APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

1901
July 23 & 24.

KALU KHABIR
v.
JAN MEAH.

Riparian owners—Water, right to use of—Irrigation—Relative rights of upper and lower proprietors on the banks of a stream, based on custom and prescription—Prescription—Custom—Injunction—Dams, construction of—Civil Procedure Code (Act XIV of 1882) s. 30—Suit by some of a class as representative of the class—Parties.

The plaintiffs prayed for a declaration that the plaintiffs and their co-villagers had a prescriptive right to conserve the water of a natural streamlet passing by their village for the purpose of irrigating their agricultural land, by constructing dams every year during the rainy season at a specified place, but allowing surplus water to run out by the sides of the dams. They also prayed for a perpetual injunction to prevent the defendants, who were riparian owners lower down the course, from interfering with the construction of dams at the place specified. The defendants denied the plaintiffs' right, and claimed a similar but exclusive right to construct dams at their village.

Both the Courts below found that the plaintiffs had proved their prescriptive right, and that it did not interfere with the right of the riparian owners lower down the channel. The suit was accordingly decreed in terms of the prayer made in the plaint.

Held, that the plaintiffs having established their right by prescriptive use, they were entitled to the reliefs claimed, and that the injunction decreed in their favour was not unwarranted by law nor vitiated by vagueness and indefiniteness.

Debi Pershad Singh v. *Joynath Singh* (1) distinguished.

Held also, that the plaintiffs having applied for permission, under s. 30 of the Civil Procedure Code, to sue on behalf of all parties

* Appeal from Appellate Decree No. 1941 of 1899, against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Burdwan, dated the 14th July 1899, affirming the decree of Babu Kadareswar Maitra, Munsif of that District, dated the 22nd of June 1898.

(1) (1897) I. L. R. 24 Calc. 865 ; L. R. 24 I. A. 60.

having the same interest in the suit, and the permission having been given in fact and notices issued accordingly, the mere fact that the order granting the permission was not recorded in the order sheet, does not vitiate the proceedings.

Dhunput Singh v. *Paresh Nath Singh* (1) followed.

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THE principal defendants, Kalu Khabir and others, appealed to the High Court.

The plaintiffs, Jan Meah and others, alleged that there was a natural streamlet existing since time immemorial, which, rising from the villages Fulnagar, Beldanga and others, passed through the villages Mitrapur and Bijoypur, in the Shahebgunj Sub-division, then fell in a southerly direction into the boundaries of Arachia, and then after running in an easterly direction, fell into the river Khari; that the said streamlet was filled with water during the rainy season, and that then, if the water rose up, the plaintiffs, the *pro forma* defendants and others, being holders of lands within the said villages of Mitrapur and Bijoypur, used to conserve water by raising bunds in their respective limits, for irrigating their agricultural lands, but allowing surplus water to run out by the sides of the bunds, and that lands within the aforesaid villages were irrigated in this wise every year, as a matter of right, openly and uninterruptedly from time immemorial, at any rate for upwards of 20 years, by the holders of the said lands, by raising dams at the place specified in the schedule to the plaint; that in the year 1302 B. S., the principal defendants holding lands in Arachia and other people, owing to scarcity of water in that year, forcibly took out water by cutting off the bunds; that this led to certain criminal proceedings, which failed, on the ground that the dispute was of a civil nature; and that the people of Arachia had the right to irrigate their lands by raising bunds in their village, but that they had no right to cut off bunds raised by the plaintiffs or to take off water conserved thereby.

The plaintiffs further alleged that it was inconvenient to make all the persons, owning lands in the villages of Mitrapur and Bijoypur, and mentioned in the schedules to the plaint, co-plaintiffs in the suit, and prayed that notices might issue asking

(1) (1893) I. L. R. 21 Calc. 180.

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them to join as plaintiffs, and that failing that, the suit might be proceeded with by the plaintiffs on their behalf.

The plaintiffs then prayed—(*i*) for a declaration that they and others holding lands as aforesaid had prescriptive and perpetual right to conserve water by raising bunds at the place mentioned ; (*ii*) for a direction that the plaintiffs might get possession of the place ; (*iii*) for a declaration that the principal defendants and other people of Arachia had no right to cut off any bunds in the villages of Mitrapur and Bijoypur, and for a perpetual injunction that they might be prevented from so doing ; (*iv*) for costs and such other reliefs as they might be entitled to.

The principal defendants, who were the appellants, alleged, *inter alia*, that the suit could not proceed at the instance of the plaintiffs, the procedure laid down in s. 30 of the Code of Civil Procedure not having been followed ; that the place mentioned in the plaint, where the bunds were alleged to have been raised by the plaintiffs, was not a part of the villages Mitrapur and Bijoypur ; that the plaintiffs never constucted any bunds at that place, nor had they any right to do so ; that the plaintiffs never irrigated their lands as alleged ; that their claim was barred by limitation, as they never had any possession of, and never raised any bund, at the place specified, within a period of 12 or 20 years ; but that since time immemorial, they, the defendants, had a bund in the confines of Arachia, to the east side of the plaintiff's alleged place, maintained by the defendants and other people of the village.

The Munsif found on the evidence that the portion of the streamlet which passed through Mitrapur and Bijoypur belonged either to the talukdars of both the villages, or belonged exclusively to the talukdar of the former village, and that it did not belong to the defendants or to their talukdar ; that the disputed bund had been in existence for upwards of 20 years before it was forcibly removed by the defendants ; that therefore the plaintiffs and their co-villagers had acquired a right in the nature of an easement to maintain a bund at the disputed place ; and that the erection of such a bund neither interfered with the riparian rights of the defendants, nor prevented the water collecting at their own

bund. With regard to the question raised about the procedure prescribed by s. 30 of the Code of Civil Procedure, the Munsif thought that the plaintiffs having applied for permission under that section, and the fact of the institution of the suit having been notified by beat of drum and by advertisement in the local paper, Burdwan Sanjibani, the omission to record the order granting the permission was perhaps a mistake, and the suit could not fail on that ground. The Munsif also supplied the defect by recording grant of the permission in the judgment. The suit was accordingly decreed in terms of the several prayers made in the plaint.

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On appeal preferred by the principal defendants, the Subordinate Judge agreed with the First Court on the merits of the case, and dismissed the appeal.

Dr. Rash Behary Ghose, *Dr. Asutosh Mukerjee* and *Babu Biraj Mohun Majumdar*, for the appellants.

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Babu Srinath Dass for the respondents.

Cur. adv. vult.

AMEER ALI and PRATT JJ. This second appeal arises out of a suit brought by the plaintiffs for a declaration of their right to erect and maintain a bund at a place described in the schedule attached to the plaint as *ka*, and for a permanent injunction restraining the defendants, other than the *pro forma* defendants, from removing it in future.

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The circumstances which gave rise to the suit are as follow:— There appears to be a natural streamlet, which issuing from some villages called Fulnagar, Beldanga, &c., in the District of Burdwan, flows in a southerly direction past the villages of Mitrapur and Bijoypur, where the plaintiffs have their holdings, and Arachia where the defendants reside and have their cultivation, and then takes an easterly course through the village named Palsana, where it joins the river Khari. The plaintiffs alleged that during the rainy season when the streamlet is filled with water the inhabitants of the riparian villages have, from time immemorial, had the right of raising bund, within the respective limits, of conserving water sufficient for irrigating their lands for agricultural purposes and letting out the surplus water for the use

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of the holders of servient tenements, and that they, as the owners of property lying on the bank of this streamlet, had, in accordance with the above prescriptive and customary right, constructed a dam at the place *ka* which was demolished by the principal defendants in the year 1302. They alleged further that this dam was built in this manner every year and that the practice was observed as a matter of right, publicly and uninterruptedly for upwards of twenty years for the purpose aforesaid, and that the defendants have and had no right to interfere with the construction of the bunds in question. They stated further that the people of the defendants' village had a similar right to build a dam or bund within their own limits for the conservation of water and that they were not entitled to interfere with the exercise of the right on the part of the plaintiffs; and as the right which they claimed was one shared in by all the riparian holders of Mitrapur and Bijoypur, the plaintiffs asked the Court to grant them leave under s. 30 of the Civil Procedure Code. And they prayed for a declaration that they and their co-villagers holding the lands described in the plaint as *kha* and *gah* have a prescriptive right based on immemorial practice to conserve water by constructing a bund at the place mentioned in schedule (*ka*) for the purpose of irrigating their lands (*kha*) and (*gah*). They also asked that the defendants might be restrained from interfering with any bund the plaintiffs might construct within the confines of Mitrapur and Bijoypur.

The defendants in their written statement alleged, *inter alia*, that the place where the plaintiffs claim to erect the bun dwas not within the confines of Mitrapur and Bijoypur as alleged by them; *secondly*, that neither the plaintiffs, nor the *pro forma* defendants, nor the ryots of Mitrapur and Bijoypur, ever constructed a dam at that place, and that they had no such right, nor had they held possession of the place, nor been in the practice of building dams for the last twelve years. The defendants also denied that the plaintiffs irrigated their land with the water of the streamlet, and they went on to allege that from time immemorial the defendants had "as usual" a bund within the confines of their own village, and that in the event of any scarcity of water, the people of that

village cause their lands to be irrigated by taking water from the stream.

As the Courts below point out, there is no suggestion in the written statement that the right claimed or the right which has been found to have been exercised by the plaintiffs interfered in any way with the enjoyment by the defendants of the water of this streamlet. It will be noticed also that in the plaint the plaintiffs based their right to conserve water for the irrigation of their lands by erecting a bund, both on prescriptive and customary right. The right on which this action was therefore brought was of a mixed character, neither purely prescriptive nor purely customary. We mention this in connection with an argument put forward on behalf of the appellants in this Court, to which we shall advert afterwards.

The First Court in an extremely careful and well-considered judgment, in which it discussed the law relating to rights of this nature in some detail, found in the first place that the place where the plaintiffs claimed to have had their bund, and where they claimed to construct the same, was not within Arachia. In fact, although the defendants had denied in their written statement that it was within the confines of Mitrapur and Bijoypur, it was conceded in the course of the trial that *ka* was within the villages within which the plaintiffs have their holdings. But the contention was that the portion of the streamlet, in which the plaintiffs wanted to erect their bund, belonged to the talukdar of Arachia. The Munsif found as a fact upon the evidence in the case that the talukdar of Arachia did not possess the jalkar right in the streamlet alongside of the villages of Mitrapur and Bijoypur, nor was he in possession thereof. He found further that the portion of the kandar or streamlet which passes through Bijoypur and Mitrapur belonged either to the talukdars of those villages, or, as the thak map shows, exclusively to the talukdar of the latter village. This finding has been practically affirmed by the Subordinate Judge and there is no dispute about it in this Court. Upon that finding, as the Munsif very properly points out, the plaintiffs have clearly a right to use the water of the streamlet for ordinary purposes. Some English cases were referred to, which go to show that the ordinary purposes in

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England are limited to personal uses and so forth. In this country, moreover, the ordinary use to which a riparian holder is entitled is not so limited as in England, but apart from that, the Munsif found as a fact that the plaintiffs had made out the special right which they claimed, *viz.*, the right of damming up the streamlet for irrigating their lands, and that they had exercised that right for more than twenty years by erecting the bund, and that the use which they had made was consistent with the custom prevailing in that part of the country. He referred to the fact that there were several bunds of that character, then built by the inhabitants of the different villages for the purpose of conserving the water within the confines of their respective properties. He found further that the defendants had not shown that such conservation by the erection of periodical bunds had in any way injured them or interfered with their rights as riparian holders, and he was of opinion that the right which the plaintiffs claimed appertained to all the lands which abutted on the stream including the lands in schedule *kha* and *gah* referred to in the plaint, and he went on to say: "Considering all the circumstances I am of opinion that the plaintiffs, as well as the other inhabitants of Bijoypur, are entitled to maintain a bund in the disputed place, and that it does not signify whether the right entitling them to do so be of the nature of an easement, natural or customary." He held further that, as the plaintiffs claimed a right by prescription, they were entitled to maintain the action for themselves, but if it were a right in which other persons were entitled to sue, leave under s. 30 had been granted; that in fact advertisements had been issued in one of the local papers and that the provisions of that section were complied with for the purpose of entitling the plaintiffs to maintain the action on behalf of themselves and the others concerned. He accordingly made a decree declaring the plaintiffs' right to erect a bund in the disputed place in terms of the prayer contained in the plaint and for possession of the disputed land for the aforesaid purpose, and also declaring that the principal defendants have no right to remove the bund and enjoining them to refrain from doing so.

On appeal to the Subordinate Judge, various questions were raised, but apparently, so far as we can see from the judgment

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of the Lower Appellate Court, no question was raised regarding the right to the portion of the streamlet running through Mitrapur and Bijoypur, nor as regards the permission granted to the plaintiffs under s. 30 of the Civil Procedure Code. The Lower Appellate Court has held that the exercise of the right by the plaintiffs as alleged by them in their plaint for more than twenty years had been satisfactorily established. He also found as a fact that, although ordinarily the holder of a dominant tenement has no right to interrupt the regular flow of a stream so as to interfere with the use of the water by other proprietors or to inflict upon them any injury, it was clear that such a right may be acquired by a grant or uninterrupted enjoyment for twenty years, which is evidence of the grant. He in fact incorporates in his judgment the dictum of Chancellor Kent in his Commentaries, and agreeing with the Munsif that the user by the plaintiffs was not by any means of an extraordinary character, but under the circumstances of this case was a right which they had established both upon prescription as well as by custom, he affirmed the decree of the Court of First Instance.

The Subordinate Judge's judgment naturally is not so full as that of the Munsif with whom he agreed, and that probably has furnished the reason for this second appeal.

It has been contended on behalf of the appellants before us, *first*, that the plaintiffs have not proved their prescriptive right; *second*, that the leave which was granted under s. 30 was not sufficient, and that therefore the plaintiffs were not entitled to maintain the action on behalf of others, and that a declaration based upon custom could not be made, because it was not proved in the case that others had enjoyed the right which the plaintiffs claimed. It was also contended that the terms of the injunction were indefinite, *first*, because the size of the bund had not been indicated; *second*, nothing was said as to the period during which the bund should be maintained; and *third*, because the rights of the defendants were not protected.

As regards the proof of the right by prescription claimed by the plaintiffs, the Subordinate Judge no doubt says that "the witnesses for the plaintiffs do not depose having seen the plaintiffs irrigate their lands with the water of this stream taken from the

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place of the disputed dam for twenty years;" but he goes on to say that they prove the existence of the dam for more than twenty years, and this is sufficient to give the plaintiffs the right to maintain the dam. As we have already mentioned, the plaintiff's claim was based upon a right founded on immemorial user as well as customary right, that is, the right which appertained to the villages abutting on the stream and through which the kandar flows. In considering what the Munsif had found, it seems to us that the Subordinate Judge, who was affirming the judgment of the First Court, was of opinion that upon the evidence it had been clearly shown by the plaintiffs that the user which they claimed had been sufficiently and clearly established, although some of the witnesses may not have seen the plaintiffs actually irrigating their lands with the water of the stream. Reading the two judgments together, we feel no doubt, that what was intended to be found by the Subordinate Judge was exactly what had been found by the First Court.

As regards leave under s. 30 of the Civil Procedure Code, we are of opinion that, as it was given in fact upon the plaintiffs application, and notices were issued in compliance with the plaintiffs' prayer, the mere fact that the order was not recorded in the order sheet does not vitiate the proceedings, and in this view we are supported by the decision of Chief Justice PETHERAM and Mr. Justice GHOSE, in the case of *Dhunput Singh* v. *Paresh Nath Singh* (1), where the learned Chief Justice held that the grant of permission under s. 30 may be inferred from the circumstances of the case. Here the Munsif finds that in the local paper, the Burdwan Sanjibani, the fact that a suit had been instituted by the plaintiffs of the character in question was duly notified, and we are of opinion that the requirements of s. 30 were therefore sufficiently complied with.

Then arises the question whether the right claimed on behalf of the other inhabitants of the village has been sufficiently established. We are of opinion that upon the findings of the Munsif, which have been substantially affirmed by the Subordinate Judge, there can be no doubt regarding the fact that the riparian

(1) (1893) I. L. R. 21 Calc. 180.

holders of the villages of Mitrapur and Bijoypur were entitled with the plaintiffs, the present respondents, to the right which the plaintiffs in their plaint claimed, namely the right to conserve water by building up a dam in the streamlet in question during the rainy season. The rights of those persons are co-extensive with those of the plaintiffs, and regard being had to the fact that the plaintiffs have established, in the opinion of both the Courts below, that they had been in the habit of erecting for many years past a dam across the streamlet in question at the particular place mentioned by them for the conservation of water for agricultural purposes, it may be taken that *that* right is, as the Munsiff has found it to be, the right of the villagers whose lands abut on the stream. The case of the *Duke of Bedford* v. *Ellis* (1) and the other cases cited by the learned pleader for the appellants therefore do not in our opinion touch the present case.

The question remains as to the indefiniteness of the terms of the injunction. As we have mentioned, the objections are of a three-fold character. As regards the periodicity of the construction of the bund, it is unnecessary for us to say anything, for it will be found that in the plaint itself it is mentioned that the bund is thrown up only during the rainy season.

As regards the right of the appellants, it seems to us that the way in which the case has been dealt with, and upon the facts found by the Courts below, the defendants are sufficiently protected. The plaintiffs have established their right to take the water for irrigating their lands by building a bund in accordance with the custom and user which has prevailed from time immemorial, and that right is co-extensive with the right of the other tenement holders—a right which is exercised by the defendants themselves as against others. We do not see how any question regarding the protection of the rights of the defendants can arise in such a case.

It was urged, on the authority of the case of *Debi Pershad Singh* v. *Joynath Singh* (2), that an injunction of such an indefinite nature ought not to be granted by the Courts in the

(1) (1901) A. C. 1.

(2) (1897) I. L. R. 24 Calc. 865; L. R. 24 I. A. 60.

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exercise of their discretion. We may observe that the case referred to was of a special character. There the plaintiffs claimed the unrestricted right of constructing a dam and of taking water without any proof that they had ever done so before, or that they had enjoyed the right by prescription or custom. The Court of First Instance and the Lower Appellate Court had made a decree in their favour upon equitable considerations. The High Court holding that the plaintiffs claimed an unrestricted right of stopping the flow of the stream for the purpose of utilising its water to such an extent as they might think fit at any time, even if the effect of the obstruction was wholly to deprive the defendants of the water, dismissed the plaintiffs' suit, and naturally so because they had not either proved custom or the right of user. Their Lordships of the Privy Council held as follows: "The right of a riparian proprietor to divert and use water for the purpose of irrigation is certainly not understated in the plaint. The right claimed by the appellants in the first conclusion is not less broadly asserted in the body of the plaint, and is neither more nor less than a right on the part of an upper proprieter to dam back a river running through his land and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of proprietors below." Then they add what is most important: "In the absence of a right acquired by contract with the lower heritors or by prescriptive use, the law concedes no such right." The suit was dismissed because the plaintiffs had failed to make out any case for the relief they claimed. In this case, both the Courts below have found as a fact that the plaintiffs have established that they have acquired by prescriptive use the right they claim; and we are of opinion that in second appeal, it is not open to the appellants to question the correctness of that finding.

The Lower Courts have declared that the plaintiffs are entitled to construct the bund at the place mentioned. That must be consistent with what they have been doing for the last twenty years and the custom prevailing in the locality. We, therefore, see no reason for complicating matters by endeavouring to define more particularly the size of the bund.

Having regard to all the facts and circumstances of case,

we are of opinion that this appeal ought to be dismissed and we accordingly dismiss it with costs.

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M. N. R. *Appeal dismissed.*

PRIVY COUNCIL.

NARENDRA NATH PAHARI

v.

RAM GOBIND PAHARI.

P.C.* 1901 *Nov.* 7, 30.

[Appeal from the High Court of Judicature at Fort William in Bengal.]

Evidence Act (I of 1872) s. 112—Child—Presumption as to paternity of child born after death of husband—Non-access, proof of—Burden of proof—Illness of husband rendering act of begetting a child improbable.

To rebut the legal presumption under s. 112 of the Evidence Act (I of 1872), it is for those, who dispute the paternity of the child, to prove non-access of the husband to his wife during the period when, with respect to the date of its birth, it must, in the ordinary course of nature, have been begotten.

Where a wife came to her husband's house a few days before he died and remained there up to the time of his death, and it was shown that a child alleged to be that of her husband, was the child of the wife, and that it was born within the time necessary to give rise to the presumption under s. 112, the Judicial Committee, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him, *held* (reversing the decision of the High Court) that the presumption as to the paternity of the child given by s. 112 must prevail.

The fact that the husband was, during the period within which the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards was held, under the circumstances, not sufficient to rebut the presumption.

APPEAL from a decree (15th February 1898) of the High Court at Calcutta, reversing a decree (26th February 1896) of the District Judge of Midnapore in favour of the present appellant.

* *Present*: LORDS MACNAGHTEN, SHAND, DAVEY, ROBERTSON and LINDLEY.