

Maharaj Singh Vs. Baljit Singh

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Court : Allahabad

Decided On : Sep-21-1966

Reported in : AIR1967All572

Judge : S.N. Katju, J.

Acts : [Easements Act, 1882](#) - Sections 4 and 15

Appeal No. : Second Appeal Nos. 3785 to 3788 of 1960

Appellant : Maharaj Singh

Respondent : Baljit Singh

Advocate for Def. : Shanti Bhushan, Adv.

Advocate for Pet/Ap. : K.C. Agarwal, Adv.

Disposition : Appeal partly allowed

Judgement :

S.N. Katju, J.

1. These are four Appeals arising out of a dispute between the parties with respect to five Parnalas.

2. Admittedly the water from the Parnalas flows from the house of Maharaj Singh and falls down on the land which now admittedly belongs to Baljit Singh, Maharaj Singh instituted Suit No. 669 of 1968 claiming an injunction restraining Baljit Singh from interfering with his right to flow water from the aforesaid Parnalas. 11 has given rise to Second Appeals Nos. 3786 and 8788 of 1960. Baljit Singh instituted Suit No. 744 of 1958. He asked for an injunction restraining Maharaj Singh from interfering with his right to obstruct the flow of water falling from the Parnalas in dispute. It has given rise to Second Appeals Nos. 3785 and 3787 of 1960.

3. The trial court held that Maharaj Singh was entitled to flow water from two Parnalas and dismissed the rest of the claim of Maharaj Singh. It also dismissed Baljit Singh's claim with regard to the Parnalas for which Maharaj Singh's claim had been allowed. Both the parties preferred appeals before the lower appellate court. It allowed the appeals preferred by Baljit Singh and dismissed the appeals filed by Maharaj Singh. The result was that while Maharaj Singh's suit was dismissed the suit instituted by Baljit Singh was partly decreed. Maharaj Singh and Baljit Singh both have preferred second appeals to this court.

4. Nand Kishore, Khoob Singh and Anup Singh were three brothers. Nand Kishore has two sons; Maharaj Singh and Damodar Prasad. Baljit Singh purchased on 7-1-1962 the interest of Khoob Singh and Anup Singh in the land over which the water from the Parnalas in dispute is discharged. Admittedly the house from which the water from the Parnalas in dispute flows down belonged exclusively to Maharaj Singh. There was a controversy with regard to the interest of Maharaj Singh in the land which is now owned by Baljit Singh and over which the water from the Parnalas in dispute falls down and flows through. It appears that the aforesaid land belonged to the three brothers Nand Kishor, Khoob Singh and Anup Singh. Maharaj Singh alleged that there was a partition between Nand Kishor and the brothers Khoob Singh and Anup Singh as a result of which the land now belonging to Baljit Singh had come to the share of Khoob Singh and Anup Singh. The court below observed as follows:

'Thus I hold that Maharaj Singh has failed to prove the Batwara between Nand Kishor and his brothers and as such he has failed to prove that the water on the

land in question was flowing as of right and as such it cannot be held that he has acquired prescriptive rights of easement to flow water on the land in question '

I am not quite satisfied with the finding of the lower appellate court that Maharaj Singh had failed to prove the partition between Nand Kishor and his brothers, but it is a finding of fact and is binding on me. The fact is that the land over which the right of easement is claimed was coparcenary property. Before its transfer in favour of Baljit Singh on 7-1-1968 when Maharaj Singh was a coparcener of the land over which easementary right was claimed by him it could not be said that he had been exercising the right to flow water 'as of right' It cannot be denied that a dominant owner could not claim an easementary right over land of which he himself is the owner. The very concept of easementary right implies the exercise of the right by one person over the property belonging to another. It was held by the court below that since Maharaj Singh was himself one of the owners of the servient tenement, he could not claim any easementary right over it. Learned counsel for Maharaj Singh strenuously argued that it could not be said that Maharaj Singh, under the circumstances of the case, could not claim the right to flow water over the land in dispute. He argued that if the land in dispute before its transfer to Baljit Singh belonged to the coparcenary of which Maharaj Singh was one of the members, then even in that case it could not be said that he was the sole owner of the land in dispute and there was no one else to resist his easementary claim over the said land. Admittedly the house from which the water flows down belonged exclusively to Maharaj Singh. Even if he was a member of the coparcenary the said house was his exclusive property. If water was being discharged, through the Parnalas in dispute over the coparcenary land, then certainly it was open to the other coparceners to challenge the right of Maharaj Singh to flow water from the house which was not coparcenary property, but which belonged exclusively to Maharaj Singh. Maharaj Singh is the owner of the house and he did not possess any right to flow water on the said land even if it was coparcenary property of which he was a member.

5. Learned counsel relied on a single Judge decision of this Court in *Atiqa Khatoon v. Aqila Bano* AIR 1966 All 415 in which Mr. Justice Upadhyaya observed as follows:

'The essential ingredient of 'animus' is there if the servient tenement does not belong to the person claiming the easement absolutely and if the exercise of the right is capable of being resisted. If that land over which the easement is claimed belongs to another person also, that other person is certainly affected injuriously by the exercise of a right of way over the land and to that extent the person exercising the right is obviously doing an act detrimental or prejudicial to the rights of the other owner'

I respectfully agree with the aforesaid observation. In the present case, water from the two Parnalas had been flowing for over 20 years on the land in dispute and it must be held that Maharaj Singh had acquired a prescriptive right of easement to flow water on the land in dispute.

6. Learned counsel for Baljit Singh referred to a single Judge decision of the Oudh Chief Court in Majid Husain v. Faiyaz Husain, AIR 1926 Oudh 237. Wazir Hasan J. C., approved the following rule of law laid down by Mitra on his book on limitation:

'The nature and character of the servient land, the friendship or relationship between the servient and dominant owners and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not 'as of right' although there is no direct proof that the enjoyment was bad with the permission of the servient owner.'

In the present case water flowed down from the house belonging exclusively to Maharaj Singh over the land which belonged to the joint family of which he was a member. There is nothing to suggest that the water from the house of Maharaj Singh could have flowed from any other direction. If the coparceners permitted the discharge of water from Maharaj Singh's house from the coparcenery land they must have clearly understood that it would later on take the shape of an easementary right. I have no hesitation in holding that the right in dispute enjoyed by Maharaj Singh was 'as of right' The trial court had decreed Maharaj Sinah's suit only with regard to the Parnalas. Learned counsel for Maharaj Singh challenged the finding of the trial court with regard to the remaining parnalas. I am not prepared to go beyond the finding of the trial court.

7. The result is that the appeals filed by Maharaj Singh, viz. Second Appeals Nos. 3786 and 3788 of 1960 are partly allowed and the suit is decreed in terms of the decree passed by the trial court. The appeals preferred by Maharaj Singh, viz. Second Appeals Nos. 3785 and 3787 of 1960 are dismissed. Suit No. 744 of 1958 instituted by Baljit Singh is decreed in terms of the decree passed by the trial court. The parties will pay and get costs in all the appeals in proportion to their success and failure in the suits throughout.

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