

(1918) 01 BOM CK 0022

In the Bombay High Court

Case No : Second Appeal No. 51 of 1917

Himatlal Maganlal Shah

APPELLANT

Vs

Bhikabhai Amritlal Shah

RESPONDENT

Date of Decision : 28-01-1918

Acts Referred:

Easements Act, 1882 — Section 24

Citation : AIR 1918 Bom 283 : (1918) 20 BOMLR 403 : 45 Ind. Cas. 422

Hon'ble Judges : Heaton, J; Beaman, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Beaman, J.—The only substantial point with which we are called upon to deal is whether the lower appellate Court was right in granting the plaintiff an accessory easement, the extent of which is unfortunately not defined in the decretal portion of his judgment. The plaintiff is admittedly entitled to an easement of discharging water upon the defendant's land from eaves which project, as we are told here, although we do not discover this on the record, from three to five inches in length. This probably is about the fact, if not absolutely accurate. On the strength of this easement the plaintiff asked the Court below to give him an injunction, restraining the defendant from making any use of his land which would prevent the plaintiff from going upon it for all the purposes of repairing the wall of his house abutting thereon. The first Court refused this injunction, and in my opinion very rightly refused it. I entirely agree with the reasons given and the characterisation of the plaintiff's case by the trial Judge. In appeal the learned Judge below found that the case fell u/s 24 of the Indian Easements Act and that the repair of the wall was an accessory easement to the admitted easement of discharging water through the eaves. It appears to me that this is an altogether illegitimate extension of the doctrine of accessory easement. The wall is just as necessary to the support of the roof as a whole as to the support of these slightly projecting eaves beyond it, and yet it is contended that because of this so-called

easement the plaintiff is to have a vague and undefined easement which might preclude the defendant from making any use of his land within five or six feet of the plaintiff's wall. It does not appear to me that this is such an easement as any person is entitled to or was contemplated by Section 24 of the Indian Easements Act. It is true that we have been referred to a very similar case in *Madras Hayagreeva v. Sami* ILR (1891) Mad. 286 in which the learned Judges took a different view, a view to which the learned Judge below intended to give effect. The result, however, is manifestly most unjust, and in principle it would come to this, that whoever built a house to the very limit of his own land might, if his neighbor did not build upon his land within twenty years, compel him to forego making any use of it for any profitable purpose within an altogether indefinite distance of the plaintiff's wall. The actual easement is for no more than discharge of water over three to five inches of defendant's land and that easement can very easily be secured and continued without extending it in the manner in which it has been extended by the learned Judge below. Such eaves, for example, in so far as they are separable from the roof as a whole and entitled to special treatment on the ground of constituting an easement, could very easily be supported from the central roof beam or in any other way entirely independent of the wall. It is only by saying that the wall is necessary to support the roof as a whole and that the eaves are dependent upon the maintenance of the roof that we arrive at the position that the maintenance of the wall is in itself a ground for granting an extended easement over the defendant's land. I do not think that that is a reasonable view in principle.

2. But after all it is not necessary to generalize and, looking to the facts of the particular case and the view taken of it by the learned trial Judge, I should have no hesitation in saying that this at any rate was not a proper case for granting an injunction of the kind prayed for by the plaintiff.

3. In the lower appellate Court we find the learned Judge saying that it was not suggested that the plaintiff could repair his wall in any other way than by having the use of the defendant's land which he asks for. It may not have been suggested, but it is pretty clear, that there must be ways in which the plaintiff could do any necessary repairs to his wall from within, and without further encroaching upon the defendant's land. For example, to take an extreme case, we might say that if the plaintiff really was so anxious about the repair of this wall and the maintenance of the easement, he might build his wall two feet further back upon his own land, the eaves then projecting two feet five inches instead of five inches beyond the wall and so preserving the old easement. There would be no difficulty whatever in arranging the matter so, though it would no doubt be very inconvenient to the plaintiff. But the course proposed by the plaintiff and sanctioned by the learned Judge below is certainly as inconvenient and in my opinion far more unjust to the defendant.

4. In this view of the case, I think that the learned Judge below was wrong in granting the plaintiff the relief he has done, and that the proper order is that the

plaintiff's suit should be dismissed, and in my opinion it ought to be dismissed with all costs at any rate of the two appeals,

Heaton, J.

5. I agree. I think that the meaning of Section 24 of the Indian Easements Act as illustrated by the examples given has been misunderstood by the lower appellate Court. The accessory rights mentioned in that section are not intended to be of such a nature as to deprive the owner of the servant tenement of his rights of property unless such a result is absolutely essential. We can in this case only say that it is absolutely essential that the plaintiff should reach his wall from the outside in order to repair it, by assuming that it is impossible for him to do it from the inside. Clearly, it seems to me, it is not impossible for him to do it from the inside, although it may be very inconvenient. The plaintiff, if he wishes to repair his wall and if the defendant is unwilling that the plaintiff should go on to his land for the purpose, must do so from the inside.

6. I think it quite right that this claim should be dismissed and the appeal allowed. I agree as to the order proposed as to costs.