

Order XXXII of the Civil Procedure Code prescribes elaborate rules to secure the proper representation of minors in civil actions, and it is my experience that civil Courts are more prone to excuse negligence on the part of minor's next friend or guardian *ad litem* than on the part of an adult litigant.

I therefore think that in the absence of a binding decision of this Court we should, in the interest of finality in litigation and in the interest of third parties who may obtain rights as a result of decrees passed against minors, answer the question propounded to us in the negative.

Answer accordingly.

J. G. R.

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APPELLATE CIVIL

Before Sir John Beaumont, Chief Justice, and Mr. Justice Ranquekar.

FIDA-ALLI MULLA KURBANALI (ORIGINAL DEFENDANT), APPELLANT v.
 AKBARALLI KADARBHAI AND OTHERS, LEGAL REPRESENTATIVES
 OF DECEASED KADARBHAI ISABHAI (ORIGINAL
 PLAINTIFF'S HEIRS), RESPONDENTS.*

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 November 8

Indian Easements Act (V of 1882), ss. 13, 24, 25, 27—Joint property—House—Partition—First and ground floors—Purchasers—Right of support to first floor—Nature of right—Easement—Natural right.

A house, consisting of a ground floor and a first floor, originally belonged to four brothers. At a partition between them, two of the brothers got the first floor which was subsequently purchased by plaintiff. The ground floor fell to the share of the other brothers which by a later purchase became vested in defendant.

A question having arisen as to the plaintiff's right of support to his first floor :

Held, (1) that the plaintiff was entitled to support to his first floor from the ground floor of the defendant ;

*Second Appeal No. 241 of 1936.

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(2) that the defendant was not liable to keep the ground floor in repair in order to render support to the first floor of the plaintiff effective;

(3) that the plaintiff could enter upon the ground floor for the purpose of himself doing the necessary repairs.

The provisions of ss. 13, 24, 25 and 27 of the Indian Easements Act, 1882, applied.

Such a right of support is not a natural right.

SECOND APPEAL from the decision of P. M. Lad, District Judge, West Khandesh at Dhulia, modifying the decree of C. C. Shah, Subordinate Judge, Nandurbar.

Right of support.

The house in suit originally belonged to a Mahomedan family consisting of four brothers. It had a ground floor and a first floor.

At a partition between them in 1876 the ground floor of the house fell to the share of Gulamhusein and Jeevabhai. The former later transferred his interest to the latter. The first floor went to the share of the remaining two brothers, viz., Hamjabhai and Hayabhai.

By a possessory mortgage of 1889 Hamjabhai's sons transferred a portion of the first floor to Isabhai (father of plaintiff). Later on the eastern portion was also conveyed to him by another mortgage. In 1913, Mariam, Hamjabhai's widow, sold the first floor to plaintiff with the consent of her daughters.

In 1931, Yakub, Jeevabhai's son, sold the ground floor to Fida-alli (defendant).

In 1932, Kadarbhai sued (1) to obtain a mandatory injunction against defendant requiring him to rebuild his ground floor portion in order that plaintiff could build over it his upper storey; (2) to obtain an order requiring the defendant to construct a staircase and a privy and (3) to obtain an injunction restraining the defendant from doing

anything as would interfere with plaintiff's enjoyment of the upper storey, the staircase, the privy and the well.

The defendant contended, *inter alia*, that he did not admit the plaintiff's claim, that he did not know of plaintiff's right, if any, that if plaintiff had any right by way of easement, the same had been extinguished and that the plaintiff was not entitled to any relief.

The learned Subordinate Judge raised, among others, issue No. 6 which was "Does Plaintiff prove that the Defendant is bound under the terms of the partition or on any other ground to maintain the ground floor portion in such state of repair as is essential for the preservation and enjoyment of the upper storey portion in a sound state"? He answered the issue by holding that "Plaintiff is entitled to such amount of vertical support for the upper storey portion from the ground floor portion as is essential for the safety of the upper storey. Defendant is not bound to keep the ground floor structure standing and in repair for the purpose at his expense, but he is bound not to pull it down or weaken it so as to make it incapable of rendering the necessary support". He accordingly passed a decree, *inter alia*, as follows:—

"It is, therefore, hereby declared that Plaintiff as the owner of the upper storey is entitled to such amount of vertical support from the ground floor structure of the Defendant as is essential for the safety of the upper storey and that incidentally Plaintiff is entitled to do all acts necessary to secure the full enjoyment of the easement, but such acts must be done at such time and in such manner as, without detriment to him (Plaintiff), to cause the Defendant as little inconvenience as possible, and the right must be exercised in the mode which is least onerous to Defendant. I order an injunction to issue against the Defendant restraining him from obstructing the Plaintiff in the enjoyment of that right.

As to whether a particular act is necessary to secure the full enjoyment of the easement and whether such act is being done at the time and in the manner causing to Defendant as little inconvenience as possible and whether the right is being exercised in the mode least onerous to Defendant are questions, which must be, and will be, dealt with in execution if and when they arise."

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Both the plaintiff's heirs and defendant preferred separate appeals to the District Court. The learned District Judge made a decree as follows :—

“The result is that the order of the lower Court with respect to the privy, the well and the staircase must be affirmed. The order with respect to the injunction must be modified. It must be directed that a mandatory injunction be issued requiring the Defendant to carry out such repairs to the ground floor as are necessary for the proper support of the first floor. A permanent injunction must also be allowed to the Plaintiff restraining the Defendant from interfering with Plaintiff's right of support for the first floor, and also restraining him from interfering with Plaintiff's rights of easements with respect to the well and the staircase.”

He gave his reasons as follows :—

“We now come to the most interesting point in the dispute, namely that relating to the right of support. The learned Subordinate Judge has correctly appreciated the situation as regards the importance of this right. However, he thought that that right was in the nature of an easement to which the provisions of s. 27 of the Indian Easements Act would apply. He refers to illustration (m) to s. 13 which describes easements of necessity and to illustration (c) to s. 27 which defines the obligations arising out of such easements. That is why he denied a mandatory injunction, but issued a permanent injunction restraining the Defendant from interfering with Plaintiff's right to such amount of vertical support from the ground floor structure of the Defendant as was essential for the safety of the upper storey and also Plaintiff's right to do all acts necessary to secure the full enjoyment of this easement. The result has been an order which really stultifies itself. It is recognised that Plaintiff is entitled to vertical support from the ground floor. It is also admitted that Defendant is bound not to do anything to interfere with this right. Plaintiff is further allowed the privilege of establishing that right by his own acts if necessary. At the same time Defendant is not called upon to keep the ground floor in proper repairs. This means that Plaintiff can enter upon the ground floor and cause such repairs to be made as are necessary for the maintenance of the upper floor. He cannot, however, require the Defendant to do such repairs.

To my mind, it appears that the right on which Plaintiff takes his stand is not of the nature of an easement at all. It is properly speaking a natural right. This would be quite clear by reference to s. 7 of the Indian Easements Act itself. Easements are defined in that section as restrictions of one or other of the following rights and in illustration (c), the right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person, is included as a natural right. There is no manner of doubt that the right of support to soil is a natural right and that it is not of the nature of an easement. The reasons on which this right is held to be a natural right and not an easement apply with equal force to the right now under contemplation, viz., the right of the upper floor to receive adequate support from the ground floor. In this connection I would like to quote the following observations of Lord Selborne in the leading

case of *Delton v. Angus*: "What is support? The force of gravity causes the superincumbent land or building to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal and inseparable from each other and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain the weight." These words would apply not only to support to soil but to support to different floors of the same building. The owner of the first floor has a right to the support of the ground floor as an ordinary right of property and not as an easement. The negation of this principle would be incompatible with the very security for property as it is obvious that if the owner of the ground floor were to remove it, the upper floor would be deprived of the support on all sides and it could not possibly stand by its own coherence alone. The principles underlying the natural right of support to soil apply to the divisions of a building into floors or flats. Thus in Peacock's Law of Easements, 3rd edition, at page 164, we read that upon the same principle if a building is divided into floors or "flats" separately owned, the owner of each upper floor or flat is entitled to vertical support from the lower part of the building and to the benefit of such lateral support as may be of right enjoyed by the building itself. The proprietor of the ground floor is bound to keep it in such repair as is necessary for it to support the superincumbent weight and the owner of the upper storey or flat is bound to maintain that as a roof or cover for the lower. This right is different from the right of support to building by other buildings or support for buildings by other adjacent and subjacent lands, because these latter rights of support are artificially imposed and do not come into existence naturally. They are acquired and are not inherent. In the case of the two floors in this case there was a union of owners in the beginning which must be held as binding on successive owners. The right to support must pass with the transfers not as an easement held by a distinct title, but as an incident of the property itself. Illustration (m) to s. 13 embodies this principle. I would, therefore, treat the right claimed by the Plaintiff as one of the natural mutual rights imposed on the owners of the different portions of the same building.

Defendant appealed and plaintiff's heirs [filed cross-objections as to the privy.

Y. V. Dixit, for the appellant.

P. V. Nijasure, for respondents Nos. 1 to 3.

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BEAUMONT C. J. This is a second appeal from a decision of the District Judge of West Khandesh at Dhulia. The suit relates to a house, the ground floor of which is vested in the defendant and the first floor of which is vested in the plaintiff. The house was originally partitioned as long ago as 1876, and it is not, in my opinion, necessary to refer in detail to the title prior to suit.

The plaintiff's case is that as owner of the first floor he is entitled to support from the ground floor. He also claims a right to the use of a privy and to draw water from a well on the defendant's land and to the use of a staircase. The trial Court held that the right to the privy had been abandoned, and it granted an injunction to restrain the defendant from interfering with the plaintiff's right to draw water from the well and to the use of the staircase, and on those two points the District Judge agreed with the trial Court, and in my opinion there is no reason for interfering with the concurrent judgments of the two lower Courts on those points.

The main question, which has been argued, is as to the right of support. The learned trial Judge held that the plaintiff was entitled to support to his first floor from the ground floor of the defendant, but he held that the defendant was not liable to keep his ground floor in repair in order to make this right of support effective but that the plaintiff could enter upon the ground floor for the purpose himself of doing the necessary repairs, and he granted an injunction to protect those rights. In appeal the learned District Judge held that the defendant was liable to keep the ground floor in repair in order to render support to the first floor of the plaintiff effective. In my opinion, the order of the trial Court was right and the order of the lower appellate Court was wrong.

I think that the learned District Judge ignored the provisions of the Indian Easements Act, which in my opinion are perfectly plain, and state what is the common law of England. Section 13 of the Act deals with the question of easements of necessity and quasi-easements, which may arise when property formerly in joint ownership is transferred to different parties, and it is provided that :

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“ Where a partition is made of the joint property of several persons—

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(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement.”

Then illustration (m) is in these terms :—

“ Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.”

So that there can be no doubt that the plaintiff is entitled to a right of support.

Then, s. 24 provides that—

“ The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement ; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible ; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.”

Section 25 provides that—

“ The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement must be defrayed by the dominant owner.”

Section 27 provides that—

“ The servient owner is not bound to do anything for the benefit of the dominant heritage and he is entitled, as against the dominant owner, to use the servient

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heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient."

In my opinion, those sections justify the order which the trial Court made and do not justify the additional order made by the District Judge, which throws the expenses of the repairs upon the owner of the servient tenement. The learned District Judge gets out of the difficulty by holding that the right of support claimed by the plaintiff is not an easement but a natural right; but clearly you cannot have a natural right of support for something, which itself has no natural existence. The proposition is stated in Halsbury's Laws of England, (2nd edn.), Vol. XI, paragraph 640, in these terms (p. 364):—

"The owner of land has no natural right to support for buildings or of the additional weight which the buildings cause. Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist."

Here not only does the object which claims support not exist *ex jure naturæ*, but the object from which support is sought also does not so exist.

In my opinion the appeal must be allowed with costs in this Court and the lower appellate Court. The order of the trial Court to be restored.

Cross-objections dismissed with costs.

RANGNEKAR J. I agree.

Appeal allowed.

Y. V. D.