APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921. *June* 24.

DHARAMDAS KAUSHALYADAS (ORIGINAL DEFENDANT), APPELLANT *v.* RANCHHODJI DAYABHAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Pleadings—Suit for right of way—Relief based on ownership and user—Defendant claiming ownership—Plaintiff not barred from claiming on the ground of easement—Practice and Procedure.

The plaintiffs sued for a permanent injunction directing the defendant to remove the posts and wire-fencing from a lane in dispute. The wording of the plaint suggested that the claim was based on ownership, but it also contained the contention that, if, as the defendant asserted, the land in fact belonged to him, the plaintiffs had acquired an easement of right of way on the said lane. The evidence in the case made it clear that the plaintiffs were using the disputed lane as a means of access to their survey number. The plaintiffs' suit was decreed in both the lower Courts. In further appeal, the defendant contended that the case of easement could not be made out where plaintiffs put forward an allegation of ownership,

Held, negativing the contention, that the real issue in the case was whether the plaintiffs had enjoyed for the statutory period the right of way over the lane in dispute and, though they were entitled to accept the defendant's contention that the lane belonged to him, that would not prevent the plaintiffs from asking the Court to protect their user of the lane.

PER MACLEOD, C. J. :—"It is not the duty of the High Court to read pleadings in the mofussil Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. We have a much larger range of vision, and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed."

SECOND Appeal against the decision of C. N. Mehta, District Judge of Surat, confirming the decree passed by K. K. Thakor, Subordinate Judge, at Surat.

Suit for injunction.

Plaintiffs alleged that they owned Survey No. 56 which formed part of their ancestral property; that

* Second Appeal No. 558 of 1920.

Survey No. 58 which was situated to the west of Survey No. 56 had a lane at its northern end leading up to the public road; that the lane had been used by plaintiffs' men for more than fifty years; that to the north of the lane was situated Survey No. 57 belonging to the defendant; that in 1917, the defendant wrongfully fixed posts in and wire-fenced a portion of the lane. The plaintiffs, therefore, sued for a permanent injunction, directing the defendant to remove the posts and wire-fencing from the lane and prohibiting him from obstructing them in future in their user of the lane. In addition to the above claim, which appeared on the plaint to be based on ownership, the plaintiffs further stated in their plaint:

"The defendant asserts his land to be in the said *sher* of ours but the said assertion is not true. And even if it be true, he may be treated as having given up his boundary hedge in our favour, and by reason of our adverse possession and enjoyment of the said *sher* for 40 years he cannot now shift his hedge to the extent even of an inch and he has no right to do so and is estopped from doing so."

The defendants contended *inter alia* that the wire-fenced strip formed part of his Survey No. 57 and that the plaintiffs had never exercised the right of way claimed by them through the suit lane.

The Subordinate Judge refrained from framing an issue about the ownership of the strip because in his opinion such an issue would have served to obscure the real issue between the parties, viz., whether or not the plaintiffs had proved the easement of way claimed by them through the lane and he held that the plaintiffs had succeeded in substantiating their claim to use the suit land including the wire-fenced strip as a way for themselves, their men, cattle and carts incidental to their use and occupation of their field Survey No. 56. He, therefore, decreed the suit.

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On appeal, the District Judge observed "conceding for the sake of argument that what the defendant alleges is true, the crucial question is whether in spite of that ownership of the defendant, have not the plaintiffs succeeded in establishing their alleged easement over it" and he found on evidence that the plaintiffs had acquired the easement.

The defendant appealed to the High Court.

Coyajee with *G. N. Thakor*, for the appellant.

G. S. Rao with *H. V. Divatia*, for the respondents.

MACLEOD, C. J. :—The plaintiffs sued for a permanent injunction directing the defendant to remove the posts and wire-fencing from the lane in dispute causing obstruction to the plaintiffs' user of the same. The plaintiffs' suit has been decreed in both the lower Courts, and it is sought now to get those decisions reversed on a purely technical objection.

The plaintiffs are the owners of Survey No. 56 on the map, while the defendant is the owner of Survey No. 57. Towards the southern boundary of Survey No. 57 is a hedge maintained by the defendant, and it might be presumed that that at any rate was the limit of the land of which he was making use. On the south of the hedge was the strip of land in dispute. On the other side of that was Survey No. 58. The plaint admittedly is not very scientifically drawn, as is often the case. It might well be urged that the plaintiffs contended in their plaint that Survey No. 58, or at any rate the disputed strip, belonged to them either by title or by adverse possession, and that, therefore, they claimed the user of this strip on their own title, and consequently sought an injunction against the defendant disturbing possession. But in paragraph 10 of the plaint it is suggested that "the defendant

asserts his land to be in the said *sher* of ours but the said assertion is not true. And even if it be true, he may be treated as having given up his boundary hedge in our favour, and by reason of our adverse possession and enjoyment of the said *sher* for 40 years, he cannot now shift his hedge to the extent even of an inch and he has no right to do so and is estopped from doing so."

That might well be redrafted by a skilled practitioner so as to claim in the alternative that if this disputed strip is within the boundary of Survey No. 57, it has either been given up by the defendant, or at any rate the plaintiffs have been using the strip for such a period that the law would protect that user and prevent the defendant from obstructing it. The evidence in the case makes it perfectly clear that the plaintiffs have been using this strip as a means of access to their Survey No. 56. At the very most, therefore, we might order the plaintiffs to remedy the technical defects in their case by amendment of the pleadings. But, as has often been pointed out, it is not the duty of this Court to read pleadings in the District Courts as strictly as they would be read if they were filed in the Chancery Division of the Supreme Court. We have a much larger range of vision, and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed.

The real issue in this case is whether the plaintiffs have enjoyed for the statutory period the right of way over the strip in question. Whether in previous years they merely exercised rights of way over that strip against the true owner, or did so because they thought it had belonged to their ancestors, it does not seem to me to make very much difference. They have enjoyed

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the rights to that strip, the defendant has obstructed them. They are entitled to accept the defendant's contention that the strip belongs to Survey No. 57. That would not prevent them from asking the Court to protect their user of that strip. The defendant's case, therefore, in appeal, resting on purely technical objections to the decisions of the Courts below, I think we are entitled to take a broad view of the question and confirm those decisions. The appeal will be dismissed with costs.

SHAH, J. :—I agree. I only desire to add that in both the lower Courts the case has been tried on the footing that the plaintiffs claim by way of easement the right of way over a strip of land which, according to the defendant, forms part of his land. It is no doubt true that in the plaint the plaintiffs put forward the case of ownership over this land and generally speaking that would not be consistent with the case of their having acquired an easement over that land. But the case has been tried on the footing of an easement, and it has been made clear before us by the admission of Dewan Bahadur Rao for the plaintiffs that they accept the position taken up by the defendant that this strip of land forms part of his land. It is, therefore, unnecessary to consider the merits of the contention urged on behalf of the defendant, that the case of easement cannot be made out where the plaintiffs put forward an allegation of ownership over that piece of land.

Decree confirmed.

J. G. R.