

**2000 M L D 1855**

**[Peshawar]**

**Before Mian Shakirullah Jan, J**

**ABDUL AZIZ and others---Petitioners**

**versus**

**MUHAMMAD MISKEEN and 8 others---Respondents**

Civil Revision No. 377 of 1994, decided on 5th May, 2000.

**Easements Act (V of 1882)---**

---S.13---Civil Procedure Code (V of 1908), S.115---Easement of necessity, right of---Alternate path available to the petitioners---Concurrent findings of facts by both the Courts below---Trial Court restrained the petitioners from using the land owned by respondents as a thoroughfare---Judgment and decree of the Trial Court was upheld by the Appellate Court ---Validity--Where joint properties of the petitioners touched the main road, they themselves could make arrangements of their approach from the main road---No flaw in the concurrent findings of both the Courts below had been found to make a case for interference in revisional jurisdiction.

Qazi Muhammad Ishaq v. Abdul Waheed PLD 1975 Pesh. 82; Abdul Ghaffar v. Abdus Sattar and another PLD 1959 Dacca 491; Aghore Bandhu Guha and others v. Mukul Kumar Roy and others PLD 1959 Dacca 891 distinguished.

Abdul Hamid Shah v. Muhammad Yar and 13 others PLD 1991 SC 815 and Abdul Karim v. Ali Zaman and others 1993 MLD 1481 ref.

Tariq Khan Tanoli for Petitioner.

Khalil-ur-Rehman for Respondents.

Date of hearing: 5th May, 2000.

## **JUDGMENT**

The plaintiffs-respondents instituted a suit for declaration to the effect that they were owners and in possession of the property comprising in Khasra No.744/148/1 measuring 5 Kanals, 15 Marlas and the defendants have got no right whatsoever to interfere in the property or in possession of the respondents and that they have also got no right to make doors thereon or use it as thoroughfare. As a consequential relief permanent injunction was also sought with further prayer that if they have installed any gate the same be demolished. The suit was contested by the petitioners resulting in the framing of several issues. Evidence pro and contra was adduced by the parties. The learned trial Court also appointed a Commissioner to visit the spot who did accordingly and submitted his report alongwith preparation of site plan. The learned Court after discussing the evidence granted decree to the respondent-plaintiff as

prayed for and the appeal of the petitioners was also dismissed and now the present revision petition.

2. The learned counsel for the petitioners made a reference to the relevant portion of the evidence and also site plan prepared by the Commissioner. The entire effort was to show that the petitioners have got no way/path for their use and there is also no possibility to use any other property in view of the location of their houses. He has also submitted that the construction has been made prior to the construction of the house by the plaintiff-respondents and at the relevant time no objection was raised by him then that cannot debar the petitioners from using the path which has already, been in their use. He has also referred to the definition of the public path given in the Punjab District Boards (North-West Frontier Province) (Amendment) Act, 1948 whereby the public path has been defined:

"Public path' shall mean any road, footway, square, Court alley or passage, accessible whether permanently or temporarily to the public, whether a thoroughfare or not .....

He has also placed reliance on PLD 1975 Peshawar 82 (Qazi Muhammad Ishaq v. Abdul Waheed), PLD 1959 Dacca 491 (Abdul Ghaffar v. Abdus Sattar and another), PLD 1959 Dacca 891 (Aghore Bandhu Guha and others v. Mukul Kumar Roy and others).

3. The learned counsel for the respondents has contended that the petitioners could not rebut the evidence on the file that the property where the so-called path is situated and which the petitioners allege to have used the same as path is situated in Khasra number which belongs to the respondent-plaintiffs and the petitioners are having adjacent property over which they have made constructions and it is nobody's right to have a construction over his own property and to use the property of others as approach or throughfare for their houses. The defendant-petitioners are three brothers who are joint owners in the property adjacent to the disputed one over which they had made construction of their houses and which are in one line and adjacent to one of the house belonging to Abdul Qadeer defendant-petitioner there is a vacant plot and which touches the Chappar Road and in which they by mutual arrangements may make (have) an approach to the Ghabbar Road in their own property and in this respect he has made a reference to the site plan prepared by the Commissioner. He has also contended that the moment the petitioners started construction the plaintiff-respondent instituted a suit which is evident from averments of the plaint whereby a prayer for restraining them from making constructions in a way to use the property of the plaintiff as a path. He has also placed reliance on PLD 1991 Supreme Court 815 (Abdul Hamid Shah v. Muhammad Yar and 13 others), wherein it was held:

"(c) Easements Act (V of 1882)---

--S.13--Right of easement of necessity---

It is riot enough to show that it is merely necessary for use of the property or without it the enjoyment of the said property could be rendered inconvenient. "

Reliance was also placed on 1993 MLD 1481 (Abdul Karim v. Ali Zman and others) wherein it was held:

"(c) Easements Act (V of 1882)---

---S.13--Right of easement of necessity--Alternate path available to plaintiff for the sustenance of claim of right of easement, plaintiff must show that without enjoyment of such right, property in question, for the beneficial user whereof the right existed, could not at all be used; and also mere necessity for use of the property and inconvenience were-not enough to grant such a right--Right of easement of necessity was not established in circumstances."

He has also contended that the two Courts below have concurrently arrived at a conclusion and there is no jurisdictional error in the judgments of the two courts below therefore, interference in revisional jurisdiction is not justified.

4. The authorities referred to by the learned counsel for the petitioners either are not on the point or have laid down general principle and which are not applicable in the instant case.

5. After going through the record of the case and the submissions made by the learned counsel for the parties it is, found that the path is situated in the property of the plaintiff-respondent and in this respect there is sufficient evidence on the record. The petitioners/defendants have made constructions in their own property in such a way as they may use some part of the property of the plaintiff-respondent as a thoroughfare and which they cannot, as they have got no right whatsoever. Even otherwise, as stated earlier, they themselves can make arrangements of their approach from the main road or the Chappar Road as their joint properties touches the main road. The two Courts below have rightly arrived at the impugned conclusion and no flaw was showing in the concurrent findings of the two Courts below to make a case for the interference in revisional jurisdiction. Resultantly I dismiss this revision petition with no order as to costs.

Q.M.H./M.A.K./139/P

**Revision dismissed.**