
(2013) 04 MP CK 0033
In the Madhya Pradesh High Court
Case No : S.A. No. 35 of 2000

State of M.P. and Others

APPELLANT

Vs

Keshar Bai

RESPONDENT

Date of Decision : 05-04-2013

Acts Referred:

Easements Act, 1882 — Section 4

Madhya Pradesh Land Revenue Code, 1959 — Section 131, 131(1)

Citation : (2013) ILR (MP) 2664 : (2013) 4 MPJR 197 : (2013) 3 MPLJ 139

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : Swati Mehta, for the Appellant; J.B. Dave, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.—The defendants who are the State of M.P. and its functionaries have assailed the judgment and decree dated 21-9-1999 passed by learned First Additional District Judge, Dhar in Civil Appeal No. 123-A/1997 decreeing the suit of the plaintiff-respondent and thereby reversing the judgment and decree dated 21-7-1997 passed by learned First Civil Judge, Class-II Dhar in Civil Suit No. 165-A/1996 dismissing the suit of plaintiff. The suit of the plaintiff is that the disputed property is owned by her in her Bhumiswami right and she is also possessing it. On this land, defendants do not have any right, title, interest. The first and second defendants are keen enough to construct a road upon the suit land from Lohari to Baggad and when the plaintiff-respondent restrained the employees of first and second defendants, they told that they have been directed to construct road by these defendants. Hence, the plaintiff filed the instant suit for injunction and prayed relief that defendants be restrained by passing a decree of permanent injunction from constructing the road from Lohari to Baggad upon the suit land. The first defendant-Gram Panchayat Lohari filed a written statement and pleaded that the disputed property is being used as public path having width 25 feet from the ancient time and from this path the bullock-carts

and tractors of the inhabitants of village pass-by and they use it for access. The road has already been constructed and only asphalt is to be made. Further it has been pleaded that on this 25 feet wide path the plaintiff never remained in possession. According to first defendant, the Gram Panchayat is not constructing the road and it has been made party unnecessarily and therefore the suit be dismissed against it by awarding special damages.

2. The second and third defendants namely Jila Gramin Vikas Abhikaran (D.R.D.A.) and State of M.P. filed their joint written-statement and pleaded that there is a customary easement right of way for last 500 years on the public path having width 25 to 30 feet. From this path, several bullock-carts, cattle, tractors and inhabitants of village access. No objection was ever raised by the plaintiff earlier and therefore she is estopped from raising any dispute. The plaintiff never remained in possession of suit property. The suit is also barred by time.

3. Learned trial Court framed necessary issues and after recording the evidence of the parties, dismissed the suit. However, the first appeal which was filed has been allowed by the impugned judgment and decree.

4. In this manner this second appeal has been filed by the State of M.P. and its functionaries which was admitted for hearing on 22-6-2000 on the following substantial questions of law:--

(1) Whether the 1st Appellate Court has committed the error of law in not dismissing the suit when it held that the road in question is a public road?

(2) Whether the 1st Appellate Court has committed error in holding that the State of M.P. is entitled to construct PAKKA road on road in question properly so as to make it usable by villagers of village Baggad Dist. Dhar and villagers of other villages for plying their vehicles including bullock-carts (sic.), tractors along with using for trafficking?

(3) Whether, impugned judgment and decree is perverse and illegal?

5. The contention of Smt. Mehta, learned Panel Lawyer appearing for appellants is that having arrived at a conclusion by learned First Appellate Court that the village path is already in existence upon the suit land for last several years and is being used as a public road, learned First Appellate Court has erred in substantial error of law in decreeing the suit of the plaintiff by passing a decree of injunction. It has also been put forth by her that there is clear admission of plaintiff that suit land is being used as village path from ancient time by the inhabitants of the village and therefore when there is an admission of plaintiff in that regard, learned First Appellate Court ought not to have decreed the suit of plaintiff by passing the decree of injunction against the defendants restraining them from constructing pakka road.

6. On the other hand, Shri J.B. Dave, learned counsel appearing for plaintiff-respondent argued in support of the impugned judgment and submitted that cogent reasons have been assigned by learned First Appellate Court decreeing

the suit and no interference is warranted in this appeal and therefore appeal deserves to be dismissed.

7. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

Regarding substantial question of law Nos. (1) and (2)

8. There is no dispute to the proposition that the suit land is owned by plaintiff under her Bhumiswami right. Indeed defendants are also not disputing this factual aspect. However, the factum of possession of plaintiff upon the suit land is highly disputed. According to the plaintiff she is possessing the suit land and on the other hand defendants in their separately filed written-statements have pleaded that said land is being used as customary easement by the inhabitants of the village for their access and they also use this way for carrying their tractors, bullock-carts, cattle etc. The specific pleadings of all the defendants that road has already been constructed only asphalt is to be made so that conveniently the inhabitants of village may carry their tractors, bullock-carts and they may use it in convenient manner. The plaintiff Kesharbai who was examined as PW1 herself in cross-examination has admitted that she allowed the villagers to carry their bullock-carts and further permitted the inhabitants of the village to use 10 feet wide road for access. In very specific words she has admitted that this way is ancient and was being permitted by her ancestor to use it as a way. She has further admitted that on the same width which was earlier being used by villagers as village path the pakka road is being constructed. Her witness Tulsiram (PW2) has also admitted this fact. Indeed learned two Courts below have also recorded a pure finding of fact that the suit land is being used as public way by the inhabitants of village. Learned First Appellate Court in paras 11, 12 and 13 of its judgment has affirmed the finding of learned trial Court holding that the suit land is being used from ancient time by the villagers as path to access. No cross-objections have been filed by the plaintiff assailing the aforesaid finding of learned First Appellate Court holding and affirming the finding of learned trial Court that the suit land is being used as public path from ancient time. This is a pure finding of fact and based upon correct appreciation of evidence and therefore it cannot be interfered with in this second appeal.

9. Section 131 of M.P. Land Revenue Code, 1959 (in short "Code") speaks about the rights of way and other private easement. According to subsection (1) of this section if in the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of village, otherwise than by the recognised roads, paths or common land, including those road and paths recorded in the village Wajib-ul-arz prepared u/s 342 or as to the source from or course by which he may avail himself of water, a Tahsildar may, after local enquiry decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned. According to me, this private easement is customary easement and is having wider connotation with that of rights of easement as envisaged in the Indian

Easements Act, 1882 (in short "Easements Act"). Sub-section (1) of section 131 of the Code is not akin to that of section 4 of Easements Act. The scope of section 131(1) of the Code is if a particular route is being used by a cultivator to access to his fields etc. and if any dispute has arisen, the Tahsildar may with reference to previous custom may decide the said dispute by considering the conveniences of parties concerned. Recently, by interpreting section 131 of the Code the Supreme Court in Smt. Ramkanya Bai and Another Vs. Jagdish and Others, has held that when a person who does have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such can resist such assertion or obstruct the exercise of the easementary right and also approach the civil Court to declare that the defendant has no easementary right of the nature claimed over his land and/or that the defendant should be prevented from inserting such right of interfering with his possession and enjoyment and such a suit is not barred. Thus, the civil Court is required to see whether the said route was being used as private easement with reference to the previous custom. Since the defendant herself has admitted that the suit land is being used as path by the villagers to carry their cattle, bullock-carts and even tractors from the period of her ancestors, certainly the ancient custom has been proved and therefore when there is specific finding of two Courts below that suit land is being used as path from the time of ancestors of the plaintiff and the villagers were using the path as their customary easement, in these facts and circumstances, I am of the view that plaintiff is not entitled to for any decree of injunction.

10. To constitute a valid custom, the essential ingredients are as under:--

- (i) It should be ancient;
- (ii) certain;
- (iii) reasonable,
- (iv) should not be opposed to morality or public policy;
- (v) not forbidden by law; and
- (vi) regular.

The aforesaid ingredients do tally in the present factual scenario since the plaintiff herself has admitted that the suit land is being used as path throughout from the time of her ancestors. Hence, I am of the view that the plaintiff has no case. The path is already there for considerable long period and is ancient; reasonable; certain; regular; is not opposed to public policy; and is not forbidden by law and therefore for the convenience of public at-large of the village if path is being constructed by constructing a pakka road it cannot be obstructed by plaintiff. The substantial questions of law No. (1) and (2) are thus answered against the plaintiff-respondent and in favour of appellants.

Regarding substantial question of law No. (3)

11. Since learned First Appellate Court by affirming the finding of learned trial Court holding that suit land is being used as path for several years as customary easement by the villagers and in these facts and circumstances if the finding recorded by it that defendants are not having any right to construct the pakka road, according to me, it is perverse. Learned First Appellate Court has incorrectly applied section 4 of the Easements Act. I have already held hereinabove that the scope of section 131(1) of the Code is not akin to that of section 4 of Easements Act and is having a wider connotation. Substantial question of law No. (3) is thus answered against the plaintiff-respondent and it is hereby held that finding of learned First Appellate Court is perverse and illegal. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by learned First Appellate Court so far as holding that defendants are not entitled to construct pakka road is hereby set aside and the judgment and decree of learned trial Court is restored in toto. No costs.