

Dwarka Vs. Ram Jatan and anr.

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Court : Allahabad

Decided On : Jun-12-1930

Reported in : AIR1930All877; 128Ind.Cas.755

Judge : Sen and ;Niamatullah, JJ.

Appellant : Dwarka

Respondent : Ram Jatan and anr.

Judgement :

1. This and the connected appeal arise from the same suit in respect of a plot of land lying between the homesteads of the parties. On 15th March, 1927, the defendants-appellants enclosed the plot by putting up boundary walls. The plaintiff sued for possession of the land by removal of the boundary walls in the right of ownership. In the alternative, he claimed a decree for his right of easement of way through his southern door and the right to discharge water from his drain across the land in dispute and for an injunction restraining the defendants from interfering with the said rights.

2. The parties are neighbours. The plaintiff purchased his house under a sale-deed dated 31st May, 1912. The defendants acquired their house under an earlier sale-deed dated 21st April, 1893. A portion of the defendant's house fell into ruins more than 20 years before suit and. the land remained vacant for this long period till the defendants constructed the boundary walls.

3. On 12th January, 1927, the parties had referred their disputes to the arbitration of five persons including the umpire. An award was given on 15th March, 1927. The award was against the plaintiff who impugned its validity on the ground of fraud and collusion.

4. The defendants contested the suit on the ground that they and not the plaintiff, were the owners of the land in dispute, that the suit was barred by Section 21, Specific Relief Act, that the plaintiff's claim having been founded upon rights of ownership and of easement with reference to the same property, was bad in law and liable to dismissal and that the plaintiff had acquired no easement of way through his southern door which had been opened only a few months before suit nor any right in respect of his drain which was constructed by the plaintiff with the permission of the defendants about 14 years before the suit.

5. The Court of first instance held that the plot in dispute belonged to the defendants and not to the plaintiff. The award dated 15th March, 1927, was set aside. The Court declared that the plaintiff had established a right of easement of way and his right to a flow of water through his drain across the land in dispute. Accordingly it ordered as follows:

Let an injunction be issued directing the defendants to allow passage to the plaintiff from his back door up to the bamboo clump leaving a way two feet wide and not to interfere with the plaintiff's rights of easement in future. Amin's map to form part of the decree.

6. Both the parties appealed. The lower Appellate Court affirmed the finding of the trial Court, that the plot in dispute belonged to the defendants and not to the plaintiff. It accordingly dismissed the plaintiff's appeal except by a variation as to the width of the passage:

An objection has been raised that the two feet passage allowed by the Munsif is very small. As I have ordered the plaintiff to cover over his drain, I think it only fair to increase his passage to three feet instead of two feet in width as ordered by the Munsif.

The defendant's appeal was also dismissed in substance, on the finding that the plaintiff had established his right of easement in respect of the way and the drain as claimed by him. As to the drain the decree of the trial Court was varied in so far that the plaintiff was directed either to cover the drain with stone slabs or to insert drain pipes across the length of the drain 'through the present construction of the defendant's house.

7. Both the parties are dissatisfied with the decrees by the Courts below. The defendants have filed two appeals. The plaintiff has filed cross-objections. The cross-objections are directed against the finding, negating the plaintiff's title to the land in suit. This finding rests upon evidence. The learned Advocate for the respondents has failed to satisfy this Court that this finding is vitiated by either improper reception or rejection of evidence or by any misapplication of law or procedure. The cross-objections, therefore, are without any force.

8. The defendants do not appear to have pressed for an issue as to whether the suit offended against Section 21, Specific Relief Act. The defendants conceded in the trial Court that the award dated 15th March, 1927, was invalid. There was a definite issue before the trial Court as regards the validity of the award. This issue was decided in plaintiffs favour with the following observation:

The defendant's Vakil conceded the invalidity of the award on the ground that by the deed of reference the presence of all the arbitrators (Ajudhya, one of them, admittedly being absent) was essential. The issue consequently goes against the defendants in the plaintiff's favour.

9. This concludes the point and the defendants-appellants cannot be allowed to resuscitate the plea that the suit is obnoxious to Section 21, Specific Relief Act. A reference had been duly made and an award duly passed. This award was challenged on the ground of fraud and collusion. The defendants themselves admitted the invalidity of the award though not on the ground set forth by the plaintiff. Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation of the award on the ground of fraud and collusion is not against the tenor of Section 21, Specific Relief Act. This section has no application except where a person having made a contract to refer a controversy

to arbitration has refused to perform it and institutes a suit in respect of the subject-matter in defiance of the contract. We are clearly of opinion that the contention of the defendants-appellants proceeds upon a misconception of law and ought to be disallowed.

10. Considerable stress has been placed upon the form of the the suit and the nature of the reliefs claimed and it has been contended that no suit is maintainable for a declaration of a plaintiff's title to and his right of easement over the same property. It is manifestly clear that the two concepts are incompatible. 'An easement' has been defined in Section 4, Easements Act (V of 1882), 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.'

11. This definition is founded upon the maxim *nulli res sua servit*. In *Ladyman v. Grave* (1871) 6 Ch. 763 at p. 767 : 19 W.R. 863 : 25 L.T. 52 Lord Hatherley is reported to have said:

You cannot have the land itself and also an easement over it.

12. It is essential for the creation of an easement that there should be two distinct heritages, that the two heritages must not belong to the same individual and that there must be some advantage derived by one tenement from or upon a neighbouring tenement greater than what would naturally and ordinarily belong to the former (*The Law of Limitation and Prescription*, Tagore Lectures, 1882, p. 357). No plaintiff can be allowed to take the impossible position of being the owner of and of having a simultaneous right of easement over the same land. Where the averments in the pleadings and the reliefs claimed are of conflicting character the Court must insist upon an election on the part of the plaintiff to choose one or other of the reliefs and upon an amendment of his plaint accordingly. Not to do so would necessarily lead to waste of time and embarrassment of trial. Unfortunately the plaintiff was not put Upon his election and the trial proceeded upon conflicting pleadings. Cases are conceivable where a plaintiff may, from obscurity or from complexity of facts, be in honest doubt as to the nature of the relief available to

him. Inconsistent claims may, therefore, under the peculiar circumstances be explained and accounted for. In the present case there could be no reasonable excuse for the inconsistent reliefs claimed by the plaintiff. The land in dispute was outside the plaintiff's purchased property and within the boundary of the property purchased by the defendants. The parties were close neighbours. It was impossible for the plaintiff not to have known that he was not the owner of the property in dispute. His claim, therefore, to ownership was not only unwise but was deliberately dishonest.

13. The reliefs based upon ownership and upon the right of easement were not claimed simultaneously but in the alternative. While we condemn the action of the plaintiff for having asked for inconsistent reliefs we are of opinion that the plaintiff should not be penalized by a total dismissal of his suit where the reliefs claimed by him are in the alternative. The defendants-appellants strongly rely upon certain dicta of the Privy Council in *Mohammad Bakhsh Khan v. Husaini Bibi* 15 C. 684 : 15 I.A. 81 : 5 Sar. 175 (P.C.), This case was considered by a Bench of this Court in *Jino v. Manon* 18 A. 125 : A.W.N. (1896) 1, and it was held that the Privy Council decision was not authority for such a broad proposition as is now enunciated by the defendants-appellants. It was accordingly held that where a plaintiff claimed in his plaint two alternative reliefs which were inconsistent with each other, that fact was no ground in itself for the dismissal of the suit. In *Sri Ram v. Mani Ram* 74 Ind. Cas. 922 : A.I.R. 1924 All. 97 : 21 A.L.J. 569 it was held that a suit was not liable to dismissal because the plaintiff claimed in the alternative over the same plot of land both by rights of ownership and of easement. A similar view was taken in *Narendra Nath Barari v. Abhoy Charan Chattopadhyaya* 34 C. 51 : 4 C.L.J. 437 : 11 C.W.N. 20 (F.B.), and it was remarked that 'the inconsistency of the two allegations may be, and probably would be, a ground for viewing them both with the greatest suspicion, but does not, as a matter of pleading, render the suit not maintainable.'

14. This view is supported in principle by a Full Bench decision of the Madras High Court in *Subha Rao v. Lakshmana Rao* : AIR1926 Mad728 , in which, though the facts were somewhat different, the Court remarked;

It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be the owner, however strongly the making of such a claim might weigh against him.

15. We are, therefore, of opinion that the action was not liable to dismissal merely on the ground that the plaintiff had asked for inconsistent but alternative reliefs.

16. Mr. Bagchi for the defendants-appellants who argued the case with considerable skill, contended that the plaintiff's claim for an easement was not maintainable on the ground that the mere user on the part of the plaintiff during the statutory period could not mature into an easement by prescription under Section 15, Easements Act, where the user was not accompanied by an animus of enjoying the easement as such. He strongly relies upon the decision of the Madras High Court in Subha Rao's case : AIR1926 Mad728 , which has already been adverted to. It was held in this case that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. Reference was made to *Lyall v. Hothfield* (1914) 3 K.B. 911 : 84 L.J.K.B. 251 : 30 T.L.R. 630 in support of the view. Section 15, Basements Act, provides that 'where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such...use of...easement shall be absolute.'

17. It is clear, therefore, that for the creation and maturity of the right of easement it is essential that the right should be openly and peaceably enjoyed by the holder of the dominant tenement for the prescriptive period 'as an easement and as of right.' In order that the user should be as an easement and as of right it is absolutely essential that the said right should be claimed over the property of another and for the beneficial enjoyment of a property which belongs to the owner. From the very nature of the conception easement is rather a fringe to property than property itself. We are, however, of opinion that the proposition of law enunciated by Mr. Bagchi does not call for a definite finding having regard to the facts and pleadings involved in the case.

18. It does not appear to have been argued in either of the Courts below that the plaintiff did not possess the requisite animus because he was claiming to be the owner of the property itself. We are clear that the plaintiff was not the owner of the servient tenement and was labouring under no delusion as to his rights in respect of the same. During the twenty years and more that he exercised a right of user over the property off. the defendants he did so with a clear consciousness that the said property belonged to another. He does not appear to have put forward a right of ownership before the present suit was launched. The question of animus is in each case a question of fact. Where the owner of one property exercises certain rights of enjoyments over the property of another for the beneficial enjoyment of the former, he must be presumed to possess an animus which is manifestly to his advantage. The lower Appellate Court, in holding that the plaintiff had established the rights of easement claimed by him, must be taken to have found by implication that the animus indicative of a right of user over the property of another was either to be presumed from the facts of the case or was established by evidence. We do not think, therefore, that it is necessary to send down an express issue on a point which was neither specifically raised in the written statement nor argued in any of the Courts below. We dismiss these appeals and the cross-objections with costs, including in this Court fees on the higher scale.