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[78] We reverse the decree of the lower appellate Court and remand the appeal for re-trial. Costs to abide the result.

PARSONS, J.:—In deciding this appeal it was incumbent on the Assistant Judge to have determined the facts for himself from the evidence. He ought not have held the appellants bound by the facts found by the Subordinate Judge, merely because they took no objection to the decree. That decree was entirely in their favour; the facts found were in the opinion of the Subordinate Judge also in their favour. Moreover, the presumptions drawn by the Assistant Judge are so opposed to those drawn by the Subordinate Judge from the same facts that they cannot be accepted without some grounds being shown to justify them. None such appears in his judgment. For instance, unless there is some evidence that the rice paid bore some proportion to the produce of the land in suit, the presumption that the rice was the produce of the land in dispute appears hardly sustainable, while the facts that the rice was only paid during Jaya's life-time and that Bhagoji always paid the assessment have not been considered at all. Again the Assistant Judge says that the second defendant is not entitled to plead his purchase for valuable consideration, as the fact of the lands being entered in Jaya's name was sufficient to put him on enquiry as to her title. This statement is not correct, since "the fact of the entry of a person's name in the Collector's books does not of itself establish that person's title or defeat the title of another"—*Fatma* v. *Darya Saheb* (1). It has never yet been held that an entry in the Collector's books is of the same effect as registration. I concur, therefore, in reversing the decree and remanding the appeal for a rehearing.

Decree reversed and case remanded.

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13 B. 79.

[79] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

GORDHAN DALPATRAM (*Original Plaintiff*), *Appellant v.* CHOTALAL HARGOVAN, A MINOR BY HIS GUARDIAN BAI PARSAN (*Original Defendant*), *Respondent.** [27th March, 1888.]

Easement—Adjoining buildings—Side wall.

A built a house in the rear of B.'s house. There was a passage between the houses. Over the passage A. built a room connecting the two houses. This room corresponded with B.'s first floor, and had an open terrace on the top of it. The structure by which A. connected the two houses was quite independent of B.'s house. It was supported throughout by wooden pillars adjoining B.'s wall, which the cross-beams did not penetrate or touch. But the structure was built so close to B.'s wall, that the latter served as a side wall to the room. This state of things had existed for upwards of twenty years.

Held, that A. did not acquire any easement over B.'s wall by merely building on his own ground close to B.'s house, even though A. had built no side wall to his own house, but trusted to B.'s keeping up his wall to shelter his (A's) house on that side.

SECOND appeal from the decision of A. Shewan, Assistant Judge of Ahmedabad, in appeal No. 208 of 1883.

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* Second Appeal, No. 58 of 1886.

(1) 10 B. H. C. R. 187.

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The plaintiff sued to recover possession of a wall between his premises and defendant's, alleging that the wall in question was his sole property, that defendant had made certain cavities in it, such as a recess and a niche, and had converted the top of the wall into a seat verging on her terrace. The plaintiff, therefore, prayed to have the cavities and the seat removed and the wall restored to its original condition.

The defendant replied (*inter alia*) that the wall in dispute was common property, that the cavities therein were ancient, that the alterations at the top of the wall caused no injury, that the wall had been a protection to her premises for a very long period, and that she had acquired a prescriptive right to such protection.

The Subordinate Judge found that the wall was the exclusive property of the plaintiff, that the cavities were not ancient, and that the defendant had acquired no right of easement over the wall. He, therefore, passed a decree in plaintiff's favour and directed the defendant to remove the cavities as well as the terrace seat, and to restore the wall to its original condition.

[80] This decree was modified, in appeal, by the Assistant Judge. He found the position of the two houses to be as follows :—

"It is perfectly clear that plaintiff's house was standing by itself originally, and that defendant's was built on to it. There was formerly and is now a passage between the two houses. Over this passage a room was made connecting the two houses. This room corresponded with plaintiff's first floor, and it had an open terrace on top of it, which the sloping roof of plaintiff's second floor room must have overhung to some extent. The structure by which defendant or some predecessor connected the two houses is quite independent of the wall. It is supported throughout on wooden pillars adjoining the wall in dispute, which the cross-beams do not penetrate. The structure must have been made after the wall was built ; otherwise it was built with no side wall for the room. That of course is absurd. It is quite clear that the structure was built after the wall in dispute was standing, advantage being taken of the latter to provide a side wall to the room above the passage."

The Assistant Judge found that the wall in question belonged to the plaintiff, but that the defendant had by long user acquired a right over plaintiff's premises to the extent that they should provide the side wall of her first floor room and a retaining wall (2 feet 4½ inches high) to the terrace above the room. He agreed with the Subordinate Judge in holding that the defendant had not established her right to make any cavities or other alterations in the wall. He, therefore, varied the lower Court's decree by declaring that the plaintiff's ownership of the wall in dispute was subject to the right of defendant to have the side wall of her room above the passage, and a retaining wall 2 feet and 4½ inches high to the terrace above the room provided by the side wall of plaintiff's house.

Against this decision the plaintiff appealed to the Hight Court.

Rav Saheb *Vasudev J. Kirtikar*, for the appellant.—It is found by the Courts below that the wall in question is not common property, but belongs exclusively to the plaintiff. The defendant's house is, no doubt, built close to the wall, but it is quite independent **[81]** of the wall. The defendant cannot, therefore, acquire any easement over the wall. She cannot prevent us from doing what we like with our own wall. Even if this were a party wall—one standing partly on our land and partly on

defendant's, we would have the right to pare away the portion of the wall on our side so as to weaken the wall on the other, and destroy what was the common property of both—*Cubitt* v. *Porter* (1). The easement claimed by the defendant is one not known to the law. It is a novel easement. Her right to make cavities in the wall is not established. The posts and beams of her house do not touch or penetrate our wall. She does not, therefore, acquire any easement whatever over our premises. Refers to Gale on Easement, p. 513; and Goddard on Easements, p. 184.

Goverdhan M. Tripati, for the respondent.—The present case comes from Gujarat, where the right of privacy is recognized. The wall in dispute has formed the side wall of our house for more than twenty-five years. Its destruction means an invasion of our privacy. Our long uninterrupted user is proof of our prescriptive title, and gives us a right of easement over our neighbour's premises. The definition of easement as given in the Easement Act as well as in the present Limitation Act is comprehensive enough to include a right of the kind we claim. Refers to *Parbutty Nath Roy Chowdhry* v. *Mádho Paroe* (2) and *Chundee Churn Roy* v. *Shib Chunder Mundul* (3). These cases show that the word *easement* has much more extensive meaning under the Indian law than the word bears in the English law, and would include even a *profit-a-prendre*. The easement we claim, though it may be a novel one, falls within ss. 3 and 26 of the Limitation Act XV of 1877.

JUDGMENT.

PARSONS, J.—Both the lower Courts have found that the wall in question is the property of the plaintiff and that the defendant has recently and unlawfully made in it cavities, such as a niche and a recess, and has placed a seat upon it. The Subordinate Judge found that the defendant had acquired no right of easement in respect of the wall, since she had not shown that she was entitled [82] to vertical or lateral support from it for her own house, which is supported solely by pillars and cross beams placed on and over her own ground. The Assistant Judge finds also that the defendant's house is quite independent of the plaintiff's wall, that it is supported throughout on wooden pillars adjoining the wall in dispute, and that the cross beams do not penetrate or touch the wall. Nevertheless, he is of opinion that she has acquired a right over the plaintiff's premises to the extent that they shall provide the side wall of her first floor room and a retaining wall, 2 feet 4½ inches high, to the terrace above this room. We are unable to concur in this decision. By merely building her house on her own ground close to the wall of the plaintiff's house, which it does not touch, but leaves entirely undisturbed and uninterfered with, the defendant can have acquired no easement over the plaintiff's premises. If she had built her house against the wall and so used it for supporting her own house, or if she had fixed her beams and posts in the wall, as was done in *Balabawa* v. *Sitaram Shastri* (4), or if she had used the top of the wall as a terrace or if she had driven nails in it, as in *Hawkins* v. *Willis* (5), she might have acquired an easement over it; but by merely building on her own ground, close to the plaintiff's house, she can have acquired no right over the wall, even though she may have built no side wall herself to her own house, but trusted to the plaintiff's keeping up his wall to shelter her house on that side. We think the

(1) 8 B. and C. 264. (2) 3 C. 276. (3) 5 C. 945.
(4) Printed Judgments for 1884. p. 178. (5) 2 Wils. 173.

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Subordinate Judge has correctly appreciated the law governing the case, and we amend the decree of the Assistant Judge by striking out so much of it as declares that the plaintiff's right of ownership is subject to any right on the part of the defendant. Costs throughout on the defendant.

Decree reversed.

13 B. 83.

[83] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

PARSHA AND OTHERS (*Original Plaintiffs*), *Appellants v.* LAGMYA SHAN AND OTHERS (*Original Defendants*), *Respondents.**
[3rd April, 1888.]

Jurisdiction—Bombay Hereditary Offices' Act (III of 1874), s. 18—Suit by village Mahars *to recover* aya*—Declaratory suit.*

Section 18, (1) as much as s. 25 of the Bombay Hereditary Offices' Act (III of 1874) excludes by direct implication any right on the part of the Civil Courts to declare that persons are eligible to serve as hereditary officers under the Act.

Khando Narayan v. *Apaji Sadashiv* (2) and *Chinto Apaji* v. *Lakshmibai* (3) followed.

Ramchandra Dabholkar v. *Anant Sat Shenvi* (4) distinguished.

The plaintiffs sued, as *vatandar Mahars* of certain villages, to establish their right to receive the *aya* attached to their office, as against defendants, who were *the vatandar Mangs* of the same villages, and who claimed the right to receive the *aya* equally with the plaintiffs.

Held, that the suit was not cognizable by a Civil Court.

[F., 25 B. 186; R., 29 B. 480 (504)=7 Bom. L.R. 497.]

THIS was a second appeal from the decision of E. M. H. Fulton, Acting District Judge of Belgaum, in appeal No. 58 of 1885 of the District file.

[84] The plaintiffs—four in number—sued for a declaration of their right to receive *aya* due to them as village *Mahars* as against defendants Nos. 1 to 5, and also for an injunction restraining defendants Nos. 6 to 15 from paying *aya* to defendants Nos. 1 to 5. The plaintiffs alleged that

* Second Appeal, No. 125 of 1886.

(1) Section 18:—When all or any of the property of a village watan of lower degree than that of Patel or Kulkarni consists of a right to levy in money or kind directly from individuals, it shall be lawful for the Collector, on the application of any person interested, to cause the nature and extent of such right and of the duties to be performed, and the persons, families, or classes liable to make payment and to perform the duties, to be defined in writing by a Panchayat of five persons; whereof two shall be appointed by the villagers, two by the watandars, and one, who shall be Sir Panch, by the Collector.

The decision shall be in accordance with the opinion of the majority of the Panchayat, provided that in case the villagers or the watandars fail to nominate members within seven days, the Collector shall appoint such members as may be required to constitute a Panchayat of five:

Provided also that, in case the Panchayat do not come to a decision within seven days from the appointment of the Sir Panch, the Collector may himself pass a decision.

The decision of the Panchayat or of the Collector, as above provided, shall be final and binding on all persons or classes whose rights, duties or liabilities have been submitted to such decision.

(2) 2 B. 370. (3) 2 B. 375. (4) 8 B. 25.