
(1999) 03 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 241 of 1998

Vir Khanna and Others

APPELLANT

Vs

Shori Lal and Others

RESPONDENT

Date of Decision : 05-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 18

Citation : (1999) 2 ShimLC 258

Hon'ble Judges : D. Raju, C.J

Bench : Single Bench

Advocate : Sanjiv Kuthiala and K.D. Sood, for the Appellant; Praneet Gupta and Bhupinder Gupta for Respondent Nos. 1 and 2 and Abhilasha Kumari, for the Respondent

Final Decision : Dismissed

Judgement

D. Raju, C.J.—The above second appeal has been filed by the Defendants in C.S. No. 31 of 1986 on the file of the learned Senior Sub-Judge, Chamba who lost before both the courts below challenging the judgment and decree passed by the learned first Appellate Judge dated 30.3.1998. It may be pointed out even at the out-set that the Appellants have come for the second time before this Court and though the Appellants were successful on the earlier occasion in getting the order of remand to the learned first Appellate Judge and when the first Appellate Judge once again held against the Appellants, the present second appeal has been filed. Both the original Plaintiff and the Defendant are said to be no more and it is their respective legal heirs and representatives who are now on record pursuing these proceedings. The suit was filed by the predecessor-in-interest of the Respondents for a decree of declaration that the map sanctioned by the Defendants No. 3 and 4, the Municipal Committee, for construction of a new shop by the first Defendant in the property in question is illegal and not binding on the Plaintiffs and Defendants No. 1 and 2 be restrained permanently from raising any construction/obstruction over the passage (stairs) from Gandhi Chowk leading to

the house of the Plaintiff in any manner. As could be seen from the materials placed on record and the judgments of the courts below, the Plaintiff based his claim of right, said to be flowing in his favour from the sale-deed dated 30.12.1995 under which the Plaintiff purchased from the first Defendant the land known as "Emporium Cottage" situated in a portion of the larger extent of the property described in the suit schedule under which the right of passage to the property in the form of stairs in question was specifically granted. The plea on behalf of the Defendant was that although the Plaintiff was allowed a right of passage over the stairs at the time of the sale of the property in 1955, there was no specific description of the said right of passage and, therefore, the Defendants No. 1 and 2 have every right to change such path by providing an alternate stairs or passage. It was also the contention of those Defendants that the said passage was used in common by others also and the other tenants had not objected to the proposed change in the stairs and in view of the provision of the alternate passage the closing of the present old stairs over a distance of 7/8 feet and joining new stairs with the old stairs, the Plaintiff cannot be said to be either prejudiced or aggrieved in any manner entitling for the relief sought for. Defendants No. 3 and 4, the local municipal authority, only placed the relevant facts about the sanction of the plan and disclosed the further fact that on an earlier occasion, on the objection of the Plaintiff the application of the first Defendant for such sanction was rejected but later the Municipal Council accorded sanction for the same in view of the provision of the alternate passage. They had no personal interest as such in the matter though their proceedings are also the subject matter of challenge in the present suit.

2. After trial and on consideration of the relevant materials on record, the learned trial Judge has come to the conclusion that the Plaintiff has an easementary right of passage over the stairs in question and the proposed construction of shops thereon is likely to obstruct the Plaintiff from enjoyment of that right. As for the plea of alternate passage and the discretion and right claimed for the Defendant, the servant owner, to have at his choice substitute the same by another passage, for the use of the Plaintiff, the learned trial Judge by placing reliance on the decision of Orissa High Court in *Khandeswar Champati and Others Vs. Gokulananda Jena and Others*, came to the conclusion that right of way acquired from one point to another in a particular direction or according to a particular route cannot at the choice of the servant owner alone, be altered or substituted by any other way and, therefore, over-ruled the objection of the Defendant and decreed the suit as prayed for. The appeal filed in C.A. No. 51 of 1988 came to be dismissed which resulted in filing of a second appeal before this Court in R.S.A. No. 204 of 1989. Surinder Sarup, J., who heard and disposed of the appeal, by his judgment and decree dated 4.7.1997 observed, in the context of a plea stated to have been raised by the then learned Counsel for the Appellant that though a perusal of the plaint does not indicate that a plea regarding necessity has not been specifically made, it was found to be inherent in the plaint taken in its totality and read as a whole and being a legal issue

involved it was considered incumbent upon the first Appellate Court to consider this aspect and give specific finding on the question as to whether a claim in respect of such easement was justified as an easement of necessity or an easement by prescription, in the light of the evidence on record. For that purpose the learned Judge was pleased to remit the proceeding to the first Appellate Court with certain restrictions in the matter of admission of additional evidence for which liberty has not been granted by the learned Judge, himself. The appeal thereafter appears to have been restored to its original file and once again, as noticed above, came to be dismissed by concurring with the judgment and decree passed by the learned trial Judge and also holding that the Plaintiff had a right of easement of necessity in respect of the passage in dispute. Hence, this second appeal.

3. Mr. Sanjiv Kuthiala, learned Counsel appearing for the Appellant, while elaborating the substantial questions of law sought to be raised, contended that the directions contained in the earlier remand order of this Court have not been properly complied with and the learned first Appellate Judge committed a grave error in over-looking the fact that there had been no proper plea of easement of necessity and easement by prescription and consequently, the finding in this regard cannot be sustained. Argued, the learned Counsel further that the discretionary relief of injunction could not have been granted by converting it into a mandatory injunction for demolition particularly when there was scope for monetary compensation to mitigate the loss, if any, to the Plaintiff and that too without properly considering the matter from the said angle.

4. Since only notice of motion had been ordered in the appeal when the matter first came before a learned Single Judge of this Court, the Respondents have entered appearance and Mr. Praneet Gupta, learned Counsel appearing for the Respondents, while adopting the reasoning of the courts below contended that in the teeth of the concurrent finding of fact recorded by the courts below there are absolutely no merit in the second appeal and the appeal does not merit acceptance. It was also contended that the claim of the Plaintiff has since been based on the recital contained in the sale deed itself, and the absence of separate pleading for justifying the easement in question either as easement of necessity or by way of prescription does not in any manner vitiate the claim of the Plaintiff and that no exception could be taken to the findings recorded by both the courts below. Argued, the learned Counsel further that on the peculiar facts and circumstances of the case the alteration and substitution proposed to be made by the contesting Defendant are not practicable and on the earlier occasion also during the hearing of the earlier appeal before this Court an attempt to reconcile the parties by providing monetary compensation could not fructify and that therefore, there is no merit in the claim about the sufficiency or otherwise of the matter to settle the claim of the parties by merely awarding compensation. Consequently, according to the learned Counsel for the Respondents, there are no merits to warrant interference in the appeal. Ms. Abhilasha Kumari, learned Counsel appearing for the Municipal Council also

brought to my notice the relevant material on record to enable this Court to come to a decision on merits.

5. I have carefully considered the submissions of the learned Counsel appearing on either side. In my view, there is no need to refer to the case law pertaining to the principles which would normally guide a court in sustaining the claim of a right of easement of necessity or acquisition of such easement by prescription having regard to the peculiar facts and circumstances of the case. In my view a simple case which requires a decision purely on facts appears to have been complicated too much by hyper-technical application of law beyond the required need and necessity. Even the learned Judge who disposed of the earlier second appeal was pleased to notice in the judgment itself that he could not find any specific pleading in the plaint about the easement of necessity as such. It is on that basis that the learned Judge felt that the first appellate court should go into the question as to whether the claim was one by way of easement of necessity or by way of prescription. It is this approach in my view which led to all the further complications that could have been avoided, in a simple case otherwise leading to lot of exhibition of learning of principles and concept, which are wholly irrelevant for the adjudication of the right claimed in this case.

6. As the plaint would disclose and as per the summary of the plaint as contained in the judgment of the trial Court as also the defence taken by Defendants No. 1 and 2, found summarised in the said judgment it could be seen that the source of rights of the very easement claimed by the Plaintiff in the case was the registered sale deed executed by the very first Defendant in favour of the Plaintiff on 30.12.1955 wherein the right in question for the usage of the passage through stairs is said to be specifically provided for. It was not also seriously in dispute as to the fact that the passage through stairs in question had been pursuant to the sale deed, though the first Defendant would contend that there was no specific description, and the same was availed of and continuously used by the Plaintiff himself and also with others. Such use could have been only pursuant to the right in whatever form and description it has been given in the sale deed itself and, therefore, the same was binding between the parties. 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. The acquisition of such easement may be permissible by more than one method or process. One such is by an express grant, the other methods being, acquisition by prescription or assertion of right based on custom or on the doctrine or principle of necessity. When the claim of the Plaintiff in a given case is the assertion of the claim of easement by grant under a registered document, as in this case, it becomes wholly unnecessary to go into the question as to whether it was an easement of necessity or easement acquired by prescription. Apparently, the question of necessity has been put into controversy in the teeth of an assertion of a claim by the Defendant that though the Plaintiff had a right to have a passage not in the

manner in which the Plaintiff claimed, in view of the effective alternate passage now provided by the first Defendant or made available to the Plaintiff, there could be no serious prejudice or grievance made out, and in appreciating this stand only the idea of necessity to allow the Plaintiff to the use of the existing passage or the feasibility and desirability of the alternate passage proposed by the Defendant, should have surfaced for consideration and it, if I may say so with respect, has been allowed to be stretched to the level of even unnecessarily mixing it with the very source of acquisition of the right itself, consequently a proper appreciation of the pleadings as also the case projected during the course of the trial and the findings rendered by the learned trial Judge on such materials as have been placed by the parties before it, would go to show that the source of the right asserted and claimed by the Plaintiff in this case and which came to be recognised by the trial court was only the right of easement by way of grant under a registered sale-deed and not by any assertion of their claim of easement by way of necessity or acquisition of such easement of right by prescription. Those questions, therefore, become really irrelevant, unnecessary and extraneous for the case on hand. Apparently, because the remit order contained a direction, the learned first Appellate Judge chose to keep into account the necessity of the Plaintiff to retain earlier passage which was in use, and he was constrained, as I could see from the judgment, to come to the conclusion that the easement was by way of necessity also. At the expense of repetition, it could be pointed out that the easement in question asserted by the Plaintiff in this case is one by a grant under a registered sale deed and if that be the position, it is not permissible for the servant owner to unilaterally alter the same or assert a claim that at his choice he can provide an alternate or make a substitute for the existing easement by grant, even without the concurrence or consent of the person entitled to such a right and irrespective of any prejudice or detriment to the rights of such person who is the owner of the dominant tenement like the Plaintiff in this case.

7. The question then which looms large for consideration is as to whether in the teeth of the said right of the Plaintiff the claim of the Defendant could be considered to be a sufficient answer or a substitute so as to compell the Plaintiff or his successor in interest to accept the alternate or substituted passage. The materials on record as also the impression gained by the court on its inspection undertaken under Order 18, Rule 18, CPC appears to have strongly weighed with the learned Judges in the courts below to come to the conclusion that the passage which was in vogue and use and which had its source as an easement by grant under the sale-deed was necessary for the effective use of the Plaintiff. The considerations which should weigh with a Court in adjudging such a necessity should not be confused with the consideration which should weigh with the Court in really finding out the source of the right claimed as an easement by way of necessity. As indicated earlier as long as the easement in question is one by way of grant under a registered sale-deed binding between the parties the first Defendant or his successor in interest could not alone alter or modify or

substitute it unilaterally as they desire and the choice is not exclusively left with them to do so. In such context, there is no scope in my view to go into the question of adjusting the equities or approving of the substituted passage on the question of any desirability or adjustment of right of the parties. That could be possible only, as long as the right as the one now under consideration is by way of grant under a registered document, and any such variation or modification could be made only by mutual consent of parties or their successors interest and as long as there is no such mutuality or concurrence for the variation or substitution the court will have no say in the matter.

8. For all the reasons stated above, I see no merit whatsoever in the second appeal. The finding arrived at by the courts below cannot be said to be in any manner vitiated on account of any patent error of law to warrant interference in this appeal. The appeal fails and shall stand dismissed. The stay order passed in CMP No. 402/98 on 30.6.1998 shall stand vacated.