BOMBAY HIGH COURT

Ambaram Popat Vankar

Vs

Budhalal Mahasukram Shah

(John Beaumont, Kt., C.J. Sen, J.)

JUDGMENT

Jonh Beaumont, C.J.

1. This is an appeal under the Letters Patent against an order made by Mr. Justice Wassoodew in second appeal, and it raises the question, whether under the Indian Easements Act a lessee can acquire a right to light over adjoining property which belongs to his landlord.

2. The plaintiff possessed a lease granted to him in 1905 of land on which he erected a building in 1906, which building had windows overlooking the adjoining land which belonged to the plaintiff's lessor, In 1920 there was a division of the freehold interest, the freehold of the land leased to the plaintiff going to the sons of the former owner, and the freehold of the alleged servient tenement, to his grandsons. In 1928 the plaintiff acquired the freehold of the property on which he held the lease, and in 1934 the defendant acquired the adjoining land, that is to say, the alleged servient tenement." This suit was filed in December, 1935. It is, therefore, clear that the plaintiff cannot prove twenty years' enjoyment of light and air through his windows without including part of the period before 1920, when the alleged servient tenement belonged to his landlord.

3. Now, under the common law, easements, whether of light or any other description, are acquired by prescription by the owner of the dominant tenement as against the owner of the servient tenement, that is to say by and against the freehold interest, Under Section 2 of the Prescription Act of 1832, which deals with easements, other than easements of light and air, the same rule holds good, and such easements can only be acquired by a freeholder against a freeholder. But it was held, as long ago as 1861 in *Frewen v. Philipps*[1] that on the language of Section 3 of the Prescription Act, a right to light could be acquired by prescription by a lessee even against his own landlord as the owner of the servient tenement. The decision met with some adverse criticism, but in *Morgan v. Fear*[2] the House of Lords said that the decision had been in existence too long to be overruled, though Lord Macnaghten observed that the only fault in the argument for the appellant against the decision in Frewen v. Philipps was that it came too late.

4. In India we have to deal with the matter under the Indian Easements Act, but I think we cannot approach the construction of the Act on the assumption that the English rule, which draws a distinction in this respect between easements of light and other easements, is one which the Indian Legislature would necessarily desire to follow. Section 4 defines an 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. There is no distinction in that definition between one form of easement and another. In the explanation it is provided that the expression "land" includes also things permanently attached to the earth. So that it includes the plaintiff's house which was permanently attached to the earth; but if the house had been separable from the land, it would not have been included in the definition of land. Then Section 12 directs that an easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or, on his behalf, by any person in possession of the same. That section seems to incorporate the English rule applicable to easements other than easements of light. It provides that an easement can be acquired by the owner, or on his behalf by a person in possession, and no distinction is drawn in that section between easements of light and other easements. The section which draws such a distinction is Section 15, which provides in the first paragraph that "where the access and use of light or air to and for any building halve been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years...", and in the third paragraph that "where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years," the right to such access and use of light or air, by or other easement shall be absolute. The first paragraph, no doubt, refers to buildings, because a right to light can only be acquired in respect of a building; there is no such easement known to the law as a right to light or air to an open space. But Section 15 deals with the method of acquiring easements, and not with the persons by whom they can be acquired, which is covered by Section 12, and it seems to me that there is no justification for drawing the distinction which has been created under English law, owing to the difference in phraseology between Section 2 and Section 3 of the Prescription Act. An easement of light, like any other easement, must be acquired, under Section 12, by the owner, or on his behalf, by the person in possession. Therefore, if the lessee acquires a right to light, he acquires it on behalf of the owner, which I think means the absolute owner, and he cannot acquire it on behalf of the owner as against such owner. A man cannot acquire an easement as against himself.

5. The learned Judge in second appeal held, however, that in the case of a right to light, the right was acquired by the owner of the house, and not by the owner of the land, and that as the plaintiff was the owner of the house built on the land in his lease, he acquired this right on behalf of himself as against his landlord who was not the owner of the house. The learned Judge based his

decision on a full bench case in the Allahabad High Court *Abdul Rashid v. Braham Saran*[3] That was a case dealing with a right of way, and had nothing to do with an easement of light. However, the Court did express the view that the English rule might apply in the case of easements of light, because the easement was acquired on behalf of the house and not on behalf of the land, and Mr. Justice Wassoodew followed that opinion. I must confess that I am wholly unable to agree with that view. I demur to the suggestion that a lessee who builds a house as a permanent structure on the land comprised in the lease becomes the owner of the house for more than the leasehold interest in the land. He may have a right to remove the house; and he may even be regarded as the owner of the materials of which the house is built. But that is the ownership of a chattel, and an easement cannot be annexed to a chattel. If the lessee becomes the absolute owner of a house built on the land leased, it would be necessary at the termination of the lease to convey the house, if not removed, by a registered document to the lessor. This of course is unnecessary as the house with the land reverts to the lessor. The doctrine that an easement of light can be acquired on behalf of a house, apart from the land, would lead to singular results. Supposing that a right to light is enjoyed for twenty years in respect of the windows of a leasehold house, and at the end of the lease the house is pulled down, what happens to the easement? If it was acquired on behalf of the house, presumably it would be destroyed on the destruction of the house. But I apprehend that in such a case there cannot be the slightest doubt that if the landlord, without any statutory interruption, built another house the windows of which were in the same position as the windows of the old house and enjoyed the same shaft of light, he would be entitled to a right to light for those windows. In my opinion the plaintiff did not before 1920 begin to acquire an easement of light over adjoining land belonging to his landlord and therefore his suit must fail. This was the view of the Assistant Judge in first appeal.

6. In my opinion, therefore, this appeal must be allowed, and the suit dismissed with costs throughout.

Sen J.

7. I agree.

Cases Referred.

1(1861) 11 C.B.N.S. 449
2[1907] A.C. 425
3[1938] All. 538, F.B