

07.03.2022
SL No.10
Court No.8
(gc)

SA 83 of 2020

Arup Chatterjee & Anr.

Vs.

Pradip Kumar Ghosh

(Via Video Conference)

None appears on behalf of the appellants.

The second appeal has come up for admission. In order to ascertain whether any substantial question of law is involved in the second appeal for which the second appeal may be admitted, we take into consideration the relevant facts.

The plaintiff/respondent filed a suit claiming himself to be the absolute owner in respect of the 'A' schedule and 'C' schedule suit properties with easementary right over 'B' schedule suit property by virtue of a registered deed of sale dated 13th December, 1999. The defendant No.2 was the owner of the adjoining western side of the suit property. The plaintiff claimed that the defendants obstructed the plaintiff when he tried to clean the schedule 'C' septic chamber. The plaintiff approached the Trial Court with a grievance that the defendants on 28th July, 2013 illegally littered the said place with garbage, brickbats and other waste materials, after removing the cover of the manhole of the schedule 'C' septic chamber,

causing total blockage of the septic privy. The plaintiff, accordingly, prayed for declaration of his absolute ownership in respect of schedule 'A' and 'C' suit property along with easementary right over the schedule 'B' common passage, along with a declaration to clean the schedule 'C' septic privy. The defendants contested the said proceeding. In their written statement, the defendants alleged that they have purchased the suit property prior to the plaintiff by virtue of two sale deeds. The septic chamber as alleged by the plaintiff was not in a usable condition. The plaintiff has his own privy connected with sewerage of HMC and he never uses the schedule 'C', namely, septic chamber. The defendants further alleged that the plaintiff damaged the portion of the passage while taking electric connection and did not repair the damaged suit passage in spite of order passed by this Court. It is further alleged that schedule 'B' suit property is the only passage for the ingress and egress of the defendants whereas the plaintiff is in advantageous position of having other paths of ingress and egress, apart from, schedule 'B' common passage. The defendants filed a counter-claim, praying, inter alia, for a decree of declaration that the defendants have right, title and interest in the common passage by virtue of two purchased deeds dated 7th October, 1994. Along with a prayer for permanent injunction, the Trial Court initially framed eight issues and after going through the case

record on the basis of oral and documentary evidence has recast the said issues and this time framed nine issues. The Trial Court on consideration of the oral and documentary evidence had arrived at a finding that the defendants have duly proved that they have easementary right over the schedule 'B' as well as X common passage. The Trial Court expressed its doubt and apprehension with regard to the claim of the plaintiff in respect of schedule 'A' suit property. On the basis of the evidence in respect of Issue Nos.4, 5 and 6 which pertains to the defendants' counter-claim and the plaintiff's claim for exclusive ownership in respect of schedule 'A', 'B' and 'C' suit properties, the learned Trial Court made the following observations:-

“Now, the allegation of the plaintiff is that the defendants are creating obstruction, whenever the plaintiff is going to clean the septic chamber. And the contention of the defendants is that, the alleged septic chamber was an abandoned one. And the plaintiff has his own privy and separate septic chamber in his purchased property. The plaintiff just to harass the defendants, wants to block the only way of ingress and egress of the defendants over the common suit passage.

It remains a proven fact that the plaintiff is the owner of schedule A suit property.

It again remains a proven fact that, the plaintiff is the owner of the septic chamber mentioned in Schedule B suit property.

It once again remains a proven fact that, both the plaintiff as well as the defendants have easementary

rights over the schedule B as well as schedule X common passage, by virtue of Exhibit 1 and Exhibit A, B and C.

Now, the plaintiff being the owner of Schedule C, septic Chamber, has every right to repair the same. But at the time of repairing and/or cleaning the said septic chamber, the plaintiff must not cause any hindrance in the way of ingress and egress of the defendants, because the defendants alike the plaintiff have equal easementary right over the schedule B and/or Schedule X common passage.

Also, the defendants having easementary right, can repair the schedule B and/or Schedule X common passage, but without causing any sort of hindrance in the way of ingress and egress of the plaintiff. Because as discussed above the plaintiff also have easementary right over the schedule B common passage.

In **Krishnammal Vs. Periasamy**, Hon'ble Madras High Court, while deciding a case of similar nature, have observed and referred to an extract of **Mitra's 'Joint Property and Partition' - Tagore Law Lectures, Third Edition 1991, at page 254**, that, "When a common passage belongs to both the plaintiff and the defendant, there is no question of any one party having an easement right over the same. It is a joint property and any co-owner has to use such property reasonably in the sense that his user does not amount to ouster other co-owners. No co-owner can complain that the use of the common passage by the other causes an unnecessary or additional burden upon the common passage."

Thus the plaintiff as well as the defendants, both having easementary right over the schedule B as well as X Common passage has every right to use the same, but keeping in mind of the fact that, such

usage must not be injurious or detrimental to each other.

Because neither the plaintiff, nor the defendants can prevent each other from using the common passage in the way most beneficial to them. Once again the 'Learned author in **Mitra's 'Joint Property and Partition' – Tagore Law Lectures, Third Edition 1991, at page 254**, has stated that, "The principle underlying the enjoyment of common property is that one co-owner can use the common property to his maximum advantage, subject, of course to the rights of the other co-owner not being any way materially interfered with and without damaging or weakening the common property."

In this case the plaintiff is the owner of Schedule A suit property as well Schedule C Septic Chamber, having easementary right over the schedule B suit passage.

The defendants also have easementary right over the Schedule X counter-claim property.

The plaintiff being the owner of Schedule C septic Chamber has every right to clean the septic Chamber, but without causing any hindrance and/or disturbance and/or detriment to the user of the defendants in respect of Schedule B as well as Schedule X common passage.

The defendants having easementary right over the schedule X common passage has very right to repair the same, but without causing any hindrance or any kind of detriment to the user of the plaintiff."

The Trial Court, thus, arrived at a finding that the plaintiff was able to prove that he has easementary right over schedule 'B' common passage as owner of the schedule 'A' suit property. The said finding is arrived at

on the basis of Exhibit 1, that is, original deed of sale being No.1107 of 2000. Naturally, the defendants were restrained from interfering in the peaceful possession of the plaintiff's Schedule A, B and C suit properties. The said decree also recognized that the plaintiff was able to prove his ownership in respect of schedule C suit property on the basis of the aforesaid Exhibit and has every right to clean the septic chamber. Insofar as the counter-claim of the defendants is concerned, the Trial Court arrived at a finding that the defendants have easementary right over the suit passage, as mentioned in Schedule X of the counter-claim and, accordingly, the defendants do have the maintenance right of the same, but subject to the condition that such acts of maintenance of the suit passage shall not be detrimental and/or injurious to the plaintiff. The plaintiff was, accordingly, restrained from interfering in the peaceful user of the defendants in respect of Schedule X counter-claim property.

Before the Appellate Court, the appeal was preferred by the defendants. The plaintiff accepted the appeal. The principal grievance before the First Appellate Court was that the plaintiff is a subsequent purchaser and the Trial Court has failed to consider that the B-Schedule common passage was created long back prior to the purchase by the respondent and, accordingly, the Trial Court has committed an error on the face of record while disposing of the Issue Nos.1, 2 and 3 in favour of the plaintiff. But

there was no evidence on record suggesting that the plaintiff is the owner of the C Schedule property and there was also a clear error in arriving at a finding that there is a septic tank on the B Schedule common passage. These are the primary issues raised in the appeal. The Appellate Court has taken into consideration Exhibits 1 to 5 of the plaintiff and Exhibit A to I series of the defendants. On consideration of the oral and documentary evidence and on appreciation of the evidence, the Appellate Court has arrived at a finding that the deed exhibited by the plaintiff in respect of his purchase and other records would show that the plaintiff purchased A Schedule property with common passage and septic chamber which facts were never denied by the defendants/appellants.

The evidence of D.W.1 was taken into consideration to show that the said witness during his cross-examination admitted that there is a septic chamber over a portion of the said 9ft. common passage which is reflected in the deed of purchase of the plaintiff. The said D.W.1 also admitted that the septic chamber is lying in damaged condition causing problem for ingress and egress. He was evasive during his cross-examination. He was specifically asked who and when the said septic chamber was constructed over the common passage whereas there is a clear finding of the plaintiff that the said septic chamber was constructed after he purchased the said property. There was no mention of the existence of septic tank over

the common passage in the deed of the defendants. On the basis of such evidence, it is possible to arrive at a finding that there is existence of septic tank now over common passage. Accordingly, the Appellate Court has rightly put the question, “whether the said septic tank belonged to the plaintiff/respondent or is connect with the toilet and sewerage system of the plaintiff/respondent’ house?” The said question was answered in the following manner:-

“From the plaintiff’s Deed, the evidence of D.W-1 and PW-1 and the commissioner’s report, it reveals that the said septic tank is just attached to the house of plaintiff/res over the common passage which is also mentioned in the Ext-I Deed of plaintiff. Defendants as D.W-1 stated that he does not know when the said septic chamber was constructed. It is not the case of any body that this septic chamber is being claimed by anybody other than the plaintiff/respondent. D.W-1 has claimed that he has document to show that the said septic chamber is not connected with the property of 81/3, Kaliprasad Banerjee Lane, Howrah and he claimed that document is commissioner’s report. But on perusal of commissioner’s report nowhere it is found that any such information is given in the report that the said septic tank is not connected with the house of 81/3, Kaliprasad Banerjee Lane, Howrah that is the house of plaintiff/respondent.”

The Appellate Court, in our view, has rightly arrived at a finding that when there is mention of existence of common passage with the septic chamber in the deed of plaintiff, Exhibit-1, there is no reason to interfere with the findings of

the learned Trial Court that the septic chamber (C-Schedule property) belonged to the plaintiff but subject to the condition that the plaintiff would not cause any hindrance or disturbance of user of the said common passage by the appellants as mentioned in B-Schedule property of the plaintiff. Both the Trial Court as well as the Appellate Court on the basis of the evidence on record and preponderance of probabilities have passed the decrees in favour of both the parties to the extent indicated therein.

In view of the concurrent finding of facts with regard to the existence of the common passage of septic tank and right of user and such findings are possible on the basis of such evidence, we are not inclined to grant the second appeal as we do not find that the said findings are perverse or contrary to record.

Moreover, we do not find any substantial question of law involved in this second appeal.

Accordingly, the second appeal fails.

The second appeal being SA 83 of 2020 stands dismissed.

However, there shall be no order as to costs.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)