

(2010) 10 BOM CK 0107

In the Bombay High Court

Case No : Second Appeal No. 49 of 2002

Mrs. Ana Colaco (since deceased through Legal representatives Mrs. Connie Pinto and Others)

APPELLANT

Vs

Mr. Thomas Colaco (since deceased through Legal representatives Mrs. Delailah Colaco and Others)

RESPONDENT

Date of Decision : 15-10-2010

Acts Referred:

Easements Act, 1882 — Section 13, 15

Citation : (2010) 10 BOM CK 0107

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : S.D. Lotlikar and P. Lotlikar, for the Appellant; J.E. Coelho Pereira and S. Karpe, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—This is plaintiff's (since deceased) second appeal arising from RCS No. 66/91/D. The plaintiff's suit for permanent injunction simpliciter came to be dismissed by the learned Civil Judge, Junior Division at Panaji by judgment dated 15/01/1998 and an appeal taken therefrom, came to be dismissed by the learned District Judge, by judgment dated 11/03/2002.

2. Hence this Second Appeal which was admitted on 17/04/2003 on several questions as substantial questions of law enumerated by letters A to E of para 3 of the memorandum of appeal.

3. There is no dispute that originally the property was owned by Anton Jose Colaco, the great grandfather of the husband of the plaintiff and the defendant and the same was partitioned in the year 1913 in four parcels and subsequently surveyed under sub-divisions 17,18,19 and 21 of Survey No. 465. The parties have been exclusively in possession of their respective portions which are shown on the survey plan - Exhibit 11. The joint house was divided between the plaintiff and defendant. The plaintiff's portion is surveyed under No. 465/18 and that of

the defendant under Survey No. 465/19. To the west of the Survey No. 465/18 there are Survey Nos. 465/17 belonging to Rafael Antonio Colaco and Survey No. 465/21. There was always a road on the western side (south west) going from Ribandar referred to as Pomburpa-Chorao road while there is a dispute as to when the road on the eastern side (south east) referred to as Chorao-Bicholim road came to be constructed. The evidence shows that it came to be constructed in the year 1986 or thereabout.

4. The plaintiff filed the suit claiming that from the balcony of their house there was a traditional passage of approximately one metre width leading to the main Chorao-Bicholim road which was used by the plaintiff to come to the said main road for about over 40 years, peacefully and without any hindrance. The case of the plaintiff was that of late defendant had started threatening her that he would block or close the traditional passage with stones and make it impossible for the plaintiff to come to the said Chorao-Bicholim road (south eastern side of the property surveyed under No. 465/19). The plaintiff claimed that the said access was the only access to the said Chorao-Bicholim road and, therefore, the defendant be restrained from constructing and blocking the said traditional passage. The plaintiff claimed that she was old, suffering from diabetic ailment, and that her only access should be open for easy and quick transportation of the plaintiff. The suit was filed on or about 1/04/1991.

5. The defendant contested the suit and denied that there was any ancestral passage from the balcony/entrance of the plaintiff's house which cut through the property of the defendant and leads to the main Chorao-Bicholim road. The defendant further denied that the plaintiff used the said passage for 40 years .

6. The plaintiff then amended the plaint so as to give the width of the said traditional passage, which was otherwise absent in her plaint as originally filed which amendment was granted by order dated 13/09/1996 and the defendant thereafter filed additional written statement again denying the existence of the said passage and further stating that the plaintiff has been sketchy and vague. The defendant stated that the plaintiff had shifted to her new house in June, 1996 which is at close vicinity and had stopped residing in the said house bearing No. 436. The defendant claimed that there exists an access which connects the Pomburpa-Madel-Chorao road and which was the only road which was existing and which has been shown in the survey plan. The defendant stated that the Madel-Chorao-Bicholim road was constructed hardly about 4 to 5 years prior to the filing of the suit and that only after the ex-parte order dated 2/04/1991 that the plaintiff under the garb and cover of the said ex-parte order with the help of two labourers and in the presence of the advocate of the plaintiff, on 21/04/1991, forcibly opened the breached portion of the defendant's eastern compound wall to create an impression that there was an access. According to the defendant the status quo as on 2/04/1991 was the existence of the compound wall, on the eastern side. The defendant stated that on 21/04/1991 one uniformed policeman and two boys from the locality were present. The

defendant stated that the partition was done for beneficial enjoyment and no access has been shown as alleged and the breach made on the compound wall on the eastern side cannot give license to the plaintiff to claim an access or right of way through the property.

7. Learned trial Court framed three issues and the first was whether the plaintiff proves that there was an access of about a meter width which was an ancestral/traditional way. The second issue was whether the suit way was the only access of the plaintiff to the Chorao-Bicholim main road and the third issue was whether the defendant proved that the plaintiff has an ancestral way/access on the north western side of her house and property.

8. The plaintiff examined her daughter in law and attorney who was married to her son only in the year 1988 and who was otherwise residing with her husband separately from her and in a newly built house. The plaintiff also examined one Agapio Colaco resident of Survey No. 465/20. The defendant also examined his son and attorney.

9. The learned trial Court found that the plaintiff had not specifically pleaded the nature of easement claimed by her and the pleadings were not precise, but were vague but nevertheless proceeded to consider the claim of the plaintiff as an easement by prescription u/s 15 of the Indian Easements Act, 1882. The learned Trial Court observed that the plaintiff had admitted that she did not have any document to show the right of access claimed by her through Survey No. 465/19 and that the survey plan also did not show the same which would otherwise have been shown since the survey operations were carried on around the year 1971. The learned trial Court also noted that the plaintiff had admitted that in the survey plan-Exhibit 11 the road on the west was shown and no road was shown on the eastern side of Survey No. 465/19 and that it had come in the evidence of the defendant that the tar road on the eastern side of the Survey No. 465/19 was constructed around the year 1986 and prior to that the main road was the Pomburpa-Chorao road on the western side of the Survey No. 465/17 and 465/21. A survey plan at Exhibit 7 also showed the existence of a public road on the western side of the Survey No. 465/17 and there was no tar road on the eastern side of Survey No. 465/19 which strengthened the case of the defendant that there was no tar road existing at the spot (on the eastern side) prior to 1986 which would mean that the main road which the plaintiff used for the purpose of proceeding from her house was the tar road on the western side of the Survey No. 465/17. The learned trial Court also held that the plaintiff had admitted the existence of an access through Survey No. 465/17 and as the Pomburpa-Madel road on the west of Survey No. 465/17 was only the tar road existing in the area prior to 1986 it was difficult to accept the submission of learned advocate that the only access of the plaintiff was through eastern side through the Survey No. 465/19. The learned trial Court also noted that the plaintiff after obtaining an order of injunction from the learned trial Court to maintain status quo, had under garb of that order made an opening on the

eastern wall of the defendant's property on 21/04/1991, and ultimately, held issues Nos. 1 & 2 as not proved and issue No. 3 as proved.

10. The learned District Judge, upholding the judgment of the trial Court, observed that the defendant had stated that there was a compound wall on the eastern side of their property since 1913 and that there was also a cross built by his father about 25 years back and that on 21/04/1991, before he reached Goa, the plaintiff had put stones near the cross by using the stones from the eastern side compound wall of the defendant which stones were lying in their property and the said statement of the defendant could be safely believed, in view of the testimonies of the plaintiff and her witness in that regard. The learned District Judge noted that the plaintiff could not say anything to the suggestion that prior to her marriage, all the persons visiting the ancestral house were using the passage from the access from the road on the west but she had admitted that the school children sometimes passed in that direction which meant that there was a passage to approach on the western side road. The learned District Judge also noted that the plaintiff had admitted that Shri Rafael Antonio Colaco, owner of Survey No. 465/17 had not objected for their passing through his property and that the said Rafael Antonio Colaco was the heir of the person who was earlier co-owner of the entire property and when the said Rafael Antonio Colaco had not objected to go through his property for the plaintiff and others to the main road, it only meant that the plaintiff and others were free to pass through the property surveyed under No. 465/17. The learned District Judge also noted that when there was a passage through Survey No. 465/17 and there was no objection from the owner of the same, it only meant that alleged traditional access claimed by the plaintiff was not such an easement without which the property of the plaintiff, could not at all be used. The learned District Judge also noted that the defendant had deposed that till the filing of the suit, the plaintiff was using the access on the western side of her house and the said access of the plaintiff started from her property and then passed through Survey No. 465/17 till the road and that the owner of Survey No. 465/17 had not objected for the use of the access by the plaintiff and that even the children of the plaintiff used to pass on the western side to go to their school and so also the friends of the plaintiff and, therefore, in the light of the overall evidence on record and on account of the fact that the compound wall of the defendant which was existing on the eastern side was demolished after filing of the suit with the help of the policeman, Agnel and Sanjay, the testimony of the defendant was believable. The learned District Judge, therefore, proceeded to dismiss the appeal filed against the judgment of the learned trial Court.

11. Shri Lotlikar, the learned Senior Counsel appearing on behalf of the plaintiff submits that the easement claimed by the plaintiff was an easement of necessity, u/s 13 of the Easements Act, 1882. Learned Counsel submits that the defendant in the original written statement had only denied the right claimed by the plaintiff and that only in the additional written statement came with the plea that the plaintiff had an access which connected the Pomburpa-Madel-Chorao road, and

such a plea could not have been accepted by way of amendment and in this regard learned Senior Counsel has placed reliance on the case of Gurdial Singh and Others Vs. Raj Kumar Aneja and Others, wherein the Apex Court has held that a new plea cannot be permitted to be added in the garb of a consequential amendment, though it can be applied by way of an independent or primary amendment. Learned Senior Counsel further submits that no finding has been given by the Courts below that the defendant had gone beyond the pleadings of the written statement in as much as there was also no denial of the existence of the public road on the eastern side of the property of the defendant. Learned Senior Counsel submits that the Courts below have proceeded to deny a right to the plaintiff because the plaintiff can pass through the property surveyed under No. 465/17 to go to the Pomburpa-Chorao road. Learned Senior Counsel further submits that the plaintiff had clearly pleaded an easement of necessity and the defendant had not taken the plea of an alternate access and, therefore, plaintiff had succeeded in proving the plea which was taken by the plaintiff.

12. On the other hand, Shri Coelho Pereira, the learned Senior Counsel appearing on behalf of the defendant has submitted that none of the questions raised as substantial questions of law arise in this Second Appeal. Learned Counsel submits that the plaintiff had claimed a right of easement by prescription and that has been negated by the learned trial Court. Learned Senior Counsel submits that the learned District Judge has also negated the plea of easement of necessity in para 11 of the judgment and easement by prescription in para 8 of the judgment based on evidence produced by the plaintiff. Learned Senior Counsel further submits that the right of access claimed by the plaintiff was not reflected in the deed of partition of 1913 nor on survey records and the road which was then in existence was Chorao-Pomburpa road and, therefore, plaintiff could not have claimed any easement towards a non existing road at least till the year 1986. Learned Senior Counsel submits that both the Courts below, as a matter of fact, have given concurrent findings that the plaintiff does not have an access through the defendant's property surveyed under No. 465/19 to go to the road on the eastern side i.e. Bicholim-Chorao road.

13. Having perused the judgments of both the Courts below and having heard the learned Senior Counsel on behalf of both the parties, in my view, this is a clear case where both the Courts below have recorded a finding that the plaintiff has no access as claimed by her cutting across the defendant's property either as easement of necessity or prescription, to go to the road on the eastern side i.e. Bicholim-Madel road. As rightly submitted by the learned Senior Counsel on behalf of the defendant, both the Courts below, based on evidence produced by the parties, have negated the existence of right claimed by the plaintiff. Findings are concurrent. No substantial questions as framed or other wise are involved in this second appeal.

14. As far as the existence of the said Bicholim-Madel-Chorao road is concerned, the plaintiff's attorney has admitted that in the survey plan the road on the west

is shown but the road on the east is not shown. It can also be seen from survey plan ? Exhibit 11 that to the east of defendant's property surveyed under No. 465/19, Survey No. 365/20 and 22 what is shown is the boundary of village Caraim. According to the defendant at the time of partition there was only one road existing which was on the western side of the entire property (i.e. Bicholim-Pomburpa road) and on the eastern side there was no road at that time. According to him, the bridge between Chorao-Bicholim over the river was constructed in the year 1986 and before that there was no ferry or any other mode of transport between these two villages. The plaintiff's attorney stated that she could not say whether the bridge was constructed by the Government about 5 years prior to the filing of the suit or that at that time the tar road was made on the eastern side of Survey No. 465/19 to proceed to Bicholim over the bridge. Obviously, she could not have said anything about the said road on the eastern side because she was married only in the year 1988 to the son of the plaintiff and otherwise she was a resident of Mumbai. The plaintiff's witness namely PW2 remained present in the Court-hall when plaintiff's attorney's evidence was being recorded and even then, he has not been consistent with his evidence. Regarding the road on the eastern side he stated that the Bicholim road was a kachha road in his childhood but it was now tarred. He also admitted that the Madel-Pomburpa road was tarred first and it was the only tar road at that time and further admitted that Chorao-Bicholim road was tarred in the year 1986. He admitted that the plaintiff's son had constructed a new house about 150 metres away. The plaintiff's son and his wife were residing there and while it is the plaintiff and her tenants who were residing in the suit house. He also stated that the buses could not proceed to Madel at that time as the road on the eastern side was not tarred. Again he admitted that prior to the tarring of the road on the eastern side some years back there was no constructed road on the spot but people used to pass from that side.

15. What follows from the survey plan and the evidence of these three witnesses, is the inescapable conclusion that there was no road on the eastern side of the property of the defendant surveyed under No. 465/19 till the year 1986 or there about as stated by the defendant. Plaintiff had no knowledge about it and PW2 has proved himself to be unreliable. If the road on the eastern side came into existence only in the year 1986 or thereabout as stated by the defendant, there would not have been any occasion for the plaintiff to go through the property of the defendant surveyed under No. 465/19. It also falsifies the claim that the plaintiff was using the passage for over forty years. On the contrary, the plaintiff had herself admitted that she did not have any document to show that she had a right of access through Survey No. 465/19. She has also admitted that on the survey plan the road on the west was shown while no road was shown on the eastern side of Survey No. 465/19. She had also admitted that the school children sometime passed in that direction i.e. through the property surveyed under No. 465/17 without the objection of the said Rafael Antonio Colaco. Not only that it was suggested to the defendant that there was a kachha

road through property surveyed under No. 465/17 and the defendant had stated that he used both the said accesses. In other words, this is a case where the plaintiff had failed to prove, as found by both the Courts below, that the access for the plaintiff was through the property of the defendant surveyed under No. 465/19. Both the Courts below have held issue No. 1 as not proved. It was for the plaintiff to prove the easement claimed by her. On the basis of evidence led by her, she had failed to prove the same, and that is irrespective of the plea subsequently taken by the defendant that the plaintiff's way was through Survey No. 465/17.

16. Shri Coelho Pereira, the learned Senior Counsel has placed reliance on Justiniano Antao and Others Vs. Smt. Bernadette B. Pereira, wherein it was, inter alia, observed that since the plaintiff had an access on the southern side of the property there was no reason why the property of other persons be used as an access to her house. Learned Senior Counsel has also placed reliance on the decision of this Court in Shalini Laxman Wadnerkar v. Bank of Baroda Employees Co-operative Housing Society Ltd. and Anr. 2006 (5) Bom C.R. wherein this Court has observed that in a case of easement of necessity, the necessity must be an absolute necessity and not merely a convenient mode of enjoyment of property and an easement of necessity cannot be granted merely on the ground of convenience and advantage. It is solely dependent upon absolute necessity. Necessity cannot be understood as mere rule of convenience and what constitutes absolute necessity in a case, is to be determined with reference to circumstances and environments of each case.

17. Considering the facts of the case, as already stated, there are no substantial questions of law involved in this case. Both the Courts have given concurrent finding that the plaintiff has no right of access through the property of the defendant either out of necessity or based on prescription. I find there is no merit in this Second Appeal and, accordingly, the same is hereby dismissed.