

(1986) 02 RAJ CK 0032
In the Rajasthan High Court
Case No : Second Appeal No. 169 of 1975

Nathu Lal and Others

APPELLANT

Vs

Ram Swaroop and Others

RESPONDENT

Date of Decision : 21-02-1986

Acts Referred:

Easements Act, 1882 — Section 12, 4
Specific Relief Act, 1963 — Section 38, 39

Citation : AIR 1987 Raj 169 : (1987) RLW 98 : (1986) 2 WLN 674

Hon'ble Judges : S.N. Bhargava, J

Bench : Single Bench

Advocate : N.L. Tibrewal and A.K. Bajpayee, for the Appellant; R.C. Kasliwal, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Bhargava, J.—This is a second appeal directed against the judgment and decree of Civil Judge, Jaipur Distt. Jaipur reversing the decree passed by Munsif, Bandikui and decreeing the suit of the plaintiff-respondents for injunction.

2. The plaintiff-respondents are tenants of shop No. 57 situated in the grain-market known as "Madho Ganj" in Bandikui town. The said shop formerly belonged to the erstwhile Jaipur State and now, after formation of the State of Rajasthan, it belongs to the State of Rajasthan. There is an open piece of land measuring 30" x 13" in front of the said shop to its East. Towards the North of the said shop, there is a Government building known as "Rahdari" having a window and a small door "Pai". The said building had been purchased by the defendant-appellants. The plaintiff's have been using the open plot of land in front of their shop for stocking and exhibiting the grains in which business they are dealing for the last 45 years. The defendant Nos. 1 to 4 have made some constructions in the adjoining building after purchasing the same and they proposed to construct shops towards the disputed land and open doors in the southern wall, with a view to get passage over the disputed land and if not

prevented, they would interfere with the plaintiff's right of enjoyment of their shop and open land in front of it. Therefore, the plaintiff's filed the present suit for a perpetual injunction restraining the defendants from opening any door in the southern wall of their building.

3. The suit was contested by the defendants Nos. 1 to 4. They have denied that plaintiff's have been using the disputed open plot as alleged in the plaint. They have submitted that it was an open land which was being used by public as a common passage. They have further submitted that the Government of Rajasthan was a necessary party and the Court-fees paid was insufficient.

4. The defendant No. 5 Municipal Board, Bandikui has filed a separate written statement and has admitted first three paragraphs of the plaint wherein the plaintiff's have claimed right of easement. It is further submitted that the Municipal Board has given permission for construction in accordance with law and it was prayed that the suit should be dismissed.

5. On the pleadings of the parties, the following issues were framed : --

" 1. Whether the plaintiff's have acquired any right of easement in respect of the land B.E.F.C. in the map?

2. If so, whether on this account the defendants can be prevented from raising the proposed constructions?

3. Whether, the suit has been under-valued and if properly valued it will go beyond the pecuniary limits of this Court?

4. Whether the State of Rajasthan is a necessary party?

5. Whether the defendants are entitled to special costs?

6. Relief?"

6. The learned trial Court decided Issue No. 1 in favour of the plaintiff's to the extent that the plaintiff's have succeeded in proving acquisition of an easementary right over the disputed land but it was further held by the trial Court that this right has not been proved to have been acquired to the exclusion of others, and therefore, it refused to grant injunction prayed for by the plaintiff's, and dismissed the suit. Issues Nos. 3, 4 and 5 were decided in favour of the plaintiff's, and they are all of formal character.

7. The plaintiff's preferred an appeal which was allowed by the Civil Judge, Jaipur District, who decreed the plaintiff's suit for injunction, with a direction that the defendants Nos. 1 to 4 shall not build in southern wall any construction which will grant them or anybody else a passage to their said building through or over the disputed open plot of land, lying to the south of their building and to the east of the plaintiff's shop, except that they might use the door already existing in the building. Hence, the defendants Nos. 1 to 4 have filed the present appeal.

8. Learned counsel for the appellants has submitted that the plaintiff-

respondents are tenants of the Government and the disputed open plot also belonged to Government, and hence, they cannot acquire any easementary right over the land of the landlord, i.e. the Government of Rajasthan. In this connection, he has placed reliance on Abdul Rashid and Others Vs. B. Braham Saran, wherein it has been observed that "a lessee of the land which he has taken for building purpose, is not in the position of an owner of immovable property u/s 12 of the Easements Act for the purpose of a right of way and hence, such person cannot acquire the right of way by easement over other land owned by his lessor". He has also placed reliance on Diwan Durag Singh and Others Vs. The State of Madhya Pradesh and Another, wherein it has been held "easement by prescription cannot be acquired when both the tenements are owned or held by same person". He has also placed reliance on Chapsibhai Dhanjibhai Danad Vs. Purushottam, wherein it has been observed that "where a lessee fails to prove that he acquired certain land by accession or was using it as an incident of his own ownership of that property and it is proved on the other hand that his use was permissive, he cannot claim acquisition of a right as an easement by prescription."

He has also placed reliance on The State of Gujarat Vs. Hiralal Motilal Luhar, wherein it has been held "when a sub-lessee of a shop owned by the Government claims a right of way as an easement of necessity on an adjacent land belonging to the Government, the owner of the dominant tenement, shop and the owner of the servient tenement land being the same viz., the government, there cannot be any right of easement over that land..... Grant of such easement by right of way over that land to sub-lessee is wrong."

9. He has further submitted that the State of Rajasthan was a necessary party as against the government it is 60 years after which a prescriptive right could be enforced and has placed reliance on Chinatalapati Venkatanarasimharaju Vs. Surisetti Ramaswami and Another, and Lakshmi Narayana Chetty v. Hira Chand AIR 1960 Mys 317 . Learned counsel for the appellant has further submitted that the defendants have a right of ingress and egress from every point of their property, and the defendants being the owner of the house, could open the gate at any place within their building, and has placed reliance on Ranjit Singh and Others Vs. Ram Nath Singh and Others, He has further submitted that the case of lost grant was never pleaded by the plaintiff's in their plaint nor there was any issue in that regard nor any evidence was led and that the learned first appellate Court has made out a new case for the plaintiff's. According to him, the incidence of lost grant and that of easement are the same and lost grant is also attached to the property. In this connection, he has placed reliance on AIR 1950 56 (Privy Council) , Saghir Ahmad Vs. The State of U.P. and Others, Bherulal Vs. Mohan Singh and Others, wherein it has been held that no right of easement can be claimed by allowing use of land as an open latrine. He has also placed reliance on Krishna Narain Agrawal 1969 SCI 1105.

10. On the other hand, learned counsel for the respondents has placed reliance

on Kshirod Ghandra Ghose v. Srish Chandra Chose AIR 1915 Cal 806 (2) wherein it has been held that the use of right of way for more than 70 years raises presumption of grant. Reliance has also been placed on Krishna Chandra Mandal v. Ram Sahay Katari AIR 1917 Pat 530 wherein it has been observed that "where the plaintiff's predecessor-in-title has openly and notoriously used the water from the tank of the defendant as of right and without any objection by the latter for 50 years, the Court is justified in presuming the existence of a lost grant." He has also placed reliance on Tinkori Pathak Vs. Ram Gopal Pathak and Others, wherein it has been observed that although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor, he may claim a right of easement based on immemorial user, as there is no reason why an owner of land should not grant any privilege he pleases to his tenant. Reliance has also been placed on Kartic Manjhi and Another Vs. Banamali Mukerji and Others, wherein it has been observed that "although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor, he may claim a right of easement based on immemorial user". It has further been held that no minimum limit of time can be laid down which would justify the inference as to immemorial user; it depends on the evidence and the circumstances of each case". Learned counsel for the respondents has also placed reliance on Manmatha Nath Vs. Rakhal Chandra Mandal and Another, wherein it has been observed that "pleadings in India have to be construed somewhat liberally notwithstanding the fact that lawyers in general in the mofussil now are more fully equipped than the average mofussil lawyers of half a century or more ago." Where there is a plea of long user, an inference can be drawn of the lost grant, and in that case, it was user of 20 years which was held to be of immemorial nature.

11. Reliance has also been placed on Nagarathna Mudaliar Vs. Sami Pillai and Another, wherein it has been observed that to infer a doctrine of lost grant or a claim based on prescription all that is necessary to be alleged is long, continuous and peaceful possession. Where these incidents are found the Court will, if possible, presume a grant of the right in question and there is thus nothing to prevent a claim to entitle by lost grant being made under the Indian Law apart from Section 15, Easements Act."

12. Learned counsel for the respondents has also placed reliance on Manu Mangal Naik and Others Vs. Dhaniram Naik, in which also it has been observed that even if a person may not be entitled to a declaration of his right of easement under the Easements Act, he may claim the relief otherwise. He can acquire right of easement on the theory of lost grant. Lastly, reliance has been placed on a decision of this Court reported in : Girdharsingh and Another Vs. Gokul and Others, wherein it has been observed that it is true that a tenant cannot acquire a prescriptive right of easement in land or wall belonging to his lessor but he may claim a right of easement based on immemorial user, for, in such a case, there is a strong presumption that the enjoyment of a right had its origin under an agreement or grant. He has also placed reliance on Hirachand v. Syed

Basheeruddin AIR 1973 Mys 151 wherein it has been observed that in a suit against an individual party who obstructed easement right of way over "Sarband" owned by the government, government is not a necessary party.

13. I have given my thoughtful consideration to the whole matter and have also gone through the judgments of the two Courts below and record of the case.

14. Section 4 of the Easements Act defines "easement" as under :--

4. An easement is a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners. The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation :-- In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon."

Section 12 of the Easements Act defines as to who may acquire easement, which runs as under : --

"12. Who may acquire easements. An easement may be acquired by the owner of the immovable property, for the beneficial enjoyment of which the right is created or, on his behalf, by any person in possession of the same.

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.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease."

15. A bare perusal of these two sections will show that an easement can be acquired by the owner of the immovable property for the beneficial enjoyment of a right by any person in possession of the same. Admittedly, the plaintiff's were lessee of the shop only which belonged to the State and they have been using the disputed land in front of their shop for exhibiting and stocking the food grains. It is also not disputed that the open land in front of the suit shop belongs to the State and was not on rent with the plaintiff's. It is also admitted that the

adjoining property earlier belonged to the State and has been purchased by the defendants Nos. 1 to 4. It is also not disputed that there is a window and a gate in the said building existing which is being used for coming out of that building and that gate opens on the open land in front of the shop of the plaintiff's. Both the courts below have come to a concurrent finding that the plaintiff's have been using this open plot of land for exhibiting and stocking their goods and that being a finding of fact, I do not propose to go into the evidence in that connection. Only question that arises in this case is whether the defendant Nos. 1 to 4 could be restrained from opening the gates on this disputed land. Learned Civil Judge has invoked the doctrine of "lost grant" in favour of the plaintiff's. The incidence of easement and that of test grant are almost the same. A right of easement is also created by grant and a grant of such right is presumed from long use or possession although the actual transaction of making such a grant cannot be discovered. If a party has been using a particular land for a particular purpose from time immemorial, it can be said that he has earned that right on the basis of doctrine of lost grant. There is no period fixed for the time of immemorial. It depends on facts of each case. In the present case, there are several shops constructed in the Chowk and all these shops belong to the landlord State and have been given on rent to different persons, and the tenants of different shops have been utilising the open plot of land in front of their shops for stocking and exhibiting the articles in which they are dealing. There is evidence that the plaintiff's have been using this plot of land for exhibiting and stocking their goods since they became tenants of the suit shop like other tenants of other neighbouring shops. If the defendants are allowed to open some more gates on this land or are allowed to make shops in their building opening on this land, it will definitely affect the right of the plaintiff's to use this open plot of land for stocking and exhibiting their goods. The plaintiff's did not claim ownership on this open plot of land which admittedly belongs to the State and the defendants have a right of passage through this open land from the gate which is already in existence and that right of the defendants has not been taken away by the decree passed by Civil Judge.

16. In the result, I do not find any force in this appeal. The appeal is, therefore, dismissed without any order as to costs.