APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

1920
February 2.

ANANTA BIN MURRARRAO NALAVDE (ORIGINAL PLAINTIFF), APPELLANT *v.* GANU BIN VITHU SURULKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Indian Easements Act (V of 1882), Sections 13, 47—Easement of taking water from a well—Easement of necessity—Discontinuance of easement—Extinguishment of easement—Right to take the water is not an interest in immoveable property within the meaning of Article 144 of the Indian Limitation Act (IX of 1908)—Rebuilding the well with permission of the owner—Fresh grant of easement—Estoppel against the owner from denying the right to take the water—Indian Evidence Act (I of 1872), Section 115.

On the plaintiff's land was a well from which the defendants had a right to take half of the water for irrigating their land; but by non-user for a period of more than twenty years the easement had been extinguished. Subsequently, the defendants rebuilt the well at their own expense, with the permission of the plaintiff, with a view to the irrigation of their land and proceeded to use the water for the purpose. The plaintiff having sued to restrain the defendants from so using the water, the lower Court held that the easement being one of necessity was not extinguished by non-user, and that the defendants' right was an interest in immoveable property which would only be lost by adverse possession of more than twelve years under Article 144 of the Indian Limitation Act. On appeal :—

Held, that the easement in question was not an easement of necessity but was an ordinary easement liable to be extinguished by non-user for more than twenty years under section 47 of the Indian Easements Act.

Held, also, that the right in question was not an interest in immoveable property which would only be liable to be lost by proof of twelve years' adverse possession against the defendants, under Article 144 of the Indian Limitation Act.

Held, however, that the plaintiff had by his conduct permitted the defendants to believe that they would have the right of easement upon the repair of the well and that the plaintiff was accordingly estopped from denying the said right of the defendants by the provisions of section 115 of the Indian Evidence Act.

* Second Appeal No. 100 of 1919.

1920.

ANANTA v.

SECOND Appeal from the decision of J. H. Betigiri, First Class Subordinate Judge, A.P., at Satara, reversing the decree passed by M. A. Bhave, Joint Subordinate Judge at Karad.

Suit for injunction.

There was a well on the land belonging to the plaintiff. The defendants who had adjacent lands had an ancient right to take half of the water of the well for irrigating their land ; but the right fell into disuse for a period of more than twenty years. The well also became dilapidated.

In 1914, the defendants obtained permission of the plaintiff to rebuild the well at their own expense with a view of taking water from the well for irrigating their land. They repaired the well and began to use its water.

The plaintiff sued to restrain the defendants from so using the water.

The trial Court granted the injunction.

On appeal, the lower appellate Court reversed the decree and dismissed the suit, on the grounds that if the right be regarded as an easement it was an easement of necessity which could not be extinguished by non-user for any length of time, and that if it be regarded as an interest in immoveable property, it could be lost only by adverse possession for twelve years against the defendants.

The plaintiff appealed to the High Court.

P. V. Kane, for the appellant :—The lower appellate Court is wrong in its interpretation of the meaning of the words in the title-deed of the defendant. These words do not confer on him co-ownership in the well, but only a right to the water in the well. Besides the appellant or his predecessor-in-title was not a party to

1920.

ANANTA v. GANU.

the deed and so is not bound by the recitals in it. There is absolutely no evidence to support defendants' contention of co-ownership. Nor does the deed confer on him an interest in immoveable property. The right is to the water in the well. This, under the explanation to section 4 of the Indian Easements Act and illustration (*c*) to that section, is an easement. The lower appellate Court is wrong in holding that it would be an easement of necessity. Under section 13 of the Indian Easements Act, sub-section 1 (*a*) or (*c*), an easement of necessity means one of absolute necessity. As the well was not used for twenty-five years, it was not an easement of absolute necessity, and section 13, sub-section 1 (*b*) and (*d*) does not apply here. As it was not an easement of necessity, the easement to take water was extinguished by 25 years' non-user under section 47 of the Indian Easements Act, para. 5. Therefore defendant had no right to take water. Plaintiff was justified in withdrawing the permission given. All that the defendant can ask is to be compensated for his expenses.

J. R. Gharpure, for the respondent :—Whether the defendant is a co-owner is a question of fact. The appellate Court on going through all the evidence came to the conclusion that he was a joint owner in the well. If his right is in the nature of an easement, it is one of necessity, as the water of the well is necessary for the irrigation of the defendants' field, which is assessed on the basis of being *bagayat* land. If it is an easement of necessity, it cannot be extinguished by 25 years' non-user as the penultimate paragraph of section 47 of the Indian Easements Act provides. Further appellant is estopped by his conduct from withdrawing the permission to use the water of the well, on the strength of which the defendants repaired the well at their own expense.

Kane, in reply :—The question of estoppel cannot be now raised for the first time in second appeal. Further to grant an easement, a registered document would be necessary. There can be no estoppel against the Registration Act or an Act of the Legislature.

HAYWARD, J. :—The plaintiff sued to obtain a perpetual injunction restraining the defendants from using the water of a well alleged to have been wrongfully dug on his land. He stated that the defendants had wrongfully dug the well upon the false plea that they had obtained permission with a view to acquire a half share in the well and that they had proceeded to take the water from the well for the purposes of irrigating their adjoining land. The defendants pleaded that they had an ancient right to take a half share of the water from the well, but that the well had fallen into disrepair and that they had consequently taken permission to repair it and had done so at their own expense and had thereupon proceeded to use the water of the well according to their previous rights for the irrigation of their adjoining land.

The Joint Second Class Subordinate Judge of Karad found as a fact that the defendants had had an ancient right of the nature of an easement to take the water from the well, but that that easement had been extinguished by non-user for a period of more than 20 years under section 47 of the Indian Easements Act V of 1882. He found further as a fact that the defendants had obtained permission to repair the well with a view to the irrigation of their adjoining land and that they had at their own expense repaired the well and proceeded, though under subsequent protest, to use the water for the irrigation of their land. He held that the defendants' action was not wrongful in repairing the well and that it was taken under the *bona fide* belief that

they would have the right to use the well. But he held, however, that owing to the subsequent protest the right obtained under permission had been revoked and that therefore, the defendants ought to be restrained from further taking the water of the well for the irrigation of their adjoining land, and that was accordingly his decree.

The First Class Subordinate Judge of Satara, upon first appeal, accepted practically these facts as found at the trial, but he obviously felt the injustice of the injunction against the defendants, and he held that their easement was really an easement of necessity and was therefore not extinguished under section 47 of the Indian Easements Act V of 1882. He held further that the right was in any case not extinguished as it was upon a proper construction of the defendants' title deed really a half share in the well and was an interest in immoveable property which would only be lost by the proof, of which there was none, of adverse possession for more than twelve years under Article 144 of the Indian Limitation Act. He, therefore, held that the defendants were not liable to the perpetual injunction passed against them and that the suit against them ought to be dismissed. He accordingly reversed the decree of the trial Court.

The plaintiff has now come before us against this decision on second appeal, and it has been urged on his behalf that the easement has wrongly been held to be an easement of necessity and that the right was an ordinary easement liable to be extinguished by non-user for more than 20 years and was not a half share of the well or an interest in the immoveable property which would only be liable to be lost by proof of twelve years' adverse possession against the defendants. It seems to me that both these arguments must prevail.

No authority has been quoted on the other side for the proposition that the right to take the water would be under any circumstances an easement of necessity, and it would be especially difficult in the present case to establish that proposition, because no water has been taken for the last 25 years for the purposes of the cultivation of the defendants' land. Nor was the right in my opinion anything more than an ordinary easement liable to be extinguished by non-user. The words in the title deed, exhibit 56, would appear to me to refer practically to the use of the water and not to the ownership of the well. The vernacular words are विहिरीचे निम्मे हिश्याचे पाण्याहुद्धां, and the introduction of the special reference to the water would appear to me to show that the use of the water was in view rather than the actual ownership of the well. It would appear to me proper to prefer this interpretation as that was the interpretation apparently held by the learned Judge of the trial Court whose view of the meaning of the vernacular words used differed therefore from the view of the learned First Class Subordinate Judge of the first appeal Court.

But it seems to me that the acceptance of these two arguments on behalf of the appellant by no means necessarily disposes of the appeal. It would appear to me clear upon the facts found that the injunction was inequitable as held by the learned First Class Subordinate Judge of the first appeal Court, and it is a sound rule that when the decision is clearly unjust, a close and critical re-examination ought to be made of the apparent legal position. We have accordingly made that examination with the help of the learned pleaders who have assisted us on behalf of the appellant and the respondent. The result has been to satisfy me that what we really have to decide is the legal effect of the conduct of the parties on the side of the appellant

in permitting the repair of the old well and on the side of the defendants in repairing it at their own expense with that permission and proceeding to make use of the water in accordance with their lapsed rights for the irrigation of their adjoining land. We ought, in my opinion, to infer upon the facts found that the appellant granted the permission on the understanding that the defendants, if they repaired the well, should be at liberty to take their half share in the water as they would previously have been entitled to under their extinguished rights for the purposes of irrigation of their adjoining land, and that that was also the understanding of the defendants. If that be the correct interpretation of what occurred, then the appellant in my opinion practically granted a fresh easement to the defendants to the extent of the use of half the water of the well for the irrigation of their adjoining land and that grant was accepted and actually used by the defendants. It was suggested in argument that it would be necessary to enquire whether such a grant was legal, and whether it would not require a formal deed and registration. But fortunately for the justice of the case it would in my opinion be wholly unnecessary to enter upon any such discussion, because the appellant was in my opinion upon the facts found clearly estopped from denying that the defendants had been duly granted the easement to use half the water of the well as before for their adjoining land. The appellant had by his conduct permitted the respondents to believe that they would have that right upon the repair of the well, and the respondents relying upon this permission had acted upon the belief that they would be entitled to that right. It would no longer, therefore, be open to the appellant to deny the truth of that belief, the truth of that thing, viz., the existence of the right to the assessment in the respondents. The appellant was in my opinion clearly estopped

from denying the right of the respondents by the provisions of section 115 of the Indian Evidence Act.

This second appeal ought, therefore, in my opinion, to be dismissed with costs.

SHAH, J. :—I concur.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920.

March 1.

PRANJIVANDAS NARSIDAS AND ANOTHER (ORIGINAL DEFENDANTS NOS. 9 AND 10), APPELLANTS *v.* MIA CHAND BAHADUR (ORIGINAL PLAINTIFF), RESPONDENT *.

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 10A—Transfer of Property Act (IV of 1882) section 41—Sale-deed in the nature of mortgage —Bona fide *transferee for value without notice of mortgage—Transfer executed less than twelve years before the institution of suit—Whether transferee protected.*

The second proviso to section 10-A of the Dekkhan Agriculturists' Relief Act, does not protect a *bona fide* transferee for value without notice of the real nature of the transaction if he holds under a registered deed executed less than twelve years before the institution of the suit.

Per MACLEOD, C. J.:—The object of the Legislature in enacting section 10-A of the Dekkhan Agriculturists' Relief Act was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property.

Per HEATON, J.:—Where section 10 A of the Dekkhan Agriculturists' Relief Act applies, section 41 of the Transfer of Property Act, ceases to have any application and is replaced by the second proviso to section 10 A (of the former Act).

SECOND appeal against the decision of M. M. Bhat, Assistant Judge of Surat, confirming the decree passed

* Second Appeal No. 575 of 1919.