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We must, therefore, reverse the decree, except as regards the third defendant, as to whom it must be confirmed, and send back the case for a fresh decision as regards the other defendants. Appellant to pay the third defendant his costs. The other costs of the appeal to abide the result.

Decree partially reversed.

17 B. 745.

17 B. 741.

[745] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

NAIK PARSOTAM GHELA (*Original Plaintiff*), *Appellant v.* GANDRAP FATELAL GOKULDAS (*Original Defendant*), *Respondent.**
[17th October, 1892.]

Easement—Right of way—Prescription—Prescriptive right of the defendant to have branches of his trees overhanging the plaintiff's land—Right of the defendant to go on to the plaintiff's land to collect the fruit of the trees distinct from and not accessory to the right to have the branches overhanging.

The defendant having acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, the lower Courts held that he had a right to go on to the plaintiff's land for the purpose of gathering the fruit of trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it an "accessory" right to enjoy the profits of the branches in the best way possible.

Held, (reversing the lower Courts' decree) that the right to go on the plaintiff's land to pick the fruit off the branches was perfectly distinct from the prescriptive right to have the branches overhanging the land, and could not be said to be accessory to the latter right in the sense of being within the limits of that right.

SECOND APPEAL from the decision of Venkatrao R. Inamdar, Acting Joint Judge of Ahmedabad.

The plaintiff sued for (1) a declaration that the defendant was not entitled to enter upon the plaintiff's land for the purpose of inspecting his own wall recently erected by him and of taking the fruit of his trees, the branches of which were hanging over the plaintiff's land, and for (2) an injunction restraining the defendant from going upon the land for the aforesaid purposes.

The defendant contended that he had acquired by long user a right of way over the land in question, and that there was no other passage by which he could go and inspect his wall and take the fruit of the trees.

The Subordinate Judge (Rao Saheb N. N. Nanavati) made a decree in the following terms:—

"The defendant has no right to enter the plaintiff's land at all times and on all occasions except during the fruit season and when the necessity arises of removing the branches or wood or repairing the wall, &c., and that the defendant do enter the plaintiff's land [746] at such times with plaintiff's permission which the plaintiff should not refuse."

Against the above decree the plaintiff appealed to the District Court, and the defendant preferred cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

The Acting Joint-Judge found on the issues that (1) the defendant had a right to pass over the plaintiff's ground, and that (2) with respect to the

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nature of that right there were "no sufficient materials on the record to prove the absolute right alleged by the defendant."

The Judge, therefore, confirmed the decree, observing: —

"The trees in question are very old ones, and their branches have been extending far over the plaintiff's land for upwards of forty or fifty years. * * His predecessors in title were entitled to prevent the extension of these, branches on the plaintiff's land. This right carried with it the accessory right to enjoy the profits of the branches in the best way possible, and this right could not be enjoyed except by passing over the plaintiff's land when necessary. In this view I think that the defendant is entitled to pass over plaintiff's ground for the purpose of exercising the above right, and for inspecting his walls, &c., on that side, and such other rights as might be necessary. * *."

The plaintiff preferred a second appeal.

Chimanlal H. Setalvad, for the appellant (plaintiff).—We allowed the branches of the defendant's trees to hang over our land, because they caused no inconvenience to us; but our allowing the branches to overhang cannot give to the defendant the right to come on our land to pluck fruit and inspect his wall. The wall was built by the respondent on his own land so late as 1882. The wall belongs to him exclusively, and if he wishes to inspect it, he may do so without coming on our land.

Rao Saheb *Vasudev Jagannath Kirtikar* (Government Pleader), for the respondent (defendant).—The lower Courts held that we are entitled to go on the plaintiff's land as an accessory right to enjoy our property. If we have acquired a right—and the lower Courts have found that we have—to have our branches overhanging [747] the plaintiff's land, then we say that we have also acquired the right of going over his land to remove fruit from the overhanging branches—*Esubai* v. *Damodar* (1). In fact, we claim a right of way over the appellant's land.

User amounting to a license would be in the nature of an easement, though it cannot amount to an easement strictly so called.

JUDGMENT.

SARGENT, C. J.—Both the Courts below have found that the defendant had acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, and that the evidence failed to establish any prescriptive right of way in defendant over the plaintiff's land; but they have held that he has a right to go on plaintiff's land for the purpose of gathering the fruit of the trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it as "an accessory" the right to enjoy the profits of the branches in the best way possible, which could not be done except by passing over the plaintiff's land. We cannot agree in this conclusion. The right to go on the land of the plaintiff to pick the fruit off the branches is perfectly distinct from the prescriptive right to have those branches overhanging the land, and cannot be said to be accessory to the latter right in the sense of being within the limits of that right, however useful and even necessary it might be to the defendant in order to obtain the full enjoyment of the profit of the branches so overhanging.

As to the right of the defendant to go on the land to repair the wall, it is not apparent on what ground the lower Court of appeal has granted it. The wall is not a common wall or a wall which plaintiff is bound to

(1) 16 B. 552.

keep in repairs, and if defendant wishes to repair it he must do so without trespassing on his neighbour's land.

We must, therefore, reverse the decree of the Court below and make a declaration as prayed for, and restrain the defendant by injunction from entering the plaintiff's land for the purposes mentioned in the plaint. Appellant to have his costs throughout.

Decree reversed.

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[748] CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Telang.

In re RATANLAL RANGILDAS.* [17th October, 1892.]

Criminal Procedure Code (Act X of 1882), ss. 517 and 523—Property seized by the police pending an inquiry or trial under a search-warrant issued by the Court—Magistrate's power to deal with such property where no offence is committed.

Section 523 of the Code of Criminal Procedure (Act X of 1882) does not apply to property which is produced before a Court in the course of an inquiry or trial under a search-warrant issued by itself under s. 96 of the Code. To such property s. 517 alone would apply; and if no offence is found in respect thereof, the Court can make no order. The property must be given back into the possession from which it came.

The scope of s. 523 must be confined to property seized by the police of their own motion in the exercise of the powers conferred on them by law: for instance, under ss. 51,54,164 or 165 of the Code of Criminal Procedure.

Per TELANG, J.—Under s. 523 of the Code of Criminal Procedure, a Magistrate is bound to institute an inquiry before making any order touching the right, not of property, but of possession to the property, seized by the police.

[**N.F.**, 12 Cr.L.J. 108=9 Ind. Cas. 634=5 S.L.R. 4; **F.**, Rat. Unr. Cr. Cas. 981 (982); **R.**, 22 B. 844 (846); 28 B. 314 (325); 29 M. 375 (377)=4 Cr.L.J. 233; 14 C.P. L.R. 60 (61); L.B.R. (1893—1900) 324 (326); **Doubted**, 26 B. 552 (557).]

APPLICATIONS under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The facts of the case were as follows:—One Bai Gulab filed a complaint in the Court of the First Class Magistrate of Surat against Itcharam Rasikdas and Utamram Itcharam, charging them with criminal breach of trust in respect of certain ornaments and jewellery which had been entrusted to them for sale.

In execution of a search-warrant issued by the Magistrate under s. 96 of the Code of Criminal Procedure (Act X of 1882) the police seized certain jewellery which was in the possession of one of the applicants, Ratanlal Rangildas.

The other applicant, Itcharam Valabh, made over to the police, as soon as they appeared with a search-warrant, certain gold ornaments which he alleged had been pledged with him by one of the accused.

The Magistrate, after trying the case, discharged the accused, finding, on the evidence before him, that there had been a trust, but no criminal breach of trust committed by the accused.

[749] As regards the property produced seized by the police, the Magistrate in the course of the trial, and without holding any inquiry, passed an order, under s. 523 of the Code of Criminal Procedure, that it should be delivered to the complainant.

* Criminal Review No. 313 of 1892.