APPELLATE CIVIL

Before Tek Chand, J.

NUNIA MAL AND ANOTHER,—*Appellants.*

versus

MAHA DEV,—*Respondent.*

Regular Second Appeal No. 627 of 1956.

1961

September, 20th.

Easements Act (V of 1882)—Sections 5 and 37 to 47—Discontinuous easements—Meaning and exercise of—Right of way—Whether a discontinuous easement—Extinguishment of the easement—Modes of—Intention to abandon easement—How proved—Principles of the Act—Whether applicable to territories in which the Act is not in force—Practice—Pleadings and evidence in suits relating to easements—Principles as to, stated.

Held, that discontinuous easement is treated as one the enjoyment of which can be had only by the interference of man, to the enjoyment of which the act of the party entitled thereto is essential. Right of way has been treated as a discontinuous easement, because to its use the act of man is essential at each time of its enjoyment, since it can be enjoyed only by actual use by the party.

Held, that sections 37 to 47 of the Indian Easements Act deal with the various modes in which an easement may be extinguished. An acquisition by prescription is extinguished by abandonment or by non-user. The release of easement by the dominant owner may be express or implied. Section 38 of the Act gives the cases of extinguishment by release and is modelled on the corresponding English law. Section 47 provides extinguishment of easement by non-enjoyment for an unbroken period of twenty years and in the case of a continuous easement, such period is reckoned from the day on which its enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner * * * and in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner. The element of intentional abandonment distinguishes the Indian provision from the English law. According to English law, a mere non-user of the right does not cause extinguishment of the right. English law does not fix the time during which cessation of enjoyment must continue in order to result in extinguishment of

the accessorial right of easement. English law emphasises that the non-user *per se* is not an absolute bar, but it can furnish presumptive evidence of abandonment of the right. Cesser of the use coupled with circumstances indicative of an intention to abandon the right, have the same effect, as an express release of the easement.

Held, that the intention to abandon may be proved from an infinite variety of acts, and can be ascertained from the circumstances of the case. An abandonment of easement may be predicated upon facts showing that the means of enjoyment of an easement have been in a state of disrepair for a long period of time. The law will imply an abandonment also where, through failure to repair or on account of the ravages of time and the elements, the subject-matter of an easement had become so dilapidated that it had ceased to be usable for the purpose intended. In such circumstances, an inference may legitimately be drawn in favour of intention to abandon the easement by cessation of use.

Held, that in those parts of the country where Indian Easements Act is not in operation, there is no reason why the principles underlying the provisions of the Indian Act should not be followed in so far as they embody the rules of equity, justice and good conscience. Where the provisions of the Act coincide with the equitable principles, the Indian Easements Act will equally serve as a safe guide and as the measure and standard of such principles. Of course, where the Act does not rest upon those principles, reference to the rules of English Common Law will be legitimate. One reason for seeking guidance from the Indian Act is, that the provisions of this Act are more suited to Indian requirements than the rules of English Common Law.

Held, that the general rules of pleadings are applicable to all suits relating to easements. The plaintiff resting his cause of action upon the existence of an easement in his favour must, in seeking support to his title, set it forth with sufficient clarity and detail in his plaint. The plaintiff must allege his ownership of the easement and clearly state the nature and the origin of his right, that is, whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the terminii of the way and its course. The corollary of this rule is, that the evidence must conform to the pleadings, and should be pertinent to the allegations in the pleadings, tending to prove or disprove the particular matters in issue. In Courts

where law of pleadings is enforced with strictness, no evidence is admitted which is not covered by the allegations contained in the pleadings.

Regular Second Appeal from the decree of the Court of Shri Madan Mohan Singh, Additional District Judge, Hissar, dated the 3rd July, 1956, reversing that of Shri Hernam Singh, Senior Sub-Judge, Hissar, dated the 9th July, 1955, and granting the plaintiff a declaratory decree to the effect that he (the plaintiff) had got a right to keep the railway siding in the property of the defendants known as Kath Mandi as before and had got the right of hauling his goods from the railway goods shed to his factory and vice versa *together with an injunction restraining the defendants from preventing the plaintiff and his legal representatives from using the said railway siding as mentioned aforesaid and from repairing it and disallowing the relief regarding damages and further ordering the parties to bear their own costs throughout.*

F. C. MITTAL & G. P. JAIN, ADVOCATES, for the Appellants.

H. L. SIBAL, J. N. KAUSHAL & D. S. TEWATIA, ADVOCATES, for the Respondents.

JUDGMENT

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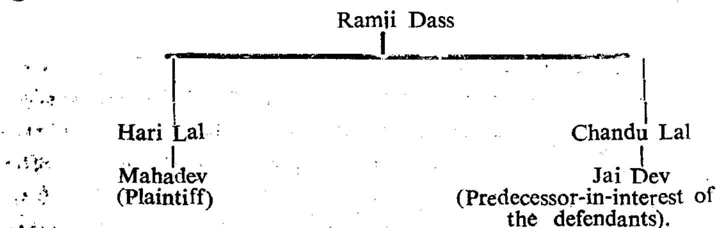
TEK CHAND, J.—This is a defendants' appeal from the judgment and decree of the District Judge, Hissar, reversing that of the Senior Subordinate Judge, Hissar, who dismissed the plaintiff's suit. The pedigree-table of the plaintiff and of the predecessor-in-interest of the defendants is given below :—



The defendants had purchased area known as Kath Mandi in the town of Hissar from Jai Parkash on 29th October, 1946, who in turn had purchased it from Jai Dev, the original owner, in 1932. The plaintiff's case is that towards the west and contiguous to Kath Mandi he owns land where cotton and ginning press is constructed. There is

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a railway siding from the Railway Station, Hissar, up to the premises of the plaintiff. The railway track passes through 385 feet long strip belonging to the Railway, 93 feet belonging to the Municipality, 631 feet within the defendants' land and the line continues for 335 feet within the plaintiff's land in which the mill is situated. The total length is 1,444 feet joining Railway Station with the plaintiff's mill. The plaintiff instituted a suit on 7th June, 1954, seeking declaration that he has a right to use area under the railway track within defendants' territory and to repair the track, and had prayed for a mandatory injunction restraining the defendants from interfering with the plaintiff's right to use and repair the track. The plaintiff had also claimed Rs. 2,000 by way of damages, but this claim has not been allowed and is no longer a subject-matter of controversy between the parties.

On 18th May, 1946, Jai Parkash vendee from Jai Dev had entered into an agreement whereby the plaintiff's right to use the track by taking railway wagons or trolly was recognised and in pursuance of this agreement, the plaintiff contends, the defendants in turn must submit to the exercise of that right by the plaintiff. This agreement is Exhibit P. 1 on the record. It was after this that Jai Parkash had sold the land to the defendants on 29th October, 1946, and the plaintiff's aforementioned right had been kept in tact in the deed of sale.

In the written statement, the defendants had denied the right claimed by the plaintiff and maintained that such a right had never been exercised for over twenty years prior to the suit and the track had never been used by the plaintiff. Admissibility of the agreement Exhibit P. 1 was assailed on the ground that it required registration under section 17 of the Registration Act.

In the replication, the plaintiff traversed the defendants' pleas and reiterated his stand taken in the plaint, and said that the railway siding had been on the site from a very long time past (*Arsa*

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Qadim). The plaintiff had entered into an agreement with the Railway for the use of the track in 1931 when the railway siding was already there. It was also asserted that the track had been used by the plaintiff eight years ago. It was pleaded that three years ago, the defendants had obstructed the plaintiff from using and repairing the track. The mention of three years is significant. It may here be stated that neither in the plaint nor in the replication there is mention or an assertion on behalf of the plaintiff of a right of easement. No plea under any provision of the law of easements has been taken in the pleadings.

At this stage, I may briefly refer to document Exhibit P. 12, dated 7th July, 1931, executed between the plaintiff and the Railway. In the preamble it is stated that at the request of Lala Chandu Lal, owner of the firm Chandu Lal and Company, a siding was constructed from the main line to the north-east of Hissar Railway station, to the ginning factory at Hissar owned by Lala Chandu Lal. A plan was annexed to the agreement and the plaintiff was styled as the licensee. It was stated that the facilities given to Chandu Lal had been revoked due to the latter's death, and the plaintiff claimed himself to be the sole owner, or occupier, of the said ginning factory and had requested the Railway to maintain the track and to permit him to use the siding. According to the terms of this agreement, the Railway had to work and maintain the siding from the main line up to the licensee's factory. It was mentioned that the privilege granted to the licensee was not transferable, and that it shall be lawful for the Railway to remove the permanent-way-materials, girder work, station machinery, weighbridge, etc., on the said siding on giving six calendar months' notice to the licensee. Para 16 of the agreement runs as under—

> "Nothing herein contained shall be construed to create any right, easement or tenancy, in favour of the said licensee over, or of that portion of the land

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occupied by the said line of Railway upon or adjacent to which the said siding and the said entrance and gateway are constructed."

On 29th December, 1950, the Railway had given six months' notice to the plaintiff terminating the licence. The notice was cancelled, and a second notice was served on the plaintiff,—*vide* Exhibit D. 18, dated 9th April, 1951. The notice period commenced from 1st May, 1951. From 1st November, 1951, the plaintiff's licence stood cancelled and the licence has not been renewed so far.

On the parties' pleadings, the trial Court framed the following issues—

(1) Did Jai Parkash execute the agreement, dated 15th May, 1946, in dispute ?

(2) Is the agreement inadmissible in evidence ?

(3) If issues Nos. 1 and 2 are decided in favour of the plaintiff, are the defendants not bound by its terms as successors-in-interest of Jai Parkash ?

(4) Did the plaintiff abandon his rights in the disputed land or the same have otherwise been extinguished ?

(5) Is the suit not within time ?

(6) To what damages, if any, is the plaintiff entitled ?

(7) Is the Northern Railway a necesary party ?

(8) Relief.

This first issue was answered in the affirmative. On the second issue, the trial Court held that the agreement, in so far as it declares, or creates, rights in immovable property, is inadmissible on the ground of non-registration and is also void under section 23 of the Indian Contract Act being without consideration. The value of the right exceeded Rs. 100. The trial Court, however, accepted the plaintiff's contention in the alternative

that Exhibit P. 1 was admissible, only as an acknowledgement, of the plaintiff's pre-existing rights. On issue No. 4, the trial Court held that in Exhibit P. 1, no rights were created, but the rights already existing had been acknowledged. The rights as claimed in the plaint came to an end by efflux of time, assuming the right to be of an easement by prescription. The plaintiff had admitted obstruction by the defendants three years before the filing of the suit, and, therefore, the prescriptive rights of the plaintiff, if any, had been lost. The plaintiff's contention raised under section 13(f) of the Indian Easements Act was rejected and it was held, that on the facts proved on the record, the ingredients required to be substantiated under section 13, read with section 47, of the Indian Easements Act, had not been established. It was also found that the plaintiff's right to the use of the siding was permissive and had come to an end in 1951 after the notice had been served upon him by the Railway. For these reasons the issue was decided against the plaintiff. Issue No. 5 was decided in defendants' favour, and it was held that the suit was barred by limitation. Issue No. 6 was decided against the plaintiff as no question of damages arose in the circumstances. On the 7th issue, it was held that the Railway was a necessary party. On the above findings, the trial Court dismissed the plaintiff's suit.

The Additional District Judge allowed the appeal, set aside the judgment and decree of the trial Court, and passed a declaratory decree holding that the plaintiff had the right to keep the railway siding on the property of the defendants, known as Kath Mandi as before and had the right of hauling his goods between the Railway goods shed and his factory. Injunction restraining the defendants from preventing the plaintiff and his legal representatives from using the railway siding and from repairing it was also passed. The relief as to damages was not allowed. The lower appellate Court held that the plaintiff had established his right which was in the nature of a quasi-easement under section 13(f) of the Indian Easements

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Act and the easement had not been extinguished under section 47 and further, that the licence had not been revoked under section 60 nor could it be deemed to have been revoked. It was also held that the Railway was not a necessary party.

I may now deal with the arguments urged by the parties' counsel. In view of the scanty regard paid to the principles of pleadings, the task of the Court in determining the right of the plaintiff, which has been allegedly violated, has become a matter of some perplexity for determining the rights and responsibilities of the respective parties. Neither in the plaint nor in the replication is there any allusion to a right of easement which acquired prominence during the later part of the proceedings in the Court. It was not suggested in the plaintiff's pleadings, whether the right claimed was an easement in gross, a prescriptive easement, easement of necessity or a quasi-easement, or what was its mode of acquisition. The nature of the alleged right has been left completely to the Court to find without specifying it in the plaint. The documents relied upon by the plaintiff do not throw any light as to the nature of the right claimed. The general rules of pleadings are applicable to all suits relating to easements. The plaintiff resting his cause of action upon the existence of an easement in his favour must, in seeking support to his title, set it forth with sufficient clarity and detail in his plaint. The plaintiff must allege his ownership of the easement. The corollary of this rule is, that the evidence must conform to the pleadings, and should be pertinent to the allegations in the pleadings, tending to prove or disprove the particular matters in issue. In Courts where law of pleadings is enforced with strictness, no evidence is admitted which is not covered by the allegations contained in the pleadings. This proposition is amply supported by several decisions of the Privy Council and of the High Courts. Reference may be made to *Eshenchunder Singh* v. *Shamachurn Bhutto* (1), *Siddik Mahommed*

(1) (1866-7) XI I.A. 7(20, 23-24).

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Shah v. *Mt. Saran* (2), and *Mohendra Nath Ghose* v. *Nabin Chandra Ghose* (3). It is incumbent on a party claiming a right of easement to clearly state the nature and the origin of the right. In *Harris* v. *John* (4), it was held that in an action to restrain the obstruction of an alleged private right of way, the plaintiff ought to show in his statement of claim, whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the terminii of the way and its course. It was observed that the right was a legal conclusion from certain facts and those facts ought to be stated in the pleadings. Reference may also be made to *Spedding* v. *Fitzpatrick* (5). The object of detailed pleadings is to enable the opposite party to know what case he has to meet at the trial, and to save unnecessary expense and to avoid the party being taken by surprise.

In the Courts below, during the course of arguments, rights of different types of easements were urged. Mr. F. C. Mittal has argued the case by taking up the conceivable claims of the plaintiff under the law of easements, and then by showing that such claims, if they had been pleaded in this case, would not have been tenable. On the admitted facts of this case, easement by prescription could not be claimed. Under section 15 of the Indian Easements Act, which corresponds to section 26 of the Indian Limitation Act, in order to acquire by prescription a right of way, it has to be shown that such a right of easement has been peaceably and openly enjoyed as such, without interruption, and for twenty years, and, further, the period of twenty years shall be taken to be a period ending within two years next before the institution of the suit, wherein the claim to which such period relates is contested. It is clearly stated in the plaint in para 5, that the defendants prevented the plaintiff from exercising his right

(2) A.I.R. 1930 P.C. 57 (1).
(3) (1920) 57 I.C. 504.
(4) (1882) 22 Ch. D. 481.
(5) 38 Ch. D. 410.

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for the last three years. According to the statement of plaintiff's attorney made before the issues, the obstruction had been for the last four or five years. As P.W. 5 the plaintiff's Mukhtiar stated, that the right had not been exercised since 1939, that is, for the last 15 or 16 years. The plaintiff has not even a semblance of claim to prescriptive easement.

It was then urged that the plaintiff had established his right to easement under section 13, and reliance was placed upon the following provision of that section—

> "13. * * * * *
> Where a partition is made of the joint property of several persons,—
> * * * * *
>
> (f) If such an easement is apparent and continuous and necessary for enjoying the share of latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.
> * * * * *"

In this connection, it has been argued on behalf of the defendant-appellants, that neither section 13 had been pleaded, nor the facts forming the ingredients of this provision had been placed on the record. In order to prove a right contemplated by section 13(f), material had to be placed on the record showing that the joint property of the parties had been partitioned and, further, that the right of easement claimed was apparent and continuous and necessary for enjoying that parcel of land as it was enjoyed when the partition took effect. Relevant portion of section 47, the applicability of which has also to be construed, runs as under—

> "47. A continuous easement is extinguished when it totally ceases to be enjoyed

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as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when for a like period it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner, and in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner :

* * * * *"

Mr. Sibbal, learned counsel for the plaintiff-respondent has mainly relied upon section 13(f) read with section 47, that the property was jointly owned and partitioned. He has referred to the statement of Jai Dev, P.W. 2, to the effect that the place in dispute originally was the joint property of his family, of which, he and the plaintiff's father were members, and that it fell to his share on partition. He then sold this property to Jai Parkash, who later on sold it to defendants by sale-deed, Exhibit D. 1. He could not tell the date when he sold the property to Jai Parkash. He said, that there was a railway track over this property leading from the Railway Station to a factory which originally was joint property but later on fell to the share of Maha Dev on partition. Exhibit D. 1, which was a sale-deed in defendants' favour by Jai Parkash, was executed by Jai Dev as the attorney of Jai Parkash, and he could not recall, if there was any talk between him and the defendants about the existence of the railway track when Exhibit D. 1 was written. In cross-examination he said, that the railway track had never been used for the last 20 or 22 years and he did not know if the railway track over the disputed site was repaired during the last 22 years. It was in a ruined condition and was not usable for several years. He could not tell when the plaintff

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entered into agreement for the use of this track with the Railways. P.W. 2, Jai Dev, does not remember the date, or, the year of partition. There is no other evidence from which the date of the partition can be ascertained. According to the contention of the plaintiff's counsel, the partition was sometime in 1931 when the joint property was split up into dominant and servient tenements and, according to the view of the lower appellate Court, the partition took place somewhere between 7th July, 1931, and 17th December, 1932. According to the learned counsel for the defendants, this conclusion is without basis and rests upon surmises. Exhibit P. 2 is an agreement entered into by Mahadev with the Railways on 7th July, 1931. By this agreement a licence was given by the Railway to Maha Dev to use the track. One of the terms of this agreement was that the Railways shall be at liberty to terminate the agreement by giving to the licensee, that is, Maha Dev plaintiff, at any time six calendar months' notice and on the expiration of the period of notice the Railways would be at liberty to remove the permanent-way-materials, girder work, etc., without paying any compensation to the licensee. This agreement does not indicate that at that time the property was joint of Maha Dev and Jai Dev.

Mr. Sibbal has next referred to Exhibit D. 1, the deed of sale, dated 28th October, 1946, by which the defendants had purchased the property from Jai Parkash. In this deed it is stated, that Jai Parkash had purchased this land from Jai Dev as per sale deed, dated 17th December, 1932. It is thus argued, that on that date the site had become the exclusive property of Jai Dev, and the partition had by then taken place. That may be so. But the crucial question is the date of the partition. I cannot accept the finding of the lower appellate Court that the property was joint on 7th July, 1931, the date when Maha Dev was granted a licence by the Railway (*vide* Exhibit P. 12). There is nothing in that agreement from which such a deduction can be made. On the contrary, the preamble of that agreement suggests that the

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partition, if any, must have been of an earlier date. Giving the earlier history, it is stated that the siding was constructed previously at the request of Lala Chandu Lal, owner of the firm Chandu Lal and Company, from Hissar Railway Station to the ginning factory owned by the aforesaid Chandu Lal. It was also stated that due to the death of Chandu Lal, the licence granted to him stood revoked. Lala Chandu Lal was the father of Jai Dev. If Chandu Lal was the owner of the ginning factory, the partition must have taken place even before the licence was granted by the Railways to Chandu Lal. It is not stated how the present plaintiff acquired the ownership rights over the ginning factory. There is no suggestion whether the alleged partition was oral or in writing. The plaintiff Maha Dev is alive but he has not chosen to enter the witness-box and to tell how and in what manner he acquired the ownership of the area under the ginning factory. P.W. 5, Baldev, Mukhtiar of the plaintiff, stated that the plaintiff was ill and not in a fit condition to appear before the Court. No medical certificate had been produced. If this were really so, he could have been examined on commission. P.W. 5 said that he did not know when the partition took place. He made it clear that it took place before 1931, but stated that he did not know if there was any regular partition-deed. The plaintiff has produced no other evidence in support of his contention. If railway wagons had in fact been taken from the Railway Station to the plaintiff's premises, some documentary evidence ought to have been forthcoming. Thus I find that the partition, which was never pleaded, has not been proved and the learned District Judge has misread Exhibit P. 12 in arriving at the conclusion that the partition had taken place in 1931 or 1932. The partition on this record might as well have taken place more than twenty years ago. At the time of execution of Exhibit P. 12, plaintiff Maha Dev is the sole owner of the factory premises and, therefore, the partition must have been earlier. There is thus no evidence to satisfy the first requirement of section 13 that partition of the joint property had taken

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place and when. The date of the partition, is very material. An easement under section 47 can be extinguished by non-enjoyment for an unbroken period of twenty years. In the case of a continuous easement, such period is reckoned from the day on which its enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner. . . . . and in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner. It is clear from the statement of P.W. 2 Jai Dev, that the railway track had never been used for the last twenty or twenty-two years and further, that he did not know if anyone got the railway track over the disputed place repaired during the last twenty-two years. His statement lends support to the defendants' contention that the easement, if any, had been extinguished in consequence of non-user for over twenty years. The plaintiff might have succeeded in repelling this contention, if he had shown that the partition had taken place within twenty years, in consequence of which, a right of easement as contemplated by section 13(f) had come into being. As the plaintiff, who could throw light on the subject has not entered the witness-box, and there is no other evidence placed on the record from which the date of partition could be ascertained, the plaintiff's right under section 13(f) stands unsubstantiated.

The defendants' counsel, in support of his contention that the right of easement, if any, had become extinguished under section 47 has argued that the easement in question was discontinuous and twenty years have to be calculated from the day from which it was last enjoyed, and the only evidence on the record is, that it was last enjoyed twenty or twenty-two years ago. The plaintiff's learned counsel, on the other hand, maintains that the easement was continuous and the period has to be reckoned from the day when its enjoyment was obstructed by the servient owner. It is conceded that if the easement is continuous, then the defendants have not placed material on the record

from which extinguishment of easement by non-enjoyment from the date of the obstruction, can be inferred. It is, therefore, important to determine as to whether the easement is discontinuous as maintained by the appellants or continuous as claimed by the respondent.

Section 5, which defines continuous and discontinuous easements, reads as under—

> "5. Easements are either continuous or discontinuous, apparent or non-apparent.
>
> A continuous easement is one whose enjoyment is or may be continual without the act of man.
>
> A discontinuous easement is one that needs the act of man for its enjoyment.
>
> An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.
>
> A non-apparent easement is one that has no such sign."

The above definition is illustrated by two illustrations appended to the section,—

> "(a) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.
>
> (b) A right of way annexed to A's house over B's land. This is a discontinuous easement.
>
> * * * * *"

According to the above definition, the right of easement as claimed by the plaintiff is discontinuous. To this argument Mr. Sibbal replied that to Punjab the Indian Easements Act has not been extended and, therefore, the above definition cannot be treated as a guide. The position taken up

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appears to me to be inconsistent. The plaintiff himself relies upon the law as contained in section 13(f) of the Indian Easements Act and he must accept the definition of continuous and discontinuous easements as contained in that Act. If the plaintiff is resting his claim on the applicability of sections 13 and 47 of the Indian Easements Act, he cannot, in logic ask this Court to apply those provisions, but to give to the words 'continuous' and 'discontinuous', a different meaning. The argument of the learned counsel which he had adopted, from the discussion in the judgment of the lower appellate Court is, that the Courts, when dealing with easements in areas to which the Indian Easements Act has not been extended, must take their law from what is extant in England and should not borrow the principles from the Indian statute. In support of this contention, reliance has been placed upon three decisions of the Lahore High Court. In *Shiv Dyal* v. *Ram Dass* (6), Addison, J., said that in the Punjab where Easements Act does not apply, the English law, which is usually taken to embody the principles of equity and good conscience, should be applied. Reference may also be made to *Karam Ilahi* v. *Ghulam Mustafa* (7), and *Mirza Ahmad Jan* v. *Kh. Ghulam Hussan* (8). There is an imposing array of authority for the view that, in those parts of the country where Indian Easements Act is not in operation, there is no reason why the principles underlying the provisions of the Indian Act should not be followed in so far as they embody the rules of equity, justice and good conscience. Where the provisions of the Act coincide with the equitable principles, the Indian Easements Act will equally serve as a safe guide and as the measure and standard of such principles. Of course, where the Act does not rest upon those principles, reference to the rules of English Common Law will be legitimate. One reason for seeking guidance from the Indian Act is, that the provisions of this Act are more suited to Indian requirements than the rules

(6) A.I.R. 1926 Lah. 473
(7) A.I.R. 1927 Lah. 492.
(8) A.I.R. 1944 Lah. 417

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of English Common Law. In the undermentioned cases, the principles underlying the Indian Easements Act were held applicable to areas where the Act was not in force: *Daya Ram* v. *Deo Ram* (9), *Bhola Nath Dutta* v. *Radha Nath Biswas* (10), *Baroda Prasad Pal* v. *Asutosh Pal* (11), *Bhupati Bhusan Mondal* v. *Jadunath Ghosal* (12), *Nritta Kumari Dassi* v. *Puddomoni Bewal* (13), *Jangbahadur Singh* v. *Thithar Singh* (14), *Daw Gyan* v. *U Maung Maung* (15), *Tan Sit Shan* v. *U Po Nyun* (16).

Mr. Whitley Stokes, the Law Member, who drafted the bill in 1877 had modelled it on the principles of the English law and some of the local Governments in the provinces had disfavoured the legislation on the ground that the principles of law would adversely interfere with the local usages and had expressed their disapproval to its extension to their provinces. The Law Commissioners then recommended the extension of its provisions only to those provinces which had offered no objection to the application of this law to their areas. The extension of the Act to other provinces was left to the option of the respective local Governments. This also suggests that the Act was intended to embody the principles of English law of easements.

A resume of the genesis of the English law of discontinuous easements will not be out of place. The English law had borrowed the classification of the easements into "affirmative" and "negative", from the civil law. The distinction between continuous and discontinuous easements and also between "apparent" and "non-apparent" was mentioned for the first time in the first edition of Gale's well-known work on Easements in 1839. This classification was imported from the French Law of prescription. This distinction originated in the year

(9) A.I.R. 1926 Nag. 376
(10) A.I.R. 1924 Cal. 844
(11) A.I.R. 1941 Cal. 289
(12) A.I.R. 1955 Cal. 70
(13) (1903) I.L.R. 30 Cal. 503
(14) A.I.R. 1935 Pat. 188
(15) A.I.R. 1936 Rang. 58
(16) A.I.R. 1939 Rang. 421

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1804 in the Code Napoleon and the definition was taken from Article 688 of the Code Civil of France.

Lord Blackburn in *Danton* v. *Angus,* (17), said,—

> "Those who framed the Code Napoleon had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil Arts. 688, 689). Those divisions and the definitions were, as far as I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French Law, and it certainly is not to be found in any English Law authority before Gale on Easements in 1839. On this division, their legislation was founded."

It will thus be seen that the definition of continuous and discontinuous easements in section 5 of the Indian Easements Act had been taken from Gale's Law of Easements who had introduced it for the first time as a part of English law, having imported it from Code Napoleon, Article 688.

The United States of America has also adopted the same definition of continuous and discontinuous easements. A discontinuous easement is treated as one the enjoyment of which can be had only by the interference of man, to the enjoyment of which the act of the party entitled thereto is essential. Right of way has been treated as a discontinuous easement, because to its use the act of man is essential at each time of its enjoyment, since it can be enjoyed only by actual use by the party,—(*vide* 28 C. J. S. 629).

(17) (1881) 6 Appeal Cases 740 (821).

In *Polden* v. *Bastard* (18), Erle C.J., observed—

"There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass. This right to go to a well and take water is not a continuous easement, nor is it an easement of necessity."

Reference may also be made to *Pyer* v. *Carter* (19), *Watts* v. *Kelson* (20), and *Worthington* v. *Gimson* (21),

Mr. Sibal has in the main relied upon an English decision in *Brown* v. *Alabaster* (22), for the proposition that a right of way on a formed road is a continuous and apparent easement. This authority modifies the principle laid down in *Polden* v. *Bastard* (18). The facts of *Brown* v. *Alabaster* (22), were that an owner of three houses in a row, along the back of which there was a defined and made path from a road to the two farthest of the three houses, clearly formed for the use of the occupiers of those two houses only, sold the two farthest houses "together with the rights, easements, and appurtenances belonging thereto." The right of way claimed being over the vendor's ground was not strictly an "easement" belonging to the houses sold or "appurtenant" to them; yet

(18) L.R. (1865-66) 1 Q.B. 156 (161).
(19) (1857) 26 L J. Ex. 258.
(20) (1871) 6 Chancery 166 (173).
(21) (1860) 29 L.J.Q.B. 116.
(22) (1887) 37 Ch. D. 490 (507).

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it was held that the purchasers of the two houses became entitled to the right of way by implied grant because it was manifest that when the path was made it was made for the use of those houses and of them only, and was there in existence at the time of sale, and evidently intended for use of the occupiers of the property severed, (*vide* Goddard's Law of Easements, 7th Ed. P. 191). The special feature of this case is that the owner of the two parcels had laid out and constructed a visible and permanent road-way over one parcel to the benefit and advantage of the other and on the conveyance of the parcel so benefited, an easement of way would arise by implied grant. It is true that the way was not strictly necessary as there were other means of access to the highway existing, but the purchaser, as a reasonable man, had a right to believe that he was acquiring with the land the right to the way, (*vide* Law of Real Property by Walsh, Vol. II, p. 581).

In *Wheeldon* v. *Burrows* (23), the rule laid down was that upon the grant of a part of the tenement there would pass to the grantee as easements all quasi-easements over the land retained, which were (i) continuous and apparent, or (ii) were necessary to the reasonable enjoyment of the land granted, and (iii) which had been and were at the time of the grant used by the owners of the entirety for the benefit of the part granted. The rule is founded upon the maxim that a grantor shall not derogate from his grant. It is just the same whether the grant is express or implied. The learned authors of the Law of Real Property, by Magarry and Wade, P. 740, 1957 edition, said that the distinction between "continuous" and "apparent" easements and others was unknown to English law until 1839, when it was imported from the French Law of prescription. According to them, it does not fit easily into the older and wider English rule against derogation from grant ; nor is it always insisted upon. At P. 741, they said that, in general, rights of way do not fall within the definition of

(23) L.R. (1879) 12 Ch. D. 31(49).

continuous and apparent easements, but in certain cases, the Courts "it seems turn a blind eye to the obstacle that a right of way is not 'continuous'. It must always be remembered that the rule against derogation from grant is capable of creating rights which cannot be easements at all. It is a flexible principle, and one which does not easily admit of limitation by rigid rules." Kay, J., in *Brown* v. *Alabaster* (22), made it clear that the right to use the backway in the same mode as it was usable at the time of the grant of the two properties did pass by implied grant and "accordingly this case must be decided on that footing" (p. 507). I do not think I will be justified in turning a blind eye to the definition of discontinuous easement which is common to the Indian Easements Act, the English law, and which is in *ipsissima verba* as Article 668 of Code Napoleon.

The next question is whether in a discontinuous easement the right claimed is extinguished by non-enjoyment or non-user for an unbroken period of twenty years. This period, in the case of a discontinuous easement, is to be reckoned from the day on which it was last enjoyed by any person as a dominant owner. I have already referred to the evidence of P.W. 2, Jai Dev, who stated that the track had never been used for the last twenty or twenty-two years, and that it was in a ruined condition and not usable for several years. P.W. 5, Baldev, plaintiff's Mukhtiar, stated that he could produce no writing to show that the railway siding or track was used after 1931. D.W. 5, Faqir Chand, who is a broker, stated that for the last twenty-three or twenty-four years the railway track in dispute had not been used by anyone and that it was in a dilapidated and unusable condition. In the course of cross-examination, he further stated that Chandu Lal worked the factory in 1931 and after that the track was never used. He stated that even the factory was not worked after 1933. D.W. 8, Nunia Mal, defendant No. 1, also stated that the siding was not being used for the last twenty-three or twenty-four years and it had not been in working condition since that time. No

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serious attempt was made to assail the veracity of this statement in cross-examination of this witness. According to the inspection note of the Senior Sub-Judge, the rails of the alleged railway track in the compound of the defendant were in a ruined and unusable condition, and a tree, considered to be ten or twelve years old, was standing on the track. The condition of the track in the plaintiff's compound beyond the defendants' Mandi was still worse and it was not even clearly visible. The above evidence shows that the easement had become extinguished by non-enjoyment and there is no evidence to the contrary.

The next question is whether there has been an extinguishment of easement in this case. Sections 37 to 47 deal with the various modes in which an easement may be extinguished. Gale expressed the opinion, that the modes by which easements may be lost correspond with those already laid down for their acquisition. Thus, an acquisition by prescription is extinguished by abandonment or by non-user. The release of easement by the dominant owner may be express or implied. Section 38 of the Indian Easements Act gives the cases of extinguishment by release and is modelled on the corresponding English law. Section 47 provides extinguishment of easement by non-enjoyment and the element of intentional abandonment distinguishes the Indian provision from the English law. According to English law, a mere non-user of the right does not cause extinguishment of the right. English law does not fix time during which, cessation of enjoyment must continue in order to result in extinguishment of the accessorial right of easement. English law emphasises that the non-user *per se* is not an absolute bar, but it can furnish presumptive evidence of abandonment of the right. The following cases are authority for the proposition that a mere cessation of user is no indication of intention to abandon.

In *Bart* v. *Boyd* (24), right of way was not lost by a mere non-user for a period much longer

(24) (1852) 7 Ex. 838.

than twenty years. The way was not used because the owner had a more convenient mode of access through his own property. Alderson B. said,—

> "The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user"

Reference may also be made to *Lovell* v. *Smith* (25), *Cook* v. *Bath* (26), *James* v. *Stevenson* (27). English law never considered mere non-user by itself to amount to an implied release, unless an intention to abandon the right is manifested. Non-user for a long period is deemed to raise a presumption of abandonment, but the presumption is rebuttable if there is some other explanation, as, an acquisition of more convenient way or there being no occasion for use, (*vide Crossley and Sons Ltd.* v. *Lightowler* (28). In *Moore* v. *Rawson* (29), abandnment of right was presumed from the act of bricking up a window for twenty years. The intention to abandon may be proved from an infinite variety of acts, and can be ascertained from the circumstances of the case. An abandonment of easement may be predicated upon facts showing, that the means of enjoyment of an easement have been in a state of disrepair for a long period of time. The law will imply an abandonment also where, through failure to repair or on account of the ravages of time and the elements, the subject-matter of an easement had become so dilapidated that it had ceased to be usable for the purpose intended. In such circumstances, an inference may legitimately be drawn in favour of intention to abandon the easement by cessation of use. The inspection note of the trial Court

(25) (1857) 3 C.B. (N.S.) 120.
(26) (1868) L.R. 6 Equity 177
(27) (1893) A.C. 162.
(28) (1867) 2 Ch. Appeals 478 (482).
(29) (1824) 3 B & C 332 (339).

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coupled with the evidence to which reference has just now been made, raises a presumption of abandonment of easement. This presumption is further strengthened by the fact that the licence which had been granted by the Railways had been long revoked by giving six months' notice to the plaintiff with the result that the very purpose of the easement had disappeared. The right claimed by the plaintiff was to bring wagons from the Railway Station on the siding passing through the Railway premises, municipal land and the defendants' property to the plaintiff's factory premises. As a result of the revocation of the licence, the very purpose of the easement has come to an end. This right can only be exercised if the plaintiff possesses the right to bring wagons from the Hissar Railway Station and that has been a dead end for very many years. This aspect of the case is also a persuasive consideration for holding that the right of easement has become extinguished. Cesser of the use coupled with circumstances indicative of an intention to abandon the right, have the same effect, as an express release of the easement. The accompanying circumstances: the duration of non-user, the condition of the siding, the revocation of the licence by the Railway are strong circumstances indicative of the intention to abandon the right. Whether applying the stricter construction of section 47, or, looking at the matter from a broader point of view as in English law, the extinguishment of the right is substantiated not only by non-user for the statutory period but also by intentional abandonment.

It has also been argued by Mr. Sibbal that, in case the plaintiff's right of easement is not held proved, he is entitled to a decree in his favour in view of the provisions of section 40 of the Transfer of Property Act. This provision, so far as it is relevant, is produced below:—

> "40. * * * * * *
> where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership

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> of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous tranferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands."

The contention of Mr. Sibbal is that the obligation created by agreement Exhibit P. 1, dated 18th May, 1946, between the plaintiff and Jai Parkash, is binding on the defendants. This contention deserves to be rejected for several reasons. Right under section 40 of Transfer of Property Act was never alleged in the pleadings or put into issue or stated in the grounds of appeal. It has been raised for the first time in this Court during the course of arguments. In the second place in order to substantiate his right, the plaintiff relies upon Exhibit P. 1, which is inadmissible in evidence for want of registration. The rights, which have been declared in Exhibit P. 1, are sought to be enforced against the defendants. For the very reason that this document is declaratory of rights, it is not admissible, and cannot be looked at. Thirdly, the provisions of section 40 of Transfer of Property Act apply where the benefit of an obligation does not amount to rights of easements. For the above reasons, contention of plaintiff's counsel under section 40 of the Transfer of Property Act is of no avail.

Lastly, it was urged by the appellant's learned counsel that the relief sought by way of declaration and injunction by the plaintiff is discretionary, and in the following circumstances it ought not to be granted; the plaintiff slept over his rights for over twenty years, the licence granted by the Railway for the siding had been revoked, and the right of easement claimed cannot be exercised unless the plaintiff has a right to bring wagons

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from the Railway Station. It was also said that the railway track is in a ruined condition and is totally unserviceable and the railway lines are buried under earth, a tree is standing in the middle of the track, and buildings are constructed within the prohibited margin. There is force in this contention.

For the several reasons discussed above, this appeal deserves to succeed. There is no merit in the plaintiff's contentions. The reasoning of the lower appellate Court and also its conclusions are erroneous in law. I, therefore, set aside the judgment and decree passed by the lower appellate Court and restore that of the trial Court. In the result, the appeal is allowed and the plaintiff's suit is dismissed with costs.

K. S. K.

APPELLATE CIVIL

Before D. Falshaw, C.J.

SIRI RAM,—*Appellant*

versus

DELHI CLOTH AND GENERAL MILLS CO. LTD.,—

Respondent.

Regular Second Appeal No. 160-D of 1961

1962
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Jan., 10th

Delhi Rent Control Act (LIX of 1956)—Sections 17, 18 and 22—Eviction order passed under section 22 against the tenant and his lawful sub-tenant—Whether enforceable in view of section 18—Section 22—Whether offends Article 14 of the Constitution.

Held, that section 18 of the Delhi Rent Control Act, 1958, does not protect even lawful sub-tenants when an eviction order is passed under section 22 of the Act. Indeed it specifically refers to eviction orders under section 14, whereas the special provisions governing eviction under section 22 specifically exclude the application of the provisions of section 14. The words "the tenant and every other person who may be in occupation thereof" in section 22 include even lawful sub-tenants.