
J. Thakur

Before Ram Chand Gupta J.

HARI SINGH AND OTHERS,—Appellants

versus

JASWANT SINGH,—Respondent

R.S.A No. 1997 of 1985

The 2nd May, 2011

Indian Easements Act, 1882—S. 5 & 13—Claim for right of easement by respondent—Ownership rights acquired by appellant in the house by operation of law i.e. by way of adverse possession—Section 13 of Indian Easement Act applicable—There is easement of necessity even if no right of easement by prescription—Appeal dismissed.

Held, that it has been rightly observed that he has right of passage through the courtyard of the house of appellants-plaintiffs to reach his cattle shed and it has also been rightly observed that if respondent-defendent has not acquired easement of prescription, he has acquired easement of necessity, as provided under Section 13 of the Act.

(Para 21)

Kabir Sarin, Advocate, *for the appellants.*

None for the respondent.

RAM CHAND GUPTA, J.

Facts giving rise to the present Regular Second Appeal are as under :

Appellants-plaintiffs filed a suit for permanent injunction restraining the respondent-defendant from passing through the court-yard of their house, duly described in the plaint and shown by red colour by letters 'ABCDEFGH' in site plan, Ex P1, attached with the plaint and from using any part of the said court-yard as passage for ingress to and egress from their house and further restraining him from causing any obstruction in raising wall in their court-yard at points 'BC'.

(2) Pleas has been taken that earlier Dharam Singh, predecessor-in-interest of appellants-plaintiffs was owner in possession of the said house, who died about 7-1/2 years ago and after his death, they came into possession of the same as owners by virtue of Will dated 27th March, 1974 executed by Dharam Singh in their favour. House of respondent-defendant is situated in the northern side of the house of the appellants-plaintiffs and the same is contiguous to their house shown by letters 'AIJDCB' and in yellow colour in the site plan, Ex-P1. Earlier Amir Chand, predecessor-in-interest of respondent-defendant was owner of the said house, who also died about four years ago and after his death respondent-defendant became owner of the said house.

(3) Amir Chand, father of respondent-defendant had instituted Suit No. 255 of 1970 on 21st August, 1970 against Dharam Singh, predecessor-in-interest of the appellants-plaintiffs for possession by partition of half share of the entire property comprised in the respective houses of the parties. However, the said suit was decided against Amir Chand by learned trial Court holding that that property was not joint property of the parties and rather Dharam Singh was continuing in exclusive possession of the house, as shown by letters 'ABCDEFGH' in site plan Ex. P1 and Amir Chand was having no right in the said house and hence, he was held to have become owner of the said house by adverse possession and it was held that Amir Chand was the owner of the house contiguous to the house of Dharam Singh. No appeal against the said judgment was filed and the

same has become final. Hence, plea has been taken that respondent-defendant is having no right to pass through the court-yard of the house of the plaintiffs for ingress to and egress from their house. It has also been pleaded that he is having separate passage from the northern side of his house for ingress to and egress from his house.

(4) Suit was contested by respondent-defendant on the plea that he had been using the court-yard of the house of appellant-plaintiffs for the last more than 40 years for ingress to and egress from his house and that the same is the only passage connecting his house with the *abadi* of the village and hence, appellants-plaintiffs have no right to close the passage of the defendant by raising a wall.

From the pleading of the parties, following issues were framed by learned trial Court :—

- “(1) Whether the plaintiffs are owners in possession the house shown by letters ‘ABCDEFGH’ read in colour in the site plan ? OPP
- (2) Whether the defendant has no right to pass through the courtyard of the plaintiffs shown by letters ‘BCEG’ in the site plan attached for purpose of ingress and egress to his house ? OPP
- (3) Whether the plaintiff are entitled to injunction prayed for ? OPP
- (4) Whether the suit is bad for non-joinder of necessary parties ? OPD
- (5) Whether the defendant has acquired the right of easement over the passage in dispute ? OPD
- (6) Relief.”

(5) Parties adduced evidence in support of their respective contentions before learned trial Court. Learned trial Court decreed the suit filed by present appellants-plaintiffs restraining the respondent-defendant from passing through the courtyard of the house of appellants-plaintiffs for ingress to and egress from their house and further restraining him from obstructing them from raising wall in their courtyard at points B and C.

as per site plan Ex. P1, in view of the finding that respondent-defendant is having no right of easement to pass through the courtyard of their house.

(6) Aggrieved against the said judgment and decree respondent-defendant filed appeal before learned Additional District Judge, Gurdaspur, who *vide* impugned judgment and decree dated 27th March, 1985 accepted the appeal filed by respondent-defendant. While reversing the finding recorded by learned trial Court, it was held that respondent-defendant is having right of easement to pass through the courtyard of the house of the appellants-plaintiffs and that the said right cannot be nullified by them by erecting a wall in their courtyard at points B to C, as shown in site plan, Ex.P1. Hence, as a consequence thereof, suit filed by present appellants-plaintiffs was dismissed with no order as to cost.

(7) Aggrieved against the said judgment and degree passed by learned first appellate Court, the present Regular Second Appeal has been filed, which was admitted for hearing by this Court *vide* order dated 29th October, 1985 without framing substantial questions of law.

(8) A Full Bench of this Court in the case of **Ghanpat versus Ram Devi, (1)** had taken a view that in view of Section 41 of the Punjab Courts Act, the amended provisions of Section 100 of the Code of Civil Procedure, as amended in 1976, were not applicable to the second appeals filed in this Court and accordingly, no substantial question of law was framed, nor the aforesaid regular second appeals were admitted on any such substantial question of law. However, the Hon'ble Apex Court in the case of **Kulwant Kaur versus Gurdial Singh Mann (dead) by Lrs, (2)**, has held that after amendment of Code of Civil Procedure in the year 1976, thereby amending Section 100, Section 41 of the Punjab Courts Act had become redundant and repugnant to the Central Act, i.e., Code of Civil Procedure and therefore was to be ignored and therefore, the second appeal shall only lie to this Court under Section 100 of the amended Code of Civil Procedure, on a substantial question of law.

(9) It may be mentioned here that though question of law was not framed at the time of admission of present appeal, and however, it has been

(1) AIR 1978 Pb. & Hy. 137

(2) (2001) 4 JT 158 (SC) = AIR 2001 SC 1273

observed by Full Bench of this Court in **Dayal Sarup versus Om Parkash (since deceased though LRs and others, (3))** that this Court can formulate question of law as contemplated under Section 100 of the Code of Civil Procedure at any point of time before hearing of the appeal, even without amending the grounds of appeal. It has also been held that it is the duty of the Court to formulate substantial question of law while hearing the appeal under Sections 100(4) and 100(5) of the Code and question of law can be permitted to be raised at any stage of proceedings.

(10) Hence, in view of this legal proposition, learned counsel for the appellants-plaintiffs was asked to file substantial questions of law, stated to be arising in this appeal.

(11) Learned counsel for the appellants-plaintiffs has filed the following substantial questions of law, stated to be arising in this appeal :—

- “1. Whether the lower Appellate Court was legally justified in reversing the detailed and well considered issue-wide judgment and decree of the trial Court without dealing with all the reasons given therein ?
2. Whether the lower Appellate Court was legally justified in allowing the appeal of the defendant-respondent when no right of easement had ever accrued to him as he not only ever pleaded the necessary requirements but also but that the predecessor-in-interest of the defendant-respondent had himself been claiming the properties to be joint till the year 1970 ?
3. Whether the findings of the lower Appellate Court regarding the right of easement of the defendant-respondent through the suit land are completely untenable and misdirected as no transfer or bequest of the immovable property concerned ever took place ?
4. Whether the lower Appellate Court acted illegally, arbitrarily, and without jurisdiction in reversing the well considered judgment and decree of the trial Court without appreciating the fact that the defendant-respondent had an alternative approach to his cattle shed other than through the disputed site ?

5. Whether the lower Appellate Court was manifestly wrong and against settled principles of law by not appreciating that mere inconvenience in use of an alternate passage is no ground for holding that any right of easement has been acquired through necessity?

(12) I have heard learned counsel for the appellants-plaintiffs on the aforementioned substantial question of law, stated to be arising in this appeal, and have gone through the whole record carefully.

(13) It has been contended by learned counsel for the appellants-plaintiffs that to acquire right of easement, there must be a dominant heritage and servient heritage and that the person claiming easementary right over a property which does not belong to him and, if he enjoys such a right in the supposition that he is owner of the property, he does not acquire right of easement. On the point he has also placed reliance upon **Rayachand Venmalidas versus Manekal Mansukhbhai**, (4) and **K. Mohideen Ibrahim versus M. Muhammed Abdullah**, (5).

(14) He has further contended that in the present case predecessor-in-interest of respondent-defendant had claiming the right of co-ownership in the property of appellants-plaintiffs right upto the year 1970 when he filed the said suit, which was decided in the year 1971 holding that appellants-plaintiffs have become owners of the said house by adverse possession and the suit filed by predecessor-in-interest of respondent-defendant was dismissed. Hence, it is contended that the present suit has been filed before expiry of period of 20 years since the decision of previously instituted suit and, hence, it cannot be said that respondent-defendant has acquired right of easement by prescription as a period of 20 years has not expired. It is further contended that so far as acquiring right of easement of necessity under Section 13 of the Indian Easements Act, 1882 (for short 'the Act') is concerned, in that case there must have been fresh transfer or bequest of the property and however, in the present case, none of the said situation has arisen, and, appellants-plaintiffs were held to have become owners by adverse possession in the previous litigation and hence it is contended that no question of acquiring easement by necessity has been made out in this case.

(4) AIR 1946 Bombay 266

(5) AIR 1978 Mad. 97

(15) It is also contended that respondent-defendant is having another access to his house as well as to the cattle shed and hence, it cannot be said that he has acquiring any right of easement of necessity.

(16) So far as legal proposition held in the aforementioned judgments, on which reliance has been placed by learned counsel for the appellants-plaintiffs is concerned, there is no dispute that for acquiring right of prescriptive easement under Section 5 of the Act, person claiming right of easement of the property must have been conscious that property belong to another person. There is also no dispute that in the previously instituted suit filed by predecessor-in-interest of respondent-defendant against predecessor-in-interest of appellant-plaintiffs, which was decided by learned trial Court *vide* judgment, Ex. P7, which has become final, predecessors-in-interest of respondent-defendant had pleaded that the entire property including the houses possessed by both the parties is joint and the said suit was filed for partition and hence, predecessor-in-interest of respondent-defendant was claiming right over the house owned by predecessor-in-interest of appellants-plaintiffs as co-owner, however, the said plea was not accepted by learned Court and it was held that predecessor-in-interest of appellants-plaintiffs had become owner by adverse possession of the said house. A period of 20 years has not expired since the decision of the said suit before filing of the present suit, in which easementary right has been claimed by respondent-defendant. However, learned first appellate Court has held that even if it is taken that respondent-defendant has not acquired easementary right by prescription, it is a case of easement of necessity as respondent-defendant is having no other way to go to his cattle shed, which is situated beyond the house of appellants-plaintiffs by placing reliance upon site plan prepared by Local Commissioner in the previously instituted suit between predecessor-in-interest of the parties.

(17) It is pertinent to reproduce Section 13 of the Act, which reads as under :—

“13. **Easements of necessity and quasi easements.**—Where one person transfers or bequeaths immovable property to another.—

- (a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement : or

- (b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement ; or
- (c) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transfer or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement ; or
- (d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied be entitled to such easement.

Where a partition is made of the joint property of several persons.—

- (e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or
- (f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The esements mentioned in this Section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable properly passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.”

(18) A plain reading of the aforementioned provision of the law shows that where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this Section, to be deemed, respectively, the transferor and transferee for the purpose of this Section.

(19) In the present case, ownership rights have been acquired by appellants-plaintiffs in the house in their possession by operation of law, i.e., by way of adverse possession. Hence, it cannot be said that Section 13 of the Act is not applicable to the facts of present case.

(20) It has been duly proved in the previous litigation as well as in the pleadings of the present case that house in possession of both the parties are contiguous to each other.

(21) From the perusal of site plan, Ex. PA, which was prepared by the Local Commissioner, appointed in the previously instituted suit, which is not disputed, house in possession of Amir Chand is shown to be situated on northern side of the house in possession of predecessor-in-interest of present appellants-plaintiffs Dharam Singh with 4-1/2 feet wide gate in the courtyard of Dharam Singh and beyond this 4-1/2 feet gate, are situated cattle sheds of Dharam Singh and Amir Chand. It has been rightly observed by learned first appellate Court that there is no other way for going through the said cattle shed by respondent-defendant except by passing through the courtyard of appellants-plaintiffs and, in fact, predecessor-in-interest of respondent-defendant and after his death, present respondent-defendant has been using the courtyard of the house of the appellants-plaintiffs for going to the said cattle shed for the last 40-45 years and if appellants-plaintiffs are permitted to raise wall at points B to C in their courtyard, the same would deprive respondent-defendant's passage to his cattle shed situated beyond the house of appellants-plaintiffs. It has also been observed by learned first appellate Court that if respondent-defendant is to approach his cattle shed through another means of access, he will have to pass through the property of one Chaudhary Makhan. Hence it has been rightly observed that he has right of passage through the courtyard of the house of appellants-plaintiffs to reach his cattle shed and, hence, it has been rightly observed that if respondent-defendant has not acquired easement of prescription, he has acquired easement of necessity, as provided under Section 13 of the

Act. Predecessor-in-interest of respondent-defendant could not claim the right of easement in the earlier suit, as the said suit was filed by him for partition on the plea that the property is joint of the parties. Hence, cogent reasons have been given by learned first appellate Court in reversing the judgment passed by learned trial Court.

(22) Hence, all the substantial questions of law, stated to be arising in this appeal by learned counsel for the appellants, are decided against the appellants and in favour of respondent-defendant.

(23) As a consequence to my above discussion, I am of the view that there is no merit in the present appeal and, the same is, hereby, dismissed.

(24) However, in view of the peculiar facts and circumstances of the case, parties are left to bear their own cost.

A. Agg.