

(2012) 11 CAL CK 0001

Calcutta High Court

Case No: S.A. No. 38 of 2004

Sushila Sharma

APPELLANT

Vs

Taritsri Ghosh

RESPONDENT

Date of Decision: Nov. 30, 2012

Acts Referred:

- Calcutta Municipal Corporation Act, 1980 - Section 586

Citation: (2013) 1 CHN 410

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: Sudhish Dasgupta, Indrajit Mondal and Sibasish Ghosh, for the Appellant;
Amitava Das and Uttam Bhattacharyya, for the Respondent

Judgement

Tarun Kumar Gupta, J.

This second appeal is directed against the judgment dated 9th of September, 2002 and decree thereof passed by learned Judge, Small Causes Court at Sealdah in Title Appeal No. 8 of 1996 reversing the judgment dated 22nd December, 1995 and decree thereof passed by learned Munsif First Court at Sealdah in Title Suit No. 168 of 1991. Present respondent Nos. 1 to 8 as plaintiffs filed said suit for declaration and injunction. The plaintiffs' case, in short, may be summarized as follows:

The Tagore Land Development Ltd. (Proforma defendant No. 4) was the owner of a vacant land measuring 1 Bigha 13 Chitak 23 Sq. feet being piece and parcel and portion of premises No. 31 Kakurgachi Road, Phool Bagan 24 Pgs. (South). The above mentioned vacant land was divided into 9 different plots each measuring 2 cottahs 13 Chitaks and 35 sq. feet of land along with 10 ft. common passage lying to the north of plot Nos. 2, 3, 4, 5, 6, 7 and south of plot No. 1, 8 and 9, and 8 ft. common passage lying to the east of plot No. 7 and 4 and west of plot No. 5 and 6. Those plots were sold out to different purchasers including the present plaintiffs giving them right of ingress and egress from the respective plots through the common

passage. 10 ft. common passage has connected 40 ft. (60 ft.) wide CIT road on the west and stretched towards the east upto the dead end of premises No. 31 Kakurgachi road touching the plot No. 68 CIT scheme at the further east. The defendant No. 1 purchased plot No. 6 and also plot No. 9 from the purchasers of those two plots on different dates. The said 10 ft. common passage lying in between plot No. 6 and plot No. 9 is the disputed A schedule property. Defendant No. 1 and her husband (defendant No. 2) managed to obtain a deed of conveyance from proforma defendant No. 4 in respect of said disputed A schedule property though proforma defendant No. 4 had no right, title and interest on said land. The deed of conveyance dated 01.03.1989 was collusive, illegal and void. The amalgamation of plot Nos. 6 and 9 including the portion of 10 ft. common passage (A schedule property) by defendant No. 3 Kolkata Municipal Corporation was also illegal. Defendant Nos. 1 and 2 did not acquire any title, right and interest in the A schedule property on the strength of their alleged purchase deed dated 01.03.1989 and they had no right of making any construction over any portion of said common passage more particularly A schedule property. Accordingly, plaintiffs filed a suit with a prayer for declaration that A schedule property was a common passage and that B schedule property i.e., plot Nos. 6 and 9 were not to be amalgamated by encroaching any portion of A schedule property. The plaintiff also prayed for permanent injunction restraining defendant No. 1 and 2 for encroaching any portion of A schedule property and also for mandatory injunction with a direction upon the defendant No. 3 CMC for recalling the plan, if any, sanctioned for construction over A schedule property.

2. The defendant Nos. 1 and 2 (appellants in this appeal) filed a written statement denying material allegations of the plaint and contending inter alia that A schedule passage was situated in between plot Nos. 6 and 9 and that on its eastern side it reached the dead end of the entire suit holding and that there was no scope for ingress and egress from the eastern side of said premises No. 31 Kakurgachi Road through said A schedule property as the same was blocked by boundary wall of premises No. 68 CIT road. It is further case that defendant Nos. 1 and 2 being lawful owners of plot Nos. 6 and 9 purchased intervening A Schedule property from the rightful vendor and that as per their prayer Kolkata Municipal Corporation amalgamated those three plots being renumbered as 58 G CIT road and that a sanction plan was granted for making construction on said land. The plaintiffs' suit was liable to be dismissed with cost.

3. The defendant No. 3 (respondent No. 9) Kolkata Municipal Corporation filed written statement stating inter alia that the assessment authority of CMC being satisfied with title of defendant Nos. 1 and 2 over plot Nos. 6, 9 and 10 assigned 58 G CIT road treating three plots as a single unit after amalgamation and that there was no irregularity in the sanction plan.

4. The Tagore Land Development Ltd. being proforma defendant No. 4 (proforma respondent No. 10) also filed a written statement alleging that said company being owner of A Schedule property had authority to sell it out and that defendant Nos. 1 and 2 acquired a valid title over said A schedule property being plot No. 10 which was nothing but a private passage lying in between plot Nos. 6 and 9.

5. Learned Trial Court, however, dismissed the plaintiffs' suit holding that plaintiffs failed to establish their right title, interest or possession in A Schedule property and accordingly plaintiffs were not entitled to get any decree for declaration and injunction. Learned Trial Court further held that the suit was also barred u/s 586 of Kolkata Municipal Corporation Act for want of proper notice to CMC.

6. Learned Lower Appellate Court, however, allowed the appeal filed by the plaintiffs allowing the prayer for declaration and permanent injunction as made out in prayer "a" and "b" of the plaint. This second appeal has been filed by the defendant Nos. 1 and 2.

7. At the time of admission of this appeal the following substantial questions of law were formulated:

1. Whether the Appeal Court could reverse the Trial Court's finding that the suit was not maintainable in the absence of notice u/s 586 of the Calcutta Municipal Corporation Act, 1980, served upon the Calcutta Municipal Corporation, the defendant No. 3.

2. Whether having regard to the configuration of the plot Nos. 6 and 9 belonging to the defendant/appellants when permitted to be amalgamated along with plot No. 10 purchased by them, originally shown as a passage meant for plots No. 6 and 9 could serve any purpose of easement or utility for the holder of plot No. 5 the plaintiff when the plot No. 10, the erstwhile passage ended in the boundary wall and from the inspection report it appears that no sewerage, electric or telephone line has been laid underneath and the plaintiff owner of plot No. 5 has direct access on the 40 ft. wide CIT Road, could have claimed any utility thereon.

8. Mr. Sudhish Dasgupta, learned counsel appearing for the appellants, submits that except plaintiff No. 4 other plaintiffs did not contest the case by producing their title deeds to show that A schedule property was a common passage for beneficial enjoyment of all the plot holders of premises No. 31 Kakurgachi Road. Mr. Dasgupta further submits that admittedly A schedule property being plot No. 10 was lying in between plot Nos. 6 and 9 having dead end to its east and hence other plot owners of premises No. 31 Kakurgachi Road had no occasion to use said for ingress and egress. He further submits that from the report dated 31.05.1991 of learned Advocate Commissioner (Ext.Cha) it appears that no water line, electric line, telephone line or sewerage line of any plot owner passed through A schedule property. According to Mr. Dasgupta as neither the sole contesting plaintiff No. 4 nor other plaintiffs suffered in any way for amalgamation of plot Nos. 6, 9 and 10 or

from making construction thereupon the plaintiffs' suit was liable to be dismissed and that learned Lower Appellate Court wrongly set aside the order of dismissal of the suit passed by learned Trial Court. Mr. Dasgupta next submits that as other plaintiffs neither appeared nor contested the suit nor filed any appeal in the Lower Appellate Court the dismissal of the suit so far as they are concerned cannot be challenged and that any decree passed in the suit will lead to anomaly and inconsistency.

9. Learned counsel for the respondent No. 4 Joysree Saing (plaintiff No. 4 and owner of plot No. 5) submits that the husband of plaintiff No. 4 deposed as P.W.1 on behalf of all the plaintiffs and that all the plaintiffs jointly filed appeal in the Lower Appellate Court and hence it cannot be said that this plaintiff No. 4 alone contested the suit or filed the appeal. He next submits that the purchased deed dated 26.12.1974 (Ext. 1) of plaintiff respondent No. 4 remained unchallenged. According to him, it was categorically stated in said deed (Ext.1) that the entire property of proforma defendant No. 4 at 31 Kakurgachi Road was divided into 9 plots keeping aside 10 ft. wide common passage running from east to west touching 40 ft./60 ft. wide CIT Road and also one 8 ft. common passage running from south to north touching 40 ft. wide CIT road on south and intersected said 10 ft. common passage in the north. He submits that appellant defendants purchased the disputed 10 ft. wide common passage i.e., A schedule property lying in between plot Nos. 6 and 9 through a kobala dated 28.02.1989 from proforma defendant No. 4 Company though the Company had no saleable interest on said land at that point of time. He further submits that even in said kobala dated 28.02.1989 (Ext. ka) it was specifically stated in para 7, 8 and 9 that the 10 ft. wide passage lying in between plot No. 6 and 9 (A Schedule property) is a common passage. According to him though said A schedule property was described as a private passage in para 15 and was sold away to defendant No. 1 as plot No. 10 but there was no existence of plot No. 10 before said alleged sale and that "A" schedule property was nothing but a portion of the 10 ft. wide common passage running from east to west lying in between plot Nos. 9, 8 and 1 in one side and plot Nos. 6, 7 and 2 in the other side. He further submits that appellant defendants did not produce their purchased deeds of plot No. 6 and plot No. 9 wherefrom it would have revealed that the 10 ft. passage lying in between these plots was nothing but a part of the 10 ft. wide common passage.

10. There is no denial that the plaintiffs jointly filed the suit praying for declaration and injunction, both perpetual and mandatory. The husband of plaintiff No. 4 deposed as P.W.1 on behalf of all the plaintiffs. It is true that only the purchase deed dated 26.12.1974(Ext.1) of plaintiff No. 4 was filed in the suit and no other purchase deed of other plaintiffs was filed. But that does not mean that other plaintiffs did not contest the suit. Again it appears from the memo of appeal of learned Lower Appellate Court that against the order of dismissal of the suit all the plaintiffs filed said appeal jointly. As such, it cannot be said that only plaintiff No. 4 proceeded with the suit.

11. From the purchase deed of plaintiff No. 4 (Ext.ka) it appears that the land of premises No. 31 Kakurgachi Road was divided into nine plots [by its erstwhile owner i.e., Tagore Land Development Ltd. (proforma defendant)] and was sold to different purchasers after keeping two common passages one 10 ft. wide running from east to west and another 8 ft. running from north to south. However, I do not agree with learned counsel for the contesting plaintiff respondent No. 4 that those common passages were also sold out by the vendor. In plaintiff respondent No. 4's purchased deed dated 26.12.1974 (Ext.1) it was only stated that the plot holders will enjoy the common passages for ingress and egress and for all other purposes including taking electric line, sewerage line etc. through the same. As such, I am not agreeable with the contention of learned counsel for the plaintiff No. 4 that this plaintiff No. 4 along with other plot holders became owners of said common passage. It only appears from the contents of said deeds that plaintiff respondent No. 4 and other plot holders acquired right of easement over said common passages. The term "easement" has been defined in Halsbury's Laws of England, 4th Ed., Vol.14 para 1 page 14 as a right annexed to land, to utilize other land of different ownership in a particular manner or to prevent the owner of the other land from utilizing his land in a particular manner. It was also defined in the case of [Dukhi Mullah and Others Vs. Halway, Proprietor of Manjhaul Factory through his Manager R. Crowdy](#), as a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. It is true that it came out from the report the learned Advocate Commissioner (Ext.Cha) that no line of electricity or water or sewerage of any of the plot owners passed through A schedule property i.e., 10 ft. wide passage lying in between plot No. 6 and plot No. 9. But it is not a case of having easement of necessity over A schedule property.

12. Admittedly, appellant defendant No. 1 purchased plot No. 9 through a kobala dated 17.11.1980 and plot No. 6 through a kobala dated 10.10.1988. It is also an admitted fact that appellant defendant No. 1 did not purchase those two plots i.e., plot No. 6 and plot No. 9 from the land owner i.e., Tagore Land Development Ltd. directly. She purchased the same from the purchasers who purchased those two plots from said proforma defendant No. 4 Company. The appellant defendant No. 1 should have produced in Court her purchased deeds relating to plot No. 6 and plot No. 9 to show that the 10 ft. wide passage lying in between those two plots was a private passage and not a common passage, but, the appellant defendant No. 1 did not dare to produce those two documents in Court. An adverse inference should be drawn against her for not producing those two vital documents. However, it appears from her purchase deed of disputed passage (Ext. ka) that owner Tagore Land Development Ltd. initially sold plot No. 9 to one Dilip Ghosh wherein the A schedule 10 ft. passage was described as a common passage lying to the south of said plot No. 9 vide para 8 of said kobala.

13. Again it appears from para 9 of said kobala (Ext.ka) that said proforma defendant No. 4 Company initially sold away plot No. 6 to one Amalendu Biswas and Saroj Ranjan Biswas by a kobala wherein the 10 ft. passage being A schedule property was described as a common passage lying to the north of said plot No. 6. As such, from the purchase deed of appellant No. 1 (Ext.ka) it is apparent that the 10 ft. passage lying to the north of plot No. 6 and south of plot No. 9 was a common passage. It is true that in para 15 of said kobala (Ext.ka) said A schedule property was tried to be described as a private passage but in view of specific averments made in para 8 and para 9 it is clear that the character of said passage being A schedule property was nothing but a common passage. Admittedly, a purchaser cannot have a title better than his vendor. After allotment of 9 plots to the plot holders in premises No. 31 Kakurgachi Road the original owner namely proforma defendant No. 4 allowed those plot holders to use those two common passages, one 10 ft. wide and another 8 ft. wide for beneficial enjoyment of those plot holders. In other words those plot holders had acquired an easementary right over said two common pathways. It thus can be said that appellant defendant No. 1 purchased said A schedule property from original owner proforma defendant No. 4 subject to the easementary rights over the same by other plot owners. It matters little whether any electric line or water line or sewerage line passed through said common suit passage i.e. A schedule property. As appellant defendant No. 1 purchased said A schedule property subject to the easementary rights of other plot holders of premises No. 31 Kakurgachi Road, the appellant defendant No. 1 is not permitted to make any construction on A schedule property infringing said easementary right of other plot owners.

14. Learned Trial Court held the suit to be not maintainable against KMC for want of notice u/s 586 Kolkata Municipal Corporation Act, 1980. Learned Lower Appellate Court also concurred to said findings and declined to give any relief by way of mandatory injunction against Kolkata Municipal Corporation.

15. In view of discussion made above I do not find any infirmity in the impugned judgment and decree of learned Lower Appellate Court.

16. As a result, the appeal is hereby dismissed on contest but without cost.

17. Send down Lower Court records along with a copy of this judgment to the Lower Court at the earliest. Urgent photostat certified copy of this judgment be supplied to the learned counsels of the parties, if applied for.