

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

The Hon'ble Justice Supratim Bhattacharya

SA 3 OF 2017

Smt. Latika Sinha & Anr.

Vs.

Smt. Kakali Das & Ors.

For the Appellants : Mr. Soumik Ganguly

Mr. Dilip Kumar Sadhu

For the Respondent : Mr. Somnath Gangopadhyay

Nos. 1 and 4

For the Respondent : Mr. Tapas Kumar Ghosh

No. 2 Mr. Tanmay Chowdhury

Delivered On : 15.07.2025

Supratim Bhattacharya, J.:

1. The present appeal has been preferred assailing the judgment and decree dated 08.04.2016 passed by the learned District Judge, Hooghly in Title Appeal no. 141 of 2015.
2. Through the said judgment the First Appellate court has passed the following

"Hence,

Ordered

that the defendants are to remove the window shades jutting out on the B schedule property and also remove the open drain as well as opening of pipes from the B schedule property within a period of three months from the date of this judgment, in default the plaintiff/appellant is at liberty to put the decree passed by this Court into execution. No order as to costs. ...”

3. The present lis has been instituted by the respondent No.1 namely Smt. Kakali Das along with her husband the proforma respondent namely Goutam Das who were the plaintiffs in the trial court. The husband and mother of the present appellants herein was the defendant No.1 before the trial court, on his death the present appellants have been substituted. The respondent No. 2 herein that is Hooghly Chinsurah Municipality was the proforma defendant No. 2 while the respondent No. 3 herein namely Biswamohan Datta was the proforma defendant No.3 before the trial court.
4. The facts which have given rise to the present lis is that Biswamohan Datta the respondent No. 3 herein was the erstwhile owner of the suit property along with other properties situated at Pipulpati, Kadamtala Mouja-Kulihanda, P.S. Chinsurah, District-Hooghly. The respondent No.3 herein being the owner of large property sold some of his properties to Manibhusan Datta and Binoybhusan Datta. Thereafter the said Biswamohan Datta again sold some of the properties to Chittaranjan Sinha (since deceased) who was the husband and the

father of the present appellants, vide two deeds of sale dated 13.06.1991 and 23.01.1992.

Thereafter the said Biswamohan Datta gifted some of his properties to his daughter and son-in-law who were the plaintiffs before the trial court vide two deeds of gift dated 24.11.1999 and 11.03.2003.

5. Through the deed of sale dated 23.01.1992 in favour of Chittaranjan Sinha the said Biswamohan Datta along with other properties had given the right of user of the B schedule property mentioned in the plaint which is a strip of land measuring about 51 feet in length and 4 feet wide.

Thereafter vide the deed of gift dated 11.03.2003 the said Biswamohan Datta gifted the self same B schedule property of the plaint to his daughter and son-in-law absolutely.

The plaintiffs have alleged that the appellant/defendant has been constructing sun shade and boxes surrounding the windows in the wall facing the B schedule property and have also alleged that rain water pipe, generator pipe and other pipes are being fixed in the wall of the building belonging to the appellants mentioned in the C schedule of the plaint facing the B schedule property thereby encroaching the B schedule property.

6. This alleged encroachment of the B schedule property by construction of windows, sun shades and fixing of pipes have given rise to the present lis.

7. Facts before the Trial Court

The plaintiffs through the plaint have prayed for the following:

“a) for a declaration that the defendant no.1 has no right to open windows, shades, slabs upon and /or beneath the windows in the eastern wall of the defendant’s house as described in schedule ‘B’ below, as no side space is left.

b) for a mandatory injunction against the defendant no. 1 to remove all illegal construction in his building described in schedule 'C' of this plaint.

c) for recovery of possession of the portions of 'B' schedule property after removing the encroachments made by the defendant no 1.

d) for a direction upon the Proforma Defendant no. 2 to remove and/or demolish illegal construction upon 'C' Schedule property of this plaint.

e) for permanent injunction against the defendant No.1

f) for costs of this suit.

g) for any other relief to which the plaintiffs are entitled to in law and equity.”

8. The Ld. Trial Court framed the following issues:

- “1.Is the suit maintainable in its present form and law?*
- 2. Whether the plaintiff has proper cause of action to file the suit?*
- 3.Whether the suit is barred for non-joinder and mis- joinder of necessary parties ?*
- 4. Whether the suit is barred under the principle of estoppel, weaver and acquicence ?*
- 5.Whether the suit is barred under the provisions of Limitation Act ?*
- 6.Whether the suit is barred u/s.34 of Specific Relief Act ?*
- 7. Whether the suit is bad for non-joinder of necessary parties ?*
- 8.Whether the notice u/s 407 of West Bengal Municipal Act 1993 is essential ?*
- 9.Whether the defendant encroached land of B schedule property?*
- 10.Whether the defendant no.1 made construction in C schedule property after sanction plan as per Municipal rule ?*
- 11.Is the plaintiff entitled to get the decree as prayed for ?*
- 12. What other relief/reliefs the plaintiff is entitled as per law and equity?”*

9. On behalf of the plaintiffs the following persons deposed

- i) Goutam Das – PW1
- ii) The Advocate Commissioner (who performed the local inspection commission) – PW2

On behalf of the plaintiffs the following documents have been exhibited :

Exhibit -1 : Original deed of gift being No.3037.

Exhibit -2 : Original deed of gift being No. 1601 dated 11.3.2003

Exhibit -3 : Certified copy of sale deed 327 of 1992

Exhibit -4 : Hooghly Chinsurah Municipality Pay Receipt

Exhibit -5 : Government tax receipt.

Exhibit -6 to 6 (a): Compared LR Parcha

Exhibit -7 : Letter dated 13.12.2005

Exhibit -8 : Letter dated 17.01.2006 issued by Hooghly Chinsurah Municipality

Exhibit -9 : Field note and rough sketch map consisting of three sheets.

Exhibit -10 : Final report and final sketch map consisting of four sheets.

i) The proforma defendant No.3 namely Biswamohan Datta adduced evidence as DW1

i) Prabir Karmakar adduced evidence as DW2

On behalf of the defendants following documents have been exhibited:

Exhibit -A : Signature of Shri Biswamohan Dutta on the building plan.

Exhibit -B : Sale deed being No. 3109 of 1991

Exhibit -C : Sale deed being No. 327 of 1992

Exhibit -D series : Two miscellaneous receipts.

Exhibit -E : Original notice dated 18.2.1992

Exhibit -F : Reply letter dated 20.02.1992

Exhibit -G : Original letter issued by Hooghly Chinsurah Municipality

Exhibit -H : Original power of attorney dated 15.06.2008

Exhibit -I : The receiving seal and signature in letter dated 21.1.2006

Exhibit -J : Original seal and signature in letter dated 05.08.2011

Exhibit -K : Xerox copy of letter dated 19.08.2011

Exhibit -L : Letter dated 25.08.2011

Exhibit -M : Copy of order dated 23.2.2012 passed by the Hon'ble High Court in C.O. No. 502 of 2012 consisting of 5 sheets.

Exhibit -N : Agreement dated 10.9.2000

- 10.** The trial court on consideration of the both oral and documentary evidence on record had come to the conclusion which is as follows:

'Hence it is,

ORDERED

that the instant suit be and the same is dismissed against the defendants on contest but without any order as to costs ...'

- 11.** Being aggrieved by the judgment passed by the trial court one of the plaintiffs namely Kakali Das assailed the said order and preferred first appeal.

The said appeal being Title Appeal 141 of 2015 was heard by the Ld. District Judge Hooghly at Chinsurah and the Ld. First Appellate Court has been pleased to allow the said appeal by passing the impugned judgment directing the defendants to remove the window shades jutting out on the B schedule property and also directed to remove the open drain as well as opening of pipes from the B scheduled property.

12. The appellants who were the respondents before the First Appellate Court being aggrieved by the said order of the First Appellate Court preferred the present appeal.

13. Mr. Soumik Ganguly, learned counsel being assisted by Mr. Dilip Kumar Sadhu on behalf of the appellants has exhaustively submitted the following:

i) The plaintiffs had filed the suit for declaration and recovery of possession and injunction against the appellant.

ii) He has further submitted that on 14.06.1991 the said Biswamohan Datta transferred some portion of the land being in the RS plot No. 1177 in favour of the defendant No. 1 and had also sold some property again on 23.01.1992 having some land with existing rooms in the ground floor and on the first floor. Through the said deed the said Biswamohan Datta gave right of common passage upon the B schedule in favour of the defendant No.1.

iii) He has further submitted that the present suit is barred under Section 407 and Section 427 of the West Bengal Municipal Act, 1993. He has further submitted that the said Biswamohan Datta has created a fake deed of gift in favour of the plaintiffs.

iv) He has further submitted that at the request of Biswamohan Datta an agreement was executed on 10.09.2000 in between the plaintiffs and in defendants for the beneficial enjoyment of the properties and through the said agreement the plaintiffs were allowed to construct their residential building without leaving a statutory side space on the eastern side of their property. He has further submitted that the

plaintiffs do not have absolute right over the B schedule property as the appellants /defendant No.1 has acquired right to the said common passage by the said deed in his favour.

v) He has further submitted that the appellants/defendant No.1 have/has not made any encroachment.

vi) He has further submitted that the suit filed by the plaintiffs is barred by the law of limitation under the provisions of Article 113 of the Limitation act.

vii) He has further submitted that the said Biswamohan Datta vide two deeds of sale in the year 1991 and 1992 has transferred the B schedule property in favour of the defendant by which easement right over the B schedule property has been given in favour of the appellants/defendant No.1 as such by the later deeds of gift the B schedule property cannot be gifted absolutely in favour of the plaintiffs.

viii) He has further submitted that from the report of the learned Commissioner it reveals that only a shade from the window that too of the second floor is jutting out in the B schedule property neither any drain water pipe, nor windows have encroached on the ground floor of the disputed passage

ix) He has further submitted that from the exhibit-B it transpires that some land with structures standing thereon was purchased from Biswamohan Datta in the year 1992 including the right to use of the 4 feet common passage and the sale deed of the year 1991 was purchased from Biswamohan Datta having the existence of the

building which has also been proved from the report of the commissioner.

Banking upon the aforesaid facts and circumstances, the learned counsel has prayed for allowing the present appeal and thus affirming the judgment of the trial court.

14. The learned counsel Mr. Somnath Gangopadhyay representing the respondents No. 1 and 4 has prayed for not allowing the present appeal banking upon the following facts and circumstances.

i) He has submitted that the first appellate court directed the appellants to remove the window shades jutting on the B schedule property and also to remove drain as well as opening of drain water pipe on the B schedule property.

ii) The learned counsel has admitted the position that Biswamohan Datta had granted user right in favour of the appellants by registered deed and subsequently thereafter transferred ownership of the B schedule property in favour of the respondents no.1 and 4.

iii) He has further submitted that the parties to the proceedings are having common right of user over the B schedule property and since the appellants have raised certain construction which include erection of drain water pipes, drain as well as window shades which were extended towards the B schedule property the right of user of the respondents no.1 and 4 are in jeopardy.

iv) He has further submitted that if the window shades are damaged the same would cause threat to the life of the persons who are using the B schedule property.

- 15.** The impugned judgment has been passed in the said first appeal which is the bone of contention between the parties in the present appeal.

At the time of admission of the present second appeal the following issues have been framed.

“I. Whether the Ld. First Appellate Court was justified in passing a decree in part holding that the defendant has encroached over a part of the common passage by construction of a sun shade and /or raising some other construction on ‘B’ schedule property by relying upon a report of the local inspection without holding any investigation under Order XXVI of the Code of Civil Procedure in the absence of which encroachment and/or the extent of encroachment over some other property cannot be decided ?

II. Whether the courts below were justified in deciding the plaintiff’s suit in isolation of the counter claim raised by the defendant in the said suit? ”

- 16.** Thus from the two issues framed it transpires that it is to be looked into as to the status of the B schedule property which is a strip of land, and whether the same has been encroached by the appellant/defendant or not.

17. The deeds registered in favour of the defendant No.1/appellants are gone through. Through the said deeds the said Biswamohan Datta has sold some of his properties to the appellant/defendant.

18. From the deeds of sale executed by the proforma respondent/defendant namely Biswamohan Datta in favour of the defendant namely Chittaranjan Sinha it transpires that vide the said sale deed the defendant has sold four rooms and one small room beneath the stair case in the ground floor along with verandah and rooms on the first floor. Through the deed of sale dated 23.01.1972 the said Biswamohan had granted the four feet wide owner's space that is the B schedule property, to the appellants /defendant the right of using the said passage as common passage. It is worth mentioning that once the said passage has been granted through a Deed of Sale as to be used as a common passage the self same right did not extinguish as the defendant/appellant has not surrendered the said right. By way of subsequent gift of the said passage to the daughter and son-in-law(plaintiffs) by Biswamohan Datta, it does not extinguish the right of user (common passage) of the appellants/defendant. As regards to this issue this Court relies upon Paragraphs-13 and 17 of the judgment passed by the Hon'ble Apex Court in the case between *Dr. S. Kumar and Ors. Vs. S. Ramalingam* reported in (2020) 16 SCC 553 which states as follows:

"13. The relationship of Defendants 1 and 2 will not negate the grant of easement right of passage granted to her in the sale deed only because the recital is generic in nature and usually put by the deed writers. Since there is

specific mention of easement rights reserved for Defendant 2 which recital is supported by a strip of land 16 ft wide which provides access to the plot of land purchased by the defendants and also to the plaintiff. Once the land has been sold with the right of access through the land adjoining the property sold, such right could not be exclusively conferred to the plaintiff in the sale deed dated 31-5-1988.

17 ... The appellants have been granted right to use passage in the sale deed. Thus, it is not easement of necessity being claimed by the appellants. It is right granted to Defendant 2 in the sale deed therefore, such right will not extinguish in terms of Section 41 of the Easements Act, 1882."

Through the aforestated judgment the Hon'ble Apex Court has proceeded to state that once land has been sold earlier with the right of access through the land adjoining the property sold, such right cannot be exclusively conferred through a deed executed and registered later on.

Another judgment been passed in the case between *Mariamamma Simon Vs. Prasad (died) and Ors.* by an Hon'ble Single Judge of the Ernakulam Bench of the Kerala High Court published in 2024 SCC Online Kerala 6585 is also relied upon. Paragraph - 11 of the said judgment lays down as follows:

"11. The distinction between easement of grant and easement of necessity is dealt with in page No. 278 of the aforesaid treatise as follows:

"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 grant also. But easement of grant is a matter of contract

between 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 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 restricts its user subject to any condition the parties will be governed by those conditions. Anyhow, 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 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, the permanency in user must be recognized and the servient tenement will be permanently burdened with the 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 out under Section 13.”

Once it has been granted as a common passage it remains the same unless and until the person who obtains the right of user of the said passage surrenders the same. Though it is the contention of the plaintiffs that the defendant had/has not been using the said B schedule property as ingress or egress and there being no door of the defendant opening towards the B schedule property but it is fact that the said right of user of the B schedule property as common passage has not been surrendered by the defendant. In such circumstance, the plaintiffs though claiming to have the absolute ownership over the B schedule property by virtue of a deed of gift, legally they are not

entitled to the same as the said B scheduled property remains a common passage.

19. It is required to be mentioned herein that the said Biswamohan Datta had executed the two deeds of sale in favour of Chittaranjan Sinha on 13.06.1991 and 23.01.1992 while the deed of gifts were executed by Biswamohan Datta in favour of her daughter and son-in-law that is the plaintiffs on 24.11.1999 and 11.03.2003. So the B schedule property was given to the defendant to be used as a common passage, much prior to the execution of the deeds of gift in favour of the plaintiffs that is daughter and son-in-law. The word 'common passage' signifies that it is common for the persons interested in the said passage herein being the respondents/plaintiffs and the defendant/appellants. A common passage remains common for the persons interested.

20. The local inspection commission was applied for by the plaintiffs which was allowed by the trial court. From the advocate commissioner's report it transpires that the eastern wall of the C schedule property (property belonging to the appellants/defendant) is unplastered and is an old wall and is not newly constructed.

21. It is also mentioned in the report that sun shade above the window (W2) is in damaged condition and even iron rod is visible from the same. In the said report it has also been mentioned that the C schedule property (property belonging to the appellants/defendant) has no plaster on it and old bricks are visible and some portion of the

sun shades over the windows are damaged. In the said report of the Commissioner it has even been mentioned that there is existence of moss, banyan tree and peepal tree in the wall on the eastern portion of the C schedule property.

22. From the report of the Commissioner it reveals that the Commissioner has not found any construction to be

23. made either it be sun shade or drain, on the contrary it has been stated that the building standing on the C schedule property is an old one. The fact that there being no complaint lodged earlier by the said Biswamohan Datta also supports the appellants/defendant that they have not constructed anything violating the rules.

This Court finds that there has not been any new construction.

24. Only inspection commission was sought for by the plaintiffs and apart from that the plaintiffs had not sought for any investigation commission. To prove the point of encroachment of the B schedule property the plaintiffs ought to have prayed for investigation commission under Order XXVI of the Code of Civil Procedure as encroachment of property can only be proved by an investigation Commissioner which the plaintiffs have not sought for. In this regard this Court relies upon Paragraphs – 10 and 13 of the order passed by an Hon'ble Single Judge of the High Court of Madhya Pradesh, Principal Seat at Jabalpur, in the case between *Anurag Jaiswal Vs. Collector, Khandwa and Ors.* which states as follows:

“10. In cases where there is no agreed Map between the parties and where question of encroachment is involved,

the power under Order 26, Rule 9 can very well be exercised. In 1975 M.P.L.J. 801 : 1975 J.L.J. 440, Durga Prasad v. P. Faujdar, a Division Bench of this Court opined that in case where there is a dispute as to encroachment, the fact whether there is such an encroachment or not cannot be determined in absence of an agreed map except by appointment of the Commissioner under Order 26, Rule 9, Civil Procedure Code.

13. The Bombay High Court has consistently taken the view that in cases of boundary dispute and dispute about the identity of land, Courts should order local investigation under Order 26, Rule 9 Civil Procedure Code. [See: (2004) 3 Mh.L.J. 724, Sukhdeo Parashramji Bhugul (Dr.) v. Wamanrao Nagorao Charhat; (2009) 6 AIR Bom R (NOC 1033) 329, Girish Vasant Rao Bhoyar v. Nimbaji Warluji Bambal; (2010) 4 AIR Bom R (NOC 450) 127, Yeshwant Bhaduji Ghuse v. Vithabaji Laxman Ladekar, (2014) 1 AIR Bom R 16 : AIR 2014 (NOC 173) 59, Malhar v. Shivaji and (2015) 4 AIR Bom R (NOC 3) 2, Shyam Janardam Chaoudary v. Asha Ramdas Katkar, Alok Aradhe, J. in 2012 (111) MPWN 62, Beejanwala Talukdar (Smt.) v. Radhakrishna Rai] opined as under:"

The plaintiffs have not sought for local investigation commission and have totally failed to prove the point of encroachment.

25. So the plaintiffs have not been able to prove as regards to either the issue of encroachment or the issue of making any new construction violating the rules by the appellants/defendants.

26. In such circumstance, this Court is of the view that the judgment passed by the learned First Appellate Court is to be interfered with. So the judgment of the learned First Appellate Court is set aside and the judgment of the learned Trial Court is affirmed.

27. The appeal being **No. SA 3 OF 2017** stands thus **allowed**.

28. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

29. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)