Present: Mr. Justice Grenier.

May 17, 1910

CHINNAPPA *et al. v.* KANAKAR *et al.*

C. R., Jaffna, 7,532.

Custom—Crossing over into neighbour's land for fencing with olas—Jaffna District.

The custom which permits a landowner to cross over into his neighbour's land for screening his fence with olas whenever his fence gets out of repair is an inveterate one in the Jaffna District, and has the force of law.

THE facts in this case are fully set out in the judgment of the Commissioner of Requests (R. N. Thaine, Esq.), which is as follows:—

"The dispute in this action is about a fence. The western boundary of plaintiffs' land is a live fence, which is also protected with ola leaves. To enable them properly to protect the fence with

[1] *(1884) 9 A. C. 571.*

May 17, 1910

Chinnappa v. Kanakar

a covering of ola leaves, the plaintiffs claim the right of entering the adjoining land, as the olas are tied outside the live fence, and for this purpose coolies have to be on both sides of the fence, to pass through the string and tie it. The defendants (first and second) deny the existence of this custom, deny that plaintiffs have acquired any right to enter their land for this purpose, and further plead that if in fact the plaintiffs did enter their land for this purpose, they did so merely with the consent of the proprietors. The main issues which require consideration are these:—

" (1) Are the plaintiffs entitled to go into the defendants' land for the purpose of tying olas on the outside of their fence ?

" (2) Can plaintiffs claim a right of servitude of this kind ?

" Plaintiffs claim the right as a custom; they contend that this custom, viz., of going into the adjoining land for the purpose of tying olas to the outside of a fence, has existed from time immemorial, and prevails in every village in the Jaffna peninsula. There is strong and abundant evidence of leading and well-educated men in the peninsula, gentlemen holding high positions under the Government, who are naturally expected to be acquainted with the custom of the people. This evidence establishes clearly that the prevailing custom is to allow a neighbouring landowner to enter one's land whenever he wants to repair his fences or cover the same with ola leaves. The object of the ola leaf fencing is to secure privacy, as well, doubtless, as to prevent straying cattle from entering the lands. Again, as to the necessity of placing these olas outside the live fence, it was explained, and I think quite satisfactorily, that whenever the fence was the property of an individual, and not the common property of two adjoining landowners, the owner of the fence is the only person likely to look after it, for fences of suriya and kiluvai trees are of some pecuniary value. At stated seasons the branches are cut and sold for manuring the gardens. It follows, therefore, that the owner of a fence which is the source of some income to him, would, if he was also anxious to screen off his garden or dwelling land from the gaze of the public eye, naturally place the ola leaves outside the fence. To fix the ola leaves properly, it is obviously necessary to enter the adjoining land, for the ola leaves are piled on the outer side, and the tying materials have to be passed from one side to the other.

" That this custom has existed for very many years, in fact from time immemorial, is not only proved by the evidence of two Maniagars of the peninsula—Government officers, who from their education and practice are presumed to have an acquaintance with the customs of the people—by the evidence of other disinterested witnesses, and of the retired Jaffna Maniagar, who has had over fifty years' service under Government, but its recognition receives support from the judgment of a Commissioner of Requests in a

case at Point Pedro, where the same point was in issue. He held the custom existed, and no appeal was taken against that finding."

[The Commissioner of Requests then proceeded to discuss the evidence as to the existence of the custom, and continued.]

" I find, therefore, that there is a universal custom in the Jaffna peninsula which allows the owner of a land desirous of covering his fence with ola leaves to enter the adjoining land, and from that side to put up, heap, and tie the ola to a fence.

" There is no law on this subject in the Statute Book. It is, however, obviously a custom which has the force of law, and is of the nature of a servitude. It is a servitude because it consists of the right of doing something upon the land of another for the benefit of the doer.[1] There is ample, strong, and overwhelming evidence proving the existence of this custom, and provided the custom is reasonable and certain, it can form the basis of a servitude.[2] There is no doubt about its certainty; there can also I think be no question about its reasonability. It cannot be said to cause any one inconvenience; it is one of the customs of the people to enclose their gardens, not only to prevent trespass, but also to secure privacy. To carry out this custom fences must be put up, and, admittedly, ola fences to protect the live fences must be put up by entering the adjoining land. Servitudes can be acquired by prescription, so that even if there were no evidence proving the universality of this custom from time immemorial, there is evidence that the plaintiffs and their predecessors in title have been in the habit of going into the defendant's land for this purpose for very many years. All the witnesses for plaintiffs, who gave distinterested evidence, swear that this fence was always covered with olas on the outside. The first defendant himself admits the fence was always fenced on the outside, though he qualifies this admission by stating that permission was granted for the purpose. This statement, however, I do not believe. Excepting his own statement, there is no other evidence in support of it.

" Further, and this is a matter of importance, there is clear and distinct evidence that the live fence in question is the property of the plaintiffs, and not common property. The defendant is unable to say who put up the fence; but though he asserts the fence to be common property, yet during the last ten years he says he has only repaired it twice. At the same time he admits that plaintiffs always cut and remove branches. If the live fence was common property, I imagine the defendant would take care to get his share of the proceeds of the branches. There is, on the other hand, strong and weighty evidence proving that the fence was planted by the plaintiffs' predecessors, and always repaired by them. I hold that the fence is the property of the plaintiffs.

[1] *2 W. P. 383*

[2] *Addison, Torts, VI. ed., 340.*

May 17, 1910

Chinnappa v. Kanakar

"This fact furnishes another reason for the plaintiffs fencing with olas on the outside. The live fence is of some pecuniary value, requiring attention, as the branches are given for purposes of manure. It may be noted it has been held 'that the boundary hedge, separating one estate from another, belongs in general to the occupier who has been in the habit of cutting and repairing the hedge.' [1]

"Summing up this, I find that the plaintiffs are entitled to enter the defendant's land for the purpose of putting up and tying olas on his western fence; that there is a custom to the effect that adjoining landowners may enter their neighbours' land for this purpose; and that this custom has the full effect of a servitude. I find that the defendants did cut and destroy fence sticks and remove olas. I award plaintiffs Re. 1 special damage, and Rs. 10 a year on account of the obstruction; that the fence is not common property, but that it belongs exclusively to plaintiffs.

"I give judgment for plaintiffs in terms of paragraphs 1, 2, and 3 of the prayer. I give damages as above assessed. The first and second defendants will pay plaintiffs' costs."

Tambyah (with him *Rutnam*), for the appellants.

Kanagasabai (with him *Balasingham*), for the respondents.

Cur. adv. vult.

May 17, 1910. GRENIER J.—

An interesting argument was addressed to me by Mr. Tambyah, for the appellants, but I am not disposed to interfere with the judgment of the Commissioner, which is an excellent one, dealing exhaustively with the questions which were submitted to him for decision. Both the *Tesawalamai* and the Roman-Dutch Law contain no reference to the custom or servitude which permits of a landowner screening his fence with olas, and for this purpose crossing over into his neighbour's land at irregular intervals whenever the fence gets out of repair. These intervals are, I understand, by no means frequent, because an ola screen is very strong and substantial, and the intervals may vary from one year to eighteen months. The custom, however, is an inveterate one in the Northern peninsula, and may rightly be said to have the force of law. It is, besides, a reasonable one. The opposition of the defendant is, I think, perverse, considering that the action of the plaintiff secures privacy for his own land, and only entails the presence of the plaintiff on his land for just sufficient time as will enable him to screen the fence.

The appeal must be dismissed with costs.

Appeal dismissed.

[1] *Addison, Torts, 445.*