
(2002) 02 AP CK 0170
In the Andhra Pradesh High Court
Case No : S.A. No. 65 of 1990

Ahmed Bi and Others

APPELLANT

Vs

Krishna Panduranga Kokil and Another

RESPONDENT

Date of Decision : 25-02-2002

Acts Referred:

Limitation Act, 1963 — Article 113, 84, 23

Citation : (2002) 3 ALD 399 : (2002) 3 ALT 314

Hon'ble Judges : B. Prakash Rao, J

Bench : Single Bench

Advocate : K. Somakonda Reddy, for the Appellant; C.V. Kanyaka Prasad, for the Respondent

Final Decision : Dismissed

Judgement

B. Prakash Rao, J.—The defendants are the appellants who are aggrieved against the judgment and decree in A.S.No.86 of 1987 & Cross-objections dated 16-12-1989 on the file of the III Additional District Judge, Kurnool arising out of the judgment and decree in O.S.No.416 of 1979 dated 29-7-1987 on the file of the II Additional District Munsif, Kurnool.

2. The respondents filed the suit for permanent injunction against the appellants-defendants restraining them from using the open space "ABCD" or space over it vertically for the purpose of egress and ingress to the premises bearing No.18/122-A from No.18/124 through doorways 1 and 2 and stairs "ST" and over bridge "OB" or by any other device and also for a mandatory injunction for removal of the doorways 1 and 2 and the stair case ST, over bridge "OB" and water pipe connected to the first floors of premises No.18/124 and 18/122-A. According to the plaintiffs, they are the owners of the premises No.18/123 and 18/122-A1, Rasool Bazar, Kurnool. Originally, these two premises along with premises No.18/122 belonged to one family and in the partition between the different branches in the said family, the ABCD open space was left open as a passage to the residents of premises No.18/122-A. The plaintiffs purchased the

premises No.18/123 and space in front of it with a bunk under a registered sale deed dated 25-7-1969. Later, they constructed a pucca shop in the place of the bunk, which was given the No.18/122-A1. The defendant No.2 is the attesor to the said sale deed apart from taking part during the negotiations for the purpose of purchase of the said house by the plaintiffs. Later, the defendant No.2 purchased the premises No.18/122/A and 18/122 under registered sale deeds dated 28-9-1970 in favour of his sons viz., defendants 3 to 5. He also purchased the premises No.18/124 on the Eastern side of "ABCD" space in the name of the defendant No.1 who is his wife under a registered sale deed dated 7-8-1951 from a different owner. However, the said premises viz., No 18/124 is not in any way connected with the premises bearing No.18/123 or 18/122 or 18/122-A. When the plaintiffs were absent in January, 1975, the defendants high-handedly opened two doorways Nos.1 and 2 in the first floor of premises No.18/124 overlooking the ABCD site and laid an over-bridge "OB" connecting the first floor of premises No.18/124 and 18/122-A with door No.3 in the first floor of premises No.18/122-A. The said over-bridge is at a height of 10 feet from the ground and they also constructed a staircase abutting "CB" wall on its Northern end to reach door No.1. In spite of the plaintiffs' objection, the defendants did not stop the construction. The case of the plaintiffs is that the defendants had absolutely no right of passage to the premises bearing No.18/122-A through the said ABCD. Again the defendants have put up a plastic pipe to take water from the premises No.18/124 to premises No.18/122-A along "OB" bridge. They also put up an opening to the over-bridge towards the North with a view to put a staircase to go down from there into the open space ABCD. As the defendants are rich and powerful, they obtained permission from the authorities and made the said construction. Hence the suit.

3. Contesting the suit claim, the case of the defendants is that the disputed site ABCD is a common "rastha" to which the plaintiffs and the defendants jointly have a right of ingress and egress and the plaintiffs have no such exclusive right. The other allegations in the plaint are denied. According to the defendants, the first floor over the premises No.18/124 was constructed 26 years back and the staircase was also constructed after permission and the plaintiffs never raised any objection. The defendants are using both the over bridge and the staircase and the pipe all along without any demur from the plaintiffs. Therefore, the said space is a joint one with joint rights of passage and the defendants are accordingly using the same. That apart, the suit claim is also barred by limitation.

4. After a regular trial, the trial court decreed the suit partly granting a mandatory injunction to demolish the over bridge OB and to close door No.2. However, in place of mandatory injunction for removal of the staircase "ST" and door No.1, the trial court awarded damages of Rs.500/-. The defendants were also restrained by way of permanent injunction from opening any windows or doors on the western wall of premises No.18/124 and from making any encroachments except making use of the stair case as existing.

5. On appeal by the defendants and also cross-objections being filed at the instance of the plaintiffs, the lower appellate court apart from dismissing the appeal filed by the defendants confirming the decree to the extent of the grant of reliefs in favour of the plaintiffs, had also allowed the cross-objections filed by the plaintiffs and granted a mandatory injunction for removal of the staircase and door No.1 by setting aside the awarding of damages by the trial. It was also held that the suit is not barred by limitation.

6. Sri K.Somakonda Reddy, learned counsel appearing for the appellant, strenuously contended that in view of the nature of the claim as set up by the plaintiffs and the construction having already been made long back, the suit is barred by limitation. According to him, applying Article 84 of the Limitation Act, the period of limitation is two years and even otherwise applying the residuary Article 113, the period of limitation being three years, the suit ought to have been dismissed as barred by limitation.

7. Repelling the said contention, it is contended on behalf of the respondents that Article 84 of the Limitation Act has no application and Article 113 being a residuary Article, it too has no application more so in view of Section 23 of the Limitation Act, which contemplates a period of 20 years in the case of easements. That apart, as found by the court below, the constructions having been made within the period of three years, the suit could not have been held to be barred by limitation.

8. From the aforesaid contentions and also on a perusal of the record, the question which falls for consideration in this appeal is as to whether on the facts and circumstances of this case, Article 84 or Article 113 of the Limitation Act will have application and consequently whether the suit is barred by limitation? As stated above, the suit is a simpliciter suit for perpetual injunction filed against the appellants herein by the respondents with mandatory reliefs complaining against the constructions made by the defendants in the common passage shown as "ABCD". According to the plaintiffs, the premises bearing different numbers except 18/124 originally belonged to one family and it is only during the partition amongst the various branches, the ABCD space was left open as a passage. The defendants being the purchasers of premises No.18/122-A and 18/122 have no right to encroach upon the ABCD open space and make any construction. However, it is also the case of the plaintiffs that the defendant No.2 who is no other than the husband of defendant No.1 and the father of defendants 3 to 5 was an active participant during the negotiations which took place at the time of purchase of the premises by the plaintiffs in No.18/123 and 18/122/A-1. Virtually, both the courts below have decreed the suit in its entirety with the finding that the ABCD disputed site is a common passage and there is a public road to its South. There are two houses with door Nos.18/122 and 18/122-A on the western side of ABCD and one house bearing No.18/124 on the Eastern side of ABCD passage. The premises No.18/123 lies to the North of ABCD. The shop as claimed by the plaintiffs bearing No.18/122-A1 lies within ABCD and it abuts

the public road on its south. Though during the course of arguments it was stated that there is a dispute of title in regard to the suit site, however, as rightly pointed out by the lower appellate court, in view of the dismissal of the suit filed by the appellants-defendants themselves earlier in O.S.No.271 of 1975 questioning the title of the plaintiffs, the same is not open for any adjudication. There is also no dispute as to title on the premises purchased by the respective parties. It is to be noticed that the suit space ABCD never belonged to the owners of premises No.18/124 and as such it cannot have any link with the other cluster of premises. Therefore, on a consideration of the entire evidence, it was held by the courts below that the owners of premises bearing No.18/124 have no access to the ABCD passage nor any right to make any construction like the over bridge. The question of claiming any title by the owners of the premises No.18/124 over the suit space ABCD also does not arise. Thus it is the finding of the courts below that the defendants claiming to be the owners of premises No.18/124 do not have any right over ABCD site. Further, it is also the finding of the lower appellate court that the defendants purchased the premises bearing No.18/124 under Ex.B.3 in September, 1970 and it is only thereafter, the stairs, over bridge, water pipe and the doorways have come into existence and that the said constructions have come up only in the year 1979. With these findings of fact, which are conclusive as far as this appeal is concerned, it has to be seen as to whether the suit is barred by limitation as contended by the appellants.

9. Article 84 of the Limitation Act reads as follows:

"84. Against one who having a right to use property for specific purposes, perverts it to other purposes. Two years When the perversion first becomes known to the person injured thereby."

10. The period of limitation as contemplated under the said Article is 2 years. On a reading of the aforesaid article, it is evident that it applies only to a case where a person having a right to use a property for specific purposes uses it for other purposes i.e., the purpose other than the one for which it was meant to be used. The said right to use may flow from any contract or agreement or licence as the case may be between the parties. The expression "perversion" itself is clear enough to indicate that it is a total change, conversion or a different use contrary to the permitted use.

11. Admittedly, in the present case, it is not the case of any of the parties that the suit site is meant for use by a party for a specific purpose. It is not the case on either side that one is vested or conferred with any such right to use the property for a particular use. In fact, the right as claimed by the plaintiffs is on the basis of easement i.e., as a right of passage and even according to the defendants, it is a common right of passage. Therefore, exercise of easementary rights or violation thereof would not fall within the mischief of Article 84 of the Limitation Act and would not amount to perversion. The other Article 113 is a residuary Article contemplating the period of limitation of 3 years to cases which are not specifically provided for in any other Article.

12. The decision in Faqir Chand (through L.Rs.) Vs. Laila Ram (through L.Rs.), , relied upon by the appellants, concerns a suit for injunction wherein the construction of a tin shed in the common passage was held to be a complete ouster of the right of common passage and, therefore, the injury was complete when the tin shed was constructed. Thus applying Article 113 of the Limitation Act, it was held that the suit seeking mandatory injunction was held to be bad. However, the said decision has no application to the facts of this case as there is no total barrage of the common passage by the defendants. It is only on the space covering the common passage, the defendants made construction of a over bridge etc., which does not totally bar the use of the passage by the plaintiffs. Having regard to the factual finding already given by the courts below that the construction was made some time in the year 1979, even applying Article 113 of the Limitation Act, it cannot be said that the suit is barred by limitation. The dispute squarely falls under the provisions of Section 23 of the Limitation Act as it is the case of easement. Accordingly, it has to be held that Article 84 of the Limitation Act has no application and the suit is not barred by limitation.

13. In view of the same, I do not find any merits in the appeal and it is dismissed. No costs.