

(1973) 09 OHC CK 0013
In the Orissa High Court
Case No : Second Appeal No. 270 of 1969

Raghunath Naik

APPELLANT

Vs

Madan Mohan Naik

RESPONDENT

Date of Decision : 06-09-1973

Acts Referred:

Easements Act, 1882 — Section 15

Citation : AIR 1974 Ori 159 : (1973) 39 CLT 1179

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : R.N. Sinha, A.K. Tripathy, B.H. Mohanty and M.K. Mohanty, for the Appellant; B. Mohapatra and R.K. Mohapatra, for the Respondent

Final Decision : Partly Allowed

Judgement

B.K. Patra, J.—This is an appeal by the defendant who was unsuccessful in the Courts below. The dispute in this litigation relates to a narrow strip of land measuring 0.005 acre situate in plot No. 803/1 in mouza Bhedabahal under Sundergarh Police Station. The position of the land is indicated in red lines in the sketch map attached to the plaint. This narrow strip of land is claimed as a passage connecting the residential house of the plaintiff standing on plot No. 802 to the public road on the east being plot No. 800.

2. The parties are related to each other. Defendant's paternal grand-father Mukund is the elder brother of the plaintiff Madan Mohan. In the year 1915, there was a partition between the two brothers. At that time a common Passage known as Khajurtal Bat was kept apart by both the brothers to be used as a passage for both of them, from the public road to their residential houses. Subsequent thereto, there was a partition between Mukundaram and his son Narendra. At the time of that partition they closed the passage Khajurtal Bat partly and instead of it opened another passage called Guhal Bat for use of the plaintiff and defendant's father Narendra. According to the plaintiff, in the year 1939 this passage Guhal Bat was closed by the defendant and a new passage --

which is the disputed passage in this case -- was opened. The plaintiff claims that ever since 1939 he had been using this narrow strip of land as a passage as of right and thereby acquired a prescriptive right thereto. Complaining that in the year 1964, the defendant by constructing a brick-wall across the passage has interfered with the plaintiff's right to use the disputed land as a passage, the latter instituted the suit giving rise to this appeal for issue of a permanent injunction restraining the defendant from blocking the passage and for a direction that he should remove the brick-wall.

3. The defendant in his written statement opposed the plaintiffs claim on several grounds. According to him, the suit land does not connect the plaintiff's house with the public road and that the plaintiff has never been using this as a passage as there is an open piece of land adjoining his house which is being used by him as a passage. In the year 1950, the defendant instituted a suit T. S. No. 63 of 1950 in the Court of the Mun-sif, Sundergarh against the plaintiff for declaration of his title to and possession of plot No. 803/1 and for an order of injunction restraining the present plaintiff from using any portion of that plot as a passage.

The trial Court decreed the suit in favour of the plaintiff but subject to the present plaintiff's easementary right on the disputed land. On appeal (T. A. 30 of 1951) filed by the present defendant, the easementary right claimed by the plaintiff was negatived and a decree as prayed for in the plaint was passed in defendant's favour. In pursuance of the decree so obtained, the defendant took delivery of possession of the disputed land through Court on 30-12-1962. In these circumstances, it is pleaded that the plaintiff's claim in the present litigation is barred by principle of *res judi-cata*.

4. The trial Court recorded the finding that for a continuous period of more than twenty years commencing from the year 1939 the plaintiff has been using the disputed bit of land as a passage for coming to his house from the public road and that the exercise of this right had never been interrupted. In answer to the plea of *res judicata*, the learned Munsif held that by the time the suit of 1950 (T. S. 63/50) was in-stituted by the present defendant, the plaintiff had completed only about eleven years" enjoyment of the disputed passage and consequently had not acquired any easementary right by prescription. That apart, the question of easementary right was not the main point in issue of the previous litigation but came up for discussion only incidentally and the point that came up for decision was not acquisition of the easementary right by prescription but only whether the present plaintiff had any easement of necessity and that in these circumstances the decision in the previous litigation did not operate as *res iudicata*.

5. On appeal by the defendant, the learned District Judge of Sambalpur upheld the finding recorded by the learned Munsif that at least from the year 1939 till 1964. the plaintiff was uninterruptedly using the disputed land as a passage and that the exercise of this right was never obstructed in spite of the claim made by the defendant that in December, 1962, he took delivery of possession of the

disputed land through Court. In regard to the argument based on *res judicata*, the learned Judge agreed with the view of the trial Court. He also rejected the plea of the appellant that whether or not there was any physical obstruction to the exercise of the right by the plaintiff, the mere passing of the decree against him in the previous litigation would operate in the eye of law as a break in the exercise of the easementary right. In the result, he dismissed the appeal. Hence this second appeal by the defendant.

6. There is a concurrent finding of fact by the Courts below that right up from the year 1939 till the institution of the present suit giving rise to this appeal, that is, for more than a period of twenty years, the plaintiff has been in uninterrupted enjoyment of a right of passage over the disputed land and this finding is binding on me in second appeal.

7. In this Court, the learned Counsel for the appellant has not pressed his plea based on *res iudicata*. What, however, has been seriously contended before me by him is that the decree obtained by him in Title Appeal No. 30 of 1951 (arising out of T. S. 63/50) operates in the eye of law as a break in the continuity of the enjoyment of the right by the plaintiff. In support of this contention, he relied on a decision of this Court in *Sri Damodar Jew Thakur Vs. Hema Narayan Misra and Others*, . Relying on a decision of the Bombay High Court reported in AIR 1948 Bom 149. *Dagadabai v. Sakharani, Misra, J.* as his Lordship then was, held that a mere declaratory decree does not interrupt the running of adverse possession and that after a declaratory decree is obtained unless appropriate steps are taken for recovery of possession, the declaratory decree by itself would not prevent the running of time and the adverse possession continuing thereafter. The passage from the Bombay decision relied upon by the Court and which clearly exposes the law on the subject may be quoted. This is what their Lordships stated--

"If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, we do not see how it can be said that it has interrupted possession; nor can it in law affect the nature of the possession, so far as we can see, unless it does so in fact : and whether it does so in fact would probably depend upon the attitude with which it was received by the defendant But in fact it was a decree in ejectment, and for ourselves we cannot say why the fact of ejectment being ordered should make any difference. Surely what counts is not the order for ejectment but the actual ejectment or cessation of possession."

8. Section 15 of the Easements Act provides the different modes of acquisition of prescriptive right. 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, such a right is acquired. What amounts to interruption within the meaning of Section 15 of the Act is stated in Explanation II which says--

"Nothing is an interruption within the meaning of this section unless 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 authorising the same to be made."

The decision in *Ram Saruo v. Abdul Haq*. AIR 1931 Lah 395 on which the respondent relies relates to the acquisition of a right of way. It was a case u/s 26 of the old Limitation Act corresponding to Section 25 of the present Act. The Explanation to that section is the same as Explanation II to "Section 15 of the Easements Act. Re- ferring to the expression "interruption" in Section 26 of the Limitation Act, the Bench stated that in India an "interruption" to be effective must result in actual discontinuance of the enjoyment of the right of the claimant. Having due re-gard, therefore, to the clear language of Section 15 of the Easements Act, I am unable to accept the contention of Mr. Sinha that there would in the eye of law be any interruption of the user of the passage by the mere fact that a decree has been passed declaring that the plaintiff has no such right or by passing a decree in favour of the defendant authorising him to recover possession of the land. There can be interruption only if in execution of the decree the decree-holder takes possession of the property thereby physically preventing the other party from continuing in enjoyment of the right. The concurrent finding of the Courts below is that despite the fact that the defendant in execution of the decree had obtained or purported to take possession of the disputed land in fact the plaintiff had never been physically deprived from enjoyment of it. How this might have come about can be easily explained. The total area of plot No. 803/1 is 0.06 acre. The disputed passage as indicated in the sketch map attached to the plaint, although situate in plot No. 803/1 measures only 0.005 acre. It runs east to west, more or less on a line with northern boundary of plot No. 802 connecting that plot to the public rasta plot No. 800. When the defendant executed the decree which he had previously obtained against the plaintiff what obviously he had done was that he took possession of the entire plot No. 803/1 excepting the disputed passage which is a very small fraction of the total plot. But the evidence is clear that possession of this narrow strip of land had not been taken and the plaintiff continued to use it as a passage. That apart, even if it is assumed that defendant had taken possession of the disputed narrow strip of land also, I fail to see how this can in any way affect the plaintiff's user of this land as a passage so long as the exercise of that right has not been prevented. The title to the disputed land always vests with the defendant because he is the owner of that land. Possession of land also must be said to be with him because the plaintiff does not claim any adverse possession in respect of that land. All that he claims is only a right of user which must exclude all notions of exclusive possession thereof. If "A" has a right of passage over the land of "B". it cannot be said that "B" is deprived of possession of the land. In that view of the matter, even if it is believed that in the execution proceeding, the defendant obtained possession of the entire plot

803/1" including the disputed passage, still in view of the concurrent finding that plaintiff's user thereof as a passage was never interrupted, the plaintiff is bound to succeed in this case.

9. The Courts below have sone wrong in passing a decree declaring the plaintiff's right over the entire plot 803/1. In doing so, they failed to keen in view the skech map attached to the plaint. In para, 1 of the plaint, the plaintiff stated that after closing the Guhal Bat the defendant opened a new passage on plot No. 803/1 measuring 0.06 acre as shown in the red ink in the attached trace map. 0.06 acre of land therefore is mot the area of the passage but the area of plot No. 803/1. On this plot there is a passage which is shown in red in the sketch map. The sketch map clearly indicates the position of the passage and the area of the passage is also mentioned in the sketch map to be 0.005 acres. The plaintiff, therefore, would be entitled to a decree only in respect of this bit of land.

10. In the result, the appeal is allowed in part. The plaintiff shall have a decree as prayed for by him in respect of 0.005 acre of land in plot No. 803/1 and more fully indicated in the sketch map attached to the plaint. His right of passage over this bit of land shall stand declared. In respect of this bit of land, the plaintiff shall be entitled to all the re-liefs granted by the Court below. Parties shall bear their own costs in this Court and in the Courts below.