
(2001) 07 CAL CK 0072
In the Calcutta High Court
Case No : C.O. No. 1341 of 1997

Swapan Sinha

APPELLANT

Vs

Usha Rani Sahana

RESPONDENT

Date of Decision : 10-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 115
Easements Act, 1882 — Section 15, 4

Citation : (2001) 3 CALLT 166 : (2002) 3 RCR(Civil) 632 : (2002) 2 RCR(Rent) 220

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : D.P. Mukherjee, for the Appellant; Pinaki Ranjan Mitra, for the Respondent

Final Decision : Allowed

Judgement

P.K. Ray, J.—This Revisional Application has been filed by defendant No. 2 of Title suit No. 268 of 1988, challenging the order dated 15th January, 1991 passed by learned Court of the 6th Munsif at Howrah whereby the petition under Order 6 Rule 17 of the CPC filed by the plaintiff seeking amendment of plaint and the prayer portion was allowed. Suit was filed by the plaintiff praying decree of declaration of passage as described in the schedule, decree of permanent injunction restraining the defendants. Temporary injunction against the defendants restraining from disposing or transferring to the suit property to private passage to 3rd party also was prayed. For adjudication of the matter, it is necessary to consider the plaint also. In the plaint, in paragraph 17, plaintiff has submitted the following:

"That the facts and circumstances of the case plaintiff is entitled to a decreed declaring that the plaintiff has a right, title and Interest and to a decree of declaration of the private passage and permanent injunction from interfering with the possession is lawfully terminated."

In paragraph 5 and 6, plaintiffs stated as follows:

"That the plaintiff states that the address of the private passage is 15/ 1/1 (15 after amendment), Prassanna Kumar Dutta Lane, Howrah.

That the plaintiff purchased the holding No. 15. Prassanna Kumar Dutta Lane and completed the construction of the house in 1960 in support of a plan duly sanctioned by the Municipality and the members of her family have been living in their said house peacefully. 1960 and without any hitch from any quarter."

2. Written statement was filed denying the plaintiffs title over the passage. The parties led evidence and the evidence of the parties has been closed by examination and cross-examination of the witness and the matter was fixed for argument. At this juncture, plaintiffs filed the said application for amendment praying the following amendments in the plaint and prayer:

"(a) After the concluded portion of paragraph No. 3 of the plaint the following facts be added;

"The said 6" ft. wide private passage on the north of holding No. 15 Prassanna Kumar Dutta Lane exclusively belongs to the plaintiff which is quite apparent from the Municipal record at the time of hearing,"

(b) After the concluded portion of paragraph No. 17 the following sentences be added.

"It is further stated that in the event if it is found that the plaintiffs is not the exclusive owner of the said 6"ft, wide private passage being holding No 15/1/1 Prassanna Kumar Dutta lane, Shibpur, Howrah the plaintiff alternatively claims for a decree for declaration that the plaintiff has easement right over the said 6" ft. wide passage."

(c) After the concluded portion of prayer (a) the following words be added:

"Alternatively the plaintiff claims declaration that she has easement right over the said 6" ft. wide passage."

(d) In the prayer portion after the prayer "d" a new prayer viz. prayer "e" be written as such:

(e) A decree for information of possession of the plaintiff in respect of the said 6" ft. wide passage."

3. The learned Court below allowed such amendment by directing payment of cost to the defendants. Defendants are aggrieved by such amendment and have come up in the revisional application. It is submitted by the learned Advocate of the petitioner that by the said amendment, plaintiff has been allowed to take inconsistent plea, in one breath the right to passage as owner, in other breath of the easement right over the said passage. It is submitted by the learned Advocate of the petitioner that both cannot co-exist. Though it is a settle legal proposition that in the matter of amendment of the plaint and/or written

statement, the Court will consider it liberally to avoid the multiplicity of any proceeding. It has been further settled that the conflicting plea can be taken so long such is not in the form of withdrawal of admission as earlier made. For consideration of this aspect of the matter whether the impugned order can be sustained and the learned Court below acted with illegality, the concerned Easement Act 1882 is relevant for reference. Section 4 of the said Easement Act is quoted in extenso for appreciation of the matter:

"Section 4. "Easement" defined.--An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own.

Dominant and servient heritages and owners

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.- in the first and second clauses of his section, the expression " land" includes also things permanently attached to the earth, the expression "beneficial enjoyment" includes also possible convenience, remote advantage and even a mere amenity: and the expression to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon."

4. Section 15 is also relevant for consideration in this case, which is also quoted hereinbelow in extenso:

"Section 15.- Acquisition by prescription.--Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years. and where support from one person's land or things affixed thereto has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of lighter air-support or other easement shall be absolute,

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation 1.- Nothing is an enjoyment within the meaning of this section when

it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.- Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III.- Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.- In the case of an easement to pollute water, the said period or twenty years begins when the pollution first prejudices perceptibly the servant heritage.

When the property over which a right is claimed under this section belongs to the [Government], this section shall be read as if, for the words "twenty years" the words [("thirty years")] were substituted."

5. On interpretation of the language of section 4 of the Easement Act, 1982 hereinafter refer to as concerned Act for brevity by simple dictionary meaning it is clear that both the ownership over a land and the Easement right thereto by use cannot co-exist together. Under the said act Easement Right is exercisable by a person always relating to a land not of his own, such is clear ex-facie from the section itself. The word "not his own" as appearing in the section 4 of the Easement Act are highly significant in adjudicating this matter. From the language of section 4, it is clear that owners of servient tenements and dominant heritage must be different. A person cannot acquired an Easementary Right over his own land because all acts done by him over his own land are acts done in exercise of his right as owner of the land and the prime requisite of animus for acquisition is thereby absent.

6. The right of Easement become extinguished the moment in ownership when the two tenements becomes vested in one and the same person. Coexistence of an Easement along with the ownership is never possible. From the definition, it is clear that there are two essential characteristics of every Easement namely two distinguished tenements one is dominant to which the right belongs and other is servient upon which the obligation is imposed. In this context, the decision of Bombay High Court in the case Marghabhai Vallabhahai Vs. Motibhai Mithabhai, , which is a judgment on consideration of the several Indian & English Authorities, is relevant. The relevant finding is quoted in extenso:

"A person cannot acquire an easement unless he acts with the knowledge that it

is case of a dominant and a servient tenement and that he is exercising a right over property which does not belong to him. If he enjoys a right under the supposition that he is an owner of property he does not acquire an easement."

7. In another Full Bench decision of Bombay High Court in the case Raychand Vanmalidas Vs. Maneklal Mansukhbhai, , has considered the question of acquisition of an easement by a person claiming ownership. The learned Judge observed in the said judgment as follows:

"To prove that the right was exercised as an easement it is necessary to establish that it was exercised on somebody else's property and not as an incident of his own ownership of that property. For that purpose his consciousness, that he was exercising that right on the property treating it as somebody else's property, is a necessary ingredient in proof of the establishment of that right as an easement. If a person has actually claimed ownership of the servant tenement in a previous litigation within the statutory period of twenty years, it may be regarded as an important piece of evidence to show that he did not exercise that right as an easement."

8. A similar question cropped up in the case Purani Dhirajlal Amritlal Vs. Mehta Sankleshwar Aditram and Another, wherein the Court held relying upon the different other judgments that inconsistent plea of ownership and easement can be taken in the alternative but at the time of trial there must be election of one of the said two pleas as both cannot co-exists. In the instant case as it appears that the plaintiff has claimed ownership over the passage and pleaded accordingly in the original plaint. Even in the amendment application of the plaint as was allowed, the exclusive belonging of the said passage was further included by amendment of paragraph 3 of the plaint and thereby averment has been made for placement of the Municipal records. Hence, the paragraph (a) of the Schedule of amendment application as well as the other contention in paragraph (b) clearly in contravention of the aforesaid legal proposition, which is a settled law. Even in Interpretation of section 4 of the Easement Act itself same cannot both co-exist namely in one breath, the plaintiff would assert her exclusive ownership in other breath would pray for easement rights.

9. Hence, in view of said fact situation. In my view though inconsistent plea can be allowed but there must be a choice and/or election of one of the pleas at the trial. In the instant case, since, already plaintiff had chosen the plea of enjoyment of the passage as belonging exclusively to him by asserting the title and prayed for such declaration, the amendment of paragraph 17 in terms of prayer (b) of the schedule of amendment cannot sustain. Similarly. In the paragraph (a) of the prayer when the plaintiff prayed for declaration of title over the passage cannot pray alternatively declaration of easement right as was allowed by the learned Court below by allowing the amendment of schedule (c)" of the Schedule of Amendment application.

10. Hence, in my view, the learned Court below committed gross illegality in

allowing the amendment of Clause (b) and (c) of the Schedule of Amendment which ex-facie violates the legal proposition on section 4 of the Easement Act aforesaid. Hence, the impugned decision of the learned Court below is illegal for non-consideration of the relevant provision of the law namely the Easement Act and particularly section 4 and 15 of the said Act and in that view of the matter this revisional application succeeds, partly to the extent by quashing the order dated 15th January, 1991 by which prayer (b) and (c) of the schedule of amendment application was allowed, I make it clear that prayer, (a) and (e) of the schedule of amendment application of the impugned order is at per law and will remain. Accordingly this revisional application is allowed and impugned order to that extent whereby the learned Court below allowed the amendment of schedules (b) and (c) of the amendment application is hereby set aside and quashed.

11. Application allowed in part