courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 05/11/2025

(2007) 2 ALD 322

Andhra Pradesh High Court

Case No: SA No. 621 of 1995

Akula Bhagiraraju and Others	APPELLANT
Vs	
Padala Satyanarayana and Others	RESPONDENT

Date of Decision: Nov. 14, 2006

Acts Referred:

- Easements Act, 1882 - Section 13

Citation: (2007) 2 ALD 322

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: Chakravarthy, for the Appellant; M. Lakshmana Sarma, for the Respondent

Final Decision: Dismissed

Judgement

P.S. Narayana, J.
Heard Sri Chakravarthy, learned Counsel representing appellants and Sri M. Lakshmana Sarma, learned Counsel representing respondents.

2. This second appeal is filed as against the judgment and decree made in A.S. No. 54 of 1988 on the file of II Additional District Judge, East Godavari at Rajahmundry, confirming the judgment and decree made in O.S. No. 1669 of 1981 on the file of the District Munsif, Rajahmundry.

3. One Akula Bhagiraju, who is no more, as plaintiff filed O.S. No. 1669 of 1981 on the file of the District Munsif, Rajahmundry, against the respondents herein and defendants in the suit, praying for a declaration of right of passage over "A.B.C.D" marked portion of the plaint schedule property as per the plaint plan and for mandatory injunction for removal of the obstruction caused by the defendants to the plaintiffs right of way over "ABCD" marked portion and for costs of the suit.

4. The Court of first instance, on the respective pleadings of the parties having settled the issues, recorded the evidence of P.W. 1 - Akula Atchayamma, wife of the plaintiff; D.W. 1, the third defendant and D.W.2 one Penumaka China Venkata Rao and marked Exs. A.1 to A.3 and ultimately dismissed the suit.

5. In fact, a Commissioner was also appointed in I.A. No. 2484 of 1981 and it is stated that no objections were filed by either of the parties to the report of the Commissioner. The said Commissioner, however, was not examined. Aggrieved by the dismissal of the suit, the unsuccessful plaintiff carried the matter by way of appeal A.S. No. 54 of 1988 on the file of II Additional District Judge, East Godavari at Rajahmundry, and inasmuch as the first appellant died, Appellants 2 to 4 were brought on record by the orders made in I.A. No. 414 of 1990, and thus, they have been prosecuting the further litigation.

6. The appellate Court, by the judgment and decree dated 4th October, 1993, dismissed the appeal. Aggrieved by the same, the present second appeal is preferred.

7. Sri Chakravarthy, learned Counsel representing the appellants had pointed out the substantial questions of law and would submit that when the report of the Commissioner is clear and categorical, when no objections were filed to the report of the Commissioner, negativing the relief on the ground that the easement of necessity had not been established since an alternative way is available, cannot be sustained. The learned Counsel also would submit that both the Courts below had not appreciated the evidence available on record properly and also the aspect of burden of proof. Learned Counsel also would contend that even if same plea of availability of alternative way is taken, it should be further proved and established that the plaintiff has a right to use such alternative way and in the absence of the same negativing the relief by both the Courts below cannot be justified. The learned Counsel placed strong reliance on a decision in Smt. Narayani Devi Vs. Phool Chand and Another, .

8. Per contra, Sri M. Lakshmana Sarma, learned Counsel representing the respondents would submit that concurrent findings had been recorded relating to availability of alternative way and hence the claim of easement of necessity, inasmuch as, had not been established, the Courts below are well justified in negativing the said relief. The learned Counsel also would submit that even if the report of the Commissioner to be taken into consideration, it would not seriously alter the situation in view of the fact that evidence is available on record relating to availability of alternative way. The convenience or inconvenience of alternative way and the other factors need not be seriously considered in the light of the detailed factual findings, which had been recorded by the appellate Court. The learned Counsel had taken this Court through the relevant findings recorded by the appellate Court and would maintain that the appellate Court having framed the points for consideration had taken every aspect, discussed all the facts in detail and recorded appropriate findings. In the light of such detailed findings recorded by the appellate Court, confirming the well considered findings of the Court of first instance, this Court in a second appeal need not disturb such findings unless it is shown such

findings are based on no evidence or perverse or non-consideration of important essential oral and documentary evidence. The learned Counsel would maintain that when the Counsel for appellants is unable to point out such legal infirmity, the second appeal is bound to fail.

9. The respective pleadings of the parties are as hereunder:

It was pleaded in the plaint that the plaintiff raised a thatched shed in the plaint schedule property in 1961 after purchase and has been using 5 feet width of passage through the defendants site marked as "ABCD" for ingress and egress on to the road lying to the, south of the defendants property. The plaintiff has been enjoying the right of passage over the said site ever since the purchase of the property under sale deed dated 16-6-1961 openly and publicly as of right without any sort of interference from the defendant, who acquiesced the same and perfected the right. It is an easement of necessity. There is no other alternative way to serve his access to the road except the "ABCD" marked portion. The defendants, with a mala fide intention to cause loss to the plaintiff, are making preparations to close the "ABCD" marked portion and are trying to construct a building closing the 5 feet width passage. If they are allowed to proceed with the above constructions, the plaintiff will be deprived of his access to the road and it will amount to infringement of his right of way.

10. The third defendant filed written statement denying the allegations in the plaint. It was also further pleaded that the site marked as "ABCD" is left for ingress and egress on to the road lying to the south of the defendants" property had been denied. It was also pleaded that the plaintiff has been enjoying the right of passage over the said site ever since the purchase of the property under sale deed dated 16-6-1961 etc., are all absolutely false. The allegation that it is easement of necessity that there is no other alternative way to serve as access to the road except "ABCD" marked portion as per the plaint plan is equally false and baseless. This defendant and his brother Suryanarayana Murthy purchased the site to the south of plaintiff s site from Ch. Adinarayana under the sale deed dated 16-6-1961. The site in which the plaintiff subsequently raised thatched shed was purchased by the plaintiff on the same day on which the defendants purchased the site from the same vendor. In fact, late V. Veeraswamy, who is the maternal uncle of plaintiff and. the defendants, settled the entire transaction. It is he that brought up all the parties and was purchasing sites for parties with a view to see that they should have separate houses for each of them. Plaintiff is no other than the sister of the third defendant. To the west of the site purchased by the plaintiff, she was already having site, which was purchased by another sister of the parties by name Gangulu Venkayamma. Therefore, by 16-6-1961 the plaintiff was already in possession of the site, which she purchased from Venkayamma even though the defendants were working for that site which the plaintiff took sale deed. The maternal uncle of the parties and at the request of the plaintiff, got it registered in favour of the plaintiff as it was thought at that time that it would serve as a good back yard for the proposed houses to be constructed in the site belonging to the plaintiff already in existence and which was purchased from her sister

Venkayamma as she was already having site to the west of the site she purchased. Even though, it was not registered by then, it was mentioned in the sale deed of the plaintiff that the western boundary is the site of the plaintiff. The site was earmarked and separate sale deeds were executed in favour of the plaintiff and the defendants. A thatti was put up subsequently in the very earmarked place on the north showing demarcation between the plaintiffs site and the defendants" site. Subsequently, in the oral partition between the brothers, the site that was purchased from Adinarayana by all the brothers of the defendants fell to the share of the third defendant and the site already belonged to the defendants which is on the western side of this particular site fell to the share of the second defendant and the site already belonged to the defendants which is on the western side of this particular site fell to the share of the second defendant and different site in another part of the village fell to the share of the first defendant. Subsequent to the purchase, the third defendant constructed a thatched shed and began living in it. No understanding or agreement was there to leave any right of passage to the plaintiff through the site of the third defendant and the entire western boundary of this defendant, which is the subject-matter of purchase by the defendants under the sale deed dated 16-6-1991. Therefore, the only way for her is only towards Akulavari Street and not towards Chakalivari Street. If really, any provision was made for her right of way, her sale deed as well as the sale deeds of the third defendant would have certainly mentioned as the owner of both the sites was one and the same. It is clearly mentioned in the sale deeds of third defendant that the eastern boundary is a well on the eastern most corner belonging to the vendor of the third defendant. It is therefore submitted that the so-called way of easement and right is false Subsequently, plaintiff demolished the thatched shed and constructed a daba as she is the owner of both the sites, which she purchased respectively from her sister and Adinarayana. The third defendant recently removed the thatched shed and began constructing a daba. At that time while the construction was going on, the plaintiff with dishonest intention, made a false claim and wanted to have direct access to the Chakalivari Street and also demanded right of way for which these defendants did not agree. It is submitted that there is no question of easement of necessity as she is having two more ways to ingress and egress through the site which is to the west of her site which was also owned by her even by the date of acquisition of site in question. There is no user of the right of way as alleged and the said right of way is for the first time set up and claimed while the third defendant removed his thatched shed and is constructing in its place a daba. The allegation that the plaintiff is using right of way through the site for last more than 20 years peacefully and without any interruption are all false. In fact, the third defendant is constructing his building in his own site and as the plaintiff has no right of way as alleged, there is no question of infringement to the right of way. The plaintiff knows fully well that the site in which daba is being constructed fell to the share of the third defendant and the Defendants 1 and 2 having nothing to do with the same. But till in view of the differences in the family with a view to harass the entire family members who are not willing to accede to the demand of the plaintiff, she unnecessarily added the Defendants 1 and 2. It is only third defendant who is the owner of the site.

11. On the strength of the above pleadings, the following issues were settled by the Court of first instance.

1. Whether the plaintiff is entitled to the declaration prayed for?

2. Whether the plaintiff is entitled to the mandatory injunction prayed for?

3. To what relief?

12. As already referred to supra P.W. 1 was examined and Exs. A.1 to A.3 were marked on behalf of the plaintiff and D.Ws. 1 and 2 were examined on behalf of the defendants Ex. A.1 is the sale deed executed by Ch. Adinarayana in favour of the plaintiff. Ex. A.2 is the registered notice dated 2-12-1981 issued by plaintiffs advocate to the defendant. Ex. A.3 is the reply notice issued by defendants" advocate to the plaintiffs advocate.

13. Being aggrieved by dismissal of the suit, the matter was carried by way of appeal A.S. No. 54 of 1988 on the file of the II Additional District Judge, East Godawari at Rajahmundry and the appellate Court at Para 8 framed the following points for consideration.

1. Whether the disputed site ABCD is a passage meant for the use of the plaintiff for the ingress and egress to reach her house from Chakalivari Street?

2. Whether the plaintiff perfected the right of use by way of prescription and also as his easement of necessity?

3. To what relief?

14. The appellate Court commenced the discussion from Paras 9 to 15 and ultimately dismissed the appeal. Aggrieved by the same, the present second appeal is preferred.

15. This Court on 29-1 -1996 made the following order:

Admit. In view of the substantial questions of law raised at Ground Nos. 10(i) and 10(ii) of the memorandum of second appeal.

The said grounds are as hereunder.

(i) Whether the claim of easement of necessity can be defeated on the ground that there is alternative private ways without pleading and proving that the plaintiff has got a right to pass through them?

(ii) Whether the burden of proving that the right to alternative way exists can be validly cast on the plaintiff?

16. The case of the deceased first appellant-plaintiff Akula Bhagiraju is that the plaint schedule site belongs to him and a house was constructed therein and the same was purchased in the year 1961 under Ex. A.1 sale deed. It is also the case of the plaintiff that the site of the defendants is to the south of the site which was purchased by the plaintiff and to the further south of the defendants site, a street by name Chakalivari Street was situated and to reach Chakalivari Street, the plaintiff has a right to use "ABCD" marked site situated in the defendants property from north to south. It is also specific case of the plaintiff that the defendants tried to construct a wall obstructing her way to reach Chakalivari Street.

17. To substantiate the stand taken by the plaintiff in this regard, P.W. 1, the wife of plaintiff, no doubt had deposed about Exs. A.1, A.2 and A.3. Except the evidence of P.W. 1 and Exs. A.1 to A.3, there is no other evidence. The report of the Commissioner was strongly relied upon to show that except this passage there is no other passage for ingress and egress to Chakalivari Street and hence easement of necessity has been clearly established. It is no doubt true that the report of the Commissioner would form part and parcel of the record and even if the Commissioner is not examined the same may be looked into. It is also said that no objections were filed by both the parties to the report of the Commissioner. It is true that the learned Commissioner recorded certain positive aspects relating to the passage and use of ingress and egress to Chakalivari Street. In fact, this Court had called for the report of the Commissioner for the purpose of further verification by the order-dated 11-12-2002. It is pertinent to note that P.W. 1 had taken specific stand at the time of purchase of the sites by the plaintiff as well as defendants on the same day, it was agreed that the defendants should leave "ABCD" site having width of 5 feet and a length of 41 feet from north to south to enable the plaintiff and his men to have ingress and egress to reach Chakalivari Street. The same had been specifically denied. In relation to this agreement, if any, the evidence appears to be highly insufficient. The Courts below recorded positive findings and negatived the same. The plaintiff appears to have constructed a thatched shed in the site purchased by the plaintiff and P.W. 1 the wife of the plaintiff has been using it as kitchen for the main house to the west of her property and thus she has always a way towards west and there are two lanes for reaching the public street which is known as Akulavari Street, situated on the west of his property. The report of the Commissioner was taken into consideration and the same was discussed at Para 7 of the judgment of the appellate Court at length and hence it cannot be said there was non-consideration of the report of the Commissioner.

18. Certain submissions were made at length by the respective Counsel relating to the claim of easement of necessity. The plaintiff took specific stand that there is no other alternative way to reach Chakalivari Street. Non-examination of any of the independent witnesses, apart from the wife of the plaintiff as P.W. 1, also had been commented upon. The evidence of D.W. 2, apart from the evidence of D.W. 1, also was appreciated at length and the alternative way available had been recorded and the report of the Commissioner also had been taken into consideration while appreciating other oral

evidence available on record the evidence of D.Ws. 1 and 2.

19. In Smt. Narayani Devi v. Phool Chand and Anr. (supra) the learned Judge of the Allahabad High Court at Paras 8, 9 and 10 observed as hereunder:

Under Section 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.

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.

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.

20. On a careful appreciation of the findings recorded by the Court of first instance and also the appellate Court, this Court is of the considered opinion that inasmuch as concurrent findings had been recorded negativing the claim of easement of necessity and predominantly these findings being factual findings in the absence of any perversity in appreciation of evidence being pointed out, it is needless to say that in a second appeal such concurrent findings recorded by both the Courts below not to be normally disturbed. It is also pertinent to note that concurrent findings had been recorded on availability of alternative way. Further, findings had been recorded relating to the absence of any evidence relating to an agreement while purchasing these sites and also absence of any other independent evidence apart from the evidence of P.W. 1 the wife of the plaintiff.

21. Hence, viewed from any angle, this Court is of the considered opinion that the second appeal is bound to fail and accordingly the same shall stand dismissed. However, it is stated that the parties are close relatives, in view of the same, the parties to the litigation to bear their own costs.