
(2000) 07 CAL CK 0030

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction S.A. No. 574 of 1986 With S.A. No. 778 of 1987

Nirmala Das and Ors

APPELLANT

Vs

Panchanan Banerjee and Others
 Biresh Kanti Das Vs
Panchanan Banerjee and Others

RESPONDENT

Date of Decision : 03-07-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, 100, 100(4)

Evidence Act, 1872 — Section 13, 32(7)

Limitation Act, 1963 — Section 25, 26

Citation : AIR 2001 Cal 37 : (2001) 2 CALLT 154 : 105 CWN 956

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mr. Sudhis Dasgupta, Mr. Anit Rakshit and Mr. Ramprokash Banerjee, for the Appellant; Mr. Haradhan Banerjee and Mr. Amar Nath Das, for the Respondent

Judgement

K.J. Sengupta, J..

1. Appellants being the plaintiffs have preferred this appeal against two Judgments and decrees having concurrent findings of the learned Courts below who have dismissed the suits for declaration of easement right in respect of a passage situated in between the premises Nos. 100A and 100B at D.C. Dey Road belonging to the plaintiffs on the one hand and premises Nos. 100/1A and 100/15 D.C. Dey Road belonging to the defendants on the other hand. The said passage situated on the western side of the premises of the plaintiffs/appellants. The plaintiffs/ appellants claim that since the date of purchase of their property by their predecessor-in-interest the aforesaid passage is being used uninterruptedly as the only passage for egress and ingress of their premises till 1981 when the defendants all of a sudden obstructed the plaintiffs from using the said passage and thereby their right, title and interest in easement right has been denied. The defence of the defendants/respondents in substance is that

there was no existence of passage. The aforesaid passage is part and parcel of their own property and they have purchased from their vendor. But in 1964 during communal riot the defendants allowed the plaintiffs to use the said passage on leave and licence and it has been revoked in 1981. As such there is no question of easement right.

2. Both the learned Courts below have come to findings that the plaintiffs/appellants have neither acquired easement in the said passage by prescription nor the said passage is required to be used as of necessity. It has been further held by the learned Courts below that the said passage is part and parcel of the property of the defendants/respondents.

3. Mr. Sudhis Dasgupta, learned senior Advocate, appearing in support of the appeal, submits though it is a concurrent fact findings still I should interfere with fact findings as both the learned Courts below approached wrongly and without understanding real issue involved. It is also contention of Mr. Dasgupta that the findings and conclusion of both the learned Courts below is based on surmises and conjecture and without considering evidence adduced by the parties.

4. He also submits that both the learned Courts below have totally Ignored the effect and scope of Exhibit-1 being the sale deed dated 17-12-1930 which is a document of more than 30 years at the time of trial. If Exhibit-1 together with map or plan of Exhibit-2 partition deed are considered and read then it would appear that there was existence of passage that is the subject matter of this suit. The learned Courts below even did not advert to the local inspection report of the learned Pleader Commissioner and Exhibit-6. Both the learned Courts below wrongly relied on false evidence of DW-1 in preference to Pleader Commissioner's report regarding existing boundary wall attached to the plaintiffs holding. The evidences of PW-2 to PW-5 were not at all considered. Even findings of both the learned Courts below, of leave and licence is without any evidence. He argues that when both the learned Courts below without considering vital and relevant evidence passed decree the second appellate Court is duty bound to interfere with this and to look into this evidence. As such it raises a substantial question of law and it squarely comes under the purview of section 100 of the Code of Civil Procedure.

5. He submits that approach of the learned Courts below while holding the plaintiffs having failed to prove the case of uninterrupted user is wholly erroneous on the point of law. There is factual existence of passage and the same will appear from the pleader Commissioner's report. The onus lies upon the defendant in this case to prove that the said passage was never used by the appellants/plaintiffs otherwise than on leave and licence.

6. In support of his submission he relies on the following decisions:

(i) M. Ratanchand Chordia and Others Vs. Kasim Khaleeli, (ii) AIR 1926 Patna 460,

(iii) AIR 1935 Lahore 937; (iv) Behari Lal Mukerjee and Another Vs. Asutosh Banerjee and Others,

(v) Lila Ram Vs. Mohar Chand and Others, (vi) 54 CWN 671,

(vii) Jogendra Krishna Banerji and Others Vs. Sm. Subasini Dassi and Others,

(viii) Kallu Mal Vs. L. Ganeshi Lal and Another,

(ix) Raja Braja Sundar Deb Vs. Moni Behara and Others, (x) AIR 1922 Madras 5,

(xi) AIR 1926 Oudh 237; (xii) Budhwanti and Another Vs. Gulab Chand Prasad,

(xiii) Dilbagrai Punjabi Vs. Sharad Chandra, (xiv) Dilbagrai Punjabi Vs. Sharad Chandra, and

(XV) 1993(1) CLJ 193.

7. Mr. Dasgupta places reliance on Gale's Easement 2nd Edition page 172 to 177, Border's Law of Easement page 196 to 201 and Hallsbury's Vol. 14 on Easement and Profits and Prandre at page 33 to 45 paragraphs 77, 80, 83, 87, 88, 89.

8. Mr. Haradhan Bandopadhyay, learned lawyer, appearing for the contesting respondents submits that the appeals are liable to be dismissed as no substantial question of law was formulated at the time of admission of the appeal. No substantial question of law is involved in this matter either. Both the learned Courts below have come to concurrent fact findings that there is no existence of passage nor the plaintiffs have been able to prove the case of continuous and uninterrupted user of the said passage. It is not open for this Court in its second appellate Jurisdiction to upset the fact findings. Therefore, second Appellate Court is precluded from opening any issue.

9. In support of his submission he relies on decisions reported in Ram Das alias Ram Suraj Vs. Smt. Gandiabai and others, , Adikanda Sethi (Dead) through Lrs. and Another Vs. Palani Swami Saran Transports and Another, and Sheel Chand Vs. Prakash Chand,

10. He argues the onus lies upon the plaintiffs to prove their case of uninterrupted user under sections 25 and 26 of the Limitation Act. In support of his submission he relies on decisions reported in Shaikh Khoda Buksh Vs. Shaikh Tajuddin

11. The text of the Gale's on Easement and Border's law on Easement relied on by Mr. Dasgupta relate to English Law of Easement and the same is not applicable in India. He argues that an enjoyment as of right cannot be inferred as a matter of course but from a finding of a user only. He argues that here is a case of permissive use. So question of easement by prescription in this case does not arise. The defendants have already proved their case of permissive user and such factum of user is not challenged in cross-examination. As such fact of permissive user is deemed to have been proved by applying the principle laid

down in the decision reported in A.E.G. Carapiet Vs. A.Y. Derderian, . In case of necessity it has to be proved by cogent evidence, but there is no such evidence. Moreover, it will appear from the evidence that there is alternative passage which was found by the Courts below. Therefore, question of easement of necessity does not and cannot arise.

12. I have heard the submissions of the learned lawyers and also considered the Judgment of both the learned Courts below. In both the plaints the plaintiffs have asked for declaration of the said passage in question being a common passage for both the premises of the plaintiffs and the defendants and alternatively the plaintiffs have acquired easement right by user of the same for a long period for enjoyment of light and air and for repair purpose. Both the learned Courts below have come to the fact findings that the said passage is not a common passage and the said passage exclusively belongs to the defendants. Both the learned Courts below has concurrently found that the plaintiffs have failed to prove uninterrupted user for about 20 years. It has been further found by both the learned Courts below that the plaintiffs have not acquired any easement right either by prescription or otherwise rather the plaintiffs were allowed to use as a licensee during a particular period.

13. These two points, viz., easement of necessity and easement of prescription have been held by both the learned Courts below concurrently with reasons. This fact findings cannot be upset by me.

14. Both the learned Courts below have proceeded treating the plaintiffs case as being the case of easement of necessity and further casement by prescription for uninterrupted use of the passage for more than 20 years. The question of easement by grant has been dealt with by both the learned Court below in a very perfunctory manner and on wrong test of evidence and on the question of law. On this point both the learned Courts below proceeded in different manner.

15. Now whole question remains on the face of the aforesaid concurrent findings whether it would be proper for this Court to come to different findings or to upset the aforesaid Judgment or not.

16. It appears from the Judgments reported in Dilbagrai Punjabi Vs. Sharad Chandra, , Budhwanti and Another Vs. Gulab Chand Prasad, and Mattulal Vs. Radhe Lal, that if both the learned Courts below do not consider the relevant evidences which have the bearing with the Issues and/or cases then it is obviously a substantial question of law and the second appellate Court should Interfere in such cases. It appears to me both the learned Courts below have approached on wrong footing and they have not made any serious endeavour to find out whether the plaintiffs have acquired easement right over the suit passage by grant or not, situates on the eastern side of the premises of the defendants.

17. The learned appellate Court below has Ignored the case that easement has been acquired by grant over the suit passage. It appears from both the plaints

that the plaintiffs have specifically pleaded that the aforesaid easement right over the suit passage has been acquired by grant also and such grant would be apparent from the deed of conveyance being the Exhibit-1. No serious attempt has been made to look at the case from that angle. It appears from the Exhibit--1, viz., the sale Deed dated 17th December, 1930 that the predecessor-In-interest of the plaintiffs, viz., Radha Nath Das purchased the premises Nos. 100A and 100B, D.C. Dey Road from one Ambika Charan Ghosh and it would further appear from the aforesaid Exhibit-1 that there is 3 width common passage on the western side of the Holding Nos. 100A and 100B, D.C. Dey Road which had been used by the predecessor-in-interest of the plaintiffs, viz., Ram Chandra Ghosh who was uncle of Ambika Charan Ghosh.

18. It appears that the learned Courts below totally ignored the plan attached to partition deed dated 4th February, 1952 being Exhibit-2 and also Exhibit-6 being the extract of assessment Register of Municipal Corporation that corroborate the fact of existence of common passage as mentioned in Exhibit--1.

19. So it will appear from the aforesaid documents that existence of the said passage in question was found even not only in 1930 but in 1952 also. The said passage was being used and was meant to be used by the predecessor-in-interest of the plaintiffs along with the other plots being held by the defendants and such fact would be apparent from the map or plan annexed to Exhibit-2 being the partition deed of 1952 which provides amongst other that other strip of land having width of 2 1/2 situates on the eastern side is not amenable to anybody for use as common passage and it was kept for laying water pipe line, electric line and provision for constructing drain for passing water. As such there was no common passage excepting the passage in question. This point has been totally Ignored and overlooked by both the learned Courts below. The easement can be claimed not only by way of prescription or by way of necessity, u/s 19 of the Indian Easement Act, 1882 it can be claimed as and by way of grant. Though the said Act has no application in Bengal but the principle laid down therein will apply. This has been settled by the various decisions rendered by this Court, to wit, Bhupati Bhusan Mondal and Others Vs. Jadunath Ghosal and Others, and Baidyanath Dutta and Others Vs. Radheshyam Dutta and Others,

Section 19 of the said Act provides as follows:-

"Transfer of dominant heritage passes easement.--Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary Intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place."

20. It would appear that the plots of land being the dominant heritage held by the plaintiffs were transferred by Exhibit-1 by a conveyance of 1930 in favour of Radha Nath Das since deceased and such transfer of the aforesaid dominant heritage was effected with the easement right over the passage in question. The aforesaid document being Exhibit-1 which is referred to in the partition deed, is a

document of more than 30 years old. It is true under law that contents of thirty years old document cannot be presumed to be true and correct automatically. In this "case Exhibit-1 was executed by the person who is dead, so the contents therein are relevant u/s 32(7) read with section 13(a) of Evidence Act, 1862. In this connection a decision of this Court reported in Jogendra Krishna Banerji and Others Vs. Sm. Subasini Dassi and Others, may be referred to.

21. This present defendants have acquired the property long after the predecessor-in-interest of the plaintiffs, Radha Nath Das, from their predecessor-in-interest. No evidence is forthcoming from the either, side as to whether use of the passage in question was discontinued even before the plaintiffs came into possession or before the defendants had acquired their plots of land. The fact mentioned in the thirty years old document as to the right of user in a piece of land shall be presumed to be correct in this case.

22. Moreover, both the learned Courts below failed to consider the evidentiary value of Exhibits 1 and 2 and Exhibit-6 being extract of assessment Register of Municipal Corporation. While dealing with the aforesaid documents the learned Courts below have tried to decide the ownership and title of the suit passage.

23. In my view it is absolutely wrong approach on the question of easement by grant under law. It is an admitted position the plaintiffs used the suit passage from 1964 to 1984. So factum of user coupled with the above documentary evidence unmistakably substantiate the easement by grant. While dealing with the question of right of easement enquiry Into title and ownership in servant tenement of the person claiming easement is not called for.

24. Therefore, the omission in considering the vital piece of evidence in this angle of both the learned Courts below involves a substantial question of law and whenever such omission is found the High Court will not hesitate to interfere with such concurrent findings and can come to different findings considering the evidence which has been left out to be considered.

25. The aforesaid proposition of law will find favour of the ratio laid down in the Supreme Court decisions reported in Budhwanti and Another Vs. Gulab Chand Prasad, , Ratanlal Bansilal and others Vs. Kishorilal Goenka and others, , Mattulal Vs. Radhe Lal, and Dilbagrai Punjabi Vs. Sharad Chandra,

26. In the decision of apex Court reported in Budhwanti and Another Vs. Gulab Chand Prasad, cited by Mr. Dasgupta Justice Natarajan speaking for the Bench has been pleased to hold in paragraph 11 amongst other that the High Court was Justified in setting aside the finding of the Appellate Judge even though it was factual in character. It is true that in a second appeal a finding on fact even if erroneous will generally not be disturbed but where it is found that the finding is vitiated by application of wrong test or on the basis of conjectures and assumptions then High Court will be within its right in setting aside in a second appeal a patently erroneous finding in order to render Justice to the party affected by the erroneous finding.

27. In this case both the learned Courts below while considering the documents adduced by the plaintiffs/appellants have proceeded applying wrong test if not on the basis of conjecture and assumption.

28. Majority view of Full Bench decision of this Court has held in a case reported in Ratanlal Bansilal and others Vs. Kishorilal Goenka and others, amongst other that where the finding of Court is on no evidence, it is then to be either on assumptions or on surmises and conjectures. How such a situation shall be allowed to go unremedied where it leads to the denial of Justice. This will bring the Judicial system to discredit before the people.

29. In the case reported in Dilbagrai Punjabi Vs. Sharad Chandra, apex Court held amongst other that it is true that the High Court while hearing the appeal u/s 100 of CPC has no Jurisdiction to reappraise the evidence and reverse the conclusion reached by the appellate Court but at the same time its power to Interfere with the findings cannot be denied if when the lower appellate Court decide an issue of fact a substantial question of law arises. The Court is under a duty bound to examine the entire relevant evidence on record and it refuses to consider important evidence on record having direct bearing on the disputed Issue and the error which arises is of a magnitude that it gives birth to a substantial question of law the High Court is fully authorised to set aside the finding.

30. As I have already indicated both the learned Courts below have omitted to consider the Important, evidence on record which are having direct bearing on the disputed issue.

31. Formulation of substantial question of law under sub-section (4) of section 100 of CPC at the time of admission of appeal is a question of procedure and such formulation is done in order to give notice to the respondent to answer to attack to be made by the appellant in this case both the parties have argued and proceeded on all points. So the respondents have not suffered any prejudice. Therefore, omission Information is not a fatal nor the same rendered the appeal infructuous. The formulation of substantial question of law is the task to be performed by the Court not by the litigants. At the time of admission for any reason such formulation of substantial question of law is not done then it is the fault of the Court and it can always rectify such defect and at the time of final hearing it would be the duty of the Court to give opportunity to the parties particularly respondent to argue on any point.

32. I am unable to accept the decisions cited by Mr. Bandopadhyay as all the decisions referred to by him, relate to case of establishing easement right by way of prescription or by way of necessity. There is no quarrel with the proposition laid down in all the decisions but in this case the prescription is not the case stated by the plaintiffs/appellants but case of grant is also there. Both the learned Courts below very casually overlooked the aforesaid documentary evidence.

33. In the premises as above, I am of the view that the decree passed by both the learned Courts below is not liable to be sustained and the same are hereby set aside and both the suits are hereby decreed declaring the plaintiffs have the easement right to the passage as mentioned therein.

There will be no order as to costs.

34. Appeal allowed