APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

ESHAN CHANDRA SAMANTA
v.
NIL MONI SINGH.*

1908
June 3, 4, 10.

Riparian owner—Irrigation—Prescription—Custom—Vicinity—Limitation—Limitation Act (XV of 1877) s. 26 and Sch. II, Art. 47.

A riparian owner claiming a right to irrigate his lands from the river flowing past his land by putting up dams therein must not interfere with the rights of the lower riparian owners.

Miner v. *Gilmour* (1), *Swindon Water Works Company* v. *Wilts and Berks Canal Navigation Company* (2), *McCartney* v. *Londonderry and Lough Swilly Railway Co.* (3) referred to.

Any such interference would be unreasonable and inconsistent with the rights of others, unless allowed in pursuance of some arrangements arrived at between the parties interested, or by the successful acquisition of a prescriptive right.

Kalu Khabir v. *Jan Meah* (4) referred to.

An upper riparian owner can acquire an easement to irrigate his land apart from the mode of acquisition mentioned in s. 26 of the Limitation Act: *Rajrup Koer* v. *Abul Hossein* (5). But if he relied on custom, he must prove that it was ancient, continuous, peaceable, reasonable, certain, compulsory and consistent with other customs regarding the right to irrigate from the river.

Art. 47 of Sch. II to the Limitation Act has no application to a suit for a declaration of the plaintiff's right to put up dams in a river to irrigate his lands, it not being one to recover possession of property.

SECOND APPEAL by Eshan Chandra Samanta and others, the plaintiffs.

This appeal arose out of a suit instituted on the 19th February, 1903, for a declaration that the plaintiffs and their co-villagers of Sonakur and Amra, lying on both sides of the river Banka, have acquired a right by prescription and custom and also

* Appeal from Appellate Decree, No. 955 of 1906, against the decree of H. E. Ransom, District Judge of Burdwan, dated Feb. 23, 1906, reversing the decree of Aghore Chandra Hazrah, Subordinate Judge of Burdwan, dated April 6, 1905.

(1) (1858) 12 Moo. P. C. 131, 156.
(2) (1875) L. R. 7 H. L. 697.
(3) [1904] A. C. 301.
(4) (1901) I. L. R. 29 Calc. 100, 110.
(5) (1880) I. L. R. 6 Calc. 394, 403.

1908

ESHAN CHANDRA SAMANTA v. NIL MONI SINGH.

as riparian proprietors, to irrigate their lands by constructing dams every year in the said river. The enjoyment of the easement, as of right, peaceably and without interruption for more than twenty years was asserted by the plaintiffs; and they also prayed for a perpetual injunction.

The defendants, who are the inhabitants of certain other villages lower down the river, denied the claim and pleaded limitation.

The evidence on the plaintiffs' side was to the effect that they had been putting up dams in the river Banka for more than twenty years prior to the institution of the suit, and that for the last eight or nine years the defendants had interferred with the *bunds* and got them out, either through the police or by Magisterial orders.

Two Magisterial orders were put in evidence—one dated 19th July 1902, and the other dated 13th August 1879. These orders were evidently made under the Criminal Procedure Code for prevention of breach of the peace.

The Subordinate Judge was of opinion that the aforesaid Magisterial orders were not evidence in the case except for the purpose of showing where the obstructions took place; and he decreed the suit declaring the plaintiffs' prescriptive and other rights to irrigate their lands from the river Banka by erecting *bunds* therein within the limits of their villages, and ordered that a permanent injunction be issued restraining the defendants from interfering in any way with the enjoyment of the plaintiffs' rights.

The District Judge, on appeal, dismissed the suit, observing as follows:—

"That the (Magisterial) order of 13th August, 1879, was an order passed under s. 532 of the Code of Criminal Procedure (Act X of 1872) and purported to have been made by the Joint—presumably first class—Magistrate after an enquiry by the order of the District Magistrate under section 533 of the Code into a dispute regarding the right of *bunding* up the Banka river for irrigation purposes. The Joint-Magistrate would have power under s. 26 of that Code to make orders in possession cases, as would be an order under s. 532 f the Code . . . . This order meant that there was no possession on the part of the villagers of Sonakur and Amra (which were on the opposite banks of the river Banka) of any right to use the water of the river to the exclusion, entirely or in part, of the public or of the lower villagers

The plaintiffs and their predecessors were bound by this order, and in the absence of any suit to contest it within three years, it must be held that this order is not merely fatal to any assertion on their part of any such right as they claim, but is even a bar to their suit under Art. 47 of the Limitation Act."

1908
ESHAN CHANDRA SAMANTA *v.* NIL MONI SINGH.

The District Judge further observed that:—

"Even if *bunds* were put up annually from 1880 to 1883, there is clear evidence that this was followed, in 1884, by an agreement being arrived at with the defendants, the lower villagers, that the *bunds* might be constructed in that year, and that this agreement was coincident with the introduction by Government notification in that year into the district of the Irrigation Act (III of 1876), which rendered the putting of such *bunds* a criminal offence.

THE plaintiffs appealed to the High Court.

Babu Jyoti Prasad Sarvadikari, for the appellants: The plantiffs claim under three-fold rights: (*i*) prescription; (*ii*) custom; and (*iii*) natural right of riparian owners. As regards (*i*), the agreement of 1884 referred to by the Court below is not on the record, and there is nothing to show that the user in 1884 was of a permissive character; "peaceably" in section 26 of the Limitation Act does not mean that there is to be no opposition, as the Explanation shows that the section itself comtemplates opposition. As regards (*ii*), there is no finding by the lower Appellate Court. An easement may be acquired by modes other than those mentioned in section 26 of the Act, which is not exhaustive: see *Rajrup Koer* v. *Abul Hossein* (1), *Budhu Mandal* v. *Maliat Mandal* (2), and *Kalu Khabir* v. *Jan Meah* (3). As regards (*iii*), it is distinctly stated in the plaint that outlets are left for sufficient water to flow downwards; and the Court of first instance finds that no serious inconvenience is caused by the *bunds* to the lower proprietors. That being so, we can claim such a right under the common law as part of our natural rights as riparian owners; we do not claim to dam up the whole river or an unrestricted use of the water. The present case is clearly distinguishable from the Privy Council case of *Debi Pershad Singh* v. *Joynath Singh* (4). The true test is not in the quantity of water taken, but in the nature of the injury, if any

(1) (1880) I. L. R. 6 Calc. 394, 402.
(2) (1903) I. L. R. 30 Calc. 1077.
(3) (1901) I. L. R. 29 Calc. 100.
(4) (1897) I. L. R. 24 Calc. 865.

1908

ESHAN CHANDRA SAMANTA v. NIL MONI SINGH.

to the lower proprietors: see *Miner* v. *Gilmour* (1); Gale on Easements, 8th edition, page 240.

The Court below is also wrong in holding that the suit is barred under Article 47 of the Limitation Act, for this is not a suit for the recovery of any property; orders under section 532 of Act X of 1872, or section 147 of Act V of 1898 do not fall within Article 47: *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2), *Goswami Ranchor Lalji* v. *Sri Girdhariji* (3).

Babu Naliniranjan Chatterjee, for the respondents. The plaintiffs, as upper riparian proprietors, cannot dam up the river and appropriate as much water as they like to the injury or inconvenience of the lower riparian owners. The rights of an upper riparian owner are discussed in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (4) and *McCartney* v. *Londonderry and Lough Swilly Railway Co.* (5). Lord Halsbury L. C., referring to *Swindon's* case, observed that it was "settled and almost codified law" on the subject. These cases lay down that the upper riparian owners must "restore the water substantially undiminished in volume and unaltered in character": see also Gale on Easements, 8th Edition, pages 245-246. The plaintiffs' allegation that outlets are kept, through which water is taken by the lower riparian proprietors, is not sufficient. They have not stated what is the volume of water passing through the channel, and the quantity of water appropriated by them; nor was there any enquiry made with respect to these matters. The plaintiffs are, therefore, not entitled to the relief they claim: see *Debi Pershad Singh* v. *Joynath Singh* (6).

As to the prescriptive right, the findings of the Court below are conclusive; the repeated obstructions by the defendants shew that the enjoyment of the alleged right was not peaceable: Gale on Easements, 8th Edition, page 234; Mitra on Limitation, page 775. Here, not merely verbal protests were made, but active resistance was offered. Magisterial orders were obtained, and the dams cut open with the help of the police. To claim a right by prescription otherwise than under section 26 of the

(1) (1858) 12 Moo. P. C. 131, 156.
(2) (1902) I. L. R. 26 Mad. 410.
(3) (1897) I. L. R. 20 All. 120.
(4) (1875) L. R. 7 H. L. 697.
(5) [1904] A. C. 301, 304.
(6) (1897) I. L. R. 24 Calc. 865.

Limitation Act, long and peaceful enjoyment must be proved so as to raise the presumption of a legal origin: the case of *Rajrup Koer* v. *Abul Hossein* (1) does not lay down that the enjoyment need not be peaceful nor continuous.

As to the right based on custom, the findings are also conclusive. For the difference between acquisition of a customary right and that of a prescriptive right, see Peacock on Easements, page 177. It is more difficult to prove a custom; it must be ancient, invariable, certain and reasonable.

The question, whether Article 47, Schedule II of the Limitation Act applied to this case, need not be decided. Article 120 of the Act may be applicable.

Babu Jyoti Prasad Sarvadhikari, in reply.

Cur. adv. vult.

CASPERSZ AND SHARFUDDIN JJ. The suit giving rise to this second appeal was brought by the plaintiffs, for themselves and the other inhabitants of Sonakur and Amra, to have it declared that they have a right to irrigate their village lands from the water of the river Banka by putting up dams therein. The defendants are inhabitants of certain villages lower down the stream of the said river, and they, it is said, on the 21st July 1902, with the assistance of the Police cut the plaintiffs dam. It is conceded in the plaint that the defendants have a right to take some water, but the allegation is that the defendants' supply must be regulated by the outlets left by the plaintiffs.

The suit was based on a three-fold right founded on (i) prescription, (ii) custom, and (iii) vicinity.

But the statements as to this right contained in paragraphs 4, 5, 6 of the plaint, are not very distinctly set forth: they overlap and coalesce to a certain extent, as will appear from a comparison of the said paragraphs.

The Court of first instance decreed the suit and found in plaintiffs' favour on their three-fold right.

The District Judge, on appeal, dismissed the suit. He relied, for the most part, on the provisions of Article 47, Schedule II of

(1) (1880) I. L. R. 6 Calc. 394.

1908
ESHAN CHANDRA SAMANTA
v.
NIL MONI SINGH.

the Limitation Act as barring the plaintiffs' suit, because they had not instituted their suit within three years from the 13th August 1879, when the Joint Magistrate, Mr. Tobin, passed an order, under section 532 of the old Code of Criminal Procedure (Act X of 1872), adverse to the claims of the villagers up the stream of the river Banka and consequently in favour of the villagers represented by the defendants in the present litigation.

It has been urged before us—first, that the District Judge has misunderstood the case; *secondly*, that Article 47, Schedule II of the Limitation Act, has no application; *thirdly*, that the District Judge ought to have arrived at a clear finding on each of the rights set up by the plaintiffs; and *fourthly*, that at any rate the plaintiffs should be allowed to take as much water as is reasonable for the irrigation of their lands.

In our opinion, the second contention is sound and must prevail. Article 47 says that a person bound by an order respecting the possession of property made under Act X of 1872 must sue to recover the property comprised in such order within three years from the date of that order. Now, the order of the 13th August, 1879, was not an order declaring one of the parties to be entitled to possession of property. No possession was given to either of the parties. The present suit, also, is not one to recover any property, but it is a suit for a declaration of plaintiffs' right to put up dams and to irrigate their lands by means of such dams. We have referred to Act X of 1872 and the order of the Joint Magistrate, and we think that Article 47 has no application to the present case.

The remaining contentions, however, must be decided adversely to the plaintiffs-appellants.

The judgment of the District Judge contains sufficient indications that he found, and in our opinion properly found, that the plaintiffs had not made out any of the rights claimed.

The question of prescriptive right has reference to section 26 of the Limitation Act. It has been found as a fact by the District Judge that the plaintiffs did not peaceably, as of right and without interruption, enjoy the right to irrigate their lands for twenty years ending within two years next before the institution of the suit. The history of the dispute between the

parties since the year 1879 precludes the possibility of any acquisition of the right claimed under section 26. Since the year 1884 temporary arrangements were in force, and in 1900 there was a fresh climax and a fresh Magisterial order. The judgment of the lower Appellate Court is full and decisive on this part of the case.

With regard to the questions of custom and vicinity, the District Judge has not expressed himself so fully. The plaintiffs claim to have acquired a customary right by long user before the year 1879, and they also rely on their natural right as upper riparian owners, in other words, on their right by vicinity or vicinage. They can acquire such an easement apart from the mode of acquisition mentioned in section 26 of the Limitation Act: see *Rajrup Koer* v. *Abul Hossein*(1). But if they rely on custom, they must prove that it was ancient, continuous, peaceable, reasonable, certain, compulsory and consistent with other customs regarding the right to irrigate from the river Banka. We need hardly say, that proof of a customary easement is immensely more difficult than proof of an easement within the provisions of section 26 of the Limitation Act. The plaintiffs claim a right to the *extraordinary* use of water, and they must not, therefore, interfere with the rights of the lower riparian owners: *Miner* v. *Gilmour*(2), *Swindon Water-works Company* v. *Wilts and Berks Canal Navigation Company* (3), *McCartney* v. *Londonderry and Lough Swilly Railway Company* (4). Any such interference would be unreasonable and inconsistent with the rights of others. It can be allowed only in pursuance of some arrangements arrived at between the parties interested or as entailed by the successful acquisition of a prescriptive right. This was the view adopted in *Kalu Khabir* v. *Jan Meah*(5), where, however, the plaintiffs were found to have acquired by prescriptive use the right they claimed. The learned Judges in the same case pointed out the *ratio decidendi* in *Debi Pershad Singh* v. *Joynath Singh*(6). The plaintiffs claim an unrestricted right to

(1) (1880) I. L. R. 6 Calc. 394, 403.
(2) (1858) 12 Moo. P. C. 131, 156.
(3) (1875) L. R. 7 H. L. 697.
(4) [1904] A. C. 301.
(5) (1901) I L. R. 29 Calc. 100, 110.
(6) (1897) I. L. R. 24 Calc. 865; L. R. 24 I. A. 60.

1908

ESHAN CHANDRA SAMANTA v. NIL MONI SINGH.

construct dams, and to impound as much water as they may find convenient, and they merely concede that the defendants may take the surplus, if any, that escapes through the outlets left in the dams put up from time to time. They have no such common-law right by reason of vicinity; they do not set up any arrangement or contract with the lower riparian owners: and they supply no materials on the basis of which the Court might determine what proportion of water should be diverted for their use without prejudicing the admitted rights of the defendants.

Applying these principles to the judgment of the District Judge, we observe that in the first part of that judgment he has correctly stated the plaintiffs alleged three-fold title. He then sums up the effect of the evidence and places reliance on the case we have cited, *Kalu Khabir* v. *Jan Meah* (1). The meaning of the District Judge is quite plain though he might have expressed himself more clearly. He concludes by saying: "It is impossible on such evidence to hold that the plaintiffs have succeeded in establishing the right, which they claim." This is a finding on the entire case, and, sitting in second appeal, we cannot disturb it.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

R. D. B.

(1) (1901) I. L. R. 29 Calc. 100, 110.