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Court : Rajasthan

Decided On : Apr-04-2002

Reported in : AIR2002Raj309; 2002(3)WLC466; 2002(4)WLN24

Judge : B.S. Chauhan, J.

Acts : Easements Act, 1882 - Sections 13

Appeal No. : Civil Revn. Petn. No. 293 of 2002

Appellant : Rama

Respondent : Megha and ors.

Advocate for Def. : P.M. Joshi, Adv.

Advocate for Pet/Ap. : A.L. Chopra, Adv.

Judgement :
ORDER

B.S. Chauhanj, J.

1. The instant revision has been filed against the order dated 14-3-2002 passed by the First Appellate Court reversing the order dated 19-12-2001 passed by the trial Court rejecting the application of the non-petitioner No. 1 under Order 39, Rule 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (for short, 'the

Code'), restraining the petitioner to interfere with the easementary right of way of the non-petitioner.

2. The facts and circumstances givingrise to this case are that petitioner and non-petitioner No. 1 are real brothers and were in joint possession of the entire agricultural holding till 22-9-84 when it was partitioned by registered partition deed. The suit was filed for claiming easementary rights of way. Along with the suit, an application under Order 39, Rules 1 and 2 of the Code was filed for grant of temporary injunction. The trial Court rejected the said application, vide order under 19-12-2001. Being aggrieved and dissatisfied, non-petitioner No. 1 filed Civil Misc. Appeal No. 77/2001, which has been allowed vide impugned order dated 14-3-2002. Hence this revision.

3. Mr. A. L. Chopra, learned counsel for petitioner, has submitted that as an alternative way/passage is available to non-petitioner No. 1, he cannot insist upon the easementary rights as per his own choice, therefore, the order of the First Appellate Court is liable to be set aside.

4. On the contrary, Mr. P. M. Joshi, learned counsel for non-petitioner No. 1, has submitted that the alternative passage is not safe as during the rainy season, it submerges into water and, therefore, no interference is warranted by this Court with the impugned order.

5. I have considered the rival submissions made by learned counsel for the parties and perused the documents produced by them at the time of hearing.

6. Admittedly, the contesting parties are real brothers. They were in the joint possession of their agricultural land till the same was divided by the registered partition deed dated 22-9-84. According to the partition deed, first two plots had fallen in the share of non-petitioner No. 1 and the third and fourth plot fell in the share of petitioner. However, the fifth plot, which is on the extreme left of fourth plot of the petitioner, has fallen in the share of non-petitioner No. 1 and passage is required to reach that plot. According to non-petitioner No. 1, when the property was joint, there was a passage through the third and fourth plots to reach the fifth plot. The said passage was used by the parties concerned for last fifty years.

However, as per the petitioner, even if the non-petitioner No. 1 is permitted to use that way when the property was joint, an another passage is available after crossing the fourth plot and turning to left and,therefore, he should use that passage/way.

7. The learned trial Court, after considering the factual position to the conclusion that there was no prima facie case in favour of non-petitioner/plaintiff for the reason that an alternative passage was available though it may be bit longer. The balance of convenience was also found in favour of the petitioner-defendant on the ground that alternative passage was available. The third ingredient of suffering from irreparable loss was also found missing and consequently the application was dismissed. The First Appellate Court reversed the order of the trial Court on the ground that alternative passage, where the river has been shown, has not generally been used earlier and if the passage is not used, it cannot be said that he has an alternative passage to reach.

8. An easement is a right which an owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do or continue to do something or to prevent or continue to prevent something being done in or upon or in respect of certain other land not his own. (Vide Dukhi Mullah v. Halway, (1896) ILR 23 Cal 55. Easement cannot be used for any purpose not connected with the enjoyment of dominant heritage. It can be used in a mode of lease onerous to survient tenement because it is merely an accessory right so far as easement of path way is concerned and the survient one cannot be held responsible to do anything for the benefit of the dominant heritage.

9. In fact, under the provisions of Section 5 of the Easements Act, 1882 (hereinafter called 'the Act'), a person can claim a prescriptive easementary right of way (survient tenement) through the property of another if he was enjoying the way as a right for a continuous period of twenty years against the interest of the dominant tenement. In the instant case, as the property was joint up to 22-9-1984, the aforesaid statutory period of twenty years is not yet complete, therefore, the question of claiming the prescriptive easementary right does not arise.

10. The case has to be examined under Section 13 of the said Act, which permits easement by necessity and that cannot beclaimed if an alternative passage is available, though it may be bit inconvenient or a longer for his ingress and egress.

11. In Sailendranath Sadhukhan v. Chhotelal Shaw, AIR 1970 Cal 449, a Division Bench of the Calcutta High Court laid down the test of determining the easement of necessity, observing that the claimant has to establish that the property, for which easement is claimed, cannot be enjoyed or used without such right. 'Effective user apart from convenience or reasonable user, is the test of it.'

12. In K. Mohideen Ibrahim v. M. Muhammed Abdullah, AIR 1978 Madras 97, the Court held as under :--

'Therefore, a person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and survient tenements and he is exercising the right over the property which does not belong to him. If he enjoys a right under the supposition that he is the owner of the property, does not acquire the easement.'

13. While deciding the said case, the Madras High Court placed reliance upon its earlier Full Bench judgment in Konda v. Ramaswami, AIR 1916 Madras 718.

14. In Smt. Narayanl Devi v. Phool Chand, AIR 1981 All 99, the Allahabad High, Court held as under :--

'Section 13 of the Easements Act contemplates that the easement, which is claimed as an easement of necessity, can be claimed as the only possible mode of enjoyment of the right claimed, having regard to the normal way of life of person which claims it and of the persons belonging to his category,'

15. In Girdharbhai Bacharbhai Patel v. Patel Gordhanbhai Purshottambhai, AIR 1981 Gujarat 93, the Gujarat High Court considered a case where a path way was available to have an access to the agricultural land jointly owned and possessed by the family members. Subsequently, partition took place. However, the land covered by the path way was kept for common use and the easementary rights were claimed therein by one of the co-sharer. The Court held as under :--

'As it is well settled, so long as the partition does not take place, every co-owner ofthe joint property is entitled to use any and every part thereof consistently with the right of user of other co-owners and such user by a co-owner should be reasonable in the 'sense that it should not amount to ouster of other co-owners. Subject to that limitation, the reasonable user by a co-owner of co-ownership property consistent with the right of other co-owners, is perfectly justified. In fact, such a user would be a necessary commitment of the co-ownership's right. As Survey No. 46/5 is found to belonging jointly to the plaintiff with the appellant-defendant, he is entitled to pass through the said land to approach his Survey No. 49, which is situated just near Southern-Western corner of Survey No. 46/5. If the plaintiff travels through the said co-ownership land, which belongs jointly to him as well as the appellant, it cannot be said that he is causing an additional burden on the co-ownership land and thereby he is ousting the appellant from the said land.'

16. In Rajpur Colliery Co. v. Pursottam Gohil, AIR 1959 Patna 463, the Division Bench held that where an alternative way is available, the easement of necessity cannot be claimed and observed that a person, claiming the easement of necessity, must establish that he has no other means of going out or coming to his plot except that particular way.

17. Similar view has been reiterated by a Division Bench of Gujarat High Court in Rameshchandra Bhikhabhai Patel v. Maneklal Maganlal Patel, AIR 1978 Guj 62, holding that the easement of necessity does not survive after the alternative out let is available to the claimant of that right.

18. Similarly, in Thottathil Thamasikkum Cherooty alias Balan v. Puliyaratharayil Velayudhan Nair, AIR 1998 Kerala 164, the Kerala High Court considered the same aspect and observed as under :--

'Since there is an alternative path way, the case of easement by necessity goes..... The very fact that the plaintiff has to walk forty-five feet to enter his property, cannot be a ground to claim the old Bund for his use, specially when he has got another way for his ingress andegress..... As the plaintiff has no rightof easement of necessity and also easement by prescription, he cannot claim that he is entitled to walk through the particular portion of the defendant's property

so as to cause hardship to the defendant.'

19. In view of the above, it becomes clear that if an alternative passage is available, the easementary right of necessity cannot be claimed even if the alternative passage is inconvenient or bit longer.

20. The instant case is examined in the light of the aforesaid settled legal proposition. At the time of partition, which took place on 22-9-84, the contesting parties did not agree to keep the land covered by the path way as under the joint ownership. After the partition, the statutory period is not yet complete. The learned trial Court has rejected the application for interim injunction on the ground that an alternative passage was available. The learned First Appellate Court has reversed the said order on the ground that the alternative passage near the river has not been used by anybody, therefore, it cannot be held to be an alternative passage. In fact, there is nothing on record to show as to whether the alternative passage is not usable or submerges in the water during rainy season. None of the Courts below considered it desirable to examine the case from this angle. If the alternative available passage is usable and remains so throughout the year, the question of claiming easementary right may not arise. As there is nothing on record to clarify the factual position, with the consent of learned counsel for the parties, the case is remanded to the learned First Appellate Court to re-examine as to whether the alternative passage is usable and remains so throughout the year, and then to pass appropriate order.

21. Thus, in view of the above, the impugned order dated 14-3-2002 is set aside and the case is remanded to the learned First Appellate Court with the request to reconsider the case after hearing the parties in the light of the aforesaid observations.

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