

FULL BENCH.

Beofre Jenkins C.J., Harington, Stephen, Mookerjee and Holmwood JJ.

MUNSHI MISSER

v.

BHIMRAJ RAM.*

1913
Jan. 14.

Easement—Flow of water over servient tenement in a definite channel, if necessary for acquiring right of easement.

The fact that water flows over the surface of the servient tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement.

Bidhoo Bhusan Palit v. Beny Madhab Mazumdar (1) overruled.

THE reference to Full Bench by Doss and Richardson JJ. was as follows:—

“The plaintiffs instituted this suit nominally for the purpose of recovering possession of a strip of land 31 cubits in length and 1½ cubits in width, but substantially for the purpose of preventing the defendants from exercising in respect of the land certain easements which they claim. Those easements are—(i) to maintain a roof which projects over the land, and to discharge rain water from this roof; (ii) to discharge water into the land through a drain, which ends in a wall standing on the boundary of the defendants’ land, contiguous to the land to which the dispute relates.

In the Court of first instance the learned Munsif found that the defendants had acquired these easements, and dismissed the suit.

In the Court of Appeal below the learned District Judge confirmed the Munsif’s decree in respect of the over-hanging roof, but as regards the drain he modified the decree and directed that the drain should be closed.

The defendants have appealed to this Court from the decree of the District Judge, so far as it is adverse to them. The plaintiffs have not appealed, and we have therefore to deal only with the second of the two easements claimed.

* Reference to a Full Bench in Appeal from Appellate Decree, No. 1931 of 1908.

As to that the learned District Judge makes the following observations :—

“But, accepting the case of the defendants in full, I think that the plaintiffs ought to have succeeded in respect of the drain. Three out of the four witnesses of the defendants admit that the water which flows from this drain does not flow in any defined channel; and the fourth witness, who says that it does flow in a channel which it has scoured out, differs from all the other witnesses in saying that he has seen water flowing from the drain within the past year. This is nobody’s case, and I do not think his evidence is very trustworthy. In view of the ruling *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1), the defendants cannot have the right to let their water pass in an undefined channel over the land of the plaintiffs. Again, it is very doubtful on the facts whether the defendants succeeded in proving that the right to let the water flow through the plaintiffs’ land had been exercised within two years of the suit. In my opinion the suit ought to have been decreed with respect to the drain only.”

These observations raise two questions: (i) whether the easement can be acquired under law, and (ii) whether in fact it has been acquired, and is a right which the defendants are entitled to exercise.

As to the first question, we think with great respect that the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1), on which the District Judge relies, is in conflict with earlier cases, and was wrongly decided.

In reference to certain cases to which we were referred at the hearing, we may point out that there is a large distinction between a servient tenement, which has to bear the burden of receiving water discharged from a dominant tenement, and a dominant tenement which, as against the servient tenement, is entitled to the uninterrupted flow of water in a defined artificial channel.

We may refer to the following cases in support of our opinion that there may be an easement of the nature of that here in question:—*Kopil Pooree v. Manick Sahoo* (2), *Imam Ali v. Poresh Mundul* (3), *Bala Bin Keshav Bava v. Maharu* (4).

In view of these cases, we think that the question, whether the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1) was correctly decided, should be considered by a Full Bench. Should the Full Bench agree with us, the case should, we think, be remanded to the lower Appellate Court to be re-heard with reference to the question whether the defendants have, in fact, the right which they claim. In connection

(1) (1903) 8 C. W. N. 244.

(2) (1873) 20 W. R. 287.

(3) (1882) I. L. R. 8 Calc. 468.

(4) (1895) I. L. R. 20 Bom. 788.

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with that question we may observe that an easement may be acquired otherwise than under the provisions of the Limitation Act : *Rajrup Koer v. Abul Hossein* (1), *Charu Surnokar v. Dokouri Chunder Thakoor* (2). The difficulty, however, which necessitates this reference, having arisen in an appeal from an appellate decree, the whole appeal must be referred to a Full Bench for disposal under rule 2 of Chapter V of the Rules of the High Court, Appellate Side."

The defendants, Munshi Misser and others, were the appellants, and the plaintiffs, Bhimraj Ram and others, were the respondents in the appeal to the High Court.

Babu Lakshmee Narayan Singh (with him *Babu Ganesh Dutt Singh*), for the appellants. My right is one of discharging water on my neighbour's land, irrespective of the channel through which it flows. There may be a right of easement, though there is no defined channel. The water coming out of my premises passed through an artificial drain. The finding is that I enjoyed this right over 20 years.

[JENKINS C.J. But there is no finding as to your enjoyment of right two years before suit.]

Yes, there is none. The point was discussed before the referring Judges.

[JENKINS C.J. But there must be a finding as to enjoyment within two years before suit, and you must also show a lost grant or the origin of your right.]

But we may suppose that the case was under the common law, and not under section 26 of the Limitation Act.

All decided cases are in my favour, the only exception being *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (3).

Babu Umakali Mukherji, for the respondents, admitted that he could not resist the point of law, and

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

(2) (1882) I. L. R. 8 Calc. 956.

(3) (1903) 8 C. W. N. 244.

referred to Peacock on Easements, pp. 118 and 119, and *Bidhoo Bhusan's case* (1). He submitted that, even if the point were decided against him, the case should be remanded for findings of fact as to the period of enjoyment of the alleged right.

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The judgment of the Court (JENKINS C.J., HARINGTON, STEPHEN, MOOKERJEE and HOLMWOOD JJ.) was delivered by

JENKINS C.J. The fact that the water flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of an easement. We, therefore, think that the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* (1) was not correctly decided. We must accordingly remand the case to the lower Appellate Court, in order that it may be determined, *first*, whether a right has been acquired to discharge water into the servient tenement through a drain, which ends in a wall standing on the boundary of the defendants' land, and, *secondly*, whether, having regard to the provisions of section 26 of the Limitation Act, the present suit lies in respect thereof, and to dispose of the case accordingly.

The costs in the High Court, including the costs of the reference, will abide the result.

S. M.

Case remanded.

(1) (1903) 8 C. W. N. 244.