

Alo Rani Banerjee and Others Vs. Smt. Malati Roy

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SooperKanoon Citation : sooperkanoon.com/856439

Court : Kolkata

Decided On : Jan-28-1991

Reported in : AIR1992Cal302,96CWN1248

Judge : J.N. Hore, J.

Acts : [Easements Act, 1882](#) - Section 13;; [Evidence Act, 1872](#) - Section 115

Appeal No. : W.A. No. 383 of 1974

Appellant : Alo Rani Banerjee and Others

Respondent : Smt. Malati Roy

Advocate for Def. : Mr. S.P. Roychowdhury and ;Mr. Tapas Mukherjee, Advs.

Advocate for Pet/Ap. : Mr. Santosh Ranjan Ghakraborty, ;Mr. Sukumar Ghosh and ;Mr. Samir Kumar Sengupta, Advs.

Judgement :

1. This appeal is directed against the judgment and decree passed by the learned subordinate Judge, 6th, Court, Ali-pore in Title Appeal No. 241 of 1973 setting aside those of the learned Munsif, 1st Court, Sealdah passed in T. S. No. 475 of 1958.

2. The plaintiff-appellants filed the said suit for declaration of right of way over the disputed land and for injunction. The plaintiffs' case is that C. S. Plot No. 395 of

Mouza Dum Dum originally belonged to one Biman Jyoti Majumder who sold 3 cottahs each to plaintiffs Nos. 1 and 2 and 4 cottahs and 4 chittaks to the defendant out of the said plot on the same day i.e. 16-6-51 after setting apart in the middle of the plot a common passage 8 feet in width and about 128 feet in length connecting Municipal Office Lane on the west and Narsingha Avenue in the east. The said common passage is the only way for obtaining access from the plaintiffs plot to Municipal Office Lane and Narsingha Avenue. The defendant later purchased from Dutta Majumdar 5 cottahs 6 chittaks of land comprised in a pond and situate on the north of the said common passage. After such purchase the defendant blocked 45 feet stretch of the common passage towards Narsingha Avenue by raising a fencing. The plaintiff repeatedly requested the defendant to remove the constructions without result. Hence the suit.

3. The suit was contested by the defendant inter alia on the plea that the defendant was owner by purchase of the disputed 8 feetwide space to the south of her pond connecting municipal lane and Narsingha Avenue and has been in an exclusive possession thereof and that the plaintiff never acquired any right of way or other easement over the said space.

4. After consideration of the evidence on record the learned Munsif has accepted the plaintiffs case and decreed the suit. The lower appellate court has, however, reversed the finding and decree of the learned Munsif as in its opinion the plaintiff has failed to prove an implied grant of the easement right of way or any easement right of necessity. The judgment and decree of the trial court were set aside and the suit was dismissed. Being aggrieved, the plaintiffs have preferred the present appeal.

5. Mr. Chakraborty, learned Advocate for the appellants has raised two points before. Firstly, it has been contended that the finding of the lower appellate court that there was no existence of a formed or defined road at the time of the severance of tenements and there was, therefore, no implied grant of quasi-easement of right of way over the disputed strip of land as claimed by the plaintiffs is based on non-consideration of important evidence and inherent facts and circumstances of the case and is perverse and there is no justification for

reversing the , finding of the learned Munsif in this regard and that the implied grant of a right of way has been clearly established in this case. Secondly, it has been contended that the defendant is estopped from challenging the plaintiffs claim of right of way over the disputed strip of land. In view of the representation of his vendor at the time of severance of the tenements that the disputed strip of land was set apart as a pathway. Mr. Roychowdhury, learned Advocate for the respondent has, on the other hand, contended that the lower appellate court was right in holding that there was no existence of a formed or defined pathway at the time of the severance of the tenements and as such there was no implied grant and representation, if any, about a future pathway would not operate as estoppel.

6. The law on the subject is well settled. Where two tenements are severed, the grantee takes by an implied grant all quasi-easements of an apparent and continuous nature. A right of way is not classed generally amongst quasi-easements of an apparent and continuous character. It is only when there is a formed road that the quasi easement can be classed as one of an apparent and continuous nature, (vide *Dakshina Ranjan Chowdhury v. Surendra Lal Dasgupta*, 39 CWN 1202). At page 165 of *Gale on Easements*, 11th Edition, the law is summarized by the learned author; after an exhaustive examination of the leading cases in England on the subject, thus :

'Where two tenements are severed and at the time of severance a formed road exists over one (the quasi-servient) tenement for the apparent use of the other (the quasi-dominant) tenement, such formed road being necessary for the reasonable and convenient enjoyment of the quasi-dominant tenement, a right to use such formed road will, it is submitted, pass by implied grant with the quasi-dominant tenement, even where the only 'apparent sign' is the state of the road on the quasi-servient tenement itself. And where the apparent sign of user is a part, not of the tenement retained, but of the tenement conveyed, such as a substantial and permanent door-way or a formed road extending over both tenements, there is ample authority for saying that the doctrine of implied grant applies'.

'As regards the cases, however, where there is no formed or defined road over the quasi-servient tenement so that the way is not evidenced by any apparent sign,

the rule in the older authorities was clear that upon severance there was no implied grant; in other words, that quasi-easements not continuous and apparent in their nature (like an ordinary right of way) did not pass on severance unless the owner used language to show that he intended to create the easement de novo'.

7. Admittedly, the disputed strip of land appertains to plot No. 395 having an area of about one bigha. Admittedly, also, on 16-6-51 Biman Jyoti Datta Majumdar by six different ft Kobalas sold away different portions of the disputed plot No. 395 retaining only a portion thereof measuring about 1 cottah and an odd which is the disputed strip of land over which the plaintiffs claim right of way. The two plaintiffs, the defendant and his mother Kiron Sasi and one Nani Gopal Datta and one Subir Chandra Guha are the six vendees and the Kobalas are Exts. 2, 2A, A2, A3, 2B and 2C respectively. It is also not disputed that the defendant subsequently purchased the disputed strip of land from Biman Jyoti Datta Majumdar. There is no dispute that the disputed strip of land claimed by the plaintiffs as common passage runs from north to south and on the north of such strip of land lies plaintiffs' portions of plot No. 395 and on the south lies the portions of plot No. 395 purchased by the defendant and her mother. The disputed passage has been shown in the sketch map of the Commissioners of local investigation (Exts. 1, 1A and 1B). The disputed strip of land connects Municipal Office Lane on the west and Narsing Avenue on the east and the sketch map shows that this is the only ingress to and egress from the plaintiffs' house. Now the disputed strip of land has been described as 'New Road' in all the documents of the parties. In the schedule of each of the Kobalas in favour of the plaintiffs (Exts. 2 and 2A) the southern boundary has been described as 8 feet wide new road and in the schedule of each of the kobalas in favour of the defendant and her mother Exts A2 and A3. northern boundary has been described as 8 feet wide new road. The lower appellate court has noticed this fact but seems to have not appreciated the significance of the same. The description clearly shows that there was already a well defined road which is none other than the disputed strip of land. The boundary cannot be said to refer to a future road. The lower appellate court has disregarded this significant fact on the ground that there is no specific mention in the kobalas of the alleged easement right. This is not necessary for an implied grant. If there was a specific mention of the right it would have then been an express grant. Where two tenements

are severed and at the time of severance a formed road exists over one (the quasi-servient) tenement for the apparent use of the other (the quasi-dominant) tenement, such. being necessary for 'the reasonable and convenient enjoyment of the quasi dominant) tenant, a right to use such formed road will pass by implied grant with the quasi-dominant tenement. There lower appellate court has failed to appreciate that the recitals in the kobalas of the parties which are binding on them clearly show the existence of a well formed and well defined road before the severance of the tenement. The lower appellate court has not considered the parcha(Ext. 3) where the disputed strip of land has been recorded as a road, He has not also considered the oral testimony of PWs 1 and 2 to the effect that the disputed path was in existence before the severance of the tenements and it has been used by the plaintiffs till obstructions were put up by the defendant. The lower appellate court has not also considered the evidence of PW1 supported by PW2, an independent witness and a common witness in all the documents, that the vendor-Datta Majumdar made a representation that the disputed strip of land would be used as a common passage. The evidence discloses that a pencil sketch indicating the common passage was shown by the vendor to the plaintiffs. This sketch was in the custody of the defendant who did not produce it at the time of trial in spite of requisition by the plaintiffs. Ext. 2 also contains a recital that plot No. 395 was subdivided into different plots and each plot was sold to each vendee. The lower appellate court has not considered all this evidence at all though the learned Munsif considered all these important pieces of evidence. The finding of the lower appellate court that there was no defined road at the time of severance of the tenements suffers from serious legal infirmity which may be interfered with in the second appeal. The evidence referred to above and the fact that only a narrow strip of land Was retained after selling the different portions of plot No. 395 which is necessary for the proper enjoyment of the portions sold to the plaintiffs clearly suggested that the disputed strip of land was set apart of as a common passage for the plaintiffs and the defendant as this was already a well defined road. It must be held that there was implied grant of right of way as claimed by the plaintiffs.

8. Mr. Chakraborty has argued that the grant implicit in the representation came into existence when the purchasers of the plots acted on the representation by

purchasing such land and as such the defendant is estopped from challenging the plaintiffs' claim. In support of his contention he has relied on a single Bench decision of this court in Nirmal Kumar Moutik v. Smt. Champabala Roy, 76 CWN 556. In that case the plaintiff was the owner of land of the colony. The plaintiff by showing the suit land as a park in the plan at the time of sale or settlement of the plots of the colony induced her prospective purchasers or lessees that the suit land would remain as such park and there would be grant of user of the land as such park. This is a representation made by the plaintiff to the defendant to purchase or to take a lease of the plot. It has been held that it is necessary that there must be recital about user of the park in the kobalas or in the various settlement deeds of the defendants. Mere absence of recitals in the kobalas about user of the park does not indicate that it was never meant to be a part though it was shown as such by the plaintiff in the plan. Estoppel is a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation of another person has been induced to act to his detriment. It has been held that the plaintiff is barred by estoppel from having a declaration from the court that the instant land was her private land and she could do whatever she likes in respect of the suit land and prevent other people from entering into the said land. It has further been held that no document in writing is required for grant of user of any land. The plan was the basis of representation and in that plan, the suit land was shown as park. There were also roads which are also shown in the said plan. It would be obvious to represent the grant of user of roads as also user of suit land as a park. Even though there was no express grant or dedication, as soon as the defendant acted on the said representation by purchasing or taking lease of the plots for consideration the grant implicit in the representation came into existence. In the instant case we have already seen that the disputed strip of land has been described as a new road in the documents and the evidence shows that there was specific representation by the vendor that the said strip of land was set apart as the common passage of the prospective buyers including the plaintiff and as matter of fact the said passage was shown in a sketch map which the defendant is withholding. It must, therefore, be held that there was representation of grant of user of the disputed road even though there was no express grant or dedication. As soon as the plaintiffs acted

on the said representation by purchasing the suit plots for consideration the grant implicit in the representation came into existence and the defendant claiming through the original vendor is, therefore, estopped from challenging the implied grant of user of the disputed strip of land. It is quite obvious that had not the plaintiffs been induced to believe that they would have right of user of the disputed strip of land, they would not have purchased portions of the plot as in that case they would have no means of access to or exit from their plots of land where they would construct residential buildings. The learned lower appellate Court has, therefore, committed an error in reversing the judgment and decree of the trial Court.

9. In the result, the appeal is allowed and the judgment and decree of the lower appellate Court are set aside and those of the trial Court are restored. I make no order as to costs.

10. Appeal allowed.