APPELLATE CIVIL.

Befor Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

BASWANTAPPA IRAPPA DESAI (ORIGINAL PLAINTIFF), APPELLANT *v.* BHIMAPPA YELLAPA KOPPAD AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*. 1921 *June* 15.

Indian Easements Act (V of 1882) sections 15, 17 (e)—Right to receive rain water—Main channel flowing through defendants' land—Plaintiff claiming a right to receive water through channels taking off the main channel—Prescriptive right.

From the main channel which drained the rainwater off the defendants' land and off other higher adjoining lands, there were certain well-defined smaller channels at right angles carrying some of the water on to the plaintiffs' land. These having been obstructed by the defendants, the plaintiffs sued for a permanent injunction restraining the defendants from interfering with his right to receive the water. The defendants contended that it was surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise, and, therefore, under section 17 (*c*) of the Easements Act, no right to it could be acquired by the plaintiff :—

Held, that, if the plaintiff had in fact been enjoying the water by means of these channels for a certain number of years, it would, considering the position of the lands and the conditions of agriculture in this country, be unreasonable to say that he could not acquire a prescriptive right to receive the water through the channels unobstructed.

SECOND Appeal against the decision of E. H. Waterfield, District Judge of Dharwar, reversing the decree passed by V. G. Sane, Subordinate Judge at Hubli.

The facts material for the purposes of this report are sufficiently stated in the judgment.

A. G. Desai, for the appellant.

Nilkant Atmaram, for respondents Nos. 1, 2 and 4.

MACLEOD, C. J :—The plaintiff sued for a permanent injunction restraining defendants Nos. 1 to 4 from interfering with the plaintiff's right to get water from the land either in the ownership or occupation of the

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defendants, and Rs. 25 as damages. Exhibit 37 is the map prepared by the commissioner which correctly shows the position of the various Survey Numbers mentioned in the case and the water channels. Defendant No. 4 is the owner of Survey No. 91, but has let that Survey Number to defendants Nos. 1—3 who are also the owners of Survey No. 4. The plaintiff was the owner of Survey Nos. 92 and 86.

The plaintiff's case is that he was entitled as of right to get the rain water which was flowing through Survey No. 91 on to his land by means of existing channels, and that the defendants were not entitled to obstruct the flow of the water through those channels.

The trial Court decided in favour of the plaintiff, but unfortunately, owing to an incorrect map being used, the trial Court found that the plaintiff was entitled to succeed, not only because he had acquired a prescriptive right to receive this water, but because he had the ordinary rights of a riparian owner with regard to the main channel which carried away the rain water towards a tank. On a reference to the commissioner's map, Exhibit 37, it will be perfectly clear that the trial Court was in error in thinking that the plaintiff was a riparian owner because the main channel flowed entirely within Survey No. 91, and the water which flowed on to the plaintiff's land flowed through channels taking off from the main channels at right angles.

The appellate Judge was, therefore, correct in pointing out that the plaintiff was not a riparian owner in regard to the main channel. He omitted to notice that what the trial Court had awarded to the plaintiff was a direction against the defendants that they should reopen the mouths of the cross-channels taking off from the main channel so that the water therefrom

could flow on to the plaintiff's land. Accordingly finding that the plaintiff was not a riparian owner he dismissed the suit.

Now the defendants have relied upon section 17 (c) of the Easements Act which provides that a right to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise, cannot be acquired by prescription, and cannot be an easement under section 15 to be acquired by prescription. It appears to me that we must consider this case according to the natural conditions and situation of the Survey Numbers in question. From the map the trend of the land is towards the plaintiff's field. Therefore, the rain-water which falls on the upper land will gradually find its way to the lower land, and there can be little doubt that the water which passes through Survey No. 91 not only includes water which actually falls on Survey No. 91 but also water coming on to Survey No. 91 from the higher land, and the object of the owner of Survey No. 91 was to get rid of this water, as paddy was not grown on Survey No. 91, by passing the water through a well-defined channel into the tank in Survey No. 93. There is no evidence to show when the offshoots were made at right angles for some of the water to flow on to Survey No. 86. But it seems to me, considering the position of these lands and the conditions of agriculture in this country, it would be very inequitable to hold, if the plaintiff had been enjoying the water by means of these channels for a certain number of years, that he could not acquire prescriptive right to receive water through the channels unobstructed, which would entitle him to come to the Court to ask for relief, in case obstruction was caused by the owner of Survey No. 91. Considerable confusion has arisen from considering the case from the point of view that the defendants were

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the owners of a dominant tenement having a right to discharge their water on to the plaintiff's land as owner of the servient tenement. But in the case of agricultural lands the right may very well be just the opposite way. Although it is quite possible that the owner of one piece of land might acquire the right to drain his water on to the land of another, it would be more natural in hilly districts, such as the one in which the suit lands are situate, for the owner of the lower land to acquire a right to receive water which either falls on or flows into the higher land. It is only in such a way that cultivation in such districts can proceed; and no authority has been pointed out to us which would prevent the owner of the land on the lower level from acquiring such a right against the owner of the land on a higher level.

Such being the facts in this case, it seems to me that the plaintiff has established the fact that he had been accustomed to receive water on to his land by means of well-defined channels from the defendants' land. No particular period has been mentioned, but the question would be a question of fact how many years the plaintiff had enjoyed this right. Evidently the trial Court came to the conclusion that the right had been enjoyed for such a period that the plaintiff was entitled to ask the Court to grant an injunction against the defendants. Although the length of the period of the user does not seem to have been considered, it seems to have been admitted, or at any rate taken as granted, that the period of the user was sufficiently long to entitle the plaintiff to an injunction. Once it has been decided that his user was sufficiently long, he was entitled to an injunction. But that question unfortunately has not been considered by the lower appellate Court, and the appellants in that Court were entitled to a finding on that question of fact. The case

proceeded on the footing that the plaintiff had been getting this water for a very large number of years, and the argument was that however long they might be getting it they would never acquire the right to have it.

The order dimissing the plaintiff's suit must be set aside and the case must go back to the lower appellate Court to decide whether the plaintiff has been getting the water flowing from Survey No. 91 for such a time as would entitle him to order for an injunction against the defendants restraining them from preventing the water from flowing on to his Survey Numbers. It is rather doubtful whether there was sufficient evidence in the trial Court on the question how long the plaintiff has been getting the water, and, therefore, it would be open to the lower appellate Court to call for evidence if it is not able on the record to come to a conclusion on this question. The appellant will be entitled to his costs of the appeal. The lower appellate Court will have to decide the question of damages, having allowed the appeal on a wrong ground.

SHAH, J:—I agree.

Decree reversed and case remanded.

J. G. R.