

(1975) 02 AHC CK 0036
In the Allahabad High Court
Case No : Second Appeal No. 105 of 1969

Mstt. Nafisun Nisa

APPELLANT

Vs

Mohd. Ishaque

RESPONDENT

Date of Decision : 13-02-1975

Acts Referred:

Easements Act, 1882 — Section 12, 8

Citation : AIR 1975 All 431

Hon'ble Judges : Jagmohan Lal, J

Bench : Single Bench

Advocate : Naziruddin and S.B. Singh, for the Appellant; K.L. Saxena, for the Respondent

Final Decision : Dismissed

Judgement

Jagmohan Lal, J.—This is a defendant's second appeal against whom a decree for injunction has been passed by the lower appellate court though originally the suit of the plaintiff was dismissed by the trial court.

2. The brief facts of the case so far as relevant for the decision of this appeal were that one Azizuddin and his wife Smt. Safia Khatoon were owners of a house situate within a compound known as Waheed Manzil. Azizuddin died leaving his widow Smt. Safia Khatoon, a major son Gawasul Aziz, two minor sons Raisul Aziz and Nafisul Aziz and a minor daughter Noorafsa Begum as his heirs who inherited the share of Azizuddin in this house and the rest of his property situate in the compound of Waheed Manzil. On 13-9-1950 Gawasul Aziz, and Smt. Sana Khatoon in her own right as well as acting as guardian of her two minor sons and one minor daughter executed a sale deed in respect of that house in favour of Mohd. Ishaq plaintiff-respondent. In the sale deed it was stipulated that the vendee Mohd. Ishaq shall have a passage at least 6 ft. wide towards the east for ingress into and egress from the house so sold to him. By the time this sale deed was executed no guardian of the minor had been appointed under the Guardians and Wards Act. Subsequently, Gawasul Aziz was appointed by the District Judge

as guardian of the person and property of his minor brothers and sister. Thereafter, Gawasul Aziz after obtaining permission from the District Judge executed a sale deed on 4-4-1952 in favour of Smt. Nafisun Nisa, defendant-appellant before us. This sale deed was executed by Smt. Safia Khatoon in her own right and by Gawasul Aziz in this own right as well as on behalf of minors whose guardian he had been appointed by the District Judge. Under this sale deed the vendors transferred an open piece of land situate in Waheed Manzil to Smt. Nafisun Nisa. Simultaneously, they imposed an easement by way of right of passage on a part of their remaining property of which the executants were full owners. This easement was imposed by stipulating that towards the south of the land sold an open land 8 ft. wide shall be left for passage to the land sold under that sale deed as well as to other houses situate in the compound of Waheed Manzil including the house of Mohd. Ishaq (plaintiff-respondent) and also for house known as Waheed Manzil aforesaid belonging to and owned by the executants. It appears that Smt. Nafisun Nisa while constructing a house on the land purchased by her under this sale deed dated 4-4-1952 projected a balcony over this passage land and also paved it with Pucca bricks. The plaintiff Mohd. Ishaq apprehending that in doing so the passage to his house would become narrow filed a suit for injunction against the defendant,

3. The suit was contested on behalf of the defendant on a number of grounds. It is not necessary to mention all the pleas taken by the defendant for the purposes of this appeal. The main pleas which are relevant for this appeal were that the sale deed dated 13-9-50 executed in favour of the plaintiff was void so far as the share of the minors was concerned and that Smt. Safia Khatoon though she was mother of these minors had no power to alienate their share under this sale deed. It was, therefore, pleaded that neither the plaintiff gets any title in the house in respect of which he claims a right of passage nor the covenant contained in that sale deed that 6 ft. wide passage would be available to him as a binding and valid covenant. With regard to covenant contained in the subsequent sale deed executed in favour of defendant it was alleged that the plaintiff was not a party to that document and no grant was made in his favour and as such he could not enforce that covenant contained in that sale deed under which a passage 8 ft. wide was to be left for the right of way to the houses of the vendor and the vendee and other persons among whom the name of the plaintiff was also included.

4. The trial court held that though the sale deed dated 13-9-50 was void with regard to the share of the minors, it was valid in respect of the share of Smt. Safia Khatoon and Gawasul Aziz and under that sale deed the plaintiff was entitled to a passage 6 ft. wide which was still available. The plaintiff could not avail of the second sale deed executed in favour of the defendant and enforce the covenant contained in it that 8 ft. wide passage will be left. On these findings the suit was dismissed.

5. The plaintiff filed an appeal. The lower appellate court held that the plaintiff

could claim passage 8 ft. wide on the basis of the sale deed dated 4-4-1952 executed by Smt. Safia Khatoon and others in favour of the defendant. He further found that the projection of the balcony did not interfere with that passage and the passage that was still in existence was 8 ft. wide. He, therefore, granted a prohibitory injunction in favour of the plaintiff restraining the defendant from erecting any building in future on the disputed passage with a width of 8 ft.

6. Feeling aggrieved by that decree the defendant filed this second appeal.

7. I heard learned counsel for the parties.

8. It has been argued that the sale deed dated 13-9-50 executed in favour of the plaintiff was void in respect of the share of the minors. In support of this proposition reliance is placed on a decision *Mata Din v. Ahmad Ali*. (1912) 39 Ind App 49 (PC). However, the sale deed is valid so far as the share of Smt. Safia Khatoon and Gawasul Aziz are concerned. The plaintiff-respondent has built a house on it. Assuming that the sale deed was not subsequently ratified by the minors on becoming major the position comes to this that the house which is the dominant tenement in this case belongs to two or more co-owners within the meaning of Section 12 of the Easements Act. The easement by way of passage 6 ft. wide as stipulated in this sale deed would not be a valid imposition of an easement in view of Section 8 read with illustration (c) of the Easements Act.

9. The other question that survives for decision in this appeal is whether an easement was imposed by the owners "of this property u/s 8 while they transferred some of their property to the defendant-appellant under the sale deed dated 4-4-1952 and whether the plaintiff can have a cause of action if an obstruction is caused in that easement. Learned counsel for the defendant-appellant argues that the sale deed dated 4-4-52 was transaction between the owners of the servient tenement (Smt. Safia Khatoon and others) and the defendant-appellant to whom a part of their land was sold by those persons. The sale deed no doubt contained a covenant that a common passage of 8 ft. wide shall be left as providing access to the land which had been sold under that sale deed as well as the remaining houses belonging to the vendors and others including Mohd. Ishaq plaintiff. It is contended that if a breach of this covenant is made by any of the parties it is only the other party to that transaction who can have a cause of action and bring a suit against him but not the third persons who were not parties to that transaction. In support of this contention reliance is placed on a Full Bench decision of Madras High Court in *Subbu Chetti v. Arunachalam Chettiar* ILR 53 Mad 270 : *Thirumulu Subbu Chetti Vs. Arunachalam Chettiar*, in which it was held that:

"Where on a contract between A and B. B agreed to pay a sum of money to C and no more circumstances appear, C being a stranger to the contract, cannot sue B for the money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the

following circumstances, e.g., (a) where B afterwards agrees with C to pay him direct or becomes estopped from denying his liability to pay him personally; (b) where the contract between A and B creates a trust in favour of C: (c) where the contract charges the money to be paid out of some immovable property or (d) where it is due to C under a marriage settlement, partition or other family arrangement."

Obviously, it was a case of payment of money and not imposition of an easement. Section 8 of the Easements Act provides that an easement may be imposed by any one in the circumstances, and to the extent in and to which he may transfer his interest in the heritage on which the liability is to be imposed. This section shows that the owner of a servient tenement can by his unilateral act impose an easement on his property even though the owners of the dominant tenement are not parties to that transaction. It cannot be disputed that in the present case the executant of the sale deed dated 4-4-1952 were the full owners of the property that was left with them after the transfer dated 13-9-1950 made in favour of the plaintiff. So it was open to them to impose any easement on their property whether that easement was for the beneficial enjoyment of the property that was sold by them under that sale deed or for the property which they had earlier sold or for the beneficial enjoyment of that property which was still left with them after that sale or even for the beneficial enjoyment of the property of other persons with which they had no concern. In respect of the property which the owners had sold earlier they would have to comply with the provisions of Section 9 before imposing a fresh easement. Section 9 provides that subject to the provisions of Section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility. It may be recalled that under the sale deed dated 13-9-1950 the vendors had provided that a passage at least 6 ft. wide would be available to the vendee Mohd. Ishaq but under this latter imposition made by them in the sale deed dated 4-4-1952 a wider passage was left. So even if that earlier imposition of easement had been valid it did not in any way come in conflict with the provisions of Section 9 by providing a wider passage. However, as held above, the earlier imposition contained in the sale deed dated 13-9-1950 was void in this case. So, it is only this latter imposition of the easement which had been validly created by the owners of the property at the time of transferring a part of their property to the defendant-appellant. The easement was imposed for the beneficial enjoyment of various tenements including the land sold to the defendant-appellant, the property still retained by the vendors and the property that had earlier been sold to Mohd. Ishaq. In respect of that property Mohd. Ishaq was no doubt only one of the co-owners in view of the transfer in respect of the minors' shares being void, but u/s 12 one of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property. In the

present case, the alleged easement was imposed u/s 3 and it would be available to the plaintiff as co-owner for the beneficial enjoyment of that property.

10. Lastly, the learned counsel for the appellant argued that an easement is itself an interest in property which could be transferred or created only by a registered instrument. In the present case, the imposition was obviously made under the registered sale deed dated 4-4-1952 and so this point has no importance.

11. As a result of the above the appeal is dismissed with costs.