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Court in the case of *Brahmadeo Narayan* v. *Harjan Singh* (1) is based upon an opposite view of the law, it must be taken to have been overruled by the decision of the Privy Council.

Case remanded.

29 C. 363.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

MANI CHANDER CHAKERBUTTY *v.* BAIKANTA NATH BISWAS.*

[31st January, 1902.]

Easement, right of—Whether a tenant having permanent interest on the land could acquire such right in other land of his lessor—Osat Taluqdar.

A tenant of land, even having a permanent right of tenancy on the land cannot acquire an easement by prescription in other land of his lessor.

[364] ***Udit Singh*** **v.** ***Kashi Ram*** **(2) and** ***Jeenab Ali*** **v.** ***Allabuddin*** **(3), referred to.**

THE plaintiffs Mani Chander Chakerbutty and others appealed to the High Court.

This appeal arose out of an action brought by the plaintiffs for declaration of a boundary between the *debuttur* land of the plaintiffs and the *osat taluki* land of the defendants, and also for a perpetual injunction restraining the defendants from entrenching upon the plaintiffs' land and tank. The allegation of the plaintiffs was that there was an idol called *Shibsundari Thakurani*, and it owned certain *debuttur* land situated within the limits of Barisal Municipality. The *debuttur* tenure comprised, amongst others, two plots of land, of which one (*i.e.*, plot No. 2) formed the *osat taluq* of the defendants, subordinate to the *debuttur* tenure, and the other was possessed by the plaintiffs as *shebaits* of the idol; that these two plots of land were adjoining each other, and a dispute arose between the plaintiffs and the defendants about the eastern boundary of plot No. 2; the plaintiffs asked the defendants to settle the matter by arbitration, which the latter refused to do; the defendants had twice caught fish in the tank situate in plaintiffs' land, for which a criminal action was brought, which was dismissed and hence the present suit was brought for a determination of the boundary between the plaintiffs' and the defendants' land. Some of the defendants, *inter alia*, pleaded that the plaintiffs not being in possession of the tank within twelve years before the institution of the suit, their claim was barred by limitation; that the suit was not maintainable in the form in which it was brought; that the disputed land was not *debuttur*, and that the plaintiffs were not the *shebaits*. In the written statement the defendants did not claim any right of easement, but the Munsif framed an issue, whether the defendants, Nos. 1 to 5 had any prescriptive right by user in the enjoyment of the water, fish, and earth of the tank in dispute. The Munsif, holding that, inasmuch as a tenant could not acquire a right of easement against his landlord, the defendants' claim of right of easement was not tenable,

* Appeal from Appellate Decree No. 1874 of 1899, against the decree of Babu Chandi Charan Sen, Subordinate Judge of Backergunge, dated the 28th of June 1899, modifying the decree of Babu Ambica Charan Dutt, Munsif of Barisal, dated the 4th of May 1898.

(1) (1898) I. L. R. 25 Cal. 778.
(2) (1892) I. L. R. 14 All. 885.
(3) (1896) 1 C. W. N. 151.

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decreed the plaintiffs' [365] suit. On appeal the Subordinate Judge, Babu Chandi Charan Sen, reversed the decision of the first Court and dismissed the plaintiff's suit.

Babu *Chunder Kant Sen* for the appellants.

Babu *Jogesh Chunder Roy* for the respondents.

RAMPINI and PRATT, JJ. The only question raised in this appeal is as to whether the defendants, being tenants of the plaintiff's can claim a right of easement in respect of the water, fish and earth of the tank in dispute.

The Munsif disallowed the claim of the defendants, because a tenant cannot acquire a right of easement against his landlord. The Subordinate Judge decided that the defendants had acquired the easement in question. He said: "When a tenant has no right to the land which he occupies, he cannot claim prescriptive right over the servile tenement, inasmuch as he has no right to the dominant tenement itself. But the defendants in this case are *osat* talukdars, having a proprietary interest in the dominant tenement. Consequently, they are entitled to claim right of easement over the land in the *khas* possession of plaintiffs."

The plaintiffs appeal. The first point that calls for observation in this case is the fact that the defendants, in their written statement, never claimed any right of easement at all. In paragraph 7 of their written statement they claimed, not a right of easement over the tank, but a fourth part of the tank, on the ground of adverse possession for twelve years. It does not appear how this claim came to be converted into one of a right of easement. But it was so converted, for we find the third issue framed by the Munsif is: "Have the defendants Nos. 1 to 5 any prescriptive right by user in the enjoyment of the water, fish and earth of the tank in dispute?"

This issue, it would seem to us, did not arise on the pleadings.

The Subordinate Judge has not cited any authority for his view, that it is only when a tenant has no right to the land which he occupies that he cannot claim prescriptive right over the servient tenement, inasmuch as he had no right to the dominant tenement itself, and it is to be doubted whether he [366] has correctly expressed what he really meant. A tenant has always a right (*i.e.*, a right of tenancy) in the dominant tenement. What the Subordinate Judge probably meant is that when the tenant has no right of ownership in the dominant tenement then he cannot acquire a right of easement over the servient tenement. Then he goes on to say or rather to imply that when he has a right of ownership, then he can acquire a right of easement. He adds that the defendants in this case being *osat* talukdars have a proprietary interest in the dominant tenement.

The Subordinate Judge's views on these points would seem to us to be incorrect. A tenant never can have a right of ownership in the dominant tenement as long as he continues merely a tenant of it, and the defendants, as *osat* talukdars of the tank cannot be said to have a proprietary interest in it.

The Easement Act does not prevail in Bengal. We have therefore to decide this case on general principles and on case-law. Now the general rule undoubtedly is, as said by the Munsif, that a tenant of land cannot acquire an easement by prescription in other land of his lessor; *see* Goddard on Easement, 5th Edition, p. 249. This principle has been recognized as applicable to India in the two cases referred to by the

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Munsif, viz., *Udit Singh* v. *Kashi Ram* (1) and *Janab Alli* v. *Allabuddin* (2). The learned pleader for the respondents contends that in neither of these cases were the tenants *osat* talukdars or tenants having permanent rights of tenancy. That is quite true, but in neither of the cases is there to be found any authority for the views propounded by the Subordinate Judge. The respondents' pleader cites the cases of *Sonethooer* v. *Himmut Bahadoor* (3) and *Nil Madhab Sikdar* v. *Narattam Sikdar* (4) as showing that tenants with permanent rights have very extensive rights in the lands forming the subject of their tenancies. This no doubt is the case, but still a tenant is always a tenant and never an owner of the land. He always derives his rights from the lessor, and as the latter cannot have the right of enjoyment of an easement as of right against **[367]** himself, so neither can his tenant against him. There is therefore not only no authority for the view of the Subordinate Judge, but it is inconsistent with the principle that underlies the acquisition of easements.

We therefore decree this appeal with costs and set aside the decree of the lower Court so far as it gives the defendants a right of easement against the plaintiffs in respect of the water, fish and earth of the disputed tank.

The cross-appeal is not pressed and is dismissed.

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29 C. 367.

Before Mr. Justice Rampini and Mr. Justice Pratt.

PARBATI NATH DUTT *v.* RAJMOHAN DUTT.* [27th November, 1901.]

Limitation Act** (XV of 1877) **Schedule ii, Article 14, Estates Partition Act** (Bengal Act VIII of 1876) **ss. 116, 149 and 150—Suit for possession.

In a partition proceeding before the Collector under the Estates Partition Act, R, a party to that proceeding, contended that certain land measured as part of the estate under partition was not part of that estate, but appertained to his howla.

The Revenue authorities enquired into his contention under s. 116 of the Act and decided it against him. On a suit having been brought by him, after the lapse of one year, for a declaration that the disputed land was part of his howla, the defence was that the suit not having been brought within one year from the date of the order passed by the Revenue authorities, it was barred by limitation.

***Held*, that the suit was so barred.**

***Laloo Singh* v. *Purna Chander Banerjee* (5) distinguished.**

THE defendant Parbati Nath Dutt appealed to the High Court.

This appeal arose out of an action brought by the plaintiff to recover possession of certain land on declaration of his title thereto. The allegation of the plaintiff was that the disputed **[368]** land appertained to the howla Mooktaram Datta Das comprised within taluks Nos. 241, 242 and 243 and not within taluk No. 2466 ; that he had acquired a right

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* Appeal from Order No. 818 of 1900, against the order of Dwarkanath Mitter, Esquire, Additional Judge of Dacca, dated the 4th of July 1900, reversing the order of Babu Kali Kumar Bose, Subordinate Judge of that District, dated the 14th of August 1897, and remanding the suit to his Court for trial on the merits.

(1) (1802) I. L. R. 14 All. 185.
(2) (1896) 1 C. W. N. 151.
(3) (1876) I. L. R. 1 Cal. 391.
(4) (1890) I. L. R. 17 Cal. 6.
(5) (1896) I. L. R. 24 Cal. 149.