

CASE NO.:
Appeal (civil) 901 of 1999

PETITIONER:
Justiniano Antao & Ors.

RESPONDENT:
Smt. Bernadette B.Pereira

DATE OF JUDGMENT: 22/11/2004

BENCH:
Ashok Bhan & A.K. Mathur

JUDGMENT:
J U D G M E N T

A.K. MATHUR, J.

This appeal is directed against the order passed by the Single Judge of the High Court of Bombay, Panaji Bench, Goa in Second Appeal No.4 of 1995 on February 13, 1998 whereby learned Single Judge has reversed the order passed by the first appellate Court.

Brief facts which are necessary for disposal of this appeal are that Smt. Bernadette B.Pereira filed a suit seeking declaration that she had acquired easementary right of access through the property of respondents, Shri Justiniano Antao, his wife Smt. Seaman Antao and Shri Diogo Antao (hereinafter referred to as the respondent-defendants) and for permanent injunction against the respondent-defendants for restraining them from obstructing, blocking, interfering with the motorable access.

The trial court by its order dated February 26, 1991 decreed the suit of the plaintiff against the respondent-defendants holding that the plaintiff had right of motorable access to her house through the property of the respondent-defendants by way of easementary right through prescription. On appeal being filed before the District Court by the respondent-defendants, the judgment of the trial court was reversed by the first appellate court on two grounds, namely, that the plaintiff had failed to allege in the pleadings that the way in question was not being used as of right and since the way was not claimed as of right the relief in question could not be granted to the plaintiff in view of Section 15 of the Easements Act, 1882 which provided that easementary right must be claimed as of right. The second ground on which the findings were upset was that the plaintiff's property was bounded on two sides by road and it does not stand to reason that in such a state of affairs the plaintiff would pass through the property of the respondent-defendants in order to reach the same road which bounds the property of the plaintiff. Aggrieved against the said order the plaintiff filed a second appeal before the High Court of Bombay, Panaji Bench, Goa and the High Court reversed the finding of the first appellate court and hence this appeal on grant of special leave.

The plaintiff and her husband Shri Bruno B.Pereira are permanent residents of Chandor-Goa and are absolute owners in possession and peaceful enjoyment along with others a landed property known as "COLOSSO" situated at Colosso, Chandor, Salcete, Goa and in this property there exists their residential house which faces towards the eastern side built by her in-laws more than 75 years ago bearing village Panchayat House No.432. Besides the

said house, there exists a garage on the north-eastern corner of the said house, built by her husband more than 25 years back. Her house along with the garage is surrounded by a compound wall on the eastern side and west, north and south with ado of rubbles and on the eastern side of the said compound wall, there is an iron frame gate of about 4 metres width. This compound wall was also constructed by her in-laws at the time of construction of the said residential house. It is alleged that prior to her marriage, her husband owned a car besides two trucks, one in working condition and the other in scrap condition and one luna moped. These vehicles were bought between the period 1960 and 1982 and these vehicles were being parked in the said garage from time to time. The defendants are the owners of the adjoining property on the eastern side of her property through which the suit access passes, the same is surveyed under No.9, Sub-division No.15 of Guirdolim village. It is alleged by the plaintiff that there exists a motorable access of about 50 metres long starting from the main village Panchayat public road and adjacent to the eastern boundary wall of the plaintiff's property and passes through the defendants' property under survey No.9/15 and it reaches to the gate of the plaintiff. It is alleged that the plaintiff had been enjoying the suit motorable access peacefully, continuously free from any obstruction and as an easementary right for the last over more than about 25 years and prior to that by her in-laws for more than 75 years for all purposes. It is alleged that even harvesting paddy crops were brought by the plaintiff through the trucks through the access motorable road. It is alleged that on July 5, 1986 at about 8.00 P.M. the defendants dumped three bullock cartloads of rubble stones near the starting point of the suit motorable access thereby attempting to obstruct the same. The plaintiff not to strain the relations with the defendants removed the said obstruction of rubble stones from the suit motorable accesses. Then again on July 6, 1986 the defendants abused the plaintiff and started pelting stones. It is alleged that the defendants threatened the plaintiff that they are going to block the said access. A complaint was filed by one of the sons of the plaintiff. The contents of the complaint was that the defendants had no right or claim to interfere with the suit access as they have acquired a right by way of prescription. The suit was contested by the defendants by filing a written statement. It was pointed out in the written statement by the defendants that there was an opening to the compound wall of the plaintiff on the southern side which gave access to the public road and the same was used by the plaintiff as per access to go from the public road to her house. They denied that there was any access passing through the property of the defendants lying on the eastern side of the plaintiff's property. It was submitted that the plaintiff was always passing through the wide gate which she had opened in her compound wall on the south-east corner directly opening on the public road. It is alleged that this gate was closed by the plaintiff only in 1984 so as to claim the suit access which they had never used for all these years. It was alleged that they were using the access through the south-eastern gate and it is only closed in 1984.

On the pleadings of the parties three issues were framed which read as under :

- " 1. Whether the plaintiff proves that she is entitled for a decree that she has acquired the right by way of prescription and easementary right for a motorable road in the suit property ?
2. Whether the plaintiff proves that she is owner in possession of a property known as "Colosso", situated at Colosso, Chandor, Salcete, Goa, registered in the Land Registration Office under No.458 and in the

Revenue Office under Matriz No.51 ?

3. Whether the plaintiff proves that she is entitled for an injunction as prayed in prayer (b) of the plaint?"

The plaintiff examined five witnesses. P.W.1, Bruno B.Pereira, is the husband of the plaintiff and the power of attorney holder of the plaintiff. He has deposed that his residential house is in Survey No.9/1 and this property is bounded by eastern side by the property of the defendants and west by the property of one Cruz, on the north by the property of one Fernandes and to the south by a public road. He has deposed that there is a garage constructed and his house was constructed by his father about 80 years back and the garage was constructed about 30 years back. He has deposed that in order to go to his house he has to take his vehicles to the defendants' property which lies on the eastern side. The length of the access passing through the defendants' property is about 50 metres and this access is being used from his childhood and ever prior to that. He has further deposed that he has no other access to go to his house. It is also submitted that in between the rubble stone wall on the south of the public road there is a drain of about one and half foot deep. He admitted that the southern side wall was broken at the corner of about 10 years back and the same was repaired by him. He has deposed that as the access through the property of the defendants was obstructed on July 5, 1986 therefore, the present suit was filed. It was put to him in the cross-examination that he has closed the opening on its southern side wall in the year 1984 and started using the suit access from 1984 onwards. He has also denied that the drain which was on the southern side of the property was repaired by him in order to take his vehicles from the southern side by public road. P.W.2 is another person who claims to have knowledge about the plaintiff's property. He has admitted that there on the south eastern side of the plaintiff's house there was a gate. On the south of the property there is a public road and in between the road on the south and the southern wall of the compound wall of the plaintiff there is a drain. However, he has deposed that the plaintiff is using the access on the eastern side for bringing their vehicles. He has further deposed that his house is at a distance of five minutes walk from the house of the plaintiff. He is friendly with the plaintiff and is visiting his house for a long time. P.W.3 has stated that from the date of her marriage she has been residing in Chandor. She has deposed about the situation of the property and has also deposed that the plaintiff had four metres wide gate on the eastern side. She also admitted that on the southern side of the plaintiff's house there is a compound wall of rubble stone and beyond that there is a public road. P.W.4, Norma Bakboda has also similarly deposed. Likewise, P.W.5- Alleluia Gomes. As against this, the defendants have examined Justiano Antao, Defendant No.2 as D.W.1. He has deposed that their property is situated outside the compound wall of the plaintiff. He has acquired the same through their ancestors. It is alleged that the plaintiff has a compound wall on the south and west of their property. He has also deposed that towards the west there is a public road. He has further deposed that presently the plaintiff comes to the road by passing through their property. But initially the plaintiff was not using his land to come to the main road but has started using the same since 1984. Prior to 1984 the plaintiff used to come to the main road from the southern side of his property where there was a gate. He has deposed that the plaintiff's cars and trucks used to pass through that gate. He has further deposed that prior to 1984 the

plaintiff had a very small opening from the eastern side in his property. It was alleged that at the time when this small gate was installed he and his brother were on board of ship. After they saw the gate they kept some rubble stones in their property in front of this gate. But the plaintiff removed the same overnight. It is alleged that the plaintiff constructed a road with the help of kharate, belt and chains. He has deposed that photographs were taken by one Anthony Dias, the photographer. He has also deposed that the plaintiff can take their vehicles from the southern side by making an opening which was in existence previously, by filling the drain towards south by mud. It has also been deposed by him that the open land belongs to him. It is admitted that in the year 1984, the plaintiff widened the opening by putting a gate in the eastern compound wall. Previously, it was a small opening and it was obstructed by them. He admitted that no complaint was filed by him in 1985 or in 1986. D.W.2, Rosario S.Antao, admitted that in the eastern side of the plaintiff's house is the property of the defendants. He has also deposed that on the south of the compound wall of the plaintiff there was an opening. It was existing for about 30 to 40 years. Presently it was closed with the help of rubble stones. It was deposed by him that earlier opening was smaller but subsequently it was widened. He has also deposed that in the year 1976 he was one of the Panch of the village Panchayat and every year the Panchayat used to dig the drain for the passage of water near the eastern compound wall of the plaintiff. The plaintiff used to take his truck by putting mud over the said drain. He has also deposed that the opening in the southern compound wall was closed by the plaintiff in the year 1984 and the plaintiff widened the opening from the eastern compound wall after about 2 to 3 years of closing of the opening in the southern wall. D.W.3 is Anthony Dias, the photographer. He has taken the photographs of the compound wall and he has produced the same as Ext.D.W.3/A along with the negatives of the same. He has deposed that these photographs were clicked in the year 1986. These photographs were also produced before us and we have perused the photographs. It appears that there were pillars on both sides showing that there was a gate. D.W.4, Chandrakant Kakolkar has deposed that in front of the house of the plaintiff he was washing his clothes. He has also deposed that towards the south of the house of the plaintiff there exists a road and the plaintiff has access to come to the road but the same was closed by the plaintiff in the year 1984. He has also supported the defendants that there was a small opening which was widened subsequently.

On the background of these evidence which has been led by the parties, the trial court after appreciating the evidence felt persuaded to grant reliefs to the plaintiff and it observed that the plaintiff is entitled to permanent injunction restraining the defendants, or their agents, servants or any other person acting on their behalf from blocking, obstructing or interfering with the suit motorable access in any manner.

Aggrieved against this order an appeal was preferred and the appellate court reversed the findings of the trial court that there is admission by the plaintiff that there existed a public road towards the west and south of their property. It was further observed that when the plaintiff has got road towards the west and south in that case why the plaintiff should be permitted to use the way from the property of the defendants. The first appellate court also observed that in order to establish acquisition of easement by prescription the plaintiff is duty bound to prove that she has been peaceably and openly using

the land of the defendants without interruption for the last 20 years. It further found that there is no pleading in the plaint that the plaintiff used the said access for 20 years as an easement and as of right in order to get the acquisition of easement by prescription. It further found that it is not the case of the plaintiff that she has no other way out and she cannot use her property without passing through the property of the defendants. It also found that in the south west of the property of the plaintiff there is an opening and she can have access to that. Therefore, the first appellate court found that the plaintiff has failed to prove that she is entitled for a decree that she has acquired the right of way by prescription for a motorable road in the suit property and accordingly reversed the finding of the trial court and dismissed the suit.

Aggrieved against this, the matter was taken in the second appeal before the High Court. Learned Single Judge of the High Court of Bombay, reversed the finding of the first appellate court and decreed the suit of the plaintiff by upholding the order of the trial court and setting aside the order of the learned Additional District Judge. Hence, the present appeal.

We have gone through the three judgments i.e. trial court, first appellate court and that of the High Court. We have gone through the evidence adduced. From this, it is more than clear that there is no specific averment in the plaint or in the statement of the witnesses showing that this access from the land of the defendants was used as of right for the last 20 years. The evidence very categorically shows that the plaintiff has an access on the south east side and this was being used by her for a long time. It was pointed out that only in the year 1984 the plaintiff has started using the access through the property of the defendants. It is also admitted that the defendants were during that time on board of ship and as soon as they came and saw the use of their land by the plaintiff, they put obstructions to it. Therefore, it is clear that it is not the case that the plaintiff has been using the access as of right through the property of the defendants for more than 20 years. Since the plaintiff has an access through the southern side of her property we see no reason why the property of other persons be used as an access to her house. If the plaintiff had no access to her house except through that of the property of the defendants then perhaps we would have considered appreciating as easement of necessity. But in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses it is more than clear that the plaintiff has failed to establish that she has been using the access peacefully, openly as of right for the last 20 years. More so we find that material placed on record and especially the photographs which have been exhibited and marked as Ext.D.W.3/A in the court that there are two pillars showing the existence of a gate in southern side but it has been closed down by rubble stones. The defendants have put up a strong case that the plaintiff has an opening in the southern side and it is amply established that there exist two pillars showing the existence of a gate which has been covered by rubble stones in the southern side. It was also pleaded that the

plaintiff was using the same and it is only after 1984 she got the gate constructed through the land of the defendants. Therefore, on the basis of the evidence and statement of the witnesses, we are satisfied that the first appellate court has correctly approached the matter and the view taken by the High Court as well as the trial court does not appear to be based on correct appreciation of facts.

In the result, we allow the appeal and set aside the order of the High Court as well as the order of the trial court and dismiss the suit and we uphold the order of the first appellate court. There shall be no order as to costs.

JUDIS