

Mariam Bibi and ors. Vs. Pradeep Alias Pradipta Kishore Mohanty and ors.

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SooperKanoon Citation : sooperkanoon.com/535700

Court : Orissa

Decided On : Aug-06-2008

Reported in : 106(2008)CLT658

Judge : A.S. Naidu, J.

Appellant : Mariam Bibi and ors.

Respondent : Pradeep Alias Pradipta Kishore Mohanty and ors.

Disposition : Appeal dismissed

Judgement :

A.S. Naidu, J.

1. The Defendants in Title Suit No. 123/71 of 1991/1989 of the Court of then Munsif, 2nd Court, Cuttack have filed this Second Appeal against the confirming Judgment and decree dated 15-12-1993 and 23-12-1993 respectively passed by the Addl. District Judge, Cuttack in Title Appeal No. 48 of 1992.

2. Original Respondent Nos. 1 and 2 had filed the aforesaid Title Suit before the Munsif, 2nd Court, Cuttack praying for declaration that they had acquired right of easement by grant, prescription and by easement of necessity over the suit schedule land and for mandatory injunction for removal of obstruction existing on 'A' schedule property, and for permanent injunction restraining the Defendants

from obstructing their (Plaintiffs) right of easement over the said land.

3. According to the Plaintiffs, they had purchased 'B' schedule land from Defendant No. 3 Fakir Khan and Defendant No. 4 Mehrun Bibi on 23rd April, 1964 by a registered sale deed. On the same day. It was averred in the plaint, that an agreement had been executed among the vendors and vendees creating right of way on the land morefully described in 'A' schedule to the plaint bounded by letters 'M N O P' and since then they were in possession of the said land for egress and ingress between their land and public road.

They had also purchased schedule 'B' land from said Defendant Nos. 3 and 4 on 22nd November, 1965 by means of a registered sale deed. The only passage to the said land was also the same land bounded by M N O P in 'A' schedule. After purchasing the lands, they constructed their residential house and stayed there using the land bounded by M N O P as their passage as of right, continuously, uninterruptedly, peacefully and to the knowledge of all till 26-10-1988 when Defendant Nos.1 and 2 obstructed their passage by raising a stone wall thereon. Hence they filed the suit.

4. During pendency of the suit Defendant No. 1 died and his legal representatives were substituted in his place.

Defendants 2, 3 and 4 as well as Defendant Nos. 1(a), 1(f), 1(g) and 1(h) did not contest the suit and they were set ex parte.

Minor Defendant Nos.1 (j) and 1 (k) filed their written statement through their guardian admitting the case of the Plaintiffs.

Defendants 1(b) to 1(e) and 1(i) filed their respective written statements repudiating the plaint averments. According to them the suit was not maintainable for want of cause of action as also non-joinder and mis-joinder of parties and was barred by the law of limitation. They pleaded that Sabik Plot No. 1182 adjoined a public road. The father of Defendant No. 1 Golap Khan had purchased a portion of that plot by a registered sale deed dated 23-5-1945 and as there was no passage connecting that plot he had purchased 2 dec. of land from out of plot No. 2946

which adjoined plot No. 1182; and Ac. 0.10 dec. from plot No. 1182 by another registered sale deed dated 1-2-1946. Thus the passage connecting his land, appertaining to plot No. 1182 to public road was their private and the Plaintiffs had no right to use the same.

They further pleaded that Mehrun Bibi, Defendant No. 4 - vendor of the Plaintiffs having threatened to use the said land as her passage, Golap Khan (Defendant No. 1) had earlier filed T.S. No. 24 of 1962 against Mehrun Bibi and others in the very Court of the Munsif, 2nd Court, Cuttack. That suit was decreed and the right, title, interest and possession of Golap Khan Defendant No. 1 over the aforesaid passage were declared. In short, the stand of the contesting Defendants was that the suit was hit by the principles of res judicata and was liable to be dismissed.

5. On the basis of the pleadings of the parties the Trial Court framed eight issues to base its decision. The Plaintiffs got four witnesses examined and exhibited as many sixteen documents in their support. The contesting Defendants got two witnesses examined on their behalf. After discussing the evidence threadbare, both oral and documentary, the Trial Court came to the conclusion that the Plaintiffs had been using the land bounded by the letters MNOP in the sketch map attached to the plaint as their passage since 1965, i.e. for more than twenty years prior to filing of the suit. It also held that there was no other passage for the Plaintiffs excepting the suit land for approaching the municipal road running from Western side of their house and that with passage of time and by their continuous, uninterrupted, open and peaceful use of the land in question as their passage for egress and ingress they had acquired easementary right.

The Trial Court also held that only because the land in question had been recorded in the names of Defendant Nos. 1 and 2 in the record-of-rights, they could not be held to have valid title to that land, more so because revenue records neither create nor extinguish any title.

On the basis of such findings, the Trial Court held that the suit land was used by the Plaintiffs as their pathway and that the Defendants had no right to raise construction thereon obstructing the passage of the Plaintiffs and that the said construction being illegal that was to be removed. The Trial Court thus decreed the

suit with the declaration and injunction sought by the Plaintiffs mandatory

6. Being aggrieved by the Judgment and decree of the Trial Court as aforesaid, the Defendants preferred Title Appeal No. 48 of 1992 which was heard by the 1st Addl. District Judge, Cuttack. Relying on Ext. 11, the Judgment of the Munsif, 1st Court, Cuttack in T.S. No. 167 of 1964 and scrutinizing the facts and law, the Appellate Court held that there was no doubt that the passage in question which adjoined their land did not belong to the Plaintiffs and hence their claim for easement of necessity, prescription and use was maintainable. On the basis of such conclusion the Appellate Court held that the Plaintiff-Respondents had been using the disputed land bounded by aforesaid MNOP as their passage since 1964, i.e. more than twenty years before filing of the suit; and that the same was the only passage between their land and the municipal road and as such they had a right of easement over that land. The Appellate Court thus confirmed the Judgment and decree of the Trial Court and dismissed the Title Appeal.

7. Learned Counsel for the Appellants assailed the confirming Judgment mainly on the ground that due to availability of other lands, the Plaintiff cannot claim easementary right over the land which exclusively belonged to the Defendants; and that the finding as to the Plaintiffs' acquisition of easementary right by prescription is an error of the Courts below. According to him as the Plaintiffs claim ownership over the land in question simultaneously they cannot claim right of easement.

8. After hearing the Learned Counsel for the parties at length, perusing the Judgments of the Courts below as also pleadings and evidence, both oral and documentary, this Court finds that the Courts below rightly have come to the conclusions that the suit land is the only passage between the land of the Plaintiffs and the municipal road. Even otherwise such finding of the Courts below being purely on facts, the same cannot be interfered with in Second Appeal.

9. If the Plaintiff in a suit for a declaration of right of way establishes the terminal from which and to which the passage runs, he is entitled to have his right of passage declared. In consonance with Section 13 of the Indian Easements Act, where by a transfer, bequest or partition a single tenement is divided into distinct

and separate tenements and any of the separate tenements is so situated that it cannot be used at all without enjoying an easement over other such tenement (s), easement of necessity arise. It is an established proposition of law that mere fact that a servient and dominant tenement belongs to a common owner, does not give rise to an easement of necessity. It must be established that both the tenements had constituted a single unit and after the severance the situation of a dominant tenement is such that it could not be used at all without the easement is claimed in the suit over the servient tenement. In the case at hand, as would be evident from the sketch-map described in the schedule, the total area appertaining to Sabik plot No. 1182 has been transferred to different persons in parcels and the lands as per M N O P in the plaint as stated above is the only passage for egress and ingress.

10. Learned Counsel for the Appellants in support of his arguments takes the aid of a decision of the Supreme Court in the case of Chapsi Bhai v. Purushottam reported in AIR 1971 SC 1828, wherein it has been held that where a person has pleaded ownership and has failed, he cannot subsequently turn round and claim that right as an easement by prescription. The said decision is not applicable to the present case, inasmuch as the consistent case of the Plaintiffs is that they have purchased only the adjoining land and had been using the land in question as their passage. By adducing evidence the Plaintiffs have established their right of way on Defendants' land continuously, openly and peacefully without any interruption for more than twenty year.

11. The Trial Court as well as the Appellate Court, on analysis of evidence, have arrived at the finding that the Plaintiffs have right of way which was acquired by them by easement of necessity, prescription and usage and have rightly directed removal of obstruction created by the Defendants by constructing a stone wall. Such finding/direction calls for no interference. That apart, Ext. 11, the decree passed in an earlier Title Suit also supports the Plaintiffs' case.

12. Looking from any angle, this Court finds that the Judgments and decrees of the Courts below do not suffer from any infirmity or illegality and therefore dismisses the Second Appeal directing the parties to bear their own costs.

