(2008) 11 DEL CK 0224

Delhi High Court

Case No: Regular First Appeal 234 of 2007

Ravinder Kumar Sejwal and Another		APPELLANT
	Vs	
D.D.A.		RESPONDENT

Date of Decision: Nov. 26, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 96
- Delhi Development Act, 1957 - Section 22
- Easements Act, 1882 - Section 13, 15, 27
- Land Acquisition Act, 1894 - Section 16, 3, 4, 6

Hon'ble Judges: Pradeep Nandrajog, J; J.R. Midha, J

Bench: Division Bench

Advocate: Ashim Vachher, for the Appellant; Pawan Mathur and Subhash Chandra, Director-LM, for the Respondent

Judgement

Pradeep Nandrajog, J.

The present appeal u/s 96 of the CPC 1908 has been preferred against the judgment and decree dated 21.02.2007 passed by the learned Additional District Judge, Delhi wherein the suit filed by the appellants was dismissed.

2. The backdrop facts leading to filing of the present appeal are that the appellants who are the joint owners of land comprised in Khasra No. 225, Village Lado Sarai, New Delhi filed a suit registered as Suit No. 103/05, praying for a decree of mandatory and permanent injunction against the respondent, Delhi Development Authority, requiring Delhi Development Authority to leave an approach road, as shown in Red in the site-plan annexed with the plaint, proved as Ex.PW-1/1, and to restrain Delhi Development Authority from interfering with the stated peaceful and uninterrupted use of the said road by the appellants to reach the land comprised in Khasra No. 225, Village Lado Sarai, New Delhi.

3. The case set up by the appellants in the plaint was that they have an easementary right to access their land comprised in Khasra No. 225 through the road in question and that they had openly, peaceably and uninterruptedly been using the said road since the days of their ancestors over the last 100 years. It was pleaded that the road is the only "approach road" and "motorable road" leading to the land of the appellants. It was pleaded that all of a sudden, the officers of Delhi Development Authority attempted to interfere with the peaceful enjoyment of the road.

4. The respondent resisted the suit by pleading in the written statement that the land on which the alleged road was stated to be in existence was acquired in the year 1980 vide Award No. 36/80-81, together with other lands surrounding the same and was placed at the disposal of the Delhi Development Authority u/s 22 of the Delhi Development Act after possession thereof was taken over on 24.6.1980 and that the appellants were attempting to encroach upon the acquired lands comprised in Khasra No. 224, 250, 699/253 and 700/253 of Village Lado Sarai. It was denied that any road or a path existed as claimed in the plaint, much less used by the forefathers of the appellants for 100 years. It was stated that, to protect the acquired land, when DDA was in the process of erecting a boundary wall to bound the acquired lands, the suit was filed with the intention of facilitating trespass on the land vested in DDA under the notification issued u/s 22 of the Delhi Development Act 1957.

5. On the basis of the pleadings of the parties, following issues were settled by the learned Trial Court:

1. Whether the suit is maintainable?

2. Whether the plaintiff is entitled to the reliefs prayed for?

3. Relief.

6. Pertaining to the evidence led by the appellants, the appellants stepped into the witness-box as PW-1 and PW-2 respectively and reiterated the stand taken by them in the plaint. In addition to the evidence of the appellants, one Mr.Ram Singh was examined as PW-4 (said witness was wrongly numbered as PW-4 instead of PW-3) who stated that he was a neighbor of the appellants. He deposed on the lines as pleaded in the plaint.

7. In cross-examination, the appellant No. 2 admitted the factum of acquisition of the land on which the alleged road was stated to exist and admitted that the appellants took no action when the land was being acquired.

8. The respondent examined two witnesses namely Mr. Raj Kumar Yadav, Patwari, South East Zone, DDA as DW-1 and Mr. P.T. Varghese, Assistant Engineer I/SED -7, DDA as DW-2. Besides reiterating the stand taken by Delhi Development Authority in its written statement the witnesses deposed that the appellants and their cousin Sh. Suresh Kumar were joint owners of land in Village Lado Sarai comprised in Khasra

No. 225 and had constructed a house thereon and that the plot abutted on a road for about 60'' in length and that the appellants and Suresh partitioned their joint holding with the northern side of the holding abutting the road being assigned to Sh. Suresh Kumar and the land towards the southern side being taken over by the appellants. They stated that at that time i.e. when the division took place a corridor having width of 5 was left to facilitate access to the part of the land which fell to the share of the appellants.

9. Pertaining to the documentary evidence produced by the parties, the relevant exhibits pertaining to the appellants are a site plan, Ex.PW1/1, photographs Ex.PW1/2 to Ex.PW1/15, showing the positioning of the land of the appellants. Pertaining to the respondents the same are a site plan, Ex.DW1/1, certified copy of the award Ex.DW1/2, possession report, Ex.DW1/3 and extract of the notification issued u/s 22 of the Delhi Development Act, Ex.DW1/4.

10. Vide impugned judgment and decree dated 21.02.2007, the learned Trial Court had dismissed the suit filed by the appellants on the ground that the act of the appellants in not raising any challenge to the acquisition of the land over which the alleged easementary right was claimed has resulted in the extinguishment of any alleged easementary right. It has also been held that the evidence established that the appellants had a right to access their land from the point mark ''F'' in Ex.PW-1/1. The result is that the suit stood dismissed.

11. At the hearing of the appeal, learned Counsel for the appellants urged that the finding of the learned Trial Judge pertaining to the appellants having an access to their land through the point mark ''F'' in Ex.PW-1/1 is unsupported by any evidence. Conceding that the appellants never challenged the acquisition when lands in Village Lado Sarai were being acquired and in respect part whereof the alleged road qua which easementary right was existing, Counsel urged that the fact of the matter remained that the appellants had no means to access their land.

12. Responding to the aforesaid two contentions urged by learned Counsel for the appellants, learned Counsel for the respondent conceded that the finding of the learned Trial Judge that the appellants could access their land through the point mark ''F'' in Ex.PW-1/1 is indeed unsupported by any evidence, but Counsel contended that the evidence on record shows that the appellants could access their land from the road ending on the boundary of the land of the appellants and that of Suresh Kumar, which road leads from the western direction towards the east and ends at the boundary of the land of Suresh Kumar and the appellants as reflected in Ex.DW-1/2. Counsel urged that the said road which abuts the northern boundary of the land of Suresh Kumar ends at the boundary of the land of Suresh Kumar and the appellants.

13. An analysis of the pleadings of the appellants and the evidence led by them reveals that the appellants had sought to claim the easementary rights in the suit

land on following basis:

I Acquisition by prescription.

II Easement by way of necessity.

Easement by way of Necessity

14. Section 13 of the Indian Easements Act, 1882 which makes provision for easement by way of necessity reads as under:

13. Easements of necessity and quasi • necessity: Where one person transfers or bequeaths immovable property to another,-

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, Clauses (a), (c) and (e) are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

15. A bare perusal of the said Section makes it clear that the easement by way of necessity can be claimed only in cases of transfer or partition of the dominant heritage which is not the case in the present case. Therefore, the plea of easement of necessity sought to be predicated by the appellants on the basis that the road is the only "approach road" or "motorable road" leading to the property of the appellants is not applicable in the present case.

Easement by way of Prescription

16. Section 15 of the Indian Easements Act, 1882 which makes provision for easement by way of prescription reads as under:

15. Easement by prescription : Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person''s land, or things affixed thereto, has been peaceably received by another person''s land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contexted.

Explanation I: Nothing is an enjoyment within the meaning of this Section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II: Nothing is an interruption within the meaning of this Section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorising the same to be made.

Explanation III: Suspensions of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV: In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this Section belongs to Government, this Section shall be read as if, for the words "twenty years" the words "thirty years" were substituted.

17. From a reading of the Section 15 it is clear that the essential requisites of the easement by way of prescription are as under:

(i) Actual enjoyment of an easement;

(ii) Enjoyment should be open;

(iii) Enjoyment should be peaceable ;

(iv) Enjoyment should be as of right;

(v) Enjoyment should be without any interruption;

(vi) Enjoyment should be for a period of twenty or thirty years, as the case may be.

18. The pleadings of the appellants and the evidence led by them needs to be analyzed in the backdrop of afore-noted six essential requisites of the easement by way of prescription.

19. As already noted above, the appellants have claimed easementary rights in the suit land on the basis that the suit land has been openly, peaceably and uninterruptedly being used by them and their ancestors since the last 100 years.

20. The appellants have not pleaded that they been enjoying the suit land ''as of right''.

21. The question which arises is what is the tenor of the expression ''as of right'' occurring in Section 15 of the Indian Easements Act and whether the fact that a person claiming easementary rights by way of prescription proves that he had been using an easement openly, peaceably and uninterruptedly since a very long period leads to a presumption that he had been using the same ''as of right''?

22. The meaning of the expression ''as of right'' was succinctly explained in the decision reported as Alimooddeen v. Wuzeer Ali 23 W.R. 52 in the following terms:

The Munsif seems to think that the words ''as of right'' in Section 27 of that Act, mean user without trespass. I think those words do not mean that, and that they mean user in the assertion of a right. There is ground, not doubt, for the Munsif''s opinion in the view that has been taken of the same words under the English Prescription Act, but after much consideration I think that the words in the Indian Act mean what I have above stated. If the observations of Lord Wensleydale in the judgment in Bright v. Walker (1834) 1 CM & R 211 : 4 Tyr. 502 : 3 L.J. (N.S.) Ex. 250 : 40

R.R. 536 be compared with the observations of the same learned Judge in Flight v. Thomas (1840) 11 A & E 688 : 3 P & D 442 : 52 R.R. 468 it will be seen what were the difficulties which arose upon that interpretation of those words in the English Act, I think we ought to do our utmost to prevent the introduction of those difficulties here. And giving to the words "as of right" what I consider to be their true meaning, and also their accustomed meaning for they are a well-known legal expression I think they signify no more than (as I have said) that the enjoyment must be by a person in the assertion of a right."

23. In the decision reported as Nasiruddin and Another Vs. Deokali and Others, it was observed as under:

In English law the exercise of a right of way and similar positive easements for a prolonged period gives rise to the presumption that such exercise was ''of right'', that is to say, it is presumed that the right of passage was exercised without any permission, express or implied, on the part of the owner of the servant tenement. This is because social conditions and the nature of the landed property in England are such that landowners are particularly jealous of their exclusive right and the familiar appearance of the notice boards to be seen in England bearing the inscription ''trespassers will be prosecuted'' is an indication of the views held by the owners of property. Accordingly, it is to be presumed that if the owner of the dominant tenement has for a long period passed over the servant tenement that he did from the beginning with a claim of right, for it is unlikely that if he had such a right that the owner of the servient tenement would have allowed him to pass. In India, however, and it may be in other countries where such views of the exclusiveness of landed property do not prevail a mere period of long user will not give rise to the presumption. It is customary for the owner of piece of waste land not to raise any objection to the passage of strangers over such land. It was pointed out by the Calcutta High Court in the leading case of (1904) 8 CWN 359 that in such circumstances mere long user gives rise to no such presumption as is to be inferred in England and that whether or not long user creates the presumption that its beginning was founded on a claim of right will depend upon the locality, the customs of the people, and it may be the relationship between the respective owners of the dominant and servient tenements.

24. We may next refer to the of the Patna High Court in Salina Jitendra Lal v. Ram Charan AIR 1959 Pat 474 in which it was held that it was wrong to say that merely because there was no cultivation of the disputed land there was a presumption either in law or in fact that the user of a pathway over the land was more of right and because of the special circumstances prevalent in India, mere user for a long period of property will not give rise to the presumption that the claim as a user was as a matter of right.

25. The law laid down in the decisions reported as Gajo Rai and Others Vs. Gaura Devi and Others, and Tukaram Rajaram Suple and Others Vs. Sonba Chindhu Mali, is

also to the same effect.

26. From the afore-noted decisions, the legal norm which emerges is that the mere fact that a person proves that he had been using an easement openly, peaceably and uninterruptedly since a very long period does not lead to a presumption that he had been using the same ''as of right''. A person claiming easementary rights by way of prescription must specifically plead and prove that he had been enjoying an easement ''as of right''.

27. In the instant case, there is one circumstance which has a material bearing on the said aspect of the matter.

28. As already noted in the preceding paras, appellant No. 2, in his testimony as PW-2 had admitted the factum of acquisition of the suit land and its being placed at the disposal of the respondent and further admitted that no action was taken by the appellants to challenge the said acquisition.

29. The fact that the appellants did not challenge the acquisition of the land in question over which the right of way is being claimed as an easementary right, the appellants have obviously not exercised their right u/s 3(b) of the Land Acquisition Act 1894 which holds that a person claiming an easementary right is a person interested meaning thereby is a person who can object to the notification issued u/s 4 of the Land Acquisition Act or the declaration issued u/s 6 thereof. Needless to state, on possession of acquired lands being taken over, by virtue of the mandate of Section 16 of the Land Acquisition Act, the land vests in the appropriate government, in the instant case the central government, free of all encumbrances and thus the respondent got the right to the land when the same was placed at its disposal by the central government, free from any encumbrance.

30. That apart, we note that DW-2, Shri P.T. Varghese stated in his examination-in-chief that the appellants had access to their land through a small rasta from the joint holding which the appellants had with their cousin and that the appellants had recently covered the same. We note that DW-2 was not even challenged with respect to his said testimony but was questioned whether as of today the appellants could access their house through the land of Suresh Kumar to which the witness replied that as of today the appellants could not do so. We note that the appellants have themselves filed photographs showing the site which are Ex.PW-1/4 to Ex.PW-1/15. The same reveal no road. It shows a barren land whereon due to wear and tear resulting from movement over a strip thereof the semblance of a kachha rasta exists.

31. In this connection a very important piece of evidence which appears to have escaped the attention of the learned trial Judge is on record, being the Award Ex.DW-1/2. The importance of the Award has to be understood with reference to Ex.DW-1/1 the plan proved by DW-1 which shows that towards the North of land comprised in Khasra No. 225 is a huge parcel of land, post acquisition placed at the

disposal of DDA comprised in Khasra No. 224, 227 and Khasra No. 699/253. The Award Ex.DW-1/2 shows the acquisition of land comprised in, amongst other Khasra No. 224, 227 and 699/253. The Award shows compensation assessed for the said lands which were acquired as per the claims of the land owners. At page 38 of the Award it has been recorded that no compensation was being assessed for the land comprised in Khasra No. 486, 509, 145/2, 146, 161/2, 232/2, 234, 282/2, 301/2, 325/2 min, 432, 68, 433, 460, 473, 521 and 82 recording that the said lands constitute a public path and for said reason no compensation was payable for the same. No pathway or a path has been recorded in the Award pertaining to the lands comprised in Khasra No. 224, 227 and 699/253. This also establishes that no pathway or a road existed on the said lands.

32. We note that the acquired lands have been placed at the disposal of DDA for constructing flats i.e. a public purpose and if what the appellants desire is given to them the entire housing project would be jeopardized because the stated rasta cuts through the middle of the acquired land, evidenced by Ex.DW-1/1.

33. The appellants are responsible for creating a situation which has resulted in no access being available to their land by not ensuring access thereto from the road which leads up to and ends at the boundary of their land with that of Suresh Kumar. We however note that during arguments, learned Counsel for DDA stated that his clients would have no objection if a finding is returned that DDA would leave a strip of land having length of 6 contiguous to the road which ends at the boundary of the land of Suresh Kumar and the appellants as per Ex.DW-1/1, having width equal to the width of the existing road towards the northern boundary of the land of Suresh Kumar.

34. Holding that on the evidence on record the view taken by the learned Trial Judge is correct, but taking on record the consent of learned Counsel for DDA as noted above we dispose of the suit filed by the appellants dismissing the suit and rejecting the reliefs prayed for; but directing DDA to leave vacant a strip of land having length of 6  contiguous to the road which ends at the boundary of the land of Suresh Kumar and the appellants as per Ex.DW-1/1, having width equal to the width of the existing road towards the northern boundary of the land of Suresh Kumar.

35. No costs.