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**(1963) 05 AHC CK 0014**  
**In the Allahabad High Court**  
**Case No : Second Appeal No. 1521 of 1957**

Joti Prasad

APPELLANT

Vs

Shotamber Nath and Others

RESPONDENT

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**Date of Decision :** 03-05-1963

**Acts Referred:**

Limitation Act, 1908 — Article 144  
Specific Relief Act, 1877 — Section 54

**Citation :** AIR 1964 All 193

**Hon'ble Judges :** Mithan Lal, J

**Bench :** Single Bench

**Advocate :** R.B. Misra, for the Appellant; V.K.S. Chaudhary, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Mithan Lal, J.—This appeal filed by the plaintiff is directed against the judgment and decree of Sri M. C. Agarwal, Judge Small Causes Court and Additional Civil Judge, (sic) dismissing the plaintiff's suit for the main reliefs and confirming the judgment of the trial Court. The cross-objection has been filed by the defendant because both the courts below have ordered the removal of the cisterns constructed by the defendants on the joint land and also against the injunction granted by the lower appellate Court.

2. Briefly stated the facts are that the parties are owners of houses in the same locality in the city of Moradabad. In front of We plaintiff's house there is first his verandah then a chabutra and then another chabutra. To the west of the last Chabutra the defendants have their house. The defendants have a projecting balcony towards the case of their house and according to the plaintiff's own case a portion of this balcony has been in existence for a long time and the land under this old balcony is also said to belong to the defendant. To the north of this balcony, according to the plaintiff's case, a new balcony was constructed by the defendants in 1942 on a land 15"x 4 1/2" and two cisterns were also newly constructed in the land under the balcony. This LAND was said to belong to the

plaintiff exclusively. It was also complained of that the defendants had opened a new parnala in the eastern wall towards We southern (sic) their old balcony.

Consequently the present suit was instituted on (sic) February 1950 for removal of the defendants' balcony (sic) suring 15" x 4 1/2", for the removal of the two (sic) the parnala. An injunction was also prayed for directing the defendants not to use the land in dispute in any (sic) except for a rasta and not to flow any water on the (sic) land.

3. The suit was resisted, inter alia, on the grounds that the land in dispute did not belong to the plaintiff out (sic) the defendants and that the constructions Including the cisterns and the parnala were ail old. me suit was also (sic) to be barred by limitation.

4. The trial court held that the land In dispute (sic) joint of the parties, that the balcony in suit had been (sic) tructed in the year 1934 and that the parnala (sic) had been in existence since 1924. The cisterns were (sic) to have been recently constructed. Consequently the (sic) tiff's suit was dismissed except for the removal of the cisterns. The lower appellate Court has confirmed the decree of the trial Court and the injunction which the trial court granted has been modified to a certain extent. The learned. Civil Judge granted the plaintiff an injunction restraining the defendants not to make any constructions on the joint land nor to use it in any manner which may. interfere (sic) the plaintiff's right of common enjoyment. With regard (sic) the parnala that Court has granted an injunction directing the defendants to keep the pipe of the parnala under (sic) repairs so that the water does not spill on the (sic) and cause nuisance to the plaintiff. It is against this order that the plaintiff has come up in appeal while the (sic) defendants have filed the cross-objection.

5. The learned counsel for the appellant has (sic) that the Courts below went wrong in holding that the (sic) and the balcony were old or that the land was joint (sic) of the parties. It is also his contention that once the land in dispute was found to be joint an order of (sic) should have been passed. Learned counsel for the (sic) dents while supporting the judgment of the lower (sic) court so far as the appeal went has urged In support or the cross-objection that the lower appellate court (sic) wrong in granting an injunction in the terms in which if has been granted ordering the removal of the two (sic)

6. So far as the findings of fact go, it has been hold by both the Courts below that the land in dispute is joint of the parties, that the balcony in dispute constructed by the defendants was constructed in 1934, i.e. more than 12 years prior to the institution of the suit, and that the parnala in suit had been in existence for more than 20 years having been in existence since 1924. Both the Courts below further held that the cisterns of the defendants were new but a part of the southern cistern did not (sic) Joint land but in the land belonging exclusively to the defendants. These findings of fact or at least some of have been challenged on behalf of the plaintiff (sic) but I do not agree with the

learned counsel for the (sic) appellant that the Courts below have in any manner erred to arriving at the findings of fact on the basis of the (sic) documentary and the oral evidence.

7. The only question of law which arises relates to the overhanging balcony and the contention on behalf of the plaintiff has been that even if the balcony has existed for more than twelve years the defendants had no (sic) right to maintain it. This contention of the learned counsel for the appellant cannot be accepted because in the (sic) Bench case *State of Indore v. Visheshwar* AIR 1934 (sic) 1054 a Division Bench of this Court after taking into consideration the Bombay cases expressing a different view and relying upon a Madras case of *Ratmnaveiu Mudaliar v. Kolandavelu Pili* ILR Mad 511 came to the (sic) conclusion that the column of air above the soil belonging to a person itself constitutes an immovable property. The Division Bench further observed that if there is an encroachment over another's immovable property and the defendant has made good his title by remaining in adverse possession for over 12 years by constructing an overhanging chajja the defendant has acquired a right by adverse possession for maintaining the chajja and the plaintiff cannot get the chajja removed. With respect I agree with the view expressed by the learned Judges in the aforementioned case.

It may be observed that a person, when he erects a building or a chajja or a balcony overhanging the land belonging to others, naturally commits an act of trespass because the owner of the land is also the owner of the column of air above it. Under Article 144 of the Limitation Act right by adverse possession is created both in the immovable property or "any interest therein not thereby otherwise specially provided for". Obviously the framers of the law recognised two rights, a right for possession of immovable property and the other, a right relating to any interest in such Immovable property. The two are not synonymous, while, the first relates to the Immovable property itself, the second relates to the benefits arising out of it. Any projection like a chajja or a balcony which overhangs another "person's" land would amount to trespass upon the interests of the immovable property of another and consequently as observed by the Division Bench in the aforementioned case that itself constitutes an Immovable property. That being so the defendants could acquire a title by adverse possession by a projecting balcony. The argument of the appellant that the defendant acquired no right to keep the overhanging balcony must be overruled. This disposes of the appeal.

8. As far as the cross-objection does the first objection relates to the cisterns but this ground of objection cannot be accepted because the northern cistern has been found to exist in the land which has been held to belong Jointly to the parties. It has further been found that both the northern and the southern cisterns are new, consequently the Courts Below were right in passing an order for the removal of the northern cistern and so much of the (sic) cistern as was found to exist on the joint land, construction of new cistern could not give the

defendants a right to maintain them.

9. The second objection which has been taken in the cross-objection and which has been vehemently urged before this Court relates to the order of injunction. The contention of Sri V. K. S. Chaudhry is that the Court should not have granted the plaintiff an injunction directing the defendants not to use the joint land in any manner which interfered with plaintiff's right of common enjoyment. I am unable to agree with the learned counsel for the respondents that this order of the lower appellate Court is in any way wrong. When it has been found that the land in dispute was joint of the parties and it has further been found that the defendants made two unauthorised cisterns one completely lying in the disputed land while only a portion of the other lay in the land the Court could protect the rights of the plaintiff by granting the plaintiff an injunction so that the defendants may not obstruct in the common enjoyment of the land. It has been submitted by Sri Chaudhry that such an injunction is likely to be misused and may lead the plaintiff to file suits on imaginary grounds but whatever may be the result it cannot be said that there was any legal error in granting the Injunction in the form it has been granted by the lower appellate court.

10. Another objection of Sri Chauhanry relates to the order Keeping the pipe of the spout in proper repairs. his contention is that there was no complaint on behalf of the plaintiff that the pipe was not in proper order or was not kept in proper repairs and so the Courts should not have granted an injunction. It is true that there was no such complaint but there was no occasion to make such a complaint when the case of the plaintiff was that the spout was new and the defendants had no right to open the spout or flow the water. When the Court found that the pipe was old that Court, in order to protect the rights of the parties, in future, gave a direction to the defendants to keep the pipe in proper repairs it cannot be said that such an order was uncalled for.

11. For all these reasons both the appeal and the cross-objection fail. The appeal and the cross-objection are Dismissed with costs.