

(1995) 04 KAR CK 0002

In the Karnataka High Court

Case No : Regular Second Appeal No. 272 of 1988

Gundali Basavanyappa

APPELLANT

Vs

G.S. Basavaraja

RESPONDENT

Date of Decision : 04-04-1995

Acts Referred:

Easements Act, 1882 — Section 19, 4
Transfer of Property Act, 1882 — Section 40

Citation : (1996) 1 CivCC 303 : (1995) ILR (Kar) 1126 : (1995) 4 KarLJ 629

Hon'ble Judges : Bharuka, J

Bench : Single Bench

Advocate : B. Veerabhadrappe and B.M. Lrali, for the Appellant; S.V. Raghavachar, for the Respondent

Final Decision : Dismissed

Judgement

Bharuka, J.—This Appeal by the defendants is directed against the judgment and decree of the lower appellate Court by which the suit of the plaintiffs has been decreed acceding to their claim of right of way through the Oni and Angala of defendants' house and that of discharging rain and drain waters through the suit drain (Kaluve).

2. The entire suit property formerly belonged to the family of the contesting parties which was purchased by one Kori Halappa who subsequently sold the same to Uduchanda Hatappa. Defendants purchased half portion of the plaint schedule property bearing No. 30 from the said Hatappa under a registered Sale Deed dated 10.5.1961 (Exhibit P-2) and the other half portion bearing No. 29 was retained by the Vendor. Subsequently the said Halappa sold the other portion of the house bearing No. 30 to the plaintiffs under a registered Deed dated 21.4.1977 (Exhibit P-1). Admittedly the defendants had executed a registered document Exhibit P-3 dated 10.5.1961 contemporaneously with the execution of the sale deed in their favour wherein they granted and conceded a right of way and that of discharge of water through the property purchased by

them in favour of their vendor Hatappa obviously for securing beneficial enjoyment of the other property held by their vendor. The said right so conceded was to be exercised over the Oni passing through the Angala as shown in the plaint sketch and the drain described therein.

3. It has been found by the Courts below that subsequent to purchase of property No. 29 by the plaintiffs, they had been using the said Oni passing through the Angala for carrying their cattle and other purposes, within the knowledge of the defendants. But they abruptly started obstructing to the exercise of that right which led to the filing of the present suit in 1981.

4. The trial Court keeping in view the pleadings, framed the following two material issues for determination:

"(1) Whether the plaintiffs prove that they have a right to use the Voni and the Angala as shown in the suit sketch?

(2) Whether the plaintiffs are entitled for the relief of declaration and permanent injunction as prayed for?"

The said issues were answered in the negative by the trial Court by holding that the right of way conceded under Exhibit P-3 was a personal right of the vendor Halappa, and as such it extinguished on sale of the property in favour of the plaintiffs. It was further held that since the plaintiffs have not based their relief by raising the plea expressly in terms of the Indian Easements Act, 1882 (hereinafter referred as "the Act") claiming their right in the nature, of easement, it cannot be adjudicated.

5. The lower appellate Court reversed the judgment and decree of the trial Court keeping in view the provisions of Section 40 of the Transfer of Property Act, 1882 and also by accepting the plea pertaining to easement of necessity. The learned Counsel for the defendants has assailed the judgment of the lower appellate Court by submitting that there being no foundation in the plaint pertaining to the plea of easement of necessity, the Court below could not have granted any relief based thereon. His further submission is that the document Exhibit P-3 merely confers a personal right on the parties which do not stand transferred to the plaintiffs in law.

6. On the other hand, learned Counsel for the plaintiffs by relying on the averments in the plaint and the relevant provisions contained under the Act, supported the reasonings contained in the impugned order.

7. The Substantial Questions of Law falling for my consideration, as re-formulated, are as follows:

(1) What is the nature of the right reserved and conceded to Sri Halappa the vendor of the contesting parties under the documents Exhibits P-2 & P-3?

(2) Whether the right possessed by the said Halappa was a right personal to him or was it annexed to the property bearing No. 29 retained by him and as such

exercisable by every owner of the said property?

8. For examining the said Questions, I may quote the relevant averments in the Sale Deed Exhibit P-2 executed by the vendor Halappa in favour of the defendants. The English translation of the same reads as under:

"...The pathway for cattle lying on the northern side of the schedule property is included in the property which you have purchased for consideration, But the house bearing No. 30 which is towards the southern side of the schedule property being attached to the house bearing No. 29 which is purchased by you, and that towards the northern side of both the aforesaid houses there being only one pathway (Oni), I reserve to myself the right to use the same for movement of my cattle."

Similarly the document Exhibit P-3 which was executed simultaneous to the Sale Deed Exhibit P-2, which though termed as an agreement is in fact a declaration made by defendant No. 1 in favour of his vendor, is in the form of a grant or concession and is to the following effect (English translation):

"I have purchased today a house bearing No. 29 for consideration, that there being a Oni towards its northern side, that there being no way towards your house bearing No. 30, confer on your people and your cattle to move about in the Oni and the Angala behind it which belong to me. I allow the rain water falling on the Angala which is behind your House No. 30 to flow through as usual in the Angala of my purchased house. Myself or my successors will not have any right whatsoever to interfere in the above said right of passage and also the right of flow of water from the Angala."

9. From a reading of the said stipulations in the Sale Deed Exhibit P-2 and the document Exhibit P-3, it stands established that while selling the property to defendant No. 1, his vendor Halappa for securing beneficial enjoyment of the property retained by him had reserved to himself the right of way and that of discharging water through the property sold to the defendant. It is also clear that in order to fortify the exercise of that right defendant No. 1 by a separate document Exhibit P-3 expressly conceded to the said right assuring his vendor that the same will not be interfered with or obstructed by him or his successors. The said documents further establish that except the Oni and the Angala there is no other passage to house No. 30 for egress and ingress of cattle and people. The lower appellate Court has also found as of fact that the plaintiffs have been enjoying or using the Oni and Angala for carrying through the fodder and the hay and to take the cattle to the back-side cattle shed and that they have no other alternative way from their house to reach the public road for the said purpose excepting the Oni and Angala. In view of the aforesaid documents and oral evidence and the findings of fact recorded by the Court below, it has to be held that the right reserved and conceded to the common vendor Halappa is in the nature of easement as defined u/s 4 of the Act, because the said right had been acquired and possessed for the beneficial enjoyment of property No. 29 by

exercising the same over the contiguous property No. 30. The right of easement so acquired are never personal and such rights are always annexed to the dominant heritage; and as provided u/s 19 of the Act, whenever the dominant heritage is transferred or devolved, unless contrary intention appears, the easement passes to the person in whose favour the transfer or devolution takes place. In the present case, there is no evidence of any contrary intention. Therefore, the right of easement referred to above acquired by Halappa has to transfer to the plaintiffs and in law the plaintiffs are entitled to exercise the same.

10. Section 13(c) of the Act reads thus:

"13. Where one person transfers or bequeaths immovable property to another,-

(a) & (b) xxx xxx xxx (c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or....."

11. In the present case, as noticed above, the right of way as an easement was necessary to be exercised over the property of the defendants for enjoying the other property of the transferor Halappa, and, therefore, notwithstanding the stipulations or grant as contained in documents Exhibits P-2 and P-3, by operation of law, Halappa had acquired the right of easement of way over the property sold by him under Exhibit P-2, and, this being a right of easement annexed to the property purchased by the plaintiffs they are in law entitled to exercise the same whether there is any specific stipulation to that effect in the sale deed executed in their favour or not.

12. So far as the reasoning based on Section 40 of the Transfer of Property Act, as set out by the lower appellate Court, is concerned, in my opinion, that is wholly misplaced. It is because to the facts of the present case the provisions contained in that Section have no application. Those provisions are intended to be applied in a situation where certain reliefs as contained, therein are claimed against the purchaser as a vendor, which is not a situation here. Moreover, the said provisions cannot be pressed into service in relation to easements.

13. So far as discharge of rain and waste waters is concerned, defendants through their Lawyer/s in both the Courts below as well as before this Court have conceded that the plaintiffs have that right and the defendants never intended or intend to interfere with the same. Therefore, no elaborate discussion is required for granting this relief.

14. Keeping in view the foregoing discussions, I find no valid reasons for interfering with the ultimate order and decree passed by the Court below, which is accordingly upheld. Appeal accordingly stands dismissed. Parties to bear their own costs.