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Jamna Das Vs. Gulraj

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Court : Rajasthan

Decided On : Aug-02-1951

Reported in : AIR1952Raj1

Judge : Ranawat, J.

Acts : Easements Act, 1882 - Sections 33 and 35; Code of Civil Procedure (CPC), 1908 - Order 18, Rule 18

Appeal No. : Second Appeal No. 85 of 1949

Appellant : Jamna Das

Respondent : Gulraj

Advocate for Def. : C.L. Agrawal and; G.N. Sharma, Advs.

Advocate for Pet/Ap. : B.D. Quanogo, Adv.

Disposition : Appeal dismissed

Judgement :

Ranawat, J.

1. This is plaintiff's second appeal arising out of a suit filed by Jamna Das against Gulraj in the Court of the Munsif, East Jaipur on 15-7-1947, for a perpetual injunction restraining the defendant from obstructing light and air of a window of

the plaintiff's house. The houses of both the parties are adjoining to each other, in the city of Jaipur and there is a kitchen on the top floor of the plaintiff's house, in which there is a window over-looking the house of the defendant, which, it is said, has been closed by the defendant by erecting a wall by the side of the wall of the plaintiff's house. The plaintiff claimed that he had acquired a right of easement by prescription as he has been receiving light and air through that window for more than 20 years. The smoke of the plaintiff's kitchen was also let out through the same window. The defendant admitted that the window had been in existence since the year 1872, but he pleaded that it was constructed with the consent of the defendant's predecessor on the condition that it would be closed whenever the defendant required the other party to do so. The defendant, in pursuance of this condition had closed the window by erecting a wall. It was further alleged that the closing of the window did not materially diminish the quantity of air and light in the kitchen of the plaintiff and there was, therefore, no cause of action for the plaintiff to sue the defendant. The trial Court decreed the suit of the plaintiff. The findings of the First Court were that, the document produced by the defendant purporting to be an agreement between the plaintiff's predecessor in interest regarding construction of the disputed window on the specific condition that it would be closed, whenever the defendant desired to close it, was not proved and the obstruction created by the defendant was such as materially interfered with the right of the plaintiff, in diminishing the quantity of light and air of the plaintiff's kitchen. On an appeal, the District Judge, reversed the finding of the lower Court as regards the execution of the agreement produced by the defendant relating to the window and it was held that the document was duly executed by the predecessor in interest of the plaintiff, but it was not relied upon on account of the suspicion that it may have been antedated by the executant Vijai Narain, who was said to be not on good terms with the plaintiff. The District Judge inspected the site and on the basis of his inspection of the spot, held that there was sufficient light and air in the kitchen of the plaintiff, even after the closing down of the disputed window. He, therefore, dismissed the suit on the ground that the closing of the window by the defendant did not interfere with theaccess of light and air to the kitchen of the plaintiff, materially. The plaintiff has come in second appeal against the judgment of the District Judge and it has been contended that the lower

appellate Court was wrong in making use of the observations made by the Court by spot inspection in place of the evidence. According to the appellant, the closing of the disputed window, materially diminished the access of light and air to the kitchen of the plaintiff.

2. It may be observed that the existence of the disputed window for more than 20 years is admitted by both the sides, but it is disputed that the closing of the window does not materially reduce the quantity of light and air so as to give a right to the plaintiff to claim an injunction or damages against the defendant. It is further contended that the disputed window was constructed with the consent of the defendant on the condition that it it would be closed whenever it was so desired by the defendant.

3. An agreement executed by Vijai Narain in favour of the defendant, Gulraj, has been produced by the defendant and Vijai Narain has come in the witness-box and he has admitted the execution of the document. Narain, one of the attesting witnesses has also been examined and he has testified the fact of the agreement. Vijai Narain who was the executant of the agreement, sold his house to Jamna Das in the St. year 1980 and the agreement of Vijai Narain is, therefore, produced against the plaintiff. The relations of Vijai Narain and Jamna Das are admittedly not very good and the stamp on which the agreement has been written was not purchased by Vijai Narain himelf, but it was purchased by one Isar and this fact has also been considered by the lower Court in holding the document to be suspicious. The counsel of the defendant has argued that during the days when this agreement was executed, it was not necessary for the executants themselves to go and purchase the stamps from the treasury, but the shopkeepers used to purchase stamp-paper from the treasury who in turn, sold them to the persons who required them for executing documents and it was because of this practice that Vijai Narain himself did not purchase the stamp from the treasury, but purchased it from Isar. This practice has not been refuted by the other side, but it is said that Vijai Narain should have obtained the signatures of Isor when he purchased the stamp from him. This defect is not grave and by itself it should not be considered sufficient to render the document of doubtful character. Even supposing that Vijai Narain had a motive to antedate the document, there is no

explanation why Narain should have participated in the fabrication of this agreement. There is, therefore, no good reason to discard the agreement executed by Vijai Narain. Moreover, the plaintiff may be considered entitled to claim an injunction against the defendant, not to obstruct the access of light and air into his window, only when he can show that the disturbance of his right to get a light and air has actually caused substantial damage to him.

Section 33, Easements Act is as follows:

'The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of an easement or of any right accessory thereto provided that the disturbance has actually caused substantial damage to the plaintiff.'

Substantial damage has been defined in Explanations 1, 2 and 3 of Section 33, Easements Act, which are as follows:

'Explanation I.' The doing of any Act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing thevalue of the dominant heritage, is substantial damage within the meaning of this section andSection 34.

'Explanation II. Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first Explanation or interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to the institution of the suit.

'Explanation III.' Where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial within the meaning of this section, if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.'

4. An injunction can be granted to restraint the disturbance of an easement, if the easement is actually disturbed when compensation for such disturbance might be recovered under Chapter IV of the Easements Act, vide Section 35, Easements

Act. The case of the plaintiff would, therefore, be governed by S- 33, Easements Act, and the plaintiff could only be held to be entitled to an injunction in his favour if he could show that the disturbance of his right to air and light had actually caused substantial damage to him. In the present case, there was a specific issue on this point and the counsel of the plaintiff has referred to the evidence of Durgalal and Jamnadas on this point. Durga Lal simply has stated that smoke also escapes through the disputed window. He has not, however, said anything which may go to show that the closing of the window would interfere with the exercise of the right to receive light and air, in such a way as to cause substantial injury to the plaintiff. The next witness, Jamna Das, is the plaintiff himself. He has stated that there is loss of light and air to the kitchen on account of the closing of the window, smoke spread out in the kitchen. As regards the right to create smoke and to let it on the premises of the defendant through the disputed window, the plaintiff has failed to produce evidence to the effect that he had acquired any such right by way of prescription. The spreading of the smoke in the kitchen of the plaintiff would, there fore, not be taken into account in judging whether substantial injury is caused to the plaintiff by the closing of the window. There is, therefore, no evidence whatsoever on the record of the case, which may go to show that the reduction in the quantity of light and air on account of the closing of the disputed window is such as would cause substantial injury to the right of the plaintiff. There is diminution of light and air in the kitchen of the plaintiff on account of the closing of me disputed window, but it is not clear whether the diminution is such as would interfere materially with the physical comfort of the plaintiff or prevent him from carrying on his accustomed business in his house as beneficially as he had done previous to the closing of the window.

5. The learned counsel for the plaintiff has cited 'Nand Kishore v. Bhagubai', 8 Born 95 and 'Kunni Lal v. Kundan Bibi', 4 All L Jour 477, in order to show that the closing down of a window and thus reducing the quantity of light and air to the dominant tenement should by itself be presumed to cause substantial injury to the owner of the dominant inheritage. These rulings, it may be pointed out, are very old. 4 All L Jour 47T has been overruled by 'Sardar Singh v. Ratan Lal', 36 All 516 and 8 Bom 95 should also be deemed so have been overruled by the decision of the Privy Council in 'P.C.E. Paul v. W. Robson', 43 Cal 46The law on this point has

been thoroughly discussed by their Lordships of the Privy Council in42 Cal 46 and the principles settled by the decisionin 'Colls v. Home and Colonial Stores, Ltd.', (1904)AC 179 were held to be good law. The decision ofthe House of Lords in 'Jolly v. Kine' (1907) AC 1,was also relied upon. The observations of LordDavey in 'Cole's case' are as follows:

'The owner of the dominant tenement is entitled,to un-interfered access through his ancient windows of the Quantity of light and air the measureof which is what is required for the ordinary purposes and inadequacy or absence of the tenementaccording to the ordinary notion of mankind.'

The question, therefore, is whether the act of thedefendant in obstructing the light and air of theplaintiffs ancient window can be consideredto be a nuisance. There is absolutely no evidenceto show that any substantial injury is caused tothe rights of the plaintiff on account of the obstruction complained of. It was for the plaintiff toshow, what specific injury was caused to him andwhen he has failed to prove this, he cannot succeed on the mere presumption that by closing downof the disputed window, specific injury should bedeemed to have caused to the plaintiff. Sucha presumption which was held to arise in 8 Bom 35cannot be raised in the present case in view of thelanguage of Ss. 33 and 35, Easements Act. It isfor the plaintiff to prove his case and a plaintiff isentitled to claim damages or an injunction under Section 33 or 35 only when he establishes that the obstruction of the ancient windows has caused substantial injury to him as defined in the sections. Mere closing down of the ancient window cannotby itself be deemed to have caused substantial injury to the plaintiff This has been heldto be so in 42 Cal 46 (PC). The plaintiff's case,therefore, has been rightly dismissed by the Courtbelow. The lower appellate Court has made use ofthe fact of the spot inspection in place of evidencefor deciding that there was no substantial injurycaused to the plaintiff by the closing down of thedisputed window. But it is not proper to use theobservations made by the Court by spot inspectionin place of the evidence itself. Spot inspection canbe used only to appreciate the evidence of theparties that has come on the record, but it ran notitself be taken to form part of the evidence. Boththe trial Court and the first appellate Court navenot discussed any evidence as regards the pointwhether the closing down of the disputed

windowinterfered with the right to light and air of theancient window of the plaintiff, in such a way asto cause substantial injury to him. The counselon either side, therefore, conceded that this maybe decided in this second appeal and the case notbe remanded for this purpose. This Court, therefore, went into the evidence and has decided thisissue which related to a question of fact. Thisappeal fails and is dismissed with costs.

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