

(1958) 08 KAR CK 0004
In the Karnataka High Court
Case No : Second Appeal No. 343 of 1954

K.G. Puttasamiah

APPELLANT

Vs

Gangamma

RESPONDENT

Date of Decision : 20-08-1958

Acts Referred:

Easements Act, 1882 — Section 13, 13 (a)

Citation : AIR 1960 Kar 170

Hon'ble Judges : S.R. Das Gupta, C.J

Bench : Single Bench

Judgement

(1) This appeal arises out of a suit for mandatory injunction directing the defendant (a) to remove the latrine pit kept by him on the sides of the northern wall of the plaintiff's house and put the same 3 ft. To 4 ft. off farther so that no damage may be caused to the said wall of the plaintiff's house and also to repair the drain so that the water of eaves of the plaintiff's house and the water of the defendant's house may flow out easily; and (b) to allow the workers of the plaintiff to enter upon the defendant's open yard for repairing the northern wall of the plaintiff's house and not to cause any obstruction in so entering and carrying out the repairing work.

(2) The defendant is the appellant before me. The first Court dismissed the suit. The lower appellate Court reversed the said decision of the first Court. The present appeal has been filed against the said decision of the lower appellate Court.

(3) The plaintiff and the defendant are adjacent owners. Their respective premises are separated by one wall which is the wall in question. The plaintiff's case is that the said wall belonged to her exclusively, the defendant's case being that the said wall was a common wall. The defendant made an alternative claim, viz., that even if the wall be held not to be a common wall, the plaintiff has no easement right to enter into his portion and repair the said wall.

(4) Both the properties originally belonged to one Muninaidu. The plaintiff purchased from him by registered sale deed dated 19-1-1939 the portion which now belongs to her. That portion is to the south of the said wall which runs east to west. On 25-1-1939, the said Muninaidu sold to one Ratnamma the other portion of the said house that is, the portion lying to the north of the said wall. The said Ratnamma thereafter sold the said portion to one Viswanatha Setty on 25-6-1940. Viswanatha Setty mortgaged with possession the said portion to one Channegowda. Subsequently, the said Viswanatha Setty sold the said portion to Channegowda.

The plaintiff contends, as I have already indicated, that the wall in question was the wall of the plaintiff and she has a right to get into the yard of the defendant in order to repair the same. The plaintiff further contends that the pit latrine lying in the yard of the defendant has to be removed to some distant place as otherwise it is causing damage to the said wall and to the plaintiff's house. The third contention of the plaintiff is that the rain water falling from the plaintiff's premises on the defendant's yard should be allowed to pass through the drain in the defendant's premises. The defendant of course denied all the contentions of the plaintiff. The lower appellate Court has found in favour of the plaintiff on all these points.

(5) At the hearing of this appeal before me, Mr. Krishnamurthi appearing on behalf of the defendant concentrated his arguments mainly on one point, i.e., regarding the right of the plaintiff to get into the yard of the defendant to repair the wall of the plaintiff. I should at this stage mention that both the Courts found that the wall in question was the wall of the plaintiff. The question which then arose was whether or not in the circumstances of this case the plaintiff has the easement right to enter into the premises of the defendant in order to repair the northern side of the said wall. The lower appellate Court has held that the plaintiff has such a right of easement and it is an easement of necessity as mentioned in clause (a) of S. 13 of the Easements Act. Mr. Krishnamurthi contended before me that the decision of the lower appellate Court on this point is erroneous.

(6) Before I deal with the contention of Mr. Krishnamurthi on this point it would be necessary to refer to the relevant portions of S. 13 of the Easements Act. The material portion of the said section reads as follows:

"13. 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 of 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 intentions expressed or necessarily implied, be entitled to such easement;

(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

(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."

As I have already mentioned, the lower appellate Court found in favour of the plaintiff on the ground that the easement in question in this case is an easement of necessity as contemplated in clause (A) of S. 13 of the Act. The learned Advocate appearing on behalf of the Respondent also urged the same contention before me.

(7) Mr. Krishnamurthi, on the other hand, contended that an easement in order to be an easement of necessity must be apparent and continuous. His contention was that there is no difference between clause (a) and clause (b) of the said section. Cl., (b) is only illustrative of clause (a) and according to him, in a case, as at present, where there is a severance of a tenement the transferee can claim an easement of necessity only if the said easement is apparent and continuous. In support of his contention, he sought to rely on two decisions, one of the Patna High Court and another of the Calcutta High Court-- Kartic Manjhi and Another Vs. Banamali Mukerji and Others, and Dakshina Ranjan Choudhury Vs. Surendra Lal Das Gupta, .

(8) In my opinion, this contention of Mr. Krishnamurthi cannot be accepted as sound. On reading the several cls. (a), (b) and (c) and S. 13, it does not appear that clause (a) was intended to apply to the same kinds of easements as are mentioned in clause (b). In my opinion, clause (a) refers to easements of necessity while cl., (b) refers to easements of qualified necessity. If it becomes necessary for the transferee, after there has been severance of the tenement, for enjoying the subject of the transfer or bequest to have an easement over the other immovable property of the transferor, then it is a case of easement of necessity and comes within clause (a) of S. 13. I no doubt agree with the view that such necessity must be an absolute necessity. But once there is such an absolute necessity for enjoying the subject of the transfer it is not necessary that the conditions mentioned in clause (b) should be present in order to entitle the transferee to have such easement.

This view seems to be supported by a decision of the Bombay High Court reported in Official Trustee of Bombay Vs. Salebhai Sarafally Bhagat, . In that case, His Lordship dealt with a situation which is almost similar as in the present case. The question in that case also was whether or not the defendants in that case has a right to go to the plaintiff's property in order to plaster the wall of the plaintiff--the same question as in the present case. It was contended in that case that an easement of the nature claimed has not been heard before and there can

be no such easement. This contention was negated by Tarapurwalla J., who decided that case and held as follows:

"The plastering is for the beneficial enjoyment of the defendant's property, and the act which they claim the right to do to enjoy that benefit is an act which is to be done on the plaintiff's property. In my opinion, if such a right exists, it would clearly be in the nature of an easement."

It should, however, be mentioned that His Lordship on the facts of that case held that the necessity was not an absolute necessity. In the course of his judgment while dealing with the effect of cls. (a), (b), (c) and (d) of S. 13, His Lordship observed as follows:

"Now an easement of necessity is created under S. 13, sub-cls. (a), (c) and (d). An easement of necessity is not created merely when the easement is necessary, but when it is absolutely necessary for the beneficial enjoyment of the dominant property. As pointed out in *Chhotalal v. Devshankar* by Jenkins, C. J., the necessity contemplated in cls. (a), (c) and (d) of S. 13 of the Indian Easements Act is an absolute necessity; while in cl., (b) of the section, it is a qualified necessity. There the easement was claimed under S. 13 cl., (b) of the section, it is a qualified necessity. There the easement was claimed under S. 13 cl., (b), which is not classed as an easement of necessity under S. 13."

The last observation negatives the contention of Mr. Krishnamurthi. It is clear from the wording of the section itself and on the authorities that cl., (b) contemplates a different case than what is contemplated in cl., (a) and the learned Judge deciding the said case *Official Trustee of Bombay Vs. Salebhai Sarafally Bhagat*, observed that a case coming under cl., (b) cannot be said to be a case of an easement of necessity but is really a case of a qualified necessity. In such a case, the conditions mentioned in cl., (b) have to be fulfilled. The cases on which Mr. Krishnamurthi relies are cases which come under cl., (b). In other words, they are cases where the necessity in question was not absolute necessity for enjoying the subject-matter of the transfer. They are cases of qualified easements. They do not, in my opinion, support the contention which is urged before me by Mr. Krishnamurthi.

(9) That being my view, the next question which arises for my decision is whether on the facts of this case, it can be said that there was absolute necessity as otherwise the case would not come under cl., (a) of S. 13. It must be conceded that the plaintiff has to repair her wall. She has to go for that purpose to the Defendant's premises in order to effect repairs to the northern side of the said wall. In my opinion, this is a necessity which must be held to be an absolute one for enjoying the subject-matter of the transfer. That being so, I am of the opinion that the plaintiff is entitled under cl., (a) of S. 13 of the Easements Act, which is applicable to the State of Mysore, to the easement right to go to the defendant's premises for the purpose of repairing the wall in question. The result, therefore, is that this contention of Mr. Krishnamurthi must fail.

(10) Mr. Krishnamurthi then contended before me that it is to be found on evidence in this case, particularly on the admission of the plaintiff herself, that at the time she purchased the property only half of the wall was in existence and the other half was built by her after he repurchase. Mr. Krishnamurthi urged before me that this being her own admission, an easement right, if any, must be limited to the wall which was in existence at the time when the plaintiff purchased her property from Muninaidu.

(11) In my opinion, the learned Advocate should not be permitted to raise this contention at this stage. There was no such plea in the written statement of the defendant. There was no issue also bearing on this point and the parties were not called upon to adduce evidence on this point either. That being so, this point for the first time cannot be urged in this Second Appeal.

(12) No other contention was urged before me by the learned Advocate for the appellant. This appeal is, therefore, dismissed with costs.

(13) Appeal dismissed.