

(1988) 02 KAR CK 0008
In the Karnataka High Court
Case No : Second Appeal No. 1188 of 1978

Soni Samaratamal Bhuraj and Others	APPELLANT
Vs	
P.B. Nagireddy and Others	RESPONDENT

Date of Decision : 26-02-1988

Acts Referred:

Easements Act, 1882 — Section 22, 23, 41, 43, 44

Citation : AIR 1989 Kar 117 : (1988) ILR (Kar) 1895

Hon'ble Judges : D.P. Hiremath, J

Bench : Single Bench

Advocate : K. Subba Rao, for the Appellant; D.L.N. Rao, for the Respondent

Judgement

1. Defendant in O.S. 475 of 1974 is the appellant in this appeal. Respondents-plaintiffs sued the appellant for a declaration that they have a right to use the latrine situate in Door No. 205(2) in XI Ward, Flower Street Bellary City and for mandatory injunction directing the appellant to agree for conversion of the said latrine into a septic tank latrine at the cost of both the appellant and respondents.

2. It was contended by the plaintiffs that the owner of the house bearing Door No. 205(2) is the defendant, plaintiff 1 is the owner of the building bearing Door No. 205(1) and plaintiff 2 is the owner of the building bearing Door No. 206. All these buildings and another building bearing Door No. 204, belonging to Soni Jetmal, belonged to common owners by name Heerad Basamma and Rudrappa. There was an open latrine in the building bearing door No. 205(2). While alienating the buildings 204, 205(1), 205(2) and 206 the vendors specifically recited in the documents of sale that a right of user of the latrine was reserved. First plaintiff purchased the building bearing Doors Nos. 205(1) and (2) from the said Heerad Rudrappa on 20-5-1957 and subsequently he sold a portion of Door No. 205(2) to the defendant on 7-6-1960 under the sale deed dated 7-6-1960. At that time, first plaintiff specifically reserved in himself the right to use the said latrine since it fell in the portion of the building sold to the defendant. Similarly, Heerad Rudrappa and Basamma sold the building bearing Door No. 206 to T.

Rangappa on 8-1-1946 for Rs. 800/-. In the said document, the right to use the suit latrine is specifically reserved in the alienee. After the death of Rangappa, his elder brother and his legatee under his Will sold the said house in favour of the 2nd plaintiff on 21-12-1949. Under this sale deed also, it is specifically recited that the 2nd plaintiff has a right to use the latrine situate in Door No. 205(2). The said right of user of the latrine is a right running with the Immovable property and cannot be defeated by the subsequent.

3. Since 15-8-1973, the City Municipality discontinued the scavenging services that were available when the properties were sold and latrine serviced by scavengers. From Feb. 1974 this service was completely stopped. Plaintiffs wanted the defendant to get the latrine converted into a septic tank latrine and were willing to share the cost of conversion ratably. Defendant was reluctant to convert the same into a septic tank latrine or permit the plaintiffs to get it done. Lawyer's notice was issued. Defendant denied his liability to comply. This is how the suit came to be filed for these reliefs. These transfers are admitted by the defendant appellant. He only denied user of the latrine as a right running with the property. Any reservation of such right of user of latrine is contrary to law and in violation of the mandatory provisions of the Municipalities Act and Public Health Act.

4. The issues whether the plaintiffs had a right of user of the latrine and whether this right runs with the Immovable property were not pressed as stated by the trial Court, but however the issue whether these plaintiffs have a right to use the latrine uninterruptedly and whether the same should be protected was very much there and the trial Court answered it in the negative. The first Appellate Court, however, reversed that finding of the trial Court and gave a decree to the plaintiffs in terms of the prayer made in the plaint.

5. In this second appeal the following questions have been set down for determination.

(1) Whether the Court below has committed an error of law in holding that the right of the plaintiffs in respect of the latrine has not been destroyed in view of the subsequent events that have taken place?

(2) Whether the right reserved in favour of the plaintiffs has stood enlarged to enable them to seek a mandatory injunction for the construction of a septic tank type latrine?

(3) Whether the Court below was right in permitting the plaintiffs to reagitate issue No. 3 which was given up by them in the Court of first instance?

6. S. 45 of the Easements Act states that an easement is extinguished when either the dominant or the servient heritage is completely destroyed. S. 43 of the Easements Act relates to extinction by permanent change in dominant heritage, whereas S. 42 relates to extinction of useless easement. S. 44 of the Easements Act relates to extinction on permanent alteration of servient heritage by superior

force, provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of S. 41 apply to such a way. S. 23 of the Easements Act, relates to the right to alter mode of enjoyment. Under that section, subject to the provisions of S. 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage. Under S. 22 the dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

7. These are the relevant provisions that are attracted to the facts of the instant case. It is not disputed that there was such an agreement when these alienations took place that plaintiffs should have right to use the latrine in the property, that has gone to the" defendant- appellant by purchase. The trial Court was more concerned with the supervening circumstances as it put it in para 18 of judgment. It refers to Ex.P. 6 in which the right of user of this latrine has been reserved. According to it, in the supervening circumstance like the Municipal law, the latrine cannot be used as it is, unless a septic tank is created, certainly it would amount to creating a new latrine altogether. According to it, it was not the intention of the parties to create a new latrine and to have a right over it. Therefore, it found that to allow the plaintiffs to reconstruct the latrine would only amount to saying that easement was created in the land and not in the latrine.

8. The first appellate Court referred to the case reported in Vishnu v. Rango Ganesh Purandare ILR (1894) Bom382. The owner of a house, as stated from the facts of that case, mortgaged the eastern portion of it to one M. The mortgage deed gave to the mortgagee the use of certain privy situated in another part of the house and the right of way to it through a certain passage. Subsequently the whole house was sold to C and C in 1880 mortgaged the western portion of it to R who got a decree and in execution the part mortgaged to him was sold in 1885 and defendant became the purchaser. It was held that the use of the passage and of the privy was privilege granted by the very instrument which created the mortgage and should be regarded as privilege ancillary to the use of the part of the house mortgaged to M in 1879. The defendant's purchase in 1885 was subject to the easement acquired by M. and the plaintiff had purchased the mortgagee's interest in the house which was included by way of easement. Similarly in the case reported in Martand v. Radhabai AIR 1931 Bom 97, there was a decree against "B" in respect of a right to easement declaring that "A" had the right, that his sweeper should go through B's land to clean the privy situated on A's land and ordering "B" not to obstruct him. "B" moved the Municipality and the privy was demolished and a new one built in a different place on A's land. A's sweeper on going to clear the new privy being obstructed by B, A sought to execute his decree. The passage used by the sweeper for going to the

new privy was precisely the same as it was before for going into the old one and A did not seek to impose greater burden on the servient heritage. It was held that the dominant tenement was not the privy, but A's house and the land with which the privy was and its removal and rebuilding on a different spot had not the effect of extinguishing the easement under S. 45. Anthappa v. Poovu AIR 1965 Mys.124, was another decision on which the appellate Court relied and it was held there under that it is a well settled principle that the extent of an easement other than an easement of necessity and also the mode of its enjoyment must be fixed with reference to the purpose for which the right was acquired. Where the karar from which the defendants acquired the right to draw water from a tank for irrigation purposes has not prescribed any limitations regarding the mode or manner of enjoyment of the right, it can be validly inferred that the intention of the parties was not to prescribe any limitations on the mode of enjoyment.

9. The point would be whether there was destruction of this easement as contemplated by S. 45 of the Easements Act. It cannot be disputed that with the advent of time when the local authorities insisted on a particular mode of enjoyment of a particular facility or amenity the parties concerned will have to move with the time. If there is a direction from the local authorities that the scavenger system was withdrawn or was no longer available and directs owners of properties to take recourse to improved modes of construction and when such mode is one of providing a septic tank type of latrine, it cannot be said that by such circumstances, which the trial Court calls supervening circumstances, the very easement itself is destroyed. Only the mode of enjoyment is changed with the changing circumstance and the right cannot be said to have been extinguished. That is precisely what the first appellate Court held, while disagreeing with the reasoning of the trial Court. In the instant case the plaintiffs having offered to meet the expenses and now it would be 2/3rds; so far as the two plaintiffs are concerned, the appellant will have to bear only 1/3rd of the total cost of such construction. It may be mentioned here that without obeying the directions of the Municipality, even the appellant cannot use the latrine as it was when he purchased the property. Reason is that the scavenging system of service has been totally withdrawn as it is abhorrent that human being should carry the excreta on head. This is uncivilised system which no civilised society would subscribe to. Therefore, it was appropriate for the Municipality to withdraw the scavenging system and if in the circumstances the Municipality should insist that improved methods of construction should be had recourse to that cannot be considered as a supervening circumstance to destroy the easement. In that view of the matter the finding of the trial Court was wholly perverse and the first appellate Court was justified in giving a decree in favour of the plaintiffs. There are no reasons to interfere with the judgment and decree of the first appellate Court. The appeal has to fail and it is dismissed. Parties to bear their own costs in this appeal.

10. Appeal dismissed.