APPELLATE CIVIL

Before Mr. Justice Kendall and Mr. Justice Iqbal Ahmad

INDORE STATE (PLAINTIFF) *v.* VISHESHWAR BHATTACHARYA AND ANOTHER (DEFENDANTS)* 1934 *July*, 31

Property—Air space above land—Immovable property—Balcony projecting over another's land—Adverse possession—Acquisition of proprietary right—Not mere easement—Limitation Act (IX of 1908), article 144—General Clauses Act (X of 1897), section 3(25).

The air space above land is immovable property belonging to the owner of the land. So the construction, in the upper storey of a house, of a verandah projecting over the land of another person is a dispossession of that person from his immovable property and not merely an easement, and such adverse possession, if continued for twelve years, will confer proprietary title on the owner of the house in respect of the air space occupied by the verandah; so that a suit by the owner of the land for demolition and removal of the verandah must be dismissed if brought after twelve years.

Messrs. *P. L. Banerji, N. Upadhiya* and *Lakshmi Kant Pandey*, for the appellant.

Messrs. *B. E. O'Conor, K. N. Katju, A. P. Pandey* and *H. C. Mukerji*, for the respondents.

KENDALL and IQBAL AHMAD, JJ.:—In these two appeals the plaintiff appellant is the State of Indore, whose title to the property in dispute has been challenged in First Appeal No. 256 of 1927; but as we have maintained it in our decision in that appeal, the objection of the defendant respondent on this ground fails. The plaintiff, therefore, must be held to be the owner of the house concerned in these two suits, namely, the house No. 15, in mohalla Brahmapuri Ahilya Bai, Benares City, which adjoins house No. 17/12 which is the property owned by the defendant respondent in First Appeal No. 319 of 1927, and house No. 11 which is owned by the defendant respondent in First Appeal No. 587 of 1927. The sole question for decision in

*First Appeal No. 319 of 1927, from a decree of Vishnu Ram Mehta, Additional Subordinate Judge of Benares, dated the 11th of April, 1927.

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the appeal before us is one that is common to both these appeals. It appears that the defendants built a three-storied verandah projecting over the land of the plaintiff and further opened some windows, which were said to invade the privacy of the plaintiff's house. The plaintiff sued for a mandatory injunction directing the defendants to demolish this verandah and to close the doors and windows, and also for a permanent injunction restraining the defendants from building verandahs overhanging the plaintiff's premises. The trial court found that the verandahs were constructed more than 12 years, but less than 20 years, ago, and as it also held that the construction of the verandah constituted a dispossession of the plaintiff, it followed that the defendant had matured his title by this adverse possession, and the suits were dismissed. It has been argued before us in appeal that no question of adverse possession can arise in a matter like this, where there has not been an actual dispossession of the plaintiff from his land, but only from the space above the land. If, in these circumstances, the defendant has acquired any right by prescription, it cannot be, according to the appellant's argument, a full proprietary right such as would arise from adverse possession.

The trial court in holding that the conduct of the defendants amounted to adverse possession relied on some decisions of the Bombay High Court. But it has been argued by Mr. *Piari Lal Banerji* for the plaintiff appellant that the Bombay decisions, at any rate, have been overruled by later decisions of the same court. In the case of *Chotalal Hirachand* v. *Manilal Gagalbhai* (1), a Bench of two Judges discussed whether the possession of a "panch" or eaves for the discharge of water overhanging the defendant's land was an easement or an occupation of the defendant's property, and they came to the conclusion that it was an easement. In the case of *Dhed Mulia Bhana* v. *Dhed Sundar Dana* (2), the

(1) (1913) I.L.R., 37 Bom., 491. (2) (1913) I.L.R., 38 Bom., 166.

learned CHIEF JUSTICE remarked: "It appears to us that the definition of 'easement' in the Easements Act applies just as much to a projection of eaves in a dry country where there is no discharge of rain-water as in a country where there is an abundant rainfall and there is discharge of water," and it was held by the Bench that the projection of eaves must be held to be an easement which is a burden on the servient tenement, but not apparently that it amounted to a trespass. In the case of *Kashibhai Kalidas Patel v. Vallavbhai Wagjibhai Patel* (1) a similar view was taken, and in the most recent case of *Chhaganlal Fulchand* v. *Hemchand Tapidas* (2), the authorities on this question have been discussed at some length with the result that the Bench found that the building of projecting eaves would not amount to a trespass. "It is difficult to hold" remarked Mr. Justice PATKAR "that the column of air occupied by a projection over the land of a neighbour is immovable property or any interest therein within the meaning of article 144 of the Limitation Act, unless it is covered by the words 'benefits to arise out of land' within the meaning of section 3, clause (25) of the General Clauses Act, X of 1897. On the other hand, projection of eaves resulting in discharge of rain-water is an easement according to illustration (*b*), section 23 of the Easements Act."

There is no doubt that the weight of the authorities of the Bombay High Court has been thrown on the side of the present plaintiff appellant. We are, however, not bound by these decisions, and, as the trial court has pointed out, the Madras High Court has taken a different view, which Mr. *Banerji* admits is against him. In the case of *Rathinavelu Mudaliar* v. *Kolandavelu Pillai* (3) it was held that "Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by

(1) (1922) I.L.R., 46 Bom., 827. (2) A.I.R., 1932 Bom., 224, (225).
(3) (1906) I.L.R., 29 Mad. 511.

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such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour if it has been in existence for more than 12 years." This view, which is the one that was adopted in the earlier Bombay rulings, appears to be based on the reasoning that as the space above land is one of the benefits arising out of the ownership of that land, it is part of the immovable property of the owner of the land, and any trespass upon it will be an act of adverse possession. We might be inclined to go even further and to hold that the space above the land is itself immovable property. As the owner of the soil is the owner of the space above it, and as there can be no ownership without property, it follows that the space above the land is property, whether movable or immovable, and it need scarcely be pointed out that it is not movable property. So it would seem to follow as a necessary inference that it is immovable property. This being so, the defendant respondent in the present case has made good his title because he has been in adverse possession for over 12 years.

As regards the windows and doors, the finding of the court is that they have been in existence for a very long time and all that the defendant respondent has done within the period to which the suit relates is to enlarge them. The learned counsel for the appellant has not addressed us on this part of the case, and we therefore see no reason to interfere with the findings of the trial court. The final result is that we dismiss both the appeals with costs.