Before Mr. Justice Kemp, and Mr. Justice Glover.

MALLIK JAWAD-UL-HUQ AND OTHERS (PLAINTIFFS) *v.* RAM PRASAD DAS AND ANOTHER (DEFENDANTS.)*

Prescription—User.

1869 July 9.

A party claiming the right of user by prescription over the property of another, must show not only that the right has existed from ancient days, but also that it has been exercised as of right, and has not been interrupted.

Messrs. *R. E. Twidale* and *C. Gregory* and *Mohamed Yosuff* for appellants.

Baboos *Debendro Narayan Bose* and *Kali Krishna Sen* for respondents.

The facts sufficiently appear in the judgment of the Court, which was delivered by

GLOVER, J.—This was a suit to have suudry channels cleared in, and obstructions removed from, a watercourse and from the opening of an "ahur," or reservoir, inasmuch as they prevented the plaintiffs from using the surplus water of the "ahur" for the irrigation of their village of Chandi. The plaintiffs claimed a prescriptive right to the use of this surplus water, which admittedly belonged to the defendants, and their allegation is (an allegation not denied) that the flow of the water has been stopped by an embankment, and carried off to irrigate the lands of a lately purchased property of the defendants situate close by the plaintiffs' village of Chandi. There are other allegations as to the position of the opening of the reservoir and as to the course of the surplus water, after first leaving the "ahur," which are denied by the defendants.

The defendants also traversed the plaintiffs' allegation as to Mauza Chandi being irrigated by the surplus water of the Kesai reservoir. The first Court found for the plaintiffs, but on appeal the Judge reversed that decision, holding that the plaintiffs who claimed a right of user of the water had not shown any exercise of that right within the last twelve years, and had therefore lost it.

* Special Appeal, No. 359, of 1869 from a decree of the Judge of Gya, dated the 23rd November 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 1st December 1866.

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It is urged in special appeal that as it had been admitted by the defendants that the plaintiffs' lands were irrigated as stated by them in the years 1815 and 1848, it was for the defendants to show when the interruption to the user took place, the *onus* being on them.

We think that the Judge's finding in this case is one of fact on evidence, with which we cannot interfere in special appeal. The *onus* of showing uninterrupted user of the defendants' surplus water was on the plaintiffs. They produced witnesses who deposed to the fact, but the Judge disbelieved those witnesses; and the remaining evidence only showed that many years back the plaintiffs had enjoyed the privilege they now claim. There was nothing in the Judge's opinion to connect that enjoyment with any present user of the water, and the direct evidence was discredited.

As to the evidence of the malik of the neighbouring village of Lutkun, which the Judge is said to have misconstrued, we do not find that the Judge has ignored the fact that he deposed to some extent in favour of the plaintiffs. Although he has only noticed the words of his deposition with reference to another part of the case, the Judge is careful to note in his decision that he has considered and weighed all that has been urged on either side.

As to the Ameen's report, we do not see how it benefits the plaintiffs' case, for granting that it does describe the appearance of the ground as in some way supporting the plaintiffs' case, it is not denied that there was at some former time a passage for the water although there may be none now; and for the rest the Judge has found the report altogether in the defendants' favor.

A party claiming the right of user by prescription over the property of another must show not only that that right has existed from ancient days, but also that it has been exercised as of right, and has not been interrupted. In this case the utmost the plaintiffs have proved in the Judge's opinion is that more than 20 years ago, they used the surplus water of the "ahur." The Judge finds it not proved that they had so used it any time within 12 years of the institution of this suit.

This special appeal is dismissed with costs.