(2011) 04 DEL CK 0266

Delhi High Court

Case No: Regular Second Appeal No. 210 of 2008 and CM No''s. 12993-94 of 2008

Chief Secretary, Govt. of NCT of Delhi and Another		APPELLANT
	Vs	
Shri Mahinder Singh Rana and Another		RESPONDENT

Date of Decision: April 6, 2011

Acts Referred:

- Delhi Land Reforms Act, 1954 - Section 185

Hon'ble Judges: Indermeet Kaur, J

Bench: Single Bench

Advocate: S.P. Sharma and Ashwani Bhardwaj, for the Appellant; Raghubir Singh Rana, for the Respondent

Final Decision: Dismissed

Judgement

Indermeet Kaur, J.

This appeal has impugned the judgment and decree dated 15.02.2008 which had modified the finding of the trial Judge dated 13.02.2007. Vide judgment and decree dated 13.02.2007, the suit filed by the Plaintiffs seeking permanent injunction against the Defendants restraining them not to close the rasta measuring 161/2 ft. in width and 130 ft. in length in front of the property of Plaintiffs i.e. property situated in Village & P.O. Tigirpur, Delhi had been dismissed. The impugned judgment had reversed this finding. The suit had been decreed in favour of the Plaintiffs; the Defendants had been restrained from closing the affronted rasta in front of the property of the Plaintiff as depicted in red colour in site plan Ex. PW-1/1.

2. This is a second appeal. It is yet at the stage of admission. It is pointed out that the impugned judgment suffers from a perversity for the reason that the land qua which the Defendants have been restrained is a gaon sabha land; it is also not the contention of the Plaintiffs that this land is owned by them; they could not have been granted the relief which has been granted by the impugned judgment; this

finding is a perversity and is liable to be set aside.

3. The case as is evident from the pleadings before the court below is that the Plaintiffs had alleged that the affronted rasta which is in front of their house was the only mode of access to their property; they were using the rasta for their ingress and egress since 1952. In 1996 on a survey conducted, there was a threat to close the rasta by erecting a boundary wall. The ADM had intervened and the rasta was directed to remain untouched. However, the Plaintiffs were again facing threats from the Defendants; present suit was accordingly filed.

4. The defence was that the suit is barred u/s 185 of the Delhi Land Reforms Act (hereinafter to be referred to as the "DLRA"); rasta being the Government land cannot be encroached upon by the Plaintiffs; they have no right to ingress or egress from the affronted land.

5. On the pleadings of the parties, six issues were framed. Oral and documentary evidence was led. PW-1 had categorically deposed that he is using this rasta for access to his house since 1952 and this is the only mode of approach to his house; it is required for the beneficial enjoyment of his property. He had admitted that on the eastern side of his house, there is a road which is 6 ft. blow the ground level and it cannot be used as rasta for ingress and egress. This testimony of PW-1 has been highlighted by learned Counsel for the Appellant to substantiate his submission that admittedly from the eastern side, there was a mode of approach to the house of the Plaintiffs; in this view of the matter, the disputed rasta qua which the injunction has been granted is liable to be set aside as it is the admission of the Plaintiff himself that he had another mode of access to his property.

6. The trial Judge had returned a finding on issue No. 1 in favour of the Plaintiffs. It was held that the Plaintiffs have got easmentary right by way of prescription to use the rasta. The other issue i.e. issue No. 3 was also decided in favour of the Plaintiffs. Issue No. 2 was however decided against the Plaintiff. The trial Judge relied upon a report of the BDO (not proved on record) to return a finding that there was a suitable public passage towards the eastern side of the property of the Plaintiffs and this was a suitable mode of access to the house of the Plaintiffs.

7. Admittedly this passage on the eastern side is 6 ft. below the ground level. This fact finding is not disputed even today.

8. The impugned judgment had reversed this finding of the trial and in this context, it had held that the trial Judge had decided issue No. 1 in favour of the Plaintiff; it had noted that the trial Judge had the recognized easmentary right by way of prescription in favour of the Plaintiffs; the conclusion of the trial Judge dismissing the suit was contrary to this finding on issue No. 1. The finding returned in the impugned judgment qua this dispute is noted herein below:

Thus the facts that have come forth before the Ld. Trial Court would reveal that there are high walls surrounding the property of the Appellants and the so called alternate passage lying to the eastern side of the property of Appellant No. 1 is not accessible to either of the Appellants. The eastern passage is not a kaccha passage falling in the low level area into which mud could be filled to raise the level. The road on the eastern side is a pakka metaled road. Obviously such a pakka metaled road is leading from one place to another and cannot be filled in between to make it accessible to the Appellants. There is no evidence on the basis of which it could be concluded that there was sufficient space available between the plots of the Appellants and the low level metaled road which could be converted into gradient to provide access to the Appellants to the metaled road. It is to be kept in mind that all the witnesses of the Appellants have deposed that the properties were being used for parking their tractor may be the cattle could climb over any rough area and up any slope, however, tractors cannot move in that manner.

Therefore, without any evidence before it, the Ld. Trial Court could not have answered the issue No. 2 to hold that the Appellants had an alternative passage to their properties. Without the need for summoning of the BDO, the uncontroversial testimonies, and the rather explanatory statements of the Plaintiff''s witnesses elicited during their cross examinations is sufficient to hold that there was no other rasta or passage available to the Appellants except the one claimed in the suit. The Ld. Trial Court has accepted the position that the road on the eastern side is at a low level but has brushed aside the question of accessibility by observing that the Appellants could approach the competent Civil authorities for leveling the same without even applying its mind to the question whether such leveling was at all possible over a metaled road.

In the circumstances, the findings returned in respect of issue No. 2 and in respect of issue No. 4 are liable to be set aside and are set aside.

These issues are now answered in favour of the Plaintiffs/Appellants that they do not have any other rasta to their properties except the rasta of 16 1/2 feet width and 130 feet length as depicted in the site plan in the suit, and the subject matter of the suit. The issue No. 4 is answered holding the Appellants / Plaintiffs to be entitled to injunction in respect of the Rasta. However since there has been no evidence brought on the record regarding the threat of demolition no relief in respect of demolition of the property can be granted.

Thus the suit of the Plaintiff/ Appellants is partly decreed. Defendants / Respondents, their officials, employees, servants etc. are restrained from closing the rasta measuring 1/2 feet width and 130 feet in length in front of the property of the Appellant as shown in red in the site plan Ex. PW-1/ 1.

9. There is no perversity in this finding. It does not in any manner call for any interference. Evidence on record clearly suggests that although on the eastern side

of the house of the Plaintiffs, there is a passage, yet admittedly this is 6 ft. below the ground level; no person can be expected to access his house by putting a ladder or any other artificial mode in order to reach his property which is admittedly 6ft. over and above the ground level. These facts were rightly construed in the impugned judgment; this easmentary right by way of prescription was admittedly being enjoyed by the Plaintiff since 1952.

10. The substantial questions of law have been embodied on page 2 of the body of the appeal.

11. Apart from the argument affronted no other argument has been advanced. No substantial question of law has arisen. There is no merit in this appeal. Appeal as also pending applications are dismissed in liming.