APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Kemp.

1918. *April 5.*

VISHNU JAGANNATH JOSHI* (ORIGINAL DEFENDANT), APPELLANT *v.* VASUDEO RAGHUNATH OKA (ORIGINAL PLAINTIFF), RESPONDENT.*

Tort—Trespass—Trees overhanging one's land—Right to cut off overhanging branches—Injunction to remove overhanging branches in absence of damage.

A person is entitled to cut off those portions of the trees which overhung his land. He can obtain an injunction to remove the overhanging portion though he may not be able to prove any damage.

SECOND appeal from the decision of T. R. Kotwal, Assistant Judge at Ratnagiri, confirming the decree passed by C. D. Pandya, Subordinate Judge at Chiplun.

Suit for injunction.

The plaintiff and the defendant owned neighbouring lands separated by a fence. On the defendant's land there was a row of cocoanut-trees alongside the fence. The plaintiff complained that leaves of those trees overhang his land, and fell there when withered; and also that cocoanuts dropped down on his land. He filed the present suit, first, to obtain an order requiring that the overhanging portions of the trees should be cut down; secondly, to obtain a permanent injunction ordering the defendant to see that leaves and fruits from his trees did not drop down on plaintiff's land; and lastly, to recover Rs. 125 as damages. The defendant contended *inter alia* that the trees which were of long standing overhang the plaintiff's land through no fault of his but owing to natural causes; and that the plaintiff had suffered no damages.

In the course of the trial, the defendant applied to the Court to raise the following issue: Does defendant

* Second Appeal No. 1185 of 1916.

prove that there is a custom in the village not to complain against overhanging of cocoanut trees over every neighbour's land? This application was rejected.

At the trial, the defendant admitted that his trees overhang the plaintiff's land. It was found that the plaintiff had suffered no damage from the overhanging of the trees. The trial Court, however, granted the injunction sought.

This decree was, on appeal, confirmed by the Assistant Judge.

The defendant appealed to the High Court.

P. V. Nijsure, for the appellant:—The plaintiff is not entitled to obtain the injunction sought, especially as he has failed to prove damage: *Hari Krishna Joshi* v. *Shankar Vithal*[1]; *Pickering* v. *Rudd*[2]; and Goddard on Easement, pp. 126-127.

My application to be allowed to prove customary easement has been wrongly disallowed by the trial Court. Customary easements are recognised in section 20 of the Indian Easements Act, 1882.

N. V. Gokhale, for the respondent:—There is a clear finding by the lower Courts that there is a likelihood of damage being caused to the plaintiff. I have always a right to cut off the overhanging branches on my land; and this right cannot be negatived by any easement: see *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*[3]; *Lemmon* v. *Webb*[4].

SHAH, J.:—This second appeal arises out of a suit brought by the plaintiff for an injunction ordering the defendant to remove the trees overhanging his land and for damages. Both the lower Courts have allowed the plaintiff's claim as to the injunction, and directed that the defendant should remove and cut off the portions

(1) (1894) 19 Bom. 420.
(2) (1815) 4 Camp. 219 at p. 220.
(3) (1904) 31 Cal. 944.
(4) [1895] A. C. 1.

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of the trees in suit which overhang the land of the plaintiff at his expense, failing which the plaintiff is to be at liberty to cut them down at defendant's costs. The damages were not proved and the claim as to damages was consequently disallowed.

In the appeal before us two points have been urged by Mr. Nijsure, first, that, as no damages are proved, no injunction could be granted, and, secondly, that the defendants should have been allowed to prove the alleged local custom as to his right to retain the trees overhanging the plaintiff's land.

As to the first point I have no hesitation in disallowing the appellant's contention. It is clear on the authorities, and for the purpose of this point it is not disputed before us, that the plaintiff has the right to cut off those portions of the trees which overhang his land. This right is recognized in *Lemmon* v. *Webb*[1]; *Hari Krishna Joshi* v. *Shankar Vithal*[2] and *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*[3]. It is conceded that if the plaintiff had sued only for an injunction, he could have maintained the action. The last two of the cases cited above are instances of such actions. But it is urged that as the plaintiff has in fact claimed damages and has failed to prove them, his claim as to injunction cannot be allowed. No authority is cited in support of this proposition, and on principle I am unable to make his claim for an injunction dependent upon his ability to prove actual damages. The plaintiff has the right to cut off the overhanging portions of the trees, and, in my opinion, he has the right also to maintain an action to enforce that right if it is disputed apart from any question of damages. In the present case the matter does not rest there. It has been found by both the Courts that the overhanging

(1) [1895] A. C. 1.
(2) (1894) 19 Bom. 429.
(3) (1904) 31 Cal. 944.

trees are likely to cause damage to the plaintiff. Under these circumstances the first point fails.

As regards the alleged custom, the defendant described the custom in the written statement in these terms: "No owner of plantation can make a complaint against another owner even if these trees grow in any direction in the air. There is a Vahivat (custom) to this effect in our province continuing for over thousands of years." When the issues were framed, there was no specific issue raised as to this custom. After the hearing of the suit commenced, an application was made on the 29th of November 1915 in which the defendant requested the Court to raise the issue as to custom in these terms: "Does defendant prove that there is a custom in the village not to complain against overhanging of cocoanut trees over every neighbour's land." The trial Court disallowed the application of the defendant for this issue and the evidence relating to it. It is urged before us that the trial Court should have allowed the defendant an opportunity of proving this custom. Having regard to the terms of the issue it seems to me that the trial Court was right in disallowing the defendant's application. As stated in the written statement and as indicated in the proposed issue there is a custom in the village not to complain against the overhanging of cocoanut trees over neighbours' lands. It seems to me that such a custom would not be reasonable and cannot be pleaded. In effect it amounts to a plea that a person whose right to land is infringed cannot sue in respect of that infringement. Apart from the form in which the alleged custom is stated by the defendant it seems to me that in substance it is indefinite and vague; and, in my opinion, it will serve no useful purpose to direct at this stage an inquiry as to custom, which, as stated by the defendant does not appear to be either reasonable or definite.

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In this view of the case it is not necessary to consider Mr. Gokhale's argument on behalf of the respondent that there could be no customary easement in respect of the right to overhang the trees on a neighbour's land as such a right is not an easement within the meaning of the definition of 'easement' under the Indian Easements Act. I express no opinion on the general question as to whether the right to retain the trees overhanging the neighbour's land is a customary easement within the meaning of section 18 of the Indian Easements Act.

On these grounds I would dismiss this appeal and confirm the decree of the lower appellate Court with costs.

KEMP, J.:—I agree.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

1918.
June 25.

VATSALABAI ALIAS SITABAI, WIFE OF VISHNU SABAJI SUKHTANKAR, MINOR BY HER NEXT FRIEND, HER HUSBAND VISHNU SABAJI AND ANOTHER (ORIGINAL PETITIONERS), APPLICANTS *v.* SAMBHAJI PANDURANG NABAR AND OTHERS (ORIGINAL OPPONENTS), OPPONENTS.*

Civil Procedure Code (Act V of 1908), Order XXII, Rules 3 and 5—Death of plaintiff— Order made to bring the legal representatives on record—Subsequent application by other persons to alter the order—Power of the Court to correct the order.

A suit was filed by five persons one of whom R died while the suit was pending. Thereupon an application was made on behalf of the minor G, son of the 1st plaintiff, that he should be brought on the record as heir and legal representative of the deceased R, relying upon an alleged adoption of G to R.

* Civil Application under Extraordinary Jurisdiction No. 58 of 1917.