

(1954) 09 BOM CK 0028
In the Bombay High Court
Case No : Second Appeal No. 956 of 1952

Rasiklal Manilal Bhatt and Others

APPELLANT

Vs

Savailal Hargovindas Sur

RESPONDENT

Date of Decision : 20-09-1954

Acts Referred:

Easements Act, 1882 — Section 7

Citation : AIR 1955 Bom 285 : (1955) 57 BOMLR 239

Hon'ble Judges : Gajendragadkar, J

Bench : Single Bench

Advocate : A.G. Desai, M.H. Chhatrapati and C.S. Trivedi, for the Appellant;
N.C. Shah, for M.B. Mehta, for the Respondent

Judgement

1. This is an appeal by defendant No. 1 and it raises a short question as to the plaintiff's right to receive lateral support to the wall on his land from the adjoining land of the defendant. Both the Courts below have granted a mandatory injunction to the plaintiff because they came to the conclusion that the wall belonging to the plaintiff was entitled to receive lateral support from the defendant's adjoining wall and that the ditch which had been recently dug by defendant No. 1 on his land had materially affected this lateral support.

2. The property in question is situated at Rajpipla. The plaintiff owns a "wada" to the south of which is a public gutter and to the south of the gutter is another residential house of the plaintiff. The defendant owns his "wada" to the north of the plaintiff's "wada" and he too owns a residential house. In about 1945, the plaintiff built the house in question with its northern wall constructed on the extreme northern limit of his "wada." In the present suit he alleged that beyond his wall the defendant had dug a ditch in 1946-47 and this ditch had diminished and materially affected the lateral support which his wall was entitled to receive from the land belonging to the defendant. That is the basis on which he claimed a mandatory injunction against the defendant calling upon him not to use the ditch and to close it at his cost.

It is this injunction which has been given by the Courts below. Both the Courts have found that the right which the plaintiff claims, and which in their opinion has been materially affected by the digging of the ditch, was a natural right available to the plaintiff in respect of his wall, and since this right had been impaired the plaintiff was entitled to the injunction.

3. It is common ground that the defendant's land is on a higher level than the plaintiff's land and there is no dispute that the plaintiff's land, unburdened and in its natural state, would be entitled to vertical and lateral support by the subjacent and adjacent strata of the land belonging to the defendant. This position is not in doubt at all. Section 7, Sub-clause (b), Indian Easements Act deals with the right of every owner of immovable property to enjoy without disturbance by another the natural advantages arising from its situation; and ill. (e) to this sub-section deals with this right; the right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person. That is why I have just stated that the right of the plaintiff's land, which is on a lower level, to receive support naturally from the subjacent and adjacent soil of the defendant is not, and cannot be, disputed.

But the question is whether this right, which is regarded as a part of the natural rights of ownership, is available to a structure on open land. In the plaint it is not alleged that, by the ditch which has been dug by the defendant, the right vesting in the unburdened and natural land of the plaintiff to receive support from the defendant's land has been impaired or diminished. The sole basis of the plaint is that the wall which has been built by the plaintiff on the extreme north of his land is entitled to receive support from the adjoining plot of the defendant, and it is this right of the wall to receive support that has been impaired and diminished.

The Explanation to ill. (e) u/s 7(b), Indian Easements Act is relevant on this point. This Explanation shows that land is in its natural condition when it is not excavated and not subjected to artificial pressure, and that the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition. In other words, the effect of the illustration read in the light of the Explanation is that the right which is referred to in Section 7(b) is applicable only to the land in its unburdened and natural state: it is not applicable to the structure built on the land. That is not to say that a similar right cannot be acquired by such structure. But it is not a natural right, and if the structure intends to claim such a right, it would be only by a process of prescription. If on his land the plaintiff had built his structure and the structure had stood for the statutory period of twenty years, then it may have been open to the plaintiff to allege that the right to receive support from the adjoining plot of the defendant had been acquired by the plaintiff's wall by prescription, and if in such a case the said right had been impaired or diminished, the plaintiff may have had a cause of action.

But it is not even alleged in the plaint that the wall has acquired such a right by

prescription. Indeed, on the allegations made in the plaint and on the evidence adduced in this case, it does not appear to be in doubt that the wall in question was built in 1945 and therefore there can be no question of prescriptive acquisition of the right in respect of the wall. Therefore, in my opinion, looking at Section 7(b) and ill. (e) and the Explanation appended to it, it is difficult to accept the conclusion of the Courts below that, because the plaintiff's land in its unburdened and natural state was entitled to receive support from the defendant's land, the same right can be claimed by the wall which the plaintiff had built.

4. This conclusion receives support from the statement of the law to be found in Halsbury on this subject. Healing with the natural rights to support, Halsbury observes that (Vol. II, p. 362) "every owner of land has "ex jure natureae", as an incident of his ownership, the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land". The same principles apply, according to Halsbury, both to lateral or adjacent support from adjoining land, as also to the subjacent support of underlying strata where the surface of the land and the strata beneath it are different freeholds and belong to different owners, and to the right of the owner of a subterranean stratum to the support of the further strata beneath. Then Halsbury refers to the support for buildings by land and he observes that the owner of land has no natural right to support for buildings or of the additional weight which the buildings cause, and that support to that which is artificially imposed upon land cannot "exist ex jure natureae" because the thing supported does not itself so exist. Then it is added that though no natural right can be claimed in respect of artificial structures, that does not prevent the owners of such artificial structures from acquiring such rights by the process of prescription.

5. The judgment of the House of Lords in --"Dalton v. Angus", 1881 6 AC 740, is always cited in this context as the leading judgment, on the subject. In tin's case, the question which arose directly for decision was whether a building can acquire a right to lateral support from adjoining land by 20 years" uninterrupted enjoyment and it was held that such a right can be acquired by prescription. While laying down the proposition that a right to receive lateral support may be acquired by a building by 20 years" user in the manner required by law, that is to say openly, continuously and without interruption, Lord Penzance was at pains to emphasize that "at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground."

This will illustrate the sharp distinction between the right which is natural and which is available in respect of land in its natural and unburdened form and a right which is acquired in respect of a structure built on the land. Whereas the right in respect of the land in its unburdened and natural form, is properly so called, a natural right, the right in respect of the building is an artificial right which is acquired by the artificial process of prescription.

6. In *Tamluk Trading and Manufacturing Co., Ltd. Vs. Nabadwipchandra Nandi*, , the Calcutta High Court had to deal with a case where the plaintiff had alleged that his cadastral survey number was entitled to receive lateral support of the contiguous plots belonging to the defendant and that the defendant, by excavating a tank in his plot, had caused the lateral support of the plaintiff's property to be diminished and impaired; and the question naturally arose before the learned Judge as to whether, impairment or damage to the natural right of the plaintiff's plot to receive lateral support having been proved, the plaintiff was entitled to the injunction claimed. Mr. Justice Mitter, who delivered the judgment of the bench, held that the right which was shown to have been impaired was a natural right available to the plaintiff and its infringement by the structure created by the defendant justified the plaintiff's claim for injunction.

But in appreciating the effect of this judgment, it is necessary to bear in mind that this was a case where the right infringed or affected was a right in respect of the plaintiff's open plot in its natural and unburdened state. This right was not attributed by the plaintiff to any structure of his own, and when it was found that this natural right to which the plaintiff's plot was entitled was threatened and had been impaired by the structure raised by the defendant, an injunction was issued in favour of the plaintiff. Both the learned Judges below have referred to this case in support of their conclusion that the plaintiff is entitled to an injunction on the facts before them.

With respect, they seem to have lost sight of the fact that the right which was asserted by the plaintiff in the Calcutta case and which was upheld by the judgment of the Calcutta High Court was a right which could be properly described as a natural right pertaining to the land in its natural and unburdened state. The right which the plaintiff in the present case has set out in his plaint is not at all such a natural right: it is a right in respect of a wall, and as I have already indicated, though a wall and any structure of like nature may acquire a right, it is an artificial right and it must be acquired by the process of prescription. In the absence of evidence that prescription has worked in favour of the structure of the plaintiff, it would be confusing the issues to regard the right set up in the plaint as a natural right which is recognised under the Indian Easements Act.

This distinction has been effectively drawn by a subsequent decision of the Calcutta High Court in -- *Bengal Provincial By. Co. Ltd. Vs. Rajani Kanta De and Others*, . Mr. Justice Mitter, who considered this point, has observed that there is a natural right of lateral support to one's land in unburdened and natural state from his neighbour's land, but that there is no such right for land burdened with the additional weight of buildings thereon unless the same were acquired as an easement. In support of his conclusion Mitter J., has cited with approval the observations made by Clerk and Lindsell on Torts, 8th Edn., p. 349. Here is what the learned authors say: "Again the right of support, apart from any easement to have a greater degree thereof, is limited to support afforded to land in its natural

state, that is to say, to land on the one hand unburdened with the weight of buildings, reservoirs of water or other artificial erections which would tend to increase the natural downward or lateral thrust"

7. Therefore, in my opinion, the Courts below were in error in upholding the plaintiff's claim for injunction in the present case. Mr. Shah for the respondent tried to make out a case of prescriptive acquisition of the right in favour of the plaintiff. He mentioned the fact that along with the present suit the defendant's suit for an injunction against the present plaintiff was tried and the same has been dismissed; and, according to Mr. Shah, that would suggest that there was a structure in existence on the plaintiff's portion of the land even before the present wall was built. I do not see how the dismissal of the defendant's suit can help the plaintiff in the present appeal.

In the present appeal I must proceed to deal with the case on the plaint as it has been filed, and in the plaint I do not see any reference whatever to any prescriptive acquisition of the right of easement in respect of the wall. Again it is not even alleged in the plaint that the ditch dug by the defendant has impaired the natural right of the plaintiff's plot to receive lateral support. Even if an allegation of this type had been alternatively made, it may have been another matter. Whoever drafted the plaint seems to have made no distinction between a natural right which is available to the land in its natural and unburdened form and a right which may be acquired by a structure on such land. Therefore, I do not see how the decree for injunction passed by the Courts below can be upheld having regard to the clear allegations in the plaint and having regard to the facts found by the Courts below.

8. In the result, the appeal must be allowed, the decree passed by the Courts below must be set aside, and the plaintiff's suit dismissed. Mr. Desai fairly does not press for him costs. There will, therefore, be no order as to costs.

9. Appeal allowed.