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Court : Allahabad

Decided On : Apr-03-1975

Reported in : AIR1976All417

Judge : T.S. Misra, J.

Acts : Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 - Rule 110B; Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 - Sections 117; [Easements Act, 1882](#) - Sections 12

Appeal No. : Second Appeal No. 361 of 1970

Appellant : Ranjit Singh and ors.

Respondent : Ram Nath Singh and ors.

Disposition : Appeal dismissed

Judgement :

T.S. Misra, J.

1. This appeal by the defendants 1 to 3 arises out of a suit for demolition of a wall and another construction raised by them on a piece of land commonly called Galiyara. The alleged constructions were made in such a way as to block the door of the plaintiffs fixed in their northern boundary wall and also the flow of drain water. The wall in dispute was said to have been constructed just adjacent to the

plaintiffs' boundary wall and that gave rise to the suit. The plaintiffs alleged that they had a right to egress and ingress through that door which had illegally been blocked by the defendants-appellants. They further alleged that they had a right to flow their drain water over the land in dispute on which the construction in dispute had been raised. The defendants resisted the suit on a variety of grounds. They pleaded, inter alia, that they had made constructions on their own land, that the defendants had not interfered with any easementary rights claimed by the plaintiffs, that the plaintiffs had, in fact, not acquired any easementary right and the suit was not maintainable in the absence of the State of Uttar Pradesh, as a defendant in the case. The trial Court having found that the defendants had made constructions on 'rasta' and blocked the plaintiffs' door without any right upheld the claim of the plaintiffs for demolition of the wall which, according to the trial court, had been raised by the defendants illegally and without any justification. The suit was accordingly decreed. Against that decision an appeal was preferred by the defendants which too was dismissed. The appellate court below found that the plaintiffs' house had been constructed 17 or 18 years before the institution of the suit, that the plaintiffs had not acquired any easementary right of way or any right to flow his drain water over it by way of easement. It, however, found that the constructions in question had been made by the defendants on a Galiyara land over which the plaintiff had a right to pass through and, therefore, concurring with the trial court it held that the defendants had made encroachment on the Galiyara land which was liable to be removed. The appeal was, in these circumstances dismissed. Being aggrieved by that decision the defendants 1 to 3 have come up to this court in second appeal.

2. For the appellants it was urged at the outset that the suit, as framed, was not maintainable inasmuch as the plaintiffs have not impleaded the State of U.P. In support of this contention reliance was placed on the provisions of Rule 110-B of the U.P. Zamindari Abolition and Land Reforms Rules read with Section 117 of the U.P. Zamindari Abolition and Land Reforms Act, I find no merit in this contention, Rule 110-B requires the State Government to be made a party in suits by persons claiming the land or any of the things vested in a Gaon Sabha or local authority under Section 117 of the said Act. Section 117 provides that at any time after the publication of the notification referred to in Section 4, the State Government may,

by notification in the gazette, declare that as from a date to be specified in this behalf, all or any of the following things, namely, tanks, ponds private ferries, water channels, pathways and abadi sites which had vested in the State under this Act shall vest in the Gaon Sabha or any other local authority established for the whole or part of the village in which the said things are situate. The Gaon Sabha was impleaded in the suit as a defendant but the State of U.P. was not impleaded. It was not disputed that the land had vested in the Gaon Sabha concerned under Section 117 of the Act. Rule 110-B would be attracted to those suits in which the plaintiff claimed the land or any of the things vested in the Gaon Sabha. In the instant case the plaintiffs had not made any claim in the land vested in the Gaon Sabha. The pathway, no doubt is vested in the Gaon Sabha but in the suit, which had given rise to this appeal, the plaintiff did not set up any claim in the land commonly called Galiyara. They, in fact, sought demolition of the wall and the other constructions which had been erected by the defendants on the pathway. Such a suit, in my view, was not the one contemplated by Clause (c) of Rule 110-B of the Rules. It was, however submitted that the plaintiffs had asserted that they had a right to pass through that pathway and to flow their drain water over it and this amounted to setting up a claim on the Galiyara land. This submission has no substance. As pointed out earlier the plaintiff had sought the removal of encroachment made by the defendants in the pathway. They had not put up any claim in the land constituting the pathway.

3. It was next urged that the lower appellate court had set up a new case for the plaintiffs and the defendants were thereby prejudiced in their defence. The submission in this behalf was that the plaintiffs had not come with, an assertion that the defendants had made an encroachment on the public pathway but had, in fact, filed the suit with the allegation that they had easementary right of passage and flowing drain water over the land in question, it was submitted that the lower appellate court having held that the plaintiffs had not acquired any easementary right as alleged should have dismissed the suit but instead of doing so it proceeded to decree the suit on the ground that the defendants had illegally raised constructions on the land constituting the pathway. This, it was urged, was a new case which the appellate court below should not have set up for decreeing the suit I find no substance in this submission. In the plaint it was alleged by the plaintiffs

that the constructions had been made on the 'Galiyara' land. The matter was further clarified by the plaintiffs in their replication. The defendants had also in para 12 of the written statement took an alternative plea that in case they are not found to be the owners of the land in dispute the land will belong to Gaon Sabha. Therefore, the defendants were not taken by surprise as is now being contended and were not prejudiced in their defence. Both the courts below found as a fact that the land over which the constructions in dispute were raised formed part of the Galiyara (pathway). This finding is a finding of fact based on evidence and is conclusive in second appeal.

4. It was then urged that in view of the provisions of Section 4 of the Specific Relief Act the plaintiffs were not entitled to maintain the suit inasmuch as specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law. Section 4 of the Specific Relief Act, in my view, is not attracted to the facts of the case. The plaintiffs had alleged that their house abutted on the pathway in question, and that they had a right of passage and also a right to flow water of their Nabdan over that land. Since the defendants had blocked the pathway by making illegal constructions thereon the plaintiffs filed the suit for the reliefs mentioned above. The suit, in these circumstances and with these allegations, was, in my view, maintainable.

5. It was next urged that no injunction should have been granted by the courts below in view of the provisions of Clauses (h) and (j) of Section 41 of the Specific Relief Act which provide that an injunction cannot be granted when equally efficacious relief can be obtained by any other usual mode of proceeding except in case of breach of trust or when the plaintiff has no personal interest in the matter. I have already pointed out above that the plaintiffs had personal interest in the matter and, therefore, Clause (j) of Section 41 would not be a bar to the reliefs sought for. The learned counsel for the appellants, however, submitted that proceedings under Section 133, Cr. P.C. were also initiated which ended in dismissal and, therefore, Sub-clause (h) of Section 41 would be an impediment for granting relief of injunction, Exhibit A-1, however, shows that the application moved under Section 133, Cr. P.C. was rejected on the ground, inter alia, that civil litigation between the parties with respect to the wall in question had already

commenced. That being so, the provisions of Sub-clause (h) of Section 41 would not be available to be invoked in the case.

6. The learned counsel for the appellants then urged that as it was not established that the pathway in question had been narrowed to such an extent as to destroy its user the plaintiffs had no right to have the wall and other constructions demolished and at any rate, the plaintiffs, who merely happened to reside in a house abutting on the public lane, could not sue for alleged encroachment in the alleged lane for no right of easement could be acquired over the public lane. In support of his contention he placed reliance on *Bahal Singh v. Mohammad Yusuf* : AIR1929 All504 and *Saghir Ahmad v. State of U.P.* : [1955]1SCR707 . It is correct that the right to use a public highway is not in the nature of an easement but the right to use the pathway is an incident of public right over it. As held in *Saghir Ahmad's* case (supra) once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over highway, the question is really immaterial whether he plies ,a vehicle for pleasure or pastime or for the purpose of trade and business. The plaintiffs in the instant case claimed in the plaint that their house abutted on the pathway in question and that their right to egress or ingress through their door fixed in the northern wall of their Ahata which opened towards the path-way and their right to flow water of their Nabdan were adversely affected and his access to the pathway was obstructed. These facts have been found to be correct by the Courts below. The plaintiffs being the owners of the house which adjoined the pathway had rights of passing through the same and flowing the water of their Nabdan which existed prior to the encroachment. The right of access to the pathway at all points where the house adjoins the pathway belongs to the owner of the house as also its occupiers and they can sue for removal of the obstruction interrupting that right. The fact that the plaintiffs had opened another door towards the east of their house or that they could have access to the pathway through some other entrance would not debar them from seeking demolition of the illegal constructions raised by the defendants on the pathway. They were definitely inconvenienced by these illegal constructions. Hence, it could be presumed that they had been put to special damage. At any rate, the constructions had been made in village pathway and the suit could, therefore, lie without proof of special damage and without

seeking aid of the provisions of Section 91, Code of Civil Procedure. Submissions of the learned counsel to the contrary are without merit and are, therefore, rejected.

7. There is no merit in this appeal, which is accordingly dismissed with costs.

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