

1890

JAN. 21.

APPEL.

LATE

CIVIL.

14 B. 452.

JUDGMENT.

[454] BIRDWOOD, J.—A partition was made of the joint property of the plaintiff and the defendant in 1865. Ten years afterwards, a wall was built between the divided lands at the joint expense of the parties; and a drain was left in the wall for the passage of water from the plaintiff's land to the defendant's land. The defendant has lately stopped the flow of water by this drain; and the suit is brought for an injunction to restrain him.

The Subordinate Judge has awarded the claim; but the Assistant Judge has reversed his decree, mainly on the ground that the plaintiff has not shown that the water must of necessity be carried off by the drain in the wall, and that there was no express agreement for the water to be so carried off. But the plaintiff would be entitled to the easement claimed by him if he could show either that it was necessary for the enjoyment of his share of the property, or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect. That would be the test applicable under the Indian Easements Act, 1882; and a similar test has been applied in parts of India where the Act is not in force. (See *Amutool Russool v. Jhoomuch Singh* (1), *Charu Surnokar v. Dokouri Chunder Thakoor*, and *Ratanji v. Edalji* (3). In *Polden v. Bastard* (4) Erle, C.J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law."

We cannot treat the Assistant Judge's finding as to the necessity of the easement claimed in this case as satisfactory, as he gives no reasons for it. Such a finding is not binding on a Court of second appeal—*Kamat v. Kamat* (5).

The decree of the lower appellate Court is reversed, and the case remanded for a rehearing on the merits with reference to the foregoing remarks. Costs to abide the result.

14 B. 455.

[455] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

SADASHIV RAYAJI (*Original Plaintiff*), *Appellant v. MARUTI VITHAL AND OTHERS* (*Original Defendants*), *Respondents*.*

[11th February, 1890.]

The Indian Oaths Act (X of 1873), s. 9—Vakil—Agent—Agent holding a power of attorney, authorizing him to act and appear for a party to a suit—Vakil's or agent's authority to terminate suit by an offer to be bound by the oath of the opposite party.

An agent, holding a power of attorney authorizing him to act and appear for a party to a suit, cannot bring the suit to a close by offering to be bound by the

* Appeal from Order No. 30 of 1889.

(1) 24 W. R. C. R. 345.
(4) L.R. 1 Q. B. 156, (161).

(2) 8 C. 956.

(3) 8 B. H. C. R. O. C. J. 181.
(5) 8 B. 368.

oath of the opposite party in a particular form. Nor can a pleader so bind his client.

Under the Indian Oaths Act (X of 1873) no person but the party himself can make such an offer as is contemplated in s. 9.

[F., 5 Ind. Cas. 514=20 M.L.J. 386=7 M.L.T. 43; R., 85 P. R. 1903=143 P.L.R. 1903.]

THIS was an appeal from an order of remand made by Rav Bahadur N. G. Phadke, First Class Subordinate Judge (A. P.) of the Satara District, in appeal No. 340 of 1888.

The plaintiff sued to recover possession of certain land. Defendants Nos. 2 and 3 disputed the plaintiff's title to the land. Defendant No. 2 was represented by an agent holding a power of attorney, which was in the following terms:—

"I, Dhondo Yeshvant Kulkarni, authorize Abaji Narayan Kulkarni to appear and act on my behalf in the matter of the suit brought against me by Sadaji Rayaji Kulkarni in the Civil Court at Tasgaon, in respect of land. He has every authority to act in that suit, on my behalf, in any way in which I might act, if present, and to give replies and to receive or take and give copies of papers therein on my behalf. I shall be bound by the replies and answers that he will give in this matter, and the statements that he will make in the same."

In the course of this suit an application (Ex. 42) was presented to the Court signed by defendant No. 3, and by Abaji Narayan, the agent of defendant No. 2. It was to the effect that they were willing to waive their defence, and deliver up possession of the land in dispute, provided the plaintiff took an [456] oath in a particular manner. This application was also signed by the pleader of both defendants.

The plaintiff took the required oath, and the Subordinate Judge passed a decree awarding the land to the plaintiff.

Against this decree the defendant No. 2 appealed to the District Court, contending that his agent had no authority to make an offer, on his behalf, to be bound by the oath of the opposite party.

The District Court allowed this contention, and, reversing the decree of the Subordinate Judge, remanded the case for a trial on the merits.

Against this order of remand the plaintiff appealed to the High Court.

Ghanasham Nilkant Nadkarni, for appellants:—Defendant No. 2 is bound by the acts of his agent. The power of attorney authorizes the agent to do every act which defendant could have done in connection with this suit. The agent has not exceeded his authority in this case. The defendant is, moreover, bound by the acts of his pleader. His pleader has signed the application (Ex. 42) on his behalf. And it is not alleged that, in so doing, his pleader acted fraudulently. If a pleader can withdraw from suit, he may also make an offer, on his client's behalf, to be bound by the oath of the opposite party—*Jagonnathdas Gurabakshdas v. Ramdas Gurubakshdas* (1); *Carrison v. Rodrigues* (2).

Daji Abaji Khare, for respondent:—The defendant's agent was not a recognized agent within the meaning of s. 37 of the Code of Civil Procedure. The agent did not hold a general power of attorney. His authority was confined to the purposes of this particular suit. His power of attorney did

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APPEL-

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BIRDWOOD, J.—An application No. 42, signed by the pleader of defendants Nos. 2 and 3, by an agent specially appointed by [457] defendant No. 2 to appear and act for him in the case, and by defendant No. 3 in person, was presented to the Court of first instance, under s. 9 of Act X of 1873. In the application it was stated that defendants Nos. 2 and 3 offered to be bound by the evidence of the plaintiffs if given on oath in a particular form. The plaintiffs accordingly gave their evidence in the required form, and a decree was thereupon made in their favour. From this decree the defendant No. 2 appealed; and the lower appellate Court reversed it, on the ground that the agent of defendant No. 2 had acted beyond the scope of his authority in signing Ex. No. 42, and it remanded the case for a fresh decision on the merits after evidence for defendant No. 2 had been taken. From this order the plaintiffs have appealed, and it is argued, on their behalf, that defendant No. 2 was bound by the acts of his pleader and his agent.

We think that the lower appellate Court has rightly construed the power of attorney held by the agent of defendant No. 2. In terms, the agent was empowered to act in the suit in any way in which defendant No. 2 might have acted; but the authority so given must be construed with reference to the special purpose for which the power was granted: see *Esdale v. La Nauze* (3); and *Juda v. Addi Raja* (1). The agent was to act and appear for defendant No. 2 in the suit. No extraordinary power was conferred upon him. The general words implying an authority to do all that defendant No. 22 himself could do can only mean that the agent could do all that was necessary for the prosecution of the suit in the ordinary way. He could not have entered, for instance, into an agreement with a pleader to pay him more than a reasonable remuneration—*Keshav Babuji v. Narayan* (4). Nor could he have brought the case to a close in any special manner, as, for instance, by joining in a reference to arbitration (*cf. Thakur Pershad v. Kalka Pershad* (5)), or by offering, as he did, to be bound by the oath of the opposite party given in a particular form. Nor could the pleader so bind defendant No. 2, for his powers were no larger than those of the agent.

[458] Again, it may well be doubted whether, under Act X of 1873, any person but the party himself can make such an offer as is contemplated in s. 9. The procedure there laid down is of a very special kind. Its efficacy is presumably dependent on the circumstance that the true merits of a case are better known to the parties than to any one else. Its adoption is an appeal to the conscience of the party to whom the offer is made; and such an appeal can rightly be made only by a person personally interested, whose confidence in the justice of his case is based on his own knowledge of its merits. The right to make the offer cannot be properly transferred to another person whose interests are not at stake, and whose knowledge of the facts would ordinarily be derived from the instructions he might have received from the party. That, we think, must be the right construction to put upon the Act. Of course, if a party specially authorizes his pleader, or an agent, to make an offer to be bound

(1) 2 M.H.C.R. 177.

(3) 1 Y. & Col. Exch. 394.

(4) 10 B. 18.

(2) 3 B.L.R. App. 15.

(5) 6 N. W. P. R. 210.

by a particular oath, he might be estopped from retracing the step he had taken if his offer were acted on; but, in the present case, it is not contended that either the pleader or the agent of defendant No. 2 was so authorized.

We, therefore, confirm the order of remand, with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Telang.

FAKI ABDULLA AND ANOTHER (*Original Defendants*), *Appellants v.*
BABAJI GUNGAJI (*Original Plaintiff*), *Respondent.**
[21st February, 1890.]

Limitation Act (XV of 1877), arts. 142, 144—Onus probandi.

In cases falling under art. 142 of the Limitation Act (XV of 1877) the plaintiff must, at the outset, show possession within twelve years, and cannot rest merely on a proof of title, while in cases falling under art. 144 the plaintiff may rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than twelve years before suit.

[459] The plaintiff sued to recover possession of certain land, together with mesne profits until recovery of possession, alleging that he had brought the land and obtained possession, and that his possession was obstructed by the defendants.

Held, that the suit fell under art. 142, and not 144, of the Limitation Act (XV of 1877), and that it was for the plaintiff to show that he, or those under whom he claimed, had been in possession within twelve years before suit.

Rao Karan Singh v. Raja Bakar Ali Khan (1) and Mohima Chunder Mozoomdar v. Mohesh Chunder Neogi (2) explained.

[F., 14 M. 96; Appr., 18 C. 513; R., 27 B. 43 (66); 35 B. 79=12 Bom. L. R. 956=8 Ind. Cas. 639; 2 L. B. R. 56; 5 Bom. L. R. 225 (229); 10 Bom. L. R. 571; 10 Ind. Cas. 554=5 S. L. R. 49; 2 N.L.R. 32; 65 P. R. 1901=105 P.L.R. 1901; 123 P. W. R. 1908; U. B. R. (1897—1901) 461.]

APPEAL from an order of remand made by Rao Bahadur G.A. Mankar, First Class Subordinate Judge of Thana, A. P., in appeal No. 355 of 1887 of the District File.

The plaintiff sued, in 1886, to recover possession of the land in dispute, alleging that he had purchased it from one Vithal Devasthale in 1835; that immediately after the purchase he had cut and stored 15,000 bundles of grass on the land; that he was prevented from cutting more by the defendants, who cut 15,000 bundles of grass, and carried them away, and also those cut by the plaintiff. The plaintiff claimed the value of 30,000 bundles of grass, together with mesne profits up to delivery of possession.

The defendants pleaded that the plaintiff's vendor had sold the land in dispute to defendant No. 2 about eighteen years before suit; that defendant No. 2 had been in possession ever since the date of the sale; and that the plaintiff had no title to the land in dispute.

The Subordinate Judge found that the sale to defendant No. 2 was proved, and that he had been in possession for more than twelve years.

* Appeal from Order No. 3 of 1889.

(1) 5 A. 1 = 9 I. A. 99.

(2) 16 C. 473 = 16 I. A. 23.