

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Woodroffe.*

ABDUL HOSSAIN

v.

RAM CHARAN LAW.*

1911
May 10.

Footings—Trespass—Survey Map, evidentiary value of—Mandatory Injunction—Specific Relief Act (I of 1877) Chap. X.—Presumption.

The existence of footings to a wall, in the circumstances of the case, raised the presumption, that the land covering such footings belonged to the owner of the wall, to which they appertain.

Where a wall was constructed by the defendant on the land covering plaintiff's footings, and after its completion, a suit was brought by the plaintiff for trespass, the plaintiff not having been guilty of delay or acquiescence:—

Held, that the proper remedy was by way of mandatory injunction ordering the demolition of the defendant's wall.

APPEAL by the plaintiff, Mullah Abdul Hossain, from the judgment of Fletcher J.

The plaintiff was the owner of the premises No. 17, Ezra Street, in Calcutta, which he had purchased in 1904. These premises were bounded on the south in part by a passage, and in part by the premises No. 16, Ezra Street, belonging to the defendant. Some time in the month of December 1908, or in the month of February 1909, a wall 12ft. 8in. in length, 1ft. 1in. in width and 12ft. 5in. in height was erected by the defendant in the immediate proximity of the plaintiff's premises, and the point in dispute in the suit was whether this wall was or was not a trespass on the plaintiff's land.

The southern boundary wall of the plaintiff's building, which was an old one, had at its basis on the south a spreading course or footings of the width of 1ft. 1in. and it was on the land covering these footings that the defendant's wall was built. The lateral extension of the cornices of the plaintiff's

* Appeal from Original Civil, No. 42 of 1910, in Suit No. 490 of 1909.

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iff's house, corresponded precisely with the southern extension of the footings.

It was contended by the plaintiff, that the land occupied by the footings belonged to him, that the defendant's wall constituted a trespass, and that the stability of his building was prejudicially affected by the erection of the defendant's wall. The plaintiff instituted this action on the 15th May, 1910, praying for a declaration of his right to the land, for a mandatory injunction for the demolition of the defendant's wall and for damages.

The defendant denied that the land in dispute belonged to the plaintiff or that his wall constituted an encroachment and contended that "inasmuch as the Calcutta survey plan of 1887-93 made under the Calcutta Survey Act (I of 1887) showed that the plaintiff had no land beyond the outer face of the southern wall of his premises No. 17, Ezra Street, the suit was not maintainable as it was in effect a suit to set aside demarcation of boundaries made under the provisions of that Act." The defendant took the further plea that in any event the plaintiff's claim was time-barred inasmuch as the wall in dispute occupied the site of an ancient wall of his own which had existed there for more than thirty years. There was a considerable conflict of testimony on this point, evidence being produced on behalf of the plaintiff to the effect that the site of the present wall was previous to its erection occupied by a narrow drain.

The conveyance granted to the plaintiff on the purchase of No. 17, Ezra Street, showed the premises to be bounded as follows:—"On the north by No. 18, Ezra Street, on the south by narrow lane, on the east by the house and premises No. 16, Ezra Street, now or lately belonging to Roop Churn Chunder and on the west by Ezra Street." The Survey Plan of 1887-93 showed the plaintiff's premises to be bounded on the south partly by a public passage and partly by a covered in area belonging to the defendant's premises, but did not shew either the drain sworn to by the plaintiff or the ancient wall sworn to by the defendant.

The suit came on for hearing before Fletcher J. and on the 4th April, 1910, his Lordship dismissed the suit with costs. His Lordship came to the conclusion that there was nothing in the conveyance to shew that the plaintiff had any title to the land in question, and that the survey map shewed clearly that the plaintiff's premises did not extend beyond the south wall of his premises. On the question of footings his Lordship observed:—

“How does the plaintiff in these circumstances get any title to this piece of land? It is said, and it appears to be true, that the footings of the foundation of the plaintiff's south wall underneath the soil project over this piece or narrow strip of land, and there is or has been an underground drain there. That these footings do in fact project over this piece of land there can be little doubt. In my opinion that does not give the plaintiff a greater right to the land than he has acquired by adverse possession by putting his footings on the defendant's land. It is wholly wrong to presume in favour of a person who has put underground footings for his foundations that the whole of the surface of the land up to the Heavens and to the centre of the earth becomes his. By putting the footings of the foundation into the land of which he cannot show that he is the owner, he cannot become the owner of the surface above it. It is not a case where the plaintiff shows that he was the original owner he having built his foundations on his own land, *i.e.*, absolutely on that narrow strip of land.

What are the rights of the plaintiff? This house is of old structure dating back for many years. He has a right to maintain the footings of his foundation on that strip. He says he has the right to the use of the drain which is said to exist on this piece of land. I am not satisfied that the drain belongs to the plaintiff's premises. If it has been his I think that the probabilities are that he deliberately abandoned it many years ago when the Corporation of Calcutta introduced the system of main drainage in connection with these houses. One of the plans show that the passage extended to the east with connection to the plaintiff's house.

The evidence establishes that the only right the plaintiff has is to have maintained underneath, the footings of his foundation. Has that right been interfered with? It is said that the stability of the plaintiff's house has been threatened. The plaintiff's house is worth about Rs. 90,000. If there was any evidence on which one could rely that the stability of the plaintiff's house was jeopardised by the new wall by having additional weight on the footings, that would be a strong case to order the defendant to take down wholly or in part this wall so as not to endanger the plaintiff's structure. The expert evidence of Mr. Johnstone, however, really comes to nothing. He cannot say whether it has or is ever likely to endanger the plaintiff's structure. I do not believe that the erection of a small wall abutting on the plaintiff's

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iff's narrow wall added such additional weight to the foundation of the plaintiff's premises that it is likely to effect injuriously the stability of the plaintiff's house.

In my opinion no case has been made out, calling upon the Court to interfere. The plaintiff has failed to prove that he is the owner of the narrow strip of land on which the wall has been built. He has also failed to prove that the stability of the house has in any way been affected by the erection of the wall. The suit fails and must be dismissed with costs on scale No. 2."

From this judgment the plaintiff appealed.

Mr. Braunfeld (with him *Mr. Morison*), for the appellant. Every one builds his house on his own land and the main wall must necessarily be on the land of the owner. To whomsoever the wall belongs, to him belongs the land on which it stands. The footings are a part of the wall and, therefore, the land on which the footings are laid, belongs to the owner and the land above the footings must *a fortiori* belong to the owner. A presumption, therefore, in this case exists that the land both below and over the footings is the plaintiff's, and his possession and that of his predecessors and their enjoyment for a very long time are sufficient title in the plaintiff. The onus is on the defendant to disprove. He has not discharged that onus. There is only one case as to the question of footings and foundations: *Mayfair Property Co. v. Johnston* (1).

Mr. Mehta (with him *Mr. B. C. Mitter*), for the respondent. The survey map of 1887 shows that there is no opening between the plaintiff's wall and the defendant's. This is conclusive against the plaintiff and even if this be not so, the defendant has had his wall there flush with the plaintiff's wall for over 30 years, and therefore limitation bars the plaintiff's suit. It is true that there are some cases decided against the defendant's view, but here the survey map must be considered, as by that survey the boundary was settled.

Mr. Braunfeld, in the course of his reply, was stopped.

JENKINS C.J. The litigants in this suit are two neighbouring house-owners, the plaintiff being the owner of No. 17,

(1) [1894] 1 Ch. 508, 516.

Ezra Street, and the defendant of No. 16, Ezra Street, in the town of Calcutta, and the point in dispute is whether a wall which in December 1908 or February 1909 was erected by the defendant in the immediate proximity of the plaintiff's premises was or was not a wrongful encroachment entitling the plaintiff to relief in this Court.

The plaintiff alleges that the wall was built on his land, and that it therefore constituted a trespass. The defendant on the other hand denies this, and he goes on to plead that even if it was built on the plaintiff's land, still it occupied the site of an old wall of his on that land which had stood there for more than thirty years; and so, he says, any claim by way of trespass now fails.

The case came in the first instance before Mr. Justice Fletcher who decided in the defendant's favour, his view being that the plaintiff had failed to establish that the site of the wall as it now stands was the property of the plaintiff. On the second point he expressed no definite opinion.

We first then have to see how far the plaintiff has succeeded in establishing his title to this piece of land, apart from any possible subsequent encroachment. The southern wall of No. 17, Ezra Street, faces in part on a public lane and in part on a portion of the premises No. 16, Ezra Street. At the base of this wall there now exists, and there has existed ever since the wall was constructed, a spreading course or footings of the width of 13in. on the south side of the wall of No. 17. It is on these footings that the defendant's wall stands. Now, are these footings within the limits of the plaintiff's land? It is not suggested that the title-deeds in this case contain anything that is opposed to that view. The description of the parcels in the deed brought to our notice certainly does not negative the idea that these footings were built within the limits of the plaintiff's land. On the other hand, we have it that these footings have been there for a great length of time, and I think it is a fair presumption in the circumstances of the case to hold that they were not placed there wrongfully. I see no ground for pre-

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suming a trespass on the part of the plaintiff's predecessor when he constructed that wall. The inference that I would rather draw would be that when these footings were placed in the position that they now occupy, they were placed within the limits of the land belonging to the plaintiff's predecessor and now belonging to the plaintiff. This view I think receives some corroboration from the fact that the lateral extension of the cornices of this house towards the south corresponds precisely with the southern extension of these footings.

Before us, indeed, no serious attempt has been made to support this finding of the learned Judge, and I do not hesitate to come to the conclusion that the plaintiff has established that these footings are within the limit of his property. While the defendant has not sought to sustain his case on the ground which found favour with the learned Judge he has urged before us and has made it his principal point that the new wall of which complaint is now made in fact occupies the site of an old wall that stood there for more than thirty years. If that be so, obviously he would have a very good answer to the plaintiff's claim.

Now, how does the case stand as to that? The onus clearly rests on the defendant. Has he discharged that onus?

[After discussing the evidence his Lordship said:—]

These circumstances appear to me not merely to throw considerable doubt on the evidence of the defendant but convince me that the old wall of the porch was, as the plaintiff maintains, not flush with the wall of No. 17. Therefore the defendant's plea that his new wall occupies the site of the old wall fails. The just conclusion from this is that there has been an unlawful encroachment. Now, if that be so, there is a wrong in respect of which the plaintiff is entitled to a remedy. In the prayer of his claim he seeks a declaration, a mandatory injunction and damages. In the view, I take it is unnecessary to enter into the question of damages, but I think the plaintiff is entitled to a mandatory injunction, and in the circumstances it appears to me that that is his proper remedy. To begin with I do not think that there has been any delay or acquiescence

on the plaintiff's part. There is a conflict of evidence on this point as between Abdul Ali and Ram Charan Law, and of the two versions I prefer that of Abdul Ali. It is true that the wall has been completed or was completed before the suit was brought, still we are here concerned with trespass on the land of the plaintiff, a trespass not carried out as the result of long and continuous work but of work completed quietly and promptly: not only has a trespass been committed, but the trespass is one which still continues and will hereafter continue to be committed as long as the wall remains in its present site. That being so, I think the proper remedy is by way of mandatory injunction. The case appears to me to come clearly within the law as established in Chapter X of the Specific Relief Act, and I think that in accordance with what is provided in section 55 it will be right for us to compel the defendant to pull down so much of the wall as is an encroachment on the land of the plaintiff, that is to say so much of the wall as stands over the 13 inches to which the plaintiff has established his title in this suit. As I have said, there is no case for damages, but the plaintiff will get his costs both of the suit and the appeal from the defendant.

A month's time is allowed to pull down the wall, with liberty to apply if necessary.

WOODROFFE J. I agree.

Appeal allowed.

Attorneys for the appellant: *Bonnerjee & Bonnerjee.*

Attorney for the respondent: *R. C. Hazra.*

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