

(1927) 01 CAL CK 0043
In the Calcutta High Court

Debendra Nath Bagchi and Others

APPELLANT

Vs

Surendra Nath Sur

RESPONDENT

Date of Decision : 19-01-1927

Acts Referred:

Limitation Act, 1908 — Section 26

Citation : AIR 1927 Cal 345

Hon'ble Judges : Rankin, C.J;C.C. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—In this case the plaintiffs are the owners of certain premises known as No. 43, Bagh Bazar Street in the town of Calcutta and the defendant is the owner of the neighbouring premises on the west which is No. 42 of the same street. The street is on the north of both the premises, and No. 42 is on the west of No. 43. Between the two premises is a wall, a more particular description of which will become necessary in connexion with certain points in the case. The plaintiffs sue for a declaration that that wall is a boundary wall belonging to them. They complain that on the 17th of October 1921 the defendant raised this wall flush against the western wall of the plaintiffs' premises to a height which may be roughly described as the top of the second storey. They say, first, that the wall belongs to the plaintiffs, and, secondly, that if that be not so, the windows and openings to the west of the plaintiffs' building are windows and openings to which the plaintiffs have prescriptive rights of light and air, and they ask for a mandatory injunction to compel the defendant to pull down this wall on the ground that it interferes with their ancient light. They ask also by their plaint for damages in respect of the interference with their rights to light and air, and in the plaint there is mention of an interference by the defendant with a certain brick-seat at the northernmost end of the wall where it adjoins the street. They make complaint also that in raising the wall the defendant has interfered with and committed trespass upon certain cornices which are on the western wall of their house.

2. The first question is, whether or not this wall belongs to the plaintiffs and the learned Judge after a careful examination of the documents and on the evidence has come to the conclusion that the plaintiffs' case on that question must fail. I agree entirely with the conclusion at which the learned Judge has arrived. The documents of title which bear upon the matter seem to be these : There is a document, dated the 15th of November 1878, which has not been produced, but it is really the root of the plaintiffs title. It is a conveyance from one Iswar Chandra Sadhukhan to Hari Narayan Mandal.

3. The first document produced by the plaintiffs is a document, dated the 30th of September 1880, whereby Mandal sold to the plaintiffs' mother. In that Bengali conveyance the premises are described as "land and brick-built wall thereon," and again as "the said land and tiled hut inclusive of brick-built wall, etc.;" and the plaintiffs' case is that the wall now in dispute is an old wall and is the wall that is referred to in that conveyance. There is in the conveyance itself nothing to show whereabouts that wall is on the plaintiffs' property. It may be on the western side, on the southern side, or anywhere else. It is true that the property which bounds the plaintiffs' property on the west is described as "vacant land of late Ishwar Chandra Sadhukhan."

4. The defendant's title is made out in this way: at some date before 18-79 there was a conveyance by Srimati Nitya Kali Debi to Iswar Chandra Sadhukhan. On the 2nd of September 1879 Sadhukhan appears to have made a deed-of-gift of this property to his wife. At these dates there was a one storeyed building upon what is now the defendant's property. On the 18th of November 1880 Sadhukhan's widow after his death sold to one Indra; and that conveyance is before the Court. It recites that the lady has "broken down the brick-built structure that was over the land and sold away the same separately," and it purports to sell

two cottahs more or less of vacant land with the foundation on three sides consisting of two bricks;

5. and it gives as the boundary on the east "the purchased land of Hari Narayan Mandal." On the 9th of September 1918 Indra sold to the defendant, and very soon after the defendant's purchase trouble began. Until that time the land was really a vacant building site on the side of Bagh Bazar Street. The defendant doubtless purchased in order to utilize the site by building houses on it and after his purchase very quickly the present dispute may be said to have begun.

6. In these circumstances it is for the plaintiffs to show as they claim the property that their document or their evidence on the matter proves that the wall is theirs, and the learned Judge has very carefully examined the evidence with respect to this matter. Sir Provash Mitter on behalf of the appellants has subjected the learned Judge's judgment to a very careful criticism. There is, I think, a good deal of force in the fact to which the learned Judge has pointed that nowhere in the documents do we find the boundary of the plaintiff's

premises described in any way by a reference to this wall. It may not be true to say if the wall belonged to the plaintiffs, that the wall in the Bengali custom would be given as a boundary, but one would certainly expect that the boundary with this clear method of defining it would be defined by a reference to the wall in some way or another.

7. Two plans, Wilkin's plan of 1887 and Smart's plan of 1909-1910, were produced in evidence. These undoubtedly show that the wall was not in the plaintiffs' possession, and Sir Provash Mitter attacked the admissibility of these plans for the purpose of proving what the boundary was. In my judgment, both of them, having been made as we know, under the Calcutta Survey Act, were admissible in evidence for the present purpose. Technically they are admissible as evidence of possession; but, in a matter of this sort, evidence of possession has a great value as regards the question of title. There is to my mind no validity in the contention that all the trouble taken to have these surveys made of Calcutta ends in the lame conclusion that the surveys are no evidence on the question of boundary.

8. The case of Jagadindra Nath Roy v. Secretary of State [1902] 30 Cal. 291 shows the contrary. The Act under which the maps were made shows that it was the business of the persons conducting these surveys to demarcate the boundaries. It was not the object of the survey to set all the owners of properties in Calcutta by the ears. It is to be hoped that only in a tiny minority of cases would it become necessary for the purpose of a survey to have an arbitration or other proceedings to settle the boundaries. A great majority of boundaries would be settled in the ordinary way without such contention. To my mind it would be reducing the Acts and the proceedings under them to nothing, if it was to be held that after all that was done to get a carefully prepared plan brought into existence by this survey it would not be evidence on a question like the one in the present suit. I think, therefore, that the learned Judge was well entitled to rely upon the evidence of these maps. There is nowhere, that I can see, in any of the other maps in the case any evidence that assists the plaintiffs. There are other maps as to which the utmost that can be said is that they are not conclusive or strong against the plaintiffs. There is, for example, a map of 1881 which refers really to the southern portion of the building as it at present stands. It is noticeable that to the west there is no sign on the Municipal sanctioned plan of 1881 of any openings. In view of the fact that on other directions there are signs of openings, this seems to be a matter which raises some little inference against the plaintiffs, even if it be true that the only compulsory requirement under the existing Municipal law of the town was to provide a plan that would show the foundation and the levels of the building.

9. There is a sanctioned plan of 1894 - a plan which came into existence for the purpose of the newer or northernmost part of the building. As to that the learned Judge points out that at all events no openings are shown on the west, but towards the south there are two openings which as a matter of fact were not

constructed. Sir Provash says quite correctly that the purpose of that plan had reference merely to the new construction, and that it did not very much matter as to what the representation was as regards the older wall. It is difficult to see, in these circumstances, that that sanctioned plan can be taken in any way as supporting the plaintiffs' case. There may be all sorts of reasons which may prevent it being conclusive against the plaintiffs' case, but there is no benefit in that plan to be drawn by the plaintiffs.

10. The learned Judge has commented upon the fact that on the western side of the disputed wall there are arches which appear to have been used at one time when the land was covered with temporary erections as a place where syces or other people might conveniently cook their food. It is quite clear that at one time that wall was serving some purpose in connexion with the defendant's land. Sir Provash Mitter points out that according to his case both the plaintiffs and the defendant had a common predecessor-In-title in Iswar Chandra Sadhukhan and that it might therefore have been when both the properties were in one ownership that this condition of affairs came about. Then, again, it may be that the existence of these arches is not conclusive against the plaintiffs, but it does not help them.

11. For all these reasons, I am of opinion that the finding of fact by the learned Judge that this particular wall was not Shown to be a part of the plaintiffs' property is right and must be affirmed.

12. I now turn to deal with the case as one of light and air through the various openings on the plaintiffs' western wall. A consideration of the evidence leads one somewhat clearly to the conclusion that the only openings which for this purpose need be elaborately considered are the openings on the western side of the western room in front of the plaintiffs' premises, that is to say, in the northern or the new portion of the plaintiffs' premises. There are other openings to the south including a window in the middle room, that is to say, in what was the most northern room before the new portion was erected. But with regard to these openings it is not proved that they enjoyed a passage of light and air from the defendant's property. There is definite evidence as regards the middle room window by the defendant who says that the wall was straight in front of it at the time he bought, and so far as the middle room window and anything to the south of that are concerned, it is not established to my satisfaction that rights of light and air were enjoyed in respect of them because it is not established to my satisfaction that the wall was not covering them up till recent times. It is necessary therefore, to concentrate attention on the western openings of the new portion of the building and with regard to them it is not proved that the plaintiffs had the two ground-floor openings for any substantial length of time.

13. The defendant's case is that plaintiffs made these openings in 1919 and the balance of probability on the evidence to my mind is that the defendant is correct as regards that matter. The learned Judge has dealt with the question of the four openings on the western side of the westernmost room of the first-floor of the

new building by taking as his terminus ad quam the year of 1919, It appears that in 1919 this portion of the wall broke down and there were certain cases in the police Court and after that date, therefore, the plaintiffs' enjoyment of light and air was not peaceable in the learned Judge's view within the meaning of the word in Section 26 of the Indian Limitation Act. An examination of the evidence with regard to that matter leads me to think that in this respect the learned Judge did not correctly appreciate the evidence. (After examining evidence on this point his Lordship held that the question of prescription has to be considered with reference to the 17th October 1921 and that that the correct inference in this case is that these openings were receiving light and air by the 17th of October 1901 and proceeded.) There remains, therefore, the question whether the interference caused by the defendant in raising this wall has been such as to ground an action for nuisance. The law, as declared in the well-known case of *Colls v. Home and Colonial Stores Ltd.* (1904) A.C. 179 refuses an action unless there has been a real interference with convenience or comfort of the dominant premises. The only room which need be considered is the westernmost room upon the first-floor of the new building. The learned Judge, in view of the very candid evidence of the plaintiff's engineer that that room can have been affected very little has held that the diminution of light and air caused by the obstruction on the west is not an interference with the comfort or convenience of this room. In view of the plaintiff's engineer's own evidence, he had very solid materials for coming to this finding; but as the photograph, which is Ex. No. 11 in this case, does not show the complete facts with regard to this matter we thought it well, in order that we might appreciate the evidence given on this subject, to see the premises for ourselves, and we have seen the premises for ourselves.

14. After doing that, and after carefully considering the evidence, now that I have a better mental picture of the place, I have come to the conclusion that the learned Judge's finding on this point is perfectly correct. To my mind there is no way of making out that the comfort or convenience in respect of light and air of this room has been interfered with. It is quite right to bear in mind the case which Sir Provash Mitter has quoted - the case of *Kine v. Jolly* (1905) 1 Ch. 480. It is a difficult case to interpret, and probably Lord Loreburn's interpretation of it is the most intelligible, because in that case he held that what really was meant by the learned trial Judge was this that the room in question had enough, light and air for ordinary purposes - say in a crowded city, - but it had not that amount of light and air that a person might reasonably expect to enjoy in a country villa. "Whatever is the true construction of that case, I am quite satisfied that no question of charm or character of this room arises so as to give the plaintiffs any ground of action. For that reason it seem to me that the only part of the plaintiffs' case which has any foundation at all must fail by reason of the circumstances that they are not really affected.

15. I will now refer in conclusion to two matters. One is the question of the seat in front of the building and the other is the question of the interference with the plaintiffs' cornices. These matters have some importance when considering the

question whether the wall has been shown to belong to the plaintiff.

16. It appears that the seat was put up and it is said that for a number of years this seat projected a few inches beyond the westernmost limit of the wall of the plaintiff's house and into the part which was at one time occupied by the wall in dispute. How long this tiny projection can be proved to have existed is a matter upon which I am in no way satisfied. The defendant has raised the wall and the plaintiff complains that he has interfered with this seat. In my judgment that seat is more an argument against the plaintiff on the question of the proprietorship of the wall than in his favour, because I have very little doubt that if he had thought he had a right to the wall or, any part of the ground on which the wall had stood he would not in building the seat have built in the way he has done but would have taken full advantage of the space which was at his disposal. However, it is not proved to my satisfaction that this projection has been in existence for any definite length of time.

17. With regard to the cornices and the interference with them, it seems clear that there has been some little interference; but it is quite clear to me that the interference has been entirely trumpery and I find, when I look at the issues settled by the learned Judge in the presence of a very experienced counsel who appeared for the plaintiff that there is no issue which can in any way - however indirect or ambiguous - be taken as referring to the interference with the cornices as a substantive claim. In these circumstances I have no doubt at all that this is a matter of a very trumpery character and that it would not be proper for this Court in a matter of this sort to go back upon the very sensible exercise of discretion by the learned Counsel who was in charge. I entirely decline to reconsider the learned Judge's judgment.

18. In these circumstances I am of opinion that this appeal should be dismissed with costs.

C.C. Ghose, J.

19. This is an appeal against a judgment of my learned brother Mr. Justice Chotzner delivered on the 21st December 1925, by which he dismissed the plaintiffs' suit with costs. (After stating facts as in the first judgment his Lordship proceeded.) In March 1881, an application was sent in by the plaintiffs' mother to the Corporation of Calcutta for sanction to erect a two storeyed house on the southern portion of the premises according to a plan submitted (Ex. I).

20. It is stated that the house in question was erected some time in 1882 and that on the first-floor, there were a window 5' x 2'-6" and some apertures on the western wall giving light and air to the plaintiffs' premises. It is further stated that some time about 1894 the tiled hut on the north was pulled down, and after sanction had been obtained from the Corporation of Calcutta for the erection of a two-storeyed building on the northern portion (see Ex. B.) the same was erected some time in 1895. On the western wall of the said newly erected two-storeyed building on the northern portion, there are on the ground-floor two

windows each measuring 2'-9" x 1' -10", they being situated on the passage from the entrance to Premises No. 43, Bagh Bazar Street. Immediately above the passage on the first-floor, there is a verandah from north to south in which there are two openings through arches measuring 9" x 5". There is a verandah on the first-floor on the road side, and on the westernmost corner of the last-mentioned verandah there is an opening looking out on Premises No. 42.

21. At the south end of the verandah there is an open space measuring 3'-6" x 5'-6". On the west of this open space is an opening similarly looking out on Premises No. 42, Bagh Bazar Street. At the roof level of the ground-floor there is a string of bricks projecting along its western edge. This has been described as a cornice.

22. The first contention that has been advanced on behalf of the appellants is that the learned Judge was in error holding that the brick-built wall, immediately on the west of the plaintiffs' premises" lies outside the ambit of the premises covered by the plaintiffs' conveyance. Now, on this point, the material documents are these which are referred to in the judgment of the learned Judge on pages 210 to 212 of the paper-book and as will be seen from what is stated below, in my opinion, no case has been made out for coming to a conclusion different from what has been arrived at by the learned Judge.

23. To start with, no real assistance can be derived by the plaintiffs from the two survey maps produced in this case, nor can the plaintiffs, in my opinion invoke in aid anything from the plans which were submitted to the Corporation of Calcutta in 1881 and 1894 for sanction to the construction of masonry structures. It has been argued that the two survey maps being Exs. 12 and 19, although they were made by the authority of Government, are not in any way conclusive on the question of the ownership of the wall in dispute and that the word "accurate" in Section 83 of the Indian Evidence Act refers only to the accuracy of the drawing and correctness of the measurements and to nothing else. In other words, it is contended that the correctness of boundaries, according to the rights of the parties, is not to be presumed from the maps. It is also urged that there was no contested proceeding within the meaning of the Calcutta Survey Act, when the properties were surveyed and that therefore there was no judicial adjudication of the rights of the owners of the two parcels, namely, Nos. 42 and 43, Bagh Bazar Street.

24. Now, it is perfectly true that a survey map is not direct evidence of title, but a survey map is direct evidence of possession at a particular time, namely, the time at which the survey was made. In each case the Court has got to decide whether the evidence of possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons and with such publicity and notice to persons interested as to be admissible. and valuable evidence of the state of things at the time they were made see : in this connexion *Nobocoomar v. Gobind Chunder* [1881] 9 C.L.R. 305 and *Jagadindra Nath v. Secretary of State* [1902] 30 Cal. 291. This

being the state of the authorities (see in this connexion Section 36 of the Indian Evidence Act) the survey maps when looked at do not show that the wall in question is within the boundary lines of Premises No. 43, Bagh Bazar Street. Further, having regard to the procedure which is usually followed by the officers who make these surveys under the Calcutta Survey Act, it cannot be doubted for one moment that if the wall in dispute had really belonged to the owners of No. 48, Bagh Bazar Street, they would have taken the necessary steps under the law to obtain an adjudication of their rights before the proper authorities. that the owners of No. 43 did not raise any question is, to my mind, sufficient evidence of the fact that they were satisfied with the result of the survey, it being always borne in mind that the proceedings of the survey authorities were conducted openly.

25. There is also, in my opinion, not the slightest pretence for the suggestion that if the wall be not held to be included within the boundaries of No. 43, Bagh Bazar Street, it should, at any rate, be held to be a party-wall. Now, the expression "party-wall" may be used in four different senses : (1)A wall of which the two adjoining owners are tenants in common, (2)A wall divided longitudinally into two strips one belonging to each of the two adjoining owners, (3)A wall which belongs naturally to one of the adjoining owners subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements (4). A wall divided longitudinally into two moieties each moiety being subject to easement in favour of the other moiety. I have examined the evidence, such as it is, for the purpose of finding out whether the plaintiffs have satisfied any one of the four conditions noted above, and I have come to the conclusion that there is nothing in the evidence to support the plaintiffs' claim to the effect that the wall in question is a party-wall between the two premises. The survey maps definitely and conclusively negative any such contention.

26. No side space on the west was left by the plaintiffs when they proceeded to erect masonry structures in pursuance of the sanctions granted by the Corporation of Calcutta in 1881 and 1894, and it seems to me that if as a matter of fact) the land on which the brick-built wall now in question stands had really belonged to the plaintiffs, there was no conceivable reason whatsoever why the western wall of the masonry structures erected by the plaintiffs should not have proceeded towards the west up to the very edge of the land on which the brick-built wall now in question stands. Further, as the learned Judge points out the nature of the brick-built wall in question is such that the wall itself bears evidence to the fact that it must have belonged to some one other than the plaintiffs. There are two recesses or arches on what has been described the wrong side of the wall, indicating that the same had formed part of some sort of structure on land which admittedly did. not form part of Premises No. 43, Bagh Bazar Street, but which did form part of Premises No. 42, "Bag. Bazar Street. It is said, however, that the wall with the recesses or arches on the wrong side, of it passed to the plaintiff by the conveyance of 1880, and therefore no point can be made from the existence of these recesses or arches in Ex. 2. To that the

answer is that it is impossible to say with any degree of certainty that a wall situated as the wall now in question is situate, did pass to the plaintiffs by the conveyance of 1880. Nor is there any foundation in the evidence on record for the contention indicated in Ground No. 10 in the Memorandum of Appeal.

27. The plaintiffs have not produced their root of title, being the conveyance in favour of Hari Narayan Mandal and no explanation has been given as to why that conveyance has been withheld. If a wall on the site of the present wall had passed to Hari Narayan Mandal by the conveyance in his favour from Iswar Chandra Sadhukhan, one would have expected that the plaintiffs would have taken care to produce the said conveyance in this case. Further, as has been pointed by the learned Judge, if the wall had been the property of the plaintiffs, no reason whatsoever has been shown why the two openings provided for in the sanctioned plan of 1894 on the west should not have been there. This is a very strong argument in favour of the contention that the plaintiffs knew full well at the time when they showed the two openings on the west in the plan of 1894, that they could not possible keep any opening on the west, because they had on right whatsoever in and to the wall which is now the subject-mater of dispute.

28. As regards the alleged encroachment on the seat at the entrance to Premises No. 43, Bagh Bazar Street, it appears that only the portion of the seat erected on the road side at the extreme north of "the wall in dispute and in a straight line with it has been built upon. If it be the case, as in my opinion it is, that the plaintiffs have not made out any case that the wall in dispute or the site belonged to them, their case with reference to the portion of the seat referred to above must fail.

29. The next question to which our attention has been drawn is whether or not the windows, apertures, openings and arches on the western wall of the plaintiffs' building are ancient lights. (After considering evidence his Lordship held that the northern portion of the plaintiffs' building was constructed 20 years prior to the 17th October 1921 and proceeded.) It would seem therefore from what has been stated above that the plaintiffs have made out a right to access and use of light and air through the four openings on the western side of their wall on the first-floor of the northern portion of their building.

30. It is said, however, by the defendant that the 20 years should be calculated not from the 17th October 1921, but from September 1919, or, at any rate, from December 1919, when the defendant was preparing to raise the wall in question to a height more than that at which it stood. What really happened in 1919 is to be found in the evidence of the defendant on pages 171 to 173 of the paper-book and in Ex. 13, being a copy of a petition of the plaintiff Debendra Nath Bagchi filed in this Court in February 1920. It does not appear therefrom that on any date prior to the 17th October 1921, the enjoyment of light and air through the said four openings on the western wall of the first-floor of the northern portion of the plaintiffs' building had ceased to be peaceable and as of right and without interruption. It may be that the access of light and air through the two

windows of light and air through the two windows on the passage on the ground-floor had become contentious, but we are not concerned, as has been indicated above, with these two windows on the ground-floor because in my opinion the plaintiffs have not made out any case in respect thereof. In my opinion the terminal date for the calculation of the period of 20 years referred to in Section 26 of the Indian Limitation Act, in respect of the Indian Limitation Act, in respect of the said arches on the first-floor must be taken to be the 17th October 1921.

31. I now proceed to consider issue No 5 with reference to the obstructions against the four openings on the western wall on the first-floor of the northern portion of the plaintiffs' building. The learned Judge has come to the conclusion that it is difficult to say that the obstructions complained of such a character as to constitute an actionable nuisance. For the purpose of fully appreciating the evidence on this point the learned chief Justice and myself went down at the conclusion of the hearing of this appeal to have a view of the plaintiffs' building. On the evidence on this point and having regard to the evidence on this point and having regard to the locality in which the building is situated and the nature and construction thereof and in particular the place where these four openings are, it being a verandah of the verandah or passage from north to south, and the amount mediately on the west of the verandah or passage referred to above, I am not prepared to say that the obstruction complained of are of such a character as to constitute an actionable nuisance. The result, therefore, is ? so far as Issue No. 5 is concerned ? the answer is in the negative.

32. There now remains for consideration the question of the encroachment on the cornice. So far as the cornice at the roof-level of the first-floor is concerned, it has not been encroached upon, and the encroachment, if any, is on the cornice at the roof-level of the ground-floor. The question of encroachment on the cornice, although referred to in the plaint, have been given up. Therefore nothing further need be said about it. I therefore, agree with the learned Chief Justice holding that this appeal fails and that it should be dismissed with costs.