

(1920) 10 BOM CK 0020

In the Bombay High Court

Case No : Letters Patent Appeal No. 77 of 1919

Rambbhai Dabhai Patel

APPELLANT

Vs

Vallabbhai Jhaverbhai Patel

RESPONDENT

Date of Decision : 12-10-1920

Acts Referred:

Easements Act, 1882 — Section 15

Citation : (1921) 23 BOMLR 422

Hon'ble Judges : Shah, J;Crump, J

Bench : Division Bench

Judgement

Shah, J.—The plaintiff in this case sued for an injunction restraining the defendant from preventing him from taking water into his field, Survey No. 729, by the artificial water-course by the eastern boundary of the defendant's land, Survey No. 730, marked JB in the plan, Exhibit 11. The water is carried from the well which is shown in the plan in the north of these two fields. It is contended that the plaintiff has no right to carry the water by that route, though he may have the right to carry it by the longer route running by the western boundary of the Survey No. 730, marked C in the plan. The plaintiff based his claim upon an ancient right to take water to his field by the shorter route as alleged by him and also upon the acquisition of such right by prescription, i.e., by twenty years' user as provided in Section 15 of the Indian Easements Act. He also referred to an agreement which was arrived at between his father and one Samal Manor who was an agnatic relation of the defendant. The trial Court raised a general issue as to whether the water course in question was proved and found it in the affirmative. "Die trial Court granted the injunction asked for.

2. The defendant appealed to the District Court which held that the agreement between the plaintiff's father and Samalbhai was not binding upon the defendant. It also held that the title by prescription u/s 15 of the Indian Easements Act was barred, as an obstruction to the easement in question was caused more than two years prior to the date of the suit. The appellate Court,

however, held that the ancient way for taking water as alleged by the plaintiff was proved by the oral evidence in the case, and further observed as follows :?

As the water has passed by the way claimed from time immemorial, it follows that it was agreed between all the then laud-holders, including the holder of defendant's land, that the plaintiff's water should pass that way. The plaintiff did not, therefore, acquire this right by prescription, but by agreement and grant.

3. Accordingly the appellate Court dismissed the appeal. The defendant then preferred a second appeal to this Court. This appeal, which was heard by the learned Chief Justice, was allowed, and the plaintiff's suit dismissed with costs throughout. This decision, as I read it, is based mainly on the ground that the only mode of acquisition, pleaded in the case apart from the agreement of 1896, was that provided by Section 15 of the Indian Easements Act and that no question was raised that the right had been used from time immemorial. It is also based upon the ground that there was no evidence in the case to prove the real agreement which the appellate Court purported to find. At the close of the judgment, it is observed as follows:?

He gets the water by a slightly longer route, but it has not been proved how the water came before the Indian Easements Act or the Indian Limitation Act) was passed. The water coming by the longer route is just as good as the water that comes by the shorter route. Therefore it, cannot be said he has Buffered any injury from the defendant's obstruction to the shorter watercourse. If it had been otherwise, I have no doubt I might have endeavoured to find some way of remedying the injury to the plaintiff which undoubtedly he would be suffering under. But here there is no injury.

4. From this decision the present appeal is preferred under the letters Patent. It is urged in support of the appeal that the plaintiff relied not only upon the acquisition of the easement u/s 15 of the Indian Easement Act but Also upon his ancient right to use the water-course described in the plaint. It is urged that the plaintiffs case was based upon an ancient right, that is, in effect, upon immemorial user. It is urged that the District Court has in fact found in favour of the plaintiff as regards the ancient right and the immemorial user, and that that finding ought to have been accepted in second appeal.

5. It is common ground before us that the plaintiff's claim, so, far as it is based Upon Section 15 of the Indian Easement Act is rightly disallowed. The obstruction to the plaintiff's right admittedly occurred more than two years prior to the date of the suit and any claim based upon Section 15 of the Indian Easement Act is barred. The case, so far as it is bused upon the specific agreement of 1896, has been negatived by the District Court. The view taken by that Court that the agreement is not binding upon the defendant is not challenged before as.

6. The only question, therefore, in the appeal is whether the plaintiffs claim in based upon the allegation of ancient right to take the well water by the artificial water-course along the eastern boundary of the defendant's field can be

allowed. On behalf of the defendant it is argued that there is no specific allegation in the plaint as to immemorial user and that the allegation as to ancient right cannot be read as implying any case of immemorial user. It is further urged that the issues framed in the trial Court and the District Court were not specific enough to raise the question of immemorial user, and that the evidence led to prove the user with reference to the point arising u/s 15 of the Indian Easements Act cannot properly be treated as supporting the inference as to immemorial user. It is also urged that the user in the present case extends over thirty to thirty-five years at the most, and that the user for such a limited period cannot be treated as a basis for the acquisition of easement in question. It is also contended that though the agreement of 1896 is not binding upon the defendant, it shows that the user by the plaintiff was under the agreement and not as of right. Lastly it is suggested that the case made by the plaintiff with reference to this agreement is really inconsistent with any ancient right.

7. I have so far set forth the rival contentions urged before us on both sides. It seems to me, however, that the decision of this appeal must depend upon the view we take of the finding of the lower appellate Court as to the ancient right, and immemorial user. It is not disputed in this case that the plaintiff has the right to use the well water, it is not disputed that he has the right to take the water to his field by the longer route, which has been indicated in the plan. Thus in any event the plaintiff has the right to carry well water to his field.

8. The question is whether he has the right to take it to his field by the shorter route along the eastern boundary of the defendant's field. There is no allegation in this case and there is no evidence as to when this well was built or as to whether any arrangement was arrived at at the time, when the well was built, among the owners of the adjoining field as to the passages by which the owners of the adjoining fields were to take water to their respective fields. The District Court has found that the ancient way for taking water as alleged by the plaintiff is proved by the oral evidence in the case. There can be no doubt that there is evidence in support of this finding. So far it seems to me that it is a question of fact based upon the evidence in the case. The learned District Judge was also of opinion that the water passed by the way in question from time immemorial. It is quite true that the expression "immemorial user" is not used in the plaint. The plaint shows that an allegation as to the ancient right to carry water by this way was, as distinguished from the right acquired u/s 15 of the Indian Easements Act, made in the plaint. That allegation could refer only to the acquisition of the easement by "immemorial user" as distinguished from prescription u/s 15 of the Indian Easements Act.

9. I think that though the expression " immemorial user " is not used in the plaint, that was involved in the plea of ancient right, which was distinctly alleged in the plaint. Such user is found by the District Judge. He has drawn from the finding as to immemorial user the inference that the plaintiff acquired this right by agreement or grant. He calls it real agreement as distinguished from a

fictitious or presumptive agreement or grant. It seems to me that it makes no difference whether the agreement or grant thus inferred is called " real", " presumptive " or " fictitious ". That is a matter of words rather than of substance. The question is whether there has been user for such length of time as would give rise to the inference as to immemorial user, from which an agreement or grant can be, inferred. If we take the finding of the District Court, the case seems to come very near the decision in (1881) ILR 6 394 (Privy Council) At page 247 their Lordships of the Privy Council, after quoting the finding from the judgment of the High Court, observe as follows :

This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the plaintiff and his ancestors, any Court which Had to deal with the subject mighty and indeed ought, to refer, such a long enjoyment to a legal" origin, ands trailer the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff"s mehal and the defendants" land by which the right was created. That being so, the plaintiff does not require the aid of the statute.

10. The statute there referred to was Section 27 of the Indian Limitation Act of 1871. The statute applicable to this case is Section 15 of the Indian Easements Act. In that case the user found was possibly for fifty or sixty years and certainly for more than twenty years. In the present case the period is about thirty-five years and certainly more than twenty years. It seems to me that the observations in that case apply to the present case. This case was relied upon by this Court in *Punja Kuvarji v. Bai Kuvar* ILR (1881) Bom. 20 The facts there found are somewhat similar to the facts of the present case with this difference that the length of the user is not indicated in the report, but it was found generally that the had been enjoyed from time immemorial. It has been suggested in the course of the argument before us that immemorial user or ancient right cannot be inferred from user extending over a period of thirty-five years, but no case has been cited to us in which the minimum limit of time, which would justify the inference as to immemorial user has been laid down. It would appear from the observations in the case of *Maharani Rajroop Koer v. Syed Abul Hossein* that their Lordships did not lay any particular emphasis upon the number of years so long as it was in exce ss of twenty years. It seems to me that no such limit can be definitely laid down. It must depend upon the circumstances of each. case. The question whether immemorial user or ancient right is established in any case must depend upon the evidence and the circumstances of that case. In the present case the District Judge has been satisfied as to the existence of the ancient right and the immemorial user.

11. The practical inconvenience to the plaintiff, if he is prevented from taking water by the shorter route and required to take it by the longer route, is a matter which cannot affect the point of law, with which we are concerned. But as that matter has been referred to in the argument, it seems to me that the

practical inconvenience to the plaintiff would be appreciable if he has to take water from the well by the longer route, it would certainly mean greater labour and greater loss of water on the way. It is a distinct advantage to him to have the water by the shorter route, if he is otherwise entitled to it.

12. I may briefly notice the other contentions which I have already set forth. I do not think that the agreement of 1896 is either inconsistent with the immemorial user or that it shows any interruption in the enjoyment of the easement in 1896. It seems to me that the defendant, who is not bound by the agreement, cannot rely upon this agreement as showing that the enjoyment of the easement was under the agreement. If the agreement is not binding upon him, the user is as of right against him and not under the agreement. The agreement with a third person does not make the user in any sense permissive, so far as the defendant is concerned. If the agreement had any validity : at all against him it seems to me that the defendant would be bound by it, and he would have no answer to the plaintiff's claim. The mere fact that there is a recital as to some dispute between the parties at the date of the agreement does not, in my opinion, indicate any interruption in the enjoyment of the right. There is nothing in the agreement to justify the suggestion that the user was interrupted. I do not think that the fact that the plaintiff has relied upon this agreement of 1896 in any sense inconsistent with the acquisition of his right in any of the two alternative modes, which are set forth in the first paragraph of "B20 the plaintiff.

13. On the whole it seems to me that out of the two modes of acquisition relied upon in that paragraph, that referable to Section 15 of the Indian Easements Act was negatived. The other mode was open to him and he has been able to establish it to the satisfaction of the District Court. Having regard to the terms of the plaintiff, I think that this mode is not outside the pleadings. It seems to me on the judgment of the learned Chief Justice that if he was satisfied that the plea of ancient right?or rather immemorial user?was within the scope of the plaintiff he would probably have taken the same view of the case, as we do.

14. I would reverse the decree appealed from, and restore that of the trial Court with costs throughout on the defendant.

Crump, J.

15. I agree. The case made by the plaintiff in his plaintiff was clearly in the alternative. He set out specifically that his right was of a very ancient origin and that on that account and also on account of twenty years" user, he was entitled to take water from the well by the channel in suit. That is, in my opinion, a sufficient plea of immemorial user. " When I consider the manner in which the Courts dealt with this plea apparently without objection from the defendant I am confirmed in the conclusion that the parties so understood it.

16. The first Court in reality dealt with three points. It held that the specific agreement in 1896 on which the plaintiff also relied was not binding upon the defendant, it also held that the plaintiff had acquired an easement in the method

permitted by Section 15 of the Indian Easements Act, that is to say, by twenty years" enjoyment. It further held that there must have been an arrangement between the persons by whom the well was built though it remarked that that arrangement, was not definitely proved. This latter finding is in reality only one aspect of the plea of immemorial user or ancient right which was set up in the plaint. The lower appellate Court also dealt with these three points but the judgment is not as specific as could have been desired. The District Judge found that there was an ancient right to take water by the channel claimed by the plaintiff and further that the agreement of 1896 was not binding on the defendant, and that the plaintiff could not rely upon the acquisition of an easement in the manner allowed by Section 15 of the Indian Easements Act because two years had elapsed since his enjoyment had been interrupted. But with reference to the ancient user which the District Judge has held established he came to the conclusion that from the evidence in the case, which shows an user of at least thirty-five years as also from the situation of the property considered in the light of the plaintiffs admitted right to use water from the well, the inference was that when the well was built, the persons using the well of whom the plaintiff's ancestor was admittedly one, agreed between themselves that the plaintiff should take the water by the shortest route to his land. That appears to me to be a finding of fact and I do not see that in arriving at that finding the learned District Judge has fallen into an error of law. When he draws a distinction between a real agreement and a fictitious or presumptive agreement I do not precisely understand what he means, but though it is true that there is no direct evidence of any such grant or agreement as he has found proved, the circumstances are such as to entitle him to infer an agreement; such as he has found in this case. It was not necessary for the purpose of that finding that there should be any direct evidence indeed there could not be, in the circumstances of the case. It was open to him to find from the oral evidence that the user is of ancient origin. It was open to him to infer from the plaintiffs right to take the water read along with the ancient user that there must have been an arrangement such as is found to exist. It appears to me also that it was open to him to rely upon the agreement of 1896 not as binding upon defendant but as evidence to show that the plaintiff's right had been admitted at the date of that agreement. Upon all these grounds his conclusion was one which he was entitled to form and is not, in my opinion, one which should be disturbed in second appeal. I, therefore, agree with the order proposed by my learned brother.