

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NOS. 8628-8629 OF 2009

DR. S. KUMAR & ORS.

.....APPELLANTS

Versus

S. RAMALINGAM

.....RESPONDENT

J U D G M E N T

HEMANT GUPTA, J.

The defendants are in appeal aggrieved against the judgment and decree passed by the High Court of Judicature at Madras on March 6, 2007, whereby judgment and decree passed by the First Appellate Court was not interfered with in the second appeal.

2. The plaintiff - respondent filed two suits, firstly, OS No. 2251 of 1985 claiming an injunction against the defendants from using a pathway shown as A B C D in the plaint and claiming exclusive right to use the said path. Another suit OS No. 9158 of 1986 was filed restraining the defendants from preventing the plaintiff from using the pathway to reach their land E F G H.

3. The learned trial court dismissed the suits on April 22, 1991 holding the defendants have right of necessity of access to their property over the pathway A B C D in the first suit. However, the First Appellate Court allowed the appeal on September 16, 1993 and granted injunction as prayed holding that there is no necessity of easement as the said defendant has access from the property of her husband which is on Mowbrays Road. The High Court has maintained the judgment and decree of the First Appellate Court vide judgment dated March 6, 2007.

4. The facts leading to the present appeal are that one C.L. Rajasekaran was the owner of big chunk of land on Mowbrays Road in the city of Chennai. He executed three separate sale deeds on different dates. The first sale deed was executed in favour of defendant No. 1 - B. Shivaraman on December 5, 1973 in respect of property measuring 3483.66 sq. feet. Another adjoining land was purchased by Lakshmi Shivaraman, wife of defendant No. 1, vide separate sale deed dated April 1, 1976, in respect of land measuring 1062 sq. feet. The plaintiff entered into an agreement for purchase of land measuring 3525 sq. feet with C.L. Rajasekaran on May 13, 1978 but the sale deed was executed on May 31, 1988 after a decree in a suit for specific performance was granted.

5. The sale of land to defendant No. 1 is abutting Mowbrays Road whereas the land purchased by defendant No. 2 is touching back of land purchased by defendant No. 1. The dispute is in respect of the passage over which plaintiff claims an exclusive right of use in terms of the sale

deed dated May 31, 1988 whereas defendant No. 2 claims access to land purchased by her on the strength of recitals in the sale deed in her favour and also the fact that she has been using such passage from the day of purchase.

6. Before we advert to the respective arguments raised by learned counsel for the parties, some factual aspects in respect of the sale deed are in question. The copy of sale deed dated December 5, 1973 has been produced by Mr. Basant, learned senior counsel for the plaintiff. The said sale deed recites that piece of land described in the schedule attached with the sale deed and marked in the plan and all rights, title and interest in the said property together with all ways sewages rights easements advantages and all other appurtenances and privileges heretofore enjoyed by the vendor stands conveyed to the said defendant. The layout plan shows that the area of land is 3483.66 sq. feet that is 44 feet 3 inches x 44 feet. There is a long rectangular strip 12 feet wide in the layout plan adjoining to the said land conveyed.

7. The second sale deed dated April 1, 1976 (Exh. B3) is in respect of plot area 1062 sq. feet having similar recitals as in the sale deed (Exh.B1) whereas in the lay out plan in the schedule attached to the sale deed, the area marked red in the plan is the area conveyed to the defendant No. 2. It is admitted by the parties that the colour in the original site plan cannot be made out at this stage but from the document attached with the sale deed (Exh. B4), land measuring 44 feet 3 inches x 24 feet was conveyed to defendant No. 2 adjoining

rectangular piece of land 12 feet wide. The plaintiff purchased land in the same block but on the rear side of the land sold to defendant No. 2 vide sale deed dated May 31, 1988. The Schedule B of the said sale deed reads as under:

“SCHEDULE ‘B’

All that piece and parcel of land bearing a part of Plot 7-A, situate at Mowbrays Road, 1st Cross Street, Alwarpet, Madras 600 018, bearing R.S. No. 3682 (Part), measuring 56ft. East to West, On the Northern Side 57’6’ on the Southern side 66 ft. North to South on the Western side and 61 ft. North South on the Eastern Side marked EPGH coloured Red in the plan measuring in all 3525 sq. feet together with a pathway having a width of 16 feet East to West, and a length of 103 feet North to South marked as ABCD in the plan and coloured Green for exclusive use of the purchasers bounded on the:

ON THE NORTH BY : House and Site owned by Sivaraman
and Lakshmi Sivaraman

xx

xx

xx”

8. Learned counsel for the appellants - defendants refers to the statement of vendor PW-3 C.L. Rajasekaran wherein he stated that he has divided the property in three parts. He stated that as per sale deed Exh. A18, he gave exclusive right over the 16 feet passage to the plaintiff and did not give any right to anyone except him. In cross-examination, he admitted that he executed a sale deed in favour of one Bharatha Reddy in 1983 after leaving 16½ feet passage in between the properties of Bharatha Reddy and the respondents, now the appellants. The length of said passage is 106 feet and width 16 feet. He further admitted that from 1976, the second respondent was using land measuring 16 x 106 feet as her pathway.

9. On the other hand, learned counsel for the plaintiff refers to the gift deed executed by defendant No. 2 on June 7, 1976 in favour of her husband in respect of land purchased except 222 sq. feet. Learned counsel for the plaintiff also refers to the written statement filed by the defendant No. 1, which written statement was adopted by the defendant No. 2, to argue that initially there was agreement to purchase four grounds - 1½ ground by defendant No. 1, remaining 2½ ground by defendant No. 2. The defendant No. 1 purchased 1½ ground vide sale deed dated December 5, 1973 but due to ceiling problems, the second defendant purchased only 1½ ground out of 2½ ground. Learned counsel for the plaintiff refers to the statement of defendant No. 1 who appeared as DW-1 Shivaraman wherein he deposed that he has purchased plot measuring 1200 sq. feet in the name of his wife in the year 1976. The said defendant has admitted that 840 sq. feet of land was settled in his favour out of land purchased in her name. Thus, the said property was intended to be used jointly by both the defendants. Since the land of defendant No. 1 is adjacent to Mowbrays Road, therefore, the defendants have access to the respective portions purchased. Thus, the defendant No. 2 cannot claim any easement of necessity.

10. On the basis of such facts, the argument of learned counsel for the defendants is two-fold:

Firstly, that the right of way to access property purchased by defendant No. 2 was reserved in the sale deed dated April 1, 1976.

Therefore, the vendor of the defendant No. 2 and plaintiff could not confer exclusive right of use of passage for the use of the plaintiff. Therefore, the exclusive right given to the plaintiff is in contravention of Section 48 of the Transfer of Property Act, 1882 and, thus, the seller has no saleable interest to confer exclusive right of user to the plaintiff.

The second argument is that merely because defendant No. 2 is the wife of defendant No. 1, will not deprive the said defendant of the right of passage conferred specifically to her in the sale deed. Even otherwise, the said defendant has an easement of necessity to approach her land. The subsequent transfer in favour of her husband of part of the property purchased by her will not deprive the independent right of access to such property merely because she happens to be the wife of the other defendant. The transferee from defendant No. 2 will retain such right as has been granted to her in the sale deed dated April 1, 1976. Therefore, keeping in view the principle of easement of necessity, the defendant No. 2 has a right to use such passage to access property purchased by her by separate sale deed on April 1, 1976 i.e. more than two years after the sale in favour of her husband. She continues to be owner of small portion of the land purchased.

11. On the other hand, Mr. Basant, learned senior counsel for the plaintiff argues that the easement can be of three kinds i.e. when it is granted specifically or easement of necessity or easement of prescription. There is no case set up by the defendants of easement by prescription. There is no easement of necessity in terms of Section 41 of the Indian Easements Act, 1882 as such easement of necessity, if

any, stands extinguished when the necessity comes to an end. Reliance is placed upon the judgment in ***Hero Vinoth (Minor) v. Seshammal¹***. It is further contended that the easement rights for not granted specifically to the defendant No. 2 as the recitals in the sale deed are generic in nature usually put by the deed writers so as to confer complete title over the land sold to the defendants but that will not include the grant of any easement rights to the defendants.

12. We have heard the learned counsel for the parties at length and find merit in the arguments raised by learned counsel for the defendants. There are three separate lay out plans on record. First, when the land was sold to defendant No. 1 - B. Shivaraman on December 5, 1973. In the said lay out plan, the adjacent land to the land sold is 12 feet wide strip throughout the length of the land. Second lay out plan is of the land sold to defendant No. 2. It shows that same 12 feet wide strip abutting the land is conveyed to defendant No. 2 on April 1, 1976. Third lay out plan is attached to the land sold to the plaintiff vide agreement dated May 13, 1978 in respect of an area which is adjacent to the land sold to defendant No. 2. However, schedule shows 16 feet wide strip 103 feet long which ends with the outer boundary of the plot sold to defendant No. 2.

13. The relationship of defendant Nos. 1 and 2 will not negate the grant of easement right of passage granted to her in the sale deed only because the recital is generic in nature and usually put by the deed

¹ (2006) 5 SCC 545

writers. Since there is specific mention of easement rights reserved for defendant No. 2 which recital is supported by a strip of land 16 feet wide which provides access to the plot of land purchased by defendants and also to the plaintiff. Once the land has been sold with the right of access through the land adjoining the property sold, such right could not be exclusively conferred to the plaintiff in the sale deed dated May 31, 1988.

14. Section 48 of the Transfer of Property Act, 1882, relied upon by the learned counsel for the appellants, reads thus:

“48. Priority of rights created by transfer. – Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.”

15. The said provision contemplates that where a person i.e. Rajasekaran has created different rights in or over the same property i.e. 16 feet wide strip of land and such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. The exception is if special contract or reservation binding the earlier transferee is executed. It will mean that the exclusive right conferred on the plaintiff in the sale deed dated May 31, 1988 will not be legal till such time the earlier transferee i.e. defendant No. 2 has a special contract or reservation which binds her. Since the right of access to defendant No. 2 was reserved in the sale

deed dated April 1, 1976, therefore, the vendor could not confer exclusive right to the plaintiff vide sale deed dated May 31, 1988.

16. The plaintiff has to maintain the 16 feet wide passage in any case in terms of the recital in his sale deed dated May 31, 1988. Therefore, if the defendant No. 2 or her transferees use the passage, then such use of passage by defendant No. 2 or her transferees cannot be said to be causing any prejudice to the plaintiff.

17. The argument that right of easement stands extinguished once the easement of necessity comes to an end is not applicable to the facts of the present case. The argument is based on the fact that right, title and interest of both the defendants now stand merged in one person after the death of both the defendants. The rights of the parties arise out of document of title in the year 1976. Still further, the rights of the parties have to be adjudicated upon as they exist on the date of filing of the suit. The subsequent events of inheritance vesting the property in the same person will not take away the right of the defendants to use the passage adjacent to their land only because the defendant No. 2 has gifted part of land to defendant No. 1 or that after the death of both the defendants, the common legal proceedings inherited the property.

19. The appellants have been granted right to use passage in the sale deed. Thus, it is not easement of necessity being claimed by the appellants. It is right granted to defendant No. 2 in the sale deed

therefore, such right will not extinguish in terms of Section 41 of the Indian Easements Act, 1882.

20. In view thereof, we find that the judgment and decree passed by the High Court suffers from manifest error and, thus, cannot be sustained in law. Accordingly, the appeals are allowed. The 16 feet x 103 feet passage adjoining the property of the defendants leading to the property of the plaintiff is reserved for the common use of defendant No. 2 and of the plaintiff. No costs.

.....J.
(L. Nageswara Rao)

.....J.
(Hemant Gupta)

**New Delhi,
July 16, 2019.**

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