

RAJASTHAN HIGH COURT

Prithvi Singh

Vs.

Banshi Lal

Civil Second Appeal No. 113 of 1985

(Prakash Tatia, J.)

16.10.2003

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties.
2. This second appeal has been filed by the plaintiffs against the judgment and decree dated 1st Feb. 1984 dismissing the suit of the plaintiffs and the appeal against which was also dismissed by the first appellate Court by judgment and decree dated 15th March, 1985.
3. Brief facts of the case are that the plaintiffs filed the suit for perpetual injunction against the defendants Nos. 1 and 2 alleging that the plaintiffs purchased a piece of land from the defendant No. 2 by the registered sale deed dated 22nd Feb., 1974. It comes from the facts of the case that there was adjoining land in the eastern side to the plaintiffs' purchased property and that was in occupation of the defendant No.1 as tenant of the defendant No. 2-seller. It appears from the fact that there was necessity for providing way to approach the plaintiffs' purchased property and for that purpose way could have been provided only in the eastern side of the purchased property, but the eastern side was occupied by the defendant No.1 as tenant, therefore, the defendant No.1 satisfied the defendant No. 2 and agreed to gift the land, which was in occupation of the defendant No.1 as tenant excluding the land in dispute, which was left for the way to reach to the plaintiff's plots. For that purpose, the defendant No.1 agreed and executed an agreement dated 22nd Feb. 1974 in favor of the defendant No. 2 agreeing that defendant No.1 will vacate the land measuring 18'x 13'and the defendant No. 2 in lieu of that executed a gift deed on the same day i.e. 22nd Feb., 1974 in favor of the defendant No.1 for the land, which defendant No.1 was

occupying as a tenant except the land measuring 18'x 13'. The gift deed was also registered on 22nd Feb., 1974, therefore, there are total three documents; one sale deed (Ex.1), dated 22nd Feb., 1974 in favor of the plaintiffs; second a gift deed (Ex. 4), dated 22nd Feb., 1974 in favor of the defendant No.1 executed by the defendant No. 2. Both the sale deed and gift deed were presented for registration and were registered on 22nd Feb., 1974. Third is the agreement of the same date i.e. 22nd Feb., 1974 executed by the defendant No.1 in favor of the defendant No.2, which also appears to have been marked as Ex. 4.

4. It appears that despite all these documents containing the admission of the defendant No. 1 that he will provide land measuring 18'x 13'to the plaintiffs so that they may use their purchased property, the defendant No.1 did not remove his possession from the said land. In this case, the disputed land is 18'x 13'only. There is no dispute with respect to the title of the property of the plaintiffs or title of the defendant No. 1, which they acquired by gift deed dated 22nd Feb., 1974.

5. The defendant Nos.1 and 2 submitted separate written statements. The defendant No. 2 admitted the facts mentioned in the plaint whereas the defendant No.1 contested the suit by saying that there was a way in the eastern side, but it was closed. The defendant No. 1 admitted gift of the land in his favor by defendant No. 2. Even after admitting gift of land by defendant No. 2 in his favor, the defendant No.1 in the same para 2 of the plaint denied the title of the defendant No.1 over the disputed land measuring 18'x 13'. The defendant No.1 also submitted that there is another way for the land of the plaintiffs, which is in the western side. The defendant No.1 also submitted that any agreement executed for the land measuring 18'x 13'is illegal because of the reason that the defendant No. 2 is not the owner of the said property and defendant No.1 is in possession of the said land of 18'x 13'and he became owner of the property by adverse possession.

6. The trial Court framed the following issues:-

- (i) Whether the plaintiffs are owner of the property marked in the map submitted with the plaint?
- (ii) Whether the land mentioned in para No.1 of the plaint is the only land available as a land for way to reach to the plaintiff's property?
- (iii) Whether the land, A, B, C and D (disputed land measuring 18'x 13') was let out to the defendant No.1 by the defendant No. 2?

(iv) Whether the defendant No.1 executed an agreement that he will provide the land for the way so that the plaintiffs may use the land for way to their property ?

(v) Whether the land B, E, F and G was given to the defendant No.1 by the defendant No. 2 so that the defendant No.1 may remove his structure from the land A, B, C and D?

(vi) Whether the plaintiffs are entitled for decree for mandatory injunction?

(vii) Whether the defendant No.1 became owner by adverse possession and subsequently new issues were framed whether the suit of the plaintiffs is not maintainable as there is no privity of the contract between the plaintiffs and defendant No.1?

7. The trial Court after trial held that the plaintiffs purchased the property by registered sale deed (Ex. 1) from the defendant No. 2 and the way (18'x 13') as claimed by the plaintiffs in the eastern side is the only place from where the way can be provided to reach to the plaintiffs' property. The defendant No. 1 was tenant in the property marked ABCD and he executed the rent deed (Ex. 5) in favor of the defendant No. 2. It was further held by the trial Court that the defendant No.1 executed the agreement (Ex. 4) that he will vacate the disputed property and he agreed to take land of the defendant No.2 in compensation of vacating the land for the way by registered gift dated 22nd Feb., 1974 itself. The trial Court further held that the defendant No.1 cannot claim adverse possession over the disputed property. However, after deciding all these issues in favor of the plaintiffs, the trial Court while deciding issue No. 9 in favor of the defendants, held that there is no privity of the contract between the plaintiffs and defendant No.1 and the suit of the plaintiffs is not maintainable. Consequentially, the trial Court decided issue No. 6 against the plaintiffs by holding that the plaintiffs are not entitled for decree of mandatory injunction.

8. The plaintiffs preferred the appeal. In the appeal the appellate Court considered the arguments of the plaintiffs-appellants on the basis of their claim of easementary right, easement of necessity. The first appellate Court after holding that there is no privity of contract between the plaintiffs and the defendant No.1, therefore, the plaintiffs cannot get the decree for mandatory injunction and, in addition to the said finding, the first appellate Court held that the mere suit for injunction is not maintainable even on the ground of easement of necessity and the plaintiffs should have filed the suit for eviction against the defendant No.1 and should have claimed relief of possession of

the disputed property. The first appellate Court, in view of the above finding, dismissed the appeal of the plaintiffs-appellants by judgment and decree dated 15th March, 1985.

9. The appellants in these facts, preferred this second appeal. Following substantial questions of law are framed by this Court while admitting the appeal :-

(i) Whether the District Judge has committed an error of law in not taking into consideration the provisions of Sections 13 and 19 of the Easements Act?

(ii) Whether the Courts below were wrong in holding that unless the easementary rights of necessity of way were not enjoyed on the earlier date of transfer, it cannot be claimed on the date of the transfer?

10. I heard learned counsel for the parties and perused the record. At the outset, it may be pointed out that both the Courts below held that the plaintiffs are owner of the property, which they purchased from the defendant No. 2 by registered sale deed dated 22nd Feb., 1974 and the way which is claimed by the plaintiffs is only way by which the plaintiffs can have approached to their purchased property. The concurrent finding of the fact is that the defendant No.1 agreed that he will provide the land of 18'x 13'so that the plaintiffs can have the way to their property. Not only this, but this is also a finding of the fact that the defendant No. 2 gifted a big piece of land to the defendant No.1 to compensate defendant No.1 for removing his possession and obstruction from the land in dispute measuring 18'x 13'. It is worthwhile to mention here that for vacating the land measuring 18'x 13'by the tenant, the owner of the property gifted the land measuring 18'x 52'to the defendant No. 1. Now, the question remains not only as framed by the Court as on 3rd Oct., 1985 while admitting the appeal, but question which arises from the facts of the case as substantial question of law is :- -

Whether the beneficiary of the contract can file the suit against the party to the contract for getting benefit arising from the contract despite the fact that the beneficiary was not party in the contract?

11. It appears from the facts of the case that the defendant No. 2 wanted to sell part of his property and the plaintiffs agreed to purchase the property but there was no way to reach the property except from the property, which was in occupation of defendant No.1 as tenant. Therefore, it appears from the facts that the defendant No.2 agreed that he will get the land for the way from the defendant No.1, who was occupying the land as tenant. The defendant No. 2 obtained the written consent of the defendant No.1 and

agreed to compensate defendant No.1 by giving a big piece of land from the land measuring 52'x 18'to the defendant No.1. The defendant No.1, therefore, surrendered his tenancy rights and the defendant No. 2 executed and gifted the property, which was in occupation of the defendant No.1 as tenant except the land measuring 18'x 13'and the defendant No.1 executed an agreement that he will vacate the land measuring 18'x 13'. Not only this but the defendant No.1 accepted and admitted that this land of 18'x 13'will be used for the purpose of way in his own title deed i.e. registered gift deed dated 22nd Feb., 1974 itself. Despite getting big property and giving an undertaking in writing, the defendant No.1 did not vacate the property in dispute to give way to the plaintiffs. The plaintiffs spent about 30 years in litigation. The relief was denied by the two Courts below on the mere ground that the plaintiffs have no privity of contract with defendant No.1 and cannot enforce the contract by which defendant No.1 agreed to give benefit for enjoyment of plaintiff's property, which was purchased after taking all care by them.

12. Learned counsel for the appellants submits that the appellants are the beneficiary of the agreement, which was executed by the defendant No.1 in favor of the defendant No. 2 and they tried to get the possession of the property through defendant No. 2 but failed and, therefore, they served a notice upon the defendant No. 2, which he refused to accept and, therefore, they had no other option but to file the suit for injunction against the defendant No. 2 as well as against the defendant No.1. It is submitted that the plaintiffs have a right to get the way as transferor of the property in view of sub-clause (a) of Section 13 of the Indian Easements Act, 1882, apart from the right of way, which is flowing from the agreement executed by the defendant No.1 in favor of the defendant No. 2. It is also submitted that since the appellant purchased the property from the defendant No. 2 on clear term that the appellant-plaintiff will be given way from the land in dispute and since, the defendant No. 2 himself did not or could not provide the land for way to the plaintiff-appellant, therefore, the plaintiff-appellant had no option but to file the suit against the defendant No. 2 and also against the defendant No.1, who refuse to vacate the land. It is also submitted that the defendant No. 2 was bound to provide the way to the plaintiffs and the defendant No. 2 is not denying that he is not responsible to provide the way to the plaintiffs. In case of failure of the defendant No. 2 to give relief to the plaintiffs, the plaintiffs have got right to file the suit on the basis of agreement, which was executed by the defendant No.1 in favor of defendant No. 2. It is also submitted that in the facts of this case, the plaintiffs were only right persons, who could have filed the suit. Learned counsel for the appellants further submitted that the Courts below and, particularly the appellate

Court was wrong in holding that the relief of injunction cannot be granted to the plaintiffs and the plaintiffs should have filed the suit for eviction against the defendant No.1 and sought relief of possession in favor of the plaintiffs despite the fact that the plaintiffs could prove their right to get the relief of injunction on the basis of easement of necessity.

13. Learned counsel for the respondent No. 2 supported the appellants whereas learned counsel for the respondent No.1 seriously contested the claim of the plaintiffs-appellants. According to learned counsel for the respondent No.1, the right of easement of necessity can be claimed by the transferee from and in the land of his transferor only and not from any other person like defendant No.1, who is not the transferor of the land in favor of the plaintiffs. It is also submitted that there is other way available to the plaintiffs, which is a case set up by the defendant No.1 and finds support from the pleadings of the defendant No.2 as defendant No. 2, in his written statement, merely submitted that the way which is claimed by the plaintiffs is the most convenient way and the defendant No. 2 has not stated that the only way available to approach the land of the plaintiffs is in eastern side. Learned counsel for the respondent No.1 submitted that for claiming right on the basis of easement, the plaintiffs are required to prove the existence of the easement and they are further required to prove that they cannot have way from another side. Learned counsel for the respondent No.1 relied upon the judgment of the Gujarat High Court delivered in the case of *State of Gujarat v. Hiralal Motilal Luhar, reported in* wherein it has been held that the essential ingredients of an easement viz. there should be two different tenements, a dominant and servant, the owners thereof should be different and the rights must relate to doing of an act upon a land not his own, should be satisfied for claiming an easement right. In this judgment it is further held that an easement of necessity should first satisfy these ingredients before the category to which it belongs can be determined. When a sub-lessee of a shop owned by the Government claims a right of way as an easement of necessity on an adjacent land belonging to the Government, the owner of the dominant tenement, shop and the owner of the servant tenement land being the same viz. the Government, there cannot be any right of easement over the land. The observation which was more relied upon by the learned counsel for the respondent No. 1 from the judgment of the Gujarat High Court is that in this case the plaintiffs failed to prove the ingredients of easement of necessity and even if it has been held that the plaintiffs proved their right founded upon the easement of necessity, then they can claim land from their transferor, who is defendant No.2 and not from the defendant No.1, who is not transferor of the land in favor of the

plaintiffs.

14. After going through the submissions of learned counsel for the parties, I am of the view that the Courts below have committed serious error of law in holding that plaintiffs cannot maintain the suit for mandatory injunction against the defendant No.1 as there is no privity of the contract between the defendant No.1 and the plaintiffs. It appears that both the Courts below failed to appreciate the entire tenure of the contract. The contract may be between two parties, for the benefit of one of the contracting parties or for the mutual benefit of two parties and there may be contract between two parties to give some benefit of the contract to third party, who is not made party in the contract deed. Here in this case, the entire tenure of transaction is that the defendant No. 2 wanted to sell the property and to fetch market value of the property or to make the property alienable, he had to provide proper way to approach the intended sale property. The negotiation was undertaken between three parties i.e. seller (defendant No. 2), purchasers (plaintiffs) and the defendant No.1, who was in occupation of the land, which was suitable for the purpose of way. All the three parties were conscious that unless and until the way is provided neither the defendant No. 2 could have sold the property nor the plaintiffs could have purchased the property and, therefore, this was an issue of bargaining between the three parties for which though different and separate documents were executed, but are in sequence to achieve to the same object, resulting into one transaction providing that defendant No.1 will provide the land for the way. The defendant No. 2 will sell the property to the plaintiffs with right to have way from a particular piece of the land.

15. In these circumstances, there are three documents i.e. agreement dated 22nd Feb., 1974 executed by the defendant No.1 in favor of the defendant No. 2, registered sale deed dated 22nd Feb., 1974 i.e. on the same day, in favor of the plaintiffs by the defendant No. 2 and the gift deed dated 22nd Feb.,1974 by the defendant No. 2 in favor of the defendant No.1, constitute one transaction only. Section 6 of the Evidence Act says that facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places and Section 7 of the Evidence Act says that facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant. The above legal aspect was totally ignored by the two Courts below. Apart from the fact that both the Courts below failed to appreciate that the benefit can be

given to contracting parties, to third party and third party can take benefit out of the contract executed by the two other parties unless the said benefit is unlawful or the contracting party can deny the benefit under any provisions of law. Here in this case impliedly it is proved that the plaintiff paid the consideration for the contract of having way from the land in dispute to the defendant No. 2, which is by necessary implication is included in the sale price of the plot. Even the defendant No. 2 paid consideration to defendant No.1 for the agreement executed by defendant No.1 in favor of defendant No. 2 and gifted land to the defendant No.1. Therefore, the consideration (may be hidden) paid by plaintiffs to defendant No. 2 passed on to defendant No.1. The entire transaction to provide land of way to the plaintiffs was with consideration, hence, was lawfully enforce- able by the plaintiffs. Here in this case, both the Courts below did not examine this aspect of the matter before holding that the plaintiffs cannot maintain the suit for mandatory injunction.

16. Therefore, the finding recorded by the Courts below is vitiated for non-consideration of the relevant provisions of law and finding is absolutely perverse as it is absolutely unjust to say that the purchaser of the property, who purchased the property with clear understanding that the seller will provide the way to the purchaser, can be denied right of way to approach the property, which may result into deprivation of the total property itself by the purchaser as, without way, they cannot enter into the property for any purpose. In case of failure of the defendant No. 2 or in case of total inaction of the defendant No.2, the plaintiffs as beneficiary acquired right to get the relief through the Court of law. Therefore, the judgment and decree passed by the trial Court on the issue Nos. 6 and 9 deserves to be set aside.

17. The appellant-plaintiff were entitled to the decree, even otherwise then, on the basis of said agreement. It is clear from a bare reading of sub-clause (a) of Section 13 of the Indian Easements Act that where one person transfers or bequeaths immovable property to another, then the transferor gets the right of way by necessary implication and that is recognized as right, as easement of the necessity. The property having no way to approach is not property in the hands of the transferor. The easement of necessity occurs on transfer is clear from sub-clause (a) of Section 13 of the Indian Easements Act.

18. In this case, learned counsel for the respondent No.1 vehemently submitted that the defendant No. 2 is the transferor and, therefore, the plaintiffs can enforce their alleged right of easement of necessity against the defendant No. 2 and not against the defendant No.1. According to learned counsel for the respondent No.1, the respondent

No.1 is tenant in the disputed property (measuring 18'x 13') and in the alternative he becomes owner of the property by adverse possession as pleaded by the defendant No.1.

19. I perused the entire record. It will be worthwhile to mention here that all three documents mentioned above were executed on the same day i.e. 22nd Feb., 1974. It is to be seen that whether the defendant No. 2 was owner of the property from where the plaintiffs are claiming right of way on the basis of easement of the necessity. The sale deed in favor of the plaintiffs was executed on 22nd Feb., 1974. The gift deed in favor of the defendant No.1 was also executed on 22nd Feb., 1974. After execution of the gift deed in favor of the defendant No.1, the defendant No. 1 acquired title of the gifted property and his tenancy right came to an end. It is not the case of the defendant No.1 that disputed land continued in his tenancy. The defendant failed to prove his title over the disputed property and in fact, he is stopped from claiming title in the property in dispute. Therefore, on the day when the defendant No. 2 executed sale deed in favor of the plaintiffs, the defendant No. 2 was owner of the property in dispute. Therefore, the claim of the plaintiffs for their right over the disputed land is, in fact, against and over the defendant No.2's land, who is transferor of the land to the plaintiffs and is under obligation to provide land to approach the sold property.

20. The plea which was advanced by learned counsel for the respondent No.1 that the respondent No.1 is tenant, does not lie in the mouth of the respondent No.1 in view of the fact that the respondent No.1 himself, in his written statement, not claimed his tenancy right over the property in dispute, but claimed his right or title on the property on the basis of adverse possession and that was concurrently negated by the Courts below, therefore, the plaintiffs' suit was maintainable on alternative ground of easement of necessity also against the defendants.

21. Learned counsel for the respondent No.1 also submitted that in case, the plaintiffs prove their right on the basis of easement of necessity for their way, then the reasonable area of way can be provided, but it is not necessary to grant the decree for the land measuring 18'x 13'. Such a plea is an afterthought and has no justification in the facts and circumstances of this case particularly when the defendant No.1 himself admitted that land of 13'x 18'is the land required for way, in his own registered gift deed dated 22nd Feb., 1974 and looking to the measurement of land, which was purchased by the plaintiffs from the defendant No. 2, it cannot be said that width of 13'is not required for way to any person to approach their property particularly when the property purchased by the plaintiffs is big-one. There appears to be no reason to

grant a decree for a lesser land, when the land for which all the three parties agreed in writing in their registered documents as well as agreement. The plaintiffs are claiming way and not only side lane. They are supposed to live with comfort and reasonably required sufficient way so that they can take their vehicles to their property. The plaintiffs are not supposed to live in a lane.

22. The Courts below were wrong in holding that until and unless, the plaintiffs files a suit for eviction of the defendant No. 2 (sic) and seek decree for possession for the land in dispute, no relief of injunction can be granted. The plaintiffs-appellants are claiming that they have a right of way over the land in dispute and the defendant No.1 is required to remove only obstruction created over the land earmarked only for the way. In such circumstances, only appropriate relief could have been mandatory injunction against the defendant No.1 to remove the obstruction from the way for which, the plaintiff filed the suit.

23. In view of the above discussion, the appeal of the appellants deserved to be allowed. Hence, the appeal of the appellants is allowed. The findings recorded by the Courts below on issue Nos. 6 and 9 are set aside. The suit of the plaintiffs is decreed and it is directed that the defendants shall vacate the land measuring 18'x 13'as prescribed in the map filed by the plaintiffs in the suit within a period of two months from today. The appellants are also entitled for the costs throughout.

Appeal allowed.

Cases Referred.

1. AIR 1980 Guj 146