APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

1932 *February* 12

MANEKLAL HARILAL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* SHAH MANEKLAL GORDHAN AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Easements Act (V of 1882), sections 13 (a) and 21—Grant—General right of way—Right of way for scavengers—Easement of necessity.

When the grant of a right of way is in general terms the grantee is not confined to the user which existed at the time of the grant but may use the way for all purposes.

The grantee is therefore entitled to use the way for scavengers to cleanse his new privy erected on his land subsequent to the grant.

United Land Company v. *Great Eastern Railway Company*,[1] *Newcomen* v. *Coulson*[2] and *Finch* v. *Great Western Railway Co.*,[3] followed.

Such a right may also be claimed as an easement of necessity.

Esubai v. *Damodar Ishvardas*,[4] followed.

SECOND APPEAL No. 11 of 1929 against the decision of M. G. Mehta, First Class Subordinate Judge A. P. at Nadiad, in Appeal No. 239 of 1926.

Suit for declaration.

One Harivalav Bechardas made a will bequeathing all his estate, including the houses situate in the north and in the south which were subsequently purchased by plaintiffs and defendant respectively, to his daughter Vejli and upon her death the undisposed of residue to his nephews. There was a khadki appurtenant to the northern portion with a Datan or a privy-pit. Under the will the claims of his lunatic brother Chhaganlal and his wife Mahalakshmi were ignored. It appears that in 1903 there was a partition between Mahalakshmi on the one hand and her nephews (predecessors-in-title of the plaintiffs and defendant respectively)

*Second Appeal No. 11 of 1929.

(1) (1875) L. R. 10 Ch. 586.
(2) (1877) 5 Ch. D. 133.
(3) (1879) 5 Exch. D. 254.
(4) (1891) 16 Bom. 552.

by a reference to arbitration which ended in an award. Under the award the khadki and the pit-privy were allotted to the share of Mahalakshmi while a right of way was reserved to the nephews to pass through the khadki. In 1920 Mahalakshmi conveyed the property allotted to her share to plaintiffs while in 1922 the defendant purchased the other property allotted to the share of the nephews. The defendants thereupon applied for permission to put up a basket privy and were allowed to do so according to the bye-laws of the Municipality which put an end to the system of pit-privies. The plaintiffs filed the present suit No. 167 of 1924 in the Court of the Joint Subordinate Judge at Nadiad against the defendant for a declaration that the defendants had no right to admit scavengers into the private khadki land for cleansing the privy and also for an injunction restraining them from doing so. The learned Subordinate Judge held that the defendant had only a right of way through the khadki which belonged to the plaintiffs but that right did not include the right of admitting Municipal Bhangies (sweepers) into the khadki for cleansing the newly constructed privy erected by the defendant, that the defendant was not entitled to do so on the ground of necessity and therefore held that the plaintiffs were entitled to the declaration and injunction.

On appeal the learned First Class Subordinate Judge A.P. reversed the decree of the trial Court and dismissed the plaintiffs' suit holding that the defendant had a right to allow Bhangies (sweepers) to cleanse his newly constructed privy through the khadki belonging to the plaintiffs, that such right was included in the general right of way and that the defendant was entitled to the easement on the ground of necessity. Plaintiffs appealed to the High Court.

G. N. Thakor, with *V. N. Chhatrapati*, for the appellants.

H. V. Divatia, for the respondents.

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PATKAR J. In this case the plaintiffs brought a suit against the defendants for a declaration that the defendants had no right to admit scavengers into their private khadki land A for cleansing the privy marked in the plan, and also for an injunction restraining them from doing so.

The learned Subordinate Judge held that the khadki land below the plaintiffs' upper storey belonged exclusively to them and defendant No. 1 had only a right of way which did not include a right of admitting Municipal Bhangies into the khadki for cleaning the newly constructed privy of defendant No. 1, and that defendant No. 1 was not entitled to do so on the ground of necessity, and therefore held that the plaintiffs were entitled to the declaration and injunction.

On appeal, the learned First Class Subordinate Judge confirmed the finding as to the ownership of the khadki, but held that defendant No. 1 had a right to allow Bhangies to cleanse his newly constructed privy, that such right was included in the general right of way, and that defendant No. 1 was entitled to the easement on the ground of necessity. He, therefore, reversed the decree of the lower Court and dismissed the plaintiffs' suit.

It appears that in 1903 there was a partition between the predecessors-in-title of the plaintiffs and the defendant by a reference to arbitration which resulted in an award. Under the award the right of way was reserved to the defendant, and a pit-privy situate near the premises belonging to the plaintiffs' predecessor-in-title was allotted to the share of Mahalakshmi, the vendor of the plaintiffs. It appears that from 1903 to 1920, Bai Ichha, the predecessor-in-title of the defendant, used the pit-privy. In the year 1920 Mahalakshmi conveyed the property to the plaintiffs. In the year 1922 Bai Ichha conveyed her right, title and interest in the property in suit to the defendant. The defendant after his purchase applied for permission to put up a basket privy

and was allowed to do so according to the bye-laws of the Municipality which put an end to the system of pit-privies.

The first question, therefore, is whether under the award the defendant got a general right of way which included the right of allowing scavengers to use the passage provided by the award in order to cleanse the new privy standing in the defendant's house. It is contended on behalf of the appellants that where an easement of way is created by a deed, the mode of enjoyment must be ascertained from the terms of the document itself with reference to the circumstances existing at the date of the instrument. It appears, however, from page 496 of Peacock's Law relating to Easements, 3rd Edition, that in the case of an easement of way created by a deed, the modern view appears to be that if the grant of the way is in general terms, it should receive a liberal construction consistently with the surrounding circumstances of the case, without restriction to the use that was made of the way at the time of the grant. At pages 500 and 501 reference is made to the cases of *United Land Company* v. *Great Eastern Railway Company*,[1] *Newcomen* v. *Coulson*[2] and *Finch* v. *Great Western Railway Co.*[3] In the case of *United Land Company* v. *Great Eastern Railway Company*[1] it was held as follows (p. 590) :—

> "No doubt there are authorities that, from the description of the lands to which the right of way is annexed, and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes. But if there is no limit in the grant, the way may be used for all purposes."

In *Newcomen* v. *Coulson*[2] it was held that the allottees of inclosures were entitled to use a way set out in pursuance of an award under an Inclosure Act not only for agricultural purposes for which the inclosures were being used at the time of the award, but for all purposes to which the land might be applied thereafter. In *Finch* v. *Great Western Railway Co.*[3] it was held that where the grant of a way is general in its terms, the grantee is not confined to

[1] (1875) L. R. 10 Ch. 586. [2] (1877) 5 Ch. D. 133.
[3] (1879) 5 Exch. D. 254.

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the user which existed at the time of grant, but may use the way for all purposes.

The right of way granted under the award was a passage for ingress and egress with all its connected rights, and I think it was a grant of a general right of way. Where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purpose for which the access would be required at the time of the grant. See *Finch* v. *Great Western Railway Co.*[1] and *Purshottam* v. *Kasturbhai.*[2]

I may also in this connection refer to Goddard's Law of Easements, 8th Edition, page 402, where it is stated :—

"If a right of way be granted for a particular purpose, the purpose is to be regarded in construing the grant, in order to ascertain the nature and extent of the easement, and the grantee may be entitled to vary his mode of enjoying the easement, and from time to time to avail himself of modern inventions, if, by so doing, he can more fully exercise and enjoy the object or carry out the purpose for which the easement was granted."

This seems to be consistent with section 21 of the Indian Easements Act.

I think that the right of way which was granted by the award was a general right of way, and cannot be fettered by implied restrictions, and I agree with the view of the lower Court that it included the right of way for scavengers to cleanse the new privy in the house of the defendant.

It is contended on behalf of the respondent that even if there is no general right of way, he is entitled to the right to which he lays claim as an easement of necessity under section 13, clause (*e*), of the Indian Easements Act. That contention is supported by the decision in the case of *Esubai* v. *Damodar Ishvardas,*[3] where it was held that a suitable enjoyment of a hut, when it was originally built, implied the use of a privy with the accompanying necessity for a way to

[1] (1879) 5 Exch. D. 254. [2] (1930) 32 Bom. L. R. 1001 at p. 1004.
[3] (1891) 16 Bom. 552.

sweepers to take away the night soil, and it was observed as follows (p. 559) :—

"Here the land was admittedly granted on *Fazendari* tenure for the express purpose of building a house to be inhabited by the grantee. The evidence shows that there never has been a privy up to the present time, and that the occupants, as would appear to be the very general practice of occupants of houses in the oarts in this locality, performed their natural functions in the oart itself, or in the neighbouring oarts; and the immediate necessity for a privy has undoubtedly arisen from the plaintiff's desire to enlarge the house, and let it out to tenants, which the Municipality refuses to allow, unless a privy is built."

I think that these remarks are quite apposite to the facts of the present case, and even apart from the inclusion of the right claimed by the defendant in the general right of way granted by the award, he is entitled to the right of way for sweepers as an easement of necessity. The case of *Chintamani* v. *Ratanji*,[1] cited on behalf of the appellants, can be distinguished on the ground that it turned upon the construction of the previous decree which secured the right for a particular purpose, and also on the ground that the easement claimed for a passage for the sweepers was not an easement of necessity as the sweepers had a different way to approach the old privy.

It is unnecessary, therefore, to discuss the question as to whether the defendants had a right to alter the mode of the use and enjoyment of the easement under section 23 of the Indian Easements Act.

I think, therefore, that the view taken by the lower appellate Court is right and this appeal must be dismissed with costs.

MURPHY J. The defendant has a house at Nadiad which opens on to a courtyard, the only ingress and egress being through a passage in the plaintiffs' building which belongs to the plaintiffs. The inhabitants of the courtyard and the defendant's building have a right of way through the passage for ordinary purposes, and the sanitary arrangements were till lately made by means of pit-privies, called Datans. The

[1] (1920) 22 Bom. L. R. 1131.

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Municipality has, however, now banned such arrangements in the case of new constructions, and the defendant has built a new privy which requires the attendance of Municipal sweepers periodically to remove night soil. The plaintiffs' grievance is that the sweepers pass through their khadki and that this is objectionable to them.

The original Court agreed in the view that the right of way did not include one for sweepers. The Court of first appeal, however, held that the passage of sweepers was necessary and reversed the decree of the first Court.

We have to deal with the point in second appeal and decide whether the circumstances allow of a right to the passage of sweepers of necessity. It appears that the two houses belonging to the parties were originally a single house which was divided by means of an award between Choksi Chhaganlal, a lunatic, represented by his wife and the plaintiffs' predecessors-in-interest represented by their mother. As there was only one privy and the arbitrators thought its division or common use would be troublesome, they awarded it to one party only, leaving the other without one, though Rs. 20 compensation was paid to Mahalaxmi. It is this division that has originated the trouble.

The award was in 1903. The parties to it who were deprived of the privy were relatives of those who got it, and probably continued to use the old one as heretofore, though it had been awarded to the other side only. But the present owners are strangers and not in the same position, and the defendant having no privy, had perforce to construct one on his own land in accordance with the existing Municipal regulations so as to enable him to inhabit the house at all.

The statute law on the point is contained in sections 13 (*e*) and 21 of the Indian Easements Act, and we have been referred to a number of rulings illustrating the application of these sections. The general rule is that the state of circumstances at the time of the grant determines the necessities of the

case, and it was decided in *Narayana Gajapatiraju* v. *Ratnayammaji*[1] that one necessity is where there is no other way, in such cases as the present one. The next adjacent case seems to be *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*,[2] where Wilson J. said (p. 674) :—" It appears to me, that a right to use a passage, enjoyed as incident to a house, must in general include a right to use it for all ordinary household purposes, for the passage of mehters among the rest." The case of *Desai Bhaocrai* v. *Desai Chunilal*,[3] which was also quoted, was one of land, ordinarily used for agriculture, having been converted into a timber-yard with the consequence that the passage through the plaintiff's land was used for a totally different purpose, and can, I think, on this ground be distinguished from the one with which we have to deal.

Mr. Thakor has relied especially on the case of *Chintamani* v. *Ratanji*,[4] from the point of view there taken that if at the time a general right was secured, the particular right was not a part of it, the particular right cannot be included. But in that case, which is also of a privy, there had been an access to the original privy, and it was a right of access to a newly constructed one which was in question. The case of *Esubai* v. *Damodar Ishvardas*,[5] which is more nearly parallel to this one, has been distinguished on the ground that this is not an easement of necessity, whereas that one was. But what is a necessity is really a question depending on the circumstances of each case.

Here the house was divided, and the single privy which it contained went to the other side. It seems to me that it was implied by this arrangement that some system of allowing sweepers into the house for cleaning a new privy was to be followed as appears from the nature of the award in question. Moreover, though it may be true that a privy to each house is not necessary everywhere, for some houses

[1] (1929) 53 Mad. 449.
[2] (1881) 7 Cal. 665.
[3] (1899) 24 Bom. 188.
[4] (1920) 22 Bom. L. R. 1131.
[5] (1891) 16 Bom. 552.

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in villages and towns do not have independent privies, in the present state of sanitary facilities, and in towns such as Nadiad, it seems to me that we cannot say that it is not necessary to have a privy in each house and that its inhabitants must go elsewhere. This being so, and the Municipal regulations requiring a privy which needs the attendance of sweepers, it seems to me that the defendant has made out his case, and the judgment of the first appeal Court is correct and this appeal should be dismissed with costs.

Appeal dismissed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

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VENKATESH KRISHNA KHASBAG (ORIGINAL PLAINTIFF), APPELLANT *v.* BHUJABALLI ANNAPPA GARGATTI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Permanent tenancy—Mortgage by permanent tenant—Tenant dying without heirs—Redemption of mortgage by landlord.

A landlord is entitled to redeem a mortgage effected by his permanent tenant who dies leaving no heirs, as he is a person having an interest in the land leased to the tenant under section 91 of the Transfer of Property Act :

Kally Dass Ahiri v. *Monmohini Dassee*[1] ; *Abhiram Goswami* v. *Shyama Charan Nandi*[2] and *Raghunath Roy Marwari* v. *Raja of Jheria*,[3] referred to ;

Sonet Kooer v. *Himmut Bahadoor*,[4] distinguished.

SECOND APPEAL No. 767 of 1929 from the decision of C. C. Hulkoti, Assistant Judge at Belgaum, in Appeal No. 75 of 1927.

Suit for redemption.

One Ramji, the grandfather of the plaintiff, was the owner of the site on which the house and shop in suit were built.

*Second Appeal No. 767 of 1929.

[1] (1897) 24 Cal. 440.
[2] (1909) 36 Cal. 1003 at p. 1014 ; s. c. L. R. 36 I. A. 148 at p. 167.
[3] (1919) 21 Bom. L. R. 895 at p. 903 ; s. c. L. R. 46 I. A. 158 at p. 164.
[4] (1876) 1 Cal. 391 ; s. c. L. R. 3 I. A. 92.