1904
APRIL 22, 25.

APPELLATE CIVIL.

31 C. 834=8 C. W. N. 529.

If the translation placed before us be correct, the rent together with the fixed collection charges blended with rent gives a total of Rs. 205, which, to my mind, represents what was intended to be regarded as the rent, and this view is supported by the details of the *kistbundi*, which deals not with the *kists* to be paid in respect of Rs. 166-12 only as rent, but in respect of the entire sum of Rs. 205. The total of Rs. 205 is subsequently spoken of as the *rent*, and there is a stipulation to realize the aforesaid *jama* with interest, and not to make any objection to the payment of the said *jama* and, later on, the jama is described as the "aforesaid *jama* of Rs. 205." It seems to me that, upon the proper construction of the document, we must take this sum of Rs. 38-4, described as collection charges, as forming part of the consideration for the lease, and as forming, in fact, part of the rent. If that be so, it is not an *abwab* and is a part of the rent. In point of fact the predecessors in title of the present defendants raised no objection to the payment of the Rs. 205 as rent. We understand that this amount has been paid for a large number of years without objection by the predecessor of the defendants and as rent. This, however, does not prevent the present respondents from raising the question, though the payment for a long series of years, at any rate, indicates that their predecessors did not regard the claim as an illegal one. The Full Bench case of *Radha Prosad Singh* v. *Balkowar Koeri* (1), on which so much reliance has been placed by the respondents' vakil, is quite different from the present case. One has **[838]** only to look to the nature of the payments in that case to appreciate that it has no application to the present circumstances. So far as authority goes, the present case would seem rather to fall within the ruling of this Court in the case of *Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (2). At any rate I can see nothing in the Full Bench case, which prevents us from taking, in the present case, the view I have indicated. It is said that the case of *Mahomed Fayez Chowdhry* v. *Jamoo Gazee* (2) has been overruled by the Full Bench decision of *Chultan Mahton* v. *Tilukdari Singh* (3), but I can find nothing in the latter case to support that contention. For these reasons I think that the decision of the first Court was correct and that that decision must be restored and the order of the Lower Appellate Court reversed with costs.

*Appeal decreed.*

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31 C. 839

## [839] APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Pargiter.*

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### MAHARAJ BAHADUR SINGH *v.* PARESH NATH SINGH.*

[15th, 16th and 17th June, 1904].

*Suit, right of—Parties—Civil Procedure Code (Act XIV of 1882) s. 30—Public road—Right of owner of soil—Right of way-Tort—Damages—Injunction—Minor—Cause of action.*

Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to exercise all rights of

*Appeal from Original Decree, No. 319 of 1901, against the decree of Nepal Chandra Bose, Subordinate Judge of Hazaribagh, dated Sep 9, 1901.

(1) (1890) I. L. R. 17 Cal. 726.
(2) (1882) I. L. R. 8 Cal. 730.
(3) (1885) I. L. R. 11 Cal. 175.

1904
JUNE 15, 16, 17.

APPELLATE CIVIL.

31 C. 839.

ownership so as not to interfere with the right of way, which exists in the public.

*Vestry of St. Mary, Newington* v. *Jacobs* (1) referred to.

When the owner of such soil is responsible for keeping the road in order and in good repair he is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road, without proving special damage.

A minor is not responsible for a tort committed by the manager of his estate, provided the tortious act was not in connection with the management of the estate.

[Ref. 33 Cal. 905=10 C. W. N. 867 ; 2 N. L. R. 110; 64 I. C. 473.]

APPEAL by Maharaj Bahadur and Sundar Lal, the defendants Nos. 1 and 3.

Raja Paresh Nath Singh and four others belonging to the Digambari sect of Jains originally instituted this suit against Maharaj Bahadur (a minor), Golap Pandey and Sundar Lal, members of the Sitambari sect of the same community, for damages and injunction.

The suit referred to a path leading from a place called Sitanal to the top of Pareshnath hill in the district of Hazaribagh. The hill is included within the zemindari of the plaintiff No. 1, Raja Paresh Nath Singh. It is a place of pilgrimage and held sacred by the Jains, who resort to it to worship the idols at the top of the hill. The Jains have enjoyed a right of way to the summit [840] of the hill from time immemorial. The path is at places steep and dangerous, and to make it easy and comfortable to the pilgrims, the plaintiffs Nos. 2 to 5 and one Harlal Pujari as representatives of the Digambari sect of Jains obtained permission from the Raja, the plaintiff No. 1, under a *hukumnamah*, dated 8th March 1898, to construct a flight of steps over the way from Sitanal to Kunthnath at the top of the hill, and commenced the work. Subsequently Harlal gave a registered *ekrarnamah* in terms of the *hukumnamah* to the Raja. Till July 1898 they constructed 500 steps, and from November 1898 to January 1899 they built 205 steps more; but the defendants demolished and removed the said 205 steps and threatened to destroy the remaining ones. The plaintiffs claiming a right to construct the steps prayed;

(*i*) for a declaration that the act of demolition and removal of the 205 steps by the defendants was wrongful;

(*ii*) for a perpetual injunction restraining the defendants from destroying the remaining stairs and raising opposition in the construction and completion of the work ; and

(*iii*) for recovering Rs. 2,500 as damages suffered by the plaintiffs.

The defence briefly was that the plaint did not disclose any cause of action; that the plaintiffs Nos. 2 to 5 did not represent the Digambari sect of the Jain community; that the defendants did not represent the Sitambari sect; that the suit was bad for want of express permission of the Court under s. 30 of the Code of Civil Procedure; that the defendant No. 1 did not commit any mischief nor oppose the plaintiffs, hence he could not be made liable; that the hill Pareshnath, although within his zemindari, was not the absolute and exclusive property of the plaintiff No. 1, it being a place of pilgrimage and worship of the Sitambari Jains, who are in charge and possession of it from time immemorial; that the Sitambari Jains had made the path, constructed temples and tanks on the hill, and placed images of their gods in them; that the plaintiffs had

(1) (1871) L. R. 7 Q. B. 47.

1904
JUNE 15, 16, 17.

APPELLATE CIVIL.

31 C. 839.

no right to construct the flight of stairs without the consent and to the exclusion of the Sitambari Jains; that the plaintiffs had suffered no loss or damage, &c.

[841] The learned Subordinate Judge held that the plaintiffs were entitled to bring the suit in their own right, and sections 26 and 30 of the Civil Procedure Code could be no bar to it; that the soil, over which the way in dispute passed, belonged exclusively to the plaintiff No. 1, that he was under an obligation to repair and maintain the way; that all the plaintiffs had jointly and severally the right to construct the stairs; that the construction of the stairs was an improvement, which in no way interfered with the right of way in the defendants; and that the defendants had no right to obstruct the construction of and to remove the stairs: and he accordingly decreed the suit enjoining the defendants not to commit further mischief, and oppose the construction of the stairs; and he also allowed damages.

Against this decree the defendants appealed.

Babu *Dwarka Nath Chuckerbutty* (Babu *Promatha Nath Sen* with him), for the appellants. All the Digambari Jains being interested in the subject-matter of the suit, the question is whether the plaintiffs could bring the suit without obtaining leave under s. 30 of the Code of Civil Procedure. I submit they could not. If the defendants are sued in their representative capacity leave must also be obtained under s. 30 of the Code; and that was not done in this case. Even the Raja, who is the owner of the soil, is not entitled to bring this suit, unless he proves some special damage; his rights must be considered as those of an owner of the subsoil only: see *Dhunput Singh* v. *Paresh Nath Singh* (1), *Raj Narain Mitter* v. *Ekadasi Bag* (2), *Buroda Pershad Moostafee* v. *Gora Chand Moostafee* (3). I submit the plaintiffs have failed, under the circumstances, to establish their right to the reliefs they seek.

Mr. *Sinha* (Babu *Charu Chunder Ghose* and Babu *Gyanendra Nath Sarkar* with him), for the respondents. It is clear on the evidence that both these sects have a right of way. It is a public way, but the ownership of the soil is in the Raja. The owner, who dedicates a portion of his land to public use, as a [842] highway, parts with no other right than a right of passage to the public over the land, and may exercise all other rights of ownership so long as he does not interfere with the right of way granted to the public: *The Vestry of St. Mary, Newington* v. *Jacobs* (4). The moment anything is fixed or attached to the soil over which the road runs, it becomes the property of the Raja, and he has a right to sue for any damage done to this property. He as proprietor can authorise anybody to do improvements to such property, without interfering with the right of way: see Goddard on Easements, 5th Edn., p. 103.

As to the right of suit by the other plaintiffs, see *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (5).

[GHOSE, J. The question is, whether the plaintiffs did bring this suit representing their community, and, if so, whether s. 30 of the Code is not a bar to it?]

These plaintiffs have a right to bring this suit in their individual capacity; their position is analogous to that of a trustee, who can bring

(1) (1893) I. L. R. 21 Cal. 180.
(2) (1899) I. L. R. 27 Cal. 793.
(3) (1869) 12 W. R. 160.
(4) (1871) L. R. 7 Q. B. 47, 53.
(5) (1897) I. L. R. 24 Cal. 385.

1904 JUNE 15, 16, 17.

APPELLATE CIVIL.

31 C. 839.

a suit in the interests of the *cestui que trust*. It is not necessary that these people should sue in their representative capacity, they having individual rights to do so. Should your Lordships think that leave under s. 30 of the Code should have been obtained by the plaintiffs, that leave may be granted now.

[GHOSE, J. I know of no authority under which that leave may be given at the appellate stage of a case.]

As regards the liability of the minor defendant, a minor is equally liable for tort committed either by himself, or by his servants under his directions.

Babu *Dwarka Nath Chuckerbutty* in reply. The position of the plaintiffs is untenable, as it is quite clear that they are suing as representing the Digambari Jains and not in their individual rights. After dedicating a property to the public, one cannot assert any individual right: *Harrendro Coomar Chowdhry* v. *Taramonee Chowdhrani* (1). The surface of the soil being in use for a public road, the Raja as owner of the subsoil is **[843]** not entitled to any damages; see *Manmatha Nath Mitter* v. *The Secretary of State for India* (2).

*Cur adv. vult.*

GHOSE AND PARGITER, JJ. This is an appeal by the defendants Nos. 1 and 3 against a decree for damage and for an injunction passed by the Subordinate Judge of Hazaribagh. The facts of the case may be briefly stated thus:—The plaintiff No. 1, Raja Paresh Nath Singh, zemindar of Gaddi Palgunge, is the owner of the Pareshnath hill. On the top of the hill there are certain shrines built by the Sitambari sect of Jains. There is a road which runs up the hill in question for the convenience and use of the pilgrims resorting to the said shrines; and it may be taken that the owner of the hill, the then zemindar of Gaddi Palgunge, dedicated the road for the use of the public. It appears that some years ago certain disputes broke out between Raja Paresh Nath Singh and the Sitambari sect of Jains, and these disputes were settled by an *ekrarnamah* executed between the parties in the year 1872; and the conditions of that *ekrarnamah* were subsequently reaffirmed in another *ekrarnamah* in the year 1878. Under these *ekrarnamahs*, the Sitambari Jains agreed to pay to the Raja certain shares of *charnawas* or offerings received at the shrines on the top of the hill, the Raja covenanting not to molest the Sitambaris and the pilgrims resorting to the said shrines, and also covenanting to continue to keep the road up the hill in repair. The road in question, however, was very steep at certain points thereof, the pilgrims being much inconvenienced in consequence, and it would appear that in February 1897 there was something like an informal meeting of a number of pilgrims belonging to the Digambari sect of Jains. They resolved to open a subscription book for the purpose of constructing a flight of steps between the said points on the road for the convenience of the pilgrims resorting to the shrines, and they entrusted the supervision of the work to five individuals, Harlal Ji, Raghudas Ji, Hazarimull Ji, Sheo Narain Ajense and Matilal Patoji. On the 8th March 1898 a *hukumnamah* was **[844]** granted by the Raja to Harlal Ji, one of the five persons we have just mentioned, describing him (Harlal Ji) as the gomastha of the Bispanthi Digambari sect of Jains, authorising him to construct the flight of steps, which had been resolved upon, with this condition, however,

(1) (1880) 7 C. L. R. 372.

(2) (1897) I. L. R. 25 Cal. 194.

that the construction should be made for the convenience of the public, and not for the personal benefit of Harlal Ji, and that the latter should not attempt to create thereby any right in himself in any portion of the hill Pareshnath. By virtue of this *hukumnamah* it would seem that Harlal Ji and the other persons mentioned in the resolution of the pilgrims, to which we have already referred, commenced to construct a flight of steps. They did construct a number of steps between certain points on the road in question, but after they had done so, it is alleged that the defendants Nos. 1 to 3 destroyed some of the same. It is in consequence of this destruction by the defendants that the present suit was instituted.

The suit was instituted by Raja Paresh Nath Singh, the zemindar, Raghu Ji, Chela of Harlal Ji (he having in the meantime died), Hazarimull, Sheo Narayan Lal and Matilal Set, the allegation in the plaint being that, under orders of Gopi Babu, manager of defendant No. 1, Maharaj Bahadur, a minor, defendants Nos. 2 and 3 destroyed the flight of steps in question, and thus caused considerabe damage. In one portion of the plaint the plaintiffs referred to the *hukumnamah* of the 8th March 1898, to which reference has already been made, and there Raghu Ji, Hazarimull, Sheo Narain Lal and Matilal, that is to say plaintiffs Nos. 2 to 5, are described as the representatives of the Digambari sect of Jains. And it is stated that these persons commenced the work in February 1898 and, after the work was completed to a certain point, the defendants caused the destruction complained of. They asked that a decree for damage to the extent of Rs. 2,500 be awarded to the plaintiffs, and that an injunction be issued upon the defendants restraining them from demolishing the remaining steps and from offering opposition to the construction of the stairs on the road in question, which had not yet been built.

We may here mention that, pending the suit, the defendant No. 2, Golab Pande died ; and the Court below decreed the suit [845] against the remaining defendants. Hence this appeal, as we have already indicated, by the defendants Nos. 1 and 3.

The principal ground which has been urged before us by the learned vakil for the appellants is that this being really a suit on behalf of the Digambari sect of Jains, of which sect the plaintiffs are members, the suit could not proceed without special permission from the Court being obtained under section 30, Code of Civil Procedure. That section runs as follows :—" Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) by public advertisement, as the Court in such case may direct." The section indicates that the suit must be a suit on behalf of numerous parties ; and it may well be said, having regard to paragraph 3 of the plaint, to which reference has already been made, that so far as the plaintiffs Nos. 2 to 5 are concerned, they substantilly sued on behalf of the Digambari sect of the Jains generally ; and so the section applies. We, however, observe that the Allahabad High Court in the case of *Hira Lal* v. *Bhairon* (1), with reference to a question of a similar nature, which then arose before it,

(1) (1883) I. L. R. 5 All. 602.

1904 JUNE 15, 16, 17.

APPELLATE CIVIL.

31 C. 839.

expressed its opinion as follows :—" We read the first part of this section as implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same." Now looking at the plaint as a whole, although it may be said that the plaintiffs Nos. 2 to 5 wished to sue on behalf of the Digambari sect of the Jains, yet there is nothing to indicate that the other members of that sect wished to bring the suit.

But however that may be, and assuming that, so far as the plaintiffs Nos. 2 to 5 are concerned, they really sued in their representative capacity, *i.e.*, as representing the whole of the Digambari sect of Jains, yet so far as plaintiff No. 1, Raja Paresh Nath Singh, is concerned, his case stands upon a wholly **[846]** different ground. He is the owner of the soil over which the road runs, the public having only a right of way and nothing more. As owner of the soil, the Raja is entitled to exercise all rights so as not to interfere with the right of way, which exists in the public. The law on this subject seems to have been thoroughly considered in England in the case of *The Vestry of St. Mary, Newington* v. *Jacobs* (1), where it was held that the owner of the soil, who dedicates a way to the public, parts with no other right than a right of passage, and that he might exercise any right not inconsistent with the exercise of the right of way of the public. Godddard in his Treatise on the Law of Easements, after referring to the case that we have just quoted, in page 104 makes the following observations :—" The right," that is to say, the right in the public, "is not a right to the land, nor to any corporeal interest in the land, and the soil is in no way the property of the owner of the right. From this it follows that, as long as the owner of the right of way is not prevented from enjoying his easement, he has no right to prevent the land owner doing anything he pleases with the soil, neither has he any right to complain or interfere with any other person, whatever he may be doing, even though it may be an unlawful act or a trespass as against the owner of the soil."

Bearing in mind the principle enunciated in the case of *The Vestry of St. Mary, Newington* v. *Jacobs* (1), and the observations, to whom we have just referred, let us consider whether in what was done either by the Raja or by plaintiffs Nos. 2 to 5 under his authority, there was any interference with the easement, which is the only right that exists in the public. The Raja was entitled to make any improvement in the road for the convenience of the public, and he might have authorised anybody to make such improvement. He did authorize Harlal Pujari as representing the Digambari sect of the Jains, and that person and the other persons, to whom some of the Degambaris entrusted the supervision of the construction of the flight of steps, commenced the work in question, and the steps were constructed between certain points of the road. The Subordinate Judge has, upon a careful examination **[847]** of the evidence adduced on both sides, found that the work done was an improvement, and that it was for the purpose of affording greater facilities to the pilgrims resorting to the shrines on the top of the hill. This finding has not been seriously questioned by the appellants, though, no doubt, Babu Dwarkanath Chuckerbutty, with the usual care that he bestows upon his cases did call our attention to certain portions of the evidence, which might perhaps be taken to suggest a different result. We,

(1) (1871) L. R. 7 Q. B. 47.

1904 JUNE 15, 16, 17.

APPELLATE CIVIL.

31 C. 839.

however, take it upon the evidence as a whole that the construction of the flight of steps was an improvement upon the road, and that the defendants, or rather some of them, chose to destroy many of these steps; and this necessitated the institution of the present suit. Now it seems to us that, when the flight of steps was constructed, the steps became part of the road, and they became annexed to the soil of which the Raja, the plaintiff No. 1, is the owner. Under the two *ekrarnamahs* of the years 1872 and 1878 to which we have already referred, he was responsible for keeping the road in order and in repair, and if anybody destroyed the improvement, that was effected, either by himself or by others; under authority received from him, he was entitled, in our judgment, to institute a suit, if not for anything else, yet for an injunction restraining the defendants from repeating their acts of destruction. We are also of opinion that he was entitled to sue for damage as well. The road in question he was bound to keep in repair and in order for the use of the public; and it is obvious that, whoever might have borne the costs of the improvement, he was entitled to bring a suit for the damage sustained by reason of the work of destruction committed by the defendants, the improvement in question having been made under his express authority. It has, however, been contended by the learned vakil for the appellants that the road, being a public road, the plaintiffs had no right to sue without proving some special damage. This argument may apply to the plaintiffs Nos. 2 to 5, but certainly not to the plaintiff No. 1; for he does not sue as a member of the public, but as the owner of the soil and the person who, under the terms of the two *ekrars* of 1872 and 1878, was bound to keep the road in repair and in order.

The next question that has been raised before us is as to the propriety of the decree for damages passed against the defendant [848] No. 1 Maharaj Bahadur Singh. We have already mentioned that he is a minor. The allegation in the plaint, so far as he is concerned, is that his manager, Gopi Babu, ordered somebody else to destroy the flight of steps constructed by the plaintiffs Nos. 2 to 5. The act of Gopi Babu, as Manager of Maharaj Bahadur Singh, was not an act in connection with the management of his estate; and we fail to see how Maharaj Bahadur Singh could be held liable for a tort committed by a person, who happened to be his manager for the time being or by other persons acting under such manager's order. The Subordinate Judge does not seem to have sufficiently considered this matter. We are of opinion that the decree for damages, so far as it has been pronounced against the defendant No. 1, cannot be sustained. But the decree for an injunc- may well be sustained, for it is obvious that people in the employ of the defendant No. 1 have committed the acts of destruction complained of, and that the same work of destruction may be repeated. Upon this ground we see no reason to interfere with the decree of the Court below in so far as it relates to the injunction against the defendant No. 1. The decree both for injunction and for damages against the other defendants must stand.

The result is that this appeal is allowed so far as to dismiss the claim for damages as against the defendant No. 1. In other respects it is affirmed.

The plaintiffs are entitled to their costs in this Court from defendant No. 3 and to their costs in the lower Court from defendants Nos. 2 and 3.