

Narayan Chandra Sarkar and Others Vs. Amrita Kumar Sarkar and Others

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Court : Kolkata

Decided On : Aug-14-2012

Judge : Tarun Kumar Gupta

Appeal No. : S.A. No. 504 of 1994

Appellant : Narayan Chandra Sarkar and Others

Respondent : Amrita Kumar Sarkar and Others

Advocate for Def. : Mr. Haradhan Mondal

Advocate for Pet/Ap. : Mr. Pratik Kumar Bhattacharya

Judgement :

Tarun Kumar Gupta, J.

The defendants are the appellants in this case against a judgment of reversal. The respondent being plaintiff filed a suit being Title Suit No.2 of 1979 in the Court of learned Munsif, First Court, Katwa with following averments:-

The plaintiff and his brother (proforma defendant No.12) purchased 'Kha' schedule property standing on plot No.4807 from its earlier owner Kshitish Chandra Chattopadhyay by a kobala dated 15.02.1965. The 'Kha' schedule property of the plaintiff is surrounded by brick built wall and there is a door on south east corner of said house through which plaintiff like his predecessor used to come to the

southern side road through a pathway which passed through plot Nos. 4818, 4819, 4816 and 4817 and which was fully described in schedule 'ka' of the plaint. The plaintiff has acquired an easementary right and ancient lost grant over that 'ka' schedule pathway. As the principal defendants threatened to block said pathway and thereby to deny the easementary right of the plaintiff to use said 'ka' schedule pathway, the suit for declaration and injunction was filed.

The principal defendants contested said suit by filing a written statement denying material allegations of the plaint and contending inter alia as follows:-

The principal defendants are the owners in possession of plot No.4818 and 4819 and their mother is also owner in possession of plot No.4816 and the 'ka' schedule property lies in the middle of the plot No.4818 and 4819 and the defendants all along are using 'ka' schedule properties as part and parcel of the land in plot No.4818 and 4819 as 'Khamar Bari'. Neither plaintiff nor his predecessor-in-interest ever used 'ka' schedule property for going to the southern main road. There is a door on the western side of the residential house of the plaintiff over the 'kha' schedule property and the plaintiff used to come out from his house facing west and then to turn south to reach the main road and that is the only way of ingress and egress from the 'kha' schedule land of the plaintiff. There is no cowshed to keep cows of the plaintiff on the 'ka' schedule and the cowshed of the plaintiff is situated at plot No.5268 which is adjacent to south and east of the main road. About five years back the plaintiff constructed the alleged door on the south eastern side of the 'kha' schedule homestead at the time of construction of the boundary wall and now plaintiff was trying to use 'ka' schedule property by using said south eastern door. The plaintiff's suit was not maintainable and was liable to be dismissed.

Learned Trial Court framed several issues on the basis of the pleadings of the parties. After contested hearing learned Trial Court dismissed the suit. Learned Trial Court dismissed the suit mainly on the grounds that the witnesses of the plaintiff namely P.W.s. were not trustworthy and that plaintiff's cowshed was on plot No.5268 which was beside the main road and not on plaintiff's homestead at 'kha' schedule property as alleged in the plaint, that there was another door on the

south western side of the house of the plaintiff situated on 'kha' schedule through which plaintiff could easily come to the main road situated to the south of his 'kha' schedule land by proceeding towards west and then by turning to the south, that plaintiff failed to examine his vendor Kshitish Chandra Chattopadhyay to substantiate the plaintiff's claim of right of easement and lost grant for using 'ka' schedule property as a passage, that the plaintiff was found to be co-sharer in respect of plot No.4816 and 4817 and that a co-sharer cannot claim any right of easement or lost grant over his own property.

In the appeal being Title Appeal No.206 of 1990 filed by the plaintiff learned Lower Appellate Court allowed the appeal by setting aside the judgment of learned Trial Court by the impugned judgment dated 24.09.1992.

At the time of hearing of this second appeal the following substantial questions of law were formulated:-

(1) Whether learned Lower Appellate Court substantially erred in law by reversing the judgment of learned Trial Court and by allowing easementary right of the plaintiff over 'ka' schedule land though admittedly some portions of 'ka' schedule land pass through plot Nos. 4816 and 4817 to which the plaintiff was a co-sharer.

(2) Whether learned Lower Appellate Court substantially erred in law by reversing the judgment of learned Trial Court without applying correct legal test.

Mr. Pratik Kumar Bhattacharya, learned counsel for the appellant defendants submits that plaintiff constructed the house as well as the eastern side door in his 'kha' schedule land and that plaintiff's predecessor-in-interest never used 'ka' schedule land as a pathway. He further submits that during evidence it came out that the plaintiff's house is situated on 'kha' schedule land at plot No.4807 having a western side door through which one can come to the southern side road by proceeding towards west and then turning towards south. He further submits that 'ka' schedule property ran through plot Nos.4818 and 4819 and is used as "khamar", and that at no point of time either plaintiff or his predecessor-in-interest used said 'ka' schedule land for going to the southern side pathway. In this connection, he further submits that the plaintiff's cowshed was to the south of said

southern side pathway and hence there was no question of taking out cows from the cowshed by using said 'ka' schedule land. In this connection he refers to the report of the learned Advocate Commissioner which was marked as Ext.A. He next submits that as plaintiff was co-sharer of plot Nos. 4816 and 4817 through which said 'ka' schedule land passed, plaintiff cannot claim any right of easement over his own land. According to him, learned Lower Appellate Court made wrong appreciation of the evidence on record and thereby set aside the well reasoned judgment of dismissal passed by learned Trial Court.

Mr. Haradhan Mondal, learned counsel for the respondent plaintiff, on the other hand, submits that the report of the learned pleader Commissioner (Ext.5) established the existence of a pathway through plot Nos. 4818, 4819, 4816 and 4817 which was fully described in schedule 'ka' of the plaint. He next submits that though it was alleged in the written statement as well as in the evidence adduced by D.W.s that the house standing on the 'kha' schedule land on the plot No. 4807 was constructed by the plaintiff and that the door to the south eastern corner of said house was opened by the plaintiff but it came out from the purchase deed of the plaintiff of the year 1965 (Ext.4) about existence of a house on said 'ka' schedule land with a door to the south eastern side for using the disputed pathway. He next submits that the report of the learned Advocate Commissioner (Ext.A) also established that the 'ka' schedule pathway was being used as a pathway by the plaintiff and that there was no 'Khamar' of the appellant on said pathway. He next submits that learned Lower Appellate Court on perusal of evidence of both P.W.s. and D.W.s as well as other documentary evidence on record came to a finding of fact that there was a pathway on 'ka' schedule land for going to the road lying to the south of plaintiff's house and that plaintiff's predecessor-in-interest as well as plaintiff after coming out from the south eastern door of their house came to the road lying to the south of their house by using said 'ka' schedule pathway. According to him, as plaintiff was not a co-sharer of either plot No.4818 or 4819 through which said 'ka' schedule pathway also passed, the logic of learned Trial Court was not tenable and learned Lower Appellate Court rightly ignored the same. He further submits that practically no substantial question of law was really involved in this case, and that this appeal should be dismissed.

Admittedly, whether there is a door in the south east corner of the house of the plaintiff situated in 'kha' schedule land from the time of his predecessor-in-interest, whether they used said door for coming to the public road to the south of their house using the 'ka' schedule pathway, whether 'ka' schedule is really pathway are pure questions of fact. Again whether plaintiff's predecessor-in-interest and thereafter the plaintiff used said 'ka' schedule pathway for long as a matter of right and thereby acquired an easementary right thereupon is a mixed question of law and fact. It appears from the impugned judgment that learned Lower Appellate Court discussed the evidence adduced by both sides including oral evidence of P.W.s and D.W.s and came to a finding of fact that there was a house with a door to its south eastern side on the 'kha' schedule property from the time of plaintiff's vendor and that by coming out through said door one can come to the public road lying to the south only by using 'ka' schedule pathway and that plaintiff's vendor and thereafter plaintiff used said 'ka' schedule land as a pathway all along. Admittedly, plaintiff purchased the 'kha' schedule property along with a house standing thereupon from his vendor through a registered kobala dated 14th of February, 1965 (Ext.4). It appears from the recitals made in said registered kobala (Ext.4) that there was a pathway to the south of said house for going to the public road lying to the south of their house by using said southern door. It is hard to believe that the use of the pathway ('ka' schedule property) for going to the southern side public road was falsely written in said kobala of 1965 in anticipation of suit to be filed by the plaintiff in 1979. The existence of the southern door on the plaintiff's vendors 'kha' schedule house and use of said door for going to the southern side public road by using the southern pathway ('ka' schedule property) goes to show that the 'ka' schedule pathway was being used even from the time of plaintiff's vendor. As such the findings of learned Lower Appellate Court on this score were based on evidence. It is true that during evidence it also came out that the plaintiff's house on 'kha' schedule property had another door to its western side through which one can proceed towards western side and then to proceed towards southern side to come to the same southern side public road. But existence of said another door cannot wipe out the easementary right of use of the 'ka' schedule pathway by plaintiff's vendor and then by plaintiff. It came out from the report of the learned Advocate Commissioner (Ext.A) that there was a shed to

the eastern side of 'ka' schedule property with 'khotas' for tying cows there. As such, the plaintiff's case of using the 'ka' schedule pathway not only for movement of persons but also for taking cows found support from said Commissioner's report. It further appears that learned Trial Court only discussed the oral evidence of P.W.s and did not examine the oral evidence of D.W.s and accordingly he came to a finding which was not in view of the entire evidence on record.

An easement is a right annexed to land, to utilize other land of different ownership, in a particular manner or to prevent the owner of the other land from utilizing his land in a particular manner and otherwise an easement is a right which the owner or occupier of certain land possesses, as such for the beneficial enjoyment of that land, to do and to continue to do something, or to prevent or to continue to prevent something being done, in or upon, was in respect of, certain other lands. The process of lost grant, on the other hand, remains one of the methods by which easement may be acquired. Twenty years' uninterrupted enjoyment of an easement raises a presumption of a lost grant namely that it had been created by a deed of grant which had been lost. The presumption of lost grant is, however, rebuttable only by evidence that making such grant is impossible.

In the case in hand, learned Lower Appellate Court on appreciation of total evidence on record, both oral and documentary, came to a finding of fact that from the time of plaintiff's predecessor-in-title there was a south eastern door in the house situated on the 'kha' schedule property for coming to the southern side public road by using the suit pathway ('ka' schedule land) and that in the process plaintiff had a right of use of said 'ka' schedule pathway as a matter of right and was entitled to get a decree of declaration and injunction. As said findings were based on evidence, I find no ground to interfere with the same at the time of hearing of the second appeal under Section 100 of the Code of Civil Procedure even if there was scope to come to a different findings of fact on the basis of the evidence on record.

As a result, the appeal is hereby dismissed on contest.

However, I pass no order as to costs.

Send down Lower Court records along with a copy of this judgment to the Lower Court at the earliest.

Urgent photostat certified copy of this judgment be supplied to learned counsels of the parties, if applied for.

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