Sudarshan Dayal vs Nanhey And Ors. on 9 August, 1951

Equivalent citations: AIR1952ALL183, AIR 1952 ALLAHABAD 183

JUDGMENT

Bind Basni Prasad, J.

1. These two appeals arise out of the same suit. Sudarshan Dayal, the plaintiff appellant in Second Appeal No. 843 of 1948, is the Owner of a house in the city of Budaun. It abuts upon a thoroughfare on one side and a blind lane on the other. In regard to the lane his allegation was that it was big Sahan Darwaza and upon it flew the rain water and sullage water from his house. To the north of this lane is the house of the defendant, Nanhey, who is a appellant in Second Appeal No. 469 of 1949. The latter has placed certain obstructions upon this lane. He has built a chabutra and has set up a hub upon it. The plaintiff claims a right of way on this land and on these allegations be brought a suit for the following reliefs:

> "(a) By a perpetual injunction the defendants may be restrained not to interfere with the plaintiffs right of way through the lane in dispute and he be ordered to remove the hut.
>
> (b) The defendants may be directed to remove the obstruction placed in the way of the flow of water which they have caused by placing a stone at the mouth of the drain.
>
> (c) The chabutra constructed by the defendants may be demolished."

2. The defendants claimed the ownership of the land in the lane, denied having stopped any drain from the plaintiff's house and asserted that the plaintiff had no right of passage upon the land in dispute.

3. Learned Munsif framed the following issues:

> "(1) Did the defendants encroach upon the sahan land of the plaintiff in building their chabutra? If so, how much land?
>
> (2) Is the land in question the property of the defendants or a public lane?
>
> (3) If so, has the plaintiff acquired a right of easement to flow his water and also to pass on this land by means of prescription?
>
> (4) Have the defendants put the hub in the plaintiff's passage?"

4. The findings of the learned Munsif were that the plaintiff was not the owner of the disputed land, that the defendants too were not the owners of the lane, nor was the land a public lane, that the plaintiff has been exercising the right of passage upon this land for more than 20 years, that he has no right to flow sullage water upon this land but he has a right to flow the rain water upon it and that the plaintiff's right of passage is confined to egress and ingress on foot but not by any conveyance. In view of these findings be decreed the suit for an injunction restraining the defendants from obstructing the plaintiff from passing upon the land in suit through the eastern door and also not to obstruct the flow of rain water of plaintiff's courtyard upon the disputed land. The defendants were further ordered to restore the old level of the land so that the rain water of the plaintiffs courtyard may easily flow out. The suit was dismissed for the demolition of the chabutra and the removal of the hut.

5. Both the parties went up in appeal. Learned Civil Judge upheld the decree of the trial Court and dismissed both the appeals. His findings were that the ownership of the disputed land did not vest in any of the parties, that the plaintiff has an casementary right of passage on the disputed land and also for the flow of the rain water and that there was no evidence on the record to show that the plaintiff used the lane by taking upon it conveyances also.

6. Against the judgment of the learned Civil Judge the plaintiff and the defendants both have preferred appeals to this Court.

7. The first contention urged on behalf of the plaintiff appellant is that when the exclusive ownership in the disputed lane does not vest in any of the parties then the general presumption of ownership vesting in both the parties should apply. Reliance is placed upon Para. 291, p. 241 of Halsbury's Laws of England, Vol. 16, which runs as follows:

> "There is a general presumption that the owner of land of whatever tenure adjoining a highway is owner also of the soil of one half of the highway, i.e., unique ad medium filum vioe; and a similar presumption arises in the case of a private or occupation road. Such a presumption is, however, praesumptin juris and not juris et de jure: it may be rebutted by evidence, e.g., by proof of title deduced to another from some person shown to have been the original owner of the highway, or by proof of acts of ownership on the part of another; and, indeed acts of ownership, such as the letting of the roadside herbage, if continued for a sufficiently long period, may confer a statutory title, or justify the presumption of a lost grant."

This proposition is based upon certain decided cases. The first of these is Harrison v. Duke of Rutland, (1893) 1 Q. b. 142 at p. 156. Kay L. J.

observed :

> "The soil of a highway belongs prima facie to the owner of the land adjoining it. If the land on either side in the property of different owners, each is owner of the soil on his side ad medium filum of the highway. But this ownership is subject to the right of the

> public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs."

This principle was followed in Commrs. for Land Tax for the City of London v. Central London Ely, Co., (1013) A. C. 364 at p. 371.

8. There is also the case of The Secretary of State v. Laxmishanker Govindram, A.I.R. (12) 1926 Bom. 27 which is of some assistance. It was held in that case that until the contrary is proved, it may generally be presumed, that the open space in a pole belongs to the owners of the surrounding houses.

9. Now the position in the present case is that none of the parties was able to establish its exclusive title to this blind lane upon which only three houses abut. It was also not established that it was a public lane. If a party is not able to prove its exclusive title to any property there is no bar to the Court holding that it is the joint property of both the parties. Learned counsel for the defendants has contended that the point which has been raised on behalf of the plaintiff in this Court was not put forward in the Courts below and it is not open to entertain it. I am unable to agree with this. The point which has been raised does not involve any question of fact. It is based upon the facts which have already been found by the Courts below. Subject to the right of passage of the persons whose houses abut upon this land, the plaintiff is the owner of the land of this lane in front of his house up to the middle line of the lane and any obstruction placed upon this portion of the lane must be removed.

10. The second question which has been argued on behalf of the plaintiff is that when the right of passage was conceded to him he should not have been deprived of using the lane for conveyances also. The Courts below have denied this right to the plaintiff on the ground that there was no evidence to show that the plaintiff bas been using this lace for conveyances. The trial Court observed that the sweepers or servants have been using the door for passage. In Hanuman Prasad v. Raghunath Prasad, 46 ALL. 673 it was held:

> "A right acquired by prescription, of immediate access from private property to a public highway is a private right distinct from the right of the owner of that property to use the highway itself as one of the public. An interference with such a right of access which prevents the persons entitled to it from bringing carts and carriages up to their houses also causes particular damage entitling them to maintain a suit."

When the plaintiff possesses the right of passage over this land on the basis of what may be called a mutual grant among the persons whose houses abut upon this land such a right included in itself also the right to bring conveyances for the purposes of agrees and ingress. The existence of the hut and the chabutra will cause obstruction to the exercise of this right. The claim for their removal should, therefore, be decreed. It may be noted that this is not a case in which the plaintiff has an easement of way, for on the findings arrived at above, there were no dominant and servient tenements.

11. There remains the question of the flow of, the sullage water. The plaintiff claims to flow it in a defined channel by the side of his house. As the ownership of that land has been held to vest in him he has that right.

12. In view of the above findings the defendants appeal has no force, The plaintiff's Second Appeal No. 843 of 1948 is allowed with costs and the decree of the lower appellate Court is modified so as to decree in entirety the plaintiff's claim. The defendants Appeal No. 469 of 1949 is dismissed. The plaintiff will have his costs in both the appeals.

13. Leave for Letters Patent appeal was asked for but it was refused.