

Faqir Ram Vs. Failu and anr.

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Court : Allahabad

Decided On : Jan-18-1980

Reported in : AIR1980All171

Judge : K.M. Dayal, J.

Acts : [Easements Act, 1882](#) - Sections 15; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 22, Rule 11

Appeal No. : Second Appeal No. 3479 of 1968

Appellant : Faqir Ram

Respondent : Failu and anr.

Advocate for Def. : Sankatha Rai, Adv.

Advocate for Pet/Ap. : R.N. Singh, Adv.

Disposition : Appeal dismissed

Judgement :

ORDER

K.M. Dayal, J.

1. The present second appeal has been filed by the plaintiff against the judgment and decree passed by the lower appellate court dismissing his suit for injunction

against the defendant-respondents. The defendant-respondents were constructing a wall of their house adjoining the portion of the plaintiff, whereupon the plaintiff filed the suit claiming.....injunction against the defendant-respondents that they could not raise the wall as some windows of his will be closed. The defendant-respondents claimed that the property of the plaintiff and the defendant, both belong to the same person and the plaintiff and the defendants were the tenants of the land on which their constructions stood. The land belonged to Raja Ausanganj and they were paying 'parjawati' to the landlord Raja Ausanganj. The defendants has purchased his house in the year 1963 and till that time that belonged to the landlord.

1-A. The trial court framed issueNo. 1 as under;

1. Whether the windows in suit were more than 20 years old as alleged by the plaintiff? If so, whether the plaintiff has acquired an easementary right or light and air from the said windows by prescription and by way of necessity?'

2. The trial court decided the issue without giving any finding whether the easement of light and air was being enjoyed by way of necessity and merely held that the plaintiff was enjoying such right for more than 20 years. The case was, thereafter, remanded by the lower appellate court and after remand, the case was again decided on 6-4-1967. The lower appellate court, thereafter, allowed the appeal and dismissed the suit, holding that as the defendants' land and the plaintiff's land belonged to the same owner at least till 1963 and the plaintiff was still a tenant of the land over which his house was constructed, he could not have prescribed any rights of easement against his own landlord. It did not enter into the question whether any right was acquired as an easement of necessity or whether the plaintiffs effected constructions could be rendered useless by the closure of the window. Learned counsel for the appellants has relied upon a case reported in : AIR1938 All293 , Abdul Rasheed v. Brahma Saran. That case related to a right of way and it was observed therein that in regard to the easement of light, Section 15 paragraph 1 of the Easements Act would apply. In that case relying upon a case Morgan v. Fear reported in 1907 AC 425 it was held, that one termor can acquire such an easement against another termor when there is same reversionary for

both, 'it was pointed out that easement of light was an exception to the general rule that one tenant of an owner of land cannot acquire an easement against another tenant of the same owner.' This case does not hold that the plaintiff who was a tenant of Raja Ausanganj, could have prescribed any right against his landlord. The defendant entered the scene in the year 1963 and the plaintiff could have acquired any right only after his enjoyment for more than 20 years after 1963.

3. There is yet another aspect of the case. In the leading case of *P. C. E. Paul v. William Robson* (1914) 12 All LJ 1166, their Lordships of Privy Council laid down the following principles of law.

'(1) The owner of a dominant tenement does not obtain by his easement a right to all the light he has enjoyed during the period of prescription. He obtains a right to only that much of it as will be sufficient for the purposes of inhabitancy and ordinary business.

(2) The easement acquired by ancient light is not infringed unless the act done amounts to a nuisance.'

4. In the instant case, there is no proof that the constructions complained of amounted to nuisance or that the portions affected by the portion had become useless. Under the circumstances, the suit for injunction could not be maintainable.

5. Learned counsel for the respondent, however, contended that the respondent No. 1 Failu, had expired and no steps had been taken for impleading his heirs and, therefore, the appeal stands abated. He relied upon a case reported in : AIR1963 All391 : *Rafuwa v. Abbas Khan*. In that case it was held that ordinarily all the heirs and legal representatives of a deceased party should be brought on record and only in exceptional circumstances, where either under the law or order of the court some of the heirs are entitled to represent the entire body of the legal representatives or the estate of the deceased, otherwise the suit or appeal abates. That case might have been good as far as the facts of that case were concerned. But the facts of the present case are very different. The defendant-respondent No.

1, Failu, is father of the defendant-respondent No. 2, Nasirullah. Nasirullah is certainly one of the heirs of Failu. There is nothing on record to suggest that Failu had left any other heir except his son, the respondent No. 2. Even assuming for the sake of argument, if there were other heirs, this case cannot be affected and the appeal will not abate. According to Para 18 of the written statement and the averments in the amended plaint, the defendants Nasirullah and Failu jointly purchased the disputed property by a sale-deed dated 16th July, 1963. They were joint-owners. Even if one of the joint-owners was dead the survivor can represent the entire estate. Therefore, I hold that the present appeal is not to abate on death of Failu.

6. However, as per my findings above, the plaintiff was not entitled to any injunction against the defendants nor was he entitled to the entire air and light that could be available to him from the disputed windows.

7. In the result, the appeal fails and is hereby dismissed. There will be no order as to costs.

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