

(1961) 12 AHC CK 0008

Allahabad High Court

Case No: Second Appeal No. 987 of 1953

Ram Kishan

APPELLANT

Vs

Gaya Prasad and Another

RESPONDENT

Date of Decision: Dec. 1, 1961**Acts Referred:**

- Easements Act, 1882 - Section 8

Citation: AIR 1963 All 238**Hon'ble Judges:** S.S. Dhavan, J**Bench:** Single Bench**Advocate:** D.S. Choudhury, for the Appellant; S.S. Tewari and Satish Chandra, for the Respondent**Final Decision:** Dismissed

Judgement

S.S. Dhavan, J.

This is a plaintiff's second appeal against the decision of the Civil Judge of Etawah modifying the decree of the trial Court which had issued an injunction restraining the defendants from interfering with the plaintiff's right to discharge rain water as well as domestic water through his Parnalas on the defendants' land, and restricting it to rain water only. The defendants have filed a cross-objection that the plaintiff's suit should have been dismissed altogether. The facts are these. The houses of the parties are adjacent. It is common ground that the plaintiff has two parnalas through which water flows on to the defendants' roof (the plaintiff alleged that he has been discharging domestic water through these parnalas but this is denied by the defendants). The plaintiff alleged that he constructed one parnala in or about the year 1908 and the other in or about 1918. The house was owned by a man called Gubre who died, according to the plaintiff's own case, about 35 years prior to the suit -- that is, in or about 1914. After his death his widow Laxmi inherited the property and remained in possession till her death in 1938. It is also common ground that Laxmi had only a widow's estate in the house. After Laxmi's death her

daughter-in-law Rukmini, the widow of a pre-deceased son, continued to reside in the house. Some time in 1938 and 1945 -- the exact date is not known -- Rukmini purported to sell this house to a woman by the name of Kalawati. The defendants, who are the reversioners of Gubre, appeared to have asserted their right in an amicable manner by paying Kalawati the price which she had paid to Rukmini. This was done in 1945 when the defendants took possession of the house as Gubre's reversioners.

2. The plaintiff complained that the defendants had interfered with his right to discharge water through his parnalas on the defendants' roof. He contended that his right has become an easement by prescription and the defendants could not interfere with it. The defendants raised two pleas in the alternative. They denied that they had interfered with the flow of water at all, and alleged that they had only made some structural alterations in one of the parnalas which had become necessary for enabling them to raise a second storey on their own house, but the flow of water had been left undisturbed. They stated that they had not done anything to the second parnala and this fact was conceded before me in this appeal. Secondly, they pleaded that being reversioners they were not bound by any grant of rights made by the widow Laxmi nor by her conduct in allowing the plaintiff to acquire a prescriptive right against the property of which they are the reversioners.

3. The trial Court held that the plaintiff had a prescriptive right to discharge domestic as well as rain water through the two parnalas on the defendant's roof and granted an injunction to restrain the defendants from interfering with this right.

4. On appeal the learned Judge held that the plaintiffs had acquired no right to discharge water other than rain water and modified the injunction accordingly. The plaintiff has come to this Court in second appeal and the defendants have filed a cross-objection against the injunction issued against them by the appellate Court.

5. I have heard learned counsel for the parties at considerable length. To determine the rights of the plaintiff, if any, against the defendants it was necessary to scrutinise the plaint and written statement and I have read both with very great care. Mr. Satish Chandra, learned counsel for the defendant-respondents advanced one brief argument against the judgment of the appellate Court which to my mind is unanswerable. He pointed out that it was common ground that Gubre's widow had a limited estate under the Hindu Law. Her right to alienate the property was circumscribed by the law. That being so, her right to create an easement by law or by sufferance was correspondingly limited by Section 8 of the basements Act, That section provides that an easement may be imposed, by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed. Illustration (c) to this section runs thus:

"A, B and C are co-owners of certain land. A cannot, without the consent of B and C, Impose an easement on the land or on any part thereof."o2 `

As a result of Section 8, the power of the Hindu widow to create an easement by grant would be limited at the relevant time to the extent of her power to alienate the property. It is conceded that Laxmi could not alienate or transfer the house except for legal necessity. Therefore she could not create an easement by grant except for necessity. An easement by grant is a form of alienation as its effect is to take away a part of the bundle of rights of ownership and transfer them to the occupier of the dominant tenement.

The question is whether the plaintiff, even if he had acquired a prescriptive right, either by grant or sufferance, during Laxmi's life time, can assert it against the defendants who are the reversioners. The plaintiff Knew that Laxmi was the widow of Gubre and had acquired only a Widow's estate in the house. It is conceded that he took no steps either to obtain reversioners' confirmation of any grant made by Laxmi or to give them notice that they were asserting a prescriptive right against the house. It is doubtful whether this notice, even if it had been served on the reversioners, would affect their right to repudiate the easement after the reversion opens in their favour, but it is not necessary to consider this point as the plaintiff served no such notice. In these circumstances, any right acquired against Laxmi is not binding on the reversioners.

6. Laxmi died in 1938. The present suit was filed in 1948 -- 10 years after her death. It is conceded that during this period the plaintiff could not have acquired any prescriptive right against the defendants. Learned counsel contended that the plaintiff having purchased the house from a transferee of Laxmi's daughter-in-law, cannot assert that that transferee had no right to create a grant in the plaintiff's favour. But it is not the plaintiff's case that he acquired any easement by grant from the transferee Kalawati or from Laxmi's daughter-in-law. He has alleged that the two parnalas were built in or about 1908 and 1918 respectively and that he had perfected his right during Laxmi's life time.

7. In this view of the matter, the cross-objection of the defendants must prevail and is allowed with costs throughout. The appeal must be dismissed with costs throughout. The net result is that the plaintiff's suit stands dismissed with costs throughout.