

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 29 OF 2020

Alka Rameshrao Raut and ors. -Vs. Pramod Vasantao Dhepe and ors.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. M.A.Sable, counsel for the appellants.

CORAM : MADHAV J. JAMDAR, J.

DATED : 12.03.2020.

1. Heard Mr. M.A. Sable, learned counsel for the appellants. This is a classic case, where the observations of the Supreme Court set out in the judgment in the case of ***S. P. Chengalvaraya Naidu (Dead) By LRS. Vs. Jagannath (Dead) By LRS. And Others***, reported in (1994) 1 SCC 1 are applicable, wherein the Hon'ble Apex Court in paragraph No.5 has held as under:-

“The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders,

bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation”.

2. However, in spite of pleading totally false case, this case has reached up to this Court by way of the present Second Appeal.

3. The learned Advocate Mr.M.A. Sable, has argued that substantial question involved in this Second Appeal is that the Courts below have not considered the arrangement deed dated 03.08.1996 in proper perspective. At this stage, only it is to be mentioned that both the Courts have recorded concurrent finding that said alleged arrangement deed dated 03.08.1996 is fraudulent, sham and bogus document created for the purpose of defeating the rights of defendant nos.1 to 6 i.e. respondents nos.1 to 6 herein.

4. Before considering the substantial question raised by the learned Advocate of the appellant, it is necessary to set out the factual position. The defendant

nos.1 to 6 are the teachers and from time to time respective defendants purchased small plot of land out of survey no.1/1 from defendant No.7 i.e. the husband of present appellant-Plaintiff and father of the present appellant Nos.2 and 3 i.e. plaintiff Nos.2 and 3 and after purchase of respective portions of land they constructed respective residential houses thereon. Thus, accordingly the defendant no.7 by registered sale deed dated 14.05.1997 (Exh.90) sold the portion of plot to defendant no.6, sold another portion of plot to defendant nos.3 and 4 out of survey no.1/1 jointly by registered sale deed dated 12.04.2001(Exh.91), sold plot out of survey No.1/1 to defendant no.1 by registered sale deed dated 07.02.2002 (Exh.89) and sold plot from said survey no.1/1 to defendant no.5 by registered sale deed dated 07.02.2002 (Exh.92). In all these sale deeds which are executed from about 1997 to 2002 as set out hereinabove it has been specifically mentioned that 10 ft. way from Warud to Morshi road up to the plot of defendant no.3 from property of defendant no.7 was granted by the defendant no.7 to the defendants nos.1 to 6. Thus, it is clear from the perusal of all these sale deeds (Exhs.89 to 92) that it is unambiguously stated that defendant no.7 has granted right of said way to the defendant nos.1 to 6 from his property bearing survey no.1/1 of Village Jarud as

various portions of said survey no.1/1 were sold from time to time to defendant nos.1 to 6 by the defendant no.7, husband of the present appellant no.1-original plaintiff no.1 and the father of the appellant nos.2 and 3. The record further reveals that defendant nos.1 to 6, who are teachers, started construction of their houses and completed the same immediately after purchase of respective portion of land by them and using the disputed way throughout since then.

5. In this background of the matter, it is pertinent to note that in the Regular Civil Suit No.29 of 2005 came to be filed by the plaintiffs i.e. wife and sons of the defendant no.7, on 09.05.2005 by taking contention that the plaintiff recently came to know that the defendant no.7 had sold the various portions of said land to defendant nos.1 to 6. It is further mentioned in the plaint that the said sale-deeds were executed by the defendant no.7 under the influence of liquor and further particularly the clause regarding right of way was included in the sale-deed by taking disadvantage that the defendant no.7 is addicted to liquor. It is also contended in the plaint that as the defendant no.7 was habitual drinker and having illicit relationship with women his relations with plaintiffs were strained and therefore the said arrangement deed

dated 03.08.1996 was executed and according to which the portion of land from which the said right of way was granted and was allotted to the plaintiffs. It is further stated in the plaint that since execution of the said arrangement deed dated 03.08.1996 the plaintiffs and the defendant no.7 are staying separate. It is significant to note that although, all these sale deeds were executed from the year 1997 to 2002 and all the respective houses were constructed by respective defendants from time to time immediately after the purchase of the respective plots and although plaintiffs are staying in the adjoining house, false contention is raised that recently in 2005 the plaintiff came to know about the aforesaid sale by the defendant no.7. It is also significant to note that both the Courts have concurrently, found that the plaintiffs and defendant no.7 are staying in the same house and they are having a joint ration card and as far as the voters list is concerned, their names are also shown as residing in the same house. The courts below have specifically recorded that the plaintiffs have failed to prove the said arrangement deed.

6. It is further significant to note that the suit has been filed on 09.05.2005 and the said date is also very significant as the said suit was filed after the

orders were passed by the Revenue Authorities against defendant no.7 and appeal challenging the same came to be dismissed by an order dated 29.04.2005 and within a period of about 10 days the suit has been filed by the plaintiffs. The averments in the plaint show that the defendant no.7 was addicted to bad voices and behind their back without their knowledge, the defendant no.7 has executed all these sale deeds. It is further contended that land from which right of way was allotted belong to the plaintiffs as per arrangement deed dated 06.03.1996. As set out hereinabove, both the Courts have held that the said arrangement deed was fraudulently brought into existence for defeating the rights of defendant nos.1 to 6, who have purchased the respective plots by various sale deeds as set out hereinabove. It is significant to note that the plaintiffs have come up with a specific case that defendant no.7 is staying separately since 1996 as the relations between the plaintiffs and defendant no.7 are strained as defendant no.7 was addicted to liquor and having illicit relationship.

7. In this background a bare perusal of arrangement deed dated 06.03.1996 shows that, although the arrangement deed in the initial part narrates that his relations with the plaintiff i.e. his wife

and plaintiff nos.2 and 3 i.e. his sons are strained, however, in the last paragraph it is stated that the defendant no.7 would stay with his wife till he is alive. Thus, it is clear that the case put up by the plaintiffs that since 1996 the defendant no.7 is staying separately is totally false. The Courts below have concurrently held that the plaintiff and the defendant no.7 are staying in the same house. It is also important to note that Courts below have concurrently held that this arrangement deed was fraudulently brought into existence just to defeat the rights of defendant nos.1 to 7. It is further significant to note that the defendant no.1 i.e. Pramod Dhepe (DW-1) in his testimony has stated that since from the date of purchase of their respective plots he along with defendant nos.2 to 6 respectively were using the disputed path way. He has further stated that plaintiffs and defendant no.7 obstructed the disputed way by raising construction of the shop premises over the disputed way and therefore, they lodged the complaint with the Gram Panchayat Jarud. The Gram Panchayat Jarud directed the plaintiffs and defendant no.7 to remove the said construction and further directed the plaintiffs and defendant no.7 that they should not obstruct the disputed way. As the plaintiffs and defendant no.7 did not abide by the said directions, they approached

Nayab Tahsildar and by an order dated 27.08.2002, the Nayab Tahsildar, Warud directed the removal of the said construction and imposed penalty on the defendant no.7. The defendant no.7 has challenged the said order dated 27.08.2002 of the Nayab Tahsildar before the Sub Divisional Officer Morshi, who by an order dated 30.08.2004 dismissed the said appeal. The said orders were challenged by the defendant no.7 before the Additional Collector, Amravati, who dismissed the said appeal by an order dated 29.04.2005 and immediately thereafter, the present suit came to be filed within a period of about 10 days i.e. on 09.05.2005.

8. It is also significant to note that when the proceedings are pending before SDO, Morshi the plaintiff no.1 has filed the application seeking that she be impleaded as a party and accordingly she was impleaded in the said proceeding as a party. The S.D.O Morshi, decided the matter against the defendant no.7 and plaintiff no.1 by an order dated 30.08.2004, however, it is significant to note that the appeal against the said order before the Additional Collector, Amravati was only filed by the defendant no.7 and not by the plaintiff no.1. It is further significant to note that as per said arrangement deed dated 03.08.1996

the property from which right of way was given was allegedly allotted to the plaintiffs and therefore, there was no question of raising construction by the defendant no.7 and his rights were not affected by aforesaid orders of the Revenue Authorities and therefore, he need not have challenged the said orders. Thus, it is clear that the appeals filed by defendant no.7 before Revenue Authorities and the present suit filed by plaintiffs are all collusive proceedings filed by the plaintiffs and the defendant no.7 in collusion with each other. It is very clear that the present suit is filed by the plaintiffs in collusion and at the instance of the defendant no.7 as he could not have filed the suit in view of specific term regarding right of way in the respective registered sale deeds executed in favour of defendant nos.1 to 6 respectively by him from time to time. It is significant to note that both the Courts below have concurrently held that the said arrangement deed dated 03.08.1996 is sham and bogus document and nothing has been pointed out by the learned Advocate of the appellants to demonstrate that the said findings is perverse finding.

9. In view of whatever set out hereinabove, the courts below are right in holding that the plaintiffs are estopped from taking contentions which they have

taken under Section 115 of the Indian Evidence Act, 1872. It is very clear that the defendant nos.1 to 6 have purchased various portions of said survey No.1/1 from the defendant no.7 from time to time as set out hereinabove, and constructed their respective houses since the year 1997 onwards and using the said way since then, and it is very clear that all the plaintiffs have complete knowledge of the said sale deeds and user of the said way by the respective defendants since 1997. Thus, case set out in the plaint that for the first time the plaintiffs came to know recently i.e. in the year 2005 that the defendant no.7 has sold the respective plots to the defendant nos.1 to 6 is totally false.

10. The Advocate of the appellant has relied on the judgment of Hon'ble Supreme Court in the case of *Justiniano Antao and ors. Vrs. Smt.Bernadette B.Pereira* reported in *AIR 2005 SC , 236* to contend that the defendant nos.1 to 7 have failed to lead evidence and failed to show that they have acquired right to easement by prescription. In that case, Apex Court has found that there is no specific averments in the plaint or in the statement of the witness showing that the access from the land of the defendants in that case was used as of right for the last 20 years. In this

particular case, this right of way is specifically set out in the respective sale deeds of defendant nos.1 to 6. The Hon'ble Apex Court in the Judgment in the case of ***Hero Vinoth (Minor) Vs. Sheshammal reported in 2006(6) Mh.L.J.593*** while setting out difference between the easement acquired by grant and easement of necessity held as follows:-

28. The question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not by anything else, Easement of necessity and quasi-easement are dealt with in [Section 13](#) of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under [Section 13](#) of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Any how the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only until such time as the

necessity was absolute; in fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of [Section 13](#) nor is it extinguished by the statutory provision under [Section 41](#) of the Act which is applicable only to easement of necessity arising under [Section 13](#).

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. Such a legal extinction cannot apply to an acquisition by grant and [Section 41](#) is not applicable in such case.”

11. The above observations are aptly applicable

to the present case and therefore, there is no substance in the contentions raised by the appellants. The contention that alternate road is available is also irrelevant for the aforesaid reasons.

12. Both the lower Courts have concurrently held that arrangement deed dated 03.08.1996 by which allegedly the portion of said land through which said way passes was allotted to the plaintiffs is a document brought into existence for defeating the rights of defendant nos.1 to 6 and the same is sham and bogus document. Therefore, there is no substance in the substantial question of law which was raised by the learned Advocate for the appellant that the Courts below have not considered in proper perspective the arrangement deed dated 03.08.1996, when, the Courts below have concurrently held that said arrangement deed dated 03.08.1996 is sham and bogus document. The learned Advocate of the appellant has failed to point out any material from the record to show that the said finding is perverse. It is clear that there is no substantial question of law involved in the present Second Appeal and therefore, the same is dismissed with costs.

JUDGE