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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA No. 211/2014 & CM No. 13473/2014

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2nd August, 2016

**SHRI JAGDISH PRASAD GUPTA (DECEASED) THROUGH HIS LRs &
ORS.**

..... Appellants

Through: Mr. Subhash Garg, Advocate.

versus

UNION OF INDIA & ANR.

..... Respondents

**Through: Ms. Barkha Babbar and Ms. Dipanjali
Tyagi, Advocates.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit impugning the Judgment of the First Appellate Court dated 28.7.2014, by which the first appellate court has set aside the Judgment of the Trial Court dated 25.7.2011. Trial court by its judgment had decreed the suit filed by the appellants/plaintiffs and allowed appellants/plaintiffs to use the passage in property no.39, Civil Lines, Delhi. The first appellate court by its impugned judgment has held that the passage in question is part of the private property no.39 belonging to the Government/Union of India, and therefore, the appellants/plaintiffs can claim no

right in the private passage/land. The right was claimed by the appellants/plaintiffs in the passage as an easement of necessity.

2. At the outset, I would like to observe that the first appellate court has, very thoroughly, exhaustively, analytically and with appropriate reasons decided the first appeal, and if it was my option I would simply dispose of this second appeal by adopting every paragraph and the reasoning of the first appellate court, because this Court could not have used better language and better reasoning than as has been done by the first appellate court. In order to show that what is being said by this Court about the thorough judgment passed by the first appellate court, let me refer to paras 11 to 25 of the judgment of the first appellate court, and though the same will make this judgment prolix, I would still seek to reproduce the same. These paras 11 to 25 read as under:-

“11. As laid down by the Hon'ble Delhi High Court in the judgment titled as "Sanjeev Kumar Jain vs. Sh. Raghubir Sara Charitable Trust Ors., reported in 2004 VIII AD (Delhi) 398, the plaintiffs, to avail the benefit of section 13 of Easement Act, have to satisfy the following conditions:-

(i) use of the passage was of necessity; and

(ii) no ingress and egress is possible to the said property except through the passage or if the sanctioned passage alone has to be used it would render at naught the utilization of the said property.

12. In the suit, the plaintiff claimed the easement of necessity on two grounds (i) that since decades the passage has been used for ingress and egress to the said property and (ii) that the passage is the only direct access to the plaintiffs property i.e. the said property.

13. Before ascertaining as to whether the plaintiffs satisfied the conditions as mentioned above to claim the easement of necessity, it is inevitable to discuss the description of the plots no. 39 and 45 and the properties existing on the same and the right of the respective parties on those plots.

14. **Plot no. 39:** Admittedly, the plot no. 39 is located at the eastern end of the plot no. 45 and is in the ownership of the defendants. At a distance of of 62 feet from the end of the plot no. 45, CPWD Quarters (now the Delhi University Metro Station) exists on the front side while the defendants have allowed the usage of the back side of the same by Education Department. It is nowhere the case of the plaintiffs that from CPWD Quarters or the land allotted to the Education Department, any entrance exists towards the space left between the plot no. 45 and that construction. The space left in between is shown as the passage in the site plan Ex. PW1/18. As per site plan Ex.PW1/18, at the end of the passage from the main road, there is a wall and behind that there is defence establishment. The passage is the part of plot no. 39 and is in ownership of the defendants. As such, the passage is not the common passage.

15. **Plot no. 45:** At the western side of the plot no. 39, there is plot no. 45. Case of the plaintiffs is that the plot no. 45 admeasuring 3.2 acre belonged to Sh. R.S. Chaudhary Banarasi Dass who vide registered Will dated 04.01.1961 bequeathed the same in favour of his son namely Sh. Inder Prasad Chaudhary (IPC) who in turn sold the same to M/s. Rentiers & Financers Pvt. Ltd. (RFPL) vide registered sale deed dated 20.11.1960. RFPL raised the construction on the same in the year 1962-63 which is known as Riviera Apartments (RA) as shown Block-C in site plan Ex.PW1/18. On 07.02.1973, RFPL applied for sanction plan for the remaining area of plot no. 45 with MCD and the same was sanctioned for the period up to 02.08.1975 for construction on four plots in Block B i.e. 45/3-B, 45/4B 45/5B and 45/6B also. Vide sale deed dated 17.12.1973, RFPL sold plot no. 45/6B to Sh. Siya Ram Aggarwal (SRA) who in turn sold the said plot to the plaintiff vide the sale deed. Resultantly, the plaintiffs constructed two and a half storied building i.e. the bungalow no. 45/6B, the said property on the said plot. According to the plaintiffs, RFPL, in addition, delivered an additional land of 70 sq. yds. to SRA, however, the same was not proved.

16. Admittedly, at the eastern side of the said property, the plot no. 39 falls. Statement of DW5 reveals that the main entrance of the said property is at western end of the same. However, in the evidence, the plaintiffs tried to build up a case that they had the entrance at eastern side also i.e. towards the passage, but, the plaintiffs failed to prove that that was the main entrance of the said property and was sanctioned also. Hence, it can be held that the plot no. 39 as well as the passage falls at the back side of the said property and also the other properties no. 45/3B, 45/4B and 45/5B. Therefore, it is wrongly stated by the plaintiffs in the plaint that the passage falls at the front side of the said property. The entrance from the Mall Road to the plot no. 45 is separate and is direct from the Mall Road itself and is common for RA and the other properties situated therein including the said property. Hence, it can also be held that the main entrance of the said property is from the western side as per site plan Ex.PW1/18.

17. In view of the foregoing discussions, it can be held that the plot no. 39 is in the ownership of the defendants and is exclusively belongs to them and falls at the eastern side of the plot no. 45 and construction existing thereon. Further, the back side of the bungalow no. 1 and the bungalows no. 45/3 B to 45/6 B, situated on the plot no. 45, acts as the boundary wall separating the plot no.45 from the plot no. 39 and the passage is the part of the plot no. 39. Therefore, it can be held that the plaintiffs are claiming the right to access from the back side of their property i.e. the said property through the passage falling in plot no. 39. Now the question arises as to whether the easement of necessity claimed by the plaintiffs pertaining to the passage is sustainable in law.

18. The question arises when the said property came in existence. It is the own case of the plaintiffs that RFPL constructed the RA in the year 1962-63; on 07.02.1973, RFPL applied for sanction plan to raise the construction in the remaining portion of the said plot; and the sanction was revalidated till 02.08.1975. In the meantime, on 07.12.1973 i.e. after applying for sanction, RFPL sold the said plot to SRA who in turn sold the said plot to the plaintiffs on 11.12.1980. It is the own case of the plaintiffs that they constructed the said property though no specific date is mentioned. Hence, it can be held that till 11.12.1980, the said property was not in existence on the said plot.

19. Regarding possession of the said plot, the plaintiffs tried to build up a case that otherwise, they had come into the possession of the said plot in 1976 vide an agreement to sell. However, the said agreement to sell was not proved. Even the date of the said agreement was not disclosed by the plaintiffs in the plaint. As such, the plaintiffs though pleaded that they came in possession of the said plot in the year 1976 through an agreement to sell but, they failed to prove the said fact.

20. Now the question arises whether the plaintiffs could open the gate towards the plot no.39 from the back side of the said property. Reliance is placed upon the clause (ix) of sale deed Ex.PW1/D-5A dated 17.12.1973 executed by RFPL in favour of SRA which provides that the vendee shall have the right to use and park his car on the 30 feet wide private road of the vendors and the vendee shall not make such changes in plot no. 6 or the building to be constructed thereupon which affect adversely the adjoining properties. Another sale deed dated 11.12.1980 Ex.PW1/D-1 provides the description of the said plot wherein it was specifically mentioned that at the eastern side, there was a government land and at the western side, there was a 30 feet private road. It is nowhere the case of the plaintiffs that they were not aware about the sale deed dated 17.12.1973. In view of the foregoing discussions, it can be held that in the year 1973, not only a separate passage was provided in the plot no.45, but also it was made clear that no construction adverse to the plot no. 39 would be raised by the purchaser i.e. SRA from whom the plaintiffs purchased the said plot. It can also be held that the plaintiffs purchased the said plot knowing fully well that at the eastern side,

there was a government land and at the western side, there was a 30 feet passage/road for usage of occupants of the plot no. 45 and they could not raise any construction towards the plot no.39 which adversely affect it. Hence, it can be held that the plaintiffs had no right to make an entry towards the plot no.39 from the back side of the said property.

21. Counsel for the plaintiffs pleaded that initially, the defendants had allowed the erstwhile owner to use the passage, therefore, the plaintiffs are also entitled to the same. As discussed above, the sale deeds mentioned above show that none of erstwhile owners claimed any right, title or interest on the passage or its usage nor made any representation to that effect to the plaintiffs. Rather, in view of the sale deeds Ex. PW 1/D-1 and Ex.PW 1/D-5A, the plaintiffs were debarred to raise any construction towards the plot no.39.

22. Regarding usage of the passage, case of the defendants was that only 25 feet X 250 feet area as shown X-3- X-4 in site plan Ex.DW2/2 was allowed to be used by the occupants of the bungalows no.45 that too on temporary basis. The plaintiffs failed to rebut the same. Further, perusal of the letter dated 15.02.1977 Ex.PW1/1 reveals that only the original gate was allowed to be used by the owners of the bungalows no. 45 **till a decision be taken by the competent authority.** The defendants though pleaded that the said permission was withdraw later on but failed to prove the same. But it can be held that the said permission was not unconditional and was merely temporary in nature. Later on, vide letter dated 12.05.1979, the defendants stated that the said portion was allowed to use, however, it was found that the occupants had unauthorizedly occupied additional area of 226 additional also and called upon them to vacate the same. Subsequently, vide letter dated 22.12.1982 Ex.PW1/6, the defendants again reiterated that the said permission was granted subject to final decision. Hence, it can be held that at no point of time, any permission was granted to use the entire passage and the permission which was granted to use the limited portion X-3 and X-4 was temporary in nature. In the judgment titled as "Hero Vinoth v. Seshammal", reported in AIR 2006 SC 2234, it was held:

"29. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily

recognized in Section 41. Such an easement will last only as long as the absolute necessity exists....."

23. In view of the foregoing judgment and discussion, it can be held that the temporary permission granted to use the portion X-3 and X-4 of the passage as shown in site plan Ex.DW 2/2, was of no consequence. It can also be held that the finding of the trial court that the passage was being used for ingress and egress to the said property for the last 40-50 years is contrary to the judicial record because no such case was pleaded nor proved by the plaintiffs. Therefore, merely because the passage was shown as a temporary passage in the records as pleaded by the plaintiffs is of no consequence.

24. There is nothing on record to suggest that the occupants of RA ever pleaded about insufficient or inconvenient access to that apartment. The record suggests that the other occupants of bungalows situated on the plot no. 45 though initiated some litigation claiming access through the passage but later withdrew the same. Hence, it can be held that on the date of the institution of the suit, no other occupant of any property existing on plot no. 45 raised any plea as to insufficient or inconvenient access or drive way to his property.

25. Admittedly, the plaintiffs have a 30 feet wide metalled road in front of the main entrance of the said property at the western side and is being used by the occupants of the plot no. 45. It is not the case of the plaintiffs that the said passage is not convenient to approach the said property or caused any hindrance in the drive way. It is also not the case of the plaintiffs that if they are not allowed to use the passage the same would render the said property useless. Their mere insistence is that the passage is a direct access to the said property. The plaintiffs have failed to explain once a metalled road with sufficient space having sanction of the competent authority approaching to the main gate of the said property is there and the plaintiffs have no sanction plan to open the gate at the back side towards plot no. 39, then why they are insisting for the passage only which according to them is temporary in nature and is not allowed in the sale deed in their favour also. It is not a case where the plaintiffs are seeking easement right on the basis that the plot no. 39 has blocked their right to air and sunlight but their case is that they be allowed to use the passage as drive way despite the fact that a permanent drive way with metaled road is available to them. Therefore, I am of the opinion that the plaintiffs failed to satisfy the conditions to claim the easement of necessity. Therefore, no easement of necessity can be granted only on the ground that it would be more convenient for the plaintiffs to use an alternative way to the said property despite the fact that a permanent, convenient and sanctioned road already existed to reach the said property. Therefore, the trial court erred in enforcing a right of way under section 13 of the Easement Act merely because it would be more convenient for the plaintiffs." (emphasis is mine)

3. Reading of the aforesaid paragraphs shows that the first appellate court has arrived at the following conclusions:-

(i) Appellants/plaintiffs claimed right in the passage only as an easement of necessity i.e the appellants/plaintiffs do not claim any ownership rights in the subject passage.

(ii) The right of easement by necessity, even if it is proved to have come into existence, the same is lost if there is available another alternative right for ingress and egress to the property of the appellants/plaintiffs, and which alternative road ie ingress and egress to the property of the appellants/plaintiffs being property no.45/6-B exists because the property of the appellants/plaintiffs has a direct access from the main Mall Road which is a metalled road of around 100 ft. in width by a 30 ft. wide metalled road being the approach available to the plot of the appellants and which is also the approach road to the adjoining properties bearing nos. 45/1, 45/2, 45/3, 45/4 and 45/5 which belonged to other owners. All these properties have the disputed passage on their eastern side whereas there exists the entrance road (directly from the Mall Road) being a 30 ft. metalled road existing at the western side of all these plots including the plot of the appellants/plaintiffs.

(iii) One of the owners in the chain of the original owners of the entire plot no.45 was a company called as M/s Rentiers and Financiers Pvt. Ltd.

(RFPL) and who sold the suit plot to the predecessor-in-interest of the appellants/plaintiffs Sh. Siya Ram Aggarwal (SRA) and which predecessor-in-interest further sold it to the appellants/plaintiffs only on 11.12.1980, and therefore till 11.12.1980 there was no construction which existed on the suit plot for claiming entitlement to use the so called easementary passage forming part of the adjacent private property no. 39 of the Union of India (defence land).

(iv) Appellants/plaintiffs claimed possession of the plot since 1976 vide an agreement to sell but no such agreement was proved on record and in none of the chain of the title deeds of the suit plot there is at all any clause of entitlement of such owners/persons to ownership rights or easementary rights in the subject passage which fell to the western side of plots no. 45/1 to 45/6-B.

(v) The documents being the Letter dated 15.2.1977 of the Union of India/defence department Ex.PW1/1 with a subsequent Letter dated 22.12.1982 Ex.PW1/6 only refer to a permission of temporary user and which was only till a decision was taken by the competent authority.

(vi) There is nothing on record to suggest that occupants of plot nos. 45/1 to 45/6-B pleaded and proved about unavailability of access to their plots, and which obviously is because each of these plots owners have a direct access to the metalled Mall Road from their plots by means of 30ft. wide metalled approach road adjoining these plots.

4(i) In addition to the aforesaid conclusions of the first appellate court, in exercise of the powers under Order XLI Rule 24 CPC read with the ratio of the recent judgment of the Supreme Court in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782*, I would like to give additional reasoning to uphold the judgment of the first appellate court as given immediately hereinafter. The subject suit was filed by the appellants/plaintiffs on 18.5.1983. As per Section 15 of the Indian Easements Act, 1882, a right of easement against a government property can only be claimed if the easement is claimed for 30 years, and which period is 20 years in case of private property. In the present case, assuming that there is at all available any easementary right of necessity under Section 13 of the Indian Easements Act to the appellants/plaintiffs then such right would not mature into a legal right unless it is found to be used for 30 years because the best case of the appellant is, use of the passage since 1976 under a non-existent agreement to sell, with the factum proved on record that the user is only since around December, 1980, and therefore even taking user since 1976, under no circumstances period of 30 years as provided in Section 15 for claiming easementary right against the property of the government stands established for the appellants/plaintiffs to claim rights in the subject passage on filing of the suit in May, 1983.

(ii) I would only further note that even a right of easement as rightly held by the first appellate court by reference to judgment in the case of ***Hero Vinoth (Minor) Vs. Seshammal (2006) 5 SCC 545*** that such a right of easement of necessity will only arise if there is no other access to the land of the appellants/plaintiffs, and for the sake of argument let us assume there exists inconvenience in the existing passage of 30 feet metalled road available to the appellants/plaintiffs, yet there cannot arise any easement of necessity as it is not as if there is no other road to the property of the appellants/plaintiffs except through the subject passage in the private property no.39 of the Union of India. This judgment in the case of ***Hero Vinoth (Minor) (supra)*** is referred to by the first appellate court in para 22 of its judgment. Para 22 of the judgment of the first appellate court has to be read with the observations in para 11 of the judgment which states that no easement by way of necessity can be claimed unless ingress and egress is impossible to the property of a person except through the passage in which easementary right of necessity is claimed.

5. Therefore, looking at the issue from any manner being, the exhaustive and the thorough judgment of the first appellate court dealing with all aspects, the fact that there cannot be any easement of necessity under Section 13 of the Indian Easements Act because the appellants/plaintiffs have their own 30 ft. metalled road to reach the main metalled road i.e non use of the subject

passage does not mean that appellants/plaintiffs cannot approach their property, the right of easement has not been proved to be existing for 30 years, being the legal requirement of a complete cause of action as per Section 15 of the Indian Easements Act, hence, appellants/plaintiffs really have no case and the endeavour of the appellants is only to somehow or the other to encroach upon the private government land.

6(i) Learned counsel for the appellants/plaintiffs has argued that the following aspects raise substantial questions of law, and that consequently the judgment of the first appellate court should be set aside and the judgment of the trial court should be restored.

(ii) The witness DW-5 Sh. Ramesh kumar Goel who deposed on behalf of the respondents/defendants conceded that in the lay out plan dated 30.3.1972 there existed a kacha road 50 ft. wide in the eastern side of B Block of 45 Mall Road, and as per the appellants/plaintiffs this admission of DW-5 is sufficient for decreeing the suit of the appellants/plaintiffs. This admission of DW-5 is sought to be buttressed by reference statements of the witnesses in the affidavits of DWs Major Neeraj Saini, Lt. Col. Kuldeep Singh which state that the plaintiffs and their survivors use the passage and as per the appellants/plaintiffs these are therefore admissions in favour of the appellants/plaintiffs of legal rights existing in the subject passage.

7. In my opinion, the argument urged on behalf of the appellants/plaintiffs has no substance whatsoever because merely because there is found to exist a passage in property no.39 as stated by DW5 would not mean a legal right automatically exists and can be so claimed on that passage by the appellants/plaintiffs or their predecessors-in-interest because a right can be claimed only if the same is a legal right, and a legal right can exist in a passage only after appellants/plaintiffs proved their entitlement as an easement of necessity noting that admittedly the appellants/plaintiffs did not claim any ownership rights in the subject passage. Easement of necessity as per Section 13 of the Indian Easements Act does not arise because appellants/plaintiffs and other owners of plot nos. 45/1 to 45/6-B have their direct access to the main Mall Road from their own metalled road 30 ft. wide, with the further aspect that easementary right can mature into a legal right only if it is found to be proved to be enjoyed for 30 years as per Section 15 of the Indian Easements Act against a government property, and in proving which the appellants/plaintiffs have miserably failed. Therefore, neither there is any easement of necessity nor any matured right exists in favour of the appellants/plaintiffs in view of Section 15 of the Indian Easements Act and thus appellants/plaintiffs cannot take any benefit of the so called admissions of there existing a passage in property no.39 belonging to the respondent/defendant/Union of India and the same being used by appellants/plaintiffs and their predecessors.

8. The present suit filed by the appellants/plaintiffs is a classic case of such persons in today's age seeking to encroach upon an appropriate valuable property of third persons and especially belonging to the government. The litigation initiated by the appellants/plaintiffs is not only baseless but driven by their greed to succeed in their false claims to claim legal rights over a passage, existing not on their own land but on separate private land of Union of India, and that too when there is no issue of lack of existence of any ingress and egress to the property of the appellants/plaintiffs or for that matter the other owners of properties nos. 45/1 to 45/6-B and all of whom have a 30 ft. metalled road for reaching their respective premises/plots/buildings and which 30 ft. wide road ultimately opens on to the main Mall Road approximately 100 ft. wide. It is high time that courts must ensure that in such frivolous litigations exemplary costs are imposed on persons who in spite of having no legal case, but only on account of their greed for misappropriating valuable immovable property in the form of a passage of Union of India, have filed this litigation. Accordingly, no substantial question of law arises for this second appeal to be entertained under Section 100 CPC and therefore this appeal is dismissed with costs of Rs.2.5 lacs against the appellants/plaintiffs. Costs shall be paid within a period of four weeks from today by means of cheque drawn in the name of Prime Minister's National Relief Fund.

9. List before the Registrar General on 7th September, 2016 for ensuring compliance of the order of deposit of costs.

AUGUST 02, 2016
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VALMIKI J. MEHTA, J

