Before Mr. Justice Aikman.

1896
December 24.

DHUMAN KHAN (DEFENDANT) *v.* MUHAMMAD KHAN (PLAINTIFF) *

Trespass—Right to access of light and air—Suit by person who had not obtained an easement by prescription—Easement.

The owner of a house, the light coming to which is obstructed by an erection made upon adjoining land by a person who, *qua* such adjoining land is a trespasser, may possibly have an action against the person causing obstruction, even though he has not obtained by prescription an easement of light. But where the person causing such obstruction is the rightful owner of the adjoining land or acting with the permission of the owner, no such action as aforesaid will lie against him unless the plaintiff has acquired an easement. *Jeffries* v. *Williams* (1) and *Jootoor Achanna* v. *Vanamala Venkamma* (2) distinguished.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Mr. *Karamat Husain*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

AIKMAN, J.:—The parties to this suit are neighbours occupying adjoining houses in the city of Allahabad. The houses stand at right angles to one another. The house of the plaintiff looks towards the west, and that of the defendant towards the south. The land in the angle formed by the houses was alleged by the plaintiff to belong to him. It has been found by the Courts below that this land does not belong to the plaintiff, but is a portion of a public lane, the ownership of which is vested in the Municipality. The plaintiff has a balcony and windows in the front of his house. He came into court alleging that a month before the date of the institution of his suit the defendant had constructed a balcony supported by stone rests, which, projecting from the front of his (defendant's) house, interfered with the plaintiff's balcony and with the light and air of one of the plaintiff's windows, and he prayed for the demolition of a portion of the defendant's balcony. The lower Courts have given the plaintiff a decree, and the defendant comes here in second appeal. The

* Second Appeal No. 1020 of 1895, from a decree of Babu Brijpal Das, Subordinate Judge of Allahabad, dated the 31st May 1895, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 20th December 1894.

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plaintiff did not in his plaint allege that he had acquired any right of easement. The finding of the Court below is that the plaintiff's balcony and window have not been in existence for more than fifteen years at the outside. It is clear that this term is not sufficient to create a right of easement. But the lower appellate Court, relying on the case *Jootoor Achanna* v. *Vanamala Venkamma* (1), has nevertheless decreed the claim. In my opinion that case is not in point. In that case it was held that it was not necessary for the plaintiff, who received light through a window in his wall opening on a piece of vacant ground the property of Government, to establish prescriptive rights against the defendant, who was a wrong doer, and that the mere fact of the plaintiff's enjoyment was sufficient to entitle him to an injunction. The learned Judge who decided that case relied on the decision in *Jeffries* v *Williams* (2). In that case it was objected by the defendants that the plaintiffs had not alleged that they had acquired any right of support from the soil in which the defendants had been excavating mines. In his judgment Parke B. remarked with reference to this plea:—"If it had appeared in the declaration that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the objection would have been fatal; because, arguing against a person having the right to the adjoining soil, or claiming under one that had all his rights to interfere with the soil, it would be necessary for the plaintiffs to show a title to a support of the soil according to the doctrine laid down in *Wyatt* v. *Harrison*; but if the defendant is not stated in the declaration to have any such right, and is therefore *primâ facie* a wrong doer, the declaration, it seems to us, would be sufficient." It appears from this that the principle upon which that case and the case in the Madras High Court were decided was that the defendant was a wrong doer. In the present case, however, the defendant has received permission from the owner of the soil, that is from the Allahabad Municipality, to construct the balcony which projects from his house. This

(1) 5 Madras Law Journal, p. 25. (2) 20 L. J. Ex. 14.

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being so, I am of opinion that the principle of *Jeffries* v. *Williams* (1) will not apply, and that the plaintiff was not entitled to the relief he asked for, inasmuch as he had not acquired by prescription any easement as against the defendant or the Municipality. Taking this view, I hold that this appeal must succeed. I set aside the decrees of the lower Courts and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

PRIVY COUNCIL.

P.C. 1896 *November 13th. December 9th.*

MUHAMMAD ABDUL MAJID AND MUHAMMAD ABDUL AZIZ AND OTHERS.

[On appeal from the High Court at Allahabad.]

In a suit for land and mesne profits, inquiry as to the latter deferred by the judgment – Civil Procedure Code, sections 45, 212 and 244.

A Court, which had virtually adjudged mesne profits to the claimant in the same judgment in which it decided that she was entitled to the immovable property claimed, left open the question of the amount of those profits to be decided in subsequent proceedings. In the decree which followed no mention was made of the profits.

Held that it was competent to the Court to defer the inquiry in that manner, nothing in the Code of Civil Procedure preventing such a disposal of the suit. If there had been a technical omission in the decree, it had not affected the right of the plaintiff.

APPEAL by special leave from a decree (22nd July 1892) of the High Court reversing a decree (2nd June 1890) of the Subordinate Judge of Jaunpur.

The point in dispute arose out of the disposal of a claim to land and the mesne profits by a judgment on the 18th June 1880 of a Court which determined the question of title and possession in favour of the plaintiff, but postponed the inquiry as to the amount of the profits to be dealt with in another and future proceeding. The decree had nothing in it as to mesne profits. The decision as to the proprietary right was supported by the judgment of the High Court on the 6th January 1882, and by the order of the

Present: LORDS WATSON, HOBHOUSE, and MORRIS, and SIR R. COUCH.

(1) 20 L. J., Ex., 14.