Sree Swayam Prakash Ashramam & Anr vs G.Anandavally Amma & Ors on 5 January, 2010

Equivalent citations: AIR 2010 SUPREME COURT 622, 2010 (2) SCC 689, 2010 AIR SCW 370, 2010 (3) AIR JHAR R 46, (2010) 1 RECCIVR 916, (2010) 1 CLR 257 (SC), (2010) 2 CIVLJ 345, (2010) 4 KCCR 183, (2010) 1 ORISSA LR 848, (2010) 1 ALL WC 695, (2010) 81 ALL LR 50, (2010) 2 MAD LJ 191, (2010) 1 SCALE 74, (2010) 2 ICC 388, (2010) 110 REVDEC 248, (2010) 78 ALL LR 720, (2010) 2 CALLT 70, (2010) 2 MAD LW 140, (2010) 1 CIVILCOURTC 351, (2010) 1 WLC(SC)CVL 172, (2010) 109 CUT LT 457, (2010) 2 ANDHLD 60, (2010) 1 ALL RENTCAS 504

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Bench: V.S.Sirpurkar, Tarun Chatterjee

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7 OF 2010
(Arising out of SLP (C) No. 17235 of 2006)

Sree Swayam Prakash Ashramam & Anr. ...Appellants

VERSUS

G. Anandavally Amma & Ors. ...Respondents

JUDGMENT

TARUN CHATTERJEE, J.

1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order dated 9th of May, 2006, passed in Second Appeal No.198 of 2000 of the High Court of Kerala at Ernakulam, by which the High Court had

affirmed the concurrent findings of fact arrived at by the courts below in a suit for declaration of easement rights in respect of `B' Schedule property of the plaint as a pathway to the `A' Schedule property of the plaint.

4. It may be mentioned that during the pendency of the second appeal before the High Court of Kerala, the original plaintiff expired and his legal representatives were brought on record as substituted respondents before the High Court, who are respondents in this appeal. For the sake of convenience, the appellants herein would be referred to as `the defendants' as they were in the original suit for declaration of easement and permanent injunction filed by the original plaintiff, who is now represented by the respondents herein.

5. The case that was made out by the plaintiff (since deceased), in his plaint was as follows: Plaint A and B schedule properties originally formed part of a vast extent of properties which belonged to one Yogini Amma. During the life time of Yogini Amma, she was in enjoyment and management of the entire property for the benefit of the first defendant Ashramam. On her death, her brother and sole legal heir Krishna Pillai and other disciples executed a settlement deed dated 20th of June, 1948 as per the directions of the deceased Yogini Amma. As per the settlement, the Schedule `A' property of the plaint was allotted to the original plaintiff (since deceased). Even thereafter, the original plaintiff (since deceased) continued to be in possession and enjoyment of the said properties effecting mutation and paying taxes. Even before the settlement deed was executed, during the life time of the said Yogini Amma, there is a building being `A' schedule property of the plaint that was in occupation of the original plaintiff (since deceased). There is a gate provided on the South Western portion of the `A' schedule property for ingress and egress to the same and `B' schedule property of the plaint which is a pathway extends up to the road on the West from the said gate. The said gate and `B' schedule pathway are as old as the building in `A' schedule property of the plaint. Other than `B' schedule pathway, there is no other means of direct or indirect access to `A' schedule property of the plaint from any road or pathway. The `B' schedule pathway of the plaint was granted to the original plaintiff (since deceased) as easement right by the said Yogini Amma and the original plaintiff (since deceased) continued to use it as such from time immemorial. This pathway is situated within the property which is now under the control and use of the defendants. Defendant Nos. 2 to 4 tried to close down the gate on the South Western extremity of the B schedule pathway and were also attempting to change the nature and existence of the `B' schedule property of the plaint. An attempt in that direction was made on 21st of July, 1982. Original plaintiff (since deceased) apprehended that defendant nos. 2 to 4 might forcibly close down the pathway. Hence, he filed a suit for declaration of easement of necessity or of grant and permanent injunction restraining the defendants from obstructing the `B' schedule pathway and for other incidental reliefs.

6. The defendant No.1 was the Matathipadhi of the Ashramam; defendant Nos. 2 and 3 were its office bearers and defendant No.4 was only an inmate of the Ashramam. Defendant Nos. 1 to 4 entered appearance and filed a joint written statement praying for dismissal of the suit by making the following defence:

The suit was not maintainable. The description of `A' schedule and `B' schedule properties was incorrect. The original plaintiff (since deceased) was attached to the institution from his childhood. In consideration of the love and affection Yogini Amma had towards the original plaintiff (since deceased), she wished to gift some portion of the property to him and in pursuance thereof, Ashramam represented by the then office bearers executed a settlement deed in respect of the properties. Original plaintiff (since deceased) was the 13th signatory in the said settlement deed. There is a pathway provided in the settlement deed on the Eastern extremity of the Ashramam properties. There is yet another lane which comes along the Western side of the Ashramam property through which also the plaintiff has access to his property. It is incorrect to say that Plaint `B' schedule is meant as a pathway for ingress and egress to `A' schedule property and that other than `B' schedule property there is no other means of direct or indirect access to `A' schedule property of the plaint. The further allegation that the pathway was granted by the said Yogini Amma to the original plaintiff (since deceased) and that he was using it from time immemorial was also not correct. Originally, there was a narrow pathway which was widened to accommodate traffic to the Ashramam. The present pathway came into existence only within the last 10 years. It can never be considered as an easement of necessity. Original plaintiff (since deceased) has no easmentary right to use the gate and the pathway and he was not entitled to the declaration or injunction prayed for. Therefore, the suit in the circumstances must be dismissed with costs to the defendants.

7. The IInd Additional Munsif, Trivandrum, accordingly, framed the following issues which are as follows :

" 1) Is not the suit maintainable?

2) Whether the plaint schedule description is correct?

3) Is there any pathway as Plaint B schedule?

4) Is the plaintiff entitled to easement right over plaint B schedule as pathway to Plaint A schedule?

5) Is the plaintiff entitled to the declaration as prayed for?

6) Whether the injunction prayed for is allowed?

7) Relief and costs."

8. After the parties adduced evidence in support of their respective cases and after hearing the parties, the IInd Additional Munsif, Trivandrum decreed the suit for declaration of easement right and for injunction filed by the original plaintiff (since deceased), holding inter alia that :-

The court noted that the plaintiff had claimed easement of necessity as well as easement of grant. According to the plaintiff, during the lifetime of Yogini Amma itself, `B' schedule pathway had been given to him as an easement of grant, which had been in use from those days and even prior to the execution of the settlement deed. The deed does not refer to the existence of `B' schedule pathway for the plaintiff to access `A' schedule property. The defendants had alleged the existence of two alternative pathways leading to the `A' schedule property. However, the same was denied by the sole witness produced by the original plaintiff (since deceased). The defendants could not lead any evidence to substantiate their claim that these pathways provide access to `A' schedule property. In a case where the original plaintiff was claiming easement right either as grant or as of necessity the plaintiff has only a primary burden to prove the absence of any alternate pathway. As the defendants have not proved the existence of any pathway for access to Plaint `A' schedule property the version of the plaintiff that there is no alternate pathway shall be accepted. According to the plaintiff, he had been residing in the building on `A' schedule property and had been using `B' schedule pathway from the year 1940. A trace of this pathway could be presumed to be in existence from the time when the Ashramam acquired the properties. As per the deed of settlement, there is a separation of tenements. At the time of its execution itself, the plaintiff could have had access to `A' schedule property only through `B' schedule pathway. As `B' schedule pathway was required for the reasonable and convenient use of the plaintiff's property and that on severance of the tenements, plaintiff can be presumed to have got a right over `B' schedule pathway by an implied grant and also an easement of necessity. It is not on record that either Yogini Amma, or the defendants themselves until 1982 had obstructed this use of pathway. There is no reason to disbelieve the plaintiff's version that Yogini Amma had given `B' schedule pathway as grant for his use as he was a close relative of the former. There is an apparent and continuous use which is necessary for the enjoyment of the `A' schedule property within the meaning of Section 13(b) of the Indian Easements Act, 1882, and, therefore, the plaintiff is entitled to easement right in respect of the pathway. The defendants have not entered the witness box to disprove the evidence led by the plaintiff.

10. In these circumstances, it was clear that `B' schedule pathway was given to plaintiff as an easement of grant.

Defendants argued that no implied grant was pleaded in the plaint. However, it does not make a difference to the findings arrived at, as the plaintiff had pleaded easement of grant. The plaintiff's right to `B' schedule pathway does not affect the interest in the Ashramam property in any manner. Since this issue was found in favour of the plaintiff, the relief of declaration and injunction was granted as prayed for.

11. Feeling aggrieved by the order of the IInd Additional Munsif, the defendants preferred an appeal before the IIIrd Additional District Judge, Thiruvananthapuram. The Appellate Court, by an order

dated 6th of April, 1999, allowed the appeal partly. The issues framed by the Appellate Court were as follows:

> 1) Whether the Trial Court was justified in granting a decree for declaration in favour of the plaintiff?
>
> 2) Whether the finding of the Trial Court that plaintiff is entitled to the decree of permanent injunction is correct?

12.The Appellate Court found that on evidence, it was proved that there is an alternate way on the western side of the `A' schedule property. The plaintiff, however, asserted that there is a difference in level of 14 feet between the `A' schedule property of the plaint and the property adjacent to it which is situated on the western side. However, the existence of an alternate pathway, howsoever inconvenient, will defeat the claim of easement of necessity. The necessity must be absolute and must be subsisting at the time when the plaintiff claims right of way by easement. In the light of these findings, the Appellate Court held that the claim of the plaintiff regarding the right of easement of necessity over the plaint `B' schedule pathway was not sustainable.

13.On the question of easement by grant, the Appellate Court was of the opinion that the plaintiff's claim in that respect stood proved. The plaintiff had acquaintance and association with the Ashramam and Yogini Amma from his childhood days as revealed from the oral and documentary evidence. Considering the location and nature of `B' schedule pathway, the location of two pillars at its inception and the gate from which it started, it could be seen that it had been in use by the plaintiff as a pathway. The plaintiff had been residing in the house on `A' schedule property even prior to the deed of settlement. Therefore, the Appellate Authority arrived at the conclusion that the plaintiff had obtained right of easement of grant from Yogini Amma over the `B' schedule pathway. An easement of grant is a matter of contract between the parties and it may have its own consideration. (B.B. Katiyar's Commentaries on Easements and Licenses, p. 762). It may be either express or even by necessary implication. Though easement of necessity will come to an end with the termination of necessity, easement acquired by grant cannot be extinguished on that ground as per section 13(b) of the Indian Easements Act, 1882. Therefore, even assuming that the plaintiff had an alternative pathway as contended by the defendants, it does not extinguish the right of easement of grant in favour of the plaintiff. Therefore, the Trial Court was justified in granting a relief of declaration of right of easement of grant over the `B' schedule pathway. However, the declaration granted on the ground of easement of necessity was not justified.

14.It was further held that the apprehension of the plaintiff on attempted obstruction of the `B' schedule pathway was well-founded and, therefore, the Trial Court was justified in granting the relief of permanent injunction against the defendants.

15. Aggrieved by the order of the first Appellate Court, the defendants took a second appeal before the High Court of Kerala. The High Court, by its impugned judgment and order dated 9th of May, 2006, dismissed the appeal and affirmed the orders of the Trial Court and of the Appellate Court.

16.The issues that were raised for consideration of the High Court were as follows:

> 1. While Yogini Amma owned and held the entire land in both the schedules at that time of alleged grant, whether the finding of easement of grant is contrary to law of easement which enjoins the existence of two tenements?
>
> 2. Whether the appellate court was right in granting an easement of grant without specifying the nature and extent of easementary right and without restricting it to the right of footway, when the terms of the grant are not known?
>
> 3. Whether the appellate court was justified in granting a decree for declaration in favour of the plaintiff as regards the easementary right by way of grant?

17.The High Court limited itself to the issue whether the decree of the first appellate court granting the original plaintiff (since deceased) right of easement over `B' schedule property by way of grant concurring with the findings of the trial court was sustainable.

18.Before the High Court, the defendants pleaded that there had been no appeal or cross objection filed by the original plaintiff (since deceased) against the order of the Appellate Court which disallowed the claim of easement of necessity and, therefore, the finding that there existed no easement of necessity in favour of the original plaintiff (since deceased) over the `B' schedule property stood confirmed. Further they contended that the alternative pathway on the western side of the `A' schedule property was rendered inconvenient by the very act of the original plaintiff (since deceased) who sold that portion of the property to a third party who began digging that pathway resulting in the difference in level. The High Court, on consideration of these contentions, held that though the claim of right of easement by way of necessity over `B' Schedule property may be affected by the subsequent sale of the said plot by the plaintiff in 1983, the claim of right of easement by way of grant over `B' schedule property stood unaffected by the said conduct.

19. The very fact that the plaintiff was continuing to use the said pathway for access to `A' schedule property was an indication that there was implied grant of `B' schedule pathway of the plaint for access to the `A' schedule property even while `A' schedule property was separately allotted to him under settlement deed. Such implied grant is inferable also on account of the acquiescence of the defendants in the original plaintiff (since deceased) using `B' schedule as pathway till it was for the first time objected on 21st of July, 1982 as alleged by the original plaintiff (since deceased).

20.The High Court observed that the Courts below had concurrently found on a proper appreciation of the evidence adduced in the case that `B' schedule property of the plaint was being used as a pathway by the plaintiff ever after construction of the building in 1940 in `A' schedule property. The defendants did not dispute the case of the plaintiff that the plaintiff was in occupation of the building ever after its construction in 1940. The defendants were also not able to establish that the plaintiff was using any other pathway for access to `A' schedule property and the building therein which was in his occupation. The mere fact that there is no mention in settlement deed enabling the use of the `B' schedule pathway for access to `A' Schedule property and the building therein is no

reason to hold that there is no grant as the grant could be by implication as well. The fact of the use of `B' schedule property as pathway ever after execution of settlement deed till 1982 by the plaintiff shows that there was an implied grant in favour of the plaintiff in relation to `B' schedule property for its use as pathway to `A' schedule property of the plaint in residential occupation of the plaintiff.

21.The High Court relied on a number of observations in Katiyars Law of Easement and Licences (12th Edition) on law with respect to "implication of grant of an easement." It may arise upon severance of a tenement by its owner into parts. The acquisition of easement by prescription may be classified under the head of implied grant for all prescription presupposes a grant. All that is necessary to create the easement is a manifestation or an unequivocal intention on the part of the servient owner to that effect.

22.The High Court quoted with approval Katiyar's note to Section 8 of the Easement Act, which reads as follows:

> "There are numerous cases in which an agreement to grant easement or some other rights has been inferred or more correctly has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part. These cases rest on the equitable doctrine of acquiescence, but they may be referred to, for the purpose of classification, as imputed or constructive grants. The party acquiescing is subsequently estopped from denying the existence of easement. It is as if such person had made an actual grant of the easement...
>
> ...It is the intention of the grantor whether he can be presumed to have been intended to convey to the grantee a right of easement for the reasonable and convenient enjoyment of the property which has to be ascertained in all the circumstances of the case to find out whether a grant can be implied. A description in a conveyance may connote an intention to create a right of easement. An easement may arise by implication, if the intention to grant can properly be inferred either from the terms of the grant or the circumstances".

23.Applying these observations to the facts of the case, the High Court held that though the original grant was by Yogini Amma that grant could not perfect as an easement for the reason that Yogini Amma herself was the owner of both `A' schedule and `B' schedule properties and consequently there was no question of `B' schedule property becoming the servient tenement and `A' schedule property becoming the dominant tenement. However, it was the desire of Yogini Amma that was implemented by her disciples by virtue of the settlement deed. Therefore, the right of the plaintiff to have `B' schedule property as a pathway could not have been taken away by the very same deed. In fact, there was implied grant of `B' schedule property as pathway as can be inferred from the circumstances, namely, i) no other pathway was provided for access to `A' schedule property in the settlement deed and ii) there was no objection to the use of `B' schedule as pathway.

24.Feeling aggrieved by the concurrent orders of the Courts below, the defendants/Appellants have filed the present special leave petition, which, on grant of leave, was heard in the presence of the

learned counsel of the parties.

25.We have heard Mr. T.L. Viswanatha Iyer, learned senior counsel for the appellants and Mr. Subramanium Prasad, learned senior counsel for the respondents. We have carefully examined the impugned judgment of the courts below and also the pleadings, evidence and the materials already on record. It is not in dispute that the trial court as well as the First Appellate Court concurrently found on a proper appreciation of the evidence adduced in the case that the `B' Schedule Property of the plaint was being used by the original plaintiff (since deceased) and thereafter, by the respondents even after construction of the building in 1940 in `A' Schedule property of the plaint. The appellants also did not dispute the case of the original plaintiff (since deceased) that he was in continuous occupation of the building even after its construction in the year 1940. It is also not in dispute that the appellants were not able to establish that the original plaintiff (since deceased) was using any other pathway for access to `A' Schedule Property of the plaint and the building therein, which was in the occupation of the original plaintiff (since deceased). The case of the appellants that since there was no mention in the deed of settlement enabling the use of `B' schedule pathway for access to `A' schedule property and the building therein, cannot be the reason to hold that there was no grant as the grant could be by implication as well. It is not in dispute that the fact of the use of the `B' schedule property as pathway even after execution of Exhibit A1, the settlement deed in the year 1982 by the original plaintiff (since deceased) would amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to `B' schedule property of the plaint for its use as pathway to `A' schedule property of the plaint in residential occupation of the original plaintiff (since deceased). In the absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative pathway for access to the `A' schedule property, it is difficult to negative the contention of the respondent that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the `B' Schedule property of the plaint. It is an admitted position that both `A' schedule and `B' schedule properties of the plaint belonged to Yogini Amma and her disciples and it was the desire of Yogini Amma that was really implemented by the disciples under the settlement deed executed in favour of the original plaintiff (since deceased). Therefore, the High Court was perfectly justified in holding that when it was the desire of Yogini Amma to grant easement right to the original plaintiff (since deceased) by way of an implied grant, the right of the original plaintiff (since deceased) to have `B' schedule property of the plaint as a pathway could not have been taken away. In Annapurna Dutta vs. Santosh Kumar Sett & Ors. [AIR 1937 Cal.661], B.K.Mukherjee, as His Lordship then was observed :

> "There could be no implied grant where the easements are not continuous and non-apparent. Now a right of way is neither continuous nor always an apparent easement, and hence would not ordinarily come under the rule. Exception is no doubt made in certain cases, where there is a `formed road' existing over one part of the tenement for the apparent use of another portion or there is `some permanence in the adaptation of the tenement' from which continuity may be inferred, but barring these exceptions, an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement."

26.In our view, therefore, the High Court was also fully justified in holding that there was implied grant of `B' schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to `A' schedule property of the plaint and there was no objection also to the use of `B' schedule property of the plaint as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose.

27.The learned counsel for the appellant raised an argument that since no case was made out by the plaintiffs/respondents in their plaint about the easementary right over the `B' Schedule Pathway by implied grant, no decree can be passed by the courts below basing their conclusion on implied grant. We have already noted the findings arrived at by the Trial Court, on consideration of pleadings and evidence on record on the right of easement over `B' Schedule pathway by implied grant. The Trial Court on consideration of the evidence of both the parties recorded the finding that there was no evidence on record to show that either Yogini Amma or the defendants themselves until 1982 had objected to the plaintiff's use of `B' schedule pathway to access `A' schedule property. The Trial Court on consideration of the plaintiff's evidence and when the defendant had failed to produce any evidence, had come to the conclusion that the plaintiff was given right of easement by Yogini Amma as an easement of grant. Considering this aspect of the matter, although there is no specific issue on the question of implied grant, but as the parties have understood their case and for the purpose of proving and contesting implied grant had adduced evidence, the Trial Court and the High Court had come to the conclusion that the plaintiff had acquired a right of easement in respect of `B' schedule pathway by way of implied grant. Such being the position, we are not in a position to upset the findings of fact arrived at by the Courts below, in exercise of our powers under Article 136 of the Constitution of India. We also agree with the finding of the Trial Court that from the evidence and pleadings of the parties `B' schedule pathway was given to the plaintiff/respondent as an easement of grant. It is true that the defendant/appellant alleged that no implied grant was pleaded in the plaint. The Trial Court, in our view, was justified in holding that such pleadings were not necessary when it did not make a difference to the finding arrived at with respect to the easement by way of grant. Accordingly, there is no substance in the argument raised by the learned senior counsel for the appellants.

28.Since we have accepted the findings of the High Court as well as of the trial court on the question of implied grant, it would not be necessary for us to deal with the decisions on the easement of necessity which necessarily involves an absolute necessity. If there exists any other way, there can be no easement of necessity. Therefore, the decision of this Court in Justiniano Antao & Ors. vs. Smt. Bernadette B.Pereira [2005 (1) SCC 471] is clearly not applicable in view of our discussions made herein above. Similarly two other decisions referred to by the High Court in the impugned judgment need not be discussed because these decisions were rendered on the question of easement of necessity.

29.Such being the state of affairs and such being the findings accepted by the High Court in second appeal, it is not possible for this Court to interfere with such findings of fact arrived at by the High Court which affirmed the findings of the Courts below. No other point was raised by the learned senior counsel for the appellants.

30.In view of our discussions made hereinabove, we do not find any merit in this appeal. The appeal is thus dismissed. There will be no order as to costs.

.....J.
[Tarun Chatterjee]

New Delhi; .....J.
January 05, 2010 [V.S.Sirpurkar]