

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 28th October, 2010*
Judgment Delivered on: 10th November, 2010

+ **RSA No.12/2002 & CM No.35/2002**

SUKHBIR SINGH & ORS. Appellants

Through: Mr.Arun Kumar Varma & Ms.Mansi
Wadhera, Advocates for the appellant.

Versus

RAM SINGH & ORS. Respondents

Through: Mr.K.S.Chhoker and Mr.Munish
Chhoker, Advocates for R-1.
Mr.Shahid Ali, Advocate for R-2.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. The present appeal has impugned the judgment and decree dated 04.10.2001 which had endorsed the finding of the Trial Judge dated 01.09.1987 whereby the suit of the plaintiff, Sh. Sukhbir Singh, had been dismissed.

2. The plaintiffs (three in number) had filed a suit against the defendants for permanent injunction. Plaintiff no. 1 was stated to be the owner in possession of the property no.WZ-820-A, plaintiff no.2 was the owner in possession of the property no.WZ- 820-B and plaintiff no.3 was the owner in possession of the property no. 820-C

located on the slopes of the pahar (rock) in the abadi of village Naraina Delhi. The said properties had been depicted in green, blue and yellow colour in the plan attached with the plaint.

3. The only approach to their properties was through this street; they have an unrestricted right to use the street which had been depicted in red colour in the site plan. This is a public street. In the alternate, if it was found that this street is not public street, the plaintiffs are co-owners in use and in possession of this easementary right/right of way as this is the only mode of access to their houses. Defendants have adopted an aggressive attitude and have threatened to prevent the plaintiffs from using this street; the plaintiffs are prevented from laying their pipes for the purposes of municipal water and electricity. In spite of requests, defendants have not heeded. Suit was accordingly filed.

4. The defendants have disputed the claim of the plaintiffs. It is submitted that the approach to the houses of the plaintiffs is through house no. 820 which is the house of their father. The defendant no. 1 is the owner and in possession of the properties bearing nos. 815, 816 and 819 and the alleged passage is the compound of the said properties and forms a part and parcel of the same. The plaintiffs have no right over the same. It is pointed that the houses of the plaintiffs i.e house no. 820-A, 820-B and 820-C are extensions of the original house i.e. house no. 820 which belongs to their father. Besides the fact that the aforementioned constructions are illegal, the plaintiffs have no right of access to their properties through this passage shown in red colour in the

site plan. It is a part of the courtyard of the properties of the defendant on which he has exclusive right and title.

5. Trial Judge had framed nine issues. Six witnesses were examined on behalf of the plaintiffs and seven witnesses were examined on behalf of the defendants. Their oral testimony was gone into in an in-depth detail. The site plan Ex.PW-6/1 had been proved through the version of PW-6. Trial Judge held that the plaintiffs have no right over this passage depicted in red colour in as Ex.PW6/1; this is the property of the defendants. Suit of the plaintiff was dismissed.

6. Impugned judgment had endorsed this finding.

7. This is a second appeal. On 01.09.2008, the appeal was admitted and the following substantial questions of law were formulated which inter alia reads as follows:

“(1) Whether the findings of the learned ADJ and that of the learned Civil Judge, without reasoned issue-wise appraisal and discussion of the evidence on record, can be a ‘JUDGMENT’ required by order 41 Rule 31 of CPC? If not, are they not liable to be set aside as perverse per (2001) 4 SCC 756 (Madhurkar and Others Vs. Sangram and Others), 2001 (3) PLR 594 (SC): (Madan Mohan Lal V/s. UOI), 2001 (2) RCR 605 (Dhanna Lal V/s. Smt. Kalavatibai) and a catena of judicial pronouncements?

(2) Whether in the undisputed circumstance of the only approach to the suit houses of the Appellants situated on the upper slope of the ‘Pahar’ (ridge) in Village Naraina being an Urban Area of the West Zone of Municipal Corporation of Delhi (and before that of the West Delhi Municipal Committee), through the ‘Street’ does not qualify to be held to be a ‘PUBLIC STREET’ under Section 298 of the Delhi Municipal Corporation Act 1957? If so, then are the contrary findings of the Trial and the First Appellate Court legally sustainable OR deny the ‘Right of Way’ and/or “Easement of Necessity” of its user by Appellants and take Municipal Water supply line and also electricity supply by cables, through it to their houses?

(3) Can the clear admission dated 22.03.1982 of the Respondent under Order 10 CPC and of dated 18.10.1985 as per interim injunction order of the learned

Trial Court, and written compromise dated 10.01.1982 of the Respondent in favour of the Appellants regarding the matter in controversy in the Suit be held to be “not made with free-will” by incorrect appreciation and misreading thereof by the Courts vitiating their finding on the point in controversy?”

8. On behalf of the appellant, it is stated that the findings in the impugned judgment are a perversity. The judgment has merely reproduced the pleadings of the parties and the depositions recorded before the Trial Judge without giving any reasoning as to how he had arrived at the aforementioned conclusion. Attention has been drawn to the judgment of the Trial Judge dated 1.09.1987. It is pointed out that the Trial Judge, except in para 26 and thereafter in para 31, has not given any discussion as to how he has arrived at the conclusion. Under Order 41 Rule 31 of the Code of Civil Procedure (hereinafter referred to as the ‘Code’) such a cursory approach does not qualify as a ‘judgment’. Counsel for the appellant has placed reliance upon a judgment of the Supreme Court reported in JT 1993 1 (SC) 213 titled as Rameshwar Dayal Vs. Banda through his LRs to support his submission that under the Code, the word ‘judgment’ as defined in Sub-section 2(9) means “the statement given by the Judge on the grounds of a decree or order”; the court is bound to give a concise statement of the case, the points of determination, the decision thereon and the reasons for such a decision; this is lacking in this judgment of the Trial Court. It is pointed out that the First Appellate Court in fact on internal page 7 of the judgment has itself agreed that the judgment of the lower court is not elucidative but since the conclusion drawn is correct, no interference is called for. It is pointed out that such an approach is erroneous. Learned counsel for the appellant has placed reliance upon a judgment of the Supreme Court reported in

2001 3 (SCC) 179 Santosh Hazari Vs. Puushottam Tiwari to support his submission that where the first Appellate Court has in a cryptic matter reversed the finding of the Trial Judge, the matter is liable to be remanded back. It is pointed out that in this case, the Supreme Court had reiterated that a first appeal is a valuable right of the parties and the judgment of the first Appellate Court must reflect its conscious application of mind on all issues arising thereupon along with the contentions put forth and pressed by the parties; this is absent in the instant case. In this view of the matter, the impugned judgment is clearly a perversity and is liable to be interfered with. The compromise dated 10.1.1982 Ex.PW 2/2 duly effected before the police and signed by all the parties has also been cursorily ignored. Attention has also been drawn to the statement of the defendant recorded under Order X of the Code on 22.3.1985. It is pointed out that the admissions made by the respondent in this statement have been ignored in the impugned judgment; if this admission of the defendant is read, relief would automatically flow to the plaintiff as the defendant has admitted that the disputed passage shown was the common access way for all the houses including the houses of the plaintiffs. It is pointed out that the plaintiffs have been using this passage since long which is the only route to access their houses; this is evident from the site plan; plaintiffs/appellants have acquired easementary right of necessity/right of way. Attention has been drawn to Section 4 of the Indian Easement Act, 1882 (hereinafter referred to as the 'said Act'), as also to the provisions of Section 14 of the said Act to support this submission. Reliance has been placed upon JT (2004) (10) SC 228 Justiniano Antao and Ors. Vs. Smt. Bernadette B.

Pereira. This was a suit where the plaintiff claimed easementary rights by way of prescription. Learned counsel for the appellant has conceded that he is not pressing his claim for easement by way of prescription and the finding of the Trial Judge as also the first Appellate Court that the appellant has failed to show that he was using this common passage since the last 20 years has not been made out and the appellant does not seek to challenge this finding. It is however submitted that in view of the ratio of the aforementioned judgment, if the plaintiff is able to demonstrate and show before this court that he has no other mode of access to his house except through that of the property of the defendants, easement of necessity necessarily arises. Reliance has also been placed upon AIR 1987 Calcutta 97 Smt.Pravabati Roy and Anr. Vs. Dwijendra Lal Sengupta and Anr. It is pointed out that the law on easement of necessity has been detailed in this judgment which necessarily encompasses that for the effective user of the property in its ordinary way, the right of easement of necessity is recognized. The ratio of the aforesaid judgment which applies to the facts of the instant case entitles the plaintiff to the relief of injunction as claimed by him as the plaintiff has admittedly no other way to approach his property. Reliance has also been placed upon AIR 2005 Delhi 319 Shri Rajiv Srivastava Vs. Sanjiv Tuli and Anr. It is pointed out that an admission made by a party under Order X of the Code is sufficient for a decree to follow under Order 12 Rule 6 of the Code as the said provision speaks of admissions made not only in the pleadings of the parties but even “otherwise”; the word “otherwise” has been interpreted to include the admissions made under Order X of the Code.

9. Arguments have been countered by the learned counsel for the respondents. It is pointed out that the statement of the respondent under Order X of the Code does not qualify as an admission. It is submitted that the alleged compromise Ex. PW 2/2 was never voluntary and this has been the stand of the defendants' right from the inception. The defendants had been taken to the police station and without their knowledge were made to sign on blank papers. Such a compromise not being voluntary was rightly held by both the courts below to be not binding upon the parties. It is submitted that the judgments of the two courts below which are concurrent findings of fact have correctly held that the houses of the plaintiffs i.e. House nos. 820-A, 820-B and 820-C are extensions of the original house which was the house of their father i.e. house no.820. They are illegal and unauthorized. By way of this suit, the plaintiffs are intending to get their illegal structures legalized; even otherwise these properties have admittedly sprung into construction only about three years ago. No easementary right has accrued in favour of the plaintiffs either by way of prescription or by necessity as they have access to these houses through the house of their father house no. i.e. 820.

10. This is a second appellate court. The substantial questions of law have been reproduced herein above.

11. Under Order 41 Rule 31 of the Code, the judgment of the Appellate Court must state the following:-

- (a) the points for determination;
- (b) the decisions thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced by signed and dated by the Judge or by the Judges concurring therein.

12. The impugned judgment runs into eight pages and the discussion and the findings emanate as follows:-

“7. I have heard Ld. Counsel for both the parties and perused the material available on record.

8. Ld. Counsel for the appellant has submitted that Ld. Lower Court has erred in holding that the land in dispute is a Private Street of the defendants/respondents. Plaintiff/Appellant has averred that the land of the street is of Village Naraina as the Village is an Urban Village. The land belongs to Delhi Municipal Corporation and under Delhi Development Act of Street vest in the public and the plaintiff/appellant are the residents of the villages for a right to pass through that street. He has further submitted that Ld. Lower Court has erred that defendants/respondents entered into compromise Ex. PW2/2 voluntarily out of their free-will and have admitted the claim of the appellants which operates as an admission and also an agreement between the parties. But Ld. Lower Court has totally ignored this fact that respondents dishonestly resiled from the agreement. Ld. counsel for the appellant has further submitted that Lower court has totally ignored that the appellants are living on “Pahar” and they have a right to abut to their houses and they have a right by way of easement and necessity. On these grounds Ld. counsel for the appellant has submitted that the judgment of the Lower Court deserves to be set aside.

On the other hand, Ld. counsel for the respondent has submitted that the Ld. Lower Court has given well reasoned judgment considering all the facts & circumstances of the case and the evidence on record which needs no interference.

The appellants have claimed the right to the disputed street by way of three separate means.

Firstly, they are saying that the land under-neath the street belongs to MCD. Therefore, respondent has no right to interfere in the use of the street by the appellant. There is no record on the file by way of which it can be said that this is a public street. Hence the contention of the Ld. counsel for the appellant that the disputed street is a public street cannot be accepted.

Secondly, the counsel for the appellant has argued that the plaintiff/appellants have right by way of easement and right of prescription in the said street for ingress and outrages and also have discharging the rain and waste water and other material of their houses. For claiming the right of the easement and right of prescription it must be shown that the said street is in use by the appellants openly, peacefully, continuously and without objection from anybody in a hostile manner

for a period of more than 20 years. It has come on the record that the appellants have constructed their houses 4/5 years ago. The appellants have placed on record the house tax receipts for the year 1979-80 onwards. The suit was filed in 1981 which means the houses were constructed recently. No evidence that the street in question is being used for more than 20 years have brought on record. Rather in the cross examination of PW1 he has admitted that house no. 820-A, 820-B, 820-C were not in use prior to 2/3 years. Rather they were in dilapidated condition. Taking this fact into consideration the contention raised by the Ld. counsel for the appellant that they have been approaching the houses 820-A, 820-B & 820-C through the street in dispute which was used for more than 20 years, cannot be accepted.

Thirdly, the use of the street cannot be said to be peaceful uninterrupted and without any restrictions. Had it been so there was no necessity to resolve the dispute between the parties by a compromise on 10.1.1982. It has been admitted by the appellants that during the pendency of the suit the defendant/respondent became violent and aggressive. However, no evidence has been brought on record that for a long 20 years the enjoyment of the street was open, peaceful, continuous and without objection of anybody. Therefore, there is no force in the contention of Ld. counsel for the appellant that the appellants have acquired the right of easement and right of prescription in the said street for egress or ingress for their houses.

Lastly, coming to the compromise dated 10.1.1982 it would not be out of place to mention that the said agreement took place during the pendency of the suit which was filed on 30.04.1981 by the appellants. Hence any agreement or compromise to be made between the parties should have been made before the court or the same settled outside the court and the same could be informed to the court but it has not happened in the present case. The alleged compromise took place in the police station. It has also been stated by DW1 that police took him to the police post alongwith his sons and threats were given to him and he was also slapped which means the said agreement, if at all, was not made with free will. Therefore, I do not find any substance in the contention of the Ld. counsel for the appellant. However, I agree with the contention of Ld. counsel for the appellant that the judgment passed by the Ld. Lower Court is not very well elucidative judgment. But since conclusion drawn by the Ld. Lower Court is correct. There is no need to interfere in the judgment.

It is pertinent to mention here that earlier an appeal was filed by the appellants against the judgment and decree passed by the Lower Court which was allowed and the case was remanded back to the Lower Court for giving specific findings in respect of additional issue no. 8-A. Ld. Lower Court vide order dated 24.1.1990 again decided the issue no.8-A in favour of defendant and against the plaintiff. I have gone through the order dated 24.1.1990. Ld. Lower Court has

discussed the entire evidence concerning this issue and has rightly reached the conclusion that the compromise deed Ex. PW 2/2 is not a voluntary compromise deed and it has no binding effect from the defts. As discussed above, during the pendency of the suit DW 1 was taken to PP Naraina by the police. He was made to sit there and was asked to put his thumb impression on the paper and was also slapped shows that the compromise deed, if any, was not free from coercion and undue influence. Hence, the same has no bindings upon the defendants. Therefore, issue no. 8-A was decided by the Lower Court vide its order dated 24-01-1990 is also correct and needs no interference.

There is no merit in the appeal. All the issues have been correctly decided by the Ld. Lower court and the judgment and decree of the lower court needs no interference. The same is dismissed."

13. Perusal of the judgment shows that in the preceding paragraphs i.e. between paras 1 to 5, the case of the parties has been set out i.e. their respective pleadings; the issues have been detailed; the witnesses examined on behalf of the plaintiff and the defendant have also been detailed. The findings are contained in para 7 onwards. The contention of the parties i.e. of both the appellant and the respondents has been dealt with in detail. The judgment, in fact, has set out the contentions in a point-wise form. The alleged compromise entered into between the parties has been taken note of. The impugned judgment has not shied from its duty; it has infact in detail examined the evidence and the contentions urged by the parties.

14. The contention of the learned counsel for the appellant that the judgment of the trial judge dated 01.9.1987 is not a 'judgment' within the meaning of the Section 2(9) of the Code is not a correct proposition. As defined under the aforementioned statutory provision, the court must state the concise statement of the case, points of determination, the decision and the reasons for this decision. This

mandate has been adhered to by both the fact finding courts. After reproducing the pleadings, framing of the issues, issue-wise findings has been given by the Judge. The testimony of each witness has been noted and taken care of. The judgments of Rameshwar Dayal (supra) and Santosh Hazari (supra) relied upon by the learned counsel for the appellant as also those mentioned in the first substantial question of law have no application. The judgment is neither shoddy nor unreasoned; for this reason alone, the judgment is not liable to be set aside.

15. As noted by the Supreme Court in the case of Santosh Hazari (supra), the High Court sitting in a second appeal can interfere only if a substantial question of law is raised; its hands are tied; if no question of law arises, it cannot interfere; only on a substantial question of law, interference is called for.

16. Ex.PW 6/1 is the site plan of the said property. The houses of the plaintiffs i.e. house nos. 820-A, 820-B and 820-C are depicted in yellow, blue and green colour. House no.820 is in front of and adjacent to house no.820 which is the house of their father. It is not disputed that house number 820-A, 820-B and 820-C have been built after the construction of house no.820; they have in fact come into existence only 3-4 years prior to the filing of the suit as is evident from the evidence adduced from the courts below; they are extensions of house no. 820. The site plan shows that access to the houses of the plaintiff i.e. 820-A, 820-B and 820-C which are in continuity and in contiguity with one and another is through house no.820. This is also the version of the defendant in his statement recorded under Order X of the CPC on 22.3.2002. The disputed passage has been depicted in red colour in the site plan. This falls

in the portion in between the houses of Ram Singh and Bishamber on the one side and Kehar Singh and Shiv Charan on the other. After the street ends there are dotted lines in Ex.PW6/1 depicting an end/closure. This is also the categorical statement of the defendant recorded on 22.3.2002 (under Order X of the Code) wherein he has stated that at both ends of the disputed passage there are doors of the defendant. Contention of the defendant that this disputed portion is a part of their compound/property is borne out. After the disputed portion ends, there is Pahar/rocky area in front of which again there is an open passage. Houses of the plaintiffs are accessible through the house of their father. This is the categorical fact finding of both the courts below and does not in any manner call for interference. Plaintiffs cannot set up a new claim and stake their right to the disputed passage/street which is the dividing street between the houses of Ram Singh and Bishamber on the one side and Kehar Singh and Shiv Charan. It cannot be said that the plaintiffs have no other means to access their houses.

17. Courts below have held that disputed property is not a public street. This is a private land belonging to the defendants. Plaintiffs have not acquired any easementary right of necessity/right of way. Section 4 of the said Act defines an easement as a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do an 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. Counsel for the appellant has not pressed any

claim on easement by prescription. His argument is based on easementary right of necessity/right of way.

18. In the instant case, the plaintiff has prayed for his right to lay down water and electricity pipes in this disputed property. It is not his case that he was earlier enjoying this right; it is not as if what he had been enjoying earlier is now sought to be interrupted or taken away. Sections 13 and 14 of the said Act deal with easement of necessity/ quasi easements and direction of way of necessity. Section 13 and 14 read as follows:

“13. Easements of necessity and quasi-easements-
Where one person transfers or bequeaths immovable property to another,-

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter

as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

14. Direction of way of necessity.- When [a right] to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.”

19. Clauses a, c and e of Section 13 are called easements of necessity. Before the application of this section, what is a pre-requisite is a transfer or bequest of an immovable property to another. In other words, easement of necessity is one which the law creates; according to the doctrine of implied grant in a particular case and is one without which the dominant tenement cannot be used at all. The right of easement of necessity is implied only in cases of severance of tenements; unity of ownership of the dominant and servient tenement at one time or other is essential. This very first condition which is required to be fulfilled is that immovable property has either to be transferred or bequeathed. An easement of necessity is in fact an easement without which the property cannot be used at all and not merely one for the reasonable enjoyment of the property. In considering the question of easement of necessity absolute necessity and not mere convenience is the test. It is one which is needed absolutely for the enjoyment of property.

20. Both the courts below have recorded a cogent and clear finding that this is the private land of the defendants over which

the plaintiffs have failed to show that it was in their use. No easementary right as such has accrued in their favour. Such a right necessarily encompasses that on the severance of a tenement, the easements that arise are easements of necessity or continuous and apparent easements, which are necessary for the reasonable enjoyment of the property granted. Applying this test to the facts of the instant case, it is clear that it can in no manner be said that the plaintiffs right to enjoy this property cannot be enjoined or has been lost by not granting to him the relief claimed by him.

21. The defendant has all along taken the plea that the properties of the plaintiffs are illegal structures. This is his contention raised in the written statement. What the plaintiffs now seek is the legalization of this illegal structure by getting the stamp of approval from the Court permitting him the laying of electric and water pipes through this private portion of the defendants. The statement of the defendant recorded under Order X of the Code clearly states that the plaintiffs have access to their houses through the house of their father; it is not as if they have no other means to approach their houses. Even otherwise in view of the definition of 'easement' as contained in Section 4 of the said Act, easementary right would not include permission to lay down electric fittings or water pipes in the portion of the another. This is not the ambit and scope of the definition of 'easement' as contained under Section 4 of the said Act. The judgment of Justiniano Antao and Ors. (supra) related to the motorable access to the house; it is distinct on its facts. In that case easement by way of prescription not having been established the claim of the plaintiff has been dismissed. Easementary right by way of

prescription has not been argued before this court. The argument of the appellant has been confined to easementary right by necessity/right of way. The judgment of the bench of the Calcutta High Court Pravabati Roy (supra) is also inapplicable. It related to a right of passage where the two courts below had given concurrent findings that this passage has been used by the plaintiff and in fact she had no other mode of access to her bathroom except through the said passage.

22. As already aforenoted there has been no admission by the defendant in his statement under Order X of the Code of which gainful advantage can be taken by the appellants. The judgment of Shri Rajiv Srivastava (supra) is inapplicable. Further the compromise deed Ex.PW2/2 had been held by the both the fact finding courts below to be a compromise under coercion which was not binding on the parties. These fact findings cannot be re-addressed or re-visited by the second appellate court.

23. All the aforenoted substantial questions of law have been answered. There is no merit in the appeal. The appeal as also the pending application is dismissed.

(INDERMEET KAUR)
JUDGE

NOVEMBER, 10, 2010
SS/nandan