BOMBAY HIGH COURT

Raychand Vanmalidas

Vs.

Maneklal Mansukhbhai

Second Appeal No. 365 of 1943

(Divatia, Sen and Weston, JJ.)

30.08.1945

JUDGMENT

Divatia, J.

1. [They were mere observations not necessary for the decision.]

2. That may be so, but they express also the law that should be followed in such cases, otherwise it will be necessary to prove animus in every case.

Divatia, J.

3. [Sections 4 and 15 of the Indian Easements Act do indicate that rights of easement must be enjoyed over the property of another.]

4. That is the ordinary law relating to easements, but there are cases which do establish that merely setting up a claim to ownership does not prevent the plaintiff from establishing a right to an easement. The owner of a dominant tenement must not necessarily believe that servient tenement belongs to another.

5. According to our contention if our client proves that for twenty years he had already enjoyed the right of easement, it would not matter even if he had set up a claim to ownership which was held disproved. The statutory right which may have been acquired for the easement cannot be taken away by any decision in the previous suit.

6. The expression "as aneasement" occurring in Sections 4 and 15 of the Indian Easements Act is interpreted in *Bright v. Walker*[1] *Tickle v. Brown*[1] and *Onley v. Gardiner*[2]

7. Consent or acquiescence of the servient owner lies at the root of acquisition of the right of easement by the dominant owner: *Sturges v. Bridgman*[3]

Divatia, J. –

[1](1834) 1 C.M. & R. 211 [3](1879) 11 Ch. 852
[2](1936) 4 Ad. & E. 369 [4] I.L.R (1891) Bom. 59**2**

8 [*The principle of Chunilal Fulchand v. Mangaldas Gwardhandas*[5] would apply to cases falling under Section 15 of the Indian Easements Act.]

9. The decision in Chunilal Fukhmd's case shows that there was unity of possession. There the plaintiff definitely asserted in the previous suit that the piece of land belonged to them and was in their possession.

10. The Act does not lay down that even in cases where the plaintiff erroneously believes that the servient tenement belongs to himself, he would be precluded from claiming easement. As an easement the owner of dominant tenement seeks to impose certain burden over the servient tenement and this right can be obtained even if the owner of the dominant tenement merely asserted rights of ownership over servient tenement. *Dharamdas Kaushalyadas v. Ranchhodji Dayabhai*[5] shows that it matters not even if the owner of, the dominant tenement believed that he owned the servient tenement. The decisions in *Narendra Nath Barari v. Abhoy Charan Chottopadhya*[6] and *Behari v. Asutosh*[7] also support his contention.

11. Till 1914 and 1915 when the two English cases (*Lyell v. Hothfield (Lord)* and *Attorney General of Southern Nigeria v. John Halt and Company (Liverpool) Limited*, were decided, there was no case in which it was held that the owner of dominant tenement must show animus that he was claiming the right as an easement. Those decisions, however, proceed upon peculiar facts. There it was proved that (1) there was unity of possession between two tenements; (2) easements were not submitted to; (3) the terms of Section 1 of the English Prescription Act were not being complied with, Therefore on facts in those cases the right of easement could not arise.

12. Following those decisions it was held by the full bench of the Madras High Court in *Subba Rao v. Lakshmana Rao* that the expression of opinion in *Konda v. Ramasami*[8] "that the assertion of ownership during the period of user is; not fatal to the success of a claim to an easement" could not be supported. They held that the acts done during the statutory period which are only referable to the purported character of owner cannot validate a subsequent claim to an easement.

13. According to the decision of the Madras High Court every person claiming under Section 15 of the Indian Easements Act will have to show that for a statutory period he must prove animus to claim as an easement. If there is any break the right would be lost. We submit that the decision in *Konda v. Ramasami* supports my contention. Further a party can set up alternative sets of facts and may succeed in establishing any one of them. See Order 6, Rule 2, and Sir Dinshah Mulla's Civil Procedure Code, p. 535, and for construction of statute *Commissioners for Special Purposes of Income Tax v. Pemsel*[9] and *Narendra Nath Barari v. Abhoy Charan Chattopadhya*[10]

14. Following the decision of the full bench in *Subba Rao v. Lakshmana Rao* Baker J. held in *Marghabhai v. Motibhai Mithabhai*[11] that easement is capable of being; acquired only if the user for the statutory period has been with the animus of enjoying the easement as such in the land of another and not if

[5] I.L.R (1921) Bom. 200: 23 Bom. L.R. 1009 [7](1924) 41 C.L.J. 379 [9][1891] A.C. 531
[6] I.L.R (1906) Cal. 51 [8] I.L.R (1912) Mad. 1 [10] I.L.R (1906) Cal. 51
[11] I.L.R (1932) Bom. 427: 4 Bom. L.R. 1015

the user has been in consciousness of one's own ownership over the same. In the later decision in

Tamanbhat v. Krishtacharya[12] and *Rau Rama v. Tukaram Nona*[13] Beaumont C. J. disapproved Baker J.'s view and in the latter case it was observed that some of Baker J.'s' observations went too far and it was held that it was not the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of dominant tenement and servient tenement and that he is exercising a right over property which does not belong to him. Regarding the English decisions it was observed that they turned on particular facts proved,

15. We therefore submit that the law is properly laid down by Beaumont C. J. in later decisions and it does not offend the provisions of the statute, Later decisions of other High Courts are *Rajlu Naidu v. K.B.M.E.R. Malak*[14] *Khanchand Jethamal v. Narandas Pahlrajrai*[15] and *Lalit Kishore v. Ram Prasad*[16]. In all these cases double claims were made, namely ownership as well as possession were claimed.

Divatia, J.

16. This appeal has been referred to a full bench on account of certain conflicting observations in *Tamanbhat v. Krishtacharya*[17] and *Rau Rama v. Tukaram Nana*[18] on the one hand and *Marghabhai v. Motibhai Mithabhai*[19] and *Chunilal Fulchand v. Mmgaldas Govardhandas*[20] on the other hand. The facts which have given rise to the point in appeal are shortly these: The respondent-plaintiff was the owner of certain houses in Ahmedabad, City Survey Nos. 651, 653-B and 655 as ancestral property. In 1919 he purchased another house, namely, Survey No, 652. The case for the defendant, who is the maternal uncle of the plaintiff, was that houses Nos. 653-B and 655 and a terrace on a part of house No. 651 were given to him in gift by the plaintiff's father about fifty years ago and since then he was in possession of the same. The terrace on house No. 651 is surrounded by three houses, Survey Nos. 651 and 652, which are in the plaintiff's possession, and Survey No. 653-B, which is in the defendant's possession. All the three houses have doors connecting them with the terrace, and there are four small windows in the wall of house No, 652 for which the plaintiff claims light and air, and also two windows in the southern wall of house No. 651 abutting on the terrace for which also he claims the right of light and air, This litigation has a previous history. The present plaintiff had filed a suit in 1933 against the present defendant to recover possession of S. Nos. 653-B, 655 and the terrace on S. No. 651 on the ground that they were given by the plaintiffs father to the defendant merely as a licensee, that there was no gift, and that the plaintiff was the owner of the same. The defendant's case was that he was not the licensee, but that the property had been gifted to him by the plaintiffs father in consideration of his sister being given in marriage to the plaintiff's father. The trial Court as well as the lower appellate Court granted a decree in favor of the plaintiff on the finding that the defendant was merely a licensee of these properties. In second appeal this Court, however, reversed that decision and held that the plaintiff had not proved that the defendant was a mere licensee and that he was not therefore entitled to eject the defendant from the premises. The decision of this Court was

[12](1932) 36 Bom. L.R. 144
[13][1989] Bom. 140:(1938) 41 Bom. L.R. 168
[14][1939] Nag. 580
[15][1939] Kar. 307
[16][1943] All. 792
[17](1932) 35 Bom. L.R. 144
[18][1939] Bom. 140: (1938) 41 Bom. L.R. 168
[19] I.L.R (1932) Bom. 427:34 Bom. L.R. 1015
[20] I.L.R (1891) Bom. 592

given on August 2, 1939. Thereafter the plaintiff brought the present suit on February 3, 1940, in which he based his claim on certain easement rights over the terrace on City Survey No. 651

treating the terrace as of the ownership of the defendant. The plaintiff claimed not only the right of way over the terrace for his two houses, Nos. 651 and 652 from the doors opening on the terrace, but, as I said before, he claimed the right of light and air through all the windows which abutted on that terrace. He also claimed the right of conveying rain water on the terrace from his house No. 651, the right of dropping water on the terrace from the eaves of the said house, for using the staircase which abuts into the terrace, and also for depositing loose articles on the same. We are not now concerned with the rights for passing rain water and the right for opening the staircase and the storing of the goods because they have been given up by the parties. The dispute was confined in the trial Court to the right of way through the two doors of the houses of the plaintiff abutting on the terrace and the right of light and air from the apertures in the walls of the two houses and the right of opening the two doors on the terrace. The trial Court held that the plaintiff was not entitled to those rights in view of the fact that in the former litigation of 1933 he claimed the terrace as of his own ownership and in the present suit he claims certain easement rights over the same terrace treating it as of the ownership of the defendant. In doing so the learned trial Judge purported to follow two decisions of this Court in *Rau Rama v. Tukttram nana* and *Tamanbhat v. Krishnackarya* and did not follow the decision in .Marghabhai v, Motibhai Mithabhai, on the ground that the latter decision was practically dissented from in the later two rulings. According to him the decision in *Rau Rama v. Tukwam Nana* laid down that where a party shows that for the statutory period he had openly exercised certain rights which were in themselves sufficient to establish an easement, prima facie he was entitled to the easement, and it was not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement. On the evidence, which consisted of two teachers who were occupying the two houses of the plaintiff, the learned Judge held that the plaintiff had through his agents enjoyed the easement rights which he now claims for the statutory period and the fact that he claimed ownership of the terrace in the previous litigation during that period did not matter at all as it was not necessary that he should be conscious throughout that the terrace was of the defendant's and not of his ownership. He, therefore, granted to the plaintiff the reliefs which he claimed in respect of the right of way as well as the right of light and air. On appeal the First Class Subordinate Judge with appellate powers confirmed that decree. He was also of the opinion that the observations of Baker J. in *Marghabhai v. Motibhai Mithabhai* went too far as observed in the later decision in *Rau Rama v. Tukarami Nana* and he agreed; with the trial Judge that the plaintiff had through his agents enjoyed rights which he claimed for the statutory period, and even though he asserted his ownership of the terrace in the previous litigation, it did not come in his way of proving the right of easement. He, therefore, confirmed the decree of the trial Court and gave permission to the plaintiff to amend his plaint by asking for relief for light and air for four jalis instead of three jalis as he claimed in his plaint, because on the evidence it was held that there were four jalis and that the plaintiff had enjoyed light and air through all of them for the statutory period.

17. The defendant has filed this second appeal against the decree of the lower appellate Court, and it is contended on his behalf that the lower Courts were wrong in following the two decisions of this Court in *Rau Rama v. Tukaram nana* and *Tamanbhat v. Krishnacharya*, because the learned Judges below only relied on certain observations in the nature of obiter dicta which were not necessary for the purpose of the actual decision. On the other hand the decision in *Chunilal Fulchand v. Mangaldas Goverdhmdas*, which was followed in *Marghabhai v. Motibhai Mithabhai*, established the proposition that a person claiming the rights as an easement must be conscious of the fact that the property over which he was exercising the rights was not his own

and that it belonged to another person; and, as the plaintiff in this case had asserted his own right of ownership over the terrace in the previous litigation for the statutory period, he cannot be held to have acquired them by way of easement. It is also contended that the decisions of the other High Courts, namely, Madras, Allahabad, Rangoon and Nagpur, as well as the Chief Court of Karachi, have also taken the same line as the decision of our Court in *Chunilal v. Mangaldas Govardhandas* and that we should follow those decisions rather than the observations in *Rau Rama v. Tukaram Nona*. *Chunilal Fulchand v. Mangaldas Govardhandas* is the earliest decision of our High Court on this point and, although that case was not governed by Section 15 of the Indian Easements Act, 1882, but by Section 26 of the Indian Limitation Act of 1877, the provisions of both the sections so far as they bear on this point are the same. In that case it was held that in order to acquire an easement under Section 26 of the Indian Limitation Act, the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years, Evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement. The plaintiff had in that case also claimed the ownership of the land, for which the easement was claimed, in a previous suit, and it was observed that from the case the plaintiff had made in his previous suit that he never claimed the right to use the nul, gutter and kothi as an easement, but by right of ownership of the land itself, the lower Court of appeal was right in holding that his claim to an easement failed in so far as it was based on Section 26 of the Indian Limitation Act. That decision was followed in *Marghabhai v. Motibhai Mithabhai*. Mr. Justice Baker sitting singly held that no claim of easement can be made with reference to the land over which a person claimed ownership or which belonged jointly to him along with others. He followed the decision in *Chunilal Fulchand v. Mangaldas Govardhandas* and also a full bench decision of the Madras High Court in *Subba Ran v. Lakshmana Rao*[21]. He also referred to two English cases on that point, namely, *Attorney General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*[22] and *Lyell v. Hothfield (Lord)*[23] In the opinion of the learned judge the English law was the same as that was adopted in the two Indian decisions in *Chunilal Fulchand v. Mangaldas Govardhands* and *Subba Rao v. Lakshmana Rao* and that, therefore, a party who claims a right of easement cannot succeed unless he established that he had consciousness of the knowledge that property over which he was claiming easement did not belong to him. In *Tamanbhat v. Krishnacharya*, it was held that where one of the issues on which the parties go to trial is an issue of easement, the mere fact that the defendants claim in their pleading ownership of the land does not affect the suit. In that case there was no previous litigation in which ownership was pleaded by the party claiming easement in the subsequent suit but there were inconsistent and alternate pleadings in the same suit, and it was held that it was open to a party to put up inconsistent defences. Beaumont C. J. who decided that case was of the opinion that certain observations made by Baker J. in *Marghabhai v. Motibhai Mithabhai* went too far inasmuch as it was stated that there must be consciousness on the part of the person who claims as an easement that all along he was claiming the right

[21] I.L.R (1925) Mad. 820 [23][1914] 3 K.B. 911
[22][1915] A.C. 599

treating the property as belonging to somebody else. The same criticism was repeated by Beaumont C. J. in *Rau Rama v. Tukaram Nona*. In that case there was no previous litigation but there was an alternative inconsistent defence of ownership and easement. The plea of ownership was not pressed at the time of framing issues and therefore there was no issue about ownership. The only issue framed was about the right of easement. The learned Chief Justice held, as he did in the previous case of *Tamanbhat v. Krishnacharya*, that it was open to a party to raise

inconsistent pleas in the alternative and that the suit should not be dismissed on that account. In doing so, however, he again repeated the criticism of *Morghabai v. Motibhai Mithabhai* and observed (p. 142):

> It is not in my judgment the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of a dominant and servient tenement and that he is exercising a right over property which does not belong to him.

It was further observed (p. 142):

> In my opinion, where a party shows that for the statutory period he has openly exercised certain rights which are in themselves sufficient to establish an easement, prima facie he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement. Most laymen do not know exactly what their legal rights may be. They do certain acts without formulating, even mentally, a legal claim, and in my opinion a right to an easement by prescription cannot be defeated merely by showing that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement.

At the same time, however, the learned Chief Justice observed, summarizing the effect of the two English decisions in *Lyell v. Hotfield (Lord)* and *Attorney General of Southern Nigeria v. John Holt and Company (Liverpool), Limited* (p. 143):-

> ...if it be shown that the owner of the dominant tenement has in fact exercised all the rights which he says go to constitute an easement in pursuance of a perfectly definite and well recognised claim of ownership, then it is not open to him to turn round and say 'now that my claim to ownership on which I always relied has failed, I rely on some of the acts of ownership as being sufficient to constitute an easement'. But these cases must all turn on the particular facts proved.
>
> All these observations were not necessary for the purpose of the decision in that case. Even so, they do not, in my view, amount to a definite opinion that in no case can an assertion of ownership over a property during the prescriptive period prevent the acquisition of easement rights over the said property. In my judgment the authority of *Chunilal Fulchand v. Mangaldas Govardkandas* is not shaken by any subsequent authority of this Court.

18. It is not necessary to enter into an elaborate enquiry as to whether the law which is laid down in Sections 4 and 15 of the Indian Easements Act was based upon English common law or upon the English Prescription Act. For the purpose of this case we have to construe Sections 4 and 15 of the Indian Easements Act. Section 4 says, among other things, that an easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do something or to prevent something being done upon certain other land not of his

own. So that it is necessary that the right must be exercised upon a land which does not belong to the person who is exercising that right, and Section 15, which deals with the acquisition of that right, dearly says, that the right must be exercised among other things as an easement. In considering this question it is necessary to keep in mind the distinction between a rule of pleading and a rule of proof. That inconsistent pleadings can be pleaded in the alternative is a well established rule of pleading, but the proof of a plea depends on the provisions of substantive law. Therefore, although it is permissible to plead inconsistent defences in the alternative, such as right of ownership and right of easement, it does not necessarily follow therefrom that when a person has unsuccessfully pleaded his right of ownership of property in a previous litigation he can in a subsequent suit succeed by merely proving enjoyment of a certain right over the property for the statutory period without also proving the enjoyment of that right as an easement under Section15 of the Indian Easements Act. To prove that the right was. exercised as an easement, it is necessary to establish that it was exercised on somebody else's property and not as an incident of his own ownership of that property. For that purpose his consciousness, that he was exercising that right on the property treating it as somebody else's property, is a necessary ingredient in proof of the establishment of that right as an easement. If a person has actually claimed ownership of the servient tenement in a previous litigation within the statutory period of twenty years, it may be regarded as an important piece of evidence to show that he did not exercise that right as an easement. It is true that the outward indication of the exercise of the right by virtue of ownership and easement may in most cases be the same; but where there is evidence of his previous conduct of the right of ownership, it is for him to show that notwithstanding that conduct he did all the acts of enjoyment of the right as an easement. His conduct is not quite conclusive against him. At the same time it lays a heavy burden on him to prove that his assertion of ownership was not merely untenable but known to be false and inconsistent with his conduct. Where there is no such assertion in a previous litigation but alternative pleas of ownership and easement are taken in the same suit, the election to prove one of the two alternative pleas may be made when evidence is to be led or even after the evidence is over. The party may contend that though the evidence is not satisfactory to establish ownership, it is sufficient to prove the right of easement. In any case it must be shown that the right was enjoyed as an easement, that is, as an assertion of a hostile claim of certain limited rights over somebody else's property. Such an assertion cannot be held proved without satisfactory proof of the requisite consciousness. Prescriptive easement, as opposed to easement by grant, is always hostile. It is in fact an assertion of a hostile claim of certain rights over another man's property and as such it resembles in some respects the claim to ownership by adverse possession of property; both are of hostile origin and are, therefore, prescriptive rights obtained by adverse enjoyment for a certain period, the difference being that while in the case of adverse possession the possessor must assert his own ownership, in the case of easement he must assert limited rights of user on a property and acknowledge its ownership in some one else. It must, therefore, follow, in my opinion, that a person who asserts such a hostile claim must prove that he had the consciousness of exercising that hostile claim on a property which is not his own, and where no such consciousness is proved, he cannot prove the prescriptive acquisition of the right.

19. Mr. Thakore has relied on the decision of this Court in *Dharamdas Kaushalyadas v. Ranchhodji Dayabhai*[24] where there was observation by Sir Norman Macleod C. J. as follows (p. 203):

> 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.

This however does not support the contention urged by Mr. Thakore that the question of consciousness, or animus as he calls it, is entirely irrelevant. All that is observed is that in appreciating the evidence it does not make much difference. The Court was only concerned with the question as to whether a person can assert a right which was inconsistent with the right alleged in the previous litigation. Inconsistent pleas were raised in the alternative in the written statement. It appears, however, as observed by Shah J. that at the time when the issues were framed the question of ownership was given up, and the only issue framed was about the right of easement. The same appears to be the case in *Rau Rama v. Tukaram Nona*. It is certainly open to a party to raise inconsistent defenses in the alternative, but at the time when evidence is led he has got to elect as to which of the two alternative inconsistent defenses he is going to prove. If he relies on the plea of ownership and leads evidence on that point and fails in doing so, and if he thereafter relies on the same evidence for easement rights, he will be met with a serious difficulty in establishing a claim of easement because of the plea of ownership for which he led evidence and failed. However it does not necessarily follow that, if a person makes inconsistent pleas he should not be allowed to lead evidence on those pleas. A party, if he chooses, is entitled to lead evidence on both the alternative pleas; and it is for the Court to decide whether he is entitled to succeed on either of the pleas. Certainly he cannot succeed on both.

20. The principle underlying the decisions of our High Court in *Chunilal Fulchand v. Mangaldas Govardhandas* and *Marghabhai v. Motibhai Mithabhai* has been followed by other Courts in *Subba Rao v. Lakshmana Rao*, *Lalit Kishore v. Ram 'Prasad*[25] *Rajlu Naidu v. K.B.M.E.R. Molak*[26] *Khanchand Jethamd v. Naraindas Pahrajrai*[27] and *Murugappa Chettiar v. Chettyar, Firm*[28] In my opinion the decision in *Chunilal Fulchand v. Mmgaldas Govardhandas* and *Marghabhai v. Motibhai Mitharbhai* are correct. The learned Judge below was wrong in relying only on some observations in *Rau Rama v. Tukaram Nona* and in 'holding that it was not necessary for the plaintiff to show that during the whole of the prescriptive period he was consciously asserting a right of easement.

21. It is contended by Mr. Thakone that, although the plaintiff has led the evidence of two teachers who were occupying the two houses, Nos. 651 and 652, an opportunity should be given to him to prove that during the statutory period he was consciously asserting the rights which he claims in this suit on the basis that the terrace belonged to the defendant. As the case has not been approached from that point of view in the lower Courts, in my opinion it is fair that the plaintiff should be given an opportunity to prove that he was asserting those rights during the statutory period with the knowledge that the terrace

[24] I.L.R (1921) Bom. 200: 23 Bom. L.R. 1009 [26][1939] Nag. 580 [28] A.I.R [1939] Ran. 34
[25][1943] All. 792, [27][1939] Kar. 307

belonged to the defendant.

22. I am, therefore, of the opinion that the appeal should be allowed, the decree of the lower appellate Court should be reversed and the following issue should be sent down to the trial Court:-

> Whether it is proved that during the period of prescription the plaintiff has exercised the rights which he now claims as easements ?
> Both the parties will be at liberty to produce additional evidence. The finding should be returned to this Court, after it is certified by the District Court, within three months after the record reaches the trial Court.

Sen, J.

23. I agree, As I was a party to the decision of *Rau v. Tukaram*[29] I shall add a few remarks. It seems that the observations on which reliance has been placed by both the Courts below were not necessary for the purpose of deciding the point that arose in that case. In that case the defendant raised alternative defenses, one of ownership and the other of an easement. There Was an issue only as to the easement; and both the trial Court and the lower appellate Court held the claim to the easement proved and the plaintiff's suit was dismissed. All that was really decided by this Court in that case was that a plaintiff may claim an easement and ownership in the alternative and that the mere setting up of a claim to ownership does not prevent him from establishing a right to an easement. Beaumont C. J. also referred to *Lyell v. Hothfield (Lord*[19]*) Attorney General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*[30] and stated their effect; and it seems to me that in view of this there is perhaps not so much divergence between those decisions and the view of Beaumont C. J. as would first appear. In *Subba Rao v. Lakshmana Rao*[31] which is also based on the said English cases, there is no actual reference to any specific kind of knowledge or belief; the reference is rather to the claimant's attitude or state of the mind. In *Marghabhai v. Motibhai*[32]*,* Baker J. seems rather to have overstated the requirement of law when he spoke of the " knowledge that is a case of a dominant and servient tenement and that he (the dominant owner) is exercising a right over property which does not belong to him". With reference to an easement like a right to light or air it would perhaps be inappropriate to speak animus or knowledge, for it is in the nature of a " negative" easement which is capable only of passive enjoyment. It is also true that in most English cases prior to 1914 not much emphasis seems to have been laid on this element in easement acquired by prescription. For instance, in *Sturges v. Bridgman* it was said that consent or acquiescence lies at the root of a claim for prescription, a proposition that was repeated in *Lyell v. Hothfield (Lord)*. But in *Attorney General of Southern Nigeria v. John Holt and Company (Liverpool), Limited*, it wag clearly laid down (p. 618):

> In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over

[29][1914] 3 K.B. 911 [31] I.L.R (1925) Mad. 820 [33](1879) 11 Ch. D. 852
[30][1915] A.C. 599 [32] AIR 1932 Bom 513 : ILR 1932 56 Bom 427 : (1932) 34 BOM LR 1015

> the property of that other. In the present case this was not so. For these reasons their Lordships are of the opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

There is in this conclusion a clear reference to the attitude or mental condition of the dominant owner, and that is in consonance with the. meaning of the words " as an easement" in Section 15 of the Indian Easements Act. That attitude of the dominant owner must involve the consciousness that the right is over the property of another person, a consciousness obviously inconsistent with a genuine claim of ownership of such property. As Beaumont C. J. observed in *Rau v. Tukaram* each case must depend on the particular facts proved, but it will be necessary in every case in which acquisition of easement by prescription is claimed to establish that such an attitude or unconsciousness in the dominant owner can be inferred from the circumstances of that case. If such an inference is impossible, for instance, owing to the fact that he had been making definite and bona fide claims of ownership, it would not be open to him to claim an easement.

Weston, J.

34. As I was one of the referring Judges in the case, I desire to add a few words. We referred this matter to a full bench, because, although the decisions of all the High Courts in India, including this Court, which had considered the question, appeared to lie one way, yet the subordinate Courts have relied upon certain observations made by the late Chief Justice in two cases, *Tamanbhat v. Krishtacharya*[34] and *Rau Rama v. Tukaram Nona*[35] as going the other way, and it seemed desirable that a full .bench should consider whether in those observations was to be found any statement of law other than that accepted in earlier cases of this Court, and by other High Courts, and, if so, whether that statement of law should be adopted.

25. The question which arises for our consideration may, I think, be put in these terms:--" Whether a person can be said to establish a right of easement, when it is shown that during part of the prescriptive period this person has exercised the right he now claims as easement, not as a right over the property of another, but as a right over property which at the time he considered to belong to himself ? " On the authority of the decisions of this Court and other High Courts, this question would have to be answered in the negative. The observations of the late Chief Justice in the two Bombay cases do, however, suggest that the consciousness during the period of prescription on the part of the person claiming the easement that the property over which he claims the easement is the property of another, and not of himself, is entirely irrelevant. The cases of the other High Courts, which have been set out by my brother Divatia, to one of which, *Khanchand Jethamal v. Narandas Pahlajrai*[36] I was a party, proceed, except *Chunilal Fulchand v. Mmgaldas Govardhandas*[37] which was a case under the Limitation Act, on the wording of Sections 15 and 4 of the Indian Easements Act, and upon observations in certain English cases, particularly the observations of the Privy Council in *Attorney General of Southern Nigeria v. John Holt and Company (Liverpool], Limited*[38] The important words in the sections of the Indian Easements Act are the words in Section 15 " as an easement," and that these words should be taken to mean that the person exercising those acts must do so

[34](1932) 35 Bom. L.R. 144
[35][1939] Bom. 140: (1938) 41 Bom. L.R. 168
[36][1939] Kar. 307
[37] I.L.R (1891) Bom. 592
38[1915] A.C. 599

with the consciousness that he is not the owner receives substantial support from the observations of their Lordships of the Privy Council in the case referred to above. These are (p. 618):

An easement, however, is constituted over a servient tenement in favor of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built, up or asserted is the right over the property of that other.I think therefore that there can be no doubt that in this country if the owner of the dominant tenement has during part of the period of prescription exercised the rights which he now claims as an easement, under the assertion or belief that he was the owner of the servient tenement, then his exercise of those rights is not exercise " as easement", and he must fail in a claim to easement. If the remarks in Tamanbhat and Rau Rama's cases, which remarks, it may be noted, were in no way necessary for the decisions of those cases, were intended to lay down a contrary proposition, then with respect I think they were wrong. I agree therefore that the case must be disposed of in the manner proposed.

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