

(1929) 11 MAD CK 0061
In the Madras High Court

(Saripella) Venkatapathiraju and Others	APPELLANT
Vs	
(Saripella) Subbaraju and Another	RESPONDENT

Date of Decision : 28-11-1929

Acts Referred:

Easements Act, 1882 — Section 41

Citation : AIR 1930 Mad 789 : (1931) 33 LW 191

Hon'ble Judges : Anantakrishna Ayyar, J;Anantakrishna Aiyar, J

Bench : Division Bench

Judgement

Anantakrishna Ayyar, J.—This second appeal raises an interesting question regarding an easement of necessity, and about the proper construction to be put on Section 41, Easements Act. The facts are not now in dispute. The plaintiffs are the appellants. There were four brothers who formed the members of an undivided Hindu family. About 40 years ago the four brothers effected a partition of the joint family properties. A plot of land with some houses thereon was divided among the four brothers. On the north a public street ran east to west, and on the south there were cultivated fields belonging to strangers. The southern portion of the common land consisted of account gardens, the same was divided into three, the western portion (B-3) fell to the share of the second brother, the middle portion C-3 fell to the share of the 3rd brother, and the easternmost portion (D-3) to the fourth brother. The remaining land was practically divided into four portions. The westernmost A, A-1, and A-2, fell to the 1st brother's share; the portion next east of that, B, B-1, and B-2, fell to the share of the 2nd brother; the portion next east of that, C, C-1, and C-2, fell to the share of the 3rd brother; and the easternmost portion, D, D-1, and D-2, fell to the share of the fourth brother. B-2 and B-3 were allotted to the 2nd brother and access from B2 and B-3 could be secured only through C-3. It is admitted that there was an easement of way of necessity from B-2 to B-3 through C-3. Some years later, the 1st brother purchased B-3 from the 2nd brother, and some years still later, B-2 (with B and B-1) was also purchased by the 1st brother. The plaintiffs (the sons of the first brother) filed the suit against defendants (the sons

of the 3rd brother) for a declaration that they are entitled to have a right of way from B2 to B3 through C-3 as was used by the 2nd brother when he was owner of B-2 and B-3. The defendants denied the plaintiff's right and urged that the right of way enjoyed by the second brother was extinguished after B-3 was purchased by the first brother, since access to B-3 could be had from the first brother's plot A-2, and that the plaintiffs could not by their purchasing B-2 long after B-3, claim to have a revival of the right of way to pass from B-2 to B-3 through C-3, as now the plaintiffs could pass from B-2 to B-3 through their own land A-2.

2. Both the lower Courts have dismissed the plaintiffs' suit, and the plaintiffs have preferred this second appeal. An easement of necessity would arise only at the time of severance of tenements, when an easement is necessary for enjoying the transferred or the partitioned property: Section 13, Easements Act. A right of way is not an apparent and continuous easement: see *Illus. (b)*, Section 5, Easements Act. An easement of necessity could not be claimed unless the property divided or transferred could not be enjoyed at all except when an easement is imposed upon the other property:

An easement of necessity is an easement without which a property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property: see *Sukhdei v. Kedar Nath* [1910] 33 All. 467.

3. As observed by Sir Arnold White Kt., C.J., and Davies, J., in *Krishnamaraya v. Manaju* [1905] 28 Mad. 495:

If A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land u/s 13, Easements Act, on the ground that it is the most convenient means of access.

4. Their Lordships held that the "law u/s 13 Cl. E, Easements Act is the same as the law in England." Their Lordships were not prepared to agree with the suggestion made in *Municipality of City of Poona v. Vaman Rajaram* [1895] 19 Bom. 797, that the question of convenience was a matter for consideration. In *Durgamani Debya v. Ambica Charan Sarma* [1906] 4 C.L.J. 367 Maclean, C.J., and Geidt, J., confirmed the judgment of Mookerjee, J., holding that to constitute an easement of necessity an absolute necessity must be established.

5. It is therefore necessary to bear in mind that in considering questions of easements of necessity convenience is not the test but absolute necessity. In some English cases the reason why an easement of necessity is presumed to have been granted is stated to be this: Public policy required that all available lands should be used and cultivated. It could not be done if there be no access to the same. We should bear this in mind, when we approach the consideration of the question that arises for decision in this case. It is admitted that the second brother had a right of way of necessity to pass from B-2 to B-3 through the land of the third brother C-3. It is also admitted that B-3 was purchased from the second brother's branch by the plaintiffs who belong to the first branch. After

such purchase access to B-3 could be had through A-2. There was no necessity to have access through C-3 for passing from A-2 to B-3 after B-3 was purchased by the plaintiffs. What is the effect of the plaintiffs' purchase of B-3 on the right of way of necessity that existed for access between B-2 and B-3 through C-3? The plaintiffs contended that the easement of necessity was in suspense, and they argued that after the plaintiffs' purchase of B-2 also some years later, the old easement right of way of necessity to pass from B-3 to B-2 through C-3, revived. I am unable to agree. Revival of easements is dealt with by Section 51, Easements Act, and the present case would not come under that section. Suspension of easements is dealt with by Section 49, and the present case would not come under that section either. C-3 the servient tenement has never passed hands from the third brother's branch to the defendants, since they have continued to be owners of the same all along. The defendants argued that as soon as the owner of the dominant; tenement acquired an adjoining plot through which access to the several portions of the dominant tenement could be had, then, the old easement of necessity became extinguished. They relied on Section 41, Easements Act, which enacts that "an easement of necessity is extinguished when the necessity comes to an end." Illustration to Section 41 was also relied upon by the respondents. The learned advocate for the appellants argued that a right vesting in the dominant owner, such as a way of necessity, is a valuable right, and he could not be said to have lost that right, simply because he spent his own money in purchasing some adjoining property. He argued that the servient owner could not take advantage of a purchase made by the dominant owner by using the dominant owner's moneys. He also submitted that the right really appertains to the two plots of lands B-2 and B-3, and as soon as the said plots became united in ownership under one person, the old right of way of necessity revived, and that the lower Courts were wrong in disposing of the question rather summarily without properly discussing the same.

6. The learned advocate for the respondents urged that an easement of necessity is co-extensive with the necessity as it existed when the easement was imposed: Section 28, Easements Act, and that it became extinguished when the necessity came to an end: Section 41. He also relied on the decision in *Holmes v. Goring* 2 Bing. 76. The Court there held that a way of necessity is limited by the necessity which created it, and ceases, if at any subsequent period the party entitled to it can approach the place to which it led, by passing over his own land. Best, C.J., at p. 236 observed as follows:

But I had rather take the case on the broad ground on which it has been argued, than on this narrow ground. The plaintiff complains that the defendant has trespassed on his land; the defendant insists that he was entitled to pass over it in the enjoyment of a way of necessity; all the four closes, he says, were originally his, and he was then accustomed to pass from the first unto the fourth; he parted with the two in the middle and contends that it is still necessary for him to pass through them. On behalf of the plaintiff it is asserted that this necessity does not exist; that at the time of the trespass he might have passed

from Close 4 into his own land, Close 6 and thence over his own land into high road; or that at all events, and at all times, he might have passed out of Close 3, into Close 5, and so have avoided Close 2, the locus in quo. My judgment will be on the latter course; if the defendant could have pursued that, and I am of opinion he could, he is entitled to no way of necessity. It has been contended that we are to look at the state of things at the time of the feoffment, and that at that time the defendant could not have passed into Close 5, because it was in the occupation of Mrs. Falconer; if so, the defendant ought to have shown in her an interest sufficient to exclude him; instead of that the case only states that she was in the occupation of Close 5, a statement consistent with a mere tenancy at will, which the defendant might at any time have determined. It is dear therefore that he ought to have passed from Close 3 into Close 5, and if so he could not claim a way of necessity over Close 2.

7. On the part of the plaintiff the case has been put on its right ground. If I have four fields, and grant away two of them, over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain; but what right? the same as existed before? No. The old right is extinguished, and the new way arises out of the necessity of the thing. The passage which has been cited from Serjt William's note contains a complete answer to the argument on the part of the defendant:

A way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant;

but a grant of no more than the circumstances which raise the implication of necessity require should pass. If it were otherwise this inconvenience might follow, that a party might retain a way over 1,000 yards of another's land when by a subsequent purchase he might reach his destination by passing over 100 yards of his own. A grant therefore arising out of the implication of necessity, cannot be carried farther than the necessity of the case requires, and this principle is consistent with all the cases which have been decided. It has been argued that the new grant operates as a prevention of the extinguishment of the old right of way, but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity. Searjt. William says:

Where a man having a close surrounded with his own land grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant; for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself.

8. What way is it the grantee shall have? Not the old, but a new way limited by the necessity. Park, J., observed:

From all the authorities referred to, it is clear, that when a way is claimed of necessity, it is a good answer to show that there is another way which the party may use.

9. Burrough, J. added:

Upon the former argument it was contended that the only necessity which could support the defendant's plea, must be a necessity continuing up to the time of the trespass justified under it. In this I entirely agree.

10. In *Goddard on Easements*, 7th Edn., at p. 559, it is stated as follows:

It is on this principle that easements of necessity are extinguished when the necessity ceases. It has been thought sometimes that the termination of the necessity would not affect the extinction of the easement, but that opinion has not been supported. The question was raised and determined in the case of *Holmes v. Goring* 2 Bing. 76, in which it was held that a way of necessity may be acquired at the time of the purchase of particular land, yet if the purchaser subsequently becomes possessed of other grounds over which he can pass, the necessity, and therefore the reason, for the existence of the right of way, is at an end, and the right itself also ceases; in support of this decision a passage from a note of Mr. Searjt Williams in the case of *Pomfret v. Ricroft*, was cited by Best, C.J., where it is said that a way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant; but added the Judge, a grant of no more than the circumstances which raise the implication of the grant require.

11. At p 588, it is observed that:

Ways of necessity are co-extensive, and cease, with the necessity; they arise by implied grant, and the right continues while the necessity lasts; the grant may in fact be regarded as conditional on the continuance of the necessity; if therefore the necessity comes to on end the right of way is extinguished.

12. It is true that during the argument in the case of *Proctor v. Hodgson*, Parke, B, observed:

The extent of the authority of *Holmes v. Goring* 2 Bing. 76 is that, admitting a grant in general terms it may be construed to be a grant of a right of way as from time to time may be necessary; I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at that time that the Court was wrong; but that is not the question now.

but this expression of opinion, coming even from Parke, B, cannot be taken to overrule the case of *Holmes v. Goring* 2 Bing. 76, and the principles of law there established.

13. In *Gale on Basements*, Edn. 10 pp. 177 and 179, the question is discussed. The question of the duration of the right has been disscussed in several cases, and it has been held to cease, when it is no longer, required in order to render the grant or, reservation effectual. Similarly in *Halsbury's Laws of England*, Vol. 11, pp. 241 and 291, the quescion is discussed. In Section 487, it is stated that:

An easement of necessity is an easement which under particular circumstances

the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists; for a grant arising out of the implication of the necessity cannot be carried further than the necessity of the case requires. Quasi-easements are rights analogous to easements, but not in strictness easements, because some necessary element is wanting.

14. The question is discussed concisely in Section 569 at p 291. Both the branches of the appellant's arguments are answered by Section 569. By acquiring an adjacent land the easement of necessity is extinguished, and further the grantee cannot by his own act, by dealing with the acquired lands, subsequently revive the way of necessity. This is what is mentioned in Section 569:

There can be no way of necessity unless the necessity existed at the time of the grant of the dominant tenement, and inasmuch as the exigency of the case alone calls it into existence, it continues only during the subsistence of the necessity; that is to say, the grant which arises by implication of law is a grant of a right of way until such time the grantee may acquire the power from some other source of teaching the quasi-dominant tenement without using the quasi-servient tenement. If the grantee has once acquired such a power, he cannot by his own act in extinguishing the power revive the way of necessity.

15. No doubt, in *Gale on Basements* at p. 181, it is remarked that:

Holmes v. Goring 2 Bing. 76 therefore though never overruled, must be looked upon as of doubtful authority.

16. See also *Halsbury's laws of England*, Vol. 11, p. 291, foot-note F., where it is stated, that

in 10 *Exchequer* 824, at p. 828, Parke, B, and Alderson, B., expressed the opinion that the decision in *Holmes v. Goring* 2 Bing. 76 was probably wrong.

17. In addition to the case of *Holmes v. Goring* 2 Bing. 76, already quoted reference may also be made to *Pearson v. Spencer* [1833] 3 B. & S. 761, *Pheysey v. Vicary* 16 M. & W. 484, *Proctor v. Hodgson* 10 Ex. 821, *Reginolds v. Edwards Willies* 125 E.R. 1173. The law as to easements of necessity is the same in those parts of British India where the *Basements Act* is not in force: *Mitchell on Easements* p. 76. Having regard to the note of warning sounded in *Gale on Easements* and also in *Halsbury's Laws of England*, Vol. 11, as to the correctness of the decision in *Holmes v. Goring* 2 Bing. 76, and not being aware of any subsequent English case where the English Courts have overruled that decision. I was anxious to ascertain whether there are any Indian decisions which have a direct bearing on the question now before me. My attention was drawn to the following remark made by the Bombay High Court in the case reported in

Municipality of City of Poona v. Vaman Rajaram of Gholap [1895] 19 Bom. 797, viz.

the case of Holmes v. Goring 2 Bing. 76, shows that a way of necessity does not last longer than the necessity.

18. But the Court had not to consider present question in that case, and the remark was only obiter. I am aware that the suggestion made in that case whether the Courts in this country might recognize a way of necessity in case of extreme inconvenience falling short of actual necessity has not been approved by the Madras High Court, in the case already referred to: Krishnamaraya v. Marraju [1905] 28 Mad. 495. But the observation of the learned Judges of the Bombay High Court in Municipality of City of Poona v. Vaman Rajaram Gholap [1895] 19 Bom. 797 that

the case of Holmes v. Goring 2 Bing. 76, shows that a way of necessity does not last longer than the necessity

so far as it goes is in favour of the defendant's contention in the present case. A decision of the Calcutta High Court of Sir Asutosh Mookerjee, Kt., Ag. C.J., and Sir Ernest Fletcher, Kt., J., reported in Abhoya Chandra Ghosh v. Raj Kumar Ghosh [1921] 60 I.C. 504, was relied on by the learned advocate for the respondents. That seeing to be a case more or less on the point. Their Lordships held that when the necessity for an easement of necessity terminates the easement also terminates:

An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists, for a grant arising out of, the implication of necessity cannot be carried further than the necessity of the case requires. Reference may in this connexion, be made to the decision of Holmes v. Goring 2 Bing. 76 which is an authority for the proposition that an easement limited by the necessity which creates it, ceases if, at any subsequent period, the party entitled can approach the place to which it led by passing over his own land. The appellant, however, has argued that the correctness of this decision has been doubted in subsequent cases, and has invited us to hold that the view just mentioned is not well founded on principle. We are unable to accept this contention as well founded.

19. After referring to some other English cases their Lordships observed that Holmes v. Goring 2 Bing. 76, had been doubted upon a point which does not touch the question in controversy, and that so far as the position contended for by the defendants was concerned the same was supported by the case of Holmes v. Goring 2 Bing. 76, and that the said decision is correct law on this point even now. Justice Shamsul Huda had held that that was the law, and on Letters Patent appeal his decision was confirmed by Mookerjee and Fletcher, JJ. The arguments

advanced by the learned advocate for the appellants in the present case were also the arguments advanced in the case reported in *Abhoya Chandra Ghose v. Raj Kumar Ghose* [1921] 60 I.C. 504.

20. No other relevant decision of any of the Indian High Courts has been brought to my notice. In Indian textbooks on the Law of Easements, also the same view has been adopted namely that the right of way of necessity only arises when there is no other possible legal mode of getting at the land, that the grant of a way of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the quasi dominant tenement. In *Peacock on Easements* (Tagore Law Lectures Edn. 3, p. 589), it is stated as follows:

An easement of necessity is extinguished by the disappearance of the necessity. This is almost a self evident proposition and scarcely needs authority to support it. *Holmes v. Goring* 2 Bing. 76 shows that a way of necessity is limited by the necessity which creates it and that if subsequently to the acquisition of the easement it becomes possible for the dominant owner to reach the same point by another way over his own land the way of necessity ceases. To the same effect is Section 41, Easement Act: see also *Katkar on the Law of Easements*, p. 87 where the law is stated in similar terms.

21. In *Dr. Stokes' Anglo Indian Code*, Vol. 1, p. 919, the case of *Holmes v. Goring* 2 Bing. 76 is cited u/s 41 of the Act. Illustration to Section 41, also supports this view.

22. In a matter like this I was curious to know what the American law on this point is. On referring to *American Cyclopaedia of Law and Procedure*, Vol. 16, p. 1193, I find the law in America is stated to be as follows:

A way of necessity ceases as soon as the necessity to use it ceases. So if the owner of a way of necessity acquires other property of his own over which he may pass, or if a public way is laid out which affords access to his premises, his right to the way of necessity ceases. But a mere revocable permission to use a way over the land of another person will not extinguish the right. This rule that the right ceases with necessity has no application to way acquired by express grant or by prescription.

23. Again at p. 1223 the following statement occurs:

Where a way is claimed as a way of necessity, evidence is admissible for defendant to show the purchase of other land by plaintiff over which access to the public highway might be had.

24. At p. 1172, the position is emphasized that "grant" is the basis of existence of a way of necessity.

A way of necessity such as the law recognizes derives its origin from a grant or reservation and cannot exist where there was never any unity of ownership of

the alleged dominant and servient estates, for no one can have a way of necessity over the land of a stranger. Necessity alone without reference to any relations between the respective owners of the land is not sufficient to create this right.

25. On the question of "Severance after Merger" the law is stated at p. 1190.

The old easement is not revived by the severance, yet if the necessity continues a new easement will be granted by implication upon the same principle and under the same circumstances that easements are granted" by implication upon the severance of an estate originally entire.

26. When an easement of necessity is extinguished when the necessity comes to an end by the dominant owner acquiring adjoining property through which he could pass and re-pass to the old dominant tenement without reference to the servient tenement, the same could not be revived by the dominant owner selling portions of his property including the newly acquired property. Section 13, Easements Act, would apply of its own force to such a case, if as a result of alienation or partition easements are found necessary: The case would then be creation of new easements u/s 13, and not revival of an easement of necessity once extinguished.

27. For the foregoing reasons it seems to me that the contention of the appellants is unsustainable both on principle and on authority. The apparent anomaly, which, the learned advocate for the appellant submitted would be the result if his contention be overruled is not really so if the correct principle underlying the law of easements of necessity be properly appreciated and kept in view. The law implies such an easement in an exceptional case, and when the reason for the rule disappears the rule itself ceases to be applicable. The result no doubt is that in some cases where the dominant owner purchases an adjacent property by paying for the same, he would unwittingly find that the easement of necessity which existed over another item of property is no longer available to him: see illustration to Section 41 of the Act. If it should work hardship in some cases, justice would probably be done in most other cases. In any event the law on the point seems to be reasonably clear. I am therefore of opinion that the decisions of the lower Courts were right and the second appeal is accordingly dismissed with costs.