

ORIGINAL CIVIL.

Before Mr. Justice Chitty.

KRISTODHONE MITTER

v.

NANDARANI DASSEE.*

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June 4.

Easement—Release—Non-user—Extinguishment—Transfer—Dominant and servient owner—Alienation—Civil Procedure Code (Act XIV of 1882) s. 276.

An easement can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner, and, if expressly released, it would amount to an alienation.

The transfer of an easement is an alienation within the meaning of s. 276 of the Code.

Mere non-user is not an implied release of an easement.

THIS was a suit instituted by the plaintiff Krishna Dhone Mitter for a declaration that he was entitled to the access of light and air to certain premises, and that an easement had not been affected in any way by the blocking up of certain windows by the defendant Sreemutty Nandarani Dasi and one Sreemutty Chundra Moni Dassee, and further that he was entitled to a perpetual injunction.

The facts were briefly as follows.

The premises No. 12 Juggernath Soorie's Lane in the Northern Division of the town of Calcutta, which belonged to one Sreemutty Chundra Moni Dassee, were on the 12th September 1905 attached and seized by the Sheriff of Calcutta in execution of a decree of the High Court passed on the 30th November, 1904.

Thereafter the premises were sold by the Sheriff of Calcutta on the 14th December, 1906 and purchased by the plaintiff Krishna Dhone Mitter, who obtained possession, after confirmation of sale and issue of a sale certificate, on the 20th March, 1907. The plaintiff's case was that at the time the premises

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were attached, viz., the 12th September, 1905, and for a period extending over twenty years previous to that date, there were four windows on the southern wall of the premises, and access and use of light and air to and for the premises through those windows had been peaceably enjoyed as an easement without interruption for more than twenty years ending about the 31st October 1906; that the defendant with full knowledge of the attachment and acting in collusion with Chundra Moni Dassee with the object of defrauding the auction purchaser of the premises induced Chundra Moni Dassee to take out the wood frames of the windows and close them with brick and mortar and plaster; this action on the part of the defendant did not in any way affect the right of easement of the plaintiff in respect of the four windows with regard to the passage of light and air through the premises. The plaintiff further alleged that the defendant wrongfully constructed a wall on the south side of the premises against the windows, and later on in April and May 1907 the defendant again wrongfully constructed another wall in the same line with and to the east of the windows, causing the walls to entirely block up the passage of light and air from the south to a portion of the premises, and, though the plaintiff repeatedly requested the defendant to remove the wall and obstruction, she refused to comply with his request.

The defendant in her written statement submitted that there was no cause of action disclosed in the plaint, and denied that the plaintiff was entitled to any easement or right to the admission of light or air from the premises through the four windows. She stated that none of the four windows were in existence on 31st October 1906, but such windows, as had formerly existed in the southern wall of premises No. 12 Juggernath Scorie's Lane, had been previously closed by Chundra Moni Dassee with the intention of renouncing, abandoning and relinquishing her right to an easement of those premises, and she denied the allegation of fraudulently colluding with Chundra Moni Dassee to take out the window frames as alleged by the plaintiff, she did not admit that the walls put up by her entirely blocked up the passage of light and air, and denied she was guilty of any wrongful conduct towards the plaintiff.

On these grounds she submitted that the suit should be dismissed with costs.

Mr. C. R. Das, (*Mr. A. N. Chaudhuri* and *Mr. N. Sircar* with him) for the plaintiff. Property sold to the purchaser at an auction sale passes all the interest at the time of attachment. The purchaser must claim through and under the attachment. *Debi Prasad v. Baldeo* (1), *Bijhawan Rai v. Mahmud Lal* (2), *Dinendronath Sannial v. Ram Kumar Ghose* (3), and ss. 276, 284, 286, 287, 312, 313, 316 of the Civil Procedure Code, referred to. An easement can be transferred. *Stokoe v. Singers* (4), *Anandlal Das v. Radha Mohan Shaw* (5).

Mr. B. L. Mitter (*Mr. S. R. Das* with him) for the defendant. Section 276 of the Code does not apply at all. There cannot be any alienation of an easement within the meaning of section 276 of the Code. Even if it were a good alienation, it would be void only as against the judgment-creditor. There could not be an alienation of an easement under section 6 of the Transfer of Property Act.

[*CHITTY J.* There could be an abandonment.]

Alienation under section 276 of the Code contemplates an alienation by two parties. *Abdul Rashid v. Gappo Lal* (6), *Khub Chand v. Kalian Das* (7), *Srinati Sukhimani Dasi v. Mahendranath Dutti* (8), *Sankaralinga Reddi v. Kandusami Tevan* (9).

A purchaser's interest only arises after sale of the property. The execution purchaser purchases only that which stood at the actual date of the sale. A license extinguishes an easement and, when executed, is irrecoverable. The leading authority is *Winter v. Brockwell* (10). See also *Davies v. Marshall* (11), *Liggins v. Inge* (12), *Gale on Easements* pp. 31, 519. The attachment prevents only alienation. A license given to a servient owner to do something on his own premises is not an act of alienation; also a license to a servient owner to construct an easement is not an

(1) (1895) I. L. R. 18 All. 123.

(2) (1892) I. L. R. 15 All. 112, 113.

(3) (1881) I. L. R. 7 Calc. 107, 118.

(4) (1857) 8 E. & B. 31.

(5) (1868) 2 B. L. R. F. B. 49.

(6) (1898) I. L. R. 20 All. 421, 423.

(7) (1876) I. L. R. 1 All. 240.

(8) (1869) 4 B. L. R. P. C. 16.

(9) (1907) I. L. R. 30 Mad. 413.

(10) (1807) 8 East. 308, 309.

(11) (1861) 10 C. B. N. S. 697.

(12) (1831) 7 Bing. 652.

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alienation. There must be a transfer. An easement apart from the dominant tenement cannot be the object of an alienation. Under section 276 of the Code only such acts as amount to an alienation are void. If the owner abandons a privilege attached to the property that is certainly not an alienation. I submit the purchaser has no cause of action against me, inasmuch as he purchased the property with the doors closed up.

CHITTY J. This is a suit for an injunction and in the alternative damages for the infringement of the plaintiff's right to light and air to the south side of his premises. The plaintiff purchased these premises at an auction sale, when the premises were sold by the Sheriff of Calcutta on the 14th December, 1906. The sale was confirmed by an order of this Court dated the 29th January 1907 and a sale certificate was issued on the 1st March 1907. It appears that the premises had belonged to one S. M. Chandramoni Dasse and they were attached in execution of a decree against her on the 12th September 1905. During the attachment and prior to the sale the plaintiff alleges that Chandramoni Dasse closed up four windows on the south of her premises with bricks and mortar, thus closing the apertures, which the plaintiff alleges were ancient lights. Whether Chandramoni Dasse did this for a consideration, *i.e.*, whether she relinquished the easement in favour of the defendant for money value or whether she closed the apertures of her own free will to suit her own purposes is a question of fact, which may have to be tried.

The defendant, however, has raised the question by way of demurrer that the plaintiff has no cause of action, inasmuch as he purchased the property with the windows closed and cannot therefore insist upon any rights, which the judgment-debtor Chandramoni Dasse may have previously possessed. The question has been argued, whether the act of Chandramoni Dasse in closing the openings was an alienation within the meaning of section 276 of the Civil Procedure Code and so void against the purchaser, who has a claim enforceable under the attachment. I have some doubt as to whether it can be said to be such an alienation, but if it is not, I do not see how I can prevent the

plaintiff from asserting a claim to any right of light and air, which Chandramoni Dassee originally possessed. If it was not an alienation, the mere blocking up of apertures would not necessarily amount to an abandonment of her rights. That is a question of fact, which I must try. I think therefore that so far as the demurrer is concerned the case must proceed. I will first try the question of the plaintiff's right to the access of light and air to this house on its southern side.

The question of damages can stand over till that point is decided.

(After taking evidence the following judgment was delivered.)
The remarks, which I made yesterday, in disposing of the demurrer must be taken as part of my present judgment.

The facts of the case have now been gone into. On those facts it is proved beyond any doubt that the four apertures in question are ancient lights. The plaintiff has put forward the story that these apertures were closed by arrangement between the sons of Chandra Moni Dassee and the defendant, who paid Rs. 10 to each of them for that privilege, and then himself by his masons closed the windows with bricks and mortar and subsequently built the wall against the south wall of the attached premises, of which the plaintiff now complains.

The defendant's story on the other hand is that he had nothing whatever to do with the sons of Chandra Moni Dasse; that they blocked up the windows of their own free will, and that he subsequently built his wall against Chandra Moni Dasse's house. It is admitted by his counsel that this wall was built solely by way of precaution to prevent the acquisition of any easement in the future. On these facts and having regard to the details of the story told, it appears to me that the defendant is on the horns of a dilemma. If we take his own case it is clear from the evidence of Kader Nath and Asutosh that these openings were blocked not in order to exclude the light and air, but because the window frames and bars had become so dilapidated as to be dangerous. There was a fear it was said of children falling out or of thieves effecting an entrance. When asked whether there was any intention of reopening the apertures Kedar Nath distinctly replied not at that time. Mere non user of easement

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is not an implied release of it and I could not therefore upon that evidence come to the conclusion that there was any intention on the part of Chandra Moni Dassee and her sons to abandon the right, which they undoubtedly possessed. If that be the case, the transfer of the dominant tenement to the plaintiff would carry with it the easement, which was then existing, but which by the closing of the apertures might be in suspense. The other point of view is that of a definite arrangement between the defendant and Chandra Moni's sons, principally Kedar Nath, and I feel bound to say that in my opinion this is probably the truth of the case.

The reason given by Kedar Nath for blocking the windows is so puerile that it can hardly be accepted. These are south windows and must be of extreme importance to the rooms, which they light and to block them up with bricks and mortar, because the frames and bars are out of repair, seems to me absurd. If there was this arrangement between the defendant and Kedar Nath it is difficult to see how the defendant can rely upon it, when he expressly denies it. But taking it to be the case, does it put him in any better position? A good deal has been said about the transfer of an easement and that it cannot be regarded as an alienation within the meaning of section 276 of the Code of Civil Procedure. I expressed yesterday some doubt on that point, but on further consideration I am inclined to think that it must be so regarded. An easement of light and air falls within the definition of immoveable property and it is a very important appanage of the property in this case, which was under attachment. An easement can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner, and, if it was so expressly released, it would in my opinion be an alienation of a portion of the property attached. It would certainly have the effect of materially diminishing the value, if the easement was, as in this case, an important one. Mr. Mitter attempted to argue that the construction of the defendant's wall by leave of Chandra Moni or her sons would amount to a license, which would have the effect of extinguishing the easement. I do not think that this is a correct way to look at it. In my opinion it was either an express relinquishment

or nothing at all. As to whether the release was carried out in proper form or not, whether there should have been a deed, is not a matter of any importance. If it was not properly carried out, it might be for that reason invalid. If it had been properly and formally effected it would, I think, be void under the provisions of section 276. As to the relief to be granted to the plaintiff there can be no doubt whatever. I have no particular sympathy for the plaintiff, who must be taken to have purchased this property with his eyes open and possibly by reason of this alteration in the south wall to have procured it at a lesser price than he might otherwise have done. That however cannot interfere with his demand for his rights, if he has any. In my opinion he has the right to have this wall, which is admittedly a temporary structure, put up for a temporary purpose, (*i.e.*, to prevent the acquisition of rights in the future) removed so far as it covers the closed apertures. It was suggested that it was not a case for a mandatory injunction, but I cannot imagine any case in which a mandatory injunction would be more appropriate. To award damages would be simply to compel the plaintiff to sell his right to the defendant at a price to be named by the Court. I therefore pass a decree in favour of the plaintiff for a mandatory injunction in the usual form for removal of so much of the defendant's wall as has been built in four of the four apertures in the first floor of the south wall of the plaintiff's premises. The plaintiff must have his costs of this suit.

Attorney for the plaintiff: *Ghosh and Kar.*

Attorney for the defendant: *S. C. Bysack.*

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