Privy Council Appeal No. 32 of 1953

Antonio Cassar Torreggiani - - - - - - - - *Appellant*

v.

Paolo and Emmanuele Pisani - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL, MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH OCTOBER, 1954

Present at the Hearing:

LORD MORTON OF HENRYTON
LORD COHEN
LORD KEITH OF AVONHOLM

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal, by leave of the Court of Appeal of Malta, from a judgment of that Court dated the 12th December, 1952, reversing a judgment of H.M. First Hall Civil Court of Malta dated the 31st October, 1951.

The facts are very fully stated in the judgments of the Courts in Malta, and may be summarised as follows.

On the 26th June, 1947, the respondents bought for £15,200 a piece of land (hereafter referred to as "the respondents' property") facing Church Wharf, Marsa, on which are the ruins of a row of warehouses, Nos. 25 to 38 inclusive Church Wharf, destroyed by enemy action in the recent war.

By a schedule of pre-emption and deposit dated the 26th June, 1948, the appellant claimed to exercise a right of pre-emption of the respondents' property. At the same time he deposited a sum of £15,964 5s. 0d. representing the purchase price plus interest to the date of filing the schedule of pre-emption. The appellant bases his claim upon sections 1508 (1), 1510 (1) (c) and 1512 (1) (b) and (2) of the Civil Code of Malta, which are as follows:—

> "S. 1508. (1) The right of pre-emption granted by law consists in the right of a person of assuming a sale made to another person, succeeding to all his rights and obligations.
>
> S. 1510. (1) The right of pre-emption is granted
> (c) to the owners of neighbouring tenements . . .
>
> S. 1512. (1) The right of pre-emption by reason of neighbourhood is only granted to the persons and in the order hereinafter mentioned
>
> (b) to the owner of a contiguous tenement enjoying an easement over the tenement sold.

(2) The easements mentioned in this section are those only which are created by the act of man or which consists in the right of way or watercourse."

There is no doubt that the appellant is "the owner of a contiguous tenement" within section 1512 (1) (b) and the only question argued on this appeal is whether, as such owner, he enjoyed "an easement created by the act of man" over the respondents' property at the time when they bought it. It is conceded that if he had a right of pre-emption, it was duly exercised, but the respondents say he had no such right, since he did not enjoy any such easement at any relevant time.

The tenement owned by the appellant (hereafter referred to as "the appellant's property") is shown on the plan which is the appellant's Exhibit E, and it lies immediately to the north-west of the respondents' property.

It consists of two fields, at a higher level than the respondents' property and certain buildings.

At this stage it is convenient to quote certain further portions of the Civil Code:—

"S. 440. (1) Tenements at a lower level are subject in regard to tenements at a higher level to receive such water and material as flow or fall naturally therefrom without the agency of man.

(2) It shall not be lawful for the owner of the lower tenement to do anything which may prevent such flow or fall.

(3) Nor shall it be lawful for the owner of the higher tenement to do anything whereby the easement of the lower tenement is rendered more burdensome.

S. 499. (1) In order to acquire an easement by prescription, possession for a period of not less than thirty years is necessary."

More than 30 years before the events already narrated the respondents' predecessors in title constructed a wall cutting off the respondents' property from the two adjoining fields which form part of the appellant's property. The wall is two feet thick and is supplied with a number of draining holes at higher ground-level, each being approximately one foot square. These holes lead to a conduit, left in the thickness of the wall, which descends vertically to a water channel (hereinafter called "the main channel") which runs the whole length of this wall on the respondents' side and which ultimately drains into the sea after traversing the site of one of the warehouses comprised in the respondents' property. Rainwater falling on the two fields flows by the force of gravity down to the said wall and through the draining holes.

The appellant's claim to the right of pre-emption, as finally formulated, was based upon three grounds:—

(i) The fact that rainwater, which had fallen on the roofs of certain warehouses belonging to the appellant, passed down through water-spouts into an adjoining yard and flowed from the yard into the main channel;

(ii) The existence of a flow of rainwater from the roofs of one of his warehouses into a ditch and thence into the main channel through one of the draining holes in the said wall; and

(iii) The existence of a flow of rainwater from his said two fields into the main channel through the draining holes and conduits in the wall already described.

The claim was upheld by the Civil Court but rejected by the Court of Appeal.

As to ground (i) it appears that from the year 1913 onwards the appellant was merely the tenant of the yard in question, the owner being a third party not before the Court and there was no evidence as to the

position before 1913. If there is a "dominant tenement" in respect of this particular flow of water, it would appear to be this yard, and the owner of it makes no claim. In these circumstances the Court of Appeal held that the appellant wholly failed to establish any ownership by prescription of an easement for the flow of water from the yard into the respondents' property.

As to ground (ii), the Court of Appeal held that the period of prescription could not commence to run until the said ditch had been dug by the appellant, and the evidence showed that the ditch was dug only some twenty-six years before the right of pre-emption was asserted.

Their Lordships find the reasoning of the Court of Appeal on these two points unanswerable. Consequently they find it unnecessary to consider the further question dealt with by the Court of Appeal as to the "visibility" of the ditch.

The greater part of the argument in regard to ground (iii) was directed to the respective contentions of the parties as to the ownership of the two-foot wall. For the appellant it was contended that the present case comes within section 447 (1) of the Civil Code, since there is a courtyard on one side of the wall and a field on the other side; the wall in question must therefore be presumed to belong in common to both adjoining owners. For the respondents it was contended that section 447 does not apply to the present case; that there is a building on one side of the wall and a field on the other and the case comes within section 446 (3) of the Civil Code. Alternatively, the respondents argued that neither section applies to the present case and that the circumstances are such as to raise a presumption, in the absence of any express provision of the Civil Code, that the wall in question was built on the respondents' property and belongs to them. In construing the subsections relied upon it is necessary to have regard to the wording of sections 444 to 447 as a whole. They are as follows:—

"444. A wall which serves to separate two buildings or a building from a tenement of a different nature, must have a thickness of two feet and six inches.

445. A party wall between two court-yards, gardens, or fields, may be built of loose stones, but must be—

(*a*) twelve feet high, if it is between two court-yards, or between two gardens in which there are chiefly oranges or lemon trees;

(*b*) eight feet high, if it is between two gardens in which there are chiefly trees other than those mentioned above; and

(*c*) five feet high, if it is between two fields.

446. (1) In the absence of a mark or other proof to the contrary, a wall which serves to separate two buildings is presumed to be common up to the top, and where such buildings have not the same height, up to six feet from the point at which the difference in height begins.

(2) The part of the wall above six feet from the height of the lower building, is presumed to belong to the owner of the higher building.

(3) Where there is a building on one side, and a court-yard, garden or field on the other side, the wall is presumed to belong entirely to the owner of the building.

447. (1) A dividing wall between court-yards, gardens, or fields, shall also be presumed to be common, in the absence of a mark or other proof to the contrary.

(2) Where the wall separates court-yards, gardens or fields, placed the one at a higher level than the other, the part of the wall which, having regard to the lower tenement exceeds the height respectively prescribed in section 445 is presumed to belong to the owner of the higher tenement."

Their Lordships think it is clear that section 445 refers only to three cases, namely where the wall is between (1) two court-yards or (2) two gardens or (3) two fields. They cannot read that section as applying to a case where a wall is between a courtyard and a field. In their opinion section 447 should be read in the same way. The two sections are closely linked, section 445 dealing with the construction of walls and section 447 with the ownership of walls and they should both be read as referring to the same sets of circumstances. It is true that on this construction of the sections they do not cover all possible circumstances, but if there is a *casus omissus* it must be dealt with by legislation and not by giving to the words a meaning which they do not naturally bear. It may be that the omission is intentional, though the reason for it is not immediately apparent.

The respondents' contention raises a question of some difficulty. On one side of the wall there is a field. On the other side one finds both a courtyard and a building, the courtyard being immediately under the wall and the building rising on the far side of the courtyard and forming part of the same premises as the courtyard. In these circumstances, is it right to say that there is a building on one side and a field on the other, so that the case falls directly within section 446 (3); or is it right to say that there is a field on one side and a courtyard on the other, in which case neither section 446 nor section 447 applies, having regard to the view already expressed by their Lordships as to the construction of section 447. Their Lordships are inclined to think that the present case does not fall within section 446 (3) but they find it unnecessary to decide the point. They are satisfied that even if it be assumed, against the respondents' contention, that section 446 (3) does not apply, the respondents' alternative argument, already stated, must prevail. There being, *ex hypothesi*, no presumption arising under the Civil Code, the Court must look to all the circumstances of the case. The respondents' predecessors carried out quite an elaborate system of works to control the flow of surface water. They erected the two-foot wall, and made the draining holes, the conduit in the wall, and the main channel. Further, they bonded the foundations of the warehouses with the wall, as appears from the Procés Verbal *in situ* recorded by the Deputy Registrar, and their Lordships agree with the Civil Court's observation that " having regard to the manner of its construction, it is to be presumed that defendants' predecessors-in-title built that wall at the same time they built the warehouses ". Their Lordships think that, even on the assumption that the respondents cannot rely on section 446 (3) of the Code, the natural and proper presumption is that their predecessors carried out this elaborate system of works on their own land and not partly on their own land and partly on their neighbour's land.

It is true that the two-foot wall is sometimes referred to in the Record as a " party wall ", but their Lordships cannot read this phrase as amounting, at any point, to an expression of opinion that the wall was in common ownership. They think the phrase was merely used as indicating a wall separating adjacent tenements, and counsel for the appellant very properly did not seek to rely upon its use.

For the reasons stated, their Lordships are of opinion that the two-foot wall should be presumed to have been erected wholly on the respondents' land. It would appear that the Court of Appeal must have taken the same view, from the passage shortly to be quoted from its judgment, but there is no express statement to this effect. On the footing that the wall was so erected, is the appellant entitled to an " easement created by the act of man " in respect of the surface water flowing from the two fields through the drainage system created by the respondents' predecessors-in-title? On the footing just stated, their Lordships are of opinion that this question must be answered in the negative. All that happens is that the owner of the lower tenement receives such water as " flows or falls naturally from the higher tenement without the agency of man "—see

section 440 (1) of the Civil Code—and regulates the flow of such water on his own land. Their Lordships accept and adopt the following passage from the judgment of the Court of Appeal:—

> " It is a settled principle in jurisprudence, and indeed one dictated by common sense, that the test to apply is to see whether the water *reaches the servient tenement as the result of natural gravitation, or whether it reaches the servient tenement artificially, in such a way that, naturally, it would not reach that tenement.*
>
> In the present case, the fact that the water reaches the servient tenement following its natural course, and not with the help of any man-made contrivances, is ascertainable *ictu oculi* and has not even been challenged. Nevertheless, the Plaintiff maintains that the works carried out—draining-holes, conduits and drippers—have altered the nature of the easement and transformed what was a legal easement into an easement created by ' the act of man '.
>
> Now apart from the evidence, it is something that has been ascertained *in situ* that the works in question are not causing any alteration of the easement, but only *regulating the exercise,* in the sense, that is, that the water overflowing from Plaintiff's field is being collected in the channel of the servient tenement—by means of draining-holes, etc.—instead of being allowed to spread out throughout the warehouses."

It is not until the water has reached the north-western boundary of the lower tenement (i.e. the north-western face of the two-foot wall) by natural gravitation that its flow begins to be controlled and regulated by works erected on the lower tenement. The owner of that tenement must not do anything which may prevent the flow or fall of the surface water through his tenement from the higher tenement—see section 440 (2) of the Civil Code—but it is not suggested that the works in question have this effect, and no authority was cited to their Lordships which suggests that there is any further limitation on the works which the owner of the lower tenement may erect on his own land, or that he alters the nature of the easement by carrying out such works.

Counsel for the appellant cited section 536 of the Italian Civil Code, which is very similar to section 440 of the Civil Code of Malta and quoted, among other authorities, the following passage from the case of *Colombelli* v. *Gandola* (Court of Cassation, Turin, 8th August, 1889):—

> " When water from the higher tenement is led to the lower tenement by means of works done by man, the flow of water cannot be regarded as a natural flow in terms of s. 536 of the Italian Civil Code."

This passage does not, however, assist the appellants, since the rainwater falling on the fields was not " led to " the respondents' property by works done by man, but reached that property simply by means of gravitation. The passage, and other authorities quoted, might have been of considerable assistance to the appellant's case if the works had been wholly or partly carried out on his property.

For these reasons, briefly stated because their Lordships find themselves so fully in agreement with the reasoning of the Court of Appeal, their Lordships are of opinion that the appellant has failed to prove that he was at any material time the owner of any " easement created by the act of man " over the respondents' property. They will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs of the appeal to this Board.

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In the Privy Council

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v.

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