

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.440 OF 1993

1. Namdeo s/o Gyanoba Jondhale (Dismissed as abated)
Age 50 years, Occu. Labourer,
R/o. Nanded, Itwara,
Nanded.

2. Deepak s/o Namdeorao Jondhale,
Age 28 years, Occu. Service,
R/o. Nanded, Itwara,
Nanded

...Appellants
(Orig. Defendants)

Versus

1. Chudabai w/o Vithalrao Jondhale,
Age 55 years, Occu. Household,
R/o. Itwara, Nanded.

2. Kiran s/o Vithalrao Jondhale,
Age 30 years, Occu. Labourer,
R/o. As above.

3. Harish s/o Vithalrao Jondhale,
Age 25 years, Occu. Labourer,
R/o. As above.

...Respondents
(Orig. Plaintiffs)

Mr. M.M. Patil Beedkar, Advocate for Appellant No.2.

Mr. S.S. Gangakhedkar, Advocate for the Respondent No.1.

Mr. S.L. Jondhale & Mr. R.S. Jondhale, Advocate for Respondent
Nos.2 & 3 (Absent).

...

CORAM : S.G. MEHARE, J.

RESERVED ON : 25.10.2023

PRONOUNCED ON : 04.01.2024

JUDGMENT :-

1. The appellants/defendants have impugned the judgment and decree of the learned IIIrd Additional District Judge, Nanded, passed in Regular Civil Appeal No.188 of 1991 dated 10.08.1993.

2. The parties will be referred to as their original status. The appellants will be referred to as the 'defendants', and respondents will be referred to as the 'plaintiffs'.

3. The brief facts were that the plaintiff's husband and father and defendant No. 1 were the real brothers. They had partitioned their properties with a third brother. The plaintiffs have received the extreme northern share, and the defendants have the southern portion of their ancestral property in partition. They did not deny the partition and three-foot lane between their houses. The plaintiffs had a case that they were enjoying their respective shares after the partition. However, towards the west of their houses, there is a way measuring 8 ft x 15 ft to reach the municipal road and then to the main road. It will be referred to as a disputed way. However, in December 1998, the defendants started constructing their house. Their construction was in violation of the Town Planning Act and Rules. They tried to encroach upon the disputed way and closed their use of it. The Municipal Council visited the spot of the incident and directed them to stop the illegal construction. The plaintiffs have come up with a case that they have a right of easement of necessity to

use the disputed way shown in the map and have sought perpetual injunction against the defendants from constructing any wall or blocking the disputed way.

4. The defendants contested the suit. They have barely denied the plaint and literally have no specific case.

5. The Court of First Instance had dismissed the suit; however, the First Appellate Court allowed the suit. Against the said judgment, the defendants are before this Court. This Court admitted the appeal on 10.11.1994 with the following order :

"Heard.

Admit. Ground Nos. 3 to 7 raise substantial questions of law."

6. Ground Nos. 3 to 7 have been reproduced as substantial questions of law as follows :

1. That the learned appellate Court has not considered that the plaintiff's case does not prove and satisfy the existence and basic ingredient as required by Sec.4 of the Indian Easement Act viz. necessity of use the disputed passage for the beneficial enjoyment of that property and dominant heritage over the defendant's property.

2. That the appellate Court has not considered the important aspect that the plaintiffs have admitted that the existence of entrance of northern side to their house as well as the existence of public road to the Northern side of their house.

3. That the appellate Court has not considered the evidence brought on record by the parties properly and made

an error in deciding the suit and the plaintiffs, by reversing the decree passed by the trial court.

4. That the appellate Court has not considered that plaintiff no.2 and their witness P.W. 3 in the evidence, admitted the fact that the disputed passage i.e. Municipal House No.7-3-14 C.T.S. No.1389, is purchased by one Mr. Anwar and the same passage is now in possession of Mr. Anwar and therefore the plaintiffs have no right or cause to file this suit.

5. That the Appellate Court has not considered that the plaintiffs have failed to prove that they are using the disputed property as right of way continuously for twenty years U/sec. 15 of the easement Act for the use and beneficial enjoyment without any interruption."

7. Heard the respective counsels at length.

8. Learned counsel for the appellant would submit that the candid admission of the plaintiffs that the space, which was claimed to be a road to approach the municipal road, is owned by one Anwar. Therefore, the plaintiffs cannot claim the easementary right against the defendants. There was no iota of discussion in the Appellate Court's judgment that one Anwar was the owner of the same strip of land, which is claimed to be the way. Anwar was not the party to the suit. Hence, the suit was bad for the nonjoinder of the necessary party. The First Appellate Court erroneously relied upon the Xerox copy of the map. For seeking relief under Section 4 of the Indian Easement Act, there shall be ownership of someone. He has referred to Sections 4 and 15 of the Easement Act. He would submit that there was no

evidence that the plaintiffs had been uninterruptedly using the disputed way for the last 20 years. Besides that, the plaintiffs had an alternate way from the northern side. Therefore, it was not an absolute necessity. Since there was no absolute necessity, there can be no easement of necessity. To bolster his arguments, he relied on the case of Shree Swayam Prakash Ashramam Vs. G. Anandavally Amma and others, (2010) 2 SCC 689. He would submit that there was another way available. Hence, plaintiffs cannot claim easement of necessity. He also relied on the case of The Roman Catholic Mission Vs. The State of Madras and another, AIR 1966 SC 1457. He prayed to allow the appeal.

9. Per contra, learned counsel for the plaintiffs would submit that the fact of closing down the disputed way has been proved as the Municipal Corporation took action against the defendants. The First Appellate Court has correctly appreciated the fact and concluded that the right to use the disputed way existed. However, the stray admission that one Anwar had purchased the land in front of the western side, which was irrelevant to the facts in question, has been incorrectly appreciated by the Court of first instance. The Court of First Instance incorrectly considered the admission regarding the alternate way from the northern side of the house. Since the disputed way to approach the main road was attempted to be blocked, the door was opened from the northern side

as the time gap arrangement. Barely having or creating an alternate way does not cease the right which was in existence. He has referred to Section 3(e) and 15 of the Easement Act. He relied on the case of Ashareddy s/o Narayanreddy Vs. Lingareddy s/o Lingappa and others, 2001 (2) Mh.L.J. 143 and Palaniswami Naicker Vs. Chinnaswami Naicker, MANU/TN/0506/1967.

10. Mostly, the facts were not disputed. The defendants did not specifically deny the existence of the disputed way. The defendants have simply denied the allegations levelled against them in the written statement. The defendants had no specific case that one Anwar owned the disputed way. Considering the arguments of both sides, first of all, it is to be determined whether the right claimed by the plaintiffs was the easement. More particularly, where neither the plaintiffs nor the defendants were the owners of the disputed way, it was a way in front of their houses. A fair reading of the plaint discloses that the plaintiffs had claimed the injunction against the defendants from closing the disputed way as it existed and was used. When the defendants started encroaching upon the disputed way by raising a new construction, the plaintiffs were seeking protection of the way that was already in existence and in their use to reach the municipal road and then the main road. As per the arguments of the learned counsel for the appellants, the basic ingredients as required in

Section 4 of the Indian Easement Act, were not in existence. Section 4 of the Indian Easement Act 1882 defines the easement as follows :

"An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and 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."

11. It is an admitted fact that the disputed way was not created after the partition of their ancestral property. It was in existence even before the partition. A fair reading of the plaint reveals that though the plaintiff had brought the case of easement of necessity, his case was primarily based upon the existence of the disputed way not owned by the defendants. Since both parties admitted that no one of them was the owner of the disputed way, and in the absence of the claim by any third party, it is presumed that it is a public road under the control of the local government. For creating a right, there must be a dominant and servient tenement. It is essential for the existence of an easement right that the burden of the enjoyment of the right must fall upon a tenement that is owned by a person different from the one who owns the dominant heritage. Unless there are two different owners, defined as a dominant owner and servient owner by Sec.4 of the Act, no right in the nature of an easement can flow. As per the definition of 'easement' in Section 4 of the Indian Easement Act, for an easement right, there must be two

tenements, a dominant tenement and a servient tenement, and the title of these two tenements must inhere in different persons. The facts of the present case were that the defendants were in their house, which was towards the south of the plaintiff's house. Though the plaintiffs claimed that they have the easement right, it appears from the pleading that they have a case of the existence of the disputed way, which was neither owned by them nor the defendants. Hence, it cannot be said that by merely claiming the easement right, the suit of the plaintiffs is liable to be dismissed. *Prima facie*, it appears that the right to enjoy the disputed way was tried to be obstructed. Sufficient material was before the Appellate Court. Barely pleading or claiming the easement right may not decide the fate of the suit. There appears substance in the submission of the learned counsel for the plaintiffs that the admission of ownership of one land by one Anwar has been misread. The defendants never denied the existence of the disputed way. The Municipal Corporation has also taken action against them. Therefore, though the plaintiffs have claimed the easement of necessity and failed to prove the same, it cannot be said they are not entitled to the relief claimed.

12. Relying on the case of Sree Swayam Prakash Ashramam (cited supra), learned counsel for the appellant has vehemently argued that the admission of the plaintiffs of having an alternate way from the northern side is not an absolute necessity. Since another way

exists, there can be no easement of necessity. This Court has already held that this was not the case of easement. It was a case of the existence of the disputed way not owned by either side and in use of the plaintiffs and tried to be obstructed by the defendants by illegal construction. Hence, the ratio laid down in the case of Sree Swayam Prakash Ashramam (cited supra) would not assist the defendants. Since the existence of the disputed way was admitted, no other evidence was required to prove its existence. The map the Appellate Court read was a plaint map, which the defendants never denied. Since the right to claim the easement was not the true case of the plaintiffs, the requisite ingredients of Section 15 of the Indian Easement Act were correctly not considered by the First Appellate Court.

13. On the above discussion of law and fact, the substantial questions of law nos. 1 and 5 have been answered that since the plaintiffs have no case of easement, there is no necessity to prove the ingredients of Sections 4 and 15 of the Indian Easement Act. Question of law no.2 is answered that since it was not the case of easement of necessity, the alternate way to use the property would not bar the plaintiffs from protecting the use of the disputed way. Questions of law nos.3 and 4 are answered that the First Appellate Court did not mistake in appreciating the evidence and not believing the admission that one Anwar was the owner of the disputed way.

14. For the above reasons, the Court concludes that there is no substance in the appeal. Hence, the following order;

ORDER

- (I) Second Appeal stands dismissed.
- (II) No order as to costs.
- (III) Record and proceedings be returned to the learned Court of first instance.

(S.G. MEHARE, J.)