

(1977) 07 GUJ CK 0010
In the Gujarat High Court

Case No : Letters Patent Appeal No. 178 of 1975

Rameshchandra Bhikhabhai Patel

APPELLANT

Vs

Maneklal Maganlal Patel and Another

RESPONDENT

Date of Decision : 26-07-1977

Acts Referred:

Easements Act, 1882 — Section 13

Citation : AIR 1978 Guj 62 : (1978) GLR 329

Hon'ble Judges : Seshareddi Obul Reddi, C.J;N.H. Bhatt, J

Bench : Division Bench

Advocate : N.R. Oza, for the Appellant; S.G. Shah, for the Respondent

Judgement

N.H. Bhatt, J.

1 to 10. xx xx 11. The last question before us for determination is: is the plaintiff's case based on easement of necessity? We are endorsing the reasoning of the learned trial Judge about the existence of easement of necessity that was there till year 1946. The situation speaks for itself and the defendants were not well-advised in disowning all the facts. They had gone to the extent of speaking of a hedge dividing survey No. 73-B and survey No.73- B-1, existing at the site till 1968 when the plaintiff, according to them, had removed the hedge highhandedly and had carried his building materials through survey No. 73-A which they said the plaintiff was permitted to carry. The learned trial Judge rightly discountenanced all this story. We, therefore, do hold that till year 1946 or thereabout when southern road came to be laid by the Ahmedabad Municipality the owners of survey No. 73-B had right of way as an easement of necessity and in exercise of that right they were entitled to pass through survey No. 73-A belonging to the defendants. However, the situation was changed when the road came to be laid. This fact is admitted that this road was so laid in the year 1946 or thereabout, that is before the structures had come to be put up by the above-mentioned Ranchhodbhai Patel the original plaintiff No.2 who ultimately withdrew from the scene of the suit. The question is: can the

easement of necessity survive after the alternate outlet is available: Even Mr. Oza, the learned advocate for the plaintiff agreed on principle that easement of necessity would no longer be available when alternative way is available to the claimant of that right. His submission, however, was that long before the said southern municipal way came to be carved out by the municipality, the co-owner of survey NO. 73-B had mutually divided the land making the survey No. 73-B-1 and 73-B-2 and that in the year 1933 the owner of survey No. 73-B-2 had taken off his claim over survey No. 73-A and so the owner claiming that right of easement was the plaintiff, the owner of survey No. 73-B-1. It is an admitted fact that Ranchhodbhai Patela, the owner of survey No. 73-B-2 had put up his construction in such a way as to make it impossible for the plaintiff to go out of his property of survey No. 72-B-1. However, the action on the part of a co-owner or any action on the part of the owners of a dominant heritage cannot work to the detriment of the owner of the servient heritage. In other words it was not open to the plaintiff and Ranchhodbhai Patel to so divide their properties that the burden on the servient heritage of the defendants, which burden was contingent on the non-availability of any alternate way for the dominant owners could continue to hang on servient heritage even after the contingency ceased. Simply because the plaintiff and Ranchhodbhai had taken into their heads to divide the property in such a way that for all time to come the servient heritage would continue to remain burdened, the defendants cannot be made to suffer. In other words they could not for all time to come take away that contingency and convert the contingent right into an absolute right. Mr. Oza in this connection submitted that it was an incident of a joint ownership that they would divide their heritage. This say cannot ordinarily be denied. However, the co-owners must remember that to their property which was joint erstwhile, a contingent right was annexed and which right would be lost on, certain contingencies disappearing. They were expected, may they were bound, to carry out their affairs including the act of partitioning their estate, in such a way that the contingent right of servient owner (viz. not to bear the burden of the dominant owner on the alternative way being available for the erstwhile joint property) would not be lost for ever. As a matter of fact on going through the relevant evidence and the judgments of both the courts we find that the year 1933 that has been referred to by the plaintiff and his supporter Ranchhodbhai does not appear to be the year in which the said partition had taken place. The said two Survey Nos. Survey No. 73-B-1 and 73-B-2 came to be noted in the public register only in the year 1968 when the controversy between the plaintiff on one hand and the defendants on the other hand had already started simmering. There is nothing on record except the bare word of the plaintiff and Ranchhodbhai Patel to show that such a partition had come to be effected in the year 1933. Mr. Oza, however, in this connection urged that the evidence of Ranchhodbhai Patel is that in the year 190 when he had sought municipal permission for putting up the structures on a part viz. the southern part of the southern portion of survey No. 73, he had submitted, a plan wherein he had shown this land as having fallen to his share and Mr. Oza also said that his client had deposed on oath that the alleged document of partition of

1933, copy of which has been before the Court and which is not admissible for want of registration, was annexed by him to his partition. Mr. Oza urged that we should accept at least this evidence which was not controverted on behalf of the defendants. Even if we accept this as true it would at the most show that in the year 1945 Ranchhodhai Patel and the plaintiff had divided their property viz. survey No. 73-B. The existence of that writing which has been said to have been produced before the Municipality in the year 1945 is on a simple paper and such a writing could have been got up even then. At any rate we are not inclined to attach much importance to the oral say of the plaintiff and Ranchhodhai Patel that the partition came to be effected in the year 1945. The said partition had come to be effected at least in the year 1945 and it was so done, despite the knowledge that a road on the southern side was imminent if not already laid. Even if it were not in contemplation, as we have said above they could not have partitioned their property survey No. 73-B in such a manner as to subject survey No. 73-A under perpetual obligation to allow ingress and egress to the owner of survey No. 73-B-1. It is they could not obviously do and thereby deprive the owner of survey No. 73-A of a possibility of avoiding the burden, which as we have said, was a contingent burden.

12. Appeal dismissed.