

HIGH COURT OF MADHYA PRADESH : BENCH
INDORE

SINGLE BENCH : HON'BLE SHRI JUSTICE VIVEK RUSIA, J.

SECOND APPEAL NO. 295/2000

Badrilal and others

Vs.

Omprakash and others.

Shri. M.L. Agrawal, counsel for the appellants.
Shri S.L. Ahirwasi, counsel for the respondents

J U D G M E N T
(Delivered on 27/04/2017)

This appeal has been filed by the plaintiffs against the judgment dated 05/07/2000 passed by the first Additional District Judge, Dewas in Civil Appeal no. 7-A/1998, by which, the judgment and decree dated 16/05/1996 passed by the Second Civil Judge, Class-I, in Civil Suit no. 23-A/89 has been reversed.

2 The appeal has been admitted on the following substantial questions of law on 17/01/2001

â□□ Whether the finding of the first appellate Court that right of way over the land of survey no. 1556 would remain intact and available to the respondents inspite of the sale of the said land by the predecessor of the respondents to the appellants is contrary to the provisions of law contained in section 8 of the Transfer of Property Act â□□

2 The appellants / plaintiffs had filed the suit for declaration and permanent injunction against the defendants. As per the pleadings in the plaint, plaintiffs nos. 1 to 7 are joint owner of the land bearing survey no. 1554 area 6.805 hectores situated at Gram â□□ Padliya, in which the plaintiffs nos. 1 to 4 are having $\hat{A}^{1/2}$ share each and plaintiffs no 5 to 8 are having $\hat{A}^{1/2}$ share each. By way of registered sale deed dated 10/01/1979, father of plaintiff nos. 5 to 7 Nathusingh had purchased the land being survey no. 1556 area 0.283 RA situated at Gram Padliya from the predecessor of defendant nos. 1 and 2. Both the land being survey nos. 1554 and 1556 were

divided by weir (medh) which was being used by the defendants to approach their land being survey no. 1550 are 0.543 hectares. The plaintiffs were already owner of the land bearing survey no. 1554 and after purchase of land bearing survey no. 1556, they became joint owner of both the land owners. They removed the weir and started cultivation both the land jointly. That, on 26/07/1989, the defendants had damaged the crops standing over the land of the plaintiffs by bullock-cart while approaching their land being survey no. 1550. When the plaintiffs objected, the defendants started dispute, for which, a report was lodged in police station.

3 `The defendants have filed revenue case no. 2-A/13/88-89, in which the order was passed dated 15/03/1990 in favour of the defendants, that they have right to use weir as passage and the plaintiffs shall not restrain, but the said order was made subject to decision of the present civil suit.

4 After notice, the defendants filed written statement admitting the sale of survey no. 1556 by sale deed dated 10/01/1979 (Ex.P/2) and also stated that despite sale in

the year 1979, they were using the weir as passage and father of plaintiff nos. 5 to 7 never objected to it, therefore, this is a traditional way, for which they are having right to use. By selling the land, they reserved the right to use the said passage.

5 On the basis of the pleadings, the trial Court has framed 5 issues including the issues whether the order of revenue Court dated 23/05/1994 is effective and binding on the plaintiffs.

6 Vide judgment and decree dated 16/05/1996, the trial Court has recorded the findings that there was weir between survey nos. 1556 and 1554, but held that while selling the land, the defendants did not reserve their right to use it as passage, therefore, the plaintiffs have right to object the defendants to use the said passage. Since the defendants themselves have foregone their rights by selling the land, therefore, the order of revenue Court is not binding on the plaintiffs.

7 Being aggrieved by the judgment and decree, the defendants preferred first appeal before the Additional District Judge. By judgment and decree dated 05/07/2000,

the Additional District Judge has set aside the judgment and decree and dismissed the plaint on the ground that, order of the revenue Court dated 23/05/1994 is binding on the plaintiffs as the revenue Court was competent to pass such order and the same has not been set aside so far. The Appellate Court has further held though while selling the land, the defendants did not reserve their rights to use the weir, even then the traditional rights cannot be closed.

8 Being aggrieved by the judgment and decree dated 05/07/2000, the plaintiffs preferred present second appeal. Vide order dated 17/01/2001, the appeal was admitted on the substantial questions of law that the judgment of the first Appellate Court is contrary to the provisions of law contained in section 8 of the Transfer of Property Act.

9 I have heard learned counsel for the parties at length.

10 The facts of the case are not in much dispute that the plaintiffs are the owner of the land being survey no. 1554 and father of the plaintiffs no. 5 to 7 had purchased the land being survey no. 1556 from the predecessor of the

defendants by way of sale deed dated 10/01/1979 (Ex.- P/2). Initially both the lands were divided by way of weir as finding recorded by the trial Court. It is also not disputed that in the sale deed dated 10/01/1979, there is no description of weir and while selling the land, the defendants did not reserve their right to use the weir as passage.

11 The first Appellate Court has set aside the judgment and decree passed by the Civil Court on the ground that the right of way over the land being survey no. 1556 remains intact and available to the defendants inspite of the sale of the land by the predecessor of the defendants. Whether such finding recorded by the Appellate Court is contrary to the provisions of section 8 of the Transfer of Property Act or not ?. For ready reference, section 8 of the Act is reproduced below :

8 Operation of transfer.â   Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

12 As per section 8 of the Act, transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and

the legal incidents thereof, if nothing to the contrary is specified. If the property is land, then all things attached to the land including the easements, rent and profit are also transferred by operation of section 8 of the Act. General presumption is in favour of the transfer of all the interest of transferee. The presumption of transfer of all the interest can be rebutted by express word or by necessarily implications. The document has to be construed as a whole to gather the real intention of the parties, if transferer intends to reserve certain rights, the same is required to be mentioned in deed, because section 8 of the Act says *“unless different intention is expressed or necessarily implied”*. In the present case, it is not disputed that in the sale deed, predecessor of the defendants did not reserve their rights to use weir as a passage. Section 8 of the Act says that right of transferer would transfer to the transferee. After selling the land to the plaintiffs, the predecessor of the defendants has also transferred all their rights to the father of plaintiff nos. 5 to 7 without reserving any rights.

13 Concept of weir is to restrain water or to make

boundary between two lands, if it is owned by two different persons. Normally, weir is being used to define boundaries of two lands owned by two different persons. When the land being survey no. 1556 was owned by the plaintiffs and survey no. 1554 was owned by the predecessor of the defendants, then both the lands were divided by the weir. When the plaintiffs purchased the land being survey no. 1556, then they have right to remove the weir, because they have become the owner of both the surveys, therefore, there was no requirement of dividing the land by weir. In such circumstances, the defendants cannot claim as a matter of right to use the land of the plaintiffs as passage or right of way to approach their land, therefore, the Appellate Court has wrongly set aside the judgment and decree in favour of the plaintiffs.

14 Even otherwise, the trial Court had granted injunction to the plaintiffs on 06/01/1999 restraining defendants from passing over the land of the plaintiff. The said order was affirmed in Civil Regular Appeal by the Appellate Court. Thereafter, the suit was decreed, hence permanent

injunction was in favour of the plaintiff. The order of the Appellate Court dated 05/07/2000 was challenged in this second appeal. Vide order dated 06/02/2001, Ad-interim injunction was granted in favour of the appellants / plaintiffs, therefore, since 1989, the defendants are not using the land of the plaintiffs as right of way and that there is also findings of the Civil Court that there is an alternate way to approach their land.

15 In view of the above, the impugned order dated 05/07/2000 passed by First ADJ, Dewas in Civil Appeal no. 7-A/1998 is set aside and the judgment and decree dated 16/05/1996 passed by 2nd Civil Judge, Class-I, Dewas in Civil Suit no. 23-A/1989 is hereby affirmed.

Present second appeal is allowed accordingly.

C c as per rules.

(VIVEK RUSIA)
JUDGE

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