirmed by the fact that the right is granted to the plaintiff *in perpetuity*. There would be no necessity to use this expression if the right were one attaching to the land. The right is thus a purely personal right, and is, therefore, a license and not an easement—*Ramakrishna* v. *Unni Check* [1].

*Macpherson* (with him *M. V. Bhat*) for respondent (plaintiff):—It is found by both the lower Courts that the plaintiff cannot use his lands for rice crops unless he first sows rice in the field in question and afterwards transplants the rice-shoots to his own lands. It is also found that plaintiff has used the field in dispute for this purpose from time immemorial. The right has been thus exercised for the benefit of the dominant tenement. That being so, it is not a license, but an easement, as defined by section 4 of Act V of 1882. It is, strictly speaking, a right of the nature of *profits a prendre in alieno solo*. But such rights are included under easements as defined by the Act. No doubt the grant of 1864 does not specifically mention plaintiffs' lands as the lands for the beneficial enjoyment of which the right in question exists. But the grant does not create any new rights, but merely confirms the plaintiff in the exercise of those rights, which had been previously enjoyed for more than fifty years. And the grant should be construed with reference to the surrounding circumstances. These circumstances show that the right in question is an easement and not a mere license.

RANADE, J.:—The chief contention in this appeal relates to the question whether the right to raise *malak*, or young rice plants, in the land in dispute, to be afterwards transplanted elsewhere, was

(1) (1892) 16 Mad., 250.

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of the nature of a license, as defined in section 52 of the Easements Act, or was an easement proper, as held by both the lower Courts.

The Easements Act, section 52, defines licenses as being rights to do, or continue to do, upon the land of another something which would otherwise be unlawful when such rights do not amount to an easement or an interest in property. This negative definition makes it necessary that, before a right can be shown to be a license only, it must be proved not to be an easement, or an interest in property. The essential requisites of an affirmative easement, as defined in section 4, are that it is a right which the owner or occupier of any land, as such, has to do, and continue to do, something for the beneficial enjoyment of his land in, or upon, or in respect of, land not his own. A license is not, as in the case of easements, connected with the ownership of any property, but creates only a personal right or obligation. License rights are not generally transferable, and the transferee is not bound to continue the license granted by the former owner, while easements, once established, follow the property. An interest in immoveable property is correctly described in section 58 of the Transfer of Property Act. It is thus clear that the decision of this appeal turns upon the inquiry whether the right claimed by the respondent-plaintiff was in the nature of an interest in property or an easement, or whether it was a mere license as defined in section 52; in other words, whether it was a limited interest to enjoy the use of land, or an incident attached to the land in dispute for the benefit of respondent's land, or whether it was a permission given to respondent which was not binding on the appellant, who is admittedly a mortgagee of the person who owned the land, and gave the permission.

The right claimed and found proved by both the Courts below is stated in the plaint to be confined to a small plot, measuring 310 cubits in length and 25 cubits in breadth, belonging to one Bapu, the mortgagor of the appellant. In this plot the respondent claims that he has, by immemorial prescription, as also under a grant from Bapu, made in 1864, a right to raise *malak*, or young rice plants, to be transplanted elsewhere. The agreement of 1864 recites the user as having obtained from former times,

and Bapu gave the right to respondent to use the land every year for raising *malak*, and, after it was removed, to cease to use the land. The grant is stated to be *nirantar*, and Bapu agrees to pay compensation in case of obstruction. It is this covenant about compensation, and the use of the word *nirantar* in the grant without further specification, and finally the absence of all mention of the land owned by respondent in which the transplantation was made,—it is these circumstances that are relied upon by appellant's counsel as reasons for his contention that the grant was a license, and not an easement or lease of the lands. The Courts below have, on the other hand, found that in this village of Halkarni, only a few lands are suited for the purpose of raising *malak*, and that the other lands can grow no rice unless it is transplanted from these low-lying lands. The obligation of the owners of the low-lying lands to those who own the upper dry lands is not confined to the plot in dispute. The liability is general, and is imposed by custom, and attaches to the lands by reason of their respective situations (Exhibit 58). It is in evidence that the respondent-plaintiff has lands of his own in the dry part of the village area (Exhibits 36, 57, 72). Two witnesses admit that both the parties to this suit raise *malak* in some temple lands cultivated by them; and appellant's witness, No. 73, admits that respondent has such a vahivat in this temple land. Witnesses Nos. 58, 69 state that this is a general practice in Chandgad mahál within which Halkarni is situated, and that even if the lands change hands, this right remains unaffected. It is quite clear that though the agreement does not mention respondent's land in express terms, the right is enjoyed by the respondent as owner of some lands to which the young rice plants are transplanted. All these facts brought out by the evidence prevent the right from being a merely personal license, and show that it is a part of the customary obligations of the owners of low-lying areas to the owners of the uplands where the water-supply is deficient.

We must accept this finding of fact, and it is plain that such a right cannot properly be described as being only a license. The words of the agreement absolutely prevent such a construction being placed upon them. The right did not originate in a grant, but in immemorial prescription, confirmed by a grant. The

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personal covenant was not intended to destroy the right, but to confirm it. This is no doubt an easement of the nature of *profits a prendre* appurtenant to land. This last class of beneficial enjoyment is not technically regarded as easements in English law, but the Indian Easements Act includes this under easements. Illustration (*d*) to section 4 of the Act mentions the right to pasture cattle in another person's lands, or to take fish out of a tank, or timber out of the forest of another man as instances of easement, and the present right resembles these easements. In *Ramakrishna* v. *Unni Cheek*[1], there is an illustration of a right in the nature of a license, pure and simple. The judgment in that case refers to an English case—*Doe* v. *Wood*[2]—where the distinction between a license and the demise of an interest in land is clearly laid down. If the authority gave only a right to dig for tin or other metals, and remove the ore so dug out, it was of the nature of a license; but if the grant demised all the ores existing in any particular area, then it was a demise of interest in land. The right claimed here conferred on the respondent the use of the land for a certain part of the year for raising rice plants for the purpose of transplanting them to his own land. The respondent has exercised this right from time immemorial, *i.e.*, at least for 50 or 60 years before the agreement of 1864, and since then down to 1893-94 against the grantor Bapu and his sons. Such a right, so attached to his lands, and so enjoyed, cannot be regarded as a mere license not binding upon the original grantor's and his son's mortgagee, the appellant. It is not a personal license revokable at the grantor's pleasure. It is an easement, or more correctly a permanent lease of the land for a portion of the year for a specific purpose. We must, therefore, overrule this contention of the appellant, and rejecting the appeal confirm the decree with costs on appellant.

*Decree confirmed.*

(1) (1892) 16 Mad., 280. (2) (1819) 2 B. and Ald., 724.