Mahesh Pratap Singh And Anr. vs Rampal Singh on 4 August, 1952

Equivalent citations: AIR1953ALL591, AIR 1953 ALLAHABAD 591

JUDGMENT

Malik, C.J.

1. The plaintiff is a co-sharer in Mahal Rampur Bhagan and his house is in plot No. 559. To the south of that plot there is a plot No. 546. The drain of plaintiff's house is marked in the site plan prepared by the commissioner which 13 a part of the decree prepared by the lower appellate Court, in this site plan the disputed portion of the drain is shown by the letters KG and C. The plaintiff's case was that the drain water of his house used to flow through this drain towards a 'talab' or tank to the south and the defendant, without any right caused obstruction to this drain a few months before the suit was filed. In the plaint it was said that the plot No. 546 was situate in Mahal Rampur Bhagan of which the plaintiff, defendants and others were co-sharers. Alter having made that statement in para. 1 the plaintiff went on to allege that he had been using the right to flow his drain water through this drain for more than 25 years. This was characterised as a 'haq ashais' which can be translated as 'a right of easement'. The other right claimed by the plaintiff was that the women of his family used to go out of a window marked L towards the west of his house and after passing, over the plot No. 546 used to go towards the tank to ease themselves. By building the wails ABC and CD to the south and the west of this plot it was said that the right of the women of the plaintiff's family for going to the tank over the plot No. 546 was interfered and the walls should-therefore, be demolished.

2. The defence was that plot No. 545 was not situate in Rampur Bhagan but in Rampur Jogshah and that neither the plaintiff nor the defendants had any right of ownership in the said plot. It was further denied that the plaintiff had constructed the drain more than 20 years before the suit or that there was in existence the window L through which the ladies of his house had been going towards the pond to ease themselves and the plaintiff had acquired a right of easement.

3. The learned Munsif held in defendants' favour that the plot No. 546 was situate in Rampur Jogshah in which the parties were not co-sharers and the plaintiff had not been using the drain or the passage for the requisite period to acquire the right of easement and dismissed the plaintiff's suit,

4. On appeal the lower appellate Court believed the evidence of the plaintiff and his two witnesses that the plaintiff's house had been constructed more than 20 years before the suit, that the drain was an old one through which the water of the plaintiff's house used to flow towards the tank and that

the window L was built at the time when the house was constructed, through which the ladies of his house used to go out to ease-themselves. The lower appellate Court has not recorded a finding to that effect in so many words but it has believed the evidence of the plaintiff and his two witnesses who had deposed-to the facts mentioned above. As a result the lower appellate Court set aside the decree of the trial Court and decreed the plaintiff's suit for demolition of the walls ABCD and for the opening of the drain KG. In the alternative the lower-appellate Court directed that the defendants could, make their own drain shown by the letters EKA wide enough to allow the flow of water from the 'nabdans' in both the houses.

5. In this second appeal Sri Shri Ram on behalf of the appellants has urged that the plain-tiff having asserted in his plaint that he was a. co-sharer in plot No. 546 he could not have had the animus to acquire a right of easement by U3er and his suit on that ground must, therefore, fail. In the alternative, he has urged that the-finding that the drain was more than 20 years old was not based on evidence but was based on mere surmises and was not binding on the Court. And further, that the lower appellate Court had not set aside the finding of the trial Court as regards the right of way and, in any case, the plaintiff had not proved his right of way and the walls ABC and CD could not be demolished.

6. On the first point the learned counsel has relied on a decision of this Court in -- 'Lalit Kishore v. Ram Prasad', AIR 1943 All 362 (A). In that case a suit had been filed by the plaintiff claiming a right of ownership by adverse possession. That suit having failed, a second suit was filed claiming a right of easement. The learned Judges observed :

> "In order to acquire a right of easement a person must not only do the necessary physical acts over the period prescribed by law but he must be setting himself up as the person who is doing those acts over the property of another."

Reliance was placed on the definition of the word "easement" in Section 4, Easements Act that an ease-ment was 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. It is urged that if the plaintiff claimed that the land was his own he could not have had the animus to acquire a right of easement over such land, and, even though he might have used the land for more than 20 years, he could not acquire a right of easement by prescription.

7. The finding in this case is that the servient tenement, plot No. 546, is in Rampur Jagshah in which the parties have no right and the defendants have, as a matter of fact, constructed the walls and taken possession of the land without any right. The allegation in the plaint that the plot No. 546 was in Rampur Bhagan is, therefore, clearly wrong and it cannot be said that the plaintiff and the defendants had any title in this plot or that the plaintiff had the right to use it in the manner in which he claimed to have used it, The question, therefore, arises whether the mere fact, that the plaintiff had wrongly alleged in the plaint that the plot No. 546 was in Rampur Bhagan, in which both the parties were co-sharers, was an allegation, which was so decisive of the matter that in spite of the finding that the plot was not in this Mahal but was in another Mohal, in which the plaintiff

had no right of ownership, the Court must dismiss the suit.

8. Cases have arisen where the plaintiff had claimed a right of ownership and in the alternative a right of easement and the Courts have considered the question whether in such a case the alternative plea could or could not be set up. In 'Narendra Nath v. Aboy Charan', 34 Cal 51 (FB) (B) decided by a Bench of five Judges, presided over by Maclean, C. J., the judgment of Geidt J. was approved which was to the effect that suit was not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights of ownership and of easement. The reasoning of the learned Judge was that the plaintiff could say that he believed the land to be his but if he was unable to prove it he could, at any rate, claim that he had been exercising the right of way as an easement uninterruptedly and as of right for over 20 years. The question directly arose in another Division Bench case -- 'Dwarka v. Ram Jatan', AIR 1930 All 877 (C) where the plaintiff had claimed possession of a piece of land toy removal of the boundary walls on the ground that the plaintiff was the owner thereof. In the alternative he claimed an easement and a decree for right 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. The question was whether the plaintiff having claimed ownership could allege and establish that he had acquired a right of easement. The learned Judges pointed out that the plaintiff had not been put to his election and the point had not been raised in the lower Courts that the plaintiff did not possess the requisite animus because he was claiming to be the owner of (sic) property. The learned Judges further observed that :

> "Where the owner of one property exercises certain rights of enjoyment 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."

9. With these observations of the law I respectfully agree. There are no doubt certain observations in the case of -- 'Lalit Kishore v. Ram Prasad (A)', which support the contention raised by learned counsel for the appellant, but both are Division Bench cases and it is open to me to fallow whichever case in my view lays down the correct law. I, therefore, hold that the finding of the lower Court that the plaintiff had acquired a right of easement to flow the water of his drain through the chanel KGC cannot be challenged in this Court merely on the ground that the plaintiff had alleged in the plaint that plot No. 546 was situate in Rampur Bhagan of which he was a co-sharer along with defendants and others. The finding is based on the evidence which has been believed by the learned Civil Judge. The learned Judge has given the defendants the option of either opening the drain KG or to make their own drain shown by the letters EKA wide enough to allow the flow of water from the 'nabdans' in both the houses. This is quite a reasonable order and it is, therefore, not necessary to interfere with it.

10. Coming to the next part of the relief granted in the decree, for the demolition of the walls ABCD, a look at the site plan would show that there are as a matter of fact two walls, one ABC towards the west, and another CD situate towards the south. Neither of these two walls are in front of the window L and it cannot, therefore, be said that these walls interfere with the ingress or egress of the women of plaintiff's family through the window L. It is urged by learned counsel for the respondents

that the women, after they came out of the window L, used to pass over the plot No. 546 to go to the pond to the south to ease themselves. It does not appear that any attempt was made in the lower Court to lead any evidence that they ever followed a definite course, through the servient tenement, nor was any attempt made to mark out a passage. From the plan attached to the decree it appears that there is a lane towards the west. Be that as it may, in the absence of any evidence that there was any marked passage which was followed by the women of plaintiff's family for more than 20 years to reach the pond at the south after coming out of the window L it is difficult to hold that they had acquired any right of way. The learned Judge was not justified in directing the demolition of the whole of the walls ABC and CD.

11. Learned counsel has prayed that an issue may be remitted to the lower Court to clarify the position but there was no evidence on the point that the women of the plaintiff's family ever followed a definite path. The whole of the plot No. 546 was an open piece of land and the women of the plaintiff's family might have gone to any part of the plot to ease themselves. It cannot even be said that there was a passage through this plot leading to a 'terminus ad quern'. In the circumstances the learned Judge was not justified in directing the demolition of the Walls ABC and CD.

12. The result, therefore, is that this appeal is partly allowed. The decree of the lower Court is amended to this extent that the order of the learned Additional Civil Judge directing the demolition of the walls ABCD is set aside. The rest of the decree shall stand.

13. The parties shall bear their own costs of this appeal.