

1903
APRIL 16.

30 C. 503 (=7 C. W. N. 649.)

[503] APPELLATE CIVIL.

APPELLATE
CIVIL.NRITTA KUMARI DASSI v. PUDDOMONI BEWAH.*
[16th April, 1903.]

30 C. 503=7 C. W. N. 649. Prescription—Beneficial enjoyment of the dominant owner—Cornice projected over another's land, as ornamentation—Indian Easements Act (V of 1882.)

There can be no prescriptive right to a projection which has been erected merely for the purpose of ornamentation.

John George Bagram v. Khettranath Karformah (1) referred to.

[Ref. 29 Mad. 511=16 M. L. J. 281; 37 Bom. 491; 49 I. C. 752.]

SECOND APPEAL by the plaintiffs, Nritta Kumari Dassi and others.

This appeal arose out of an action brought by the plaintiffs for removal of a wall built by the defendants and for restoration of a cornice to its former state. The allegation of the plaintiffs was that their house and the defendants' house, which were both one-storeyed, stood side by side, but their house was a cubit higher than that of the defendants, and about 6 inches of the cornice of the roof of their house projected over the roof of the defendants' house; that the defendants built a second storey over their house, and in consequence thereof a wall of the second storey interfered with the cornice which projected over the lower storey of the defendants' house for many years. The defence of the defendants mainly was that, inasmuch as they built upon their own land, the plaintiffs could not compel them to remove the wall. The Court of First Instance decreed the plaintiffs' suit. On appeal the Subordinate Judge of 24-Pergunnahs reversed the decision of the first Court.

Dr. Ashutosh Mukerjee (Babu Inanendra Nath Bose with him) for the appellants. The Court below has erroneously held that no easement can be acquired, as the cornice projected, not over vacant land, but over the defendants' roof: see *Mohanlal Jechand v. Amratlal Becharadas* (2). No issue was raised in the Court [504] below as to whether the cornice was beneficial to the dominant tenement: that question should have been gone into. No doubt, under the English law an easement must be beneficial: see Gale on Easements, 7th Edition, page 6; and *John George Bagram v. Khettranath Karformah* (3).

No one appeared for the respondents.

RAMPINI AND MITRA, JJ. This is an appeal against the judgment of the Subordinate Judge of the 24-Pergunnahs, dated the 16th of July 1900. The action is one of a somewhat unusual nature. The plaintiff seeks to restrain the defendant from maintaining a wall which he has erected in the course of the construction of a second storey to his house. The plaintiff says that this wall interferes with a cornice of his house which has projected over the lower storey of the defendant's house for many years, and that he should have the wall, which the defendant has erected so as to "absorb" or include his cornice, removed and broken down.

The Subordinate Judge has found as fact that the cornice of the plaintiff's house has projected to the extent of 6 inches in width over the defendant's lower storey for a considerable period, more than the

* Appeal from Appellate Decree No. 2108 of 1900, against the decree of Karuna Das Bose, Subordinate Judge of 24-Pergunnahs, dated July 16, 1900, reversing the decree of Soshi Bhusan Chowdhry, Munsif of Alipore, dated Aug. 28, 1899.

(1) (1869) 3 B. L. R. (O. C.) 18, 47.

(3) (1869) 3 B. L. R. (O. C.) 18.

(2) (1876) I. L. R. 3 Bom. 174.

period necessary for the establishment of an easement, provided such an easement as the plaintiff claims can be acquired. But he has held that no such right can be gained by prescription, inasmuch as this cornice which projects over the defendant's house is not necessary for the protection of the plaintiff's property, but has been constructed on the plaintiff's house merely for the purpose of ornamentation. He says in his judgment: "One fundamental principle of the right to an easement is that it confers some benefit on the person who claims the easement, and does not serve merely a purpose of ornamentation." The plaintiff now appeals against this order of the Subordinate Judge.

We have given this case our best consideration, and, on the whole, we see no reason to interfere with the order of the Subordinate Judge dismissing the plaintiff's appeal to him, and we think that he has laid down the law as to easements perfectly [505] correctly. We find in the Indian Easements Act (Act V of 1882), which, of course, is not in force, in this province, but which we think may be referred to as an authority on the subject as to what an easement in India is, it is laid down that "an easement is a right which the owner or occupier of certain land possesses, as such, for the *beneficial enjoyment* of that land to do and continue to do something," and so on. Then, we find it laid down in *Gale on Easements*, 7th edition, page 6, that "an easement is a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements by which the servient owner is obliged to suffer or not to do something on his own land, for *advantage* of the dominant owner." Thus, it appears from these authorities that there can be no prescriptive right to a projection which has been erected merely for the purpose of ornamentation.

We find this also laid down in the case of *John George Bagram v. Khettranath Karformah* (1), in which Chief Justice Peacock has pointed out that there is no prescriptive right to anything which is "a mere matter of delight and not a matter of necessity." In these circumstances we think that this case has been rightly decided. The plaintiff's cornice, which no doubt projected over the defendant's land for some time, is not a subject with regard to which an easement can be acquired by the plaintiff. The defendant has clearly a right to the enjoyment of his land *usque ad cælum* unless the plaintiff can establish a prescriptive right to project his cornice over it. In our opinion he cannot successfully do so, and this appeal must be dismissed with costs.

* *Appeal dismissed.*

30 C. 506 (=7 C. W. N. 437.)

[506] APPELLATE CIVIL.

RADHARAMAN MUNSHI v. SURNOMOYI DEBI.* [17th March, 1903.]

Interest—Mesne profits, interest on—Civil Procedure Code (Act XIV of 1882) s. 211.

Regard being had to the provisions of s. 211 of the Civil Procedure Code (Act XIV of 1882) in the ascertainment of mesne profits due to the decree-holder, he is entitled to receive interest, year by year, on the amount found to be due.

Hurro Durga Chowdhry v. Surrut Sundari Debi (2) distinguished.

* Appeal from Order No. 100 of 1902, against the order of Jogendra Chandar Moulik, Additional Subordinate Judge of Pubna and Bogra, dated Nov. 26, 1901. *

(1) (1869) 3 B. L. R. (O. C.) 18, 47.

(2) (1881) I. L. R. 8 Cal. 332; L. R. 9 I. A. 1.