APPELLATE CIVIL.

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

1938 September 2

RAU RAMA ATKILE (ORIGINAL PLAINTIFF), APPELLANT *v.* TUKARAM NANA ATKILE (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

Easement—Claim to ownership—Easement claimed in alternative—Alternative claim not bad in law—Practice —Proof of easement.

An easement can only be claimed in respect of somebody else's property, and a party cannot claim an easement over his own property. But a party may claim an easement and ownership in the alternative.

Tamanbhat v. *Krishtacharya*[1] and *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya*,[2] followed.

Marghabhai v. *Motibhai Mithabhai*,[3] discussed and disapproved.

Where a party shows that for the statutory period he has openly exercised certain rights which are in themselves sufficient to establish an easement, *prima facie* he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement.

SECOND APPEAL against the decision of G. H. Guggali, District Judge at Sholapur, reversing the decree passed by M. H. Kazi, Joint Subordinate Judge at Pandharpur.

Suit for injunction.

The parties to the suit were near relatives. They were first living joint. In the year 1908 their estate including the wada in suit was partitioned. The northern one-third of the wada fell to the share of the plaintiff and the southern one-third was assigned to the share of the defendants. The open space which was situated to the south of the building was also divided in three portions. There was an old *mori* in the southern wall of the defendant's portion. In 1932, the plaintiff sued for a permanent injunction to restrain the defendants from discharging water through the *mori* and water spouts over his land.

The defendants contended that the strips of land adjoining their portion of the house to the south belonged to them.

*Second Appeal No. 191 of 1936.

(1) (1932) 35 Bom.L.R. 144. (2) (1906) 34 Cal. 51, F. B.
(3) (1932) 56 Bom. 427.

They also contended in the alternative that they had acquired an easement of discharging water through the *mori* and the spouts over the plaintiff's land.

The Subordinate Judge held that the defendants had acquired an easement of discharging water through the *mori* but not through the spouts and passed a decree accordingly.

Both the plaintiff and defendants appealed to the District Court. The District Judge held that the *mori* and the spouts were in existence and were being used for more than twenty years and the right of discharging water through them was enjoyed peaceably, without interruption and as of right for more than twenty years. He, therefore, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

S. Y. Abhyankar, for the appellant.

D. A. Tulzapurkar, for the respondent.

BEAUMONT C. J. This is a second appeal from a decision of the District Judge of Sholapur. The plaintiff sued to restrain the defendants from allowing the water from a *mori* and spouts on the defendants' buildings to enter upon the plaintiff's open site. In their written statement the defendants maintained that they were the owners of the vacant land on which the water was discharged, and alternatively they claimed an easement to discharge water through the *mori* and the spouts over this land, assuming that the land was of the plaintiff. The District Judge held the claim to an easement proved and dismissed the plaintiff's suit.

It is contended in this appeal that in view of the claim of ownership put forward in their written statement, the defendants cannot rely on evidence which goes to establish an easement, and reliance is placed on the decision of Mr. Justice Baker in *Marghabhai* v. *Motibhai Mithabhai*[1] and a decision

[1] (1932) 56 Bom. 427.

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of a full bench of the Madras High Court, *Subba Rao* v. *Lakshmana Rao*[1] Those cases were distinguished by this Court in *Tamanbhat* v. *Krishtacharya*,[2] and I think that the present case falls within the latter authority, because no issue was raised as to the defendants' ownership of this piece of waste land. The only issue raised was as to easement, and I think that *Tamanbhat* v. *Krishtacharya*[2] is an authority for the proposition that merely setting up a claim to ownership does not prevent the plaintiff from establishing a right to an easement. But I should like to make one or two observations about the decision of Mr. Justice Baker in *Marghabhai* v. *Motibhai Mithabhai*,[3] because I think that some of the learned Judge's observations go too far. It is not in my judgment the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of a dominant and servient tenement and that he is exercising a right over property which does not belong to him. It is of course perfectly true that an easement can only be claimed in respect of somebody else's property, and a man cannot claim as easement over his own property. But it is also clear that a plaintiff may claim an easement and ownership in the alternative, as was held by the Calcutta Full Bench in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya*.[4] In my opinion, where a party shows that for the statutory period he has openly exercised certain rights which are in themselves sufficient to establish an easement, *prima facie* he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to

[1] (1925) 49 Mad. 820., F.B.
[2] (1932) 35 Bom.L.R. 144.
[3] (1932) 56 Bom. 427.
[4] (1906) 34 Cal. 51., F.B.

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an easement. Most laymen do not know exactly what their legal rights may be. They do certain acts without formulating, even mentally, a legal claim, and in my opinion a right to an easement by prescription cannot be defeated merely by showing that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement. On the other hand, it is, I think, established by the decision of Mr. Justice Shearman in *Lyell* v. *Hothfield (Lord)*[1] and the decision of the Privy Council in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*[2] that if it be shown that the owner of the dominant tenement has in fact exercised all the rights which he says go to constitute an easement in pursuance of a perfectly definite and well recognised claim of ownership, then it is not open to him to turn round and say "now that my claim to ownership on which I always relied has failed, I rely on some of the acts of ownership as being sufficient to constitute an easement". But these cases must all turn on the particular facts proved, and I think that Mr. Justice Baker's judgment to which I have referred is calculated to cause embarrassment by attempting to lay down general propositions which are unsound. In the present case, I am of opinion that there is no reason for suggesting that the plaintiff was doing the acts on which he relies to constitute an easement, under a claim of ownership.

The appeal fails and is dismissed with costs.

SEN J. I agree.

Decree confirmed.

J. G. R.

[1] [1914] 3 K. B. 911.

[2] [1915] A. C. 599.