Before Mr. Justice Baker.

1931

February 18.

YOSEF DAVID VARULEKAR

v.

MOSES SOLOMON TALKAR.*

Indian Easements Act (V of 1882), Secs. 23, 45, 47—Privy—Sweeper, passage to—Decree—Removal of privy lower down—Burden on servient heritage not increased—Decree can be executed in respect of new privy—Civil Procedure Code (Act V of 1908), Sec. 47.

The plaintiff had a privy at one end of his property, which was cleaned by a sweeper who used to pass through a lane (gully) belonging to defendants, and he obtained a decree establishing his right of the easement. Subsequently the defendants having moved the Municipality, the plaintiff's existing privy was demolished, and a new one was erected at a point further down on the plaintiff's property. The defendants having obstructed the plaintiff's sweeper from passing through their lane to clean the new privy, the plaintiff applied to execute his decree :—

Held, (1) that the dominant heritage was not the privy but the plaintiff's house and land within which the privy was ;

(2) that the removal of the privy and its rebuilding on a different spot on the plaintiff's land had not the effect of extinguishing the easement under s. 45 of the Indian Easements Act, 1882 ;

(3) that as long as the sweeper entered the plaintiff's land or rather left the defendants' land at the same point, there was no increase in the burden, and that the case was governed by s. 23 of the Act ;

(4) that the decree of the plaintiff was capable of execution, since the right of way to which the plaintiff was entitled was in respect of cleaning the privy standing in his land and the fact that the privy was moved further down in the plaintiff's property made no difference.

PROCEEDINGS in execution.

Talkar (plaintiff) owned a house and open land surrounding it. At one point on his land there was a privy for his use. It was cleaned by his sweeper, who passed through an adjoining lane (gully) belonging to Varulekar (defendants). In 1921, the plaintiff obtained a decree against the defendants establishing the right of his sweeper to pass through the defendants' land (24 Bom. L. R. 298).

At defendants' instance, the Municipality required the plaintiff to remove the privy. The plaintiff accordingly demolished his old privy and erected a new one at a point lower down on the plaintiff's land. To clean the new privy the plaintiff's sweeper used to pass along the identical line of passage on the defendants'

* Second Appeal No. 465 of 1928, from the decision of N. N. Master, Assistant Judge at Thana, in Appeal No. 146 of 1927, confirming the decree passed by D. S. Gupte, Subordinate Judge at Alibag, in Darkhast No. 311 of 1927.

land and then passed through the plaintiff's land for some distance. The defendants obstructed the sweeper from going to the new privy to clean it.

The plaintiff thereupon applied to execute the decree which he had already obtained against the defendants.

The defendants contended that owing to the demolition of the old privy the plaintiff had lost his right of easement, and that the old privy having ceased to exist the decree was not capable of execution.

The executing Court ordered the execution to proceed, observing as follows :—

"The plaintiff wants to take his sweeper to the privy by the old passage given to him by the High Court's decree. He does not ask for any additional passage or increase of easement...I do not think the defendants are entitled to disobey the decree and obstruct the plaintiff's sweeper on the mere ground that the plaintiff's privy has changed its position and that too at the instance of the defendant himself. No sound argument or authority has been cited to me in support of the defendant's contention."

This decree was, on appeal, confirmed by the Assistant Judge, for the following reasons :—

"The shifting (by the plaintiff of his privy) has not added any burden to the defendants' servient land as contended by the defendants' pleader before me. Plaintiff does not want over the defendants' land a longer way than hitherto enjoyed by him nor has he added to the number of his privy. The burden of the sweeper in going to a longer distance for cleaning the new privy from the point A, which is the place of the old privy, after crossing the old way in the defedants' compound, falls not on the defendants' land but on the plaintiff's land. So the change of place of the privy does not add to the burden on the defendants' land in any way. The user beyond *terminus ad quam* does not injuriously affect the defendants' servient tenement and so the case of *Lawton* v. *Ward* at p. 338 of Gale on Easements (10th Edition of 1925) cited by the learned pleader for the plaintiff does apply. Then further it is contended that the old privy having been demolished the easement is extinguished because it was for the old privy only as the dominant tenement. This is a wrong assumption because the way was used not for the privy itself but for the inhabitants occupying the property of the plaintiff. That property is therefore the dominant tenement and it is not destroyed. Under s. 23 of the Indian Easements Act, the plaintiff as dominant owner can alter the mode and place of enjoying his tenement, provided he does not thereby impose any additional burden on the servient heritage which in the present case is the defendants' compound used by the plaintiff's sweepers. It is not proved by the defendants that by altering the place of the privy, the plaintiff has imposed additional burden on his said compound."

The defendants appealed to the High Court.

A. G. Desai, for the appellants.

W. B. Pradhan, for the respondent.

BAKER J. The plaintiff in this case obtained a decree against the defendants, the decree being: "ordered that the plaintiff has

A. C. J. 1931

VARULEKAR v. TALKAR

Baker J.

the right that his sweeper shall have liberty to go through the lane described in the plaint in order to clear the latrine situated in the plaintiff's premises described in the plaint; and the defendants are ordered not to obstruct the sweeper. The plaintiff should get the obstruction caused by the defendant removed through Court." This was on February 16, 1920. On appeal this decree was confirmed by the District Judge, Thana. On second appeal to the High Court the decree was confirmed, the case being *Varulekar* v. *Talkar*[1], in which reference is made to the Judge being satisfied that the lane was used by the plaintiff as of right for more than twenty years and that a right to an easement had been established. The High Court, however, in its judgment advised the defendants to move the Municipality to require the plaintiff to remove the privy further away from the plaintiff's house, and in that case the privy would not be cleaned by the sweeper using the defendants' ground. In consequence of this, the Municipality was moved by the defendants, and the privy which formed the subject of suit and which is marked A on the plan was taken down and a new one built at the point X on the plaintiff's land. When the sweeper employed by the plaintiff was going to clean this privy, he was obstructed by the defendants, and the plaintiff, therefore, sought to execute the decree in the former suit, No. 402 of 1919. The defendants contended that as the plaintiff had removed his former privy and rebuilt it, he cannot enforce his rights under the decree. The Subordinate Judge of Alibag found against him, and this finding was confirmed on appeal by the Assistant Judge of Thana. The defendants make this second appeal.

This case raises a point of law which does not seem to be directly covered by authority, although I should think it is of fairly frequent occurrence. The question is whether by pulling down the privy which formed the subject of the former suit and rebuilding it at another place, the plaintiff has thereby lost the right of easement which he had in respect of the previous privy, and secondly, whether by the removal of the privy which formed the subject-matter of the present suit the decree is no longer capable of execution. It is to be observed that the passage used by the sweeper for going to the new privy is precisely the same as it was before in going to the old one. The plaintiff does not seek to impose any greater burden on the servient heritage by requiring the sweeper to pass over a greater portion of the defendants' land than before. The learned advocate

(1) (1921) 24 Bom. L. R. 298.

for the appellants relies on ss. 45 and 51 (*c*) of the Indian Easements Act. Section 45 says :—

"An easement is extinguished when either the dominant or the servient heritage is completely destroyed."

Section 51 says (we need only refer to the last paragraph) :—

"An easement extinguished under section forty-five revives...(*c*) when the destroyed heritage is a dominant building, and, before twenty years have expired, such building is rebuilt upon the same site, and in such a manner as not to impose a greater burden on the servient heritage."

The argument of the appellants is that in this case the dominant heritage must be taken to be the privy which has been destroyed, and therefore the easement was extinguished under s. 45, and as admittedly the new latrine is not re-built on the same site, the easement is not revived. Reference has been made to Gale on Easements, 10th Ed., p. 338. That, however, is on the second point, i. e., the imposing a greater burden on the servient heritage. On behalf of the respondent. it is contended that the dominant tenement is not the privy, but the plaintiff's house and reference is made to s. 4 of the Indian Easements Act, in which an easement is described as a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do and continue to do something, or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own, and it is contended that the case is governed by s. 23, which provides that subject to the provisions of s. 22, the dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. The learned advocate for the respondent has relied on the cases in *Jadulal Mullick* v. *Gopalchandra Mukerji*(1), *Jesang* v. *Whittle*(2), and *Purshottam* v. *Kasturbhai*(3). Those cases, however, bear rather on the second point, i. e., as to the increase on the burden of the servient heritage. Although no case has been quoted precisely on this point, I have no doubt that the dominant heritage in this case is not the privy but plaintiff's house and land within which the privy is. The definition in s. 4 of the Indian Easements Act is in consonance with that definition rather than with the theory that the dominant heritage is the privy itself. Therefore, the removal of the privy and its re-building on a different spot in the plaintiff's land would not have the effect of extinguishing the easement under s. 45 of the Act. The case is, in my opinion, governed rather by s. 23, which provides

(1) (1886) I. L. R. 13 Cal. 136.

(2) (1899) I. L. R. 23 Bom. 595, s. c 1 Bom. L. R. 37.

(3) (1930) 32 Bom. L. R. 1001.

A. O. J. 1931

VARULEKAR v. TALKAR

Baker J.

that the dominant owner may from time to time alter the mode and place of enjoying the easement provided he does not thereby impose any additional burden on the servient heritage. Now, it is admitted that in order to go to the new privy at X the sweeper only passes over the same portion of the defendants' land as before, and enters the plaintiff's land at the same place. The only question to be considered in the light of the cases which have been quoted above is the increase in the burden, if any, on the servient heritage. It is obvious that as long as the sweeper enters the plaintiff's land or rather leaves the defendants' land at the same point there is no increase in the burden, and it follows, therefore, that the provisions of s. 23 will govern the case.

With regard to the question that the original decree referred to a privy which is no longer in existence, and therefore the decree is now incapable of execution, the answer is that in view of what has gone before, the right of way to which the plaintiff is entitled was in respect of cleansing the privy standing in his land, and the mere fact that this privy has been replaced by another at a distance of some twenty or thirty feet will not render the decree incapable of execution, and therefore the present proceedings under s. 47 of the Civil Procedure Code are open to the plaintiff.

The result is that the appeal fails, and is dismissed with costs.

Appeal dismissed.