Supreme Court of India
Umrah Khatoon vs Md. Zafir Khan & Ors on 16 December, 1996
Author: Hansaria
Bench: N.P. Singh Hansaria

PETITIONER:
UMRAH KHATOON

Vs.

RESPONDENT:
MD. ZAFIR KHAN & ORS.

DATE OF JUDGMENT: 16/12/1996

BENCH:
N.P. SINGH B.L. HANSARIA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T HANSARIA, J.

This appeal arises out of the suit filed by the respondent No.1 in which the main prayer was to declare that she had acquired easementary right to use the suit passage for discharge of drain water. The trial court decreed the suit and on appeal being preferred by the defendants, the same was dismissed. On further appeal to the High Court, the suit has, however, come to be dismissed only on the ground that in para 7 of the plaint a statement had been made by the respondent that "the suit land is existing since 1918 and is part of the plaintiff's house". The High Court has opined that this statement shows that the plaintiff was claiming title to the suit land, though the relief prayed for was not based on title as such. This, according to the High Court, was the result of artistic drafting of the prayer portion. After placing reliance on the judgment of this courts in Chapisibhai Dhanjibhai Dand v. Purshottam (AIR 1971 SC 1878), the High Court came to the conclusion that s the plaintiff-respondent had failed to establish title, she could not turn round and claim relief on the basis of easement.

2. A reading of the High Court's judgment shows that it confined its attention only to the aforesaid averment in the paragraph 7 of the plaint, as to which it was submitted that the statement might not be read in isolation but may be read along with other averments in the plant, which show that the

relief was really being sought on the basis of acquisition of easementory right. We have, however, perused the whole plaint and find that the plaintiff had indeed claimed title over the lane and, in the alternative, had contended if her title were not to be accepted, she had in any case acquired easementory right to discharge the drain water.

3. A perusal of the first appellate judgment shows that the plaintiff did fight for her title over the land so much so that a Pleader Commissioner was appointed to find out as to whether the land was part of plot No.650 of plaintiff's land or appertained to plot No.649 which is part of defendant's land.

4. Plaintiff's claim for title may not be accepted for reasons which may not be adverted. But then, the plaintiff's claim for easementory right has been accepted by the trial court as well as the first appellate court.

5. The question which, therefore, arises is as to whether plaintiff should lose altogether, even though her claim for easementory right has been found acceptable, because she also claimed title over the lane. Shri Mukherjee, appearing for the respondent, urged that the High Court took the correct stand inasmuch as the suit filed was really non- maintainable. The learned counsel submitted that though the High Court has not dismissed the suit on this ground, that indeed is purport of the High Court's judgment. The submission of Shri Sanval on the other hand was that as ultimately the plaintiff had prayed for right of easement, she may not lose that right only because in the body of the plaint some assertions had been made regarding title also.

6. We have duly considered the rival submissions and, according to us, it would not be just and proper to dismiss the suit on the ground of non-maintainability. No doubt, plea of non-maintainability is a question of law, but to allow the same to be raised for the first time in the last court, and that too after the defendant has lost on merits, does not advance the cause of justices it rather obstructs the same as plea of maintainability is after all a technical plea and course of justice should not be allowed to be thwarted on technical grounds.

7. Keeping in view the totality of the facts and the course which this litigation has taken though the three courts below, we are of the view that the prayer of the plaintiff to allow her to discharge drain water over the land in question is more in accord with justice than to deny it, as it has been found that she had in fact discharged the drain water through the lane for long many years.

8. We, therefore, allow the appeal, set aside the impugned judgment of the High Court and restore the same of the first appellate court by which it affirmed the decree of the trial court. In the facts and circumstances of the case we leave the parties to bear their own costs.