

(1975) 05 AHC CK 0037
In the Allahabad High Court
Case No : Second Appeal No. 3317 of 1968

Smt. Balley and Another

APPELLANT

Vs

Rama Shanker Lal and Others

RESPONDENT

Date of Decision : 14-05-1975

Acts Referred:

Easements Act, 1882 — Section 15

Citation : AIR 1975 All 461

Hon'ble Judges : K.B. Asthana, C.J

Bench : Single Bench

Advocate : R. Dwivedi and R.P. Singh, for the Appellant; Prem Chandra Srivastava, for the Respondent

Final Decision : Allowed

Judgement

K.B. Asthana, C.J.—The plaintiff-respondent brought the suit giving rise to this appeal for a permanent injunction restraining the defendants from interfering in any way with the right of the plaintiff, the members of his family, the labourers employed by him and the bullocks belonging to him from going to plots Nos. 9 and 10 over the rasta MNPQ shown in the plan attached to the plaint and for directing the defendants to remove the portion of a wall MN marked in the plan aforesaid constructed by them. The plaintiff's case was that the passage claimed by Him was one Lattha wide joining his plots Nos. 9 and 10 with the main public road in the north and passing over the boundary between plots Nos. 30 and 31 and that he, members of his family and servants had been using it for a period of more than 25 years as of right without any let or hindrance; thus they acquired a prescriptive right of easement u/s 15 of the Easements Act. The plaintiff further pleaded that the passage over the land MNPQ shown in the plaint map was the only access available to the public road from his plots Nos. 9 and 10. The defendants resisted the suit on the plea that there was no passage one Lattha wide as claimed by the plaintiff and what existed was a mere channel for irrigation purposes between the two fields Nos, 30 and 31 which the plaintiff

claimed falsely as a passage. It was denied that the plaintiff as of right had been using any part of the land as a rasta. It was further pleaded that the plaintiff had two or three years prior to the filing of the suit constructed a gate on the north of his plots Nos. 9 and 10 which were enclosed by boundary walls and has falsely put up the claim that the gate existed for a long time as the access point from the public road to plots Nos. 9 and 10. It was also pleaded that in the consolidation proceedings no such claim was ever asserted by the plaintiff and a chak road was carved out on other plots from the public road which runs towards the east of the plaintiff's plots Nos. 9 and 10 and he can reach his plots through the chak road.

2. The learned Munsif who tried the suit made a local inspection and found that there was no passage one Lattha wide as claimed by the plaintiff on the spot. He found that on the ridge between the two fields there was a beaten path 1 to 2 feet wide which led from the main road in the north up to the northern boundary of the plaintiff's fields Nos. 9 and 10 passing over the boundary between plots Nos. 30 and 31. The learned Munsif further found that the gate set up by the plaintiff in the north of his boundary enclosing plots Nos. 9 and 10 appeared to be new and fresh. As regards the wall alleged to have been constructed by the defendants, it was found that the defendants had enclosed their plots Nos. 30, 31 and 33 and that wall was also freshly constructed. The learned Munsif on a consideration of the entire evidence on record found that the plaintiff had failed to establish the Existence of the passage as claimed by him as one Lattha wide sufficient for the plaintiff to carry his bullock carts and Ikkas, and dismissed the suit. On appeal by the plaintiff, the learned Civil Judge found that there was no passage one Lattha wide as claimed by the plaintiff on the spot but there was a "Danda" a foot path, on the ridge between the boundaries of the two fields 1 to 2 feet which connected the plaintiff's enclosure on plots Nos. 9 and 10 with the main public road in the north. The learned Judge held that the plaintiff having established by cogent evidence that he, members of the family and servants had been using the "danda" for more than 25 years without any interruption, the plaintiff acquired a prescriptive right of way u/s 15 of the Easements Act and to that extent decreed the plaintiff's suit restraining the defendants from interfering with the plaintiff's right to use the passage as found on the ridge between the defendants' plots 30 and 31. The learned Judge further decreed the suit directing "the demolition of the wall MN constructed by the defendants. It may be stated here that the learned Judge affirmed the finding of fact recorded by the learned Munsif that there was no proof that the defendants had in any way after the formation of the chaks in the consolidation proceedings reduced the width of the passage. He also affirmed the finding that the plaintiff had constructed a gate on the northern boundary of his Gher in plots Nos. 9 and 10 in the recent past. The defendants feeling aggrieved have now come up in second appeal.

3. When this appeal was heard by me at an earlier stage. I sent down an issue for finding "Whether the plaintiff, his servants and cattle can have access to his grove in plots numbers 9 and 10 from the Ghazipur-Varanasi road by any

pathway other than MNPQ marked in the Amm's map, paper No. 20C2 on record?" A finding has been returned to the effect there is a chak road running in the east of the plaintiff's plots Nos. 9 and 10 and at the south-east corner of the field of Prem Prakash adjacent to plaintiff's plots there runs a beaten track passing on the southern boundary of the plaintiff's Gher and if the plaintiff removed his hedges on the southern boundary, he can have access to his plots Nos. 9 and 10. A belated objection was filed to these findings which I admitted after condoning the delay.

4. I do not find any merit in the objection raised to the finding recorded by the court below on the question of an alternative passage. It was urged by the learned counsel for the plaintiff-respondent that to the south of the plaintiff's gher in plots Nos. 9 and 10 is the railway land and any time access through it can be stopped. Learned counsel, however, has not been able to satisfy me that the finding recorded by the court below that there is a well beaten track which is used by the villagers running adjacent to the southern boundary of the plaintiff is erroneous. There is no evidence on record to show that the said beaten track is on railway land. Even if it were so, it cannot be predicated nor is it necessary to do so what rights have been acquired by the villagers on the land under the said beaten track. Suffice to say that there is an alternative passage through which the plaintiff can have access to his Gher in plots Nos. 9 and 10 from the public road.

5. The main question that falls for determination in this appeal is whether the plaintiff can be said to have acquired a prescriptive right of way u/s 15 of the Easements Act on the "Danda" running over the ridge "between the two fields Nos. 30 and 31. Learned counsel for the plaintiff-respondent contended that the learned Judge of the lower appellate Court rightly applied the law in holding that the plaintiff having proved that he has been passing over the disputed passage for over 25 years after purchasing plots Nos. 9 and 10 for enjoyment thereof without any let or hindrance, it would be presumed that he did it as of right. Reliance was placed in this connection on the cases of Hari v. Mahadeo AIR 1921 Nag 127 Phoolchand v. Murari Lal AIR 1951 MP 89 and Tukaram Rajaram Suple and Others Vs. Sonba Chindhu Mali, . In my judgment, the learned Judge of the court below seems to be of the view that once a person establishes his passing over a piece of land for more than 20 years without any evidence of interruption or hindrance, then he would be deemed to be so doing as of right and he would acquire a prescriptive right of way under Sec. 15 of the Easements Act. Even the cases cited by the learned counsel for the plaintiff-respondent do not lay down any such rule of law. It would be seen that in all those cases on the facts and circumstances it was either found that the user was as of right or the user was not as of right but was by way of leave or licence. Here in the instant case the plaintiff came with a case that there was passage one Lattha wide on which bullock carts and Ikkas could pass and he had been using it for over 25 years as of right for access from the main road to his Gher in plots Nos. 9 and 10. This affirmative case pleaded by him has not been found to be established. What has

been found established is that on the ridge between the boundaries of the two cultivated fields there was a passage 1 to 2 feet wide which could be used as an access from the public road to the agricultural plots in the village lying to the south of that public road. It is the common feature in our agricultural villages that on the Mend "boundary between two cultivated agricultural fields public generally pass and hardly by habit any agriculturist objects to it. I have no hesitation in holding that such passing over the ridges of the field to and fro by the villagers would always be the permissive user. Thus an uninterrupted user by any person of a ridge between the two agricultural fields for passing over it could be presumed to be permissive and not as of right. Moreover, it would not be in public interest if this court countenances recognizing acquisition of prescriptive right of way over the boundaries of the agricultural fields as that would lead to complications in the agricultural areas having a baneful effect and completely preventing the re-arrangements of agricultural fields or their divisions. In the circumstances of the instant case in the consolidation proceedings, on the own admission of the plaintiff, Rama Shanker Lal, who appeared in the witness box, he did not ask for a chak road over the disputed land. The view of the court below that such an objection could not have been raised u/s 9 or 20 of the Consolidation of Holdings Act may be a correct view but there was nothing to prevent the plaintiff when the chaks were being carved to ask the Consolidation to leave a passage. The attempt of the plaintiff that the consolidation had put stone pillars demarcating the passage has miserably failed as there is a finding recorded that no such stone pillars were found at the spot which were put as demarcation by the Consolidator. I, therefore, hold that the lower appellate Court has misdirected itself in holding that as of right the plaintiff had "been using the "Danda" for access to the plots 9 and 10 from the public road. It would be "presumed that the user was permissive. The plaintiff could not succeed therefore merely on the evidence as adduced by him that any prescriptive right of way has accrued to him u/s 15 of the Easements Act.

6. There is a cross-objection filed by the plaintiff-respondent claiming that the suit ought to have been decreed to the full extent of the width of the passage as one Lattha. Since there is a concurrent finding of fact recorded by the court below that there was no passage one Lattha wide as claimed by the plaintiff, this cross-objection has no merit and is dismissed.

7. The result, is that the appeal is allowed, the judgment and decree of the lower appellate court is set aside and the plaintiff's suit stands dismissed with costs throughout.