(1988) 07 P&H CK 0005

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1176 of 1987

Harbans Singh and others	APPELLANT
Vs	
Bhajan Singh and others	RESPONDENT

Date of Decision: July 26, 1988

Acts Referred:

- Easements Act, 1882 - Section 13

Hon'ble Judges: S.D. Bajaj, J

Bench: Single Bench

Advocate: H.L. Sarin, Miss Ritu Bahri with him, for the Appellant; A.S. Bakshi, for the Respondent

Final Decision: Dismissed

Judgement

S.D. Bajaj, J.

Four residents of village Bath in plaintiffs 1 to 4 and two residents of village Kaler in plaintiffs 5 and 6 filed against the owners of land comprised in Khasra Nos. 5/19 and 5/21 of the land situated in village Kaler in defendants 2 to 5 and their paternal uncle Surjit Singh defendant No. 1, to whom they had allegedly given land aforesaid for cultivation, civil suit No. 292 on July 22, 1983 for perpetual injunction restraining defendants from interfering with or obstructing two karmas wide kacha passage from inside their lands aforesaid connecting to two villages which had been used by them peacefully, as of right, openly, continuously without interruption as an easement for more than 30 years. Defendant-Respondents urged in reply that the alleged pathway existed upto Khasra Nos. 474 and 475 in village Kaler and ended at Khasra No. 28/1 and in village Bath upto Khasra No. 475 and that Khasra number of the pathway itself was 387.

2. Learned trial Court decreed the suit on February 2, 1985. In civil appeal No. 182 of 1985 decided on February 12, 1987, learned lower Appellate Court reversed the decision of the learned trial Court and dismissed the suit. Feeling aggrieved,

plaintiffs have filed R.S.A. No. 1176 of 1987 in this Court.

3. I have heard Shri H.L. Sarin, Advocate, learned counsel for the plaintiff appellants, Shri Aftab Singh Bakshi, Advocate, learned counsel for the defendant-respondents and have carefully gone through the record of proceedings before the learned two courts below.

4. Learned brother D.V. Sehgal J. observed in his order dated March 31, 1987 as follows:-

Contends that Akash Shaja prepared by the Consolidation department Exhibits P.2 and P.3 of village Klair and Bath respectively when taken together prove that a path was provided. These documents have not been dealt with by the learned Appellate Court while reversing the finding recorded by the trial Court. Notice of motion for 6-5-1987. Status quo at the site should be maintained. Records also.

5. A careful perusal of Akash Shajra of village Kaler Exhibit P.2 shows that the pathway coming from village Kaler to village Bath marked ABC therein ends on Khasra No. 18 and 19 of village Bath and does not travel upto Khasra Nos. 5/19 and 5/21 of the defendant-respondents at all. There is no two karams wide passage shown in the lands of defendant-respondents therein. Similarly in Akash Shajra Exhibit P.3 of village Bath the passgae is shown to exist upto the junction of Khasra Nos. 474 and 484 and the Khasra number of the land covered by the passage is 387. Both these documents were duly adverted to and considered by the lower Appellate Court in para 6 of its assailed judgment dated February 12, 1987 and were rightly availed of by it for reversing the finding of the learned trial court on issue No. 1. There is thus no merit in the contention raised by learned counsel for plaintiff-appellants that both these documents were not considered by the learned lower Appellate Court or either of them proves the existence of alleged pathway.

6. The pathway cannot, however, be claimed as an easement even because as per assertions, made by witnesses produced by both the parties before the learned trial Court, learned lower Appellate Court has returned in para 7 of its assailed judgment dated February 12, 1987 a finding of fact that there is a link road in existence connecting the two villages through a longer route This finding of fact is conclusive inter parties in the present R.S.A. While deciding a similar question in Pedda Seetharamappa and Others Vs. Pedda Appaiah, , the High Court observed:-

It is well settled that necessity under those clauses as well as under the general law is not an ordinary necessity but an absolute one. In order to claim an easement of necessity it must be shown that it is one without which the property retained upon a severance cannot be used at all. It is not enough if it is shown that it is merely necessary to the reasonable enjoyment of property or that in the absence of an easement there would be inconvenience felt. Thus, a plaintiff who claims a right of passage through the field of another, has to prove that he has no alternative means of access however inconvenient to his field. In the light of these authorities if 1 refer

to the facts of the instant case, I find that the respondents himself in his plaint has referred to another track FED. The appellants also admitted the existence of this track and stated further that it is this track that has been used by the respondent to go to his filed; whereas the case of the respondent is that this track FED was not in their use as this is saline land and during rainy seasons till summer sets in, there will be quick sands in the said track and it is impossible for the bulls to pass through. In other words, it is contended that it is practically impossible to use that track to go to his land. It is admitted by the appellants also in their evidence that during rainy season and afterwards till full summer sets in there will be quick sands in the said track and that bulls cannot pass through the said track during that season, but go along the ridge of the adjoining patta land. It is common ground therefore, that there is a cart track FED through during rainy season it is difficult for that track to be used. In other words, the cart FED would not be a convenient means of access to respondent for a portion of the year namely, the rainy season. But on the ground that it is not a convenient means of access, the respondent would not acquire any right of easement of necessity u/s 13 of the Easement Act. An easement of necessity such as is referred to in Section 13 means an easement without which, the property ratained could not be used at all and not one merely necessary to the reasonable enjoyment of the property.

9. There is thus no merit in the appeal which is dismissed with costs.