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Court : Rajasthan

Decided On : Oct-28-1969

Reported in : 1969WLN554

Judge : C.M. Lodha, J.

Appeal No. : S.B. Civil Second Appeal No. 137 of 1966

Appellant : Bhooramal

Respondent : Govind Dev and ors.

Advocate for Pet/Ap. : Mr. Rastogi

Disposition : Appeal allowed

Judgement :

C.M. Lodha, J.

1. This is plaintiff's second appeal arising out of a suit for perpetual injunction instituted by them in the Court of Civil Judge, Neem-ka Thana on 14. 7. 1960 with a prayer that the defendants may be restrained from raising any construction on a piece of land lying contiguous to the plaintiff's house situated in the village Neem-ka-Thana.

2. It appears that the village Neem-ka-Thana was a Jagir village of Bhomiyas Baldeo Singh. Bhoor Singh, Than Singh, Sanwat Singh and Narain Singh, who agreed to sell the land in question which is a small piece of land measuring about 210 sq ft. lying between the public road and the house of the plaintiff for Rs. 50/- but did not execute a sale deed in the defendant Govind Deo's favour nor handed over the possession of the same to him. Consequently Govind Deo filed a suit for specific performance against the aforesaid Bhomiyas in the Court of Civil Judge, Neem-ka-Thana, which was registered as Civil Suit No. 207 of 1957 and obtained an exparte decree on 24.4.1958 against them for executing of the sale deed in the plaintiff's favour. It further appears that the Bhomiyas did not execute the sale deed as directed by the decree and consequently the sale deed was executed by the Court itself on behalf of the vendors on 30.1.1960, and was registered on 3.3.1960. A certified copy of the exparte decree has been placed on the record and marked Ex. A. 1 and so also a copy of the sale deed marked Ex. A. 2. After the registration of the sale deed the plaintiffs were put in possession of the land on 13. 7. 1960 by the officers of the court and a memorandum of handing over possession of the land was got prepared a copy of which has been placed on the record and marked Ex. A 3 Having thus perfected their title to the land in question, the defendants started collecting building material in order to raise construction on it and this gave rise to the plaintiffs suit the plaintiffs case was that this land constituted a part of the way 'Rasta Chouk', & the plaintiffs have been using this land as passage for more than 20 years and thus have acquired a right of easement in respect of this land 'Hakook Estfayda Hq Aasyees'. It was also stated that the water flowing through the plaintiffs' 'Nala' passes over this land. The plaintiff further alleged that their varandah abuts on this land and if the defendants are allowed to raise construction on it, the frontage of their house would be spoiled and they would also be deprived of free access to light and air which they have been receiving in their house ever since its construction. The plaintiffs also filed a plan along with the plaint & it has been marked Ex. A. 1 in which the disputed land has been shown with a boundary in red ink. The defendants denied the plaintiffs' right to get them restrained from raising a construction on the land in question and placed that out of many doors windows and apertures existing in the plaintiffs' house only one door opens on the land in question and therefore there would be

no diminution of light and air to the plaintiffs' house by their construction on the land in dispute. They pleaded that the plaintiffs' house had been existing for the last 14 to 15 years only and they had not acquired any right of easement for passage, light and air as pleaded by them.

3. After recording the evidence produced by the parties the learned Civil Judge held that the plaintiffs had failed to prove that their house had been existing for more than 20 years from before the date of the suit and in this view of the matter he repelled the plaintiffs' case of prescriptive easement with respect to the land in question. He also found that the land in question which had been sold to the defendants did not form part of the way and that the sale of this land to the defendants in pursuance of the decree of the court was valid. On these findings the learned Civil Judge dismissed the plaintiffs suit.

4. Dis-satisfied with the judgment and decree of the trial court the plaintiffs filed appeal in the Court of District Judge, Jhunjhunu but were unsuccessful and have consequently come to this Court in second appeal.

5. Mr. Rastogi, learned Counsel for the appellants has pressed the following points:

1. That the land in question is a part of the public way, and could not have been sold to the defendants to the detriment of the plaintiffs, who had a right to use this land as a passage.

2. That the defendants did not acquire a valid title to the land in question.

3. That the finding of the lower court that the plaintiffs had failed to prove continuous user of the land in question by them for passage was based on misreading of evidence.

6. I may take up the first point. learned Counsel for the appellants has urged that the plaintiffs had specifically pleaded in para No. 1 of the plaint that the land in question was a part of the public way, and that the defendants had not expressly denied this allegation in the written statement, and therefore, this allegation must be taken to be impliedly admitted by the defendants. He has further submitted that

the case had been argued from this point of view both before the trial court as well as the first appellate court. His contention is that the plaintiffs whose house is abutting on this land is entitled to access to the public road from all points on his boundary. It is argued that the defendants had admitted that one of the doors of the plaintiffs opens on the land in dispute, and consequently the plaintiffs' right of way over the land is fully established. On the other hand, learned Counsel for the respondents has challenged the right of the plaintiff-appellants to urge this point for the first time in second appeal on the ground that no such plea was taken in the plaint, nor any issue was struck nor the defendants had an opportunity to fight out the case on this ground. A large number of authorities have been cited by the learned Counsel for both the parties in support of their respective contentions.

7. In the *Official Liquidator v. Burjorjee* AIR 1932 PC 118 their Lordships quoted with approval the following observations from the judgment of Lord Watson in (1892) A.C.473:

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either?' admitted or proved beyond controversy, it is not only competent, but; expedient in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding new questions of fact in considering'; which the court of ultimate review placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the courts ought not in any case be allowed unless; the court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea.

8. In *District Board, Farrukhabad v. Prag Dutt and Ors.* AIR 1948 All. 382 it was observed that where the plea was raised before the lower appellate court' and was decided by it, it could be raised for the first time in the High Court also. The contention raised by the appellant in that case was based on the provisions of the Professions Tax Limitation Act, which was not raised before the trial court, but was raised before the lower appellate court and was allowed to be raised in the High

Court also.

9. In *Subhanno v. Kudappa* : [1965]2SCR661 Raghubar Dayal J. speaking on behalf of himself and Sikri J, observed that a pure question of law can be urged at any stage of the litigation even in the court of the last resort.

10. On the basis of the aforesaid rulings it has been argued by the learned Counsel for the appellant that even though no issue has been framed on the question whether the land in question forms part of the public way, it is amply established on the record that is so, and the question whether the defendant is entitled to construct on this land is a pure question of law. learned Counsel for the respondent, on the other hand, relied on *Trojan and Co. v. Nagappa* AIC 1953 SC 235, *Kedar Nath v. Prahlad Rai* AIR Bhanwarlal v. State , and *S.N. Mundade v. New Mofussil Co. Ltd.* AIR 1946 PC 97 in support of his contention that it is not open to a court to construct a new case for one of the parties in the second appeal which has not been pleaded by that party at any stage and to give a judgment on that basis.

11. In *S.N. Mundade v. New Mofussil Co. Ltd.* AIR 1946 PC 97 it was observed that where a plea in any form is not taken before the trial Court there is no trace of it in the pleadings of the party it is not the subject of an issue, the trial Court does not refer to the plea in its judgment, nor is any evidence led with regard to it, it is not open to the party to take such plea for the first time before the appellate Court. Similar observations are contained in the judgment of the their Lordships of the Supreme Court in *Trojan and Co. v. Nagappa* AIR1948 All. 382, wherein it has been said that it is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found.

12. The question, therefore, which arises for determination in the present case is whether the appellant's plea based on the public way never put forth at any stage, in the two lower courts and is being argued for the first time here in this Court and whether the defendants, case would be prejudiced by allowing this plea As I have already stated above it was pleaded by the plaintiff in para No. 1 of the plaint that the land in question constitutes part of the public way 'Jamin Rasta Chouk'. The

appellant's counsel is also correct in his submission that the defendants have I. nowhere denied in their written statement that the land in question is not 'Jamin Rasta Chouk' part of the public way though in para No. 1 they have said generally that the allegations contained in para No. 1 of the plaint are denied. learned Counsel for the appellant has strenuously urged that the omission on the part of the defendants to specifically deny this allegation must be construed as an implied admission and has placed reliance in this connection on *RimNath Ghand v. Phoolchand* ILR 1959 (9) Raj. 17, and has further urged that it was not necessary for the plaintiffs to have pleaded in the plaint the law pertaining to the right to construct on a public way or part of the public way. It does appear to me that the question of a public way was agitated in the trial court as well as in the first appellate court, The trial court observed that the land in question is away from the public road and it cannot be accepted that the plaintiffs have a right of passage over the land in question. In the appellate court there is not much discussion about this aspect of the matter but in the opening part of the judgment while narrating the plaintiff's case the learned Judge has observed that 'The land in suit was a part of public way that has been used by them as chowk (lying in front of their Haveli)'.

13. I have carefully considered over the matter and am of the view that the question whether the land in dispute is to be considered a part of the public way or not was very much present in the minds of the parties as well as before the lower courts. I called upon the learned Counsel for the respondents whether he disputed the correctness regarding location of the land as shown in the plan (Ex. A. 1) filed along with the plaint and in all fairness the learned Counsel conceded that the plan Ex. A. 1 correctly represented the site. In this view of the matter there does not appear to be any dispute between the parties regarding the location of the land and the simple point which is to be determined by the Court is whether this land should be considered as a part of the public way or not. It is not disputed that the land in question touches the main road on the eastern side to the extent of 7 and on the southern side of the land there is the plaintiffs' house abutting on it. It has also been admitted in the written statement that a door of the plaintiffs' house opens on this land and this door has been existing ever since the house was built. It has been further admitted that the plaintiffs' house has been in existence for the last 14 or 15 years, and consequently its door also. It would not be unreasonable

to presume in this state of circumstances that the plaintiffs have been using the land in question as passage for coming to the main road, the nearest edge of which on the southern side is 8 1/4 from the boundary of the plaintiffs' house at the shortest and 13' at the longest. In these circumstances it is to be determined whether this land should be construed as a part of the public way? This is only a question a drawing inference on the material facts regarding which there appears to me to be no dispute between the parties. learned Counsel for the appellant submits that failure on the part of the defendants to specifically deny the allegation contained in the plaint that the land in question forms part of the public way amounts to an admission of the defendants. I, however, find it difficult to accept that contention, firstly because what constitutes a public way is to be determined with reference to the facts and circumstances of each case. That apart, there is no clear admission contained in the written statement that the land in question is a part of the public way. At this stage I also cannot fail to observe that the pleading in the plaint in this respect is also not clear as it should be. It has, therefore, to be determined as to whether the land in question should be considered as a part of the public way. There is no doubt that if it is considered a part of the public way then the plaintiffs would be put to a special injury by allowing construction thereon as admittedly there is the plaintiff's door opening on this land.

14. learned Counsel for the respondents has urged that the public way has been shown within dotted lines in the plan Ex A. 1 submitted by; the plaintiffs themselves and the width of that public way has been shown as 10'-6'. The land in question, it is argued, is situated away from this public way even though it is contiguous to the road on the western side- On the other hand the contention of the appellant's counsel is that the public way is not to be confined to the metalled road or that portion of the land only on which the vehicles run but the land lying contiguous to such a metalled road on both the sides so as to allow space to the vehicles to turn back or for the pedestrians to step aside should be also considered as part of the public way Reliance has been placed in this connection on *Ladu Ram v Municipal Board, Ganganagar* ILR 16 Raj. 1229, *Patna Municipality v. Duwarka Prasad* AIR 1939 Pat. 683, *Hanuman Prasad v. Raghunath Prasad* AIR 1924 All. 715, *Firm Kasturi Lal v. Jagroan Municipality* AIR 1939 Lah. 199, *Usman v. Rahmat* AIR 1936 Lah. 797 and *Moolchand v. Chhoga*

ILR 11 Raj. 836.

15. In *Ladu Ram v. Municipal Board, Ganganagar* ILR 16 Raj. 1229 it was observed by the learned Judge as follows:

The public, it would therefore follow, are entitled to use the whole width of the public way, however, wide it may be, for they are entitled to the benefit of the original dedication and to use every part of the public way.. The plaintiffs are thus entitled to the whole width of 50 feet of the two public ways in question, which should therefore be restored, unless, of course, it could be shown that the obstructions thereon were authorised by the statute.

16. In *Patna Municipality v. Dwarka Prasad* AIR 1939 Pat. 683 Harries C.J., speaking for the Court observed as follows:

The owner of land abutting a roadway is entitled to access to that roadway at all points on his boundary. It was suggested that the plaintiff-respondents had no real complaint in this case, because they had or could have access to their property. In my view it matters not whether access can be given to them, because these buildings seriously infringe one of their most valuable rights, namely a right of access to the highway along the whole length of their boundary. In my view these constructions are a serious infringement of the plaintiffs' rights, and that being so, the latter was entitled to insist on their removal.

17. In *Firm Kasturi Lal v. Jagroan Municipality* AIR 1939 Lah. 199 It was held that the public have a right to use every part of a public street not merely the metalled portion in the centre. Again in *Usman v. Rahmat* AIR 1936 Lah. 797 it was held that it is not necessary to prove the user and the exercise of right of way for 20 years or even for any fixed number of years. User will be only evidence of original dedication in such cases.

18. In *Hanuman Prasad v. Raghunath Prasad* AIR 1924 All. 715 the learned Judges quoted with approval the following passage from Lord Selborne in 46 L.J. Ch. Div.69:

These authorities recognised such a right of immediate access from private property to public highway as a private right distinct from the right of the owner of that property to use the highway itself as one of the public.

19 After bestowing my careful consideration on the facts and circumstances of the present case and the law bearing on the subject I am definitely of the opinion that the land in question must be considered as a part of the public way. The plaintiffs in the present case can be regarded in two capacities, one as ordinary members of the public and secondly as having a particular right in it by virtue of long user admittedly for 14 to 15 yrs. It would be giving a much too restricted construction to the term public way to say that it is limited only to the metalled or tarred road on which the vehicles actually ply. It is common knowledge that some open space of land is left on both the sides of the road so that it may be possible for the pedestrians to step aside from the road when there is rush of vehicular traffic and apart from that some open land must be kept on either side of the road though at some points it may be irregular so that the vehicles may take a turn. A public way cannot be treated as if it is only the land lying within two rails as in the case of a railway track. I am told that the Rajasthan Town Municipalities Act, 1951 was applicable to Neem-ka-Thana at the relevant time. The term 'street' as well as public street have been denned in this Act in Section 4 Clauses (18) and (16) respectively.

4(16) public street' shall mean any street:

- (a) over which the public have right of way, or
- (b) heretofore levelled, paved, metalled, channelled, sewerred or repaired, out of municipal or other public funds; or
- (c) which under any provision of this Act becomes a public street

4(18) street shall mean any road, footway, square, court, alley or passage, accessible whether permanently or temporarily to the public, whether a thoroughfare or not, and shall include every vacant, space notwithstanding that it may be private property, and partly or wholly obstructed by any gate, post, chain or

other barrier if houses shops or other buildings about there on, and if it is used by any persons as a means of access to or from any public place or thoroughfare, whether such persons be occupiers of such buildings or not but shall not include any part of such space which the occupiers of any such building has a right at all hours to prevent all other persons from using as aforesaid.

20. The fore-going definition of 'street' would show that it includes a vacant space also. The land in question is nothing but a vacant space on the western side of the main road 8 1/4' deep at one point and 17 deep another point which is not much looking to the developing town of Neem-ka-Tnana. Thus looking to the location of the land I am firmly of the opinion that it is being used as a part of the public way.

21. In *Municipal Board Mangalaur v. Mahadeoji* : [1965]2SCR242 their Lord-ships were pleased to observe that the open space lying on either side of the metalled road was a part of the public way as in the circumstances it was reasonable to hold that the entire pathway between the two drains was dedicated to the public. It was further pointed out that the fact that only a part of the public way is metalled does not necessarily limit the width of the pathway. Following the same reasoning it would be proper and reasonable in the present case also to hold that the land in question which is a small open space contiguous to the metalled road is a part of the public way, and the defendants are not entitled to raise construction on it. This finding alone is sufficient to dispose of this appeal and its natural corollary is that the plaintiffs' suit must be decreed.

22. In view of what I have stated above it is not necessary to go into other questions canvassed by the learned Counsel for the appellant as this finding is by itself sufficient to dispose of the appeal.

23. In the result I allow this appeal, set aside the judgments and decrees of the courts below and decree the plaintiffs' suit and restrain the defendants from raising any construction on the land in question. In the circumstances of the case I leave the parties to bear their own costs.

24. Learned Counsel for the respondents prays for grant of leave to appeal to Division Bench. However, I do not consider it a fit case for grant of leave. The

prayer is disallowed.

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