
(1971) 05 RAJ CK 0006

In the Rajasthan High Court

Case No : Civil Second Appeal No. 397 of 1970

Kanakmal and Others

APPELLANT

Vs

Mahadev Prasad

RESPONDENT

Date of Decision : 03-05-1971

Acts Referred:

Easements Act, 1882 — Section 13, 5

Citation : (1971) WLN 120

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

C.M. Lodha, J.—This is a defendant's second appeal arising out of a suit for mandatory injunction directing the defendants to remove the wall raised by them contiguous to the western gate of a godown belonging to the plaintiff-respondent and also for issue of a perpetual injunction restraining the defendants from obstructing the passage of light and air through the said gate. It has also been prayed that the defendants may further be restrained from obstructing the flow of water from the roof of the godown through the spouts falling on the defendants' land.

2. Raj Kanwar and Suraj Singh were admittedly the original owners of both the godown belonging to the plaintiffs and the house belonging the defendants. They sold the godown and one other house situated towards the north of the godown to one Premsukh by sale deed (Ex.9) dated 5.1.1949. Premsukh in his turn sold the godown to one Harswaroop by a sale deed (Ex 8) dated 26.7 1955. Har Swaroop sold it to Nathulal vide sale deed (Ex.2) dated 8.9.1964 and lastly Nathulal gifted the godown in question to the plaintiff Mahadeo Prasad by a gift deed (Ex.1) dated 14.12,1965. This is how the plaintiff Mahadeo Prasad came to be the owner of the godown.

3. As regards the house belonging to the defendants admittedly situated on the

west pf the godown, Raj Kanwar and Suraj Singh mortgaged it with one Rameshchander Sarda sometime in 1942 A. D. and purchased it in court auction in connection with his mortgage decree against Raj. Kanwar and Suraj Singh. It further appears that the defendants purchased this house from Remeshchander by a sale deed (Ex. A.4) dated 4.5 1959. Thus the house and the godown in question which once belonged to Raj Kanwar and Suraj Singh passed on to two different petsons, that is, the plaintiff became the owner of the godown and the defendants purchased the house.

4. The plaintiff filed the present suit in the Court of Munsiff, Ajmer City (West), Ajmer on 7.1.1966 for the reliefs mentioned in the earlier part of this judgment alleging that he had been receiving light and air through the western gate of the godown opening in the plaintiff's house for over 20 years, but the defendants had obstructed the same by constructing a wall contiguous to the gate so that the passage of light and air was completely blocked resulting in substantial diminution of light and air coming into the godown. The plaintiff further pleaded that he and his predecessors-in-title had been discharging rain water from the roof of the godown through the three spouts for more than 20 years over the defendants' chowk but the defendants were threatening to close down the aforesaid spouts also and thereby obstruct the flow of water through the said spouts. It was also pleaded that the land on which the wall had been constructed by the defendants belonged to the plaintiff, and the wall so constructed by the defendants had covered half the stone brackets (Todas) of the plaintiff fixed in his own wall. The plaintiff filed an amended plaint on 27.1.1966 by which he was permitted to rest his case for the reliefs claimed by him not only on prescriptive easement but also on easements of necessity and quasi-easements both with respect to light and air alleged to be enjoyed through the gate as well as the right to discharge water from the roof of the godown through the three spouts on the defendants' land.

5. After recording the evidence produced by the parties the learned Munsiff by his judgment dated 31.5.1969 decreed the plaintiff's suit for demolition of the wall and further restrained the defendants from interfering or obstructing the passage of light and air through the western gate of the plaintiff's godown. A perpetual injunction was also granted against the defendants from obstructing the flow of water through the above mentioned three spouts existing on the roof of the plaintiff's godown.

6. Aggrieved by the judgment and decree by the trial court the defendants filed appeal which was dismissed by the learned Civil Judge, Ajmer by his judgment dated 5.10.1970. Consequently, the defendants have come in second appeal to this Court.

7. It may be relevant to state here that the plaintiff's claim that the land on which the wall in dispute had been constructed by the defendants belonged to the plaintiff has been negated by both the courts below and thus this part of the plaintiff's case stands finally rejected. As regards the alleged prescriptive

easement claimed by the plaintiff to receive light and air through the western gate of the godown both the courts below have come to a concurrent finding that the plaintiff has failed to prove acquisition of prescriptive right in this connection and the respondent has not relied on prescriptive right before me in this appeal. Consequently this part of the plaintiff's case is also closed. It may be noticed that in the amended plaint the plaintiff had pleaded in the alternative easement of necessity and quasi-easement in support of his right to receive light and air through the western gate of the godown. In disagreement with the trial court the first appellate court has come to the conclusion that the plaintiff has failed to prove an easement of necessity. Before me the learned Counsel for the respondent has not tried to support the decree by the lower court on the ground of easement of necessity in this respect. Consequently the only ground which survives for decision in this appeal is whether the plaintiff has succeeded in proving quasi easement to receive light and air through the western gate of his godown which admittedly opens on the defendant's land?

8. Learned Counsel for the appellants has strenuously urged that neither the courts below nor the parties correctly understood and appreciated the ingredients and implications of a quasi easement and that has resulted in miscarriage of justice. It is submitted, that as an inevitable result of not appreciating the implications of a quasi-easement, the courts below have also failed to appreciate the evidence led by the parties in its correct prespective. It has also been submitted in this connection that the issue framed by the trial court on this question is too vague and does not embrace within itself the ingredients of quasi-easement relied upon by the plaintiff in support of his claim.

9. On the other hand, learned Counsel for the respondent has urged that the finding arrived at by the courts below is one of fact, and should not be interfered with in second appeal.

10. For a correct appraisal of the contentions raised by the learned Counsel for the parties it would first be necessary to reproduce the law bearing on the subject of quasi-easement. The relevant portion of Section 13 of the Indian Easements Act (Act V of 1882) with which we are concerned in this connection reads thus:

13. Easement of necessity and quasi easements:

Where one person transfers or bequeaths immovable property to another:

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or-

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

....

11. Section 5 which is further relevant for our purpose defines continuous and discontinuous, apparent and non-apparent easements thus-

Easements are either continuous, or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continued 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 signs.

12. Illustrations appended to this section go to show that a right annexed to B's house to receive light by the windows without obstruction by his neighbour "A" is a continuous easement, whereas a right of way annexed to A's house over B's land is a discontinuous easement. Similarly the rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain are apparent easements, whereas a right annexed to A's house to prevent B from building on his own land is a non-apparent easement.

13. That the alleged right to receive light and air through the gate in question is a continuous and apparent easement cannot be disputed. But what has been strenuously argued by the learned Counsel for the appellant is that the plaintiff has miserably failed to show that the easement claimed by him was necessary for enjoying the godown in question as it was enjoyed when the transfer took effect. In order to illustrate his point, the learned Counsel has invited my attention to Illustration (c) given below Section 13 which reads as under:

(c) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

In order to further fortify his submission he relied on *Hamida Khatoon v. Baryapore Panchayat* AIR 1947 Patna 122.

14. In my opinion the position of law as submitted by the learned Counsel for the appellants does not admit of any doubt, and the learned Counsel for the respondent also did not challenge it, and in my opinion rightly so. Thus the sole question to be decided in case of quasi-easement is whether there has been any disturbance in the enjoyment of the subject matter in dispute as it was enjoyed when the transfer took effect? Applying the said principle to the present case the moot point for decision would be as to the mode of enjoyment of the godown in question at the time when Raj Kanwar & Suraj Singh the original owners of the

godown and the house belonging to the defendants) sold the godown in question to Premsukh on 5.1.1949 by Ex. 9. This would mean that the plaintiff claiming such an easement has to show that the easement was not only apparent, and continuous but was necessary for enjoying the subject in dispute as it; was enjoyed when the transfer of the subject matter took effect. Looked at from this stand point, I cannot help pointing out that issue No. 3 pertaining to this matter is not only much too wide but highly vague and does not bring out the point of controversy between the parties. At one stage, learned Counsel for the respondent endeavoured to show that inspite of the defective frame of the issue the parties had led evidence on the relevant points for establishing a quasi-easement. His submission was that the evidence read as a whole indicated, that at the time of the sale of the godown in question by Raj Kanwar and Suraj Singh the western gate of the godown was kept open for light and air and that there has been substantial diminution of light and air in the godown on account of construction of the wall by the defendants. But soon-after he realised that the evidence of the witnesses was not recorded in the manner in which it should have been with the result that there has been left room for argument from the side of the appellants that the ingredients of a quasi-easement have not been fully established. He, therefore, agreed that proper issues may be framed and the case be remanded to the trial court. I may here point out that the criticism advanced by the learned Counsel for the appellants in respect of the evidence produced by the plaintiff applies more or less in the same measure to the evidence produced by the defendants also.

15. In the circumstances I am inclined to accept the contention advanced on behalf of the appellants that neither the parties, nor the trial court which recorded evidence correctly appreciated the ingredients and implications of quasi-easement pleaded by the plaintiff in respect of the right claimed by the plaintiff to receive light and air through the gate in question. Unfortunately for the parties, the first appellate court did no better. It also failed to direct its attention on the question as to whether the light and air were being enjoyed through the gate in question on or about 5.1.1949 when Raj Kanwar and Suraj Singh sold the godown to Premsukh, and whether the light and air so received was necessary for enjoying the godown in question? In this view of the matter, the right course, in the circumstances of the case, would be to frame a proper issue on the point and allow both the parties an opportunity to lead evidence on it. I am, therefore, of opinion that Issue No. 3 as framed by the trial court should be substituted by the following issue-

3. Whether the easement claimed by the plaintiff to receive light and air through the western gate of the godown is necessary for enjoying the said godown as it was enjoyed when Raj Kanwar and Suraj Singh sold the godow in question to Premsukh on 5.1.1949?

16. There is another aspect of the case which does not seem to have attracted the attention of the courts below. It is well established that no party can claim an

easement of light and air unless there has been or is likely to be a substantial diminution of light and air. The plaintiff undoubtedly pleaded in para No. 5 of the plaint that by erecting the wall in dispute in front of the western gate of the godown the defendants have completely blocked the gate and have thereby rendered the godown unfit for comfortable use. This virtually amounts to pleading that the act of the defendants in raising the wall has caused substantial diminution of light and air in the plaintiff's godown, However no issue was framed on this point. I am, therefore, of opinion that an additional issue should be struck on this point and the parties should be allowed an opportunity to produce their evidence on it. This will be issue No. 3-A, and would read as follows:

In case issue No. 3 is decided in favour of the plaintiff has the construction of the wall in dispute by the defendants resulted in substantial diminution of light and air in the plaintiff's godown?

(Burden on Plaintiff)

17. This brings me to the question of the three spouts existing on the roof of the plaintiff's godown. The trial court has framed issue No. 6 on this point and the learned Counsel for the parties are agreed that what I have said in respect of issue No. 3 applies equally to issue No. 6 also. The easement to discharge rain water through the spouts in question has been claimed by the plaintiff as an easement of necessity and/or quasi-easement. The learned first appellate court has found this issue proved as an easement of necessity, but it has nowhere discussed how it is an easement of necessity? All that he has said in this connection is that the Plaintiff and his witnesses have stated that the water from the godown falls in the "chowk" of the defendants and there is no rebuttal of this fact. Having given this finding he has at once come to the conclusion that since it is not proved that there are other spouts from which the water can be discharged in any other direction, there is every reason to hold that these spouts are absolutely necessary for discharge of the rain water from the roof of the plaintiff's godown. It may be pointed out that easement of necessity is a term of art and in order to claim it successfully it has to be established that it is not possible for the person claiming such easement to resort to any other mode for exercise of the right claimed. The learned Civil Judge has not discussed the implications of the term "easement of necessity", and, therefore, his finding in this respect is vitiated. It may be pointed out that even though the plaintiff has also claimed this right as a quasi-easement the learned first appellate court has recorded no finding on this aspect of the plaintiff's claim. The issue regarding easement with respect to the spouts is also not happily worded and in the circumstances of the case it would be proper to reframe this issue also and allow both the parties an opportunity to prove their respective cases. Consequently, I recast the issue No. 6 as follows:

Whether the plaintiff has acquired a quasi-easement to discharge rain, water on the defendants land through the spouts in question, existing on the roof of his

godown, and or whether plaintiff can claim this right as an easement of necessity?

(Burden on plaintiff)

18. The result is that I allow this appeal, set aside the judgments and decrees of the courts below and remand the case to the trial court for recording the evidence of the parties on the fresh issues framed by me as above and then to decide the case afresh after hearing arguments. In the circumstances of the case I leave the parties to bear their own costs of this appeal. Costs hereafter will abide the result.

19. Since the case is an old one, the learned Munsiff is directed to expedite its disposal. Let the record of the case be sent to the trial court at once. The parties are directed to appear before that Court on 12.7.1971 to enable that court to take further proceedings. The parties are further directed to file the lists of witnesses whom they wish to examine in respect of the aforesaid issues on or before 12.8.1971 in the trial court.