

D. Ramanatha Gupta Vs. S. Razaack

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Court : Karnataka

Decided On : Feb-16-1982

Reported in : AIR1982Kant314; ILR1982KAR579; 1982(1)KarLJ394

Judge : G.N. Sabhahit, J.

Acts : [Easements Act, 1882](#) - Sections 15; ;[Evidence Act, 1872](#) - Sections 90

Appeal No. : Second Appeal No. 183 of 1974

Appellant : D. Ramanatha Gupta

Respondent : S. Razaack

Advocate for Def. : S. Shankarnarayan, Adv. for ;R. Narayanappa, Adv.

Advocate for Pet/Ap. : S. Javali, Adv. for ;M.V. Balasubramanyam, Adv.

Judgement :

1. This appeal by the defendant is directed against the judgment and decree dated 19-2-1973 passed by the Second Addl. Civil Judge, Bangalore in R. A. No. 35/70, on his file, allowing the appeal of the plaintiff on reversing the judgment and decree dated 31-3-1970 passed by the Second Addl. First Munsiff, Bangalore in O. S. No. 489/64 on his file, dismissing the suit of the plaintiff for injunction.

2. It is the case of the plaintiff that he is the owner of the premises known as Ali Buildings bearing No. 840, Old Taluk Cutcherry Road, Nagarthpet and 112

Chowdeswari Temple Street, and defendant is the owner of the premises adjoining his premises bearing Nos. 113 and 114, Old Taluk Cutcherry Road. There are two windows of the size of 36' X 56' on the up stairs of the plaintiffs building through which the light and air passes to the property of the plaintiff. These windows and ventilators have been according to the plaintiff in existence for over 50 years and the plaintiff has been in enjoyment of the light and air, coming through them and it is undisturbed during all this period. Thus the plaintiff has acquired easement right to the light and air through the windows and ventilators having enjoyed the same in his own right undisturbed for a period of 50 years. The defendant some time ago demolished the structure in Nos. 113 and 114 Chowdeswari Temple Street, and is now putting up a new storied building. If the defendant were to Put Up a two storied building, the windows and ventilators would be completely shut up and there will be no air and light and there will be no passage through which the air and light pass to the property of the plaintiff. Hence, he averred that the defendant is not entitled to obstruct the air and light coming through the windows. Therefore, the plaintiff sought to restrain the defendant by means of an injunction from blocking the windows and ventilators. Hence, he instituted the suit for permanent injunction against the defendant with a prayer for issuance of an injunction - permanently, prohibiting the defendant from shutting out the windows and ventilators situated in the plaintiff's property and for costs.

3. The suit was resisted by the defendant. He contended that the plaintiff did not acquire any easement by prescription for the alleged flow of light and air through the windows and ventilators. He specifically pleaded that the predecessors-in-title of the plaintiff executed an agreement on 5-9-1921 to the predecessors-in-title of the defendant undertaking not to obstruct the raising of the building by constructing the floors. Hence he submitted that the suit for injunction was not maintainable.

4. The trial Court raised the following issues as arising from the pleadings.

(1) Whether the plaintiff has acquired Prescriptive right to enjoy light and air through the windows and ventilators in question?

or

(2) Whether the predecessor in title of plaintiff has executed the ' agreement dated 5-9-1921 and if yes whether plaintiff has not enjoyed light and air as a matter of right ?

(3) Whether plaintiff is entitled to the injunction prayed for ?

(4) To what reliefs are the parties entitled

5. The trial Court, appreciating the evidence on record, held that the plaintiff has not acquired the easement alleged by prescription in view of the fact that the predecessors-in-title of the plaintiff have executed agreements as per Exts. D-3 and D-4 dated 5-9-1921 not to obstruct the predecessors-in-title of the defendant from raising their building by putting up upstairs. In that view, he dismissed the suit as not tenable. Aggrieved by the said judgment and decree the plaintiff went up in appeal before the learned Civil Judge, Bangalore, in R. A. No. 35 of 1970 on his file and the Second Addl. Civil Judge, who heard the appeal, raised the following points as arising for his consideration in the appeal.

(1) Whether the plaintiff has established The prescriptive right to the user of light and air through the windows and ventilators?

(2) Whether such a right should be negatived in the light of Ext3. D-3 and D-4 agreements ?

(3) Whether they have been Properly admitted in evidence

6. Reassessing the evidence on record. in the light of the arguments addressed before him, the learned Civil Judge held that the plaintiff did acquire prescriptive right for air and light. He further held that Exts. D-3 and D-4 were not properly proved and that they were not legally admitted into evidence and in that view he allowed the appeal, reversing the judgment and decree of the trial Court and decreed the suit of the plaintiff for permanent injunction. Aggrieved by the said judgment and decree, the defendant has come up with the above second appeal before this Court.

7. The learned Advocate appearing for the appellant-defendant strenuously urged before me that the Courts below failed to notice that the suit itself was not maintainable as it was a mere suit for permanent injunction without any prayer for declaration that plaintiff acquired prescriptive right to the inflow of air and light through the windows and ventilators. He further submitted (hat the learned Civil Judge legally erred in thinking that the plaintiff enjoyed the inflow of light and air as of right even when it was specifically brought to his notice that the plaintiff enjoyed the air and light by virtue of agreements contained in Exst. D-3 and D-4. He further submitted that the learned Civil Judge wrongly held that Exts. D-3 and D-4 were not properly proved and in that view he submitted that the judgment and decree of the first appellate Court should be set aside and these of the learned Munsiff should be sustained and restored and the suit of the plaintiff should be dismissed. As against that, the learned Counsel appearing for the respondent plaintiff argued supporting the judgment and decree of the learned Civil Judge.

8. The points, therefore, that arise for my consideration in this appeal are:

(1) Whether the suit for mere injunction is maintainable when the same is based on the alleged prescriptive right, without a prayer for declaration that the plaintiff acquired such prescriptive right?

(2) Whether the learned Civil Judge was justified in thinking that Exts. D-3 and D-4 were not proved?

(3) Whether the learned Civil Judge was justified in holding that the plaintiff established the alleged prescriptive right

9. Point No. 1 :

An easement can be acquired by three known Modes: (1) by express or implied grant, (2) by user as of right for the statutory Period of 20 years under the Easements Act, i.e., by prescription and (3) by im. memorial user based upon the fiction of a lost grant. For the second mode of acquisition of easement under the Easements Act, it is necessary that the required period of 20 years or over must end within 2 years next before the institution of suit wherein the claim to the

easement is contested. This necessarily implies that the right of easement by prescription under the Act cannot become absolute unless the right has been contested in a suit.

In *Muthu Goundan v. Anantha Goundan* (AIR 1916 Mad 1001 (2) : 31 Ind Cas 528), a Division Bench of the Madras High Court had occasion to consider this aspect. His Lordship Justice Sadasiva. Aiyar, speaking on this aspect has observed :

'The question when what might be called an easement by statutory prescription is claimed by the plaintiff, is whether under Section 15 of the Easements Act, the prescriptive right by enjoyment for 20 years has been acquired by the plaintiff. As pointed out by Chamier, J. in *Sultan Ahmed v. Waliullah* (1912-17 Ind Cas 22 : 10 All LJ 227). 'The fifth paragraph of Section 15 of the Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.' See also *Regroup Kier v. Abdul Hussein* (1880) 7 Ind App 240 (249) (PC) and the judgment of Lord Macnaghten in *Hyman v an Den Bergh* (1908-1 Ch 167) construing similar provisions of the English Prescription Act. As Peacock says in his book on Easements at page 435, 'the right is created upon the bringing of the first action in which, by reason of the claim having been brought into question, it becomes necessary for the person claiming such right to possess it for the pur. pose of his action or defence.'

10. In *Siti Kantapal v. Radha Gobindaen* : AIR1929 Cal542 . A Division Bench of the Calcutta High Court has further made the proposition lucid. In the course of the judgment this is what the High Court has ruled :

'It has been authoritatively held that a tie to easement is not complete merely upon the effluxion of the period mentioned in the Statute viz., 20 years and that however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within 2 years of the institution of the suit.'

11. It is, therefore, necessary that in a suit for injunction based on a prescriptive easement right, the plaintiff should seek for a declaration from the Court that he has so acquired the prescriptive right of easement. In the present suit, however, the plaintiff has not sought for declaration that he has acquired prescriptive right of easement with regard to the inflow of air and light through the windows and ventilators. Without more, therefore, the suit is liable to be dismissed. The Courts below have obviously missed this legal aspect.

11-A. Point No. 2:

The learned Civil Judge has come to the conclusion that Exts. D-3 and D-4 are not duly proved. The learned Munsiff has invoked the provision in Section 90 of the Evidence Act as the documents were dated 5-9-1921 and they were more than 30 years old when they came up for consideration before the Court - the suit is of the year 1964. Section 90 of the Evidence Act reads:

'Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper' the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.'

In the instant case, the custody is proper custody because the defendant has purchased the property. The learned Civil Judge appears to think that the signature of the executants are not properly put on these documents. But, the presumption says that it shall be presumed that the handwriting of any particular person is in that person's handwriting; and the signature seen on the documents is of the person mentioned in the document. It is needless for me to explain that the

necessity for enacting the presumption arose because in the case of ancient documents, it would be difficult to secure proper evidence, not only on account of failure of memory but also because men are not immortal. With the passage of time men are likely to die and evidence is likely to disappear. It is for that purpose that a presumption is provided for. At the same time, it is necessary to sound a note of caution that Section 90 of the Evidence Act is not mandatory. It gives discretion to the Court to raise the presumption or not to raise the presumption. But the discretion should be used judicially and when the trial Court has used the discretion in a judicial manner, the appellate Court should be slow in interfering with the discretion so used in all cases of exercise of judicial discretion by the trial Court. (vide *Radba Kishun v. Basdeolal*, AIR 1935 Ouch 482).

12. In the instant case, the learned Civil Judge, as stated above, appears to think that presumption should not be raised because the signature is not properly put on the documents. The trial Court has rightly pointed out that the signature may be any mark or any writing and that it need not necessarily be the writing of the name of the executant. In *Shailendranath Mitra v. Girijabhushan Mukherji* : AIR1931 Cal596 it is laid down by a Division Bench of the Calcutta High Court thus :

'According to the general policy of law 'signature' includes a mark; a mark being a sort of symbolic writing.'

In the instant case since the building was owned at the time by the firm, they have put the signature by writing the Firm's name. There is nothing illegal or wrong about it.

13. It is no doubt true that a. witness examined as D. W. 2 deposed that two persons put their signatures. Much cannot be made of this discrepancy because, as stated above, human memory is likely to fail in the case of execution of ancient documents. When once it is held by the Court that the document has come from proper custody and the document is an ancient document, the presumption under Section 90 of the Evidence Act may be raised holding that the signature of the person mentioned in the document All the a same, D. W. 2 has identified the reasons who have executed the documents Exhibits D-3 and D-4. Moreover, the documents find support in the recital of Ext. P-2, title deed of the plaintiff himself.

Ext. P-2 is a Certified Copy of the original Sale Deed in favor of the present plaintiff's father. It states, inter alia, thus :

'This Deed of Sale executed this Sixteenth day of February One thousand nine hundred and twenty one (1) A. M. Hajee Oosman Sait (2) A. M. Hajee Abdul Wahid Sait two undivided cutchee Memon brothers sons of the late Ali Mohamed Sait residing in Ebrahim Sahib Street, Civil and Military Station, Bangalore and till lately doing business in Avenue Road, Bangalore City under the name and style of Messrs. Ali Mohamed Hajee Jan Mohamed and Sons.'

That is also the description to be found in Exts. D-3 and D-4. Therefore, there was no basis for the learned Civil Judge to doubt the veracity or genuineness of Exts. D-3 and D-4. The trial Court after considering the aspect in detail has rightly held that the documents are genuine and that they have come from proper custody and that there. fore presumption has to be raised under Section 90 of the Evidence Act. There was no tenable ground for the first appellate Court to . interfere with the discretion so used by the trial Court. Hence, I have no hesitation to set aside the finding of the first appellate Court and sustain and restore the finding of the trial Court in that behalf, that Exts. D-3 and D-4 are properly proved and admitted into evidence.

14. Point No. 3:-

That being so, the next question that arises for my consideration is: Whether in view of the agreements, it could be said that the plaintiff has acquired a prescriptive right at all, with regard to the inflow of light and air through the windows and ventilators. Explanation I to Section 15 of the Easements Act reads-

'Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not 'been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfillment of which it is to cease.'

In the instant case by reading Exts. D-3 and D-4 it is obvious that the agreements came into existence before opening the windows and ventilators on the specific assurance that they would not obstruct the construction of the first floor by the predecessors-in-title of the defendant on their building. Obviously since the buildings were adjacent there was a dispute between the predecessors-in-title of the plaintiff and defendant with regard to the opening of the windows in the first floor by the predecessors-in-title of the plaintiff. It is in that connection and in order to resolve the dispute that the predecessors-in-title of the plaintiff agreed that they would not obstruct the predecessors-in-title of the defendant to put up the first floor in case they wanted to do so. Therefore, the enjoyment of the light and air through the windows and the ventilators is obviously conditional that the enjoyment should cease if the defendant puts up the first floor to his building. That being so, it is obvious, that the right cannot be claimed as an easement at all to be perfected by prescription. It is not enjoyed as of right. It is enjoyed by the permission and on condition. Hence, the learned Civil Judge is in manifest error in thinking that the plaintiff has acquired the right by prescription with regard to the inflow of the light and air, ignoring the significance of the agreements Exts. D-3 and D-4. The learned Munsiff was perfectly justified in holding that a prescriptive right could not be acquired on the facts of the case in view of the agreement contained in Exts. D-3 and D-4.

15. It may also be mentioned in passing that Sections 15, 28, 33 and 35 of the Easements Act should be read together in the matter of prescriptive right with regard to the flow of the light and air. Mere diminution of air and light would not give the plaintiff a cause of action to sue for injunction. It should be substantial interference with the normal enjoyment of light and air so as to disturb the usual mode of life of the inhabitants of the building. In other words, it should amount to an actionable nuisance. (Vide *Ligory Minezes v. J. C. Lobo* AIR 1970 Mys 76). Such a case is not even made out in the plaint.

16. In the result, therefore, the appeal is allowed. The judgment and decree of the first appellate Court are set aside and the judgment and decree of the trial Court is sustained and restored and the suit of the plaintiff for injunction is hereby dismissed. No costs of this appeal.

17. Appeal allowed.

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