

(1998) 12 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 434 of 1993

H.P.S.E.B. and Others

APPELLANT

Vs

Shiv Kumar Sharma and Others

RESPONDENT

Date of Decision : 28-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Easements Act, 1882 — Section 13
Land Acquisition Act, 1894 — Section 11, 16

Citation : (1999) 2 ShimLC 111

Hon'ble Judges : Kamlesh Sharma, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Devyani Sharma, for Respondent Nos. 1 3 and Vivek Thakur, Assistant A.G., for the Respondent

Final Decision : Dismissed

Judgement

Kamlesh Sharma, J.—This Regular Second Appeal, at the instance of the H.P. State Electricity Board and Ors. is against the decree and judgment dated 11.10.1993 passed by Additional District Judge, Solar , Camp at Nalagarh, whereby the appeal of Respondents was allowed and the decree and judgment dated 31.8.1992 of Sub-Judge, Ist Class, Nalagarh District Solan, was set aside and their suit which was dismissed by Sub-Judge Ist Class, was decreed as under:

...the suit of the Plaintiffs is decreed and it is hereby ordered by way mandatory injunction that the Defendants shall remove the barbed wire fencing at the point where the site shown in red in the maps Exts. PW1/0 and Ext. PW4/A touches the boundary of the Plaintiffs' property shown in yellow in the aforesaid maps. It is further ordered by way of permanent prohibitory injunction that the Defendants shall not cause any interference in the right of the Plaintiffs to approach their property shown in yellow in the aforesaid two maps through the road shown in blue and vacant portion shown in red beyond the said road. Decree-sheet be drawn accordingly.

2. The factual matrix of the case is that the Respondents-Plaintiffs purchased land measuring 10.10 Bighas, bearing Khasra No. 1, 755/682/3 1, 22 and 23 situated in Village Kunjahal, Pargana Dharampur, Tehsil Nalagarh, District Solan, for a consideration of Rs. 17,000 from its previous owner Rikhi Ram vide registered sale-deed dated 20th April, 1978, (hereinafter referred to as "Plaintiffs" land"). Thereafter, the Appellants-Defendants acquired the remaining land of Rikhi Ram and certain other land held in village Kunjahal, Pargana Dharampur, Tehsil Nalagarh, District Solan, under the provisions of Land Acquisition Act, in the year 1981. When Appellants-Defendants put barbed wire fencing around their acquired land previously belonging to Rikhi Ram; the Respondents-Plaintiffs felt aggrieved as approach to Plaintiffs" land from Nalagarh-Barotiwala-Kalka Road got obstructed as the remaining land of Rikhi Ram acquired by Appellants-Defendants falls on the way towards its east and earlier they were passing through it for going and coming to their land from the said road. According to Respondents-Plaintiffs, the Plaintiffs" land is bounded by the Territory of Haryana from three sides and the only access available to them is from the land of Appellants-Defendants who had constructed the road up to the family quarters constructed by them and thereafter, there remains kacha portion over which there can be link road for going to Plaintiffs" land as shown in red in the maps Ext. PW-1/0 and Ext. PW-4/A. As per the Respondents-Plaintiffs, the said fencing was put in the year 1986 and they have filed their suit on 15.5.1987 claiming right of passage by way of easement of necessity and in the alternative by way of customary easement. They have also put up the case that in their sale-deed, there is a specific clause that they will have right of ingress and egress to and from the land sold to them.

3. The Appellants-Defendants in their written statement denied all the allegations made in the plaint except that the land of Rikhi Ram acquired by them is towards the east of the land of Respondents-Plaintiffs and beyond it, there is a motorable road for Nalagarh-Barotiwala-Kalka road. According to them, the Respondents-Plaintiffs do not have any right to pass through their land to approach the said road. As such, immediately after acquisition in the year 1981, they had put barbed wire fencing around their land. They have specifically denied that fencing was put in the year 1986 as alleged in the plaint and took the preliminary objection of limitation besides the others.

4. The trial Court dismissed the suit holding that Respondents-Plaintiffs had failed to prove their plea of easement of necessity, as such; they have no cause of action and their suit is not maintainable. It is also held that there is no reference in the sale-deed executed by Rikhi Ram in favour of Respondents-Plaintiffs that they have right of ingress and egress, through the land lying to the east for going to Nalagarh-Barotiwala-Kalka road from the Plaintiffs" land. According to the trial Court instead of plan filed with the plaint another plan was proved, as such; relief of injunction prayed by Respondents-Plaintiffs could not be granted.

5. The District Judge reversed the findings of the trial Court and on the basis of evidence on record held that since both the Respondents-Plaintiffs and Appellants-Defendants are transferees from Rikhi Ram and the land acquired by the Appellants-Defendants is towards the east of the Plaintiffs' land beyond which exists Nalagarh-Barotiwala-Kalka Road, the only approach from the Plaintiffs' land to the said road can be through the land of Appellants-Defendants as the other three sides of the Plaintiffs' land are surrounded by the Territory of Haryana State. The District Judge has also found that the sale-deed Ex. PW-1/A does contain a clause giving the Respondents-Plaintiffs right of approach from the land purchased by them. Though the description of the approach does not figure in the sale-deed, it can legitimately be inferred that the approach was through the left out land of the vendor, Rikhi Ram, because otherwise there was no necessity of making reference to the approach. So far as the question whether the fencing around the acquired land of Appellants-Defendants was put in the year 1981 or 1986, on the failure of Respondents-Defendants to produce relevant record which was with them as stated by Assistant Engineer, Dalip Singh, adverse inference has been drawn to hold that fencing was put in the year 1986 as claimed by the Respondents-Plaintiffs. The District Judge also found that Subhash Chander Nijhawan, (PW-4) has proved map Ext. PW-4/A, which is a farrow copy of map Ext. PW-1/A filed along with the plaint and the letters A, B, C, D, marked on it will not make any difference. Hence, the trial Court is not right that map Ext. PW-1/0 is not proved and the claim of Respondents-Plaintiffs cannot be accepted.

6. After hearing learned Counsel for the parties and going through the record, this Court finds that these findings of fact, stated hereinabove, arrived at by the District Judge do not call for any interference in exercise of jurisdiction u/s 100, CPC After going through the pleadings and evidence on record, this Court finds that the District Judge has correctly read and interpreted them to come to the conclusion that the only approach available to the Respondents-Plaintiffs is through the land of Appellants-Defendants, as such, they have a right to approach their land as claimed by them and the Appellants-Defendants have no right to obstruct their approach by putting barbed wire-fencing.

7. The learned Counsel for the Appellants-Defendants has vehemently argued that if the following substantial question of law arising in this appeal is decided in favour of Appellants-Defendants, the suit of the Respondents-Plaintiffs will fail. The substantial question of law is, "Whether in view of the fact that the property was acquired under the provisions of the Land Acquisition Act, the alleged right of passage stand extinguished with the acquisition of the property and vesting thereof from all encumbrances in favour of the Defendant/Appellant?"

8. Admittedly, the Appellants-Defendants had acquired the remaining land of Rikhi Ram along with land of some other landowners in the year 1981 and possession thereof was also taken by them, as a result of which the said land had vested in them free from all encumbrances as provided u/s 16 of the Land

Acquisition Act, hereinafter called "the Act".

9. Now, the question arises whether the right of Respondents-Plaintiffs to pass through the acquired land for reaching Nalagarh-Barotiwala-Kalka road by way of necessity was encumbrance which stood extinguished. Both the parties have referred to some case law to urge their respective stand. In AIR 1925 Lah 523 *Mitra v. Municipal Committee, Lahore*, it is held that the word "encumbrance" used in Section 16 of the Act includes a right of passage and Section 16 would operate to extinguish all easements. In the said case, the learned Judges were dealing with the case in which the easement claim was such for which adequate compensation could be awarded and was awarded. It was not a case of approach to the property of claimant by way of easement of necessity.

10. Next judgment is of Calcutta High Court in *Baraset Basirhat Light Railway Co., Ltd. Vs. Nrisingha Charan Nandi Chowdhury*, in which the learned Judges have held that the word "encumbrance" in Section 16 means some burden created by acts or omissions of human beings and it does not mean a burden or obligation created by nature. They were dealing with the burden upon the acquired portion of the river to pass the running water downwards, which according to learned Judges, is not encumbrance within Section 16 and, therefore, it is not extinguished by the proceedings under the Land Acquisition Act.

11. Relying upon these two judgments of Lahore High Court and Calcutta High Court, in *George Vs. State*, , the learned Judges of Kerala High Court held that the sluice is encumbrance and its loss by the acquisition can be compensated by damages and keeping in view the larger interest of the farmers, State was within its right to put a strong bund to prevent the flow of saline water into their paddy fields for which purpose the land was acquired.

12. In *The Collector of Bombay Vs. Nusserwanji Rattanji Mistri and Others*, the learned Judges have opined that the word "encumbrance" in Section 16 can only mean interest in respect of which a compensation was made u/s 11 or could have been claimed. By "interest" the learned Judges mean one or more of those rights which go to makeup "ownership". It will include, for example, mortgage, lease, charge, easement and the like. (See para-13).

13. Therefore, it is clear that if the encumbrance of easement is such in respect of which compensation can be claimed, it extinguishes as provided u/s 16 of the Act. But, the right of passage by way of easement of necessity is not such an encumbrance, as, if it extinguishes, it becomes impossible to use the dominant tenement at all and no amount of compensation can make good the loss.

14. Referring to Section 13 of the Easement Act, it is clear that easement of necessity arises when by a transfer, bequest or partition, a single tenement is divided into distinct and separate tenements and any of them is so situated that it cannot be used at all without enjoying an easement over the other such tenement or tenements. This ingredient of easement of necessity is present in

the case in hand as two pieces of land one purchased by the Respondents-Plaintiffs and another acquired by the Appellants-Defendants were earlier one unit and the situation of the land of Respondents-Plaintiffs is such, which is dominant tenement, that it can be approached only through the passage from the land of Appellants-Defendants, which is the servant tenements, as correctly found by District Judge. (Please see : Smt. Usarani Das Vs. Bhaktahari Mohanty and Others,

15. In view of the above discussion, the substantial question of law is answered in negative that the right of passage by way of necessity as enjoyed by the Respondents-Plaintiffs over the land of Appellants-Defendants did not extinguish with the acquisition.

16. In the result, there is no merit, in this appeal and it is rejected. The decree and judgment dated 11.10.1993 passed by Additional District Judge, Solan, Camp at Nalagarh, is affirmed. No order as to costs.