

(1931) 02 BOM CK 0009
In the Bombay High Court
Case No : Second Appeal No. 465 of 1928

Yosef David Varulekar

APPELLANT

Vs

Moses Solomon Talkar

RESPONDENT

Date of Decision : 18-02-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Easements Act, 1882 — Section 23

Citation : (1931) 33 BOMLR 1114

Hon'ble Judges : Baker, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Baker, J.—The plaintiff in this case obtained a decree against the defendants, the decree being: "ordered that the plaintiff has the right that his sweeper shall have liberty to go through the lane described in the plaint in order to clear the latrine situated in the plaintiff's premises described in the plaint; and the defendants are ordered not to obstruct the sweeper. The plaintiff should get the obstruction caused by the defendant removed through Court." This was on February 16, 1920. On appeal this decree was confirmed by the District Judge, Thana. On second appeal to the High Court the decree was confirmed, the case being Varulekar v. Talkar (1921) 21 Bom. L.R. 298, in which reference is made to the Judge being satisfied that the lane was used by the plaintiff as of right for more than twenty years and that a right to an easement had been established. The High Court, however, in its judgment advised the defendants to move the Municipality to require the plaintiff to remove the privy further away from the plaintiff's house, and in that case the privy would not be cleaned by the sweeper using the defendants' ground. In consequence of this, the Municipality was moved by the defendants, and the privy which formed the subject of suit and which is marked A on the plan was taken down and a new one built at the point X on the plaintiff's land. When the sweeper employed by the plaintiff was going to clean this privy, he was obstructed by the defendants, and the plaintiff,

therefore, sought to execute the decree in the former suit, No. 402 of 1919. The defendants contended that as the plaintiff had removed his former privy and rebuilt it, he cannot enforce his rights under the decree. The Subordinate Judge of Alibag found against him, and this finding was confirmed on appeal by the Assistant Judge of Thana. The defendants make this second appeal.

2. This case raises a point of law which does not seem to be directly covered by authority, although I should think it is of fairly frequent occurrence. The question is whether by pulling down the privy which formed the subject of the former suit and rebuilding it at another place, the plaintiff has thereby lost the right of easement which he had in respect of the previous privy, and secondly, whether by the removal of the privy which formed the subject-matter of the present suit the decree is no longer capable of execution. It is to be observed that the passage used by the sweeper for going to the new" privy is precisely the same as it was before in going to the old one. The plaintiff does not seek to impose any greater burden on the servient heritage by requiring the sweeper to pass over a greater portion of the defendants" land than before. The learned advocate for the appellants relies on Section 454 and 51 (c) of the Indian Easements Act. Section 45 says:-

An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

3. Section 51 says (we need only refer to the last paragraph):-

An easement extinguished u/s forty five revives...(c) when the destroyed heritage is a dominant building, and, before twenty years have expired, such building is rebuilt upon the same site, and in such a manner as not to impose a greater burden on the servient heritage.

4. The argument of the appellants is that in this case the dominant heritage must be taken to be the privy which has been destroyed, and therefore the easement was extinguished u/s 45, and as admittedly the new latrine is not re-built on the same site, the easement is not revived. Reference has been made to Gale on Easements, 10th Ed., p. 838. That, however, is on the second point, i. e., the imposing a greater burden on the servient heritage. On behalf of the respondent it is contended that the dominant tenement is not the privy, but the plaintiff's house and reference is made to Section 4 of the Indian Easements Act, in which an easement is described as a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do and continue to do something, or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own, and it is contended that the case is governed by Section 23, which provides that subject to the provisions of Section 22, the dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. The learned advocate for the respondent has relied on the cases in *Jadulal Mullick v. Gopulchandra Mukerji* ILR

(1886) Cal. 136, *Jesang v. Whittle* ILR (1899) 23 Bom. 595, 1 Bom. L.R. 37, and *Purshottam Bhaichand Vs. Kasturbhai Lalbhai*, , Those cases, how-ever, bear rather on the second point, i.e., as to the increase on the burden of the servient heritage. Although no case has been quoted precisely on this point, I have no doubt that the dominant heritage in this case is not the privy but plaintiff's house and land within which the privy is. The definition in Section 4 of the Indian Easements Act is in consonance with that definition rather than with the theory that the dominant heritage is the privy itself. Therefore, the removal of the privy and its re-building on a different spot in the plaintiff's land would not have the effect of extinguishing the easement u/s 45 of the Act, The case is, in my opinion, governed rather by Section 23, which provides that the dominant) owner may from time to time alter the mode and place of enjoying the easement provided he does not thereby impose any additional burden on the servient heritage. Now, it is admitted that in order to go to the new privy at X the sweeper only passes over the same portion of the defendants' land as before, and enters the plaintiff's land at the same place. The only question to be considered in the light of the cases which have been quoted above is the increase in the burden, if any, on the servient heritage. It is obvious that as long as the sweeper enters the plaintiff's land or rather leaves the defendants' land at the same point there is no increase in the burden, and it follows, therefore, that the provisions of Section 23 will govern the case.

5. With regard to the question that the original decree referred to a privy which is no longer in existence, and therefore the decree is now incapable of execution, the answer is that in view of what has gone before, the right of way to which the plaintiff is entitled was in respect of cleansing the privy standing in his land, and the mere fact that this privy has been replaced by another at a distance of some twenty or thirty feet will not render the decree incapable of execution, and therefore the present proceedings u/s 47 of the CPC are open to the plaintiff.

6. The result is that the appeal fails, and is dismissed with costs.