

APPELLATE CIVIL.

Before Mr. Justice Barlee and Mr. Justice Macklin.

NARAYAN BALWANT JADE (ORIGINAL DEFENDANT), APPELLANT *v.* SHANKAR WAMAN GOVAIKAR AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1 TO 5), RESPONDENTS.*

1937
August 16

Easement—Common wall—Easement of air and light through windows in common wall—Whether easement can be acquired by prescription.

The plaintiffs sued for the establishment of an easement of light and air through the windows which they had built in the southern wall between their house and the defendant's land. The defendant contended that the wall was a joint wall and therefore acquisition of easement of light and air was not possible.

Held, that the wall being the joint wall of the plaintiffs and the defendant, the easement of light and air through the windows opened in the joint wall could not be acquired by prescription.

Rajubhai v. Lalbhai,⁽¹⁾ and *Bass v. Gregory*,⁽²⁾ followed.

Sturges v. Bridgman⁽³⁾ and *Marghabhai v. Motibhai Mithabhai*,⁽⁴⁾ referred to.

CROSS APPEALS against the decision of S. M. Kaikini, Assistant Judge at Satara, reversing the decree passed by B. C. Patil, Joint Subordinate Judge at Satara.

Suit for injunction.

The plaintiffs alleged that the southern wall of their house belonged exclusively to themselves, that they had a right to light and air through the windows and *jabis* in that wall, and that the defendant was building on his land so as to interfere with the plaintiffs' right. The plaintiffs, therefore, sued for injunction to restrain the defendant from interfering with his right to the enjoyment of light and air from the windows

*Cross Appeals Nos. 62 and 78 from Order.

⁽¹⁾ (1925) 28 Bom. L. R. 1000.

⁽²⁾ (1879) 11 Ch. D. 852.

⁽³⁾ (1890) 25 Q. B. D. 481.

⁽⁴⁾ (1932) 56 Bom. 427.

1937

NARAYAN
BALWANT
v.
SHANKAR
WAMAN
GOVAIKAR

and *jalis* in the southern wall; and to restrain him from taking support of plaintiffs' wall for his house.

The defendant contended, *inter alia*, that the wall in dispute was common to both the houses, and that the plaintiffs could not acquire by easement any right to light and air through the windows or *jalis* in the said wall.

The Subordinate Judge held that the southern wall of plaintiffs' house was not of their exclusive ownership; that it was common and belonged jointly to plaintiffs and defendant. He held that easement of light and air through the windows opened in the joint wall could not be acquired by prescription: *Rajubhai v. Lalbhais*⁽¹⁾.

On appeal, the Assistant Judge held that the plaintiffs failed to prove that the southern wall of the house was of his exclusive ownership. He was further of opinion that though the wall may be held as common, the plaintiffs could claim a right of easement. He, therefore, reversed the decree and remanded the suit to trial Court to find whether the plaintiffs' claim to the apertures was in time or barred or otherwise extinguished. His reasons were as follow:—

"The essentials of easements are that there should be a dominant tenement and a servient tenement. And the easements, here, light and air, are to be for the dominant tenement. Plaintiffs' house is the dominant tenement and it is for this house that the light and air are required. If this house has enjoyed this right as an easement and that for the requisite period as laid down in law then the house is entitled to that right. By what apertures, whether joint with the neighbours or even exclusive of the other neighbour, this light and air comes is a matter of no consequence. See *Katjar on Easement*, page 388 and *Boss v. Gregory* (1890), 25 Q.B.D. 481. No doubt in *Rajubhai v. Lalbhai* 28 Bom. L. R. 1000 followed in *Marghabhai v. Motibhai* 34 Bom. L. R. 1015 the view accepted by the lower Court is expressed. But it is clear that the law has not been discussed there at all. Even it was thought that the claim to the right to light and air is an action for trespass; but as laid down in *Paul v. Robbon* I.L.R. 42 Cal. 46 (r. c.) confirming *Paul v. Robbon*, I.L.R. 39 Cal. 59 it is an

⁽¹⁾ (1925) 28 Bom. L. R. 1000

action for nuisance. So, to claim a right for light and air has nothing to do with trespass on any property and least of all it is a trespass on the wall in which there are these apertures. For these reasons, I hold that though the wall is joint, plaintiffs can claim a right of easement through the apertures in it."

1937

NARAYAN
BALWANT
v.
SHANKAR
WAMAN
GOVAIKAR

The defendant appealed to the High Court.

S. Y. Abhyankar, for the appellant.

P. B. Gajendragadkar, for the respondents.

MACKLIN J. These are cross appeals from an order of the Assistant Judge of Satara passed in appeal remanding the case for the determination of the fact of an easement claimed by the plaintiffs. The plaintiffs objected *inter alia* to the finding of fact that the wall through which the plaintiffs claimed an easement of light and air over the defendant's property for the benefit of their own house was a joint wall, and the defendant objected to the finding of law that it was possible for the plaintiffs to acquire an easement of light and air through the wall, having regard to the fact that the wall was a joint wall. The plaintiffs had sued for the establishment of an easement of light and air through windows which they had built in the wall intervening between their house and the defendant's land.

The trial Court, relying upon *Rajubhai v. Lalbhai*,⁽¹⁾ dismissed the suit simply on the ground that "an easement of light and air through windows opened in a joint wall cannot be acquired by prescription". The Assistant Judge who heard the appeal preferred to disregard this authority on the ground that it contained no discussion of the law; and he held that the nature of the apertures, whether joint or even the exclusive property of the defendant, was of no consequence. For this he relied on *Bass v. Gregory*⁽²⁾; but on reading that case I am unable to see how it supports the view of the learned Assistant Judge, since it only decides that in the special circumstances of *Bass v. Gregory*⁽²⁾ the

⁽¹⁾ (1925) 28 Bom. L. R. 1000.

⁽²⁾ (1890) 25 Q. B. D. 481.

1937

NARAYAN
BALWANT

v.

SHANKAR
WAMAN
GOVALKAR*Macklin J.*

plaintiff's right to light and air through a particular aperture could be presumed, and even that a lost grant could be presumed.

The question then is whether the Assistant Judge was right in refusing to accept the bald statement of law in *Rajubhai v. Lalbhai*.⁽¹⁾ The difficulty in accepting it as authoritative lies in the fact that it is made without any clear expression of reasons. But upon a careful perusal of the case I have come to the conclusion that the learned Judges who decided it based their decision somehow upon the power of the defendant to resist the opening of the windows. But they only said (p. 1002) :

"There can be no question of easement as regards light and air in the case of joint property. Both parties were entitled to the full ownership of this wall . . . If the plaintiff opened apertures in the wall he could not acquire an easement of light and air through those windows over the defendants' premises. It would be open to the defendants to object to the windows being opened, and even if they did not file a suit that would not prevent them from blocking the windows opened by the plaintiff so as to look over the defendants' premises."

There is no such word as "since" or "because" between the last two sentences ; but the last sentence seems to be superfluous unless it serves as a reason for the first. But if it does serve as a reason for the first and means that there can be no easement through windows in a joint wall because the defendant could have sued to have them removed or could have blocked them up, then the statement of the law here given is in apparent conflict with the recognized principle that there can be no easement except from user which is capable of being resisted either physically or in the Courts. This is the principle enunciated in *Sturges v. Bridgman*,⁽²⁾ cited by Mr. Justice Baker in *Marghabhai v. Motibhai Mithabhai*⁽³⁾.

We have then to decide the case on general principles. The case of *Marghabhai v. Motibhai*⁽³⁾ affords a useful parallel.

⁽¹⁾ (1925) 28 Bom. L. R. 1000⁽²⁾ (1879) 11 Ch. D. 852.⁽³⁾ (1932) 56 Bom. 427.

The plaintiff was there claiming a right to the free access of light and air for his house over a stranger's property. He had to prove that he had enjoyed light and air for twenty years as an easement, and his difficulty was that between his tenement and the defendant's tenement there was an intervening strip of land over which light and air had indeed come to his house but which was owned not by the plaintiff exclusively but by him jointly with the defendant. It follows, therefore, that he enjoyed the light and air which came to him by virtue of his right in the intervening land as a joint owner and consequently did not enjoy it as an easement, since the essence of an easement is that it should be a right over property belonging not to the plaintiff but to someone else. The distinction between that case and the case with which we are now dealing is one of degree only. There the question was whether the plaintiff could get an easement through an intervening strip of land. Here the question is whether he can get an easement through an intervening wall. The principle is the same in each case, and I think, therefore, that the decision in *Rajubhai v. Lalbhai*⁽¹⁾ is correct and must be followed, and that the trial Court was right in dismissing the suit.

The defendant's appeal No. 62 of 1935 must accordingly be allowed with costs. In view of this decision the plaintiff's cross appeal No. 78 of 1935 no longer survives for decision and is dismissed without costs.

The case is returned to the lower appellate Court for decision in accordance with this judgment.

Decree reversed.

J. G. R.

⁽¹⁾ (1925) 28 Bom. L. R. 1000.