THE
INDIAN LAW REPORTS
LUCKNOW SERIES

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice Ziaul Hasan

SETH SRI NATH (DEFENDANT-APPELLANT) *v.* KEDAR NATH PURI (PLAINTIFF-RESPONDENT)* 1936 *August*, 14

Easements Act (V of 1882), section 13(a)—Sale of plots of land for building purposes—Severance of tenements—Lateral support, right of—Implied grant of right of lateral support for building to be constructed against adjacent plots—Interpretation of statutes—Illustrations, whether part of statute.

Held, that when there is a severance of tenements at the time of sale of plots for building purposes it must be deemed that there is an implied grant of the right of lateral support for the building which is intended to be constructed on those plots against the adjacent plots and the purchaser acquires the said right as an easement under the provisions of section 13, clause (*a*) of the Indian Easements Act. *Charles Dalton* v. *Henry Angus & Co.* (1), referred to.

Held further, that illustrations are to be taken as part of the Statute. *Balla Mal* v. *Ahad Shah* (2), followed.

Dr. *J. N. Misra*, for the appellant.

Messrs. *M. Wasim* and *A. P. Singh*, for the respondent.

SRIVASTAVA, C.J. and ZIAUL HASAN, J.:—These are two cross-appeals arising out of a suit for recovery of damages.

The facts of the case are that in December, 1930, the Lucknow Improvement Trust sold certain plots of land

*First Civil Appeal No. 60 of 1934, against the decree of Babu Bhagwati Prasad, Subordinate Judge, Lucknow, dated the 6th of March, 1934.

(1) (1880-1) 6 A.C., 740. (2) 21 B.L.R., 558.

1936

SETH SRI NATH v. KEDAR NATH PURI

Srivastava, C. J. and Ziaul Hasan, J.

situate at Lal Bagh circus by public auction. Plot No. 30 was purchased by the plaintiff Kedar Nath Puri and plots Nos. 28 and 29 by the defendant Seth Sri Nath. The plaintiff constructed a two-storeyed house on plot No. 30 and the construction was completed in December, 1931. The defendant with a view to construct a building on his plot No. 29 which is contiguous to the plaintiff's plot No. 30 dug a trench adjacent to the plaintiff's southern wall 3 feet lower than the depth of the plaintiff's foundation. The facts stated so far are no longer in dispute.

The plaintiff's case as set forth in the plaint was that the defendant left the trench open for more than a week with the result that rain water collected in the trench and the walls and roofs of the plaintiff's house were badly cracked. It was also said that the defendant had acted in the way he did in order to cause loss to the plaintiff and had acted with negligence. It was further averred that by reason of the damage caused to the building the tenant who occupied the ground floor vacated it and the plaintiff who resided on the first floor of the building had to shift to another house which he had to take on rent. The plaintiff therefore claimed a decree for Rs.6,000 which was made up as follows:

	Rs.
(1) Cost of the repairs of the building ..	2,370
(2) Depreciation in the value of the building	3,100
(3) Loss of rent for March and April, 1933	120
(4) Rent of the house occupied by the plaintiff for March and April ..	40
(5) Fee of the Engineers employed by the plaintiff to examine the damage ..	100
(6) Expenses of travelling from Hardwar to Lucknow and of changing the house	170
Total ..	6,000

It was pleaded in defence that the defendant had dug the trench on his own land and had not thereby

1936

SETH SRI NATH v. KEDAR NATH PURI

Srivastava, C. J. and Ziaul Hasan, J.

infringed any right of the plaintiff. It was denied that the defendant had acted negligently or maliciously or that the damage caused to the plaintiff's building was due to any act or omission on the part of the defendant. It was suggested that the damage caused was due to the bad materials used in the construction. It was also alleged that the extent of damage was exaggerated and that the amount claimed was fictitious.

On the pleadings of the parties the learned Subordinate Judge framed the following issues:

(1) Had the plaintiff any cause of action to file the present suit?

(2) Did the plaintiff in constructing his building encroach on the defendant's land as alleged by the defendant? If so, to what effect?

(3) Did the defendant dig his own foundation negligently and with a view to cause damage to the plaintiff's building as alleged? If so, to what effect?

(4) What damage if any has been caused to the plaintiff's building and is the plaintiff in any case, apart from the question of negligence and malice, entitled to damages? If so, to what extent?

(5) To what relief if any is the plaintiff entitled?

He decided issue 1 in the affirmative. His finding on issue 2 was that the plea embodied in that issue had no bearing on the case. With reference to issue 3 he found that the defendant was negligent in digging his foundation adjacent to the plaintiff's building and in keeping it open in rainy weather and was therefore liable for damages done to the plaintiff's building. His finding on issues 4 and 5 was that the plaintiff was entitled to only Rs.2,000 for cost of repairs and Rs.100 for the fees of engineers who were called to inspect the building after its being damaged. He accordingly gave the plaintiff a decree for Rs.2,100 and ordered the parties to pay and receive costs in proportion to their success and failure.

1936

SETH SRI NATH v. KEDAR NATH PURI

Srivastava, C. J. and Ziaul Hasan, J.

Both parties being dissatisfied with the decree of the lower court have appealed. We would take up the defendant's appeal (No. 60 of 1934) first.

Before discussing the case on its merits the learned counsel for the defendant made a grievance of the fact of the learned Subordinate Judge having decreed the plaintiff's claim on the basis of a right of easement and implied grant, though no such case was set up in the plaint. It is quite true that the plaint is very vague and makes no mention either of a right of easement or of any right based on a grant whether express or implied. All that is stated therein is that the act of the defendant in digging the foundation of his house deeper than the foundation of the plaintiff's house was improper and that he had acted with negligence and in order to cause loss to the plaintiff. It should be noted that the defendant in paragraph 18 of his written statement complained that the plaintiff had not made it clear, what right recognized by law of the plaintiff, if any, the defendant had infringed. The Subordinate Judge tried to elucidate the matter in the oral pleadings but we regret that he stopped short at a certain point, and the elucidation was far from complete. In the course of these oral pleadings the plaintiff's pleader first of all stated that he did not put forward any plea of easement but at the end it was stated that he withdrew the plea that he does not set up an easement. He did not care to explain the nature of the right of easement which he wished to set up. Nor did the court or the defendant question him about it. In the circumstances the issues were also framed in general terms and make no specific reference to any grant or right of easement. It appears that after the trial had been completed, at the time of arguments the plaintiff relied on the natural right of lateral support as well as on an implied grant and right of easement. The learned Subordinate Judge disallowed the claim based on the natural right both on the merits as well as on the ground that it was a new case

1936

SETH SRI NATH v. KEDAR NATH PURI

Srivastava, C. J. and Zia-ul Hasan, J.

which had not been set up in the pleadings. But as regards the claim based on grant and easement he was of opinion that it could be entertained, as it involved substantially a question of law, the facts necessary for the application of that law admitting of no doubt. The case based on the natural right has not been supported before us and need not be considered. As regards the other case though it was not clearly and specifically mentioned yet it is in no way inconsistent with the oral pleadings. We put the question directly to the learned counsel for the defendant if he alleged any prejudice by reason of this case not having been clearly put forward in the pleadings and if he wanted to produce any evidence on the point which he could not produce during the trial but the learned counsel did not attempt to make out any case of prejudice. Nor did he ask for any further opportunity for giving evidence. In the circumstances we are satisfied that all the relevant evidence having been adduced by the parties and there being no room for doubt as regards the material facts bearing on the question the grievance based on the vagueness of the pleadings is merely technical. We are accordingly of opinion that there is no such variance between pleadings and proof as to contravene the rule that the plaintiff should not succeed on a case not made in the plaint.

Turning now to the merits of the case the only question of fact which was disputed before us was whether the plots Nos. 29 and 30 were sold by the Improvement Trust for building purposes. Exhibit A-4, the sale-deed in favour of the defendant, contains an express condition to the effect that the purchaser will construct a double-storeyed building over plot No. 28 with a frontage and arcade over the area enclosed in red and hatched in white on the plan attached to the sale-deed and that the frontage design of the buildings must be in accordance with the plan attached. But the sale-

1936

SETH SRI NATH v. KEDAR NATH PURI

Srivastava, C. J. and Ziaul Hasan, J.

deed makes no mention about plot No. 29 being sold for construction of a building thereon. Similarly exhibit 26, the sale-deed in favour of the plaintiff, makes no mention of plot No. 30 being sold for construction of a building. However there is the sworn statement of the plaintiff that the plots purchased by him and the defendant were auctioned on one and the same day and that they were so auctioned for building purposes. The explanation for the fact of construction of building not being mentioned in the sale-deeds with reference to plots Nos. 29 and 30 is that they lie outside the circus and the purchasers were not therefore required to make the constructions thereon conform to the special design fixed for the buildings within the circus. In the circumstances we have no hesitation in believing this statement of the plaintiff and in holding in agreement with the lower court that the plots Nos. 29 and 30 were sold by the Improvement Trust for building purposes.

Next as regards the legal aspect of the case. The plaintiff claims that he had a right of lateral support in respect of the building constructed by him on plot No. 30 against the defendant's contiguous plot No. 29 and bases his claim on an easement of necessity and *quasi*-easement under section 13 and on an implied grant of such right from the Improvement Trust at the time of the sale. As remarked by Peacock in his Law relating to Easements, third edition, page 311, "theoretically, all methods of acquisition lie in grant, whether express, or implied from the acts of parties or surrounding circumstances, or presumed from long user, or as arising by prescription". In the present case admittedly the Improvement Trust was the owner of the entire area of open land which was divided up into various plots which were put to sale for building purposes. Two of these plots were plots Nos. 29 and 30. The question therefore is whether the plaintiff when he purchased plot No. 30 for building purposes acquired either by grant or by Statute any right of lateral support

1936

SETH SHI NATH v. KEDAR NATH PURI

against the contiguous plot No. 29 which was purchased by the defendant. Section 13 of the Indian Easement Act runs as follows:

"Where one person transfers or bequeaths immovable property to another,—

(*a*) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or,

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement".

Srivastava, C. J. and Ziaul Hasan, J.

We are of opinion that clause (*b*) has no application to the case because at the time of the transfer of plot No. 30 no building stood thereon and it could not therefore be said that the right of lateral support for the building subsequently constructed was one which was enjoyed when the transfer took effect. But we think that the case is one falling within clause (*a*) of the section. These plots were sold at the same time for building purposes. It seems to us, independently of authority, that in such a case there is a manifest intention that the purchaser of one plot should have a right of lateral support for the building to be constructed by him against the adjacent plot. We are of opinion that the grant of such an easement of support must in the circumstances of the case be presumed on the ground that where the vendor and the vendee knew very well that substantial buildings are to be erected upon the land they must be deemed to have impliedly engaged to afford the necessary lateral support to the buildings constructed on the adjoining plots. There can be no doubt on the language of clause (*a*) of section 13 that the purchaser of plot No. 30 would have been entitled to this easement of lateral support against the contiguous plot No. 29 in the hands of the transferor in case the last-mentioned plot had not been transferred by the

1936

SETH SRI NATH v. KEDAR NATH PURI

Improvement Trust. Illustration (*k*) of section 13 may be usefully referred to in this connection. It runs as follows:

> "*A* grants lands to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A's* land as is necessary for the safety of the house".

Srivastava, C. J. and Ziaul Hasan, J.

This illustration leaves no doubt that in a case like the present, the plaintiff could have claimed the right of lateral support for his house against plot No. 29 in the hands of the Improvement Trust. As the defendant purchased the plot from the Improvement Trust at the same time as the plaintiff and with knowledge that the plots were sold for building purposes he cannot be in a better position than his transferor. It was argued that where there is any conflict between the illustration and the main enactment the illustration must give way to the latter. It would be enough to say that we fail to see any such conflict between the illustration and the enactment. On the contrary we think that the illustration is fully in accord with the principle underlying clause (*a*) of section 13. It might also be pointed out that as remarked by their Lordships of the Privy Council in *Lala Balla Mal* v. *Ahad Shah* (1) illustrations are to be taken as part of the Statute.

In Peacock's Law of Easement, third edition, page 358, the learned author observes as follows:

> "It is well established that on a severance of tenements the grantee of a house, or of land sold for the purpose of being built upon, will acquire by presumption of law an easement of support for his house built or to be built, from the adjoining portions of the severed property".

Another observation in the same book at page 390 may be usefully quoted:

> "It is now settled law that when on a disposition of property belonging to the same owner, the severed tenements are conveyed either simultaneously or at different

(1) 21 B.L.R., 558.

> times but as part of one transaction, *quasi*-easements, apparent and continuous and necessary for the enjoyment of the severed tenements as they were enjoyed at the time of severance, will pass by presumption of law to the grantee thereof".

In *Charles Dalton* v. *Henry Angus & Co.* (1) which is an authority about the acquisition of an easement of a right to lateral support by prescription the following observations of Lord Chancellor SELBORNE at page 792 of the report are apposite to the case:

Srivastava, C. J. and Ziaul Hasan, J.

> "If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of the natural . . . . I think it clear that any such right of support to a building, or part of a building, is an easement."

It was also argued that the easement referred to in clause (*a*) of section 13 is an easement of necessity and that the right of lateral support claimed by the plaintiff was not one of absolute necessity. We are of opinion that when the plot was sold for building purposes the buildings intended to be constructed necessarily required support from the subjacent soil and the right should therefore be regarded as one of necessity.

For the above reasons we are of opinion that when there was a severance of tenements at the time of the sales made by the Improvement Trust it must be deemed that there was an implied grant of the right of lateral support for the building which was intended to be constructed on those plots against the adjacent plots and that the plaintiff acquired the said right as an easement

(1) (1880-1) 6 A.C., 740.

1936

SETH SRI NATH v. KEDAR NATH PURI

Srivastava, C. J. and Ziaul Hasan, J.

under the provisions of section 13, clause (*a*) of the Indian Easements Act.

Lastly, it was contended that the defendant dug the foundation on his own land in the month of February and that the damage to the plaintiff's house was the result of the rains which came on unexpectedly after the foundations had been dug. It was argued that in the circumstances the defendant had not committed any breach of the plaintiff's right and the damage was accidental for which he should not be made responsible. We regret we cannot accede to the argument. The plaintiff examined P. W. 4, T. N. Sanyal, Engineer, Improvement Trust, P. W. 6, A. N. Bose, Assistant Engineer, Martin & Co., P. W. 7, J. L. Webb, Engineer-in-charge of Martin & Co., and P. W. 9, A. L. Mortimer, ex-Consulting Architect to the United Provinces Government, in support of his claim. Their evidence shows that the main cause of the damage was that the defendant dug a long foundation extending the whole length of the house at one time and that this foundation was deeper than that of the plaintiff. These witnesses have stated that even if there had been no rains damage would have been caused on account of the defendant's digging deeper than the foundation of the plaintiff's building without taking the precaution of making shoring arrangement. The only witness examined by the defendant in rebuttal is D. W. 5, H. R. Hilton, a retired Engineer. Even this witness had to admit that digging deeper than the adjoining foundation can cause damage to the latter and that if he had been in the position of the plaintiff he should have made shoring arrangement. Thus having given careful consideration to the evidence referred to above we are in agreement with the lower court that the defendant was negligent in digging his foundation adjacent to the plaintiff's building in the manner he did and is therefore liable for the damage caused to the plaintiff's building.

1936

SETH SRI NATH v. KEDAR NATH PUR

Srivastava, C. J. and Ziaul Hasan, J.

The result therefore is that the defendant's appeal must fail and is dismissed with costs.

Next we will take up the plaintiff's appeal (No. 63 of 1934). This appeal relates only to a few items of damages. The most important of these is a sum of Rs.3,100 claimed on account of depreciation. The learned Subordinate Judge was of opinion that as he was allowing the plaintiff Rs.2,000 for pulling down and rebuilding the damaged portion therefore no question of depreciation arises. In our opinion the view of the learned Subordinate Judge is not correct. The estimate of Mr. Webb, which was accepted by the Subordinate Judge and on the basis of which Rs.2,000 were allowed for repairs, shows that this amount represents only the cost of rebuilding the damaged wall and repairing the cracks in the roofs. It is therefore clear that only the damaged wall was to be pulled down and built anew. The estimated amount makes provision only for filling the cracks in the damaged roofs and not for the roofs being built afresh. In the circumstances it is clear that the building with the cracks in its roofs filled in cannot be of the same value as it was before the building suffered the damage. In our opinion therefore the plaintiff is entitled to some compensation under this head. Mr. Webb estimated the amount of depreciation at Rs.3,100 at Rs.20 per cent. of the cost of the building. We think that the extent of this depreciation may reasonably be put at 5 per cent. We would accordingly allow Rs.775 on account of this depreciation.

Next it is claimed that the plaintiff is entitled to Rs.120 on account of the loss of rent by reason of the tenant having vacated the ground floor and Rs.140 on account of the rent paid by him for the house to which he had shifted after his own house had been damaged. The learned Subordinate Judge thinks that the building had not become so dangerous as the plaintiff or his tenant considered it to be because it has survived an

1936

SETH SRI NATH v. KEDAR NATH PURI

earthquake shock after the damage. It was not denied that the tenant and the plaintiff both did vacate the house. So there is no reason to think that they did not in good faith believe that occupation of the house had become risky. In the circumstances we think that the plaintiff should be allowed both these sums.

Srivastava, C. J. and Ziaul Hasan, J.

A sum of Rs.170 which was claimed under the head miscellaneous has also been disallowed. It is said that when the house was damaged the plaintiff was at Hardwar and on receipt of information about the damage had to come to Lucknow and to arrange for his family moving into a rented house. This amount of Rs.170 relates to the expenses of travelling from Hardwar to Lucknow and of changing the house. We think that these damages cannot be regarded as the direct result of the injury caused to the house and have rightly been disallowed.

An item of Rs.216 in the estimate of Mr. Webb relates to miscellaneous work and repairs which may become necessary in connection with the re-construction including all unforeseen and appurtenant works. This item is of the nature of theoretical damages and no sufficient ground has been made out for our allowing it.

Lastly, Mr. Webb's estimate included supervision charges at $2\frac{1}{2}$ per cent. The learned Subordinate Judge was of opinion that no supervision charges could be allowed. He accordingly disallowed a sum of Rs.154 on this account. It has been admitted on behalf of the defendant that supervision charges at the rate of $2\frac{1}{2}$ per cent. would amount only to about Rs.50. A sum of Rs.104 should therefore be added to the amount decreed in favour of the plaintiff.

The result therefore is that the plaintiff's appeal succeeds in part. We accordingly modify the decree of the lower court and give the plaintiff a decree for Rs.3,239 instead of Rs.2,100 allowed by the lower court with proportionate costs in both the courts.

Appeal partly allowed.