

21.06.2023
sayandeep
Sl. No. 01
Ct. No.652

CO 151 of 2018

Sri Nandan Jana
Vs.
Jagai ghosh @ Jagai Chanda Ghosh

Mr. Partha Pratim Ray
Mr. Mrinal Kanti Sardas
Mr. Gautam Das
Mr. Dyutiman Banerjee

.....for the petitioner

Mr. Pritam Choudhury
Mr. Satyajit Mahata

..... For the O.P.

This is an application under Article 227 of the Constitution of India against the order No. 26 dated 25.08.2017 passed by learned Civil Judge (Junior Division) 1st Court, Baruipur, South 24 Parganas in Misc. Appeal No. 1 of 2015. Petitioner contended that the opposite party herein instituted Title suit No. 146 of 2013 praying *inter alia* for a declaration of plaintiff's right of easement on the passage described in "C" schedule to the plaint. It has also been stated in the plaint that in the eastern side of the "B" schedule, there is a common passage for egress and ingress from the "A" schedule property through the said common passage which is 8 ft. width and 21 ft. 10 inches in length described in "C" schedule to the plaint. Petitioner's case is since the time of defendant's predecessor-in-interest the plaintiff's predecessor-in-interest are using the suit passage described in "C" schedule for their egress and ingress into the "A"

schedule property. Plaintiff also stated in his plaint that there exists no other common passage for their egress and ingress.

In the said suit, petitioner herein as defendant appeared and filed written statement and petitioner contended that there was no common passage which can be claimed by the plaintiff in the said suit for their egress and ingress. The plaintiff purchased the land from Mr. Prabir Ghosh and others in the year 1999 and Mr. Prabir Ghosh and others purchased the said land from Kishori in 1991 and in both the deeds there exists no common passage as claimed by the plaintiff.

In fact the right title interest and possession in the suit passage absolutely under the control of the defendant and plaintiff after 14 years of their purchase, claimed such right which is not sustainable in the eye of law. In the said suit an application under Order 39 Rules 1 and 2 was also filed for an order of injunction restraining the defendant from disturbing plaintiff's peaceful enjoyment of the suit passage. Petitioner herein filed written objection. By an order dated 20th November, 2014, the Trial Court disposed of the said injunction application restraining defendant from disturbing peaceful enjoyment of the property described in "C" schedule to the plaint.

Being aggrieved and dissatisfied with the said order, the petitioner herein preferred appeal. The Appellate Court after discussing the point involved

therein disposed of the said injunction matter. The Appellate Court was pleased to set aside the order impugned and directed both the parties to maintain *status quo* till disposal of the suit.

Being aggrieved by the said order dated 25.08.2017, the petitioner herein contended that the plaintiff has no *locus standi* to approach before this Court with the claim of easement right after expiry of 14 years and the Court below erred in failing to note that the statements made by the plaintiff is a concocted one. Learned Court below also erred in holding that the opposite party could not discharge the burden of satisfying the Court by leading evidence or otherwise that he had a *prima facie* case in his favour. Learned Court below erred in overlooking that no common passage claimed by plaintiff was mentioned in the deeds dated 24.06.1999 and 10.04.2013 by which property mentioned in 'A' and 'B' schedule to the plaint was purchased by the plaintiff from their vendors and in the instant case opposite party could not show that he has acquired any right which is required to be protected by way of any interim order. The order is otherwise bad in law and is not sustainable and accordingly the petitioner has prayed for setting aside the order.

In this context, he has relied upon a Judgment in the case of **Hero Vinoth (Minor) vs. Seshammal** reported in **(2006) 5 SCC 545**.

Mr. Pritam Choudhury, learned counsel appearing on behalf of the opposite party submits that the opposite party being the plaintiff has filed the present suit on the ground that he has acquired easement of necessity right over the suit passage . Now in order to prove his case that he has no other passage for his egress and ingress, he has already filed a local inspection commission petition and the said local inspection petition has been allowed by the Trial Court and the case is awaiting local inspection commissioner's report and the next date for filing such commissioner's report is on 14th September, 2023. He further submits that the Court below was justified in passing the order of *status quo* and unless the order of *status quo* is maintained, the object of filing the suit would be frustrated and as such the order impugned does not call for any interference. He further submitted that in the defendant's deed dated 10th April, 2013, passage has been delineated, which clearly establish *prima facie* case in favour of plaintiff for getting the order of status quo.

Easement of necessity arises when one property is severed into two and the two plots are so situated that one cannot be enjoyed without exercising a particular privilege in or upon the other. The rationale or legal basis of this kind of easement can be traced to the operation of an implied grant. Typically an easement by necessity is created by law as opposed to

mutual agreement or promise between neighbours. In essence, the “necessity” is for the non-landlocked property (servient tenement) to give rights of way to the landlocked property (dominant tenement). In case of granting injunction over a property on the ground of easement of necessity, plaintiff must, *prima facie*, establish that following land sub-division a parcel of land has become effectively landlocked and the landlocked property owner can only access the property by going through the passage and there is no other passage for egress or ingress. The convenience is not the test of an easement of necessity. Since plaintiff’s case revolves upon the prayer for easement of necessity, the plaintiff is required to *prima facie* establish aforesaid requirement in order to get an equitable relief.

Learned counsel appearing on behalf of the petitioner/defendant submits that he has already filed an amendment application which is also pending for hearing on 14th September, 2023, to incorporate in written statement about plaintiff’s another subsequent purchase deed which goes to show that plaintiff has alternative passage for his egress and ingress.

However, it appears that while both the Courts below disposed of the application they did not have the scope to consider from the local inspection report or from any subsequent deed or otherwise whether plaintiff has alternative passage to egress and ingress to adjudicate plaintiff’s case of absolute necessity. In view

of such matter, I think that the Court below is required to rehear injunction application on the issue of easement of necessity in the light of the commissioner's report as well as defendant's contention that the plaintiff has alternative passage for his egress and ingress in view of his other purchase deed No. 160805515 of 2019 dated 30th September, 2019.

Accordingly, the order impugned dated 28th November, 2014 is hereby set aside.

C.O 151 of 2018 is thus allowed.

The Trial Court is directed to hear the injunction application afresh after submission of Commissioner's report and after disposal of the amendment application filed by the defendant. Till disposal of the injunction application afresh, the parties will maintain *status quo* in respect of "C" schedule passage.

Trial Court will direct the Commissioner to submit his commission report within a period of 30 days from the date of communication of the order and the Trial Court is further directed to dispose of the pending amendment application within a period of 30 days from the date of communication of the order. The Trial Court will also dispose of the injunction application afresh as stated above within a period of 90 days from the date communication of the order.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Ajoy Kumar Mukherjee, J.)