



IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 9642 OF 2010

MANISHA MAHENDRA GALA & ORS. ...APPELLANT(S)

VERSUS

SHALINI BHAGWAN AVATRAMANI & ORS. ...RESPONDENT(S)

WITH

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J U D G M E N T

PANKAJ MITHAL, J.

1. The dispute in the above two appeals is in connection with easementary rights over 20ft. wide road situated over land Survey No.57 Hissa No.13A/1 which is presently owned by the respondents herein (hereinafter the 'Ramani's').

- 2.** In Suit No.14 of 1994 instituted by Joki Woler Ruzer, the descendants of the subsequent purchaser Mahendra Gala were added as plaintiff Nos.2-4 (hereinafter the 'Gala's'). The suit was for declaration of their easementary rights over the 20ft. wide road situate in the property of the Ramani's and for permanent injunction in respect thereof. The suit was decreed by the court of first instance vide judgment and order dated 06.02.2003. However, the aforesaid judgment and decree was set aside in appeal by the Ad-hoc District Judge-2, Raigad, vide judgment and order dated 12.03.2009 and the suit was dismissed. The High Court vide impugned judgment and order dated 01.10.2009 upheld the aforesaid judgment and order of the appellate court in Second Appeal No.305 of 2009.
- 3.** Apart from the above suit, Suit No.7 of 1996 came to be filed by the Ramani's for declaring that the Gala's or their predecessor-in-interest have no right, title and interest in the property and they do not have any right of way through the above land. The aforesaid suit was dismissed vide judgment and order dated 06.02.2003 by the court of first instance i.e. Civil Judge, Junior Division, Murud. On the appeal being

preferred, the judgment and order passed by the court of first instance was set aside and the suit was decreed holding that the Gala's have no right of way either by easement of prescription or of necessity on the suit land/road. The Gala's were restrained from disturbing the possession of Ramani's over the suit land and from doing any overt act over it.

4. Aggrieved by the dismissal of their Suit No.14 of 1994 and the decreeing of the Suit No.7 of 1996 of the Ramani's, these two appeals have been preferred by the Gala's. Their predecessor-in-interest Joki Woler Ruzer has not joined and has not preferred any separate appeal. Meaning thereby, that the original plaintiff has accepted the verdict of the High Court.
5. It would be necessary and beneficial to recapitulate certain background before considering the submissions of the respective parties to arrive at any conclusion with regard to their rights over the suit land, more particularly on the road in question.
6. There is no dispute that one Ramchandra Borkar was the owner of the vast land situate in Mouje Korlai, Taluka Murud, District Raigad, Maharashtra i.e. Survey No.48 Hissa No.15

and Survey No.57 Hissa No.13. The aforesaid Ramchandra Borkar fell into arrears of government dues recoverable as arrears of land revenue and, therefore, his aforesaid properties were acquired by the government. Subsequently, a part of the aforesaid property i.e. land Survey No.48 Hissa No.15 was sold out by the government on 25.04.1969 through public auction in favour of one Woler Francis who was also put in possession thereof on 08.07.1969. Thus, Woler Francis became the exclusive owner in possession of land Survey No.48 Hissa No.15 admeasuring 1 hectare and 76 acres situated at Mouje Korlai Taluka, Murud, District Raigad.

7. The remaining land which was initially possessed by Ramchandra Borkar and which was acquired by the government, was subsequently re-acquired by one Vasant Ramchandra Borkar, of the family of original owner Ramchandra Borkar. The said Vasant Ramchandra Borkar sold out a piece of the said land on 09.07.1988 to one Dharmadhikari being land Survey No.57 Hissa No.13A/2. The balance land which was essentially a part of Survey No.57 was sold to the family of Ramani's by a registered Sale Deed dated

11.09.1989 and was numbered as Survey No. 57 Hissa No. 13A/1.

- 8.** In this way, the entire property of the Borkar family comprising of Survey No.48 Hissa No.15 and Survey No.57 Hissa No.13 which was acquired by the government came into the hands of Woler Francis (Survey No.48 Hissa No.15); the family of Ramani's (Survey No.57 Hissa No.13A/1); and the family of Dharmadhikari (Survey No.57 Hissa No.13A/2).
- 9.** The road in dispute on which easementary rights are claimed by the Gala's forms part of Survey No.57 Hissa No.13A/1 which is under the ownership of the Ramani's.
- 10.** Sometime in 1994, Woler Francis died and he was succeeded by his heir and legal representative Joki Woler Ruzer. When his use of the above 20ft. wide road was objected to by the Ramani's, he filed Suit No.14 of 1994 for declaration of his easementary rights over the said land and for a decree of permanent injunction. During the pendency of the said suit, the aforesaid Joki Woler Ruzer transferred and assigned his rights of the entire land i.e. Survey No.48 Hissa No.15 in favour of one Mahendra Gala, the predecessor-in-interest of the

Gala's. The aforesaid Mahendra Gala was impleaded as plaintiff in the aforesaid suit on 28.07.1998 and subsequently on his death, the present Gala's were substituted as his heir and legal representative.

- 11.** The suit was contested by the Ramani's by filing a written statement. They resisted the claim of the Gala's regarding easementary rights over the disputed *rasta*. They contended that they have purchased the property Survey No.57 Hissa No.13A/1 and categorically denied use of the said *rasta* uninterruptedly by the Gala's.
- 12.** In the said suit, oral and documentary evidence were adduced by the parties. The Gala's produced Navneet Liladhar Hariya, their Power of Attorney holder and the Manager of the property as PW-1, Bhalchandra Nathura Choradhekar, Sarpanch of the village as PW-2, Dattatray Shankar Sawant, one of their neighbours as PW-3 and Bhalchandra Dattaram Tandel, Surveyor as PW-4, in order to prove their easementary right of way over the disputed *rasta*.
- 13.** The Gala's also relied upon the sale deed by which Joki Woler Ruzer had transferred and assigned his rights in land Survey

No.48 Hissa No.15 in favour of Mahendra Gala, the predecessor of the Gala's.

- 14.** The Ramani's examined Sanjay Borkar as DW-1 and filed certified copy of the deposition of one Arjun Ramani. Additionally, they brought on record *purshis Exh.165 and Exh.170*.
- 15.** On the basis of the pleadings of the parties and the evidence adduced, the trial court framed several issues but the primary issue was whether the Gala's have any easementary right of way over the land of the Ramani's i.e., the disputed *rasta*.
- 16.** We had heard Shri Huzefa Ahmadi, learned senior counsel for the appellants and Shri Devansh Anoop Mohta, learned counsel for the respondents.
- 17.** The main thrust of the argument of Shri Huzefa Ahmadi, learned senior counsel for the Gala's (appellants in both the civil appeals) is that Gala's are undisputedly the owners in possession of the land Survey No.48 Hissa No.15 and since they have no alternative way of access to the said land except the *rasta* in dispute, the only option to them is to have egress and ingress through the said *rasta* for use of their land. They

have acquired easementary right by prescription and that of necessity over the said *rasta* and more particularly through an agreement i.e. the Sale Deed dated 17.09.1994 which records their right of way through the said *rasta*. He further submits that once the suit was decreed by the court of first instance and findings were recorded in favour of the Gala's, the appellate court ought not to have overturned those findings. It ought to have exercised restraint in interfering with the aforesaid decision.

- 18.** The above submissions were stoutly opposed on behalf of the Ramani's by their counsel.
- 19.** 'Easement' is defined under Section 4 of the Indian Easements Act, 1882¹ to mean a right which the owner or occupier of a land possesses for the beneficial enjoyment of his land on the other land which is not owned by him, to do and continue to do something or to prevent and continue to prevent something being done on the said land. It may be pertinent to mention here that the land which is to be enjoyed by the beneficiary is

¹ Hereinafter referred to as "The Act", for short

called 'Dominant Heritage' and the land on which the easement is claimed is called 'Servient Heritage'. The easementary right, therefore, is essentially a right claimed by the owner of a land upon another land owned by someone else so that he may enjoy his property in the most beneficial manner.

20. Now, we first proceed to examine if the Gala's have acquired any easementary right over the *rasta* in dispute existing on the servient heritage.

21. In the case at hand, the Gala's are admittedly the owners of Survey No. 48 Hissa No.15 whereas the Ramani's are the owners of Survey No.57 Hissa No.13A/1 on which it is alleged, exists the *rasta* in dispute. The Gala's claim that the use of the aforesaid *rasta* is for the beneficial enjoyment of their land as they have no other way of access to their land and that they have been enjoying the said easementary right for the "last many years".

22. Section 15 of the Act categorically provides that for acquiring any easementary right by prescription, the said right must have been peaceably enjoyed in respect of the servient heritage without any interruption for over 20 years. In the plaint,

neither the original plaintiff Joki Woler Ruzer nor the Gala's have specifically claimed that they or their predecessor-in-interest were enjoying easementary right of use of the said *rasta* for over 20 years. They simply alleged that they have been using and managing the same since "last many years". The use of the term "last many years" is not sufficient to mean that they have been enjoying the same for the last 20 years. Last many years would indicate use of the said *rasta* for more than a year prior to the suit or for some years but certainly would not mean a period of 20 or more years. Therefore, their pleadings fall short of meeting out the legal requirement of acquiring easementary right through prescription.

- 23.** In this connection Shri Ahmadi, learned counsel for the appellants, relying upon "***Ram Sarup Gupta (Dead) By Lrs. vs. Bishun Narain Inter College & Ors***"² submitted that the pleadings must be construed liberally and it is not necessary that the precise language or expression used in the statute should be used. The aforesaid decision lays down that

² (1987) 2 SCC 555

pleadings should be liberally construed and need not contain the exact language used in the statutory provision but it does not mean that the pleadings even if fails to plead the essential legal requirement for establishing a right, the same be so construed so as to impliedly include what actually has not been pleaded more particularly when it happens to be an essential ingredient for establishing a right. Thus, the aforesaid pleadings cannot be treated to be of sufficient compliance of the statutory requirement. It is settled in law that a fact which is not specifically pleaded cannot be proved by evidence as evidence cannot travel beyond the pleadings.

24. The plaint was filed and verified by Joki Woler Ruzer who has not entered the witness box to substantiate the pleadings as to for how long he or his predecessor had been using the said *rasta* for egress and ingress to their land before the institution of the suit or to say that the easementary right, if any, attached to the said land, was also transferred or purchased by his predecessor.

25. On the contrary, the deposition of Sanjay Borkar (DW-1) who is from the family of the original owners of the land has

categorically stated that the original plaintiff Joki Woler Ruzer was not having any right of way on his land and so also the Gala's (plaintiff Nos.2-4), the subsequent holders of the land, rather they possess an alternative way to approach their land.

- 26.** Navneet Liladhar Hariya (PW-1), the Power of Attorney holder of the Gala's, stated that the road of 20ft. in width exists on Survey No.57 Hissa No.13A/1 which is being used as an approach road to Survey No.48 Hissa No.15. The said *rasta* was being used by predecessor-in-interest of the Gala's but now the Ramani's have started raising objection. Since they have no other way of access to their land, they are being denied connectivity or approach to their land. As a result, access to the Dominant Heritage stands completely blocked. In cross-examination, he states that Dharmadhikari has also purchased some land from Vasant Ramchandra Borkar and that the said Dharmadhikari is having right of way through the disputed *rasta*. PW-2, the then Sarpanch simply deposes that he has knowledge of the existence of disputed *rasta* since his childhood. The neighbour (PW-3) also repeated the same thing and stated that there is a road from Salav-Murud road which

passes through the land of the Ramani's up to his land i.e. Survey No.43. The said road is in existence since long and is being used by the agriculturist. Nobody has ever raised objection to its use. The Surveyor (PW-4) is alleged to have surveyed the land on 26.12.1998. He had shown the existence of the road in dispute in the sketch map prepared by him.

- 27.** The aforesaid evidence simply proves that there exists a road on Survey No.57 Hissa No.13A/1 for long but that by itself is not sufficient to prove that the Gala's have acquired any easementary right over the same. There is no evidence to prove that the Gala's are in use of the said land for the last over 20 years uninterruptedly. The Gala's have entered the scene only on purchasing the said land on 17.09.1994 after the suit had been filed and as such, they could not and have not deposed anything about the pre-existing right or the easementary right attached with the Dominant Heritage. The said right has to be proved as existing prior to the institution of the suit. Neither the Gala's nor their predecessor-in-interest Joki Woler Ruzer have dared to come in the witness box. They have only relied

upon the deposition of their Power of Attorney holder/the Manager.

- 28.** The law as understood earlier was that a General Power of Attorney holder though can appear, plead and act on behalf of a party he represents but he cannot become a witness on behalf of the party represented by him as no one can delegate his power to appear in the witness box to another party. However, subsequently in ***Janki Vashdeo Bhojwani vs. IndusInd Bank Ltd.***³, this Court held that the Power of Attorney holder can maintain a plaint on behalf of the person he represents provided he has personal knowledge of the transaction in question. It was opined that the Power of Attorney holder or the legal representative should have knowledge about the transaction in question so as to bring on record the truth in relation to the grievance or the offence. However, to resolve the controversy with regard to the powers of the General Power of Attorney holder to depose on behalf of the person he represents, this Court upon consideration of all

³ (2005) 2 SCC 217

previous relevant decisions on the aspect including that of ***Janki Vashdeo Bhojwani (supra)*** in ***A.C Narayan vs. State of Maharashtra***⁴ concluded by upholding the principle of law laid down in ***Janki Vashdeo Bhojwani (supra)*** and clarified that Power of Attorney holder can depose and verify on oath before the court but he must have witnessed the transaction as an agent and must have due knowledge about it. The Power of Attorney holder who has no knowledge regarding the transaction cannot be examined as a witness. The functions of the General Power of Attorney holder cannot be delegated to any other person without there being a specific clause permitting such delegation in the Power of Attorney; meaning thereby ordinarily there cannot be any sub-delegation.

- 29.** It is, therefore, settled in law that Power of Attorney holder can only depose about the facts within his personal knowledge and not about those facts which are not within his knowledge or are within the personal knowledge of the person who he represents or about the facts that may have transpired much

⁴ (2014) 11 SCC 790

before he entered the scene. The aforesaid Power of Attorney holder PW-1 had clearly deposed that he is giving evidence on behalf of plaintiff Nos. 2 to 4 i.e. the Gala's. He was not having any authority to act as the Power of Attorney of the Gala's at the time his statement was recorded. He was granted Power of Attorney subsequently as submitted and accepted by the parties. Therefore, his evidence is completely meaningless to establish that Gala's have acquired or perfected any easementary right over the disputed *rasta* in 1994 when the suit was instituted.

- 30.** The only proper and valuable evidence in this regard could have been that of Joki Woler Ruzer who had instituted the suit but he failed to depose before the court. His pleadings are also vague and do not specifically state that he had been in use of the *rasta* in dispute for over 20 years or that he had acquired and perfected easementary right over the said *rasta* by prescription or necessity.
- 31.** In the absence of any evidence or material to show that Joki Woler Ruzer had actually acquired any easementary right over

the *rasta* in dispute before the institution of the suit, he could not have transferred any such right in favour of the Gala's.

- 32.** The easementary right by necessity could be acquired only in accordance with Section 13 of the Act which provides that such easementary right would arise if it is necessary for enjoying the Dominant Heritage. In the instant case, findings have been returned not only by the appellate courts but even by the trial court that there is an alternative way to access the Dominant Heritage, which may be a little far away or longer which demolishes the easement of necessity. There is no justification to go into those findings of fact returned by the courts below.
- 33.** In the light of the aforesaid findings, the Gala's are not entitled to any easementary right by necessity upon the disputed *rasta*.
- 34.** The next contention is that the Gala's have acquired easementary right under the Sale Deed dated 17.09.1994 and that it would not stand extinguished even if the necessity has ceased to exist. To buttress the above submission reliance has been placed upon ***Dr. S. Kumar & Ors. vs. S. Ramalingam***⁵.

⁵ (2020) 16 SCC 553

In the above case, the right of easement claimed was expressly granted under the sale deed to the buyer and therefore it was held that the right so granted cannot be defeated or extinguished merely for the reason that easement of necessity has come to an end.

- 35.** The situation in the present case is quite different. The property owned and possessed by the Gala's was originally the property of Ramchandra Borkar which was acquired by the government. It was purchased by Woler Francis in public auction from the government on 25.04.1969. Thereafter, it devolved upon his legal heir Joki Woler Ruzer who sold it to the predecessor-in-interest of the Gala's vide Sale Deed dated 17.09.1994. There is no evidence whatsoever on record to establish that the government ever transferred any easementary right over the *rasta* in question to Francis Woler or that his legal heir Joki Woler Rozer ever acquired or perfected any easementary right over it. Therefore, the right which was not possessed by them could not have been transferred to the Gala's under the Sale Deed dated 17.09.1994.

36. The said Sale Deed dated 17.09.1994 in original has not been produced in evidence. It was only the photocopy of the same which was brought on record. The photocopy of a document is inadmissible in evidence. Moreover, the said sale deed was executed by predecessor-in-interest i.e. Joki Woler Ruzer in favour of predecessor-in-interest of the present Gala's. The said sale deed would not bind the third parties who are not signatories or parties to the said sale deed. No evidence has been adduced to prove that Joki Woler Ruzer, predecessor-in-interest of the Gala's, had perfected easementary rights over the disputed *rasta* and thus was legally entitled to transfer the same. He himself has not come before the Court that he had actually acquired any easementary right in the disputed *rasta*. It is not the case of Gala's that their predecessor-in-interest had acquired or purchased the said property from government auction with any easementary right over the *rasta* in dispute. Thus, the Gala's have failed to prove that they have acquired any easementary right under the sale deed. In view of the above discussion, reliance upon ***Dr. S. Kumar & Ors. (supra)*** is

completely misplaced and the submission in this regard has no merit.

37. Lastly, a frail submission was advanced that one Dharmadhikari, owner of Survey No. 57 House No. 13A/2 is enjoying easementary right over the said *rasta* and, therefore, Gala's cannot be denied the same benefit. The submission has been noted to be rejected for the simple reason that in the Sale Deed *Exh. 163*, the original owner Vasant Ramchandra Borkar while transferring land to Dharmadhikari has specifically assigned right to use the said *rasta* to Dharmadhikari and not to anyone else. The predecessor-in-interest of the Gala's i.e., Joki Woler Ruzer or Francis Woler never acquired any such right under their sale deed so as to legally transfer it to the Gala's. DW-1, Sanjay Vasant Borkar, grandson of the original owner of the entire property, clearly deposed that the disputed *rasta* was only for use by Dharmadhikari as per the sale deed but no such right was sold/assigned to the predecessor-in-interest of the Gala's. Therefore, the Gala's cannot acquire easementary right as is enjoyed by Dharmadhikari whose case stand on a totally different footing.

38. It would not be fair on our part if we do not deal with yet one another submission of Shri Ahmadi regarding the powers of the appellate court in disturbing the findings recorded by the court of first instance. The submission made in this context is quite elementary in nature as Section 107 of the Code of Civil Procedure, in unequivocal terms, lays down the powers of the appellate court *vis-à-vis* to determine the case finally; to remand the case; to frame issues and refer them for trial; and to take additional evidence or to require such evidence to be taken and shall have the same powers to perform duties as nearly as may be that are conferred by the code to the courts of original jurisdiction.

39. Therefore, on the simple reading of the above provision, it is evident that the first appellate court is empowered to exercise powers and to perform nearly the same duties as of the courts of original jurisdiction. Therefore, the first appellate court has the power to return findings of fact and law both and in so returning the finding, it can impliedly overturn the findings of the court of first instance if it is against the evidence on record or is otherwise based upon incorrect interpretation of any

document or misconstruction of any evidence adduced before the court of first instance.

40. In view of the facts and circumstances of the case and the above discussions, we find that none of the contentions raised by Shri Ahmadi, learned senior counsel for the appellants (Gala's), are of any substance. We do not find any basis to record that the Gala's have acquired easementary right over the disputed *rasta* in any manner much less by prescription, necessity or under an agreement. Therefore, the appellate courts and the High Court have not committed any error of law in dismissing Suit No.14 of 1994 of the plaintiffs/appellants and in decreeing Suit No.7 of 1996 of the defendants/respondents.

41. The appeals lack merit and are accordingly dismissed.

..... J.
(PANKAJ MITHAL)

..... J.
(PRASHANT KUMAR MISHRA)

**NEW DELHI;
APRIL 10, 2024.**