APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Marten.

1917.

December 18.

JANARDAN GANESH KHADILKAR AND OTHERS (ORIGINAL DEFENDANTS, APPELLANTS *v.* RAVJI BHIKAJI KONDKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Easements Act (V of 1882), sections 2 (c) and 17 (c)—Non-riparian owner—Right to the flow of river water over another's lands—Ancient and uninterrupted user—Presumption of a lost grant—Prescription.

The plaintiff sued for a declaration that he had a right to take the water of a river for cultivating his lands by making it flow over the paddy lands of the defendants. The facts proved showed that from time immemorial the plaintiff and his ancestors as owners of certain non-riparian lands had been taking water from the river at or about a certain spot on the river banks, and thence over the lands of the defendants successively till the plaintiff's lands were reached. The defendants' objection was that the right claimed was really one " to surface water not flowing in a stream " and hence could not be acquired as an easement under section 17 (c) of the Indian Easements Act, 1882, nor be the subject of a presumed lost grant.

Held (PER BEAMAN J.), that the plaintiff having acquired the right claimed by him before the Indian Easements Act came into force, and having enjoyed such right from time immemorial, the case was saved by section 2, clause (*c*) of the Act.

Held (PER MARTEN J.), (1) that section 17 (*c*) of the Act did not apply as the plaintiff's claim was to river water and not to mere surface water on the defendants' lands ; (2) alternatively, that the plaintiff was protected by section 2 (*c*) if he could show that he had acquired any legal right before the Act came into force ; (3) that the right he claimed could have been the subject of a grant and had a lawful origin, notwithstanding that such grant involved the passage of river water over the defendants' lands in no definite channel and that the plaintiff was a non-riparian owner ; (4) that consequently a lost grant could be presumed, and that having regard to the immemorial user it ought to be presumed, and therefore the plaintiff was legally entitled to the right he claimed.

PER MARTEN J. :—" The presumption of a lost grant is one which may be made in India as well as in England. The presumption arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions and one is that the right could have been the subject of a grant."

* Second Appeal No. 833 of 1915.

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SECOND appeal against the decision of K. B. Wassoodew, Assistant Judge at Thana, confirming the decree passed by J. A. Samant, Subordinate Judge at Bhiwandi.

Suit for declaration and injunction.

Plaintiff sued to establish a right of easement over the defendants' lands in respect of irrigating the plaintiff's lands by drawing water through a wooden pipe placed across an embankment to the north of Survey No. 18 near the river which ran through the Pye village, and by diverting the same water over the three defendants' lands in succession on to the plaintiff's lands. Plaintiff also claimed that the defendants might be restrained from interfering with the position of any pipe which the plaintiff might have to place over the embankment in question, or with the plaintiff's right to cause cuts in the embankments of the defendants' lands in the exercise of the aforesaid right.

The defendants alleged *inter alia* that the embankment in question (to the north of Survey No. 18) was erected by defendant No. 3 in his own land for the purpose of keeping out the river floods, that there was no pipe placed across it by the plaintiff, that plaintiff never irrigated his lands in the manner alleged and that he had not acquired any right by prescription.

The Subordinate Judge found that from times out of memory the plaintiff took water from the river in seasons of drought by submerging the fields belonging to the defendants, that about 18 years ago or thereabout the villagers of Pye in order to counteract the over-flooding of the river erected the embankment to the north of Survey No. 18 at a point where the water from the river was admitted for irrigation. He, therefore, allowed the plaintiff's suit.

On appeal, the Assistant Judge, confirmed the decree.

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The defendants appealed to the High Court.

Jinnah with *S. R. Bakhle* and *B. V. Desai*, for the appellants.

Wadia with *A. G. Desai*, for the respondent.

BEAMAN, J.:—Assuming (but without deciding) that Mr. Jinnah's contention is sound, viz., that the plaintiff could not have acquired the right which he is suing to enforce, under the Indian Easements Act, still the case is saved by section 2, clause (c), of that Act.

The lower Courts have found concurrently, as a fact, that the plaintiff has acquired this right and enjoyed it from time immemorial.

Even if it were a right that could not be acquired as an easement, there is nothing intrinsically unreasonable in it. On the contrary it is compatible with the usages and sentiments of the agricultural population in many parts of India. In my opinion the decree of the Court below must be confirmed and this appeal dismissed with all costs upon the appellants.

MARTEN, J.:—This second appeal raises an interesting question as to water rights which has been decided in plaintiff's favour in both the Courts below. The facts proved show that from time immemorial the plaintiff and his ancestors as owners of certain non-riparian lands have been taking water from a river at or about a certain spot on the river banks, and thence over the lands of the defendants successively till the plaintiff's lands are reached. The water thus taken has not flowed in a definite channel over the defendants' lands, but has followed the general lines indicated by the colour blue, viz., first to the south of the westernmost embankment coloured red on the map in the suit, and then bifurcating almost at right angles east and west. The map is not so helpful as it might be. It contains no scale and no compass bearings, and only shows a

portion of the river, viz., that to the east of the embankment I have mentioned. It is on the site of this embankment that the water has hitherto been taken. The embankment itself was only built some eighteen years ago but the findings are that the plaintiff then pierced this embankment so as to admit of the water flowing as before, and that the pipe he subsequently placed for that purpose was a hollowed palm tree which he subsequently renewed. It was then that the defendants obstructed the pipe and the flow of water for the first time, and consequently this action was brought. The embankment I have referred to is called "the dam in dispute" in the Court of first instance, and must not be confused with the *dam* which from time to time has been placed by the plaintiff and others in the river bed itself so as to ensure a supply of water in time of drought or scarcity.

The technical difficulty here is that the water has been brought not in a defined channel but has been allowed to spread over and irrigate the defendants' lands first and then the plaintiff's. This indeed appears to be a common method of irrigation in India (see *Adinarayana* v. *Ramudu*[1]). It has at any rate been the method adopted for very many years for irrigating the paddy fields in dispute in the present case. Accordingly the contention of the defendants that the plaintiff's right, if established, "would tend to the total destruction of the defendants' property" within the meaning of section 17 (*a*) of the Indian Easements Act may be summarily dismissed.

The defendants' substantial objection is that the right claimed is really one "to surface water not flowing in a stream" and hence cannot be acquired as an easement under the Indian Easements Act (see section 17 (*c*)), nor be the subject of a presumed lost grant

[1] (1912) 37 Mad. 304 at p. 306.

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In my judgment that is not really the right which the plaintiff is claiming. He is really claiming the right to take the water from the river without interruption by the defendants, and to have it conveyed over their lands. According to the Court of first instance the plaint alleges that "from the time of his ancestors the plaintiff has been in the habit of taking the water of that river for irrigating his lands". The plaint then proceeds to give details as to how that water is taken and reaches plaintiff's lands.

Some difficulty was caused by the fact that a large portion of the embankment in question appears to be on land belonging to Government, and not to the defendants as they alleged. The Collector, however, does not appear to take any objection, and so far as the present parties are concerned, I do not know that the point is really very material. Defendant 3 is now the Government tenant but has been warned not to obstruct the plaintiff in taking the water.

If, then, my view of the facts is correct the claim is to river water and not to mere surface water on the defendants' lands, and consequently section 17 (*c*) does not apply.

It is no doubt true that the method of conveying that river water over the defendants' lands creates a difficulty, for some is used to irrigate the defendants' lands or may be lost by percolation, and on the other hand the volume of general water on the defendants' lands may be affected by rain water falling on their lands or from other like causes. This might, however, happen just the same if the water was conveyed in a definite open channel. Some of the river water might still be diverted by cross-cuts in that channel on the defendants' lands. Further, rain water falling on the defendants' lands might easily increase the volume of water in the open channel. One may, I think, fairly assume

that the method actually adopted in the present case of conveying this river water for all these years is the one best suited to local requirements, and preferable in particular to a definite channel with cross cuts. *Budhu Mandal* v. *Maliat Mandal*[1] and *Kensit* v. *Great Eastern Railway Co.*[2] are instances of an easement or grant for river water across certain lands.

But the plaintiff does not necessarily depend on the Indian Easements Act. Section 2 (*c*) provides that nothing in that Act is to derogate from "any right acquired before this Act comes into force". Had then the plaintiff or his predecessors-in-title acquired any such right before the Indian Easements Act came into operation? I think he had. The decisions in *Ramessur Persad Narain Sing* v. *Koonj Behari Pattuk*[3] and *Rajrup Koer* v. *Abdul Hossein*[4] show that the presumption of a lost grant is one which may be made in India as well as in England. The presumption arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions and one is that the right could have been the subject of a grant. As Lord Selborne puts it in the leading case of *Goodman* v. *Mayor of Saltash*[5]: "An open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law".

Is then the grant of the right claimed reasonably possible in law? I think it is. It is true that the plaintiff is a non-riparian owner. Presumably therefore

(1) (1903) 30 Cal. 1077.
(2) (1884) 27 Ch. D. 122.
(3) (1878) 4 Cal. 633.
(4) (1880) 6 Cal. 394.
(5) (1882) 7 App. Cas. 633 at p. 639.

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the riparian owner of the embankment in question could not have made a grant of the river water so as to affect the lower riparian owners. (See *Ormerod* v. *Todmorden Mill Co.*[1] and *McCartney* v. *Londonderry and Lough Swilly Railway*[2].) But the grant would at any rate be good as against such grantor (see same cases), and I assume also against his sequels in title. And the lower riparian owner could not complain unless he was injuriously affected in fact. (See *Kensit* v. *Great Eastern Railway Co*[3].) Further, as between himself and the lower riparian owners, the grantor might justify the user by a grant from the lower riparian owner or by prescription (see *McCartney's Case*[4]). In this very case we find a *dam* erected in the river bed, and this I suppose could only be justified against lower riparian owners by grant or prescription. Possibly the non-riparian grantee could not sue the lower riparian owners in his own name. See *Ormerod* v. *Todmorden Mill Co.*[5]. Here, however, the defendants or their predecessors are either the original grantors of the river water, or else are the grantors of the right to have such water conveyed over their land in the way specified. In other words I think it reasonably possible in law that the defendants' predecessors could have granted the right to convey definite river waters over their lands notwithstanding that such river waters flowed or passed through the defendants' lands in no definite channel. In this respect the case presents a considerable resemblance to that of *Adinarayana* v. *Ramudu*[6].

It was suggested that the pleadings in the present case did not permit of the presumption of a lost grant. The plaint, however, clearly pleads the fact of immemorial

(1) (1883) 11 Q. B. D. 155.
(2) [1904] A. C. 301.
(3) (1884) 27 Ch. D. 122.
(4) [1904] A. C. 301 at p. 315.
(5) (1883) 11 Q. B. D. 155 at p. 169.
(6) (1912) 37 Mad. 304.

user, and it is this fact which raises the presumption in law. Further, this very point is dealt with in the judgment of the Court of first instance at page 22, line 41. If necessary therefore the pleadings should be treated as amended so as to raise this point expressly, and I decide this case on that footing.

Some objection was made as to the form of the original decree. No objection appears to have been taken on this head in the lower appellate Court, and I do not see that it is essential to vary the form of the decree. In effect the injunction is intended to preserve the immemorial user.

In my judgment the appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Kemp.

BAI NEMATBU, WIDOW OF MAHOMADALLI ABEDIN GYANI AND WIFE OF SHAIKH FAKRUDDIN KOTHARE (ORIGINAL OPPONENT,-DEFENDANT No. 1), APPELLANT *v.* BAI NEMATULLABU, WIDOW OF ABDUL TYAB ISMAILJI MASKATI (ORIGINAL APPLICANT, PLAINTIFF), RESPONDENT.*

Indian Limitation Act (IX of 1908), Sections 5 and 14—Delay—Sufficient cause—Review—Strict proof, meaning of—Civil Procedure Code (Act V of 1908), Order XLVII, rule 4, sub-clause (2) (b).

The plaintiff, a Mahomedan lady, applied for review of the judgment of the First Class Subordinate Judge, A. P., at Surat. Her appeal was dismissed by the Judge on October 8, 1915. The application for review was made on January 5, 1916 to the District Judge, Surat. This application to that Judge was irregular as before that the plaintiff had filed a second appeal to the High Court on November 10, 1915. After the withdrawal of the second appeal on March 29, 1916, the application of January 5, 1916 was transferred by the District Judge for disposal to the First Class Subordinate Judge. It was dismissed as being not properly made under Order XLVII, Rule (1) of the Civil

* Appeal from Order No. 48 of 1916.