Mst. Atiqa Khatoon And Ors. vs Mst. Aqila Bano And Ors. on 12 December, 1955

Equivalent citations: AIR1956ALL415, AIR 1956 ALLAHABAD 415

JUDGMENT

Upadhya, J.

1. This is a plaintiffs' appeal arising out of a suit for an injunction. The plaintiffs alleged that the defendants had opened a door in their house through which they started passing over the plaintiffs' land and they had also constructed a 'parnala' through which they had started flowing water and this 'parnala' passed through the plaintiffs' land. The defendants' case was that the 'parnala' and the door were old and the defendants had acquired the right to use them as easements.

The trial court decreed the suit. On defendants' appeal, the lower appellate Court after considering the evidence on record allowed the defendants' appeal in part and held that the door complained of was proved to be old, but dismissed the appeal so far as the 'parnala' was concerned. It further held that the defendants had the right of way through the door complained of and modified the decree of the trial Court to that extent.

2. In this Second Appeal the respondents are unrepresented. Learned counsel for the appellants has urged before me two points. The first is that the lower appellate Court has not properly appreciated the Amin's report relating to the door. That report was an important piece of evidence. According to the learned counsel the finding of the lower appellate Court is vitiated inasmuch as an important piece of evidence has been overlooked.

Learned counsel has taken me through the relevant portions of the judgment, but I feel it is not correct to say that the Amin's report escaped the attention of the lower appellate Court. In fact, it had mentioned the Amin's map in connection with the 'parnala' and I do not feel justified in thinking that it did not take the entire evidence including the Amin's map into consideration in arriving at the finding that it gave.

3. The second point raised by the learned counsel is that defendants 1 to 6 raised the plea of joint ownership of the 'rasta' land, and because of this plea it appears that in exercising the right of way, the defendants had exercised that right as owner of the 'rasta' land.

Reliance has been placed on several cases including -- 'Narayan Balvant v Shanker Waman', 1938 Bom 215 (AIR V 25) (A), 'Raychand Vanmalidas v. Maneklal Mansukhbhai', 1946 Bom 266 (AIR V S3) (FB) (B) and 'Lalit Kishor v. Ram Prasad', 1943 All 362 (AIR V. 30) (C). The last case is a casein which the defendant had, in an earlier proceeding taken the plea that the land had belonged to him

and this Court took the view that the person claiming the right of easement could not do so in respect of the land which he claimed to be his own.

The idea is that as required by Section 15, Indian Easements Act, the right to enjoy the easement should have been exercised 'as an easement' for the period prescribed. If the servient tenement belonged to the person claiming the easement, it cannot be said that the rights have been exercised as an easement. The fact appears to be that the right is one to be exercised as owner. That was not a case where the servient tenement was claimed to belong jointly to the person claiming the easement and the other person against whom it was claimed.

The case reported in 1938 Bom 215 (AIR V 25) (A)', however, was one in which a right to light and air through windows in a joint wall was claimed. The learned Judges were of opinion that this was not possible. They relied upon an earlier decision of their Court reported in -- 'Marghabhai Vallavbhai v. Motibhai Mithabhai', 1932 Bom 513 (AIR V 19) (D). The plaintiff in that case was claiming a right to the free access of light and air for his house over a stranger's property.

It was found that between the plaintiffs' house and the defendant's tenement there intervened a strip of land over which light and air had indeed come to the plaintiffs' house and this strip was owned jointly by the parties. The learned Judges thought that it followed that the plaintiff enjoyed the light and air by virtue of his right in the intervening land as a joint owner and did not enjoy it as an easement since the essence of an easement is that it is a right over property belonging not to the plaintiff but to someone else.

4. No doubt it is well settled that there can be no easement except by user which is capable of being resisted either physically or in Courts --'(Sturges v. Bridgman', (1878) 11 Ch. D. 852 (E)). I fear the learned Judges who decided the Bombay cases were not invited to consider that the other joint owner could have resisted the plaintiff in his using the property for the better enjoyment of his own exclusive property.

With great respect for the learned Judges who decided these two cases I am of opinion that even if the owner of the dominant tenement claimed to be a joint owner of the servient tenement he could not have properly claimed a right to receive light and air or a right of way over the joint land and it was open to the other joint owner to resist the claim if made.

5. The essential ingredient of 'animus' is there if the servient tenement does not belong to the person claiming the easement absolutely and if the exercise of the right is capable of being resisted. If that land over which the easement is claimed belongs to another person also, that other person is certainly affected injuriously by the exercise of a right of way over the land and to that extent the person exercising the right is obviously doing an act detrimental or prejudicial to the rights of the other owner. I am, therefore, of opinion that this plea cannot succeed in the circumstances of the present case.

6. As mentioned above, the findings of the lower appellate Court is based on evidence and I see no reason to interfere. The appeal is, therefore, dismissed. As no one appears on behalf of the

respondents, no order is made as to costs.

7. Leave to appeal is refused.