

Sunil Kumar Basu and Two ors. Vs. Dr. Dwinjendra Nath Mitra and ors.

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SooperKanoon Citation : sooperkanoon.com/875217

Court : Kolkata

Decided On : Dec-05-1995

Reported in : (1996)1CALLT249(HC)

Judge : Basudeva Panigrahi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rules 1 and 2; ;[Specific Relief Act, 1963](#) - Sections 34, 37 and 38

Appeal No. : S.A. No. 969 of 1978

Appellant : Sunil Kumar Basu and Two ors.

Respondent : Dr. Dwinjendra Nath Mitra and ors.

Advocate for Def. : Bidyut Banerjee, Adv.

Advocate for Pet/Ap. : Bhaskar Ghosh, Adv.

Disposition : Appeal allowed

Judgement :

Basudeva Panigrahi, J.

1. This appeal is directed against the reversing judgment and Decree dated 20.6.1978 passed by Subordinate Judge, Alipore in T.A. No. 1029/78 dismissing the plaintiff suit for permanent injunction. The facts leading to this appeal are

summarily stated:-

2. The plaintiff No. 1 who is the appellant in this case who along with other co-plaintiffs filed the suit for permanent injunction against the defendant No. 1 restraining him from interfering with the construction work of a boundary wall on the eastern end of the common passage described in schedule 'A' to the plaint. Plaintiff No. 1 and the Plaintiff No. 2 whose interest was devolved upon proforma defendants 3 and 4 are the owners of the premises No. 16/C and 16/A situated in Abinash Chandra Banerjee Lane. The other plaintiffs namely, originally numbered as plaintiffs 2 and 4 are the joint owners of the premises No. 16/B, Abinash Chandra Banerjee Lane. The defendant No. 1/respondent is the owner of the premises No. 19/E, Abinash Chandra Banerjee Lane. The plaintiffs claimed that they set apart a passage with a width 6 ft. for their exclusive use which is leading to the Corporation Road, Abinash Chandra Banerjee Lane. This said passage extends up to the northern corner end of the premises of the appellant. The south-west corner of the appellant No.'s premises joint common passage. At the request of the defendant No. 1, the plaintiffs allowed him to draw the water pipe line along the passage. The appellant also made a gift of land measuring 3' x 33' from his own land on the north of his premises to Calcutta Municipal Corporation. The plaintiff No. 1 intended to erect a boundary wall at the extreme end of the eastern side of the common passage and collected materials for the said purpose. The defendant No. 1 had however not allowed the appellant from erecting the boundary wall which resulted in filing of the present suit. Thus, plaintiffs have filed the suit for permanent injunction against the defendant No. 1 from disturbing their peaceful possession and enjoyment of the common passage.

3. The defendant No. 1 however, disputed the possession and claimed that the suit passage does to exclusively belong to the plaintiff. On the other hand, it was claimed that the common passage is the 'bustee passage' over which he has a right of use. It further transpires that he claimed to have drawn an electric line so also pipe line which would demonstrate his exercise of. right over the same; and has been using the passage for more than 2 years before the filing of the suit with tacit knowledge of the plaintiff without any interruption. Proforma defendants were substituted in the event of death of the plaintiff No. 2 who filed a written statement

supporting the stand of the defendant No. 1.

4. The learned Trial Court rendered the following findings : the defendants by mere laying down the water pipe line through the disputed passage could not have derived the right of user over the passage. The said pipe line was allowed to be drawn without any inconvenience to the plaintiffs or used to be repaired as and when necessary without any detriment against the interest of the plaintiffs. Therefore, the defendant No. 1 would continue to exercise the same right of repair of the pipe line whenever necessary as before and his right is limited only for the said purpose. It is further held that the suit passage is the common passage of the plaintiffs over which the defendant No. 1 had no ostensible right. The space was set apart by the plaintiffs from their own purchase land for the purpose a convenient use of passage. Therefore, in the above situation, the defendant No. 1 was restrained from using the passage. The first appellate Court however, held that the pipe line and the electric connection had been taken through the disputed passage and thus could legitimately be held that the said passage was used as a common passage and in such situation there could not have been any. decree for permanent injunction against the defendant No. 1. Finally the first appellate court had upset the judgment and decree passed by the Trial Court.

5. Mr. Ghosh, the learned counsel appearing for the appellant, has raised series of contentions in support of the appeal. It is however, stressed that the plaintiff No. 1 purchased the land along with the right over the passage under Ext. 4, sale deed dated 13th February, 1956, Defendant No. 1 who happened to be a subsequent purchaser could not have claimed easementary right either by prescription or by necessity. When there was categorical statement of the defendant. No. 1 that the suit land had never been used for laying down the pipe line, the first appellate court has patently gone wrong in dismissing the suit, solely on the ground that defendant No. 1 having laid his pipe line across suit passage. The learned counsel has further highlighted that the respondent has failed to produce the best documentary evidence available with him i.e., the Municipal plan which could have reflected the situation of the door leading to the passage, rather, from the defendant's testimony it would further transpire that the suit passage is inaccessible from his house. The appellant has laid great stress that mere

sporadic use of passage would not turn in to right over the same.

6. Mr. Bidyat Banerjee, the learned counsel appearing for the respondent has strongly contended that the pipe line was laid across the suit passage which would irretrievably suggest that the defendant No. 1 has right over the common passage. It is further urged that the sale deed upon which the appellant has claimed does not spell out that there was any right of passage given to the plaintiff. In this background, the appeal court's judgment and decree having not suffered from any serious infirmities, the appellant's contentions are bound to be spurned.

7. These undisputed facts were placed by both parties in course of hearing that the plaintiffs No. 1 brother had purchased 8 cottas 11 chittacks of land in the premises at 16, Sura First Lane (Now Abinash Chandra Banerjee Lane), under a registered conveyance deed date 13.2.56 vide ext. 2. The graveyard situated on the south-west corner of this premises was excluded from the sale transaction which was numbered as 16/D. The area purchased by the plaintiffs brother, Sushil Kr. Bose, is however, indicated under 16 A, 16/B and 16/C. The width of the land shown at the eastern extremity was 63'-6'. The defendant No. 1 purchased another piece of land under Ext. 3 covered under the premises No. 19/E on 29.7.1960. In the Ext. 3, 16' wide passage has been shown in the plan but peculiarly there was no reference to the disputed passage. Ext. 4 is the deed of conveyance dated 13th February, 1956 Sushil Kr. Bose in favour of the plaintiff No. 1 for the land measuring 2 cottahs 2 chittacks 10 sq. ft. land. In the plan the width of the extreme eastern boundary had been shown to be 56'-6' besides 6' kept for the common passage. From a conjoint reading of the Ext. 2 and 4 it transpires that the passage covered under the suit came into existence after the conveyance made in favour of Sushil and before the plaintiff No. 1 purchased from him. Had the defendant No. 1 got any right over the suit passage, the recital of the sale deed could not have been silent about it over which now he lays a claim. In such situation, the claim' by the defendant No. 1 over the suit passage has no legal basis.

8. The learned first appellate court has, however, over emphasised on the report of the commissioner while deciding the right over the passage. The trial court has

discussed and discarded the same but the appellate court without discussing as to how it would be relevant has simply relied upon the same and held that defendant No. 1 has indefeasible right over the suit passage. The appellate court if intended to rely upon the commissioner's report which was rejected by the trial court should have assigned sufficient reason but could not have finally relied upon. Therefore, the 1st appellate court has seriously erred in accepting the commissioner's report.

9. The learned counsel for the appellant has drawn my attention that the defendant No. 1 had signally failed to establish that he derived a right over the suit passage or the doctrine of either, easement or by prescription. The defendant No. 1 did not, however, in the written statement specifically plead as to from what date he commenced to exercise easementary right, rather, the sale deed Ext. 3 is specifically silent about such right, there is no pleading that the defendant No. 1 had acquired right on the doctrine of 'prescription by necessity' inasmuch as when alternative passage is available the doctrine of necessity would recede to the background.

10. The learned counsel appearing for the appellant has placed another formidable point for consideration that the trial court has recorded a finding that the passage is situated at 2 ft. lower in level than the varendah of the house of defendant No. 1. So the passage is not accessible without prancing from his house.

11. A piquant situation arises from the stand taken by the defendant No. 1. It is stated that there is a door facing towards the lane. But the learned Munsif in his findings categorically held that had there been such door entry facing towards the lane, the defendant No. 1 would not rest content without producing the plan which was approved by the Municipal Authority. In the absence of the plan it cannot be said in uncertain term that there was a door entry leading to the passage.

12. The defendant No. 1's written statement is conspicuously silent about easement by prescription. In absence of plea no finding need be rendered in this appeal.

13. From the above discussions, it appears that a portion of land which was purchased by the brother of the plaintiff No. 1 was set apart for use of passage by the plaintiffs and other proforma defendants. In such context, It cannot be argued that such advantage shall be also available to the defendant No. 1 unless there is an understanding between the parties. It is no doubt true that the legal representatives of the plaintiff No. 2 have however, joined hands with the defendant No. 1. But all the same it would not in any way affect the right of the plaintiff No. 1 to claim the ownership along with other owners. In such situation, the learned first appellate court has come to an erroneous view that the plaintiffs have surrendered their rights over the suit passage without any substantial evidence. In the aforesaid circumstances, I am unable to agree with the observation of the first appellate court that defendant No. 1 has acquired a right of easement over the suit land. The defendant No. 1 whenever any occasion would arise of repair pipe line shall be permitted to do so by the plaintiff No. 1. It is further order that the defendant No. 1 is restrained from disturbing the peaceful user of the suit passage by the plaintiff No. 1 along with other plaintiffs and the proforma defendants 3 and 4.

Thus, the appeal is allowed and judgment and Decree of the 1st Appellate Court are set aside but in the circumstances without costs.

Accordingly, in the result I agree with the observation of the learned trial court and decree the suit restraining the defendant No. 1 from causing any obstruction to the raising of boundary wall on the eastern end of the suit passage by the plaintiff No. 1.