APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Brett.

MOHINI MOHAN ADHIKARY
v.
KASHINATH ROY CHOWDHRY.*

1909
Feb. 25.

Easement—Musical Festival.

No easement to hold something in the nature of a musical festival on a plot of ground can properly exist.

SECOND APPEAL by the defendants, Mohini Mohan Adhikary and others.

Appeal No. 2483 related to rights of easement claimed in a plot of land by Radha Kanta Thakurjee and others, *shebaits* of the *Thakurs* Radhaballav and Radhakanta, against Mohini Mohan Adhikary and others, *shebaits* of another *Thakur* Gopinath. The rights claimed were: (i) the right of holding *kirtan* (holy music) over the entire land at a certain festival of their *Thakurs*, and (ii) the right of taking their *Thakurs* across this land from the *dole-mancha* to a certain pathway at certain festivals.

The defendants contended, *inter alia*, that the right of holding *kirtan* cannot be claimed as a right of easement.

The Munsif decreed the suit. On appeal, the Subordinate Judge modified the decree of the Munsif but upheld the Munsif's decision on the point of easement. The defendants, thereupon, preferred this second appeal.

Babu Dwarka Nath Chakravarti (*Babu Brajendra Nath Chatterjee* with him), for the appellants. There cannot be an easement of this nature. Which is the *servient* tenement and which the *dominant* one? Who is to benefit by this user?

* Appeal from Appellate Decree, No. 2483 of 1906, against the decree of Sripati Chatterjee, Subordinate Judge of Hooghly, dated July 23, 1906, affirming the decree of Kali Kumar Sarkar, Munsif of Arambagh, dated March 31, 1905.

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What is the origin of the right claimed? Assuming there was a custom, the custom must be reasonable: Gale on Easements, 8th Ed., p. 3: *Kuar Sen* v. *Mamman* (1).

Babu Baidya Nath Datta (*Babu Atulya Charan Bose*, *Babu Ram Chandra Majumdar* and *Babu Beer Chandra Dutt* with him), for the respondents. It was a user from time immemorial. The Court was justified in inferring grant. The case (1) cited by the appellants is in my favour.

MACLEAN C.J. As regards this appeal, two questions arise: *first*, whether there was an easement acquired by the plaintiffs in this suit to hold something in the nature of a musical festival once or twice a year on the plot of ground which is the subject of dispute; and, *secondly*, whether the plaintiffs acquired a right of way to carry their idols over this piece of land. As regards the first point, I think no such easement can properly exist: it cannot exist as an easement. There may have been a custom—a custom entitling them to hold a "*kirtan*," a sort of religious concert on the piece of land. But that is not the case set up. We do not think there can properly be what is known as an easement, such as the plaintiffs claim. This appeal, therefore, succeeds on this point. As regards the other question, the Court below seems to have thought that it was established that the plaintiffs had been exercising a right of way over the plot of ground for the purpose of carrying idols one or two days a year. But there does not seem to be any particular track: the people carrying the idols sometimes along one track and sometimes another: but always across this strip of ground. The lower Court has given the defendants an opportunity of showing in execution proceedings that there is a definite track, or to have a definite track marked out, which the plaintiffs must follow for the purpose of carrying idols. That is in favour of the defendants. I think the Court below was right and we cannot interfere. The result is that so much of the decree of the Court below as deals with the question of easement, that is to say, the right

(1) (1895) I. L. R. 17 All. 87.

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to hold the musical entertainments must be reversed, but it stands as to the right of way. As each party has succeeded partially in this appeal, there will be no costs.

BRETT J. I agree.

Decree modified.

S. M.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Brett and Mr. Justice Fletcher.

1909

March 10

COOVERJEE BHOJA*

v.

RAJENDRA NATH MUKERJEE.

Damages, measure of—Contract for forward monthly Deliveries—Construction of Contract—Breach before the time for complete Performance—Market Rate, where no Market in India, how to be determined.

The defendant contracted to sell to the plaintiffs 5,000 tons of manganese ore of a certain quality to be delivered into waggons at Kamptee, B.-N. Ry., "500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than 15th February 1907." In October 1906 the defendant tendered in part fulfilment of the contract certain Domree ore which the plaintiffs refused to accept, on the ground of inferiority in quality. Thereupon the defendant on the 5th November 1906 wrote cancelling the contract, and on the 17th January 1907 finally repudiated all liability under the contract. On the 5th March 1907, the plaintiffs instituted an action for damages for non-delivery. It was established in evidence that ordinarily there was no market rate for manganese ore in India, but that there was a free market in England, and that the plaintiffs intended to ship the ore to England :—

Held, that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract.

Josling v. *Irvine* (1), *Brown* v. *Muller* (2), *Roper* v. *Johnson* (3), followed.

Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for those breaches was the value to

* Appeal from Original Civil, No. 5 of 1908.

(1) (1861) 6 H. & N. 512. (2) (1872) L. R. 7 Ex. 319.

(3) (1873) L. R. 8 C. P. 167.