

Hirachand Vs. Syed Basheeruddin

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Court : Karnataka

Decided On : May-30-1972

Reported in : AIR1973Kant151; AIR1973Mys151; (1972)2MysLJ281

Judge : B. Venkataswami, J.

Acts : [Easements Act, 1882](#) - Sections 1, 15 and 23

Appeal No. : Second Appeal No. 627 of 1969

Appellant : Hirachand

Respondent : Syed Basheeruddin

Advocate for Def. : V. Tarakaram, Adv.

Advocate for Pet/Ap. : V.S. Gunjal, Adv.

Disposition : Appeal dismissed

Judgement :

B. Venkataswami, J.

1. This Second Appeal is by the defendant in O. S. No. 93/1 of 1962 on the file of the Munsiff at Aland. It is directed against the judgment and decree, decreeing, the suit, made by the Civil Judge. Gulbarga, in R. A. No. 514 of 1964. That appeal had been preferred by the plaintiff against the judgment and decree of the Munsiff,

dismissing the suit.

2. The material facts, briefly stated, are as follows:-- The plaintiff sued for a declaration of his easementary right over a 'Sarband' belonging to the Government, It is his case that he has been using the 'Sarband' to walk up to his land for over 30 to 35 years and that the appellant herein obstructed such right of way by constructing an 'Ami' across it. The case of the appellant-defendant is that there was no such right and a declaration of such an easementary right cannot be granted in the absence of the Government as a party.

3. The trial Court, while holding that the plaintiff had established the alleged user for a period of 30 to 35 years, came to the conclusion that the suit would not be maintainable without impleading Government as a party. The suit was, therefore, dismissed. On appeal by the plaintiff, the lower appellate Court came to the conclusion that the 'Sarband' was not a Government property and, therefore, decreed the suit limiting such user to a mere footpath. As regards the finding that it was being used for over 30 to 35 years, it remained undisturbed. Aggrieved by the said decree, the defendant appeals.

4. On behalf of the appellant, two contentions were urged by Mr. V. S. Gunjal, the learned Counsel. They are:

(1) That so long as the 'Sarband' is Government property, the suit should have been filed against the Government to establish the easementary right of way;

(2) that the Indian Easements Act not having been extended to the Hyderabad area, the plaintiff's only remedy was to establish the right as a customary easement, which has neither been pleaded nor proved by any evidence.

5. I am not persuaded to accept either of the above contentions of Sri Gunjal. Taking the second contention first it is not in dispute that the Basements Act had not been extended to Hyderabad, nor that it was in force in the erstwhile State of Hyderabad. But on behalf of the respondent, it is contended that the principles of the Easements Act would nevertheless apply, so long as they are in consonance with the principles of justice, equity and good conscience. I am in agreement with

this contention.

6. In *Kunjammal v. Rathnam Pillai*. (AIR 1922 Mad 5). it had been contended that there cannot be a right of way through a dwelling house and such a right cannot be claimed pursuant to Section 15 of the Easements Act. In other words. Section 15 of the Easements Act would not be attracted to the case. Their Lordships after adverting to a decision of the Privy Council in *Rajrup Koer v. Abdul Hussain*, (1879) 7 Ind App 240 (PC), held that though Section 15 of the Easements Act deals with requisites necessary to acquire a right under the Act, other titles and modes of acquiring easements are not excluded or interfered with. But it is pointed out by Sri Gunzal that this case was not in point, as what we are concerned with in the present case is the acquisition of a right of way which would well have been within the scope of Section 15. had the Act been in force in the territory in question. I am in agreement with this submission and the case therefore, would not support the contention urged and no assistance can be derived from it by the respondent.

7. But the case of *Numia Mal v. Maha Dev.* . cited on behalf of the respondent, seems to me to be on the point. The Court therein was directly concerned with a proposition that the Courts while dealing with easements in an area to which the Easements Act had not been extended, must take their law from what is extant in England and should not borrow the principles from the Indian Easements Act. This is what Tekchand, J. observes in para 17 of the said report:

'.....There is an imposing array of authority for the view that in those parts of the country where Indian Easements Act is not in operation, there is no reason why the principles underlying the provisions of the Indian Easements Act. should not be followed in so far as they embody the rules of equity, justice and good conscience. Where the provisions of the Act coincide with the equitable principles, the Indian Easements Act will equally serve as a safe guide and as the measure and standard of such principles.

Of course, where the Act does not rest upon those principles, reference to the rules of English Common Law will be legitimate. One reason for seeking guidance from the Indian Act is. that the provisions of this Act are more suited to Indian

requirements then the rules of English Common Law. In the undermentioned cases the principles underlying the Indian Easements Act were held applicable to areas Where the Act was not in force

The principles underlying the above enunciation, with which I am in respectful agreement, would, in my opinion, be applicable to the facts of the present case. Hence the contention that the respondent should have pleaded and proved a customary easement of right of way, has to fail.

8. Before advertng to the only remaining contention, it would be necessary to refer to one other aspect of the case. It may be recalled that the trial Court has held that the respondent had exercised the right of way claimed for over 30 to 35 years over the 'Sarband' belonging to the Government. But the lower appellate Court, while upholding the finding regarding the period of user, came to a contrary conclusion regarding ownership of such 'Sarband'. Ordinarily, in the absence of any other circumstance, such long user would give rise to a presumption that such user has been one of right. In the circumstances, the right is one which can be said to have been perfected, irrespective of the fact that the servient owner of the 'Sarband' is the Government or an individual. The lower appellate Court, has come to the conclusion that the right had been perfected against an individual servient. owner, whoever he might be. In view of this conclusion, the suit has been decreed. No argument was addressed on behalf of the appellant in regard to the said conclusion of the learned Civil Judge. This finding, therefore, must be taken to remain unassailed. Once this position is reached it is clear that this coupled with the conclusion reached by me in regard to. the second contention dealt with earlier, would in my opinion be sufficient to dismiss the appeal, as the first contention regarding the effect of of Government would not then survive. However, since the said point was debated upon at some length on behalf of both parties. I propose to consider it

9. The argument is that the respondent could claim relief of declaration of title to the easementary right only on the basis of the allegation in the plaint that the 'Sarband' in question belonged to the Government. That being so. no such declaration could be granted in the absence of Government as a party on record.

Hence the suit should be held as not maintainable. On behalf of the respondent this contention is sought to be met by a two-fold argument; (1) that a suit of the present nature would lie against a stranger obstructor of an easement right, even while such a right is still in process of being acquired and perfected. The position cannot be worse in the case of a perfected easementary right. In support of this contention the case cited is *Hajisa Imansa v. Kalyan Rao Anantha Rao*. (1960-38 Mys LJ 977) = (AIR 1961 Mys 86); (2) that a suit against a stranger obstructor for establishment of an easementary right would lie, without the servient owner being brought on record as a party. In support of this contention the case cited is: *Keduruddin Ahmed v. Asrafali*, : AIR1937 Cal355 .

10. In *Hajisa's* case (1960-38 Mys LJ 977) = (AIR 1961 Mys 86) it is true that the facts of the case seem to disclose that the Government was in fact the servient owner and had not been made a party. But the question that arose for consideration was whether a suit would be maintainable against a stranger obstructor in regard to an easementary right of drawing water through a channel, such right not having been perfected, but still being in the process of acquisition. The question whether or not a suit of that nature would be maintainable in the absence of the servient owner as a party to such a suit did not arise for consideration. Hence the decision is of no assistance to the respondent.

11. In *Keduruddin's* case : AIR1937 Cal355 the High Court at Calcutta had been directly concerned with a contention that whether or not in a suit against an obstructor of an easementary right, a servient owner would be a necessary party. In coming to the conclusion, that he would not be a necessary party, this is what B. K. Mukherjee, J. (as he then was) has said at page 358 of the above report:

'.....As regards the servientowners who are alleged to be left out, it is not suggested that any of them was a party to the act of obstruction complained of or was in any way resisting the plaintiff's claim for outlet of water or boat passage. Following the principle laid down in : AIR1924 Cal1050 I hold that the absence of these persons is in no way fatal to the plaintiff's suit

I am in respectful agreement with the above enunciation. It is also pertinent to mention that no decision was cited taking a contrary view. Hence the first

contention also fails.

12. In the result the appeal fails and is dismissed with costs. The cross-objections also fail and are dismissed, but without costs.

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