

Moparthy Surayya Vs Nimmagadda Seetharamaiah and Another

Court: Andhra Pradesh High Court

Date of Decision: Dec. 19, 2002

Acts Referred: Easements Act, 1882 & Section 15

Hon'ble Judges: C.Y. Somayajulu, J

Bench: Single Bench

Advocate: G. Krishna Murthy, for the Appellant; D. Srinivas, for the Respondent

Final Decision: Dismissed

Judgement

C.Y. Somayajulu, J.

Appellant filed O.S. No. 519 of 1982 on the file of the Court of IV Additional Munsif Magistrate, Guntur seeking a

mandatory injunction against the first respondent to remove "CD" wall, shown in the plan annexed to the plaint, and for a permanent injunction

restraining the respondents and their men from interfering with his use of the joint passage shown as "ABCD" in the plan, to reach his plot shown as

CGFE", from the road on the north, alleging that the portion shown as "ABCD" in the plaint plan is set apart for a common passage between him

and the respondents and even otherwise he also acquired an easementary right over "ABCD" portion of the plaint plan to reach his site shown as

CGFE" from the road on the north. First respondent filed his written statement denying the claim of the appellant, contending that the appellant has

no right over "ABCD" portion of the plaint plan as he has been using a portion of the land to the west of "CGFE" portion of the plaint plan in order

to reach the main road on the west. Second respondent filed a written statement supporting the case of the appellant. In support of his case

appellant examined himself as PW.1 and two other witnesses as PWs.2 and 3 and marked Exs.A.1 to A.8. In support of his case first respondent

examined himself as DW.1 and another witness as DW.2. No documentary evidence was adduced by the respondents. The learned trial Judge

decreed the suit granting the relief sought against the first respondent only and dismissed the suit against the second respondent. On appeal in A.S.

No. 144 of 1986 by the first respondent, the learned III Additional District Judge, Guntur allowed the appeal and dismissed the suit against the first

respondent also. Hence this second appeal by the plaintiff in the suit.

2. The point for consideration is whether the appellant has a right of way over the portion shown as "ABCD" in the plaint plan?

3. The specific averment in para-3 of the plaint is that appellant is in occupation of "X" marked portion and 1st respondent is in occupation on "Y"

marked portion in the plaint plan, (which are house portions) and that they occupied Gramakantham Poramboke opposite to their respective

portions on the western side of their house portion about more than 25 years prior to the filing of the suit, for the purpose of tethering their cattle

and to store manure, and thus "CGFE" marked portion is under his occupation and "A1 A2 E D" marked portion is in the occupation of the first

respondent and "A A1 A2 A3" portion is in the occupation of the second respondent and that "ABCD" marked portion is set apart as a passage to

reach their respective sites from the road on the north, and in any event since he has been using the portion marked "ABCD" in the plaint plan

without interruption from anybody, he acquired a prescriptive right of easement over the said "ABCD" marked portion to reach his portion shown

as "CGFE" in the plaint plan.

4. The main contention of the appellant is that "ABCD" marked portion of the plaint plan is set apart, by an agreement between the parties, to be

used as a pathway. His alternative plea is that he acquired prescriptive right over the said "ABCD" portion to reach "CGFE" marked portion of the

plaint plan which is in his occupation. The entire portion shown as "A3 B G F", shown in the plaint as per the averments in the plaint, is

Government Poramboke. Even assuming that appellant has been in exclusive enjoyment of "CGFE" portion of the plaint plan, for the appellant to

acquire a prescriptive right over "ABCD" portion, to reach his land shown as "CGFE", he has to establish that he perfected his right over "CGFE

portion by adverse possession against the Government, and thereafter he has been using the "ABCD" portion for 30 years, from two years prior to

filing of the suit, because as per Section 15 of the Easements Act, for a person to prescribe easementary rights over a Government Land, he has to

exercise the right for a period of over 30 years, and since "CGFE" portion continues to be the Government Land till the appellant acquired a right

thereon by adverse possession, and when both "ABCD" and "CGFE" portions continue to be the lands belonging to Government, they cannot be

"dominant" and "servient" tenements at the same time. The averments in the plaint is that appellant is in occupation of the "CGFE" portion of the

plaint plan for nearly 25 years. So the question of appellant acquiring prescriptive right of way over "ABCD" portion of the plaint to reach "CGFE

within 25 years does not arise. There is no evidence on record to show that there was an agreement between the parties to set apart "ABCD

marked portion of the plaint plan as a passage. So, the theory of an easement by agreement cannot be believed.

5. In the above circumstances, the oral evidence adduced by the appellant, contrary to his own plaint case, is of no consequence. Sri Krishna

Murthy, learned counsel for the appellant, has taken me through the entire oral evidence and tried to draw some support from some admissions

made by the respondents that the appellant is in occupation of the portion shown as "CGFE" for nearly 30 to 40 years. That admission are of no

help because evidence was recorded several years after the institution of the suit, and the user, as stated by witnesses, can only by approximate but

not exact. That apart the settled position of law is that a party can succeed on the evidence adduced which is in consonance with his pleading, but

not on the evidence which is contrary to his pleadings.

6. All these apart when it is the contention of the appellant that he acquired as easementary right over the Government Land, Government is a

necessary party. But for the reasons best known to him appellant did not made the Government a party to the suit. That circumstance is sufficient

to non-suit the appellant. In view of the above, the learned appellate Judge dismissing the suit of the appellant on the ground that he failed to

establish any type of easement cannot be said to be erroneous. Two decisions are relied on by the learned counsel for the appellant. In B. Nihal

Chand and Another Vs. Mt. Bhagwan Dei, it is held that for a party to acquire an easement over serviant tenement he need not necessarily to be a

owner, and it would be enough if he is an occupier of the dominant tenement. That decision is of no help to the appellant because the averment in

the plaint in this case is that both the alleged dominant and servient tenement belong to the Government and appellant was in possession of the

dominant tenant for about 25 years only. So, he cannot acquire an easement rights over "ABCD". In SHIMBU DAYAL Vs. GAJJU MAL AIR

1928 LAH 709, it is held that even a trespasser in possession can claim a right of way; That decision has no application to the facts of this case,

because the Government, which admittedly is the owner of the property is not made a party to the suit. Neither the appellant nor the first

respondent, who according to the averments in plaint are in occupation of Government Poramboke opposite to their house portion for a period of

about" 25" years prior to the filing of the suit, which is less than the period of 30 years mentioned in Section 15 of the Easements Act can be said

to have any right over the property occupied by them. Therefore, I find no merit in this appeal and so the appeal is dismissed. No costs.