

(1913) 04 CAL CK 0042
In the Calcutta High Court

Madan Mohan Chakravarty and Others	APPELLANT
Vs	
Sashi Bhusan Mukherji and Others	RESPONDENT

Date of Decision : 25-04-1913

Acts Referred:

Easements Act, 1882 — Section 12

Citation : 31 Ind. Cas. 549

Hon'ble Judges : N.R. Chatterjea, J

Bench : Single Bench

Judgement

N.R. Chatterjea, J.—This appeal arises out of a suit for declaration of a right of way, for restoration of the path to its former condition and for perpetual injunction. The Courts below have concurred in decreeing the suit, and the defendants have appealed to this Court.

2. The first contention raised on behalf of the appellants is that the suit ought to fail, as the owners of all the servient tenements over which the way is claimed, have not been made parties to the suit, and the case of Madon Mohan Chattopadhyaya v. Akshoy Kumar Baruri 5 Ind. Cas. 23 : 14 C.W.N. 15 is relied on in support of the contention. It is not alleged that the owner of any land other than bhadrar kola over which the way passes, has obstructed the plaintiffs or ever has denied the plaintiffs' right. The owners of the land bhadrar kola alone have caused the obstruction, and all the owners of that land have been made parties to the suit. In the case cited above, all the servient owners were not made parties and the learned Judges observed that it was difficult to see how a decree based on an easement in that state of the record could be passed. But "all the servient owners", I think, mean all the servient owners who had raised objections to the plaintiffs' right of way and against whom there was a cause of action and do riot refer to the owners of all the tenements over which the way passed. If a way passes over 50 different parcels of land owned by 50 different persons, and the owner of the fiftieth parcel obstructs the way on his own land and the owners of the remaining parcels do not raise any obstruction nor even

deny plaintiff's right, I do not think the latter are necessary parties or can be joined in a suit against the person who obstructs the way. The plaintiffs in the present case complain of the obstruction at the site of the bhadrar kola, and all the owners of that tenement have been made parties. They no doubt pray for a declaration of their right of way which is described as passing over the lands of other persons but that is merely descriptive of the way, and they have no cause of action against the owners of the other tenements. One Siva Prasanna, the owner of a tenement over which the way passes, was made a party defendant and he pleaded that there was no cause of action against him. The obstruction being confined to bhadrar kola alone, there was no cause of action against the owners of the other tenements over which the way passes. I am accordingly of opinion that this contention has no force.

3. Secondly, it has been argued that the user by the plaintiffs' tenants cannot inure to the benefit of the plaintiffs. But the enjoyment by the tenant in possession of the dominant tenement under a claim of right in respect of the dominant heritage may give the owner a prescriptive right. The easement is acquired for the benefit of the dominant tenement, and becomes appurtenant to it into whatsoever hands it passes. See Goddard on Basements, 7th Edition, page 223, Gale on Easements, 6th Edition, page 202. Section 12 of the Easements Act (V of 1882) lays down that an easement may be acquired on behalf of the owner of Immovable property by any person in possession of the same. Although the Act does not apply to Bengal, it shows that the principle is a well-recognised one. It was contended that the servient owner may allow successive tenants in temporary occupation (say for 2 or 5 years each) of the dominant tenement to use a way, but that such user cannot confer a right upon the landlord. But this question does not arise in the present case, as one of the tenants alone is found to have used the way for 25 years. The lower Appellate Court has found that the plaintiffs themselves have been in possession of the dominant tenement for 20 years and that before that their tenants were in possession of the same from 1258 (1851) and that it was clearly established by the evidence that the way had been in existence from beyond that time. The user by the plaintiffs themselves is sufficient, in so far as the suit is based upon Section 26 of the Limitation Act.

4. The third contention is that the Court below has misconstrued the word "adhin" in the road cess return and that it ought to have held that the plaintiffs were subordinate tenure-holders under the defendants. I am of opinion, however, that the Courts below have rightly construed the word "adhin" as meaning appertaining to" and not "subordinate" to the howla, and that they have arrived at a right conclusion in holding that they were not subordinate tenure-holders.

5. The fourth point taken is that as both the plaintiffs and the defendants hold tenures within the same howla, the plaintiffs are co-owners with the defendants and cannot acquire a right of easement against the defendants. They are not co-owners of the same piece of land and the lands held by them respectively are separate. It is found that the howla was partitioned among the co-sharers long

ago and the dominant tenement fell to the share of the plaintiffs" predecessor-in-title, while the servient tenement fell to the share of the defendants on partition. The defendants do not admit that the plaintiffs have any right to the servient tenement. But although the parties hold separate tenures and the tenures are permanent, they hold under the same landlord and the question, therefore, arises, whether one permanent tenure-holder can acquire an easement by prescription against another permanent tenure-holder under the same landlord. The ordinary rule no doubt is that a prescriptive right cannot be acquired by one tenant against another tenant of the same landlord. In the case of *Kilgour v. Gaddes* (1904) 1 K.B. 457 : 73 L.J.K.B. 233 : 52 W.R. 438 : 90 L.T. 604 : 20 T.L.R. 240, Collins, M.U., referring to Section 2 of the English Prescription Act said: It appears to me clear that under the section, the right cannot be acquired merely by a tenant as against a tenant, but must be acquired by the owner of fee in one of the tenements as against the owner of the fee in the other. Here the respective tenants of the so-called dominant and servient tenements hold under the same landlord; and, if the proposition be correct that a prescriptive right of way under, Section 2 of the Act must be acquired by the owner of the fee in one of the tenements as against the owner of the fee in the other, then in this case the defendant's contention would involve the result that the tenant of one of the tenements has acquired for his landlord a right of way over the landlord's own land; which is impossible and inconsistent with the essential notion of a right by prescription, namely, that the right is acquired by the owner of land over land belonging to another owner. I limit what I am saying to such an easement as a right of way, because questions with regard to the easement of light, stand on a different footing, and depend on the provisions of Section 3 of the Act. The present case depends on Section 2, which deals with prescriptive rights of way and other similar easements," and it was also pointed out that the reason why a prescriptive right of way cannot be acquired by user by one tenant over land in occupation of another tenant of the same owner is that the enjoyment of the easement in that case would not be as of right.

6. In that case the question arose between two termors. A permanent tenure-holder like a mokuraridar in this country does not stand in the same position as a termor. As pointed out by Pontifex, J., in *Kasumunnissa v. Nilratan Bose* 8 C. 79 : 9 C.L.R. 173 in this country putnis, zurpeshgis, leases and interests of that nature are very considerable interests in the land and cannot be looked upon as a mere lease for a term of years and are in fact substantial proprietary interests, and it was held by the Privy Council in *Sonet Koer v. Himmut Bahadoor* 1 C. 391 : 25 W.R. 239 : 3 I.A. 92 : 3 Sar. P.C.J. 608 : 3 Suth. P.C.J. 257 that a mokurari tenure is an absolute interest which does not revert to the zemindar on failure of heir of the grantee, and that it goes to the Crown by escheat.

7. But it was held in the case of *Kally Das Ahiri v. Monmohini Dassee* 1 C.W.N. 321 : 24 C. 440 that though there may be some correspondence between a conveyance in fee simple and a mokurari maurusi lease, in its practical results the legal effect is not the same, and that an owner by granting a lease in

perpetuity carves a subordinate interest out of his own and does not annihilate his own interest, and that the word "lease" implies an interest still remaining in the lessor. The observations of the learned Judge in that case were quoted with approval by the Privy Council in the case of *Abhiram Goswami v. Shyama Charan Nandi* 4 Ind. Cas. 449 : 10 C.L.J. 284 : 6 A.L.J. 857 : 11 Bom. L.R. 1234 : 19 M.L.J. 530 : 14 C.W.N. 1 36 C. 1003. In the case of *Ram Chander Chakerbutty v. Baikunta Nath Biswas* 9 C.W.N. 856 : 29 C. 363 it was held that an osat talukdar cannot acquire an easement by prescription in respect of the water of a tank of his lessor. The learned Judges in that case observed that although tenants with permanent rights have very extensive rights, still a tenant is always a tenant and never an owner of the land and as he always derives his rights from the lessor, and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him.

8. The tenement over which the right was claimed in that case was not in the possession of another permanent tenure-holder but appears to have been in the khas possession of the landlord himself.

9. Having regard, however, to the present state of the authorities, it seems very doubtful whether a tenant although he is a permanent tenure-holder, can acquire a prescriptive right of way against another permanent tenure-holder under the same landlord.

10. The question is one of importance and requires careful consideration; but it is not absolutely necessary to decide it in the present case.

11. Although the plaintiffs may not claim a prescriptive right because both they and the defendants are tenants under the same landlord, I think the Courts below are right in presuming an implied grant upon the facts proved in the case. The two tenements at one time belonged to the same persons, i.e., before the partition. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts, arises primarily with reference only to continuous and apparent easements, and a way is evidently not a continuous nor always an apparent easement see *Ram Narain Shaha v. Kamala Kanta Shah* 26 C. 311 at p. 313 and it is accordingly contended on behalf of the appellant that in the absence of an express grant, no right of way could be claimed.

12. The distinction between continuous and discontinuous easements has, however, recently been considerably modified, although the decisions in the recent cases, as observed in *Goddard on Easements*, 7th Edition, page 196, have unfortunately not tended to simplify, define or render the rule of law clear as to implied grants and reservations of continuous and discontinuous easements on severance of property and the effect has tended rather to indecision than to settlement of the principles of law." In this state of the authorities, I do not think it will serve any useful purpose by discussing the English cases on the point. The result of the authorities is stated in *Goddard on Easements* (7th Edition, at page

197) thus:

The net result is that the distinction which was made in *Pearson v. Spencer* (1861) 1 B. & S. 571 : 7 Jur. (N.S.) 1195 : 4 L.T. 769 : 124 R.R. 656 *Worthington v. Gimron* (1860) 29 L.J.Q.B. 116 : 2 El. & El. 618 : 6 Jur. (N.S.) 1053 : 119 R.R. 873 and *Polden v. Bastard* (1865) 1 Q.B. 156 : 7 B. & S. 130 : 35 L.J.Q.B. 92 : 13 L.T. 441 : 14 W.R. 198 : 147 R.R. 374 between continuous and discontinuous easements, though not altogether abrogated, has been very much modified: for *Brown v. Alabaster* (1887) 20 Q.B.D. 225 : 57 L.J.Q.B. 198 : 58 L.T. 162 : 36 W.R. 440 : 52 J.P. 51 and *Thomas v. Owen* (1887) 20 Q.B.D. 225 : 57 L.J.Q.B. 198 : 58 L.T. 162 : 36 W.R. 440 : 52 J.P. 51 are decisions that if ways are made in a defined direction and between fixed bounds and are evidently intended to be permanently attached to one part of a property for the sole use thereof, no distinction can be made between a right of way which is a discontinuous easement and a continuous easement, though probably it would still be held that no grant could be implied on division of a property if the way were an ill-defined track, unmetalled and unpaved, over unenclosed ground of the vendor of the would-be dominant estate.

13. The fact that a path is metalled and paved would no doubt indicate permanence in the adaptation of the tenement, but I do not think the learned author means to say that it is absolutely necessary that the path should be paved and metalled even if it otherwise appeared that there was permanence in the adaptation.

14. The plaintiffs purchased the dominant tenement so far back as 1851, i.e., about 60 years ago, after partition between their vendors and their co-sharers. The lower Appellate Court has found that it was clearly established by evidence that the way had been in existence from beyond that time and in fact it has been found upon the evidence on both sides that the way has been in existence from time immemorial. The Court of first instance says, "moreover the right to use the path in question was practically a right inseparably attached to the bari by immemorial user and cannot be detached from it, and so whoever becomes the owner of the bari must have a right to use the path for all purposes. The existence of this path from a very remote past, and its enjoyment down to the time of the obstruction complained of by the plaintiffs and the previous occupiers of the bari, lead me to refer this long enjoyment to a legal origin and to presume a grant or an agreement between the owners of the howlas creating this right."

15. The facts found, therefore, show that the path was evidently intended to be permanently attached to, and for the use of, the would-be dominant tenement now occupied by the plaintiffs. The learned Subordinate Judge finds that there could be no question as to the fixity of the path. So it was not an ill-defined track but a formed road. It may not be paved or metalled: very few private paths in villages are metalled or paved in this country, but the facts found show that there was a permanence in the adaptation of the tenement from which continuity could be inferred.

16. In these circumstances, I think the Courts below are right in presuming an implied grant on severance of the two tenements. But even if there was no formed road or a way of the nature stated in the passage in *Goddard on Easements* cited above during the unity of possession of the two tenements and the way as it came into existence only after the partition, the fact that the tenant in possession of one tenement has been using the path over the other for about 60 years would lead to the inference that the user had its origin in a grant not as a matter of legal presumption, but a grant which may be found as an inference of fact. And I think it is open to a Court dealing with facts to draw such an inference of fact from an unbroken user for about 60 years. The Court of first instance expressly drew such an inference and the Court of Appeal below confirmed it. The user is found to have been as of right.

17. The Court of Appeal below has further found that the disputed way is one of absolute necessity and the only way for ingress and egress to and from the plaintiffs' dwelling houses. It is true every right of way of necessity is founded upon presumed grant, and unless a grant can be presumed, no way of necessity can be claimed. But on a severance of a property, a grant by the owner of one of the severed portions to the owner of the other can be presumed, and has been presumed in this case.

18. It was pointed out, on behalf of the appellants, that according to the finding of the Court below, the path cuts the kola diagonally from north-west to south-east, whereas the Commissioner's map shows a different direction of the path, and that this shows that there was no definite pathway. But the apparent discrepancy is explained by the fact that the plan attached to the plaint is a rough sketch and what is shown as an oblong figure in the plan is shown in the Commissioner's map in a different shape. The question does not appear to have been raised in the Courts below and I do not think that there is any force in this objection.

19. I am accordingly of opinion that the plaintiffs have established their right of way, and that the decree of the Court below is correct. The appeal must, therefore, be dismissed with costs.