1903
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APPELLATE CIVIL.

30 C. 1077.

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[1077] APPELLATE CIVIL.

BUDHU MANDAL *v.* MALIAT MANDAL.*
[7th and 17th July, 1903.]

Easement—Customary right—Use of water and water course—Riparian rights—Irrigation—Continuous use—Interruption—Unreasonable rights—Nuisance.

An easement which is not a customary right need not be reasonable.

An easement may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation, by means of embankments erected on the dominant tenement. In establishing such easement, it is immaterial whether the exercise of the right is continuous, provided it has been exercised for the statutory period, during seasons of drought, when it could be taken advantage of.

Cooper v. *Barber* (1), *Whalley* v. *Lancashire and Yorkshire Railway Company* (2), and *Rylands* v. *Fletcher* (3) distinguished.

Hollins v. *Verney* (4) doubted.

[**Rel. on**: 15 C. W. N. 259=13 C. L. J. 670=9 I. C. 69.]

SECOND APPEAL by the defendants, Budhu Mandal and others.

Eleven suits were instituted by different raiyats of the village Duria against the defendants for damages done to their paddy crops by the wrongful acts of the defendants. The plaintiffs' case was that they had paddy fields in the said village on the north of the river Soori, which flowed here from west to east through the opening of a railway bridge of 25 spans, and their fields lay on the east and west sides of the railway line ; that for the purpose of irrigating their lands, they used to raise a bund across the river at some distance on the west of the said bridge, whereby the water rose and flowed over the fields on the western side of the bridge, whence it was taken to the eastern side through the openings, two small bunds being erected, one on each side of the bridge, to prevent the water from flowing back into the river ; that the water so taken from the river used to flow over the railway cuttings on both the sides of the line ; **[1078]** and that the defendant No. 1, who had obtained a settlement of the fishery rights in the said railway cuttings, caused the said small bunds to be cut with the help of the other defendants on the 16th September 1895, and thereby prevented the water from coming upon the plaintiffs' lands. It was alleged that by erecting the bunds and using the water of the river in the manner aforesaid for upwards of 20 years, the plaintiffs had acquired a right of easement in respect thereof, and that the defendants, by diverting the water course as aforesaid in infringement of that right, and thereby causing loss of paddy crops to the plaintiffs in the fields on the east of the railway line, had made themselves liable to damages.

The defendants denied the rights alleged by the plaintiffs and contended that they were opposed to law and unreasonable. It was further contended that the plaintiffs used to irrigate their fields by water taken from the river along a different channel ; that the defendant No. 1 used to cultivate paddy on the lands on both the sides of the railway line let out to him ; and that he had simply prevented the

* Appeal from Appellate Decree No. 2167 of 1900 against the decree of C. H. Bompas, Offg. District Judge of Birbhum, dated July 30, 1900, affirming the decree of Bepin Behari De, Munsif of Rampur Hat, dated March 29, 1900.

(1) (1810) 3 Taunt. 99.
(2) (1884) L. R. 13 Q. B. D. 131.
(3) (1866) 3 H. L. 330.
(4) (1884) L. R. 13 Q. B. D. 304.

plaintiffs from making preparations to wrongfully erect a bund on the east of the bridge, which would have had the effect of submerging his *abadi* lands and destroying the crops raised thereon.

The Munsif held that the plaintiffs had established their alleged right by proving more than 20 years' user from a date prior to 1280 B. S. down to 1302 B.S., and had thus acquired a right of easement. He found that the defendant No. 1 had interrupted that right in Bhadra 1302 B. S., in the manner alleged in the plaint, with the view of improving the position of his cuttings and thereby making them culturable ; and he decreed the suits for damages in a modified form. With reference to the contention of the defendants that as the cuttings were, before the occupation of the defendant No. 1 in 1301 B. S., in possession of one Sukchand Mal for 15 or 16 years, that period could not be taken into account in calculating the period of the plaintiffs' 20 years' user, the Munsif held that the tenancy of the said Sukchand, which included the land as well as the fishery, was a permanent and heritable one, and section 27 of the Limitation Act did not therefore apply.

[1079] The defendants appealed to the District Judge who dismissed the appeal.

Mr. *Hill* (Babu *Saroda Prosanna Ray*, Babu *Tarak Chandra Chakravarti* and Babu *Nikhil Nath Roy*, with him) for the appellants. The right claimed is not strictly an easement ; it is a customary right in the inhabitants of the village ; it must be reasonable. Besides, if it is at all an easement, it is supported on a customary right, and as that right cannot exist by reason of its being unreasonable, the easement cannot exist. Even as a prescriptive right, it cannot be supported in law; the bund the plaintiffs claim to erect is not on the defendants' land, but they simply claim a prescriptive right to submerge the defendants' lands ; in such a case no length of enjoyment gives a prescriptive right; see *Hilton* v. *Earl Granville* (1), *Rowbotham* v. *Wilson* (2), *Blackett* v. *Bradley* (3), *Dyce* v. *Lady James Hay* (4), *Zumeer Ali* v. *Doorgabun* (5), *Gooroo Churn Goon* v. *Gunga Gobind Chatterjee* (6), *Joy Doorga Dossia* v. *Juggernath Roy* (7), *Sreedhur Dey* v. *Adoyto Kurmokar* (8), *Doorga Churn Dhur* v. *Kally Coomar Sen* (9). The last six cases aptly illustrate destructive easements. See also *Rylands* v. *Fletcher* (10), which is a leading case, *Whalley* v. *Lancashire and Yorkshire Railway Company* (11), *Cooper* v. *Barber* (12), a case almost on all fours with the present ; Goddard on Easements, 5th Edn., p. 28 ; Broom's Legal Maxims, 6th Edn. p. 370 ; Coleson and Forbes on Waters, 2nd Edn., p. 137 ; Angel on Water courses, para. 332.

As to twenty years' user, the Munsif finds that out of the 25 years from 1280 B. S. to 1305 B. S., the years of the suit, there was no drought for 12 years, and consequently no exercise of the right claimed. This is not evidence of a character to support the alleged easement : see *Hollins* v. *Verney* (13). In short, to support such an easement, (i) the plaintiffs must show acts by **[1080]** themselves or their predecessors for the statutory period, and (ii) the easement claimed must not be destructive

(1) (1845) 5 Q. B. 701.
(2) (1860) 8 H. L. 348.
(3) (1862) 1 B. & S. 940.
(4) (1852) 1 Macq. Sc. Ap. 305.
(5) (1864) 1 W. R. 230.
(6) (1867) 8 W. R. 268.
(7) (1871) 15 W. R. 295.
(8) (1873) 20 W. R. 237.
(9) (1881) I. L. R. 7 Cal. 145.
(10) (1866) 3 H. L. 330.
(11) (1884) L. R. 13 Q. B. D. 131.
(12) (1810) 3 Taunt. 99.
(13) (1884) L. R. 13 Q. B. D. 304.

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of rights *in toto*. On the other hand, the plaintiffs are bound to prevent water from flowing over the defendants' lands ; if they do not do so, they commit a nuisance. Besides, the period during which Sukchand held the lands should be excluded.

Lastly, it is submitted, that the onus of proving the damages was wrongly placed on the defendants.

Babu *Nalini Ranjan Chatterjee* (Dr. *Rashbehary Ghose* with him) for the respondents. A hypothetical case has been set up for the plaintiffs in this Court. The plaintiffs claimed only a prescriptive right and not a customary right. The plaintiffs in each case do not say that they collectively take the water to the village, but each claims the right with respect to his land, a prescriptive right to take water over other people's land ; the question of reasonableness does not therefore arise.

[RAMPINI, J. Can you acquire easement so as to destroy the servient tenement?]

No. But the opposite side cannot use the land in a different manner for their own advantage to the prejudice of our easement. The Calcutta cases cited on behalf of the appellants are all distinguishable. *Actual* user is not contemplated by s. 26 of the Limitation Act : see *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1) and *Oomur Shah* v. *Rumzan Ali* (2). Sukchand's case does not come under s. 27 of the Limitation Act. As to the case of *Hollins* v. *Verney* (3), cited by the other side, see Goddard on Easements, 5th Edn., pages 205-208.

As to the damages, no question of onus, it is submitted, arises here.

Cur. adv. vult.

RAMPINI AND PARGITER, JJ. The suit out of which this second appeal arises was brought by the two plaintiffs along with ten similar suits instituted by other persons to establish a right of easement over the defendants, lands, namely, that they are **[1081]** entitled, by constructing an embankment across the river Soori and diverting the water of the river over the lands of mouza Duria, to convey the water over the first defendant's land on to their own land in order to irrigate it. A railway runs through the mouza and crosses the bed of the river by a long bridge built upon arches. The first defendant holds the railway cuttings on each side of the line and (as we understand the facts) the river water when diverted flows over a portion of his land and under some of the arches so as to irrigate the lands on both sides of the line. The water, as it flowed over the defendant's land (which is said to be lower than the adjacent lands) and under the arches was ordinarily prevented form flowing back into the river bed by some small bunds, but the defendants cut these bunds in the year 1302 and the water escaped back without irrigating the plaintiffs' land, and thus the plaintiffs' crops were damaged.

The plaintiffs and their fellow-villagers therefore brought these suits separately to recover damages.

Two questions arose,—*first*, whether the plaintiffs had the easement alleged, and, *secondly*, what amount of damages they were entitled to get.

Both the Lower Courts have found the question of the easement in favour of the plaintiffs, and the Lower Appellate Court has affirmed the amount of damages which the Munsif awarded them.

(1) (1881) I. L. R. 7 Cal. 132.
(2) (1868) 10 W. R. 363.
(3) (1884) L. R. 13 Q. B. D. 304.

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The defendants appeal. On their behalf Mr. Hill has contended (i) that the right claimed is not an easement, but is a customary right and it is one of the essential conditions of such a right that it must be reasonable ; (ii) that even as an easement the right claimed must be reasonable ; (iii) that the easement claimed infringes the first defendant's right to use his own land as he pleases and would indeed entirely destroy his rights in his property ; (iv) that if the easement alleged be founded upon prescription it cannot be maintained, for the plaintiffs do not claim a right to erect bunds on the first defendant's lands, but to erect bunds on their own lands ; and this can give them no prescriptive right to submerge the first defendant's lands ; (v) that the plaintiffs when diverting the river water to irrigate **[1082]** their lands are bound to prevent it from flowing on to the defendant's land or to take it away if it does overflow there ; and if they fail to do so, the overflow becomes a nuisance and the defendants may abate the nuisance ; (vi) that the right is claimed only for seasons of drought and therefore there has been no continuity in its exercise, and so no easement can have been established ; (vii) that the period of Sukchand's lease for the lands now held by the first defendant must be excluded in computing the period necessary for the acquisition of the easements ; and (viii) that the onus of proving the damages has been misplaced.

With reference to the first and second of these pleas it is sufficient to say that the easement claimed in this suit is not a customary right and need not be reasonable and that there is nothing unreasonable in the easement as found by the lower Courts to have been established by the plaintiffs.

The easement claimed by the plaintiffs will not destroy the defendant's enjoyment of his property. He has hitherto used the cuttings as fisheries. The easement claimed by the plaintiffs will not prevent the defendants using them as such or growing paddy on them in years when there is no drought or turning them into agricultural land, as they gradually silt up, and rise to the level of the plaintiffs' land when the water of the Soori will no longer flow over them. The case of *Cooper* v. *Barber* (1) cited by Mr. Hill does not appear to be in point, as in that case the plaintiff had established no right of easement and could not have an easement for subsoil percolation ; for where an easement cannot be prevented it cannot be acquired.

It is immaterial that the plaintiffs do not claim any right to erect bunds on the defendant's land. They claim the right by means of bunds erected on their own land to cause the water of the river to flow across the defendant's cuttings on to their land on the east. An easement of this nature may exist and may be established.

The plaintiffs when they have been found to have established as easement are not bound to prevent the water of the river flowing on to the defendant's land, nor are the defendants entitled to interfere with the flow of the water on to their lands caused **[1083]** in the exercise of the plaintiffs' right. The cases of *Whalley* v. *Lancashire and Yorkshire Railway Company* (2) and *Rylands* v. *Fletcher* (3), relied on by the learned counsel for the appellant, do not appear to help the appellant, for no question of easement was involved in them.

It is immaterial whether the exercise of the right is continuous, provided it has been exercised over a period of 20 years, during the

(1) (1810) 3 Taunt. 99.
(2) (1884) L. R. 13 Q. B. D. 131.
(3) (1866) 3 H. L. 330.

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periods of drought, when it could be taken advantage of. The case of *Hollins* v. *Verney* (1), cited by the learned counsel in support of his argument, seems to be of doubtful authority. In any case it was decided under the English Prescription Acts, and has no direct application to the present case.

We see no reason why the period of Sukchand's lease should not be taken into consideration in computing the period necessary for the acquisition of the easement. His right in the land is not shown to have been of a leasehold nature or in any way different from that of his successors, the defendants.

The onus of proving the damages has not been misplaced though the Judge does not consider it to have been altogether satisfactorily discharged. He has, however, affirmed the findings of the Court of first instance on the question of damages. We accordingly dismiss the appeal and the analogous appeals with costs.

Appeal dismissed.

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30 C. 1084.

[1084] CRIMINAL REVISION.

SUNDAR MAJHI *v.* EMPEROR.*

[23rd June, 1903.]

Arbitrator—Public servant—Mischief—Land-mark—Penal Code (Act XLV of 1860) ss. 21, 434.

The parties to a proceeding under s. 145 of the Criminal Procedure Code by mutual consent referred the dispute as to the possession to the arbitration of A, and the Magistrate thereupon cancelled the proceedings under s. 145. The arbitrator in order to define the boundary erected certain pillars, which were destroyed by the accused, and they were in consequence convicted under s. 434 of the Penal Code :

Held that the conviction was illegal, as A was not an arbitrator within the definition of s. 21, cl. (6) of the Penal Code, nor was he a public servant authorized to fix the pillars within the meaning of s. 434 of that Code.

RULE granted to the petitioner, Sundar Majhi.

This was a Rule calling upon the District Magistrate of Birbhum to shew cause why the conviction of the petitioner should not be set aside on the ground that Mr. Ahmad, under whose authority the boundary pillars had been set up, was not an arbitrator within the definition of s. 21, cl. (6) of the Indian Penal Code.

Proceedings under s. 145 of the Criminal Procedure Code were instituted by the Subdivisional Magistrate of Rampur Hat between the Manager of the Benagaria Mission and his tenants as the first party and the Rajah of Hetampur and his tenants as the second party, with respect to certain disputed lands on the border line of the villages Tadbandha and Mijhanpur which were claimed by the parties respectively. On a petition being put in by the parties the Magistrate, on the 24th November 1902, passed the following order :—

"A petition is filed to-day signed by both parties stating that they are willing to refer the whole dispute to the arbitration of A. Ahmad, Esq., District Magistrate of Birbhum, and to abide unconditionally by his decision in every respect. This compromise naturally does away with the [1085] likelihood of an imminent breach

* Criminal Revision No. 488 of 1903, against the order passed by A. J. Laine, Sessions Judge of Birbhum, dated March 18, 1903.

(1) (1884) L. R. 13 Q. B. D. 304.