1899, said that it is not at all shown that the plaintiff is a *benamdar* for the defendants Nos. 4 to 6. That being so, there is no reason why the defendants Nos. 4 to 6 should be saddled with the costs of the other defendants. The decree of the Court below, so far as it makes them liable for the costs of the other defendants, must therefore be set aside.

We make no order as to the costs of this Court.

1902 DEC. 10, 16, 17, 18 & 19.

APPELLATE CIVIL.

30 C. 265=7 C. W. N. 229.

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30 C. 281.

[281] APPELLATE CIVIL.

MADHUB DASS BAIRAGI *v.* JOGESH CHUNDER SARKAR.*

[7th and 8th August, 1902.]

Easement—Prescription—Prescriptive right to the use of water—Storage of water in another's tank for the purposes of irrigation—Presumption of right from long enjoyment—Injunction.

Through an opening at the north-western corner of a tank water flowed in, and by another opening at the south-eastern corner water flowed out, into two channels.

The plaintiff and his predecessors in title used from time immemorial the water of the tank through these openings and channels for irrigating their lands.

Held, that a presumption arose that this enjoyment had an origin, conferring a right to the use of the water—*Ramessur Pershad Narain Sing* v. *Koonj Behari Pattuk* (1) relied upon; and that the plaintiffs were entitled to an injunction restraining the defendant from closing up either of the openings.

Arkwright v. *Gell* (2), *Birmingham, Dudley and District Banking Co.* v. *Ross* (3), *Wood* v. *Waud* (4), *Burrows* v. *Lang* (5), *Greatrex* v. *Hayward* (6), *Kisto Mohun Mookerjee* v. *Juggurnath Roy Joogee* (7), and *Toolsee Doss Kobeeraj* v. *Bhyrub Lall Tewaree* (8), referred to.

[Dist. 4 C. L. J. 370=11 C. W. N. 85; Appr: 22 I. C. 306; Ref. 18 I. C. 597; 33 All. 665; 36 C. L. J. 161.]

SECOND APPEAL by the defendant JOGESH CHUNDER SARKAR.

The plaintiff Madhub Das Bairagi, a cultivator, alleged that there was a *mohana* or opening at the south-eastern corner of a tank belonging to the defendant, through which the water used to be baled out into two *nalas* or channels for the purpose of irrigating the lands of the plaintiff; and that there was another *mohana* at the north-western corner of the tank, through which the plaintiff and other cultivators used to store water into the said tank from the neighbouring fields for the purpose of irrigating their lands; and that the plaintiff and his predecessors had been enjoying these rights without interruption for 60 or 65 years. The defendant Jogesh Chunder Sarkar closed up both the aforesaid *mohanas* in Ashar 1303 B. S. Thereupon the plaintiff [282] brought this action in the Court of the Munsif of Kotalpur for a declaration that he was

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* Appeals from Appellate Decrees Nos. 1049, 1075 and 1076 of 1899 against the decree of K. N. Roy, Subordinate Judge of Bankoorah, dated the 1st of March 1899, reversing the decree of Baboo Lal Singh, Munsif of Kotalpur, dated the 23rd of September 1897.

(1) (1878) I. L. R. 4 Cal. 633.
(2) (1839) 5 M. & W. 203.
(3) (1888) L. R. 38 Ch. D. 295.
(4) (1849) 3 Exch. 748.
(5) (1901) 2 Ch. 502.
(6) (1853) 8 Exch. 291.
(7) (1869) 11 W. R. 236.
(8) (1867) 8 W. R. 311.

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APPELLATE CIVIL.

30 C. 281.

entitled to the use of the water flowing in and out of the tank through the aforesaid *mohanas*, and for an injunction restraining the defendant from closing them up.

The defendant admitted in his written statement that the *mohana* existed from time immemorial, but alleged that the plaintiff, or his predecessors never enjoyed any such prescriptive right to the use of the water of the tank as alleged in the plaint, inasmuch as the *mohanas* were used only by the *maliks* for draining out the water of the tank and that they were not used by any one else.

The Munsif was of opinion that the plaintiff had failed to make out a clear case of easement, and he therefore dismissed the plaintiff's suit.

The District Judge, on appeal, found that the aforesaid *mohanas* and *nalas* existed as a matter of fact from time immemorial, and that the plaintiff had satisfactorily proved his prescriptive right to irrigate his lands by the water of the tank in question through the south-eastern *mohana*, and also to store water in the said tank for the purposes of irrigation through the north-western *mohana* ; and he accordingly allowed the appeal preferred by the plaintiff, reversing the judgment of the Court of first instance.

Babu *Surendra Chandra Sen* for the appellants. The right to water as claimed by the plaintiff is not such a right as may be legally claimed as an easement. To have the plaintiff's land irrigated when the *mohana* is opened by the defendant (owner) himself is very different from the prescriptive right of getting his land irrigated by the water of the defendant's tank according to the plaintiff's own will and pleasure. *See Arkwright* v. *Gell* (1), *Birmingham, Dudley and District Banking Company* v. *Ross* (2), *Wood* v. *Waud* (3), *Burrows* v. *Lang* (4), *Greatrex* v. *Hayward* (5).

Babu *Golap Chunder Sastri* for the respondents. The plaintiff has acquired an user over the water of the defendant's [283] tank by long and continuous enjoyment : see *Kisto Mohan Mookerjee* v. *Juggurnath Roy Joogee* (6), *Toolsee Dass Kobeeraj* v. *Bhyrub Lall Tewaree* (7), *Ramessur Pershad Narain Sing* v. *Koonj Behari Pattuk* (8). The Preamble to Regulation II of 1793 and s. 76 of the Bengal Tenancy Act contemplate tanks and reservoirs for the storage of water for agricultural purposes; a prescriptive right to the use and storage of water as claimed by the plaintiff is not therefore repugnant to the law of this country.

Babu *Surendra Chandra Sen* in reply. The case cited by the other side, from the Weekly Reporters, are distinguishable from the present one. The question whether an easement could be claimed by compelling the defendant to collect water in his tank for the benefit of the plaintiff should be answered in the negative : see the judgment of COUCH, C.J. in *Bunsee Sahoo* v. *Kalee Pershad* (9). Upon the finding of facts the plaintiff is not legally entitled to the decree, which has been passed in his favour by the Lower Appellate Court.

MACLEAN, C. J. The difficulties of satisfactorily dealing with a case of this nature are enhanced by the circumstance that the case came before us upon second appeal, and we are therefore precluded from

(1) (1839) 5 M. & W. 203.
(2) (1888) L. R. 38 Ch. D. 295.
(3) (1849) 3 Exch. 748.
(4) (1901) 2 Ch. 502.
(5) (1853) 8 Exch. 291.
(6) (1869) 11 W. R. 236.
(7) (1867) 8 W. R. 311.
(8) (1878) I. L. R. 4 Cal. 633.
(9) (1870) 13 W. R. 414.

ourselves looking and enquiring into the evidence. It has been found by the Lower Appellate Court that the two *mohanas*, which mean openings, at the north-western and south-eastern corners of the tank in question, and the two *nalas* or channels at the south-eastern corner have existed from time immemorial, and that the plaintiffs and their predecessors have been irrigating their lands from time immemorial by the water of the tank through these *mohanas* and *nalas*. The Judge says this : " In these circumstances, when the plaintiffs and their witnesses swear that these two *nalas* as well as *mohanas* existed from time immemorial, and that they and their predecessors have been irrigating their lands from time immemorial by the water of the tank through these *mohanas* and *nalas*, I think that their evidence ought to be accepted." This is a finding to the [284] effect I have stated. As I understand the facts, the tank has a *mohana* at the north-western corner through which the water flows into the tank and a *mohana* at the south-eastern corner through which the water flows out of the tank into the two *nalas*, and through those two *nalas* which are well defined channels, the water flowed and has been used for the purpose of irrigating the plaintiff's land. Upon these findings of fact, I think we may reasonably hold that a presumption arises that this enjoyment had an origin which conferred a right, and for this proposition I refer to the judgment of their Lordships of the Judicial Committee in the case of *Ramessur Persad Narain Sing* v. *Koonj Behari Pattuk* (1). During the course of the argument I entertained some doubt as to whether the principle of the English cases, such as *Arkwright* v. *Gell* (2), *Birmingham, Dudley and District Banking Co.* v. *Ross* (3), *Wood* v. *Waud* (4), *Burrows* v. *Lang* (5), and *Greatrex* v. *Hayward* (6), did not apply, though these cases seem not to be quite in accord with the view entertained in the Indian Courts in such cases as *Kisto Mohun Mookerjee* v. *Juggernath Roy Joogee* (7) and *Toolsee Dass Kobeeraj* v. *Bhyrub Lal Tewaree* (8). But on the whole, I think, upon the findings of fact in the present case, it is governed by the principle of the Privy Council authority (1) to which I have referred. I therefore think that in substance the decree of the Lower Appellate Court is right and that it ought to be affirmed and that there ought to be a declaration that the plaintiffs are entitled to the water from the tank flowing through the *mohana* at the south-eastern corner and that the defendant ought to be restrained by injunction from closing up either the *mohana* at the north-western corner through which the water flows into the tank, or the *mohana* at the south-eastern corner, through which it flows out of the tank, into the two channels I have referred to. Decrees will be made accordingly in all the three cases. The appellant must pay the costs of these appeals.

STEVENS, J. I concur.

Appeals dismissed.

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(1) (1878) I. L. R. 4 Cal. 633.
(2) (1839) 5 M. & W. 203.
(3) (1888) L. R. 38 Ch. D. 295.
(4) (1849) 3 Exch. 748.
(5) (1901) 2 Ch 502.
(6) (1853) 8 Exch. 291.
(7) (1869) 11 W. R. 236.
(8) (1867) 8 W. R. 311.