

(1975) 05 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : Second Appeal No. 73 of 1972

Mistry Ali Mohd. Abdullah and others	Vs	APPELLANT
Khawaja Abdul Qadus and others		RESPONDENT

Date of Decision : 16-05-1975

Acts Referred:

Limitation Act, 1963 — Section 20

Citation : AIR 1976 J&K 23

Hon'ble Judges : Mian Jalal-Ud-Din, J

Bench : Single Bench

Advocate : I.K. Kotwal, for the Appellant; R.P. Bakshi and G.A. Tak, for the Respondent

Final Decision : Dismissed

Judgement

Mian Jalal-Ud-Din, J.—This is plaintiff's second appeal and arises out of a suit for declaration founded on right of easement and also for

mandatory injunction that was decreed by the Munsiff, Doda, but on appeal was dismissed by the District Judge, Bhadarwah.

2. Briefly stating the facts of the case are as under:

There is a residential house of the plaintiffs-appellants situate in Khasra Nos. 969, 970-min at Nagar, Bhadarwah. Land comprising Khasra No.

976-min adjacent to these survey numbers belongs to the defendants. The plaintiffs claim a right of way over the land in khasra No. 976-min. They

also claim right to use the water of the spring located in the said survey number. The plaintiffs have averred that they have been enjoying this right

of easement over the land of the defendants and they have been using the same as their path-way and also have been enjoying the water of the

spring for over twenty years. The defendants have raised obstruction thereon by

erecting a wooden fence and thus have been and are preventing the plaintiffs from exercising this right of easement.

3. The defendants resisted this suit on the ground that no such right of easement is available to the plaintiffs. The defendants have outright denied the right of easement, and also the right of the plaintiffs to use water of the spring located in the land of the defendants.

4. The suit was originally brought in the Court of the Sub Judge Bhadarwah, wherefrom it was transferred to the Court of Munsiff, Doda, who on a consideration of the evidence that was led by the parties in the case and after hearing arguments, found that the plaintiff's right of easement was established and that the defendants have wrongfully obstructed the path-way. The Munsiff consequently decreed the suit of the plaintiffs as prayed

by them. On appeal, the learned District Judge, Bhadarwah, found that no such right existed in favour of the plaintiffs, on the other hand the evidence led by the plaintiffs negated their claim. The requirements of Section 15 of the Easements Act have not been fulfilled. The learned

District Judge also held spot inspection and after making personal observation found that the right of easement of the plaintiff was not established.

He therefore, set aside the judgment and decree of the trial court, and dismissed the suit of the plaintiffs. Aggrieved by this order of the District

Judge, the plaintiffs have come up in further appeal to this court.

5. I have heard the learned counsel for the parties at great length.

6. In order to establish the right of pathway by the plaintiffs over the land in dispute that has ripened into right of easement, it must be shown that

the enjoyment of such right by the plaintiffs was peaceable and open and that the pathway was being used as of right as an easement without

interruption and that too over a period of 20 years. I have been led through the evidence that has been adduced by the parties in the case. There

are glaring discrepancies in the statements of the plaintiff's witnesses. It is true that the plaintiffs have been using the land comprising Survey No.

976-min in possession of the defendants for some time but there is no evidence to show that this pathway was being used by them as of right and

openly so as to enable them to claim right of easement.

7. Abdul Aziz P.W. stated that the land in dispute belongs to the parties and is comprised of one survey number, which is not a fact. Then he

proceeds to say that half of the land belongs to the plaintiffs and the other half to the defendants. There is an old path-way from the house of the

plaintiffs leading to their land. There is also a spring in the joint land of the parties. It is clear that this is not the case of the plaintiffs at all.

8. Ghulam Mohd P.W. stated that there is a pathway from the house of the plaintiffs which leads to their land but this is a general pathway and all

people use it. It is a sort of thoroughfare. This witness has functioned as Patwari and as Girdawar some time past in this area.

9. Mohd. Sultan P.W. affirmed that the spring is located in the land of the plaintiffs and that he saw the plaintiffs using the path-way from the year

1947. This again is not the case of the plaintiffs.

10. Munawar Bhan P.W. stated that there is a pathway that goes from the house of the plaintiffs to the spring of the defendants but this pathway

leads through the land of the parties, and that this pathway is being used from antiquity.

11. Hemraj P.W. has also stated that the spring is located in the joint land of the Parties. From the statement of Ahad Kumar P.W. it appears that

the disputed pathway is being used like a thoroughfare. This pathway is exactly like the other thoroughfares, which are used by the public.

Moreover he has further stated that pathway is not being used as a matter of right but its user is founded upon permission given by the owners

thereof. The witness could not say whether this was a public pathway or a private one.

12. Shri Ali Mohd plaintiff as his own witness also stated that the spring was located in the joint holdings of the parties.

13. Now the evidence of the plaintiffs, a resume of which has been given above, does not establish the case of the plaintiffs that they have been

using this pathway as of right and also openly. It can be well gleaned from the evidence on record that the pathway the plaintiffs have been using

was on mere permissive lines which did not create any vested right in the plaintiffs to claim a right of easement. There is, also the report of the

various revenue officers on the record especially the report of the Naib-Tehsildar who went on spot and found that no pathway, as claimed by the

plaintiffs, existed. It is also found that there are no entries in the revenue records suggesting that a right of path-way existed on Survey No. 976-

min. Had this been so, then there ought to have been some entries in 'WAJIB UL ARAZ' or in some other revenue record. It is also not correct

that the spring is located in the joint land of the parties as given out by some of the witnesses of the plaintiffs. That indeed runs counter to the very

case set up by the plaintiffs.

14. In *Piare Lal v. Ishq Lal*, AIR 1926 Lah 522(1) it has been held that in order to claim a right of easement it must be shown that it was not

attributable to any permission on the owner's part. In *Lambodar Panda and Others Vs. Ramesh Chandra Panda and Others*, the view has been

laid down that a person claiming a right of way should prove that the user was as of right. It has been further observed that according to the

conditions in India there is a presumption that the user is permissive and the person claiming the right must prove the acquisition of such right u/s 20

of the Limitation Act or Sec. 15 of the Easements Act.

15. It is also to be noticed that the District Judge who is the first appellate court went himself on spot, and after conducting spot inspection and

after examining the position came to the categorical conclusion that the plaintiffs have not been using this way as of right.

16. For the foregoing reasons I am inclined to agree with the view expressed by the learned District Judge in appeal and I affirm the judgment of

the District Judge and dismiss the appeal. However in view of the peculiar circumstances of the case, the parties are left to bear their own costs

throughout.