Smt. Lucy Pinto Vs Glary D''Souza

Court: Karnataka High Court

Date of Decision: June 1, 2012

Acts Referred: Easements Act, 1882 â€" Section 41

Citation: AIR 2012 Kar 145 : (2012) 5 KarLJ 659

Hon'ble Judges: A.N. Venugopala Gowda, J

Bench: Single Bench

Advocate: M. Sudhakar Pai, for the Appellant;

Final Decision: Dismissed

Judgement

A.N. Venugopala Gowda, J.
Appellant has called in question the legality of the Judgment and Decree passed on 30.07.2007 in R.A. No.

208/2004 by the learned Civil Judge (Sr. Dn.), Mangalore D.K., confirming the Judgment and Decree dated 30.10:2004 passed in O.S. No.

424/2004 by the learned Civil Judge (Jr. Dn.), Mangalore, D.K., dismissing the suit filed by the appellant. The material facts in a nutshell are as

follows:-

O.S. No. 424/2004 was filed by the appellant/plaintiff, to pass permanent mandatory injunction directing the defendant/respondent to close the

opening made by the defendant on the north-eastern side of his property for gaining access to ''PPP way'' existing in the ''A'' schedule property,

being the opening demarcated as ''AB'' in the plan annexed to the plaint and for passing decree of permanent prohibitory injunction restraining the

defendant from entering into ''B'' schedule property, through ''PPP pathway'', passing through ''A'' schedule property and for incidental reliefs.

2. Plaintiff is the owner of the plaint ''A'' schedule property and defendant is the owner of the plaint ''B'' schedule property. Both the said items of

properties earlier belonged to the late Flora Correa i.e., mother of the Plaintiff, who acquired the same under a sale deed dated 04.01.1957. She

released her undivided half share in the suit property in favour of the plaintiff under a release deed dated 24.05.1963. The plaintiff, subsequently

settled the said joint property on her father Mr. Camil Pinto. Upon demise of Mr. Camil Pinto, the plaintiff and her brother Joseph Pinto got the

joint property divided into two shares under a partition deed dated 24.04.1971, wherein, the property described in the schedule "B" of the said

partition deed was allotted to the plaintiff and the property described in schedule "A" of the partition deed was allotted to the share of Mr. Joseph

Pinto. Defendant purchased the property of Mr. Joseph Pinto under a sale deed dated 20th June 1984. The southern side of the plaint "B"

schedule property abuts public road known as ""Suterpet 4th Cross Road"".

3. Defendant had filed O.S. No. 533/1986 against the plaintiff herein, for relief of declaration that he has got easementary right of way across "A"

schedule property, being the way, shown by him in the plan annexed to the plaint. The said suit was contested by the plaintiff herein. Upon trial, the

suit was dismissed on 07.12.1991. The Judgment and Decree passed was questioned in R.A. No. 174/1991 on the file of I Addl. Civil Judge (Sr.

Dn.) Mangalore. Appeal was allowed by a Judgment and Decree dated 24.03.1992. The said decree was questioned by the plaintiff herein in

RSA No. 334/1992, which was disposed of as per the judgment and decree dated 11.08.1998, modifying the judgment and decree passed in

R.A. No. 174/1991.

4. The appellant-plaintiff, averred that after passing of the Judgment and Decree dated 11.08.1998 in RSA No. 334/1992, the defendant has

made an opening on the north-eastern side of the property for the purpose of gaining access to "PPP road" passing through "A" schedule property

and this permanent arrangement for gaining access to the property from the southern side was not made by the defendant at the time of passing the

Judgment and Decree dated 11.08.1998 in RSA No. 334/1992. It was stated that the said arrangement was made on the southern side by laying

a concrete way over the storm water drain for ingress and egress from "B" schedule property from the Suterpet road and in view of the said

permanent arrangement made by the defendant, there is no need for the defendant to make use of the PPP way, passing through "A" schedule

property. Stating that the cause of action to the suit arose in the month of December 2003, when the defendant caused a permanent means of

access to "B" schedule property from the southern side of the "B" schedule property, the suit was filed for the said reliefs.

5. Defendant having not appeared in response to the summons, was placed ex parte. The learned Trial Judge raised the point for consideration i.e.,

whether the plaintiff is entitled for the relief of permanent mandatory injunction and permanent prohibitory injunction as prayed in the plaint?

6. Plaintiff got himself examined as PW1 and marked Exs. P1 to P12.

7. The learned Trial Judge taking into consideration Ex. P7, the Judgment and Decree passed in RSA No. 334/1992, has opined that the present

suit being on the same set of facts in respect of the same subject matter between the same parties, no relief on the same subject matter can be

granted in view of the applicability of the principles of res judicata. It was observed that, though the defendant has got right of way as per Ex. P7,

despite the defendant also having acquired alternative way, the plaintiff cannot preclude the defendant from using the way granted to the defendant

vide Ex. P7, since the said Judgment and Decree has become final and is binding on the parties. Consequently, the suit was dismissed.

8. As against the said Judgment and Decree, the plaintiff preferred R.A. No. 208/2004 in the Court of Civil Judge (Sr. Dn.) Mangalore D.K., but

without success.

9. Feeling aggrieved, the plaintiff has filed this second appeal contending that after disposal of the previous proceedings i.e., the suit and the

appeals, noticed supra, the respondent laid cement slab ramp on the southern side of his land and is gaining access to the property effectively and

hence, the suit filed contending that the right of way granted in RSA No. 334/1992 has come to an end due to the acquisition of alternative way, on

the analogy of extinguishing of easement of necessity i.e., by acquisition of alternative way. According to the appellant, the defendant- respondent

had made the claim in O.S. No. 533/1986 based on easement of necessity, which having got extinguished by acquisition of alternative way, both

the Courts below have committed an error in dismissing the suit and the appeal respectively.

10. Sri M. Sudhakar Pai, learned Advocate for the appellant, strenuously contended that both the Courts below have committed serious error and

illegality in holding that Ex. P7 operates as res judicata and in denying the relief to the plaintiff. He submitted that the issues framed and decided

earlier in the suit and appeals being not directly and substantially in issue in the present suit, the principles of res judicata is not attracted. He

submitted that the easement claimed by the respondent being an easement of necessity, has come to an end by acquisition of alternative way and

hence, Section 41 of the Easements Act, 1882 (for short ''the Act'') applies. Learned counsel further submitted that, since the matter has not been

correctly appreciated and decided by both the Courts below, interference is called for.

11. In the aforesaid factual background and the contentions urged, the points for consideration are:

1. Whether the easementary right which was subject matter of adjudication in the earlier suit and appeals between the parties, is one of ''easement

of necessity'' or an ''''easement of grant''?

2. Whether there is extinguishment of easementary right of the respondent by attraction of S. 41 of the Easements Act 1882?

3. Whether in view of Ex. P7, the principles of res judicata is attracted?

Re. Point No. 1:-

12. To answer this question, it is necessary to notice the judgment in RSA No. 334/1992 decided on 11.8.1998, marked as Ex. P7. The plaintiff

herein had filed the said appeal questioning the decree of declaration that the plaintiff i.e., the respondent in the said appeal is entitled to an

easementary right of way across the property bearing No. 72/14A and the consequential relief of permanent injunction restraining the appellant i.e.

the defendant therein, from interfering with the right of user of the path way either by locking the gate or by causing any other obstruction of

whatsoever nature across the said path way and also the mandatory injunction directing him to remove the obstruction caused to the path way

granted by the First Appellate Court. As is clear from the said judgment and also not disputed by Sri M. Sudhakar Pai, that the property originally

belonged to a common owner and the eastern portion was purchased by the respondent and that a portion of the property is situated between 3rd

Cross Road and 4th Cross Road. Calling the said path way as an easement of necessity and complaining of obstruction, O.S. No. 533/1986 came

to be filed, which was dismissed by the Trial Court and was reversed and decreed by the Appellate Court in R.A. No. 174/1991, by observing

that, the path way in dispute was only way to reach the suit property from 3rd Cross and as a result, the suit was decreed. The said decree was

questioned in RSA No. 334/1992 by the appellant herein. During the pendency of the matter, it was suggested that the respondent can reach the

4th Cross, by passing over the Municipal drain and reach the 4th Cross Road, as has been done by the neighbouring eastern plot owner and that is

easiest way to reach the 4th Cross. But the same was not accepted on the ground that the Municipal drain is on the higher level. Other suggestions

made was also not accepted.

This Court, despite noticing that, there are two ways, one to reach the Main Road 3rd Cross and another to reach 4th Cross, which is the shorter

way, found that the respondent is justified in not accepting the suggestion to use the 4th Cross, because of the Municipal drain coming in between.

As a result, the impugned Judgment passed by the First Appellate Court was modified enabling the respondent herein i.e.; the plaintiff in the said

suit, to use the path way in dispute and directing the removal of the obstruction caused. It was found that the easementary right in question is not an

easement of necessity, which means that, it is an easement of grant. The said judgment and decree has attained finality. In view of the said

categorical finding, it has to be held that the easementary right claimed by the respondent is by way of grant.

Re. Point No. 2:-

13. S.13 of the Act is with regard to the Easement of necessity and quasi easement. The grant of easement may be express or even by necessary

implication. From the findings in Ex. P7, it can be seen that the easementary right under consideration is by necessary implication. When the

easementary right is by grant or by necessary implication, it will not amount to an easement of necessity, falling under S.13 of the Act, even though

it may also be an absolute necessity for the person in whose favour the grant has been made by express or even by necessary implication. This

Court, despite being made known of the access which the respondent can have from the 4th Cross, did not find it appropriate to reverse the

judgment and decree dated 24.3.1992 passed in R.A. No. 174/1991 by the learned I Additional Civil Judge and CJM, Mangalore. Thus, there is

permanent recognition of the easementary right of the respondent which is clear from the findings recorded in Ex. P7. Hence, the said right cannot

get extinguished as per the provision in S. 41 of the Act, which is applicable only to an easement of necessity arising under S.13 of the Act.

Keeping in view the findings recorded in Ex. P7, in my opinion, S.41 of the Act is not attracted.

Re. point No. 3:-

14. Indisputably, there was prior litigation between the parties in O.S. No. 533/1986 which came to an end in RSA No. 334/1992 vide Ex. P7.

No doubt, no specific issue was framed with regard to the nature of easementary right i.e., whether it is of necessity or grant and its permanency.

From Ex. P7, it is apparent that this Court has made it clear that the easement is not one of necessity and the property having originally belonged to

a common owner and the respondent having purchased the eastern portion thereof, the easementary right is by way of grant. In order to minimise

the hardship to the appellant, this Court made the position clear in Ex. P7, as follows:

I feel and I am satisfied that the land P1.P.P2 shall be extended in such a way that PPP can be drawn only North-South and not beyond that point

East-West. I am therefore constrained to modify the decree of the appellate court directing that PPP i.e. the two parallel P1-P3 and P4 wall

running North -South alone shall be the way to the use of which the plaintiff shall be eligible and not otherwise.

Consequently, if there be any obstruction in that way that shall be removed. It is also made clear that the area on the west of P-4 and P-5, the

defendant is entitled to use for his benefit and convenience. It is also equally made clear that the passage P.1 P.5 P.6 and 9.2, the defendant is

entitled to use the other area of the land for his benefit and convenience.

15. Undeniably, the judgment and decree as at Ex. P7 has attained finality. The present subsequent suit was maintained by stating that after passing

of judgment and decree as at Ex. P7, the defendant made an arrangement by laying concrete way over the storm water drain for ingress and egress

to "B" schedule property from the Suterpet road and in view of the said permanent arrangement made, there is no need for the defendant to make

use of PPP way passing through A schedule property and that the cause of action for the suit arose in the month of December, 2003 when the

permanent means of access to B schedule property from its Southern side was made. The Courts below have concurrently held that principles of

res judicata apply in view of the earlier litigation, noticed supra and as a result have non-suited the plaintiff.

16. From the perusal of the record, it is clear that, in the present suit i.e., O.S. No. 424/2004, the foundation for the claim is the laying of concrete

way over the storm water drain for ingress and egress to the defendant"s property. The appellant, in Ex. P7 had suggested that the respondent can

reach 4th Cross i.e., Suterpet Road, by passing over the Municipal drain which was not accepted by the respondent. Though an offer was made to

connect the respondent"s property by road, the suggestion was not-accepted. Keeping in view the record of the case, submissions made by the

learned counsel, the offers made and the rejection, it was held as follows:

There are two ways one to reach the Main Road 3rd Cross and another 4th cross which is the shorter way.

Thus, it is clear that the issue of an alternate way to the respondent was directly and substantially involved in O.S. No. 533/1986 and was put forth

and urged for consideration in RSA No. 334/1992. In view of the finding in Ex. P7, I find that the principles of res judicata as contained in S.11 of

CPC is attracted and the Courts below were justified in non-suiting the appellant.

In the result, the appeal being devoid of merit, shall stand dismissed with no order as to costs.