APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

BENI AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* SEETAL DIN (PLAINTIFF-RESPONDENT)*

1934 *April, 4*

Easements Act (V of 1882), section 23—Easement for running water over another's land—Discharge of foul effluent, whether permissible under the grant of easement.

Held, that the discharge of foul effluent into a drain through which there might be a presumed grant of running water is not permissible in law as it would impose an overburden on the servient tenament. *Raman Chandra Das Dalal* v. *Bhola Nath Hati* (1), relied on. *Phillimore* v. *Watford Rural District Council* (2), referred to.

Messrs. *Radha Krishna, S. C. Dass* and *S. N. Srivastava*, for the appellants.

Mr. *P. N. Chaudhri* holding brief of Mr. *Hyder Husain*, for the respondent.

NANAVUTTY, J.:—This is an appeal from a judgment and decree of the learned Subordinate Judge of Partabgarh setting aside a judgment and decree of the Munsif of Partabgarh and decreeing the plaintiff's suit.

The facts out of which this appeal arises are briefly as follows:

The house of the plaintiff Seetal Din adjoins that of the defendants Beni and Babu Lal, sons of Sheo Din Tamoli of Macendrewganj in the town of Bela Partabgarh. There is a drain passing through the houses of the parties. It commences from inside the house of the late Rai Bahadur Babu Shankar Dayal, which is to the south of the house of the defendants, and runs towards the north underneath the houses of the plaintiff and the defendants. The drain eventually terminates in a cess pool which is on a vacant land. There is another drain which begins from the courtyard of the defendants'

*Second Civil Appeal No. 69 of 1933, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 26th of January, 1933, reversing the decree of Babu Kali Charan Agarwala, Munsif of Partabgarh, dated the 11th of May, 1932.

(1) (1929) A.I.R., Cal., 55. (2) (1913) 2 Ch., 434.

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house and passing through the plaintiff's land joins the bigger drain, which has been marked yellow in the Commissioner's map, the smaller drain being marked blue. It is the common case of the parties that rain water used to flow through the yellow drain from the house of the defendants. The defendants further alleged that sullage water from the latrine and kitchen and bath water also used to flow into the same drain. The plaintiff's contention is that no such water used to flow into the drain.

The learned Munsif held that latrine water did not flow into the drain but the water used in cleaning utensils and for bathing purposes did flow into this drain. The plaintiff appealed to the lower appellate court and the learned Subordinate Judge held that the water used in the kitchen and for bathing purposes never flowed from the house in possession of the defendants into the yellow drain in the plaintiff's house and that the defendants had failed to establish the right of easement claimed by them. He, therefore, allowed the appeal of the plaintiff and decreed the plaintiff's suit, and granted him a permanent injunction prohibiting the defendants from throwing any water from their house upon the plaintiff's land through the drain in question.

The defendants have, therefore, come in second appeal. I have heard the learned Counsel of both parties and have examined the evidence on the record. In my opinion this appeal is concluded by findings of facts. The learned Subordinate Judge has given his finding on the question of fact in issue in the following terms:

> "Thus evidence on behalf of the plaintiff is decidedly strong on the point in dispute. That produced on behalf of the defendants is unsatisfactory."

After perusing the evidence on the record I entirely agree with him that the evidence of the defendants is unreliable and the evidence adduced on behalf of the

plaintiff satisfactorily proves his contention. I, therefore, uphold the finding of the learned Subordinate Judge and hold that the defendants have failed to establish the right of easement set up by them.

Nanavutty, J.

It was further contended before me on behalf of the appellants that as no case of nuisance was alleged or proved by the plaintiff, so the plaintiff had no cause of action and that the right of flow of rain water in favour of the defendants included in law the flow of all kinds of water. In support of this contention reliance was placed upon paragraph 849, volume XXI of Halsbury's Laws of England, which runs as follows:

> "In order to constitute an actionable nuisance the act complained of must be *injuria*, that is. the violation of some right which another possesses. There must, therefore, be a right existing in the complainant, and a corresponding duty on the part of the alleged wrong-doer not to interfere with that right. Absence of the right or of the duty, or of the violation of the duty, prevents the act complained of from being actionable."

I cannot accede to this contention. Exhibit 3 is a copy of the findings recorded by Mr. Mahendra Nath Agarwal, Honorary Health Officer of Bela Municipality. Paragraphs 3 and 4 of that report show that sullage water from the latrine flowed through the drain in question and that the dwelling of Seetal Din under which this drain passed smelt badly and was damp. This clearly shows that the sullage water did constitute a nuisance and was injurious to the health of the plaintiff and his family. In *Raman Chandra Das Dalal* v. *Bhola Nath Hati and another* (1) it was held that the discharge of foul effluent into a drain through which there might be a presumed grant of running water was not permissible in law as it imposed an overburden on the servient tenament, and reliance was placed upon a ruling in *Phillimore* v. *Watford Rural District Council* (2), wherein it was held that a grant of flow of water did not

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authorize the discharge of a sewage effluent. I, therefore, overrule this contention and hold that the plaintiff has not only alleged but also proved that he had a cause of action in respect of the nuisance that he complained of in his plaint.

The only other point that was argued before me was that the memorandum of costs prepared by the lower appellate court was wrong and that an additional amount of Rs.64 was incorrectly shown therein. This is a matter into which the office of this Court will look into and if there is an obvious clerical mistake made in the preparation of the decree by the lower court, the office will have that mistake rectified when the decree of this Court is prepared.

For the reasons given above this appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Rachhpal Singh

1934
April, 9

KING-EMPEROR (APPELLANT) *v.* CHANDEWA PASI (COMPLAINANT-RESPONDENT)*

United Provinces Excise Act (IV of 1910), *section* 60, *clauses (a) and (f)—Distilling of illicit liquor by accused—Chaukidar entering and searching the house not against wishes of accused—Accused admitting guilt—Illegality of chaukidar's entering the house, effect of—Acquittal of accused, if can be sustained.*

All provisions as regards the searches of houses and the precautions necessary to be taken before any search is held have been framed with a view to protect the interests of the accused. Where, however, the entry of the chaukidar into the accused's house was not apparently .against the wishes of the owner of the house nor was it with the intention to intimidate, annoy or insult the owner in possession of the house but the accused

*Criminal Appeal No. 11 of 1934, against the order of M. Abdul Majid Khan, Magistrate, 1st class, of Unao, dated the 25th of October, 1933.