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**(1980) 11 AHC CK 0022**

**Allahabad High Court**

**Case No:** Second Appeal No. 1933 of 1972

Smt. Narayani Devi

APPELLANT

Vs

Phool Chand and Another

RESPONDENT

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**Date of Decision:** Nov. 17, 1980

**Acts Referred:**

- Easements Act, 1882 - Section 13

**Citation:** AIR 1981 All 99

**Hon'ble Judges:** V.K. Mehrotra, J

**Bench:** Single Bench

**Advocate:** S.P. Tripathi and V.K.S. Chaudhary, for the Appellant; H.S. Tripathi, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

V.K. Mehrotra, J.

This is a plaintiff's second appeal.

2. On May 27, 1966 the plaintiff purchased a house from one Sita Ram through a registered sale deed. Immediately to the west of this house was a piece of land 39.6" long and 3.6" wide. The latrine of the house, which was constructed by Sita Ram in the year 1941, opened towards this piece of land and the sweeper used to clean the same by passing over this strip of land. A few days earlier, on May 16, 1966, Sita Ram sold this strip of land to the defendants. The case of the plaintiff was that the defendants had purchased the land lying to the west of this strip of land also and while building a house had started raising constructions on this strip of land as well with the result that the egress and ingress of the sweeper for the purpose of cleaning the latrine had been obstructed.

3. There was an earlier litigation between Sita Ram and the predecessor-in-interest of the defendants of the property lying to the west of the land in suit. In the suit filed by Sita Ram (Suit No. 257 of 1963), a compromise decree (Ex. 3) had been

passed at the appellate stage providing for the keeping of this strip of land open for egress and ingress of the sweeper for cleaning the latrine. There is no dispute now between the parties about this fact.

4. The plaintiff alleged that she was entitled to restrain the defendants from raising any constructions over this strip of land which may have the effect of precluding the sweeper from approaching the latrine for cleaning the same. She, therefore, prayed that the constructions raised by the defendants be removed and the land in suit be restored to its original condition and further that "the defendants be restrained from interfering in any manner with the egress and ingress of the sweeper for cleaning the plaintiff's latrine.

5. The defendants, inter alia, claimed ownership of the land in suit. They denied that the plaintiff had any claim for the user of the strip of land by the sweepers for cleaning the latrine. The suit was decreed by the trial court but that decree was reversed by the lower appellate court. Hence, the present second appeal.

6. On consideration of the material on record, the lower appellate court came to the conclusion that the strip of land in dispute was the property of the defendants who had purchased it from Sita Ram. It, however, took the view that the plaintiff had failed to establish any claim to the user of this land by the sweepers as an easement of necessity so as to enable her to obtain the decree which was granted by the trial court. This view of the lower appellate court has been assailed on behalf of the plaintiff in this appeal.

7. In paragraphs 11, 12 and 13 of the plaint, a case has been set up by the plaintiff claiming user of the strip of land for the cleaning of the latrine as an easement of necessity. The lower appellate court, as is clear from its judgment, was of opinion that such a user of the suit land could not be claimed as an easement of necessity for the plaintiff had purchased the house from Sita Ram after the sale of this strip of land to the defendants and further that the latrine in question could be cleaned by the sweepers by approaching it from within the house after entering it through the door to the south and passing through the open courtyard inside the house.

8. u/s 13 of the Easements Act, where a person transfers or bequeaths Immovable property to another and an easement in other Immovable property of the transferor is necessary for enjoying the subject of the transfer, the transferee shall be entitled to such easement and where an easement in the subject of the transfer is necessary for enjoying other Immovable property of the transferor, the transferor, shall be entitled to such easement. In the present case, the strip of land was transferred to the defendants on May 16, 1966 by Sita Ram. The house, which was later purchased by the plaintiffs was then owned by Sita Ram and the use of the strip of land for cleaning the latrine of the house by sweepers" ostensibly was necessary for the enjoyment of the house by Sita Ram. The strip of land was, therefore, open to enjoyment as an easement of necessity by the transferor, namely, Sita Ram on May

27, 1966 when he sold the house to the plaintiff,

9. Illustration (f) of Section 13 reads thus:

"(f) A is the owner of a house and adjoining land. The house has windows overlooking the land. A retaining the house, sells the land to B without expressly reserving any easement, The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light and B cannot build on the land so as to obstruct such light."

This illustration elucidates that it is permissible for the owner of a property, subsequently transferred, to enjoy a right which constitutes a burden upon the adjoining property transferred earlier.

10. The lower appellate court, it appears from a perusal of its judgment, was under an impression that before being entitled to claim an easement by way of necessity it must be established by the plaintiff that the claim is one of absolute necessity in the sense that there should be no other manner of such enjoyment available in any circumstances whatsoever. This, however, is not the requirement of law. Section 13 of the Easements Act contemplates that the easement, which is claimed as an easement of necessity, can be claimed as the only possible mode of enjoyment of the right claimed having regard to the normal way of life of the person who claims it and of persons belonging to his category. The lower appellate court seems to have been impressed by the fact that it would be open to the plaintiff to get the latrine cleaned by permitting entry to the sweepers through the courtyard inside the house itself. The plaintiff is indisputably a Hindu lady and it is well known that Hindus are generally averse to permitting entry to sweepers inside the house for the purpose of cleaning latrines of the kind used by the plaintiff, namely, service latrines.

11. The question as to whether the plaintiff was entitled to claim relief in the suit on the basis of the pleadings in paragraphs 11, 12 and 13 as an easement of necessity has not been approached by the lower appellate court in its true legal perspective. It has obviously not considered the evidence on record from the point of view of the correct legal requirement of a claim for an easement of necessity. The dismissal of the suit, therefore, by it cannot be upheld. The matter deserves to be gone into by the lower appellate court again.

12. The appeal is allowed. The decree of the lower appellate court is set aside and the matter remanded to it for decision afresh in accordance with law. The status quo as obtaining today shall, however, not be disturbed by the appellant during the pendency of the case before the lower appellate court. Costs shall abide the result.