

(2015) 03 BOM CK 0039

In the Bombay High Court

Case No : Chamber Summons (L.) No. 241 of 2015 in Suit No. 234 of 1998

Pashmina Co-Operative Hsg. Soc. Ltd.

APPELLANT

Vs

Subhash Amolakchand Gandhi and Others

RESPONDENT

Date of Decision : 25-03-2015

Acts Referred:

Easements Act, 1882 — Section 15
Limitation Act, 1963 — Section 25, 26

Citation : (2015) 6 ABR 29 : (2015) 4 ALLMR 351

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Dinyar Madon, J.P. Sen, Senior Advs., Gautam Ankhad, Vishesh Malvia and Hiral Thakkar, Advocates i/b. Federal and Rashmikant, for the Appellant; Nisha Parmar and Divya Jain, Advocates for the Respondent

Judgement

R.S. Dalvi, J.—The plaintiff has claimed title over one plot No. 3 under the registered Deed of Conveyance dated 18th December, 1969 where the plaintiff's building has been constructed. The plaintiff has claimed to trace its title under the conveyance by one Habib Mohammed Hashambhoy (Habib) which was granted to one Tulsidas Chatrabhuj Gandhi and Madhukanta Gandhi (Gandhi). Under the said conveyance Habib covenanted that the road on plot No. 7B (which is adjacent to plaintiffs plot No. 3) and is a private road and shall be kept open for the purpose of access inter-alia to plot No. 3. On 16th August, 1960 a conveyance was executed by Gandhi in favour of one L K Marketing Investment Company (L K Market) from whom the plaintiff purchased plot No. 3. The plaintiff accordingly claims access to its plot from plot No. 7B. The conveyance is also stated to have been executed by Habib in favour of one Ms Ratan Mathurdas Merchant (Ratan) in respect of plot No. 7B on 9th September, 1974. Defendant No. 4 claims to be the brother and the sole heir of Ratan. Defendant No. 1 claims to have purchased plot No. 7B under two conveyances dated 18th and 19th December, 1997 from defendant No. 4.

2. Hence whereas the plaintiff claims right under the covenant under the

conveyances of its predecessors-in-title to have access from plot 7B to plot No. 3, and the defendants claim title to plot No. 7B. The plaintiff has challenged the conveyances in favour of the defendants by way of an amendment to the plaint which has been earlier allowed.

3. The plaintiff has further sought a declaration that the private road under the plot No. 7B which is the approach road to its properties belongs to the plaintiff and one other society and that defendant No. 1 is not entitled to enter upon or remain thereon or to park his cars or vehicles on plot No. 7B which is the approach road to the plaintiff's property. The plaintiff has accordingly claimed declaration of ownership on the said plot.

4. A conveyance by and between the defendant Nos. 2 and 3 and defendant No. 1 is claimed to have been executed in respect of plot No. 6A which is also an adjoining plot. The plaintiff has sought declaration that the plot No. 6A which is the approach road to its property is common passage road and none of the defendants has any right, title or interest therein. The plaintiff has sought declaration that the conveyance in respect of the said plot dated 23th October, 1997 is illegal and sham.

5. The plaintiff's ownership right in respect of plot No. 3 is not disputed. The plaintiff's claim that plot No. 7B belongs to plaintiff is disputed. The plaintiff's right of access to plot No. 6A is also disputed.

6. The above documents of title would be required to be seen in this suit to adjudge the plaintiff's rights to plot No. 7B.

7. Upon such a case plaintiff has sought to amend the plaint under the above Chamber Summons. Under the amendment by which paragraph 19A and prayer (C-4) are sought to be added in the plaint, the plaintiff seeks to aver that in the alternative to the plaintiff's case that plot No. 7B belongs to the plaintiff, the plaintiff enjoys his easementary rights of parking on plot No. 6A and 7B. The plaintiff has sought to aver that right from the conveyance dated 21st October, 1959 an express grant of right of access thereunder carried with it the implied right to park on plot No. 6A and 7B for fully enjoying plot No. 3. The plaintiff claims that the easement of parking is part of and ancillary to the right of access and has been continuously exercised by the plaintiff since 1969 which is the date of the conveyance in favour of the plaintiff by L K Market. The plaintiff claims a vested right to park its cars on plot No. 6A and 7B. The plaintiff seeks to aver that right is not inconsistent with the claim of ownership of defendant No. 1 and that the right to park on the servient land is necessary to make a grant of vehicular access effectual. Hence the plaintiff would contend that if plot No. 7B is held not to belong to the plaintiff, the plaintiff would seek a decree for a declaration that it enjoys the easementary rights of parking on plots 6A and 7B. The plaintiff has accordingly prayed for declaration that the plaintiff be declared entitled for easement of parking on 6A and 7B.

8. The plaintiff's application for amendment has been seriously disputed. The

Court must, therefore, see whether the amendment can be granted as a necessary and alternative relief or whether it cannot be granted upon a new and inconsistent case being made out by the plaintiff and upon fact that in a suit of 1998 upon the claim of ownership rights from 1969 the amendment sought in 2015 is barred by the Law of Limitation.

9. The plaintiff has claimed easementary right of parking. The easementary right can be claimed under Section 15 of the Indian Easements Act, 1882 which deals with acquisition by prescription. The relevant part of Section 15 runs thus :

15. Acquisition by prescription.-

Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years.

... and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years.

the right to such access and use of light or air, support or other easement shall be absolute.

Explanation II. Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

10. The plaintiff must show the enjoyment of the easement of 20 years without interruption. The plaintiff must show the right of way. The period of 20 years is the period ending within two years next before the filing of the suit. The interruption contemplated in the first part of section must result in actual cessation of the enjoyment by the obstruction caused by the party contesting. This would be in a suit for claiming acquisition by prescription.

11. The plaintiff continued to park the cars of its members on the plot Nos. 6A and 7B. The defendants applied for certain injunction restraining the plaintiff from parking the cars which has been refused. The plaintiff has applied for the plaintiff's access to its property and the right of way including parking of cars continued to be enjoyed by the plaintiff. There is, therefore, no interruption which has resulted in cessation of the enjoyment of the access to the plaintiff's property. However the plaintiff has not claim acquisition by prescription under Section 15 of the Easements Act. The plaintiff has claimed the declaration that it has the right of parking which it is continuing to enjoy. Mr. Madon would argue that the right of way or the easementary right of parking has been availed by the plaintiff two years prior to the making of this application for amendment to be incorporated in the plaint.

12. The plaintiff has sought the declaration relating to its easementary right of parking. The defendants have disputed that right but not yet interrupted that right at this juncture. On such facts the delay, if any, or the bar of limitation, if any, in the declaration of easementary right of parking is to be decided.

13. It is argued by Ms. Nisha Parmar on behalf of the defendant that the amendment cannot be allowed because if allowed the suit would be barred by the Law of Limitation or that the Court should exercise its discretion in not granting the amendment which is grossly delayed. It is argued that since the plaintiff was parking the cars on plot Nos. 6A and 7B, which right was contested by the defendant, prior to the filing of the suit, the cause of action arose in favour of the plaintiff to apply for the declaration of the easementary right of parking at the time of the filing of the suit and is delayed by 17 years.

14. Indeed a suit for declaration is required to be filed within three years of the right first accruing under Article 58 of the schedule 1 of the Limitation Act 1963. The plaintiff seeks to aver about the enjoyment of its easementary right as part of and ancillary to the right of access given to the plaintiff under the conveyance executed in its favour on 18th December, 1969. The right to park cars is ancillary to the right to have access to the plaintiff's plot. The right of access can be pedestrian as also vehicular. Thus seen the amendment is ancillary to the actual claim of the plaintiff that the suit plot of land belongs to it. It would belong to it under a conveyance by purchase. It would also belong to it by prescription under Section 15 of the Indian Easements Act, 1882. However, if that right is ancillary it should have been claimed at the time of the filing of the suit itself. The right claimed is of declaration. A declaration must be claimed within 3 years when the right first accrued. It would be taken to have accrued at the time of the filing of the suit. Thus seen the right of declaration cannot be claimed 17 years after it accrued due, though it may be ancillary to the right claimed in the suit. Accordingly the question of limitation / delay would have to be considered.

15. Mr. Madon on behalf of the plaintiff drew the Court's attention to Section 25 of the Limitation Act, 1963 for the limitation period set out for acquisition of easement by prescription. The relevant part of Section 25 runs thus :

ACQUISITION OF OWNERSHIP BY POSSESSION

25. Acquisition of easement by prescription.-

(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as or right, without interruption, and for twenty years. ...

(2) Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

... Explanation. Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment

by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

16. It may be seen that the limitation for the acquisition of prescription is of the same time period for the similar easement under Section 15 of the Indian Easements Act, 1882. But that would in a suit filed upon the easement having been obstructed. Such suit would be to claim (reclaim) the easement. The plaintiff's suit not one such. The plaintiff continues to enjoy the easement being the right to park cars of its members on plot No. 7B. The plaintiff only claims a declaration that it has such right (or continues to have such right). Mr. Madon would contend that the since plaintiff has continued to park its cars which would make the grant of right of access effectual and has not been successfully interrupted for a period of two years by the defendant, the plaintiff's cause of action also has actually not begun to claim the right of easement. Hence it is seen that the plaintiff has come to the Court to challenge the defendants' contest over the plaintiff's parking on plot Nos. 6A and 7B to obtain the right of access on plot No. 3 through such parking. Mr. Madon would contend that thus seen the plaintiff's claim for amendment is neither delayed nor barred by the Law of Limitation.

17. It may be mentioned that a similar period of limitation has been specifically laid down in Section 26 of earlier the Limitation Act being Indian Limitation Act, 1908. The illustrations mentioned in the said section make the position of the acquisition of easement by prescription clear. Illustrations under Section 26 of the Indian Limitation Act, 1908 are thus :

Illustrations

(a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January, 1890 to 1st January, 1910. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

18. Hence the obstruction has to be for a period of one year and the claimant must sue within two years after enjoying easementary right for 20 years or more. It is clear that a civil action to claim an easement must be filed within two years of the obstruction which results in cessation of the enjoyment of the easement and that the plaintiff must show that the right of easement was enjoyed by the plaintiff continuously for twenty years without interruption. In this case the continuance of right of parking the cars by the plaintiff on plot Nos. 6A

and 7B is not denied. The two year period after the obstruction resulting in cessation has not expired. The suit has been filed (the amendment has been prayed for) before the end of the two years. However, from the plaintiff's case itself since there has been no obstruction, the two year period has not even begun. Consequently a civil action simpliciter to claim a right of easement has not began. The suit in that behalf (or the application for amendment) would be premature. The plaintiff has not claimed to be the owner of the plot Nos. 6A or 7B under any document of title. The plaintiff's document of title is in respect of plot No. 3. The plaintiff has claimed its right under the covenants to keep plot No. 7B open for all times by the plaintiff's predecessor-in-title Habib under the deed of mutual covenant executed by Habib on 2nd April, 1957 when he was the owner of the suit plot of land and which continued under the later conveyance dated 21st October, 1959 to Gandhi who was conveyed the right, title and interest in the suit plot of land 7B was enjoyed by Habib and still later to the plaintiff's immediate predecessor-in-title L K Market on 16th August, 1960 and subsequently to the plaintiff on 18th December, 1969. The plaintiff claims the enjoyment of the easement continuously from 1969 until the filing of the suit and thereafter until the date of the application for amendment. Under these circumstances, it is contended that though the amendment is sought 17 years after the filing of the suit, it cannot be taken to be barred in view of the specific period of limitation in respect of the claim for acquisition of easement by prescription.

19. It may be worthwhile to consider the period of limitation under the precedents. The earliest case under Section 15 of the Indian Easements Act, 1882 and Section 26 of the Indian Limitation Act, 1908 is of Siti Kanta Pal and Another Vs. Radha Gobinda Sen and Others, in which it has been held that the title to easement is not complete merely upon the effluxion of the period of 20 years in the aforesaid provision. It has been held that, however, long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question. The right is inchoate only.

20. In the later judgment in the case of Dwarka Prasad Singh and Others Vs. Patna City Municipality and Another, , it has been held that an obstruction which is not submitted to or acquiesced in for one year is not an interruption within the meaning of Section 26 of the earlier Limitation Act. It is also held that an easement becomes absolute and indefeasible on enjoyment of 20 years ending within two years next before the filing of the suit in which the claim to which such period relates is contested. It is observed that interruption of more than a year in the explanation to Section 26 of the Limitation Act will operate to prevent the claimant from adding the period of enjoyment after such interruption so as to make up the requisite total of 20 years. It is observed that would not nullify the right of the plaintiff which is already acquired. Such right is by 20 years uninterrupted enjoyment because he could sue within two years of the interruption.

In that case the plaintiff enjoyed the right of easement by water going into drain. The drain was blocked. The land was coal-tarred and metalled. The plaintiff applied for restoration of the drain. It was held that the basis of the plaintiff's suit of easement of drainage itself failed.

21. In the case of Arjuna Udayar (died) and Others Vs. Munuswamy Naicker and Others, : the Court considered the required period of 20 years of enjoyment of the easement for the suit to be filed within 2 years next thereafter upon the interruption by cessation having continued for one year.

In that case the plaintiff claimed the right to take water from the well through a specified channel. The defendant disputed that right and claimed that plaintiff was taking water through some other channel. It has been held in paragraph 6 of the judgment upon citing Goyle's Law of Easements and Licenses-Second Edition 1996, that for the acquisition of easement by prescription it is necessary that the required period of 20 years or over must end within two years next before the institution of the suit wherein the claim of the easement was contested. This necessarily implies that the right of easement cannot become absolute unless the right has been contested. It is observed that if the plaintiff filed a suit upon enjoyment of easement for 19 years and a day, and files his suit on the first day of the 21st year he will succeed since then he can show 20 years enjoyment before the filing of the suit, the interruption being disregarded since it would be one day less than a year but if the suit is filed on the following day it will be too late for then the interruption will have lasted for full two years. It is, therefore, held in paragraph 7 of the judgment that the language of the section makes it clear that the enjoyment for the period of 20 years must terminate within two years prior to the institution of the suit. It would, therefore, be for 22 years that the plaintiff must enjoy the easement.

That, however, would be decided in the suit on merits. In any case that would be in a suit for claiming the easement and not for declaration of the enjoyment of the easement.

22. The latest case of M/s. Spring Borewells Co. Pvt. Ltd. Vs. Union of India--> : considered the earliest case of Siti Kanta (Supra) to hold that the plaintiff claiming the easementary right cannot sue only for enjoyment but must sue for declaration of the acquisition of the prescriptive right of easement and has observed thus:

The reading of Section 15 would make it clear that an absolute right would be available over the property belonging to another if the requirements contemplated therein are satisfied which is akin to claiming right by adverse possession. 23. Consequently the reliance by the defendant upon the judgment in the case of Radhika Devi Vs. Bajrangi Singh and others, and Sou. Shakuntala J. Gujar Vs. Shri Dilip R. Pawar and Another, need not be adverted to as they applied to limitation period in different circumstances upon the period being set out in schedule 1 of the Limitation Act which do not apply to the suits

on easements.

24. Similarly the argument about the delay, defeating the defendants' rights as held in the case of Purushottam alias Nana U. Sanyasi Vs. A.N. Jog and Others, would have to be seen as the plaintiff has claimed a declaration of the enjoyment of the easement. In the case of Pankaja and Another Vs. Yellappa (D) by Lrs. and Others, , amendment even after substantial delay has been allowed by the Supreme Court upon use of its discretion though in the original suit for permanent injunction, declaration of title was claimed after much delay.

25. It must be remembered that this suit is not for claiming the right of easement lost by interruption of the defendants. It is for declaration that it subsists and has not been lost but is enjoyed. Thus seen the suit is only for declaration and would be governed by Act 58 of the Limitation Act. That, of course, would be seen on merits at the hearing of the suit.

26. It is further argued on behalf of the defendant that the easement and ownership right are mutually exclusive concepts and, therefore, are inconsistent with one another and such inconsistent right cannot be allowed by way of amendment. Ms. Parmar on behalf of the defendant has relied upon the case of E. Elumalaichetty Vs. Naina Mudali and Others, and Arunachalam Pillai and Another Vs. Sorimuthu Pillai, in which the Madras High Court has indeed decided that easementary and ownership rights are mutually exclusive concepts and are contradictory and inconsistent with one another. The easementary right over a property can be claimed only if the person claiming it accepted the title of the person to such property against whom it is claimed and the plaintiff filing a suit for declaration regarding a common pathway over which he would claim an easement cannot plead title to such property and also claim easementary right. Indeed that stands to reason. It would, therefore, have to be seen what the plaintiff's suit is for.

27. The plaintiff claims title under conveyance only to Plot No. 3. The plaintiff has traced its title from L K Market to Habib. The plaintiff has shown that Habib enjoyed the easement was created upon plot No. 7B for access to plot No. 3 which continued from Habib to Gandhi to L K Market to the plaintiff in the conveyances of 1959, 1960 and 1969 respectively. The plaintiff's essential prayer is the declaration that the private road on plot No. 7B belongs to the plaintiff and that the defendant No. 1 is not entitled to enter upon it, remain on it or park its cars also on it. It is over this plot that the plaintiff claims its easementary right since that is claimed pursuant to the covenant to keep that plot open and upon the plaintiff's enjoyment of that plot since 1969 until the filing of the suit till 1998. That would be an easementary right by prescription under Section 15 of the Indian Easements Act, 1882. It is thus that the plaintiff claims declaration that the private road on the plot 7B would belong to the plaintiff. Had the plaintiff claimed plot No. 7B under a conveyance, the plaintiff would not be entitled to claim that it belongs to it under an easementary right. The plaintiff has not claimed the plot No. 7B under any conveyance. The plaintiff

has claimed its rights under the covenants in the conveyance dated 21st October, 1959 which covenant was passed on by Habib to Gandhi to L K Market and by L K Market to the plaintiff and pursuant to which the plaintiff enjoyed its easementary rights since 1969. Consequently the prayer (C-4) claimed in the amendment is not mutually exclusive or inconsistent with prayer "a".

28. An alternative relief which is not directly contradictory to the main relief is always allowed by way of amendment. (See G. Nagamma and Another Vs. Siromenamma and Another, .

29. The plaintiff has claimed amendment in the alternative to its previous claim in the plaint that plot No. 7B belongs to the plaintiff. The plaintiff has sought to contend that the plaintiff enjoys the easementary rights under the express grant of right of access in the conveyance dated 21st October, 1959 and that parking of cars would make that grant effectual. In view of the fact that it is seen that the plaintiff claims that plot No. 7B belongs to it, which would belong to the plaintiff if the plaintiff succeeds in showing the continuance and peaceable enjoyment of the easement without interruption for 20 years from the date of its conveyance being 18th December, 1969, the alternative submission and relief does not make a new or different case.

30. Counsel on behalf of the defendant has relied upon the judgments in the case of South Konkan Distilleries and Another Vs. Prabhakar Gajanan Naik and Others, to show that the new case contrary to the plaint was not allowed by way of amendment. Indeed a new case may not be allowed but an alternative case based upon the grant of right of access in the conveyance showing the tracing of title of the plaintiff would be allowed as in the cases of Srinivas Ram Kumar Vs. Mahabir Prasad and Others, , Abdul Hamid Sadiq Vs. Bibi Ashrafunnissa, and Sudhir Kumar Verma Vs. Sri Ashok Kumar Sah and Anr., Civil Revision No. 385 of 2001, Patna decided on 28th January, 2002.

31. The argument on behalf of the defendant that the amendment would change the nature of the case of the plaintiff cannot be accepted as in the case of Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, .

32. Mr. Madon would contend that the amendment be allowed and the issue of limitation be kept open. Indeed the issue of limitation would arise and would have to be decided in the suit on merits. The plaintiff would make its suit prone to be dismissed as being barred by limitation upon any amendment which would be later seen to bar the remedy claimed by the plaintiff. The specific period of limitation for the grant of the declaration of the easement would be seen in the suit. However, the amendment deserves to be granted as the claim on merits deserves to be adjudicated. Consequently the Chamber Summons is made absolute in terms of prayer "A". The plaintiff shall carry out amendments as per the schedule to the Chamber Summons within two weeks from today. The plaintiff shall also carry out amendments in the copy of the plaint served upon the defendants within two weeks.

33. The suit shall proceed as per the case management directions passed on 18th December, 2014. The plaintiff shall file affidavit of evidence as also affidavit of documents within two weeks.

34. The suit is adjourned to 30th March, 2015 for considering the admissibility of the documents of the plaintiff.