

Madan Gopal Bhatnagar

Vs

Smt. Jogya Devi and Others

Civil Appeal No. 642 of 1978

(V. R. Krishna Iyer, Jaswant Singh JJ)

13.03.1978

JUDGMENT

JASWANT SINGH, J. –

1. This appeal by special leave which is directed against the judgment and order dated November 17, 1976 of the High Court of Judicature at Allahabad in S.A. No. 886 of 1975, raise a very interesting question of law viz. whether a lessee of land taken by him for building a house can for his own benefit acquire an easement of way or of flow of water over other land of his lessor. Though this question seems to have arisen a number of times in different High Court of India, it is a question of first impression so far as this Court is concerned as it was left open in Chapsibhai Dhanjibhai Danad v. Purushottam ((1971) 2 SCC 205 : 1971 Supp SCR 335 : AIR 1971 SC 1878).
2. For a proper determination of this question, it is necessary to refer a few provisions of the Indian Easements Act, 1882 (6 of 1882) (hereinafter called 'the Act').
3. Section 4 of the Act defines 'easement' as '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, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own'.
4. Section 12 of the Act specified the persons who can acquire easements and provides that an easement can be acquired by the owner of an immovable property or, on his behalf, by any person in occupation of the same.
5. Section 15 of the Act deals with the method of acquiring easements.
6. The words "owner ... or on his behalf by any person in occupation of the same" occurring in the aforementioned Section 12 of the Act are very significant. They no doubt indicate that it is the owner of an immovable property or a person in occupation of such property who can acquire an easement but it is to be noted that the person in possession of immovable property like a lessee or a mortgagee who is not an owner thereof cannot acquire easement for his own benefits as in that event he would be violating the provisions of Section 12 which clearly interdicts the acquisition of an easement by a lessee or a mortgagee for his own benefit. As in the instant case, the appellant was not an owner but only a lessee of the immovable property at the time he is alleged to have commenced using the adjacent land belonging to his landlord as a passage or as a means for a discharging waste water, he cannot tack the period during which he was using the way or discharging the water on the other land of his landlord during the period of the lease to the period

starting from the point when he commenced doing so as an owner. He could, of course, have started prescribing for such easement from February 18, 1970 when he purchased the right of reversion from his lessor. He cannot tack on the period of his prior enjoyment as lessee to the period of enjoyment since 1970 when he purchased the right of reversion and became the absolute owner. This conclusion receives support from a number of decisions of the Indian High Court. In *Udit Singh v. Kashi Ram* (ILR (1892) 14 All 185 : (1892) 12 All WN 38 (FB)), a Full Bench of five Judges of Allahabad High Court held that a tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as a tenant over the other land belonging to his landlord. The following observations made by Edge, C.J. in that decision are worth quoting :

I should point out that the tenant does not allege that his holding had at the time it was let to him the right of way in question as appurtenant to it, nor does he allege that the landlords granted any such right of way as appurtenant to the holding, nor against does he allege that the way claimed was what is known in law as a way of necessity : he merely alleges that he as the tenant in the occupation of his holding had by user obtained a right of way against his landlords, over their adjoining land. In my opinion it is contrary to common sense that any such right as is here alleged could possibly have been acquired. Such right could only have been acquired, it at all, in respect of the holding occupied by the plaintiff. That holding is the landlords' holding and they, the landlords, are in possession of it through their tenant the plaintiff. The plaintiff is not an owner claiming a right in respect of a dominant tenement over another servient tenement : he is not claiming this right for or on behalf of his landlords : but he is claiming it adversely to them, although for and on behalf of their own property. The law, as conceive it to be, was very concisely put and illustrated by Lord Cairns in his judgment in *Gayford v. Moffatt* (LR (1868) 4 Ch A 133 : 33 JP 212 (LC)). That was a case in which a tenant was claiming a right of easement over his landlord's property as a right acquired by the tenants not granted by the landlord. Lord Cairns said - "But, it is not necessary to examine the user, for this reason, that if there is a person to whom the owner of two closes has demised one of them, and if in order to get at that one there is a necessity to cross the other close which was not demised, and if, in the course of years, from the circumstance that the landlord had no particular occasion to use the close for any other purpose, or that he was not strict in obliging his tenant to adhere strictly to the way, he had allowed the tenant for his convenience occasionally to make deposits of this kind on other parts of the close, still it is utterly impossible that by such a course of proceeding the tenant as against his landlord could acquire any easement whatever."

7. In *Jeenab Ali v. Allabuddin* (1 Cal WN 151), it was held that a tenant is always a tenant and never an owner of the land; he always derives his rights from the lessor; and as the latter cannot have the right of enjoyment of an easement as against himself, so neither can his tenant against him. To the similar effect is the decision of the Madras High Court in *Basawanguid Narayan Kamthy v. Lamgoppa Shetti* (38 Mad LJ 28 : 26 Mad LT 439 : 54 IC 943 : 11 LW 34), where it was pointed out that an easement by prescription, as stated in Section 12 of the Act, could only be acquired by persons who have been owners of immovable property and not mere lessees; and that if a lessee by his user acquires any easement over another's land, he acquires it for the benefit of the tenement he is holding; and as that holding belongs to his landlord, the benefit will go to the latter.

8. In *Abdul Rashid v. Braham Saran* (AIR 1938 All 293 : ILR 1938 All 538 : 175 IC 241 : 1938 All

LJ 436), relying on the observations of Lord Cairns in *Gayford v. Moffatt* (LR (1868) 4 Ch A 133 : 33 JP 212 (LC)), to the effect that it would be inequitable for a lessee to prescribe against the landlord as regards the acquisition of a right of way or any other easement, it was held by a Full Bench of the Allahabad High Court that a lessee of the land which he has taken for building purpose is not in the position of an owner of immovable property under Section 12 of the Act for the purpose of a right of way and hence such person cannot acquire the right of way or easement over other land owned by his lessor.

9. In *Doma Matadin v. Ragho Rama Bhoyar* (ILR 1947 Nag 254 : 1947 Nag LJ 18 : 229 IC 544), it was held that no easement by prescription can be acquired by a tenant against his landlord.

10. Again in *Girdhar Singh v. Gokul* (1975 Raj LW 299 : ILR (1975) 25 Raj 837 : AIR 1976 Raj 10), it was held that a tenant cannot acquire a prescriptive right of easement in land or well belonged to the landlord.

11. In view of the foregoing, we have no hesitation in holding that the High Court was right in disallowing the claims of the appellant and restoring the decision of the trial Court in reversal of the decision of the lower appellate Court. We must, however, make it plain that we say nothing in respect of a tenant's right of acquisition of easement of light and air or support for the building erected by him on the leasehold, as we are not concerned with the same in the present case. We would also like to add that it quite often happens that in many States, land reforms measures confer the substantial part of the ownership on tenants leaving only the husk of landlordism in the landlord himself. In such a situation, the question may well arise whether the principle of acquisition of easements by the tenant who is the substantial owner, is permissible or not over landlord's other lands. This question need not engage us here because the appellant is not any such tenant. In the result, the appeal fails and is hereby dismissed but without any order as to costs.

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