

Karunaiananda Nadar Vs. V.S.V. Senthappa Nadar and ors.

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Court : Chennai

Decided On : Dec-19-1972

Reported in : AIR1973Mad477; (1973)1MLJ418

Judge : Ismail, J.

Acts : [Easements Act, 1882](#) - Sections 20 and 22

Appeal No. : Second Appeal No. 1617 of 1969

Appellant : Karunaiananda Nadar

Respondent : V.S.V. Senthappa Nadar and ors.

Advocate for Pet/Ap. : Mr. V. Sundaresan

Judgement :

1. The plaintiff in O. S. No. 352 of 1966 on the file of the Court of the District Munsif Sattur, who lost before the Courts below, is the appellant herein. The suit was instituted by the appellant for the issue of a mandatory injunction compelling the respondent herein to remove the sun shade which he put up on his own property. The allegation of the appellant was that he was entitled to a pathway of 18 ft. wide, having purchased that right of way under Ex. A-2, dated 31-1-1960, registration copy of a sale deed and Ex. A-3 dated 18-1-1960, a registered sale deed, from the owners of the land and consequently as the disputed sun shade obstructs his right of way, he was entitled to have a mandatory injunction for the

removal thereof. It is admitted that the size of the sun shade is 2 1/4 ft. in width protruding into the pathway and 8' in length. Consequently out of 18' width of the pathway, the obstructed portion is only 2 1/4'. The question was considered by the Courts below as to whether the appellant would be able to enjoy his right of pathway reasonably without any inconvenience to him with the balance of 15 3/4 ft. width of the pathway. As a matter of fact, on the basis of the evidence, the Courts below have gone into the question and come to the conclusion that the sun shade does not in any way interfere with the reasonable use of the pathway. as a pathway not only for the passing and re-passing of the appellant but also for taking lorries by the appellant and therefore the appellant was not entitled to the mandatory injunction asked for and accordingly dismissed the suit. Hence the present second appeal by the plaintiff in the suit.

2. Mr. V. Sundaresan, learned counsel for the appellant does not question any of the findings of the Courts below with regard to the reasonable use of the pathway with the sun shades in existence, by the appellant. But he contends that having regard to Section 20 of the Easements Act 1882, hereinafter referred to as the Act, this being a specific case of grant of easement over a pathway of 18' wide, no diminution or whittling down of that right can be permitted under any other provision of Chapter III of the Act. I may just refer to Section 20 and 22 of the Act which are the relevant sections. Section 20 states that the rules contained in Chapter III in which the said section occurs, are controlled by any contract between the dominant and servient owners relating to the servient heritage, and the provisions of the instrument or decree, if any, by which the easement referred to was imposed. Section 22 states that the dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of as easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall at all request of the servient owner, be so confined. Mr. Sundaresan's simple argument is that Section 22 has no application to the present case, in view of Section 20, because the appellant had obtained a right of passage over a pathway of 18' wide by express grant and therefore the owner of the land, namely, the respondent herein had no right to diminish the width of the pathway in respect of which the appellant had obtained a right under Exs. A-2 and A-3. In support of this contention, the learned

counsel for the appellant relied on *Shamji Ghelabhai v. Jamnadas Meghaji*, ILR 55 Bom 138 AIR 1931 Bom 87. I am of the view that the decision of not of any assistance to the appellant, having regard to the facts of the present case.

In that case, the covenant was as follows:--

'You should build on this land after reserving the strip of land on the north measuring 15 ft. broad north to south and 90 ft. east to west for the purpose of passage. It is agreed by consent of all persons that the whole passage 15 ft. wide north to south and 653 ft. long east to west should be reserved for convenience of all the persons residing in the houses that will be built. Hence, you should not have any obstruction of any sort on this land reserved for passage. You should not obstruct the passage of my carts, horses, cattle and servants.'

That was the covenant entered into between the owner of a large piece of land and the persons who purchased several plots thereof. A person who purchased two of the plots on either side of the passage erected posts and gates at two points and this reduced the width of the passage to 7 ft. and 10 ft. respectively. The plaintiff instituted the suit for a declaration that he was entitled to use the full width of the road 15 ft. and for removal of the gates. The trial Court, which originally disposed of the suit, held that the plaintiff was entitled to have the use of the full width of the road and that the gates constituted an obstruction as they stood then and ordered the defendants to leave a clear space of 15 ft. between the gate posts. On appeal the first appellate Judge varied the decree by directing the defendants to widen the distance between the gates to 10 ft. which he considered to be sufficient for the passage of wheeled traffic; and he treated the case as one of an easement of right of way. In the second appeal preferred by the plaintiff, the Bombay High Court relied on Section 20 of the Act and held that the defendant was bound by the terms of the contract and there was nothing in the circumstances of the case or in the situation of the parties or in the situation of the land to restrict the extent and manner of enjoyment of the right granted by the words of the deed. In the course of the judgment, the learned Judge referred to and relied on several English cases and also on a passage in *Peacock on Easements*, 3rd Edn. p. 487 to the effect:

'Where, however, there is nothing in the circumstances of the case, or in the situation of the parties, or in the situation of the land to restrict the extent and mode of enjoyment of the right granted the words of the deed or act granting the right should have their full operation.'

I am of opinion that the said decision of the Bombay High Court has to application to the facts of the present case. As far as the present case is concerned, the pathway of 18 ft was constructed even before the appellant herein came on the scene. The appellant purchased the actual right to use the pathway under Ex. A-3 dated 18-1-1960 from the original owners of the land. According to that the right that was conveyed is stated as follows:--

(Original in Tamil omitted--Ed.)

A few days thereafter, that is, on 31-1-1960 he purchased the adjacent property along with this right of way under the original of Ex. A-2. The recitals in that document relating to the right to way is as follows:--

(Original in Tamil omitted--Ed.)

Having regard to the fact that the passage was already constructed or laid and what was dealt with under Exs. A-3 and A-2 was only a right to use that passage. I am unable to agree with the contention of the learned counsel for the appellant that under Exs. A-3 and A-2 there is an express grant on the part of the vendors thereunder granting and setting apart a passage of 18' width, which width cannot be diminished under any circumstances by the operation of Section 20 of the Act referred to already. In view of the facts of this case, it is not necessary for me to elaborately go into Section 20 of the Act and to find out to what cases and under what circumstances Section 20 can be applied so as to override Section 22 of the Act. Simply as a matter of construction, when Section 20 says that the rules in Chapter III are controlled by any contract between the dominant and servient owners relating to the servient heritage, it only means that if there is any inconsistency between the terms of the contract between the parties and the rules laid down in Ch. III, it is the terms of the contract that will prevail and not the particular rule contained in that chapter. But when there is no such inconsistency,

the terms of the contract can be given effect to without ignoring or in any way whittling down the effect of any rule contained in Chapter III. As far as the present case is concerned, from what I have extracted from Exs A-3 and A-2 it is clear that there has been no specific grant of or any covenant to reserve a 18' pathway for the use of the appellant herein. On the other hand the vendors under Ex. A-3 had stated that they would use the pathway in common along with the appellant herein and consequently what was conveyed under Ex. A-3 was only a right of way and not any special right to a pathway or passage of any particular width. Similarly, having regard to the recital contained in Ex. A-2, which has also been extracted. I am of the opinion that the said document cannot be construed as a grant of a right of way over every inch of the 18' pathway referred to therein. All that can be held with reference to the language of Exs. A-3 and A-2 is that in the existing pathway of 18' width, the appellant has a right to use the same either for his passage or for taking carts or other vehicles. So long as this right of the appellant is not interfered with in any way by the construction of the offending sun shade, as has been found by the courts below. the appellant is not entitled to rely upon Section 20 and ignore Section 22 of the Act. It is not disputed before me that if Section 22 of the Act applies, the conclusion of the courts below is correct and the finding of fact arrived at by the courts below that the appellant can still reasonably use the pathway for all his reasonable requirements without in any way demolishing the offending sun shade is also correct. Therefore, having regard to the recitals contained in Exs. A-2 and A-3. I am unable to hold that there is anything in those documents which is in any way contrary to or in conflict with the provisions contained in S. 22 of the Act so as to hold that the recitals contained in those documents override Section 22 of the Act.

3. In view of this, I am of the opinion that no interference whatever is called for with the conclusion of the courts below. The second appeal fails and is dismissed. There will be no order as to costs. No leave.

4. Appeal dismissed.