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MOTILAL
v.
THE
MUNICIPAL
COMMISSIONER
FOR THE
CITY OF
BOMBAY.

nary jurisdiction of the Court. As to limitation, the case falls, I think, under the general law, and is admittedly not barred by its provisions. I agree, therefore, that the second question also should be answered in the negative.

Attorneys for plaintiff:—Messrs. *Mulji and Raghavji*.

Attorneys for defendant:—Messrs. *Crawford, Burder & Co.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

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June 18.

HARI KRISHNA JOSHI (ORIGINAL DEFENDANT), APPELLANT, v.
SHANKAR VITHAL (ORIGINAL PLAINTIFF), RESPONDENT.*

Easement—Trees—Trees overhanging neighbour's land—Nuisance—Easement Act (V of 1882).

Plaintiff sued for an injunction restraining the defendant from allowing the branches of a tree belonging to him to overhang plaintiff's land, and for an order directing him to cut off such branches.

Defendant pleaded that the branches of his tree had projected over plaintiff's land for forty years, and he contended that he had, therefore, acquired a prescriptive right of the nature of an easement over plaintiff's land.

Held, that the plaintiff was entitled to cut away the branches which overhung his land, though they had done so for more than forty years.

SECOND appeal from the decision of Ráo Bahádur Káshináth B. Maráthe, Subordinate Judge First Class A. P., at Ratnágiri in Appeal No. 445 of 1891.

The plaintiff sued for an injunction restraining the defendant from allowing the branches of his *cashew* tree to overhang the plaintiff's ground, and for an order directing him to cut off such branches.

Plaintiff alleged that the branches of the trees overhung a part of his land measuring about 22 cubits by 15, and that, in consequence of the shadow cast by the branches, his cocoanut trees died.

Defendant pleaded that the branches had overhung the plaintiff's ground for more than forty years.

The Court of first instance dismissed the plaintiff's suit, holding that the right claimed by the defendant was an easement

* Second Appeal, No. 760 of 1892.

which he had enjoyed for more than forty years, and that the prescriptive right so acquired could not now be disturbed by an injunction.

The plaintiff appealed and the appellate Court reversed the decree of the lower Court and granted an injunction. The judgment of the appellate Court was as follows:—

“No right of easement can be acquired by the natural growth of a tree. No part of the tree or branch that overhangs the land of another can remain constant or unchangeable for any length of time. The foliage, the sprouts, the twigs, the flower and the fruit change every day in form and size and number; and even the bark and concentric wooden tissue round the axis of the trunk and branches change within short periods, and they cannot last so long as is necessary to create the easement claimed. No tree or its branches can, therefore, be allowed to grow so as to cause injury to, or restrain a neighbour from enjoying, his property in the best possible manner, and the overhanging of a tree or its branches for any length of time cannot be brought within the purview of the definition of an easement as given in Act V of 1882.”

The defendant preferred a second appeal to the High Court.

Vásudev G. Bhandárkar for appellant (defendant):—The branches and foliage of our tree have been overhanging the plaintiff's ground for nearly forty years. We have thus acquired a prescriptive right to have this state of things continued. The existence of such prescriptive right seems to be admitted in *Náik Parsotam v. Gandrap Fatelal* ⁽¹⁾. We have acquired a right of the nature of an easement as defined by Act V of 1882. The objection to the acquisition of an easement for roots of trees consists in the secrecy of the mode of enjoyment. That objection is not applicable with respect to branches of trees. Refers to *Gale on Easements* (5th Ed.), p. 524.

Múnekhsháh Jahíngirsháh for respondent (plaintiff):—There is no authority that an easement of the kind claimed by the defendant can be acquired by prescription. It is settled law that no easement can be acquired by user for roots of trees, the reason being that there is a perpetual change in the quality of inconvenience imposed by it. The same objection applies in the case of branches of trees. Refers to *Gale on Easements* (Ed.), p. 493. A nuisance of this kind is a continuing wrong, for which a cause of action accrues from due to due. Section 23 of the Limitation Act (XV of 1877) would save the bar of limitation—*Vináyak v. Bhiwa* ⁽²⁾

(1) I. L. R. 17 Bom., 745.

(2) P. J., 1886, p. 79.

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JARDINE, J.:—We are of opinion that the judgment of the lower Court is correct on the question of right.

The defendant contends, that because the branches of his tree growing on his own land have for forty years projected more or less over the adjoining land of the plaintiff he is entitled as against the plaintiff to have the continuance of this state of things decreed. The argument used is that the defendant has acquired, by prescription, a "right," which should be treated as an easement under Act V of 1882.

The first question is as to the law before the passing of that Statute. Two rules of Hindu Jurisprudence are quoted in the Vyavahāra Mayukha, Chap. XV, clause 12, from Kātyāyana as follows: "The fruit and flowers of trees produced upon the boundary between two fields, are declared to be joint property, pertaining in common to the masters of the two fields." "But where the branches of trees growing in one man's field, be spread over that of another, then he shall be considered as the owner [of their produce] over whose field they are so situated." We quote from the translation made by Mr. Borradaile of the Bombay Civil Service. In Mandlik's Hindu Law, p. 136, the second rule is, however, translated as follows:—"But where the branches of trees growing in one man's field are spread over that of another, then he shall be considered as the owner in whose field the trees stand." It is unnecessary to say which translation is correct, as the rule relates only to the overhanging produce or timber, and throws no direct light on the question of prescription or the plaintiff's right to cut away so much as overhangs his land. Apparently Borradaile uses the Sanskrit word *samstit* in the two places in the same one sense, while Mandlik gives it two meanings. No reported case has been shown us.

In similar matters the Indian Courts have often followed the principles applied by the Courts in England. These have lately been set forth in the Supreme Court in *Lemmon v. Webb*⁽¹⁾ by Lord Justice Lindley, Lopes and Kay, L.JJ., concurring. The question raised at the trial was whether the owner of the land was entitled, there being no immediate danger, to remove

(1) (1894), 3 Ch. 1.

the overhanging boughs, without notice to the owner of the tree. Kekewich, J., held in the negative, treating the inconvenience as a nuisance of omission and long standing. The Court of Appeal took a different view: and as its judgment supports the reasoning of Ráo Bahádur Káshináth B. Maráthe in the judgment now before us, where he excludes from the category of easements this overhanging of boughs, on the ground that they are constantly undergoing change in foliage, sprouts, twigs, flowers and fruits, in form, size and number as also in girth, we think it right to read it from beginning to end, as we concur altogether in the reasoning and consider it applies to the case before us. Lord Justice Lindley said, pp. 12-15:—

“The plaintiff and the defendant in this case are adjoining land-owners. Some old trees situate on the plaintiff’s land had branches which projected over the defendant’s land. The defendant cut off so much of these branches as projected over his land, and he did so without going on to the plaintiff’s land and without previous notice to him. The question is whether the defendant was justified in so doing. Mr. Justice Kekewich thought not, and gave the plaintiff judgment for £5 and costs, and from this judgment the defendant has appealed.

“There is some controversy as to whether the defendant did not cut rather more than he himself says he did and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land; and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment, for the action was not brought for such a trumpery purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the defendant had no right to cut the branches at all, or, at all events, no right to cut them without previous notice to the plaintiff and a request to him to cut them and a non-compliance by the plaintiff with that request.

“It was contended on behalf of the plaintiff that, having regard to the age of the trees and of the projecting branches, he had

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acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled, and that either under the Statute of Limitations or by prescription the plaintiff had a right to keep the branches when they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action of trespass would lie in such a case, and it is plain that Lord Ellenborough did not think it would (see *Pickering v. Rudd*)⁽¹⁾. According to our law, the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in the third edition of Gale on Easements, (6th Ed., p. 461) to which reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty, but it is quite inconsistent with the authorities to which I will refer presently, and no Court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it.

"The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the

(1) 4 Camp., 219.

law for centuries—see Bro. Ab. “Nusans”; (Vol. II, p. 105, pl. 28); *Norris v. Baker*⁽¹⁾, *Pickering v. Rudd*⁽²⁾; *Crowhurst v. Burial Board of Amersham*⁽³⁾—and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Mr. Justice Kekewich intimate any doubt upon the law up to this point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with, and the real question is whether notice is required by law. The authorities to which I have referred, do not allude to the necessity of notice. In *Pickering v. Rudd*, which was an action for cutting the plaintiff's Virginian creeper, the plea contained no averment of notice, and the plaintiff did not demur, but new assigned and alleged an excessive cutting. Lord Ellenborough held that the only question was whether the defendant had exceeded his right by cutting too much. Again, in Chitty on Pleading (7th Ed., Vol. 3, p. 364), a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the 7th Ed., Vol. 3, p. 364, such an averment is introduced, and reference is made to *Jones v. Williams*⁽⁴⁾. *Jones v. Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance and non-compliance with that request are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided, and so far the decision only applies to what one man may do on another man's land. It does not show what a man may or may not do on his own land. But in *Jones v. Williams (ubi sup.)* Baron Parke, who delivered the judgment of the Court, referred to a case in *Jenkins*, p. 260, case 57, and to *Penruddock's case*⁽⁵⁾ as authorities

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(1) 1 Roll., 393.

(3) 4 Ex. Div., 5.

(2) 4 Camp., 219, and 1 Stark., 56.

(4) 11 M. and W., 176.

(5) 5 Rep., 100b.

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for the proposition that an owner of land cannot without notice remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained.

“ But, assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree. The judgment of Mr. Justice Best in *Earl of Lonsdale v. Nelson*⁽¹⁾ is explicit, that overhanging trees may be lopped by the owner of land over which they hang without notice. Mr. Justice Best says the right so to lop them is an exception to the general rule which requires notice before a nuisance, not created by the owner of what creates it, can be abated by a person injured by it. He is not alluding to a case of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards (His Lordship read passages from the judgment of Mr. Justice Best and continued :—)

“ What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots (see Gale on Easements, 3rd Ed., pp. 419—420, 6th Ed., p. 461). (His Lordship read an extract from that work and continued :—) This passage has the authority of the late Mr. Justice Willes, who edited the edition from which I have read the foregoing extract.

“ The law on the subject is, in my opinion, as follows :—The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

(1) 2 B. and C., 311.

"The defendant contended that he was justified in cutting the plaintiff's trees because they were in imminent danger of falling, but this is not proved, and my judgment is not based on grounds of urgency.

"The appeal, therefore, must be allowed, and the appellant must have the costs of the appeal, and judgment must be entered for the defendant; but, having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the defendant, there will be no order as to the costs of the action."

Following the Lords Justices we are of opinion that the plaintiff may on his own land cut away the boughs that overhang. We are also of opinion that this judgment confirms the view of the lower Court that a growing tree being always in a state of change differs from such things as eaves and projecting beams. Thus the private nuisance caused by the overhanging boughs does not create a "right" under the definition of Easements in the Indian Statute, nor does the convenience to the owner of the tree, always changing in extent and position of space, become at any time so determinate that it can by length of time be held to be enjoyed as "of right," a matter essential under section 15 of that Statute. In this way we deal with the argument about prescription.

It is unnecessary to determine here the other issue raised in the lower Court whether the plaintiff is entitled to the relief by injunction, as no contention has been raised before us on that point. Nor are we in a position to say whether for the purpose of relief the plaintiff if he tried to abate the nuisance himself would have to enter on the defendant's land. The point not having been raised it is unnecessary for us to consider whether the relief by injunction can be granted under section 54, clauses (b), (c) and (d), of the Specific Relief Act.

For these reasons we are of opinion that the decree should be confirmed with costs.

Decree confirmed.

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