

(2018) 11 OHC CK 0005

In the Orissa High Court

Case No : Regular Second Appeal No. 224 Of 2016

Smt. Namitarani @ Pratimarani Khuntia

APPELLANT

Vs

State Odisha, Represented Through The Collector, Cuttack
And Others

RESPONDENT

Date of Decision : 19-11-2018

Acts Referred:

Code Civil Procedure, 1908 — Section 96, 100

Citation : (2018) 11 OHC CK 0005

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Advocate : Shabasis Das, S. Das, P. Sahoo, P. Das

Final Decision : Dismissed

Judgement

D. Dash, J

1. In this appeal under section 100 of the Code of Civil Procedure (for short, called as "Code"), the appellant has called in question the judgment passed by the 1st Additional District Judge, Cuttack in R.F.A. No.133 of 2010 followed by the decree, confirming the judgment and decree passed by the learned Civil Judge, Junior Division, First Court, Cuttack in C.S. No.13 of 2007.

The appellant, as plaintiff, had filed the suit, for declaration of right of use of the land described in Scheduel-"B" of th plaint as the pathway in coming over the land described in Schedule-"A" of the plaint and for permanent injunction. The suit having been dismissed, she had carried the appeal under section 96 of the code, which has come to be heard and decided by the 1st Additional District Judge, Cuttack. Since no such fruitful result has yielded in the said first appeal in favour of the appellant, this appeal has been filed.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. The plaintiff's case is that she is the owner in possession of the landed property described in Schedule-"A" of the plaint. This land had been purchased by the plaintiff from one Nrusingha Pradhan by registered sale deed dated 30.08.1988 for valuable consideration. It is asserted that since the time of purchase, she has been in possession of the same being so delivered by her vendor, namely, Nrusingha Pradhan. The land having been so mutated in her name, she has been paying the revenue to the State. It has been further pleaded that after purchase, the plaintiff has constructed a house over said Schedule-"A" land and is in occupation of the same.

It is the plaintiff's specific case that her vendor and after him, she has been using both the pathway as available over the land assigned with plot nos.91 and 92 under Khata No.511, the property described in Schedule-"B" of the plaint. It is her case that said way is being used by the plaintiff to bring agricultural produce and other materials to her land over Schedule-"A" through carts and tractors. It is her further case that except the said pathway lying over the land under Schedule-"B", she has no other alternative land to have ingress and egress to her own land in Schedule-"A".

When on a fine morning towards the end of the month of January, 2007, some measurement works over the land under Schedule-"B" was undertaken by the Government Officials with an intention to construct boundary wall closing the said pathway used by the plaintiff, she filed the suit.

For proper appreciation, description of the suit land in Schedule-"B" of the plaint, is shown hereunder:

"S C H E D U L E 'B'

District Cuttack, Mouza Nuahat, Tahasil Cuttack Sadar, Thana Cuttack Sadar, Khata No.511 Plot No.91 Ac.1.23 decimals and plot no.92 Ac.0.16 decimals from out of both the plot a pathway exists towards the northern side of plot no.87 stretching from west to east towards the southern side of plot no.91 and 92 measuring 50 feet in length X 10 feet in breadth, approximately."

4. The prayers made in the plaint are as under:

13. xx xx xx

(a) Let a decree be passed by declaring the right of the plaintiff to sue the pathway as described in Schedule-"B" land to come to the Schedule-"A" land;

(b) Let a decree be passed by restraining the defendants permanently not to obstruct the pathway as described in Schedule-"B" land in any manner.

Xx xx xx xx"

The first prayer relating to the declaration of right of the plaintiff to use the pathway as described in Schedule-"B" of the plaint concerns with a stretch of land towards the northern side of land under plot no.87 stretching from west to east

towards the southern side of land under plot nos.91 and 92, measuring 50 feet (L) X 10 feet (B).

5. The State-defendant no.1 and its officials (defendant nos.2 and 3), without filing the written statement, contested the suit.

6. The trial court, in order to render the decision as to the plaintiff's entitlement of the claim of right of way over the land described in Schedule-"B"to come over to her land in Schedule-"A" , having examined the evidence on record, both oral and documentary in the backdrop of the case projected in the plaint, has gone to negate the claim of the plaintiff as to be having the said right of pathway over Schedule-"B"land to come over her own land described in Schedule-"A" of the plaint. It has been said that the plaintiff has no easementary right over the land in Schedule-"B". In view of the said conclusion, the trial court has dismissed the suit.

7. The lower appellate court having gone to judge the sustainability of the above conclusion, having undertaken the exercise of reappraisal of evidence at its level, has ultimately found no justifiable reason to take a view contrary to what has been taken by the trial court. Thus finding the trial court to have committed no error either on fact or on law in dismissing the suit, the lower appellate court has upheld the said result of the suit; non-suited the plaintiff.

8. The appeal has been heard on the following substantial question of law:

"Whether the courts below, while refusing to record the findings that the plaintiff-appellant, the appellant has the right of easement of way over the suit land still in view of the pleadings and evidence on record ought to have bestowed due attention in finding out as to whether the plaintiff-appellant has the natural right of way so as to exercise the same in order to approach the public road without any obstruction from any quarter including the owner of the said land?

9. Learned counsel for the appellant submitted that here it was not a case of claim of right of easement of way over the suit land by the plaintiff and the courts below have committed error being swayed away in that direction from the very beginning till finally holding the plaintiff to have failed to establish a case of easementary right in so far as that stretch of land over Schedule-"B" is concerned. His submission was that in view of the situation of the land of the plaintiff described in Schedule-"A" , the suit land in schedule-"B"and the public road as per the map as also now in existence in the field, it is a natural right of way remaining in favour of the plaintiff over that stretch of land in Schedule-"B"so as to have ingress and egress to her land in Schedule-"A" with the house standing over there. Therefore, he submitted that simply taking that into consideration, which in fact is not denied either through pleading or by leading evidence from the side of the defendants, the plaintiff's suit ought to have decreed holding that she has a right of way over a reasonable portion of the land under Schedule-"B" in order to approach and return from her land and house standing over the land described in Schedule-"A" of the plaint and thus there can

be no obstruction to that exercise of right.

10. Learned Additional Government Advocate, referring to the discussion of evidence, as made by the lower appellate court, submitted that it being clearly there in evidence that the plaintiff's purchase land under Schedule-"A" at its eastern side directly adjoins the public road and therefore, when the purchased land is of the plaintiff is not going without having any approach to the public road, the claim of natural right of way over a portion of described land in Schedule-"B"sans foundation. According to him, if a piece of land of a person adjoins the public road at one place and thus is not going without any approach so as to have ingress and egress, the very claim of natural right of way on the land of another touching at another point of the land of that person so as to approach the public road is not available in law. He further submitted that the natural right of way always concerns with the situation of the land of the party-claimant and the public road intervened by the land of another over which such right is claimed and the geographical situation has to be such that save and except using the intervened land of another, the party-claimant would have no right of entry and exit to his own land which is not the case here. He also submitted that the owner of a piece of land does not have the natural right of way so as to approach from all points of the entire boundary of his own land, be it of a rectangular size or squarish or in whatever other shape as it be. He further strenuously submitted that even if a natural right of way is said to have been existing over a portion of land at some point of time, the party having such natural right of way by his own conduct of non-user of the same in having its entry and exist to his own land to approach the public road for a continuous period time, can said to have abandoned such right of natural way and that he cannot again come to claim later unless of course, it is shown that such non-user for that period was for some compelling reasons beyond his case and control. He, therefore, submitted that answer to the substantial question of law, as has been framed, while admitting the appeal in any event has to be returned against the plaintiff's claim.

11. The difference between "natural right" and "right of easement" before stated for proper appreciation.

In Peacock on Easements it was stated:-

"Natural rights are by law annexed to, and are inherent in a land exjure naturo, of natural right, and exist prima facie in all cases as between a landowner and his neighbour, otherwise, as Mr. Goddard says in his work on Easements (7th Edn. p.3) no man would be assured that his land would not at any moment be rendered useless by a neighbour's act otherwise lawful or a neighbour might deprive a landowner of the benefit of certain things which in the course of nature have been provided for the common good of mankind."

The Division Bench in Girish Chandra Sahu and others -V- Nagendranath Mitra and others; 1978 (1) CWR, 348, case held:

"Natural rights though resembling easements in some respects, are clearly distinguishable from them.

The essential distinction between easements and natural rights appears to lie in this that easements are acquired restrictions of the complete rights of property, or, to put it in another way, acquired rights abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belonging to the ordinary incidents of property and are ipso facto enforceable in law."

12. The Madras High Court in the case of Bharathamatha Desiya Sangam, Madhavaram & Anr v. Roja Sundaram & Ors, AIR 1987 Madras 183, while dealing with right to access to highways held that owner of land abutting road is entitled to access to it from every point of his boundary. He is entitled to enforce his right notwithstanding the fact that there is some space available between the offending constructions. The Court further observed that the offending constructions would constitute a continuing wrong and though suit is filed after construction, it would be maintainable.

The Court in the foregoing decision referred to the case of Municipal Committee, Delhi v. Mohammed Ibrahim, AIR 1935 Lah 196, wherein it was laid down that to the owners of houses abutting a public highway, the question of frontage means a great deal and if anything is done by those in whom the highway vests which interferes with the rights of the owners with regard to the highway and which tends to diminish the comforts of the owners, they will undoubtedly have an actionable claim against the encroachers. In the case of Patna Municipality v. Dwarka Prasad, AIR 1939 Pat 683, it was held that the owner of the land abutting a roadway is entitled to access to that roadway at all points on his boundary.

In the case of Damodara Naidu v. Thirupurasundari Ammal, AIR 1972 Mad 386, it was held that where there is a public highway, the owners of land adjoining the highway have a right to go upon the highway from any point of their land and if that right is obstructed by anyone the owner of the land abutting the highway is entitled to maintain an action for the injury, whether the obstruction does or does not constitute a public nuisance.

13. Adverting to the case in hand, it is seen that the claim of right of way is connected with the land of the plaintiff as described in Schedule-"A" of the plaint, which she has purchased on 30.3.1988 by registered sale deed from one Nrusingha Panda admitted in evidence and marked as Ext.1. The courts below have very rightly gone to examine the land description given under that sale deed which also finds appended with a map showing the existence of the land assigned with plot nos.91 and 92, which is the land described in Schedule-"B" and over which a right of way is claimed in this suit. This Schedule-"B" land is situated on the north west side of Schedule-"A" land of the plaintiff. It has been found by the courts below that neither in the recital of Ext.1 nor in the map

appended to it, there is any mention regarding existence of any path way over Schedule-"B"property which is not disputed by the learned counsel for the appellant in course of hearing of this appeal. This leads to infer and show that at the relevant point of time of purchase of Schedule-"A" land by the plaintiff, there was no such user of any part of the land under plot nos.91 and 92 situated towards the north-west side of Schedule-"A" land which came to the hands of the plaintiff by virtue of her purchase. Normally had such user been by the vendor of the plaintiff, such an important matter very much touching the user of the land under transaction that to concerning entry and exit to it, would not have been omitted to be so indicated. Nowhere in Ext.1, it has been recited that Nrusingha Pradhan, the vendor of the plaintiff had been exercising such right of way nor even during the trial, said vendor has come to the witness box to depose in that light to fill up the gap providing any explanation to the vital omission.

14. When it has been pleaded in paragraph-4 of the plaint that Schedule-"A" property belonging to the pleadings is placed/situated in such fashion that there is no way to come to the suit land except using the pathway running over the land under plot nos.91 and 92 in Khata No.511; the record of right as well as the village map proved from the side of the plaintiff under Ext.5 do not support it and rather falsify the said projected factual aspect. The map clearly shows that the public road runs abutting the land under plot nos.85, 88, 89, 91 and 92. The plaintiff's purchase is of the entire land covered under plot no.87, which very much adjoins the public road at its eastern side. So, here it is not a case that the plaintiff has no entry or exit to her own purchased land from any other part except through the purported pathway over Schedule-"B"that she now claims, running over the land under plot nos.91 and 92 and that the land of the plaintiff without attached to the right of way over the land under plot nos.91 and 92 as is now claimed is rendered useless and thus becoming a no man's land.

15. Let us assume a case where the land of a person when one side completely adjoins the public road and all other three sides, it has the public road intervened by the land of other persons. The natural right of way certainly in that situation cannot be extended on the lands of all such owners on the other three sides so as to provide luxury and comfort to the person concerned to have entry to the public road from all the four sides of his land. A person who is the owner of a piece of land situated beyond the public road being intervened by the land of another person, although has the natural right of way over the land of that person abutting the public road, yet he has to further establish its exercise by showing its user as such for the court to declare the said right of natural way. It has to be shown first that the claimants either the owner or occupier of the land, has no other way of entry and exit to have the access to the public way from the land owned or occupied by him. Secondly, that he never at any point of time has abandoned such user even if a natural right of way existed over the land of another situated in between his land and the public road in his favour and despite the availability of any other way for the access to the public road at a later point of time, the natural right of way having been continuously exercised,

it has never so ceased as such. The exception to this remains that suppose a person's land is lying vacant and the user of exercise of natural right of way over the land of other is occasional but then if the land of that owner is having no other way to have the access to the public road other than by coming over the land of another which adjoins the public road, even for that non-continuous use or occasional user, the abandonment of right of natural way cannot be inferred, which is not so in the given case.

For the aforesaid discussion and reasons although it is found that the courts below have not bestowed due attention to find out as to if the plaintiff has the natural right of way over any portion of Schedule-"B"land so as to approach the public road, this Court finds that such a natural right of way over the land under Schedule-"B"land is not available to the plaintiff and, therefore, the owner of said Schedule-"B"land cannot be put to restrictive user of the same in any such manner.

The substantial questions of law stand answered accordingly against the claim of the plaintiff.

16. In the wake of aforesaid, appeal stands dismissed and in the facts and circumstances without cost.