
(2012) 05 MP CK 0004
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2505 of 2012

Ramkishan

APPELLANT

Vs

Mahesh and State of M.P.

RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(r)
Constitution of India, 1950 — Article 227
Madhya Pradesh Land Revenue Code, 1959 — Section 13, 131, 132

Citation : (2012) 4 MPHT 339 : (2012) 4 MPLJ 461

Hon'ble Judges : Sanjay Yadav, J

Bench : Single Bench

Advocate : S. Sarwate, for the Appellant; Arun Choubey, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Yadav, J.—Order dated 16-1-2012, passed by III Additional District Judge, Khandwa, passed in MCA No. 19/11 is being questioned vide this petition under Article 227 of the Constitution of India; whereby, an order dated 15-11-2011 by trial Court injunction the respondent-defendant for causing interference in the suit property has been reversed. The suit by the petitioner is for declaration and permanent injunction in respect of passage over Khasra No. 571 area 0.04 hectares used by the petitioner and his family members to reach land bearing Khasra No. 569/1, 569/2, 563/3, 564/3, 568, which as per plaint allegation belongs to the petitioner and his family members. An easementary right thereon having been claimed by the respondent/ defendant leading to an order dated 17-8-2011 u/s 131 of M.P. Land Revenue Code, 1959 (hereinafter to be referred as "the Code of 1959" passed by Additional Tehsildar, Khandwa, creating right of passage thereover in favour of defendant. Along with suit petitioner filed an application under Order 39, Rules 1 and 2, Code of Civil Procedure, 1908.

2. Trial Court on a finding that a passage in question being not a common passage and that the roads for ingress and egress of defendant exists, enjoined the defendant from causing any interference over the suit premises. Trial Court observed : --

3. in an appeal under Order 43, Rule 1(r) of the CPC the Appellate Court intercepted the trial Court's order on two counts, firstly, that a suit arising of a proceeding u/s 131 of the Code of 1959 is not maintainable and secondly there being an undertaking by the petitioner plaintiff recorded in the Panchnama to give the right of way to the respondent defendant, reverse the trial Court order.

4. Regarding first assumption that the suit is non maintainable there is no cavil even amongst the parties that in view of decision in Smt. Ramkanya Bai and Another Vs. Jagdish and Others, , the suit in question is maintainable. It is held therein that:--

The Code nowhere bars the jurisdiction of Civil Courts to decide upon easementary rights relating to agricultural or other lands. The Madhya Pradesh Land Revenue Code neither creates nor recognizes any new category of private easementary rights either by way of right of way or right to take water, which is not covered by the provisions of the Easements Act or which is not required to fulfil the requirements prescribed by the Easement Act. An easement cannot be acquired otherwise than in the manner provided in the Easements Act. Section 131 of the Code does not provide for or recognize a new type of easement which is not contemplated or recognized in Easements Act, but merely deals with customary easements covered by section 18 of the Easements Act. Nor can it be said that the elements of an easement required to be fulfilled under the Easements Act are not required in respect of a private easement u/s 131 of the Code. Apart from the fact that section 131 of the Code does not deal with acquisition of any special easement by some method which is not referred in the Easements Act, sub-section (2) of section 131 expressly provides that irrespective of any order, passed by the Tehsildar u/s 131, any person can establish any right relating to an easement by a civil suit. There is nothing in section 131 or any other provision of the Code, which makes the decision of the Tehsildar final and not open to question in a Civil Court. Therefore, the decision of the Tehsildar will not bar a subsequent civil suit by either party to a proceeding u/s 131 of the Code, in respect of the easement claimed in the proceedings u/s 131 of the Code.

5. As to second assumption the Appellate Court relied upon the spot panchnama, dated 25-8-2011 to conclude that the plaintiff had consented for the right of passage over suit property. The said panchnama is brought on record, which is in following terms :--

6. The panchnama as is apparent therefrom is in pursuance to the proceedings u/s 131 of Code of 1959, wherein on an application u/s 132 an interim order dated 24-8-2011 was passed in the following terms:--

7. Pertinent it is to note that being aggrieved by the said interim order that the petitioner has filed a suit. The question therefore, is whether the Appellate Court was justified in relying upon the spot panchnama prepared in pursuance to the proceedings u/s 131 subject to challenge in suit, holding the same to be a consent given by the petitioner plaintiff for the right of way over suit property.

8. Trite it is that while exercising the discretion for grant of an interim injunction during pendency of a suit following three tests are applied, viz. (i) whether plaintiff has a prima facie case, (ii) whether balance of convenience is in favour of the plaintiff, and (iii) whether the plaintiff would suffer an irreparable injury if temporary injunction is declined. These parameters are to achieve the object to protect the plaintiff from an injury, which cannot be compensated adequately.

9. Thus, when these three parameters are meted out the petitioner/plaintiff would be entitled for a relief of temporary injunction during pendency of the Civil Suit. [Please see : Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, and Hindustan Petroleum Corporation Ltd. Vs. Sri Sriman Narayan and Another,

10. It is a matter of record that the respondents defendants is the owner of Khasra No. 584/1, 585 and 572. That in 1920 one Bhila had purchased Khasra No. 348 (New No. 572) from Ghisabai vide sale-deed dated 22-4-1920 and therein no prima facie proof from the sale deed, which is on record that a right of passage is there from Khasra No. 571.

11. Furthermore, respondent purchased Khasra No. 572 from Kadwa Grandson of Bhila vide sale deed dated 13-12-2199 (sic).

12. Apparently, when there was no right of passage to Bhila over suit property no such right could be created for the first time.

13. In the case at hand the Appellate Court has erred in placing reliance on panchnama, construing it to be prepared on consent given by the petitioner/plaintiff. The said panchnama in fact is in furtherance to an order passed in a proceeding in a Revenue Case under the Code of 1959.

14. The Appellate Court lost sight of the fact that order passed in the said proceeding being a subject-matter of challenge in the civil suit, no right could have said to accrue in favour of respondent/defendant on the basis of said panchnama. The Appellate Court committed an error in construing the preparation of panchnama as consent given by the petitioner/plaintiff.

15. In view whereof, impugned order dated 16-1-2012, is not sustainable in the eyes of law and is hereby quashed. Order 15-11-2011 passed by the trial Court is revived. The petition is allowed to the extent above.