

(1980) 03 GUJ CK 0030
In the Gujarat High Court
Case No : Second Appeal No. 129 of 1976

Girdharbhai Becharbhai Patel

APPELLANT

Vs

Patel Gordhanbhai Parshottamdas

RESPONDENT

Date of Decision : 18-03-1980

Acts Referred:

Easements Act, 1882 — Section 13

Citation : AIR 1981 Guj 93 : (1981) 22 GLR 338

Hon'ble Judges : S.B. Majmudar, J

Bench : Single Bench

Advocate : B.R. Shah, for the Appellant; S.N. Shelat, for the Respondent

Judgement

1. This second appeal is preferred by original-defendants Nos. 1, 2 and 3 of Regular Civil Suit No. 17 of 1968 filed by Respondent-Plaintiff No. 1 in the Court of learned Joint Civil Judge. Junior Division, Nadiad. The learned Trial Judge has decreed the suit of Respondent No. 1 plaintiff by issuing a permanent injunction against the concerned defendants to the effect that they should not themselves or through others obstruct the plaintiff's cart road and disputed way from Chaklasi road to the northern boundary of Survey No. 47/1 Kharba and finally through cart road in the boundary of Survey No. 49 adjoining the kharba with carts bullock and plough. That decree of the Trial Court was confirmed by the learned Extra Assistant Judge of Kaira at Nadiad in Regular Civil Appeal No. 23 of 1974 and that has resulted in the present second appeal at the instance of the aforesaid defendants.

2. In order to appreciate the controversy between the parties, it is necessary to have a look at the relevant facts leading to this litigation. Respondent No. 1 as plaintiff in the trial court contended that he is the owner of Survey No. 49 situated in the sim of village Salun, Taluka Nadiad of Kaira district. The original-defendant No.1 who died pending the suit and who is represented by his heirs and legal representatives 1-A to 1-F, was the owner of Survey No. 46/6. While according to the plaintiff Survey No 46/5 is of joint ownership of the plaintiff and

the said defendants. On the joint ownership Kharba land a well of joint-ownership is situated. The plaintiff case is that he is the joint owner with aforesaid defendants so far as survey No. 46/5 is concerned. He contended that for approaching his agricultural land Survey No. 49 from village Salun, he had to go first to Chaklashiwali Nal and had then to pass from the northern Shedha of Survey No. 47/1 and Survey No. 47/2 which belong to defendants Nos. 4 to 6 on the one hand and defendant No. 7 on the other. The plaintiff's further case is that having reached the northern boundaries of Survey No. 46/1 and Survey No. 46/2, he used to enter the Kharaba land of Survey No. 46/5 which was a joint land between the plaintiff and defendant No. 1 and through that Kharaba land, he used to approach his land Survey No. 49. The plaintiff claims that he is using this way since times immemorial, since the days of his ancestors, continuously and without any obstruction. His further case is that he and the defendants are of the same family and their common ancestor was one Gopaldas Kalidas who was the owner of both the lands Survey Nos. 49 and 46. Thereafter there was a division of properties and the defendant No. 1 came into possession of Survey No. 46/6 which was a sub-division of Survey No. 46. Survey No. 46/5 was kept joint between the parties. Plaintiff's further case is that even though he was utilising the said way as an easementary right since so many years, on 10th April, 1967 the said right was obstructed by defendant No.1, Consequently he had to file the aforesaid suit for getting necessary injunctions against the concerned defendants.

3. Defendant No. 2 contested the suit as the main contesting defendant. Defendants Nos. 1 and 3 adapted the written statement of defendant No. 2. On a contention by defendant No. 2 that the suit suffered from non-joinder of necessary parties, the plaintiff amended his plaint and thereafter defendants Nos. 4 to 15 were joined as additional defendants. These other defendants did not seriously enter into the arena to contest the plaintiff's case. The real dispute is between the Plaintiff on the one hand and defendants Nos. 1, 2 and 3 on the other. Their contention was that the land Survey No. 46/5 is not of common ownership but is of independent ownership of defendants Nos. 1 to 3 and as such the plaintiff has no right, title or interest therein. They also contended that the plaintiff had no easementary right as alleged by him and he had no right to pass with cart, plough or bullocks through their Survey No. 46/5. Hence he was not entitled to any relief as prayed for by him in the suit.

4. On these pleadings issues were framed at Exhibit 20. The learned Trial Judge after recording evidence of respective parties, came to the conclusion that the plaintiff had proved that he had a right of way for carts etc. Through the northern borders of Survey Nos. 47/1 and 47/2 and through the waste land of Survey No. 46/5 to go to his Survey No. 49. It was found by him that the plaintiff had established his case that he had this right by immemorial user or user for more than 20 years ending with in two years of the suit. Plaintiff's alternative case that he had a right to pass by the suit way since he had the easementary right of necessity was also held proved. The contesting defendants' contention

that the plaintiff had an alternative way to approach Survey No. 49 from the western side thereof was held not proved. On the basis of the aforesaid findings of his, the learned Trial Judge, as a necessary corollary, decreed the suit of the plaintiff and granted him a Perpetual injunction against the concerned defendants.

5. As stated above, the trial Court's decree in favour of the plaintiff resulted into Regular Civil Appeal No. 28 of 1974 before the District Court of Kaira at Nadiad. It may be stated at this juncture that defendants 1-A to 1-F. 2 and 3 challenged the decree of the Trial Court by preferring this appeal. The other defendants who were the owners of Survey 47/1 and 47/2 had not preferred any appeal against the decree of the trial Court. The appeal of contesting defendants Nos 1-A to 1-F. 2 and 3 was ultimately dismissed by the Appellate Court and that has brought the dissatisfied defendants-appellants to this Court by way of present second appeal.

6. The aforesaid facts will show that the contest between the parties is limited to plaintiff-respondent No.1 on the one side and the present appellants who are defendants Nos. 1-A to 1-F. 2 and 3 respectively on the other side. So far as these contesting defendants are concerned, they are the owners of Survey No. 46/1 and they also claim to be the sole owners of Survey No. 46/5. It is necessary to, recall the plaintiff's main grievance at this stage. He claims the suit way from Survey Nos. 46/5, 47/1 and 47/2. So far as Survey Nos. 47/1 and 47/2 are concerned their owners who are alleged to be servient owners by the plaintiff did not contest the decree passed by the Trial Court against them. Only the defendants 1-A to 1-F. 2 and 3 who contested before the appellate Court have challenged the appellate decree before this Court.

7. Mr. B. R. Shah, the learned advocate appearing for the appellants raised the following contention in support of this appeal.

1. The learned Appellate Judge has committed an apparent error of law in holding that Survey No. 46/5 is a coownership property of which plaintiff respondent No. 1 a co-owner along with the appellants.

2. Even assuming that Survey No. 46/5 is a co-ownership property between the parties even then the plaintiff cannot claim a right of way over the said property so as to approach his field Survey No. 49 as this would amount to creating an additional burden on a joint property and it would not amount to a reasonable user there of. And consequently the plaintiff is not entitled to any relief on the basis that he had a right to utilise Survey No. 46/5 for approaching his own land Survey No. 49.

3. It was, lastly contended by Mr. Shah that in any case even assuming that the plaintiff can make use of Survey No.46/5 to approach his Survey No. 49 as a co-owner, he is required to use it in the most reasonable manner so that least burden is caused on its other co-owners.

8. Mr. S. N. Shelat, the learned advocate appearing for the plaintiff, has

supported the judgment and order passed by the learned Appellate Judge.

9 to 11 (xx xx xx xx)

12. That takes me to the second contention of Mr. Shah. It was submitted in the alternative by Mr. Shah that even assuming that Survey No. 46/5 is a Joint property of the plaintiff and the appellants, even then the plaintiff cannot use the said joint property to approach his exclusive Survey No. 49 which is situated in the south-west corner of the joint land Survey No. 46/5. According to Mr. Shah, Survey No. 46/5 was to be used for taking water from the well and no other user could be countenanced even on the part of any of the co-owners. Otherwise it would amount to a nonpermissible user thereof as it would cast an additional burden on this Joint land. There is no merit even in this submission of Mr. Shah. Once it is held that Survey No. 46/5 jointly belongs to the plaintiff as well as the appellant-defendants, it necessarily follows that the plaintiff cannot claim an easementary right over the said land. It must be stated that even the learned advocate for the plaintiff respondent before the lower Appellate Court fairly conceded this position which has been noted in Para 9 of the Judgment of the Appellate Court. Once the plaintiff is not claiming or cannot claim any easementary right over his co-ownership property Survey No. 46/5, it is difficult to appreciate the apprehension of Mr. Shah that if the plaintiff is permitted to approach his Survey No. 49 through the co-ownership property Survey No. 46/5, it would amount to casting a burden on Survey No. 46/5. The plaintiff, as a co-owner of Survey No. 46/5, has every right to reasonably use every part of Survey No. 46/5. As it is well-settled so long as partition does not take place, every co-owner of a joint property is entitled to use any and every part thereof consistently with the right of user of the other co-owners and such user by a co-owner should be reasonable in the sense that it should not amount to ouster of the other co-owners. Subject to that limitation the reasonable user by a Co-owner of co-ownership property consistent with the right of other co-owners, is perfectly justified. In fact such a user would be a necessary con-comitant of the co-ownership right. As Survey No. 46/5 is found to belong jointly to the Plaintiff with the appellant-defendants, he is entitled to pass through the said land to approach his Survey No. 49 which is situated just near south-west corner of Survey No. 46/5. If the plaintiff travels through the said co-ownership land which belongs jointly to him as well as the appellants, it cannot be said he is casting an additional burden on the co-ownership land and thereby he is ousting the appellants from the said land. Consequently, it cannot be said that by permitting the plaintiff to travel over the co-ownership land Survey No. 46/5, an unnecessary burden is being imposed on the said Survey No.46/5. It may be recalled at this juncture that even though the plaintiff travel is over Survey No. 46/5 which is a joint land of his along with the appellants no easementary right is created in his favour, so far as Survey No. 49 is concerned, it can never be styled as a dominant tenant vis-a-vis Survey No. 46/5. Consequently no burden is being cast on Survey No. 46/5 because a co-owner of it utilises it for approaching his own exclusive land Survey No. 49 which situated on its south-western corner.

In that view of the matter, the apprehension felt by Mr. Shah is misplaced and has no factual or legal justification. The second contention of Mr. Shah, therefore, is also devoid of any merit and is liable to be rejected.

13. That takes me to the last contention of Mr. Shah, Mr. Shah submitted that even assuming that the plaintiff can utilise Survey No. 46/5 which is a joint ownership property with the appellants he must so use the said land for approaching his Survey No. 49 that no avoidable inconvenience is caused to the other co-sharers of the said land. To that extent Mr. Shah is right. Even though the plaintiff is a Co-owner of Survey No. 46/5 with the appellants, he can utilise it for approaching his Survey No. 49 in a way which is least onerous to his other co-owners. That would really amount to a reasonable user of the said land. It is true that the plaintiff is not getting any easementary right over Survey No. 46/5 for approaching his Survey No. 49. But even in cases of easementary rights of way, provisions of Section 22 of the Indian Easements Act, 1882 would apply. They provide that the dominant owner must exercise his right in the mode which is least onerous to the servient owner. It is true that between appellants on the one side and the respondent plaintiff on the other, there is neither any dominant owner nor any servient owner. Hence strictly speaking Section 22 may not apply. Still as a co-owner he is to utilise the co-ownership property in a reasonable manner which does not unnecessarily inconvenience his other co-owners. It must be stated at this juncture that the decree passed by the learned Trial Judge is in very wide terms. A perpetual injunction is granted against the appellants-defendants restraining them from obstructing the cart road and disputed way from Chaklasi road to the northern boundary of Survey No. 47/1 Kharba and finally through cart road in the boundary of Survey No. 49 adjoining the Kharba with carts, bullocks and Plough. Mr. Shah again finds fault with this decree passed in favour of the plaintiff and against the appellants and other defendants. But such a decree can operate consistently with the defendants' contention that the right of way i.e. the utilisation of the way for the plaintiff over Survey No. 46/5 would be in such a manner as not to unnecessarily inconvenience the defendants. In fact, merely because the plaintiff carries his carts his bullocks and plough through the co-ownership Property Survey No. 46/5 it cannot be said that any unreasonable inconvenience is being caused to the defendants. It is obvious that he will be utilising the said joint ownership property in a manner which would least inconvenience his other co-sharers. The decree passed by the Trial Court and confirmed by the Appellate Court is in no way inconsistent with the aforesaid contention raised by Mr. Shah on behalf of the contesting defendants. Hence, even this apprehension of Mr. Shah is not well founded. In the result none of the contentions raised by Mr. Shah has any merit and consequently this second appeal fails and shall stand dismissed. In view of the near relationship of parties, there will be no order as to costs in this second appeal.

14. Appeal dismissed.