

**CONCORDIO ABELLANA, SR., PEDRO E. MENDEZ, VERANO BADANA,
CONCORDIO ABELLANA, JR., TEODOLFO ABELLANA, MUSSULINI
BUCAO, REMEDIOS GARCIANO, ALFREDO SY, JUANITO JABELLANA,
CATALINO ...**

G.R. No. 97039. April 24, 1992

Ponente: GRIÑO-AQUINO, J.

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GRIÑO-AQUINO, J.:

The petitioners who live on a parcel of land abutting the northwestern side of the Nonoc Homes Subdivision, sued to establish an easement of right of way over a subdivision road which, according to the petitioners, used to be a mere footpath which they and their ancestors had been using since time immemorial, and that, hence, they had acquired, through prescription, an easement of right of way therein. The construction of a wall by the respondents around the subdivision deprived the petitioners of the use of the subdivision road which gives the subdivision residents access to the public highway. They asked that the high concrete walls enclosing the subdivision and cutting off their access to the subdivision road be removed and that the road be opened to them.

The private respondents denied that there was a pre-existing footpath in the place before it was developed into a subdivision. They alleged furthermore that the Nonoc Subdivision roads are not the shortest way to a public road for there is a more direct route from the petitioners' land to the public highway.

After trial, the trial court rendered judgment disposing as follows:

"WHEREFORE, judgment is hereby rendered, and, accordingly, defendants Orlando P. Naya and Rosendo. Estoye, Jr. and the intervenors are hereby ordered to demolish the subject fences or enclosures at the dead ends of Road Lots 1 and 3 of the Nonoc Homes Subdivision at their expense and to leave them open for the use of the plaintiffs and the general public, within fifteen (15) days from finality of this judgment. The complaint as against defendant Municipal Government of Talisay, Cebu is ordered dismissed. All counterclaims are ordered dismissed. No pronouncement as to costs." (p. 15, Rollo.)

However, on appeal by the defendants and intervenors (now private respondents), the appellate court on October 17, 1990, reversed the appealed judgment. It found that:

"As borne out by the records of the case, the abovementioned requisites essential for the grant of an easement of right of way are not obtaining in this case hence no alternative presents itself except reversal of the judgment below. x x x.

"However, the foregoing is without prejudice to the filing of the appropriate action by the proper authorities. Records bear that attention of the Municipal Mayor of Talisay was already called by Provincial Fiscal to Opinion No. 172, .Series of 1975, of Department of Justice wherein Acting Secretary of Justice opined that 'road lots in a private subdivision are private property and should be acquired by the government by donation, purchase or expropriation if they are to be utilized for a public highway. xxx.'

"x x x x x x x x.

"WHEREFORE, the judgment appealed from is hereby REVERSED and set aside. The Municipal Government of Talisay, Cebu, at its option, may institute the proper action for expropriation." (p. 22, Rollo.)

In an order dated January 9, 1991, the appellate court denied petitioners' motion for reconsideration of the aforesaid decision. Hence, this petition for review in which the petitioners allege that the Court of Appeals erred:

1. in not holding that the easement claimed by them is a legal easement established by law (Art. 619, Civil Code) and acquired by them by virtue of a title under Art. 620, Civil Code and P. D. No. 957 through the National Housing Authority which has exclusive jurisdiction to regulate subdivision and condominium projects;
2. in not holding that the footpaths and passageways which were converted into subdivision road lots have acquired the status of public streets in view of Section 4 of Municipal Ordinance No. 1, Series of 1969 of Talisay, Cebu which provides that subdivision roads shall be used not only for the exclusive use of the homeowners but also for the general public, and Section 5, of Ordinance No. 5, Series of 1974 which provides that "those subdivision road lots whose use by the public are (sic) deemed necessary by the proper authorities shall be made available for public use" (p. 7, Rollo); and
3. in not determining whether or not the closure of, the dead ends of road lots 1 and 3 of the Nonoc Homes Subdivision by the private respondents, Estoye and Naya, was legal.

After deliberating on their petition for review of the decision dated October 17, 1990 of the Court of Appeals in CA-G.R. CV No. 19948, and the private respondents' comments, we find that the petition raises merely factual issues which are not reviewable by this Court under Rule 45 of the Rules of Court, and that, in any event, no reversible error was committed by the Court of Appeals in dismissing the complaint on the ground that the requisite conditions do not exist for the grant of an easement of right of way in favor of the petitioners' land under Articles 649 and 650 of the Civil Code. The appellate court did not err in holding that the road lots in a private subdivision are private property, hence, the local government should first acquire them by donation, purchase, or expropriation, if they are to be utilized as a public road.

Petitioners' assumption that an easement of right of way is continuous and apparent and may be acquired by prescription under Article 620 of the Civil Code, is erroneous. The use of a footpath or road may be apparent but it is not a continuous easement because its use is at intervals and depends upon the acts of man. It can be exercised only if a man passes or puts his feet over somebody else's land (4 Manresa 597; Haffman vs. Shoemaker, 71 SE 198, both cited on p. 454, Vol. 2, 6[th] Ed., Paras, Civil Code of the Philippines). Hence, a right of way is not acquirable by prescription (Cuaycong, et al. vs. Benedicto, et al. 37 Phil. 781; Ronquillo, et al. vs. Roco, et al., 103 Phil. 84; Ayala de Roxas vs. Case, 8 Phil. 197).

Neither may petitioners invoke Section 29 of P.D. 957 which provides:

"SEC. 29. Right of Way to Public Road. - The owner or developer of a subdivision without access to any existing public road or street must secure a right of way to a public road or street and such right of way must be developed and maintained according to the requirement of the government authorities concerned."

The above provision applies to the owner or developer of a subdivision (which petitioners are not) without access to a public highway.

The petitioners' allegation that the footpaths which were converted to subdivision roads have acquired the status of public streets, is not well taken. In the first place, whether or not footpaths previously existed in the area which is now known as the Nonoc Homes Subdivision, is a factual issue which this Court may not determine for it is not

a trier of facts.

The municipal ordinances which declared subdivision roads open to public use "when deemed necessary by the proper authorities" (p. 7, Rollo) simply allow persons other than the residents of the Nonoc Homes Subdivision, to use the roads therein when they are inside the subdivision but those ordinances do not give outsiders a right to open the subdivision walls so they can enter the subdivision from the back. As the private respondents pointed out in their Comment:

"The closure of the dead ends of road lots 1 and 3 is a valid exercise of proprietary rights. It is for the protection of residents in the subdivision from night prowlers and thieves. And the public is not denied use of* the subdivision roads, only that the users must get inside the subdivision through the open ends of the road lots that link the same to the public road. It is common to most, if not all subdivisions in Cebu, Metro Manila and other places, that points of ingress to and egress from the subdivisions are the points where the subdivision roads intersect with public road. It is of judicial notice that most, if not all, subdivisions are enclosed and fenced with only one or few points that are used as ingress to and egress from the subdivisions." (pp. 54-55, Rollo.)

WHEREFORE, finding no merit in the petition for review, the same is DENIED with costs against the petitioners.

SO ORDERED.

Narvasa, C. J., Cruz, and Medialdea, JJ., concur.

Bellosillo, J., on leave.

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