

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.74 and 139 of 2019

AFR

R.S.A. No.74 of 2019

Tutul Kishore Das *Appellant*
Mr. Abhijit Pal, Advocate

-versus-

Pavan Kumar Agarwal and *Respondents*
another
Ms. Pratyusha Naidu, Advocate

R.S.A. No.139 of 2019

Pavan Kumar Agarwal and *Appellants*
another
Ms. Pratyusha Naidu, Advocate

-versus-

Tutul Kishore Das and others *Respondents*
Mr. Abhijit Pal, Advocate

CORAM:
JUSTICE CHITTARANJAN DASH

DATE OF JUDGMENT : 22.09.2023

Chittaranjan Dash, J

1. Heard learned counsel for the parties.
2. Challenge in this appeal is to the judgment and decree passed by the learned 2nd Additional District Judge, Cuttack who analogously disposed of the R.F.A. No.153 of 2016 and R.F.A. No.160 of 2016 vide judgment dated 13th February, 2019 and decree dated 27th February, 2019.

3. The Appellant in RFA No.153 of 2016 have preferred the Second Appeal registered vide RSA No.139 of 2019 whereas the Appellant in RFA No.160 of 2016 preferred Second Appeal vide RSA No.74 of 2019 before this Court.

4. The Appellant in RSA No.74 of 2019 is **Tutul Kishore Das** was the Defendant No.1 in the original Civil Suit No.90 of 2013 whereas the Appellant in RSA No.139 of 2019 was the Plaintiff **Pavan Kumar Agarwal and another** in the original suit No.90 of 2013.

5. For the sake of convenience the parties to both the Appeals are addressed in the manner arrayed in the original suit for the sake of convenience and to avoid confusion.

6. As depicted in the plaint, the suit property consists of A, B and C schedule. "Schedule A" i.e. Plot No.31 measuring an area of Ac.0.01 decimal under Khata No.253, Chaka No.24 under Mouza- Badakesharpur in the district of Cuttack is the purchased property of the Plaintiff whereas the "Schedule B" land i.e. Plot No.28 measuring an area of Ac.05 decimals out of Ac.0.43 decimals and 462 sqr. Links under Khata No.252 in the same mouza is the purchased property of the defendant No.1.

7. The "Schedule C" property is the part of Plot No.28 carved out measuring an area in the Western side 25ft x 104 ft. is equal to 2600 sq.ft. is the disputant area which is claimed to be a passage granted in favour of the Plaintiff in his sale deed whereas subsequently it is sold out in favour of Defendant No.1.

8. Succinctly, the factual background giving rise to the present Appeals are that Schedule 'A' land is stated to have been purchased by the Plaintiffs from their vendors Sanjib Kumar Sahu, Sanghamitra Sahu, Salila Sahoo @ Behera and Malabika Sahu through registered sale deed No.4195 dated 16.07.2009
R.S.A. No.74 and 139 of 2019

wherein Defendant No.2 of the Original Civil Suit No.90 of 2013 was the identifier. As per the genealogy depicted in the plaint, the vendor of the Plaintiffs and the Defendant No.1 are related to each other being wife, son and daughters. The further case of the Plaintiffs is that while conveying the "Schedule A" land to the Plaintiffs the "Schedule C" land was set apart for joint usage as common road to be used and utilized by the Vendors, the father and husband of the vendors of the Plaintiffs as right of way by succession over which they shall have every right to take water, pipe line, electric line and phone line, so also to make drains for proper discharge of rain water at their respective cost to which the sellers shall have no objection whatsoever. The value of the said common passage was also fixed at Rs.50/- as carved out in green colour in the map attached to the Sale deed.

9. It is also the case of the Plaintiffs that after the purchase of the land they converted the kism of the land purchased under "Schedule A" land to homestead vide OLR No.882 of 2011 and they constructed the culvert over the *chaka nala* to approach to their purchased land through "Schedule C" land on 23.04.2013. The Plaintiffs asserted that they have constructed two storied building over an area of 2000 sq.ft. over "Schedule A" land for the purpose of their business as well as residence. According to the Plaintiffs they have been using the "Schedule C" land in the manner declared in the sale deed as a road to approach the National Highway from their purchased land i.e. "Schedule A" land and transporting their goods through truck over the same. It is also the case of the Plaintiffs that Defendant Nos.2 and 3 have sold the "Schedule C" land along with the "Schedule B" land to the Defendant No.1 for which the Defendant No.1 is obstructing them to use the "Schedule C" land as approach to the National Highway. It is further case of the Plaintiffs that "Schedule C" land is the only way for the Plaintiffs to approach to the National Highway for all purposes and the Defendant Nos. 2 and 3 have no

authority to sell the same. According to the Plaintiffs the cause of action arose on 10.10.2012 when the Defendant Nos.2 and 3 sold the “Schedule C” land to the Defendant No.1 while selling “Schedule B” land to him and on 01.03.2013 when the Defendant No.1 obstructed the Plaintiffs to use the “Schedule C” land as passage.

10. Being aggrieved by the said action of the Defendant No.1, Defendant Nos.2 and 3, the Plaintiffs brought the Civil Suit before the learned Civil Judge, Junior Division, 1st Court, Cuttack registered as Civil Suit No.90 of 2013, *inter alia*, praying for the following reliefs:

- “1. To declare that the Plaintiffs have acquired right of path way over “Schedule C” property by virtue of registered sale deed No.4195 dated 16.7.2009.
2. To declare that the inclusion of “Schedule C” land in Registered Sale Deed No.2995 dated 10.10.2012 in favour of Defendant No.1 is illegal and void.
3. To declare that Defendant No.1 has no right, title and interest over the “Schedule C” land and interference in any manner with the possession of the Plaintiff over “Schedule C” property is illegal.
4. The Defendant No.1 to be permanently restrained from coming upon the “Schedule C” land and from interfering in any manner with the possession of the Plaintiffs over the suit “Schedule C” land.”

11. The Defendant No.1 having caused his appearance in the Civil suit No.90 of 2013 filed the written statement of defence, *inter alia*, traversing the plaint averments and pleaded that the suit as laid is not maintainable in law or in fact; that the Plaintiffs have no cause of action to file the suit as against Defendants; the Plaintiffs suit is barred by law of limitation, estoppels and acquiescence; the Plaintiff’s suit is hit by resjudicata; the suit is barred for non-joinder and mis-joinder of necessary parties; the genealogy given in ***R.S.A. No.74 and 139 of 2019***

paragraph-3 of the plaint is incorrect; the allegation made in paragraph 4 of the plaint is false, baseless and concocted and that it is incorrect to say that “Schedule C” land was set apart as common road to be used and utilized by the Plaintiffs as well as the seller of the Plaintiffs and Defendant No.1, further alleging that the averments made in paragraphs 6 and 7 of the plaint are incorrect.

12. According to the Defendant No.1, the Defendant Nos. 2 and 3 while owners in possession of “Schedule B” property sold the same to him vide Sale Deed No.2955 dated 10.10.2012 with value and consideration and delivered the possession thereof and the alleged “Schedule C” land does not exist at all, as depicted in the plaint since alleged “Schedule C” land has been carved out by the Plaintiffs on their own though it forms part of “Schedule B” land. According to the Defendant No.1, the vendors of the Plaintiffs have no manner of right, title and interest over Plot No.28 i.e. “Schedule B” land and as such the recitals made by the vendors of the Plaintiffs in the Sale deed dated 16.07.2009 giving them the right to approach to their land which admittedly exists over Plot No.28 does not bind the Defendant No.1. According to the Defendant No.1, the vendors of the Plaintiffs cannot assign and/or permit the right of way over a land in which they have no manner of right, title and interest at all. It is further case of the Defendant No.1 that Schedule A and B property have a chaka nala between them and there is no culvert over the chaka nala. It is asserted by the Defendant No.1 that there is 20 feet road of the northern side of the Schedule ‘B’ property which connects the Plot No.32. It is also asserted that Plot No.32 is approached by the Plaintiffs through the land of Defendant No.3 by virtue of sale deed bearing No.3865 dated 16.07.2009. The Defendant No.1 also pleaded that adjoining the chaka nala, there exist Plot No.29 which adjoins the National Highway including its ridge in its western side. The Defendant No.1 denies the

averments made in paragraphs 8 and 9 of the plaint. According to them the Defendants 2 and 3 are the absolute owners in possession of the “schedule B” property and have executed the registered sale deed No.2955 dated 10.10.2012 in favour of the Defendant No.1. According to the Defendant no.1 the “Schedule B” land was the self acquired property of Defendant Nos.2 and 3 and as such the vendors could not have assigned the approach to the Plaintiffs through their land or any kind of interest in favour of the Plaintiffs and as such the recital of the alleged sale deed dated 16.07.2009 allowing the Plaintiffs to approach to their land through “Schedule C” property as their path way is not binding on the Defendant no.1 and further that the Plot No.31, the purchased land of the Plaintiffs is not adjoining Plot No.28. The Defendant No.1 further averred that as per the provision of the easement Act, one can only right of way over the land of their vendors and in the present case the vendors of the Plaintiffs being not the owners of the Plot No.28, no easement could be made on the road or for the use of the vendors of the Plaintiffs. The Defendant No.1 finally pleaded that he being the rightful owner over “Schedule B” land and “Schedule C” property being part of his purchased land, he is the rightful owner in possession and have acquired right, title and interest over the same.

13. Later, on the basis of the amendment brought to the plaint the Defendant No.1 also filed additional written statement challenging the portion allowed to be amended and the plea taken under paragraph-8(a) and (b) and (c).

14. Defendant Nos. 2 & 3 in the suit who are the vendors of Defendant No.1 and also partly the vendors of the Plaintiffs did not either filed statement of defence or contested the case.

15. The learned Civil Judge, Junior Division, 1st Court, Cuttack having gone through the divergent pleadings of the parties framed the following five issues:

- “1. Whether the suit is maintainable in its present form?
2. Whether the Plaintiffs have cause of action to file the suit?
3. Whether the Plaintiffs have acquired right of path way over the schedule ‘C’ property by virtue of RSD No.4145 dated 16.07.2009?
4. Whether the Defendants are invading or trying to invade upon the right of the plaintiffs over the suit schedule ‘C’ land?
5. Whether the Plaintiffs are entitled for any other relief/reliefs as prayed for?”

16. After formulating of issues, the parties adduced documentary and oral evidence where, the Plaintiffs examined two witnesses including Pavan Kumar Agarwal himself as PW-1. The Plaintiffs also proved documents vide Ext.1 to Ext.7. On the other hand, the Defendant No.1 Tutul Kishore Das examined himself as DW-1 and proved two documents vide Ext.A and Ext.B.

17. In the light of the above issues, the learned trial court at the first instance having assessed the evidence laid before it by the parties found the Plaintiffs to have proved its case partly and decreed the suit in favour of the Plaintiffs in part on contest and observed that the Plaintiffs have got the permanent right of path way mutually with the Defendant No.1 but only in respect to “10 feet wide passage” i.e. part of “Schedule C” land exist over Plot No.28 at the western side to reach the National Highway.

18. Being aggrieved at the findings recorded by the learned Civil Judge, Junior Division, 1st Court, Cuttack the Plaintiffs preferred RFA No.153 of 2016 and Defendant no.1 preferred RFA No. 160 of 2016 before the learned District Judge, Cuttack who later transferred the Appeals to the court of learned 2nd Additional District Judge, Cuttack for disposal.

19. As stated above, learned 2nd Additional District Judge heard both the above Appeals analogously and disposed of the same vide common Judgment dated 13th February, 2019, confirming the judgment and decree dated 31.08.2016 and 13.09.2016 respectively passed by the learned Trial Court in Civil Suit No.90 of 2013. The learned First Appellate Court, however, dismissed the RFA No. 160 of 2016 preferred by the Defendant No.1.

20. Being aggrieved with the findings recorded by the first Appellate Court the both parties i.e. the Defendant no.1 preferred RSA No. 74 of 2019 and the Plaintiffs preferred RSA No.139 of 2019, as stated above, which were admitted on the following substantial questions of law.

- “1. Whether the courts below in the facts and circumstances of the case have erred in law by not non-suiting the Plaintiffs in view of the provision of section 61 of the Easement Act, 1882?
2. Whether in the absence of pleadings in the plaint that the approach road under “Schedule C” was as of easement of necessity; the courts below are right in granting the benefits as provided in section 13 of the Easement Act ? and
3. Whether in the facts and circumstances of the case, the courts below have erred by not holding that the principle of estoppels has its play in the matter as there has been creation of easementary right by means of registered documents”

Submissions

21. In reference to the question No. 1, it is argued by Mr. Abhijit Pal, the learned counsel for the Defendant No.1 being Appellant in RSA 74 of 2016 that “Schedule C’ Property is admittedly part of “Schedule B” property. According to him it is also admitted by the Plaintiffs that Schedule ‘B’ property has been legally transferred by the Defendants No. 2 and 3 vide regd.

Sale deed No.2955 dated 10.10.2012 in favour of the Defendant No.1 and the claim of the Plaintiffs as such that the “Schedule C” property allowed to be used as “road” to approach “Schedule A” property by the Defendant No.3 with limited interest as an approach road construed as a license which stood revoked on sale of the “Schedule B” property to Defendant No.1 that attracts section 61 and 62(a) of the Easement Act and the license granted would stand revoked.

22. The learned Counsel further submitted that in the case in hand there is no specific averment in the plaint to the effect that the servient and dominant tenement constituted a single unit and as a result of subsequent transfer of the Schedule ‘B’ property to the Defendant No.1 cannot be at all use on account of its situation without enjoying a right of passage over “Schedule C” property. According to Mr. Pal the learned courts below got misdirected itself in making out a third case beyond pleadings, which is not permissible in law and hence the decree passed by both the courts below are liable to be set aside. Mr Pal also argued that the title of the Defendant No.2 and 3 to the Schedule ‘B’ property cannot be denied by the Plaintiffs and as such the principle of estoppels will not apply to the Defendant nos 2 & 3 while transferring Schedule ‘B’ property to Defendant No.1 and Defendant No.1 being the absolute owner in respect to Schedule ‘B’ property cannot be enjoined from utilizing his own property for the convenience of the Plaintiffs allowing 10 feet path way. In support of his submissions, learned counsel relied upon decisions in the matter of *Ibrahimkutty Koyakutty v. Abdul Rahumankunju Ibrahimkutty and others : AIR 1993 Kerala 91 & Smt. Usarani Das v. Bhaktahari Mohanty and others : AIR 1984 Orissa 97.*

23. Ms. Naidu on the contrary while argued for the Plaintiffs contended that the Plaintiffs are the purchasers of “Schedule A” property from their vendors

that includes Defendant No.3 whereas her husband, the Defendant No.2 is a signatory in the sale deed no. 4195 dated 16.07.2009 conveying the right of use of "Schedule C" property jointly by the Plaintiffs and the Defendants. She pointed that the map attached to the deed specifically carved in green colour is the area identified in respect of right granted and argued that pursuant to the purchase by the Plaintiffs they have been using the said 25 feet wide road appertaining to Plot no. 28 for approaching the National High way. According to Ms. Naidu, Malabika Sahu (D.3) is the common vendor to both the Sale Deeds and Defendant No.2 being her husband is the signatory to the deed of the Plaintiffs. Both having consciously granted right of passage in favour of the Plaintiffs with value, cannot convey it subsequently in favour of anybody else. In this context she argued that the date of execution of the two deeds determines the priority i.e one executed earlier has priority over the other. According to her in view of the fact that Malabika Sahu being the common owner has transferred her interest for a value to the Plaintiffs as such the second sale deed in favour of the Defendant No.1 transferring 25 feet road is void-ab-initio.

24. Responding to the revocation of right accrued through the grant in the sale deed it is argued that when the conveyance grants a right in favour of the Plaintiffs by the vendor, the vendor is precluded from preventing the vendee there from and accordingly the right cannot be revoked. It is further argued that the road referred to in the deed is the only road having 25 feet width connecting plot of the Plaintiffs to the National highway and required to be used for transporting goods in trucks. According to Ms. Naidu the learned courts below have concurrently confirmed that there is no alternative passage available to the Plaintiffs to approach the National high way. She further argued that in order to find an easement of necessity, the necessity must be absolute necessity and not merely a convenient mode of enjoyment of

property. Emphasizing on the same she also argued that an easement of necessity is an easement without which the property cannot be used at all and not merely reasonable and convenient enjoyment of the property. She further argued that easementary right has been granted and specifically mentioned in the sale deed and there is no evidence to show its extinguishment. She accordingly, canvassed for allowing the Appeal of the Plaintiffs. In support of her submission, the learned counsel relied upon decision of Hon'ble High Court of Madras in the matter of *Mr.D.Jeyabal Vrs. Mrs.S.Chitra decided on 26.04.2019: S.A No.824 of 2011*, decision of our Hon'ble Court in the matter of *Rama Chandra Sahu and others v. Gopinath Panigrahi: 2014 (I) OLR-1002, Sri Alekh Rajhans Vs. Joint Commissioner, Consolidation and 3 others, Bharat Chandra Dash and another: 2013 (I) OLR-584 & Smt. Usarani Das V. Bhaktahari Mohanty and Ors. : S.A.Nos. 316 & 317 of 1978.*

Findings

25. In view of the rival submissions of the learned Counsels as above and the substantial questions of law framed for determination, on perusal of the materials on record, it is the admitted case of the parties that Defendant No. 2 –Suresh Chandra Sahu and Defendant No.3 Malabika Sahu are husband and wife. Plaintiffs have purchased “Schedule A land” i.e. Plot No.31 from Sanjib Kumar Sahu, Sanghamitra Sahu, Salila Sahoo @ Behera (children of Suresh Chandra Sahu D.2) and Malabika Sahu (D.3) vide R.S.D No.4195 dated 16.07.2009 (Ext.1). It is also found from Ext.1 that Defendant No.2 is a signatory to this document. The description of the property in Ext.1 is North-Chaka Nala, South- Prafulla Kumar Sahoo and others, East- Plot Nos.32 and 33 and West-Chaka Nala. It is further found from Ext.1 that on the date of execution of Ext.1, the Plaintiffs have also purchased plot Nos.32 and 33. In

Ext.1, it is mentioned that “*the sellers have set apart a 25 feet wide common passage (road) over the Plot No.28 towards the northern side of the plot No.31 marked in green colour to be utilized by the purchasers (Plaintiffs) as well as the seller and the father and husband of the seller as their right of way by way of succession and over which they shall have every right to take water pipe line, electric line and phone line and so also to make drains for proper discharge of rain water at their respective costs to which the present seller has no objection whatsoever. The approximate value of the said common passage is Rs.50/- (Rupees Fifty only).*”

26. It is also not in dispute that the Defendant No.1 has purchased suit schedule ‘B’ land i.e. plot No.28 from Defendant No.2 (Suresh Chandra Sahu) and Defendant No.3 (Malabika Sahu) vide R.S.D No. 2955 dated 10.10.2012 (Ext.5).

27. In the instant case, the dispute between the parties is in respect of 25 feet common passage over the Plot No.28 towards the northern side of the Plaintiffs’ plot No.31 as shown in the sketch map annexed to Ext.1 (Sale deed) wherein Defendant No.2 and his wife Defendant No.3 have put their signatures.

28. In the instant case, as held above, both the Plaintiffs and Defendant No.1 have purchased suit schedule ‘A’ and suit schedule ‘B’ land. The Defendant No.1 claims that the alleged schedule ‘C’ land does not exist in their sale deed dated 10.10.2012. The vendors of the Plaintiffs have no manner of right, title, interest over plot No.28 (schedule ‘B’) land as such the recitals made by the vendors of the Plaintiffs in the sale deed dated. 16.07.2009 regarding road over plot no.28 does not bind the Defendant No.1 and that the Plaintiffs can approach the National High way after passing the canal through western side ridge of plot no.29. He further asserted that there is 20 feet road of the

northern side of the Schedule 'B' property which connects the Plaintiffs' another Plot No.32 and that the adjoining the chaka nala, their exits Plot No.29 which adjoins the National Highway including its ridge in its western side.

29. It reveals from Ext.1 and Ext.5 that the vendor of the Defendant namely Malabika Sahu (D.3) is the common vendor to both the above sale deeds. It is also found that Ext.1 was executed prior to Ext.5. It is settled principle of law that in between two registered documents determines its priority i.e. the one executed earlier has priority over the other. In the instant case Malabika Sahu along with her children have sold suit schedule 'A' property in favour of the Plaintiffs wherein Suresh Chandra Sahu (husband of Malabika Sahu) is one of the signatory. In the sale deed Ext.1 dated 16.07.2009, right to the extent of 25 feet common passage over the Plot No.28 towards the northern side of the Plaintiffs' plot No.31 has been granted. Therefore, having regard to the recitals in Ext.1, it can be held that it is an easement by grant and conveyance of passage by the common vendor Defendant No.3 shall be binding on her as well as all who have consciously been its signatories. All that transpired in the recital of the deed executed in favour of the Plaintiffs was absolutely within the knowledge and domain of the vendors of the Defendant No.1 and the land under "Schedule A and B" property being that of the family of which all the vendors in both the deed executed in favour of the Plaintiffs and Defendants constitutes one family has to be construed a single constituent in the peculiarity of the circumstances. Therefore, the subsequent sale deed dated 10.10.2012 (Ext.5) executed by common vendor Malabika Sahu and her husband in favour of Defendant No.1 in respect of Schedule.'B' land cannot extinguish the grant already conveyed in the earlier sale deed vide Ext.1. Therefore, the same vendors if have subsequently divested the portion of land in favour of the Defendant No.1 that had once divested in favour of the

Plaintiffs giving a special right with value much prior to the execution of the subsequent one have to come within the mischief of the principle of estoppels.

30. Further, between the two registered documents the priority has to be given to the one executed earlier in consonance with Section 48 of the transfer of Property Act 1882 which reads thus:

“48. Priority of rights created by transfer:- Where a person purports to create by transfer at different times in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.”

31. In view of the provision above said the right of way to access to the property purchased by the Plaintiffs held to have been reserved granted in the sale deed No. 4195 dated 16.07.2009(Ext-1). Therefore, the vendors of the Defendant No.1 and that of the Plaintiffs could not have conveyed the entire land under “Schedule B” property including the passage conveyed under the deed executed in favour of the Plaintiffs. Such assertion by this Court is in tandem with the provision under Section 48 of the Transfer of Property Act in as much as the provision contemplates that where a person has created a right in or over the property such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. It will mean that the exclusive right conferred on the Defendant No.1 in the sale deed by way of conveyance dated 10.10.2012 will not be legal till such time the earlier transferees i.e the Plaintiffs has a special contract or reservation which binds the Defendant No.1. Since the right to access to Plaintiffs and their sellers was reserved in the sale deed No. 4195 dated 16.07.2009, therefore, the vendors could not confer exclusive right to the Defendant No.1 vide sale deed No. 2955 dated 10.10.2012. The Defendant No.1 has to maintain the 25 feet wide passage in any case in terms of the

recitals in the sale deed of the Plaintiffs dated 16.07.2009(Ext-1). Therefore, if the Plaintiffs or their transferee use the passage, then such use of passage by the Plaintiffs or their transferees cannot be said to be causing any prejudice to the Defendant No.1. My above view is fortified from the decision of the of the Hon'ble Apex Court in the matter of *DR. S. KUMAR & others Vrs. . RAMALINGAM decided in Civil Appeal nos. 8628-8629 of 2009.*

32. Thus it is held that the Plaintiffs have acquired easementary right over schedule 'C' property by means of registered document vide Ext.1. The learned Courts below have erred by not considering the easementary grant given in Ext.1.

33. In the case in hand, as held above, the vendors of Ext.1 set apart a 25 feet wide road to be utilized by the Plaintiffs and their sellers and successors. So the intention of the vendors/sellers is very clear as to use of 25 feet road as common passage for all to approach the National High way.

34. It is the case of the Plaintiffs that the 'C' schedule land is their only approach road to the National High way. It is also found from the evidence of PW-1 and PW-2 that the road as described in the sale deed (Ext.1) is the easement of necessity to the Plaintiffs. DW-1 (Defendant No.1) in his evidence has stated that plot no.28 and 31 are not adjoining plots and there is a chakanala in between both the plots. DW-1 in his cross examination has stated that he cannot say through which passage the Plaintiffs are coming out from their own land i.e. plot No.31.

35. So from the pleadings and evidence adduced from the side of the parties, it is proved that the suit schedule 'C' land is not only easement of necessity but also is easement acquired by grant as depicted in Ext.1. In the matter of grant, the parties are governed by the terms of the grant. The language

employed in the recital under vExt.1 is irrevocable. It will not amount to an easement of necessity under section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. The observations of the learned Courts below regarding the right of path way which is limited interest of the Plaintiffs and transfer of plot no.28 vide Ext.5 in favour of defendant no.1 seems to be of absolute transfer in nature is not in consonance with law. Both the learned Trial Court and First Appellate Court holding mutual right of path way of the Plaintiffs for their enjoyment of passage over the portion of the suit schedule 'C' property to the extent of 10 feet only at the western side of plot no.28 is also wrong. Both the learned Trial Court and First Appellate Court confused themselves in distinguishing easement by grant and easement of necessity. In the instant case, the Plaintiffs claimed their right of passage as per the grant given by their vendors. They have also claimed the said passage necessary for their beneficial enjoyment to approach the National High way.

36. Hence, as stated above, under Ext.1 the Plaintiffs have been granted right to use 25 feet wide common passage over the Plot No.28, by the vendors and such right will not extinguish by execution of Regd.Sale deed vide Ext.5 in favour of the Defendant no.1 and that the same cannot be obstructed by the Defendant No.1 so also by Defendant Nos.2 and 3.

37. In the result, I find that the judgment and decree passed by both the learned Trial Court and first Appellate Court suffers from manifest error and, thus, cannot sustain in law. Accordingly, the RSA No.74 of 2019 filed by the Appellant/defendant no.1 is dismissed and the R.S.A No. 139 of 2019 filed by the Appellants/Plaintiffs is allowed. There is no order as to cost.

38. The 25 feet common passage over the Plot No.28 towards the northern side of the Plaintiffs' plot No.31 (as per the recital in Ext.1) is reserved for the common use of the plaintiffs, his vendors and Defendant No.1.

(Chittaranjan Dash)
Judge

KC Bisoi /A.R.-cum-Sr. Secretary

