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to consult the guardian of the person or the persons who had, under Hindu Law, to see to the minor being married. He took no evidence on the question as to what would be for the welfare of the minor, and assumed to himself the jurisdiction of deciding upon the question that the minor should be immediately married, the question who should be the eligible persons, whose claims should be considered, and the question who should be ultimately chosen for the purpose. Having assumed jurisdiction over all these questions to himself, he apparently delegated some of his assumed powers—of selecting the bridegroom—to the Subordinate Judge. The Subordinate Judge has not seen the rival bridegrooms proposed. The powers of selecting the bridegroom were sought to be exercised, not only without an application from, or notice to, the guardian for marriage, and without the intervention of the guardian of the person, but in the teeth of her opposition, and against the wishes of the minor herself, who had attained the age of discretion, being 16 years old.

It seems to me, therefore, that the proceedings were entirely misconceived, and I agree that the order of the District Judge should be set aside. Costs throughout will come out of the estate.

Order set aside.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Tyabji.

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August 18.

SHRIMANT CHINTAMANRAO APPASAHEB PATWARDHAN, CHIEF OF SANGLI, BY THE STATE KARBHARI MR. R. S. ATHAVLE, DIWAN OF SANGLI (ORIGINAL PLAINTIFF), APPELLANT *v.* RAMCHANDRA GOVIND AND ANOTHER, BOTH MINORS BY THEIR GUARDIAN MOTHER LAXMIBAI, WIDOW OF DHONDO ALIAS GOVIND RAMCHANDRA VIRDE, SONS AND HEIRS OF THE DECEASED DHONDO ALIAS GOVIND RAMCHANDRA VIRDE (HEIRS OF ORIGINAL DEFENDANT), RESPONDENTS.*

Indian Easements Act (V of 1882), sections 15 and 47—Acquisition of easement by prescriptive rights not proved—Easement by immemorial user or grant, can be proved.

*Second Appeal No. 856 of 1927.

Interrupted user such as would defeat the acquisition of an absolute right of easement under section 15 of the Indian Easements Act, 1882, does not exclude or interfere with other modes of acquiring easements. Consequently a party is not debarred, where interruption is shown, from establishing his right to the easement whether by grant or by such long user as would justify the Court in presuming the existence of a grant which is lost.

Rajrup Koer v. *Abul Hossein*[1]; *Achal Mahta* v. *Rajun Mahta*[2]; *Arni Jagirdar* v. *Secretary of State for India*[3]; *Kurupam Zamindar* v. *Merangi Zamindar*[4]; *Punja Kuvarji* v. *Bai Kuvar*[5] and *Charu Surnokar* v. *Dokouri Chunder Thakoor*,[6] referred to.

SECOND APPEAL against the decision of E. H. P. Jolly, District Judge at Sholapur, confirming the decree passed by D. S. Kembhavi, Subordinate Judge at Pandharpur.

Suit for injunction.

Plaintiff sued for an injunction restraining defendant from passing dirty water on to plaintiff's site through a *mori* (drain) through defendant's wall.

Defendant contended that he acquired a right of easement to allow the dirty water to pass over plaintiff's site as he had openly and peaceably enjoyed the right for over 20 years ending in 1919, that is, two years before the suit was filed. He also claimed the easement by immemorial user.

In the Court of the Subordinate Judge, four issues were raised :

"1. Does defendant prove 20 years' peaceful and open enjoyment, as of right, of the easement claimed by him ?

2. Does plaintiff prove the interruption of over one year in 1917-1918 as alleged by him ?

3. Is the plaintiff entitled to the injunction asked for ?

4. Does defendant prove immemorial user ?"

The Subordinate Judge found that defendant had not proved 20 years' peaceful and open enjoyment as of right and without interruption because the evidence showed that between 1911 and 1917 plaintiff's men had on several occasions closed the *mori*. He, however, held that defendant had acquired by immemorial user an easement as

(1) (1880) 6 Cal. 394.
(2) (1881) 6 Cal. 812.
(3) (1882) 5 Mad. 226.
(4) (1882) 5 Mad. 253.
(5) (1881) 6 Bom. 20.
(6) (1882) 8 Cal. 956.

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the defendant's *mori* had been in use from time immemorial at least from 1886. He, therefore, dismissed the plaintiff's suit.

On appeal, the District Judge agreed with the Subordinate Judge that defendant had not acquired any easement under section 15 of the Indian Easements Act, 1882, but he held that defendant acquired by immemorial user an easement which could not be extinguished by such interruption as was caused by plaintiff periodically between years 1911 and 1917, since under section 47 of the Indian Easements Act discontinuance for 20 years was necessary in order to extinguish an easement once acquired.

Plaintiff appealed to the High Court.

A. G. Desai, for the appellant.

S. Y. Abhyankar, for heirs of the respondent.

TYABJI, J.—This appeal arises out of a suit for a perpetual injunction against the defendant not to pass dirty water on the plaintiff's site, and for an order to close the *mori* more particularly referred to in the plaint. Both the lower Courts have decided against the plaintiff. Their decisions amount to a finding that the defendant has proved that he has the right to pass the water, as he has been doing.

It is not in dispute that such a right falls within the definition of an easement in section 4 of the Indian Easements Act.

The lower Courts have also found that the defendant cannot bring himself within the terms of section 15 of the Indian Easements Act (V of 1882), which, so far as relevant, is to the effect that where any easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such easement shall be absolute; provided that the said period of twenty years shall be a period ending within two years next before the institution

of the suit wherein the claim to which such period relates is contested.

The defendant failed on the issue under section 15, because the plaintiff proved that the defendant's enjoyment of the said easement had been interrupted by the plaintiff, within the period of twenty years, referred to in the section : inasmuch as disputes had arisen between the parties about the year 1911, when the plaintiff began to obstruct the defendant from exercising the right claimed as an easement over this land ; and such disputes and obstructions continued until 1917. The decision on this issue was not questioned before me.

The lower Courts have, however, found in the affirmative on the issue : " Does the defendant prove immemorial user ?" The argument before me was, (1) whether any such means of acquiring an easement as is implied in the issue can be recognised by the Courts of British India ; and (2) if the issue was available to the defendant, whether there was any evidence on which the issue could be found in the affirmative.

The terms of the Act are not, perhaps, beyond discussion, but I am saved from any necessity for interpreting them by the decision of the Privy Council in *Rajrup Koer* v. *Abul Hossein*.[1] Their Lordships were considering, not section 15 of the Indian Easements Act, but section 27 of the Indian Limitation Act, IX of 1871, which is similar in terms to section 26 of the Acts of 1877 and 1908, and also to section 15 of the Indian Easements Act.

I shall presently refer to the argument that (because of section 17 of the Indian Easements Act or otherwise) the terms of section 15 thereof must be construed as having a different meaning from the terms of the corresponding section of the Indian Limitation Act.

Putting that argument aside for the present, I find it laid down by the Privy Council, that the provisions in

[1] (1880) 6 Cal. 394, s.c. L. R. 7 I. A. 240.

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question (p. 402) "enact a mode of acquiring ownership by possession or enjoyment." And they continue (p. 403) :—

"Then there is this provision, . . . 'Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.'

On the assumption of fact made by the Munsif that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years ending within two years before the institution of the suit; and, therefore, that the plaintiff had acquired no title by virtue of this Statute."

Then their Lordships explain the object of the Statute in the following terms (p. 403) :—

"The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time."

Thus their Lordships in the first place explain (1) that the object of the Statute is to enact one specific mode of ownership by possession or enjoyment and (2) to make more easy the establishment of rights of this description ; (3) that its effect is not to exclude or interfere with other modes of acquiring easements ; so that (4) Courts may still presume the existence of a grant at some distant period of time. This case has been frequently followed : *Achul Mahta* v. *Rajun Mahta*,[1] *Arni Jagirdar* v. *Secretary of State for India*,[2] *Kurupam Zamindar* v. *Merangi Zamindar*,[3] *Punja Kuvarji* v. *Bai Kuvar*[4] and *Charu Surnokar* v. *Dokouri Chunder Thakoor*.[5]

It was argued, however, as I have indicated, that there is a distinction between the effect of the Indian Easements Act and the Indian Limitation Act : because the Indian Easements Act contains section 17, which prevents the acquisition

[1] (1881) 6 Cal. 812.
[2] (1882) 5 Mad. 226.
[3] (1882) 5 Mad. 253.
[4] (1881) 6 Bom. 20.
[5] (1882) 8 Cal. 956.

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of easements otherwise than in accordance with section 15. Section 17, in the first place, contains a definition of the rights acquired under section 15 as prescriptive rights. That, of course, has no bearing on the present question. Then it goes on to provide that none of the four kinds of rights specified in the section can be acquired by prescription under section 15. I am unable to understand how this provision can limit those rights which can be acquired irrespective of the provisions of section 15. If rights can be acquired independently of the terms of section 26 of the Indian Limitation Act, they can be acquired independently of the terms of section 15 of the Indian Easements Act. In other words, though a person may be unable to rely upon this remedial provision, the provision of section 15 is not prohibitory of other modes of acquiring easements.

It was not suggested in argument that any other provisions of the Indian Easements Act make that Act either prohibitory or exhaustive. The preamble of the Indian Easements Act refers to the expediency of defining and amending the law relating to easements and licences; similarly, the preamble of the Indian Limitation Act of 1877, which their Lordships of the Privy Council were considering, recited that it was expedient to amend the law relating to the limitation of suits, appeals and certain applications to Court; and that it was also expedient to provide rules for acquiring, by possession, the ownership of easements and of other property.

I will, for the present, postpone the necessary recapitulation of the state in which the law stands in view of the decisions to which I have referred. When I do so, I shall have to deal with one or two points argued before me, which have not been covered so far. For the present, I turn to the question whether the decision of the lower Courts is, otherwise, such as must be interfered with in Second Appeal.

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The form in which the issue is worded is certainly unhappy. The expression "time immemorial" is taken from English law. It has a connotation that obviously cannot be applicable to Indian society and circumstances: *Mollwo, March, & Co.* v. *The Court of Wards.*[1] This becomes evident when the meaning of the expression is determined with precision: and, being a term having a special significance in the law, it must, if at all, be used in its proper significance.

The word "immemorial" is defined in the Oxford Dictionary as: "That is beyond memory, or out of mind; ancient beyond memory or record, extremely old." The following uses of the term are cited (1765) Blackstone. Comm. I, Introduction, 64. "They receive their binding power and the force of laws by long and immemorial usage." (1872) Wharton Law Lex. "Immemorial usage, a practice which has existed time out of mind; custom prescription".

The origin of the expression 'time immemorial' is traced by referring first to the converse expression 'time of memory'. Allied expressions are then mentioned: "Time out of mind" (also out of memory); "from a time or during a period beyond human memory," leading up to: "time, times (also for, from time) immemorial," "from time whereof is no mind," or "whereof the memory of man is not (to) the contrary"; "during, from out of, of time that no (man's) mind is the contrary." The learned District Judge had perhaps this in mind, when he says "with regard to immemorial user, the building itself has been in existence since before the memory of living men." But the expression means something much more than that, as is evident from the above. Webster's Dictionary is shorter "Time immemorial, English Law, a term antedating (legal) history, and beyond 'legal memory' so called; formerly an indefinite time, but in 1276 fixed by statute (viz. 3 Ed. I) as the beginning of the reign of Richard I (1189). Proof of

[1] (1872) L. R. I. A. Sup. Vol. 86.

unknown possession or use of any right since that date made it unnecessary to establish the original grant."

The impracticability of giving effect to this meaning of the expression "time immemorial" in regard to rules of English law required the enactment in England of the Statute, 2 & 3 Will. IV, c. 71 (1832), which, after reciting that "The Expression Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary, is now by the Law of England in many cases considered to include and denote the whole period of Time from the reign of King Richard the First; whereby the title to matters, that have been long enjoyed, is sometimes defeated by showing the commencement of such enjoyment," enacts (with some savings and limitations) that a claim, which might be lawfully made by custom, prescription or grant, shall be deemed absolute and indefeasible if it shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of sixty years, unless otherwise specially provided in the statute. The statute then provides prescriptive periods of 20 or 40 years for rights of way and water courses, and 20 years for access of light.

The use of the term "time immemorial" is, therefore, misleading and unsatisfactory. If the issue had to be decided as framed, it would be hardly possible to find in the affirmative in any case in India. But the decision of the Privy Council to which I have referred (*Rajrup Koer* v. *Abul Hossein*[1]) points to the fact that the matter to be attended to is whether there is evidence before the Court from which it may be presumed that there existed at some distant period of time a grant which is now lost or incapable of being proved. The same is indicated by the words occurring in the

[1] (1880) 6 Cal. 394.

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preamble to the English Statute: "whereby the title to matters that have long been enjoyed is sometimes defeated."

In view of these considerations, it is desirable that, in such cases, the form of the issues laid down in *Achul Mahta* v. *Rajun Mahta*[1] should be followed: they direct the attention of the parties and the Court to the exact questions that arise for decision:

(1) "Was the right of way in question peaceably, openly, and as of right, used by the plaintiff or those through whom he claims within two years of the institution of the suit?

(2) "Is there evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of section 26 of the Limitation Act, 1908, or of the Indian Easements Act, 1882, section 15?"

The question, then, is, whether, if the issues had been framed as they ought to have been framed, was there such evidence, as would justify a finding in favour of the defendant, on the second of the issues above?

In considering this question, one must be careful that the proviso to section 15 of the Indian Easements Act is not entirely nullified. This would happen if no heed were paid to the question whether or not the period, during which the easement had been enjoyed uninterruptedly, ended within two years next before the institution of the suit, or whether any interruptions occurred during the period referred to in section 15. Where there is such an interruption of the enjoyment, not followed by a suit within such a period as section 15 contemplates, this may supply a cogent—not necessarily a conclusive—ground, for the conclusion that the plaintiff did not come to Court, because he knew that there was no grant in his favour; and that, when the matter was fresh, and evidence was available, he feared to bring a suit. On the other hand, that he was allowed to resume the enjoyment of the easement is also a matter that would have to be considered. In any case, attention must be

[1] (1881) 6 Cal. 812.

directed to the real ultimate question: whether, from the evidence, the Court can conclude that there was originally a grant: that conclusion may be based on a presumption drawn from long and undisturbed enjoyment.

This brings me to a recapitulation of the result of the discussion with reference to the Indian Easements Act and other modes of acquiring prescriptive rights. I will take this opportunity of filling in one or two gaps to which I alluded before. A person claiming an easement may establish his right to it by the prescriptive method defined in section 15. Or, secondly, he may claim that he had a right independent of section 15; as, for instance, that he had a grant of the easement from the owners of the servient tenement. A grant may be proved by producing the document evidencing it; or by other evidence which takes the place of the document: thus evidence may be adduced from which the Court presumes that there was a grant which is lost. This last mode of proving the existence of an easement is, as I have explained, the mode that is often described as an easement from time immemorial: and which, for the reasons I have explained, would be better described as in the issue set out above.

The interpretation of section 15 of the Indian Easements Act, suggested by the appellant, as a prohibitory and exhaustive section, clearly appears to be untenable in the light of the preceding discussion. If section 15 were the only method available for proving the existence of an easement, it would mean that an express grant could not be proved: or that an express grant could be defeated by showing one year's interruption within the period referred to in section 15, viz., a period of 20 years ending within two years next before the institution of the suit, wherein the claim to which such period relates, is contested. This would be in contravention of section 47, under which an easement is extinguished only when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

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What applies to an express grant, proved by the production of the document granting it, applies equally to an implied or a lost grant however proved,—whether the implied or lost grant is proved by adducing, in the first instance, evidence of circumstances (long user) from which the grant may be presumed; or whether it is proved otherwise.

It was argued before me that there was no evidence on which the finding favourable to the respondent could have been so arrived at. But both the learned Judges have referred to and accepted as credible evidence showing that, as from 1886 to 1910, the right claimed in the suit was peaceably and openly enjoyed by persons claiming title thereto as an easement and as of right without interruption. It cannot be said, therefore, that there was no evidence from which a grant may be presumed. On the other hand, no such circumstances exist as would derogate from that inference. It is not my function to go into the details of the evidence in the case. The Courts have arrived at a decision with which I cannot interfere, and which I have no authority to scrutinise in Second Appeal. I imply neither that I should have come to the same conclusion, nor a different one.

The appeal is dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

1931
August 20.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY (REFEROR), *v.* THE PROVIDENT INVESTMENT CO. LTD. (ASSESSEE).*

Indian Income-tax Act (XI of 1922), section 10 (2) (iii)—Money borrowed by assessee for foreign investment—Income derived from such investment not received in British India and not liable to income-tax—Claim to deduction of such income from income liable to income-tax.

In 1926 the assessee Company borrowed Rs. 32,74,134 in India and with that and some other moneys which formed part of the capital of the Company amounting in

* Civil Reference No. 10 of 1930.