Paul Vs. Robson

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Court : Kolkata

Decided On : Aug-01-1911

Reported in : (1912)ILR39Cal59

Judge : Lawrence Jenkins, K.C.I.E., C.J. and; Woodroffe, J.

Appellant : Paul

Respondent : Robson

Judgement :

Lawrence Jenkins, K.C.I.E., C.J.

1. This appeal, arises out of a suit in which the plaintiffs allege interference with the access of light and air to the windows of premises known as No. 7, Esplanade East in the town of Calcutta, and claim relief by way of injunction and damages.

2. This interference is said to have been occasioned by the erection of a five-storied building on the site of No. 8, Esplanade East, where there had previously stood, in the front part, a one-storied building, and, in the back part, a two-storied building. Nos. 7 and 8 Esplanade Road have a southern aspect and face the maidan, No. 8 being to the East of No. 7.

3. The plaintiffs have successive life, interests in No. 7 under a marriage settlement, of which the fifth defendant, Mr. McNair, is one of the trustees, and he is made a defendant, because he declined to join as a plaintiff. The first four

defendants are members of a well known firm of builders and architects, who carry on business under the name and style of Mackintosh Burn & Co.: they are the owners of No. 8, Esplanade East, and have erected the building of which complaint is made. The windows alleged to have been darkened are admittedly ancient, and it is not disputed that the plaintiffs have an easement for the access of light and air to them.

4. The erection of the defendants building led to the institution of this suit on the 4th of February 1910.

5. The suit was heard by Stephen J., who dismissed it with costs, and from his judgment the present appeal has been preferred.

6. Apart from legislation, the English law which prevailed before the Prescription Act, 2 and 3 Will. IV, C. 71, is that to which we must look for the rules governing the right to light. Though the Indian Statute Book contains an easement Act which defines the law of easements, it has no application to Bengal: here the only legislation as to easements is to be found in Part IV of the Indian Limitation Act. That part is headed, 'Acquisition of ownership by possession,' and the sections in it prescribe a mode of acquiring ownership by possession or enjoyment. Rajrup Kaer v. Abul Hossein (1880) I.L.R. 6 Calc. 394, 402. Section 26, the first section in that part, deals with 'Acquisition of right to Easements,' and provides that, where the access and use of light and air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption and for 20 years, the right to such access and use of light or air shall be absolute and indefeasible. This section is concerned only with the acquisition of the easement, and does not purport to measure the extent of the right, or to indicate the remedy by which a disturbance of the right is to be vindicated: for that recourse must be had to the English law as it stood before the Prescription Act. The extent of the right, in the absence of express stipulation, hardly admits of precise measurement; but the point at which its invasion becomes actionable in concrete cases is capable of description, and that description is one which is indicated by the remedy by which the right can be vindicated. That remedy is a suit not for trespass, but for nuisance, and 'Nuisance,' it is said, 'is where any man raises' any

wall or stops any water or doth anything on his - own ground to the unlawful hurt or annoyance of his neighbour. It may also be by stopping lights in a house or causing water to run over house or lands for remedy whereof an action upon the case or assize lyeth.' (Termes de la Ley.)

7. What amounts to a nuisance must largely be a question of fact to be determined by reference to the circumstances of each case, the test being that there has been a sensible abridgment of the plaintiff's right resulting in loss to him. Where the alleged nuisance is an interference with an easement of light or air to a house, that is unoccupied but suitable for residence and business purposes, it must be shewn that there has been a sensible privation of light sufficient to render the occupation of the house uncomfortable and to a sensible degree less fit for the purposes of business.

8. There has been much discussion before us as to whether, in investigating the alleged nuisance, regard is to be had to the state of things before the interference or not, and it has been contended that, on this point, there is a conflict of view between Lord Macnaghten and Lord Lindley, on the one hand, and Lord. Davey, on the other, in Colls v. Home and Colonial Stores [1904] A.C. 179. And this conflict, it is suggested, has become more marked and irreconciliable by the adherence of Cozens Hardy L.J. to the one Kine v. Jolly [1905] 1 Ch. 480, 503 and of Farwell, J. to the other view Higgins v. Betts [1905] 2 Ch. 210 I doubt whether there is an$ real conflict: and it appears to me that the difference of expression on which the argument rests may be fairly referred to the difference in the facts or conditions under review, and the considerations that particularly engaged the attention of those by whom these divergent expressions were severally used. No one, I imagine, would suggest that in a suit for disturbance of light the character of the previous enjoyment, could be wholly disregarded nuisance implies comparison, and the previous state of affairs is a necessary standard for that comparison. In every case, therefore, that comes before the Court the previous enjoyment is proved or sought to be proved, and it is an element which must, from the nature of things, be present in the mind of the Court.

9. But that is a very different thing from saying that the previous enjoyment furnishes the decisive measure of the 'unlawful hurt or annoyance.' Even Higqins v. Betts [1905] 2 Ch. 210 on which reliance has been principally placed, recognises the materiality of the prior enjoyment for the ultimate finding of the learned Judge, which must have embodied what he regarded as the true test, that the rooms in question 'were materially affected and injured, and that there was a substantial deprivation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff carrying on his accustomed business (that of a licensed victualler) on the premises as beneficially as he had done before.' The fact is that what has to be determined in each case is whether, having regard to all the surrounding circumstances, a nuisance has been proved. In arriving at this conclusion I cannot perceive that I am in any way deviating from what was decided in Baqram v. Khettranath Karformah (1869) 3 B.L.R. (O.C.) 18 Modhoosdodun Dey v. Bissonauth Dey (1875) 15 B.L.R. 361 or Delhi and London Bank v. Hem Lall Dutt (1887) I.L.R. 14 Calc. 839. What then are the material, circumstances, ill this case by reference to which we have to determine whether there has been such an interference with the plaintiff's easements of light as amounts to a nuisance?

10. His Lordship then, having discussed the evidence in the case, continued as follows:

Now, one cannot read this evidence without feeling that the defendants' building operations have not darkened the plaintiffs' premises to the extent that might have been expected. The principal explanation of this is that the plaintiffs have the advantage of a considerable quantity of light from other sources, and in particular from the south and the west. Are then the defendants entitled to rely on this for the purpose of establishing that, notwithstanding their newly erected building, the plaintiffs' premises are not uncomfortable and not less fit for business purposes?

11. Comfort and fitness are conditions that must depend on existing facts and regard must be had to the state of things as they exist for the purpose of determining whether a nuisance in fact has been proved. But this must be taken subject to one qualification: the opinion has been expressed by Lord Lindley in

Colls V. Home and Colonial Stores, Limited [1904] A.C. 179, 201, by Lord Atkinson in Jolly v. Kine [1907] A.C. 1, 7, and by Romer L.J. in Kine v. Jolly [1905] 1 Ch. 480, 497 that light from other-sources to which a right has not been acquired by grant or prescription, and of which the plaintiffs may be deprived at any time ought not to be taken into account. Whatever the difficulties this opinion may involve, I think I ought to regard it as at present conclusive.

12. We have been told that the case was discussed before Stephen J. on the common assumption that the plaintiffs in this case could not be deprived of the light from other sources on which the defendants, rely, There are indications that that is so, and I feel no doubt that the representation made to us is correct.

13. I, therefore, propose to deal with this appeal on that footing, and at the same time I have the satisfaction of feeling that this assumption is probably in accordance with the fact. What then does the evidence in this case show? We have gone carefully through it, and it has been subjected to much critical comment on both sides, with the result of establishing the correctness of the learned Judge's estimate of the weight due to the evidence of certain witnesses called by the defendants for the purpose of showing that what has been done does not constitute an actionable nuisance. The witnesses to whom I refer are those several gentlemen who are engaged in business in Calcutta, and more particularly Mr. Muir, Mr. Stockwell, Mr. Deacon and Mr. Hardy. I select these four witnesses for special mention as they, from previous business connection with the premises, are preeminently qualified to depose to the effect of the defendants' building.

14. To Stephen J. it seemed that these witnesses gave their evidence independently and with every desire to be fair between the parties. This is quite as I should have expected.

15. Agreeing as I do with the learned Judge's estimate of their evidence, I do not think it necessary to discuss it in detail; it will be sufficient that I should express my conclusion. I find, then that, though there is an abridgment of direct light from the east, there still remains a sufficiency of light for the ordinary purposes of this house, and that, even the diminution of light to the rooms Nos. 2 and 3 on the ground flour to which windows Nos. 10, 13, and 16 belong, does not to such a

material extent detract from the value of those rooms considered as an integral part of the plaintiffs' premises, as materially to affect the suitableness of those premises for the purposes for which they may reasonably be regarded as available.

16. Though the argument before us has practically been limited to a discussion of the easement of light, complaint is also made of the interference with the access of air to the plaintiffs' premises, but as to this part also of their case the plaintiffs have failed to establish an actionable nuisance.

17. The result then is that I hold that the plaintiffs have not proved that their premises have been materially affected or injured, or that there has been a sensible deprivation of light and air, sufficient to render the occupation of the premises uncomfortable, of to prevent their being used for purposes of business as beneficially as before.

18. Further than this, I hold that the plaintiffs have failed to prove that the selling or letting value of the premises has been diminished: in fact, the indications are, if anything, the other way. I do not forget Mr. Martyrose, but in view of the learned Judge's (appreciation of his evidence, for which there seems to be very good reason, I certainly am not prepared to act on it. So confident are the defendants that no loss could be proved on the score of the diminution in the access of light and air to the plaintiffs' premises that they intimated their willingness that there should be a reference as to damage if the Court considered a prima facie case of nuisance had been made out, and they intimated this willingness, though the Judge expressly called on the plaintiffs to prove damages at the trial. After some consideration the plaintiffs rejected any proposal for a reference, and ultimately Mr. Pugh said, 'I ask the Court to decide on the evidence and not to send the case to a Referee for ascertainment of damages.' On this evidence I hold no damages have been proved.

19. I would point out, for what it may be worth, that the defendant firm have, in the course of the hearing before us, offered for the property a sum equal to the value placed by Mr. Marty rose on it, as it was before the erection of their building. This offer was refused. I do not suggest that this is in any way conclusive, but so far as

it goes, it accords with my independent; finding that no damage has been proved.

20. One or two points still remain to be considered as influencing the question of costs.

21. First, it is said that unless the suit had been brought, the defendants would have carried their building to an even greater height, and that would seem to be so. The result of the suit has been that the defendants have set back the top storey of their' building so as not to affect the plaintiffs' easement. The defendants, however, expressed their willingness to make and retain this set-back at an early stage of the case, and on the 16th of February, the fifth day of the hearing, Mr. Buckland 'offered not to reduce the set-back to less than six feet, which as admitted by Mr. Esch would not obstruct sky-light from the first floor any more than it is at present obstructed.' This offer was not accepted. Before us Mr. Buckland has repeated this offer and expressed his willingness that it should be embodied in the decree in the form of an undertaking.

22. The utmost concession that can be made to the plaintiffs on this score is that each side should bear its own costs of the suit up to the end of the 16th of February.

23. Then we were urged to regard the erection by the defendants of the tower at the south-west coiner of their building as a breach of the interim injunction obtained from Fletcher J., and that we should now ?direct its removal.

24. The evidence convinces me that this tower does not materially affect the plaintiffs' right, and having regard to the circumstances that led to its erection, it would be wrong for ns to accede to the plaintiffs' request.

25. The result then is that in my opinion the judgment of Stephen J. dismissing the suit should be upheld. There will, however, be embodied in the decree an undertaking by the defendants not to reduce the setback on the top storey of the premises to less than 6 feet from the western wall.

26. We direct. that each side will bear its costs of the suit up to and including the 16th of February, except as otherwise specifically ordered, and subject to that the

plaintiffs must bear the defendants' costs of the suit.

27. The defendants must get the costs of the appeal.

Woodroffe, J.

28. I agree.