

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.383 of 2013

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Ravindra Kumar @ Rabindra Kumar S/O Late Ram Govind Singh resident of Chandmari Road, P.S. Kankarbagh, District Patna, at present residing at Governor Quarter, Patna Water Board (near Water Tower Patna High Court) P.S. Kotwali, District Patna.

... .. Defendant/Respondent/Appellant
Versus

Yatendra Narayan Chaudhary S/O Late Hridya Narayan Chaudhary Resident of Village Karson Nadiami, P.S. Sakatpur, District Darbhanga at Present residing at Mohalla Mohanpur, (Punai Chak), P.S. Shastri Nagar, District Patna.

... ..Plaintiff/Appellant/Respondent

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Appearance :

For the Appellant/s	:	Mr. Jitendra Kishore Verma
For the Respondent/s	:	Mr. J.S.Arora, Sr. Advocate
		Mr. Ajay Kumar Jha,
		Mr. Pankaj Kumar Jha

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

CAV

Date :- 28-06-2018

This second appeal has been filed against the judgment and decree dated 31.10.2013, passed by the learned Ad hoc Additional District and Sessions Judge V, Patna, in Title Appeal No. 47 of 2010., whereby the learned appellate court below has reversed the judgment and decree dated 21.05.2010, passed by the learned Sub-Judge-II, Danapur, Patna, in T.S.No.78 of 1999, whereby the said suit was dismissed.

2. The suit was instituted by the respondent herein, seeking declaration of his right of easement over a piece of land described in Schedule-III of the plaint, a pathway. He also



sought for a declaration that the appellant-defendant did not have any right to cause any obstruction in peaceful user by the respondent(plaintiff) over the suit land and, if during the pendency of the suit, any kind of obstruction was created, the same be directed to be removed.

3. By way of amendment, the respondent had prayed for removal of obstruction created by the appellant/defendant from the suit land.

4. I have heard Mr. Jitendra Kishore Verma, learned counsel, appearing on behalf of the appellant(defendant) and Mr. J.S.Arora, learned senior counsel, appearing on behalf of the respondent(plaintiff). They have also submitted their written notes of arguments.

5. For the benefit of clarity and convenience, the appellant (defendant) and the respondent(plaintiff) are being described in the present judgment as per their party position in the title suit.

Case of the plaintiff(respondent)

6. The case of the plaintiff(respondent) is that plot no.219, having an area of 09 katha 17 dhur and 14 dhurki, belonged to one Sumitra Devi, who had transferred a portion thereof in favour of Lal Muni Devi by executing a sale deed



dated 30.10.1975, admeasuring 02 katha 15 dhur and 17 dhurki. While conveying the said land in favour of the purchaser, Sumitra Devi retained small piece of the said plot adjacent north of the land as her road running east to west, having a width of 10 ft. The said land transferred through the sale deed has been described in the plaint as Schedule-II property. The land said to have been retained for the purpose of the road/lane finds place in Schedule-III of the plaint. Schedule-III land is the subject-matter of the dispute. The said Lal Muni Devi subsequently transferred the Schedule-II land in favour of one Nirmala Jha through a sale deed dated 10.05.1978 (Ext.4/A) with her right of user over the suit land as a *Rasta*. The said Nirmala Jha, while enjoying his right, title and interest over the schedule-II land, had been using the Schedule-III land as a pathway. Nirmala Jha transferred the Schedule-II land in favour of the plaintiff by executing a sale deed dated 10.02.1996 (Ext.4/B).

7. It was thus the case of the plaintiff that the plaintiff came in possession of the Schedule-II land and had been enjoying the disputed Schedule-III land as *Rasta*. It was his specific case that that through a sale deed dated 10.02.1996, Nirmala Jha had transferred Schedule-II land with all amenities,



including the right of easement, over the Schedule-III land. He asserted that defendant no.2 executed a sale dated 05.05.1997 in favour of defendant no.1 (appellant) through which he illegally and without any right, transferred the Schedule-III land, though defendant no.2 was not competent to execute the sale deed dated 05.05.1997 (Ext.D/2) in respect of Schedule-III land since defendant no.2 had neither any title nor possession over the said land. On the strength of the said sale deed dated 05.05.1997, defendant no.1 had attempted to block the western extremity of Schedule-III land on account of which certain disputes had arisen and a proceeding under Section 144 of the Cr. P.C. was initiated. The plaintiff pleaded that the plaintiff as well as his vendor had acquired a valid right of easement over the suit land. He also asserted before the court below that in defiance of the order of the trial court to maintain the status quo, the defendant no. 1 had put an iron gate and installed a padlock, causing obstruction and inconvenience to the plaintiff.

Case of defendant no.1(appellant)

8. Defendant no.1 pleaded in his written statement that the suit land of the area 1 ½ decimals of plot no.219, khata no.63 was owned and possessed by Ganga Dayal Choudhary and others, who had sold the same with other land of plot



no.225 to M/s S.K.Trading Company in the year 1971. There is a local Board road running north to south and adjacent west of plot no.219 area 1 ½ decimals and adjacent back, i.e., in the east is plot no.225 and to reach the local Board Road there was no other way. The defendant had, therefore purchased 1 ½ decimals of land of plot no.219 for his own use and for coming to the local Board road. M/s S.K.Trading Company had sold the disputed land, which they had acquired through the registered sale dated 05.05.1997 and had put him in possession over the same land and since then the defendant(s) were coming in possession of the same, using it as absolute owner. The defendant asserted that the defendant had constructed a residential house over the plot no.225 which is adjacent east of the defendant's suit land area of 1 ½ decimals of plot no.219. The plaintiff was having his boundary wall adjacent north and south of the suit land and he had got his exit towards west over the local Board road. He asserted that the plaintiff had constructed shops towards west of his purchased plot and closed his outlet and somehow or the other, he wanted to come out from the suit land of the defendant forcibly, though there is already a local Board road adjacent west of the plaintiff's land/flat and house. He asserted that the plaintiff did not have



any right of easement or right of user. Neither Lal Muni Devi nor Nirmala Jha had ever used the suit land as Rasta and in view of the sale deed dated 05.05.1997, executed by defendant no.2 in favour of defendant no.1, the defendant no.1 had acquired valid right, title and possession over the suit land and that defendant no.2 was fully competent to execute the sale deed dated 05.05.1997.

Issues before the trial court

9. The trial court, based on rival pleadings, framed 10 issues. For the present adjudication, however, the following issues are relevant which are at the core of the dispute which are as follows:-

“5. Whether there is inconsistency in between the sale deed standing in the name of defendant no.2 and the sale deed standing in the name of defendant no.1?

6. Whether the sale deed dated 5.5.77 executed by defendant no.2 in favour of defendant no.1 purportedly convey out the C.S. Plot No.219 valid?

7. Whether the suit land detailed in schedule III of the plaint are the land retained by Smt. Sumitra Dvi out of Sch-1 land?

8. Whether the plaintiff's land ad house is situated running north to south and he has alternative way (rasta) on the road towards west



of the house?

9. Whether the plaintiff has right of easement over schedule III land or the same is the exclusive property of the defendant no.1?"

Discussions and findings of the trial court

10. The parties adduced their respective evidence in support of their case, both oral and documentary, before the trial court.

11. The plaintiff got examined 05 witnesses, out of whom P.Ws. 1,3 were Masons, who claimed that they were engaged in building the house of the plaintiff. The plaintiff got himself examined as P.W. 5. The Advocate Commissioner was examined as P.W.4. One more witness, namely, Paras Nath Jha, a relative of the plaintiff, also deposed before the trial court in favour of the plaintiff. The plaintiff proved the sale deed dated 01.11.1975, executed by Sumitra Devi in favour of Lal Muni Devi as Ext.4; certified copy of the sale dated 11.05.1978, executed by Smt. Lal Muni Devi in favour of Smt. Nirmala Jha As Ext.4/A; certified copy of the sale deed dated 27.02.1996, executed by Smt. Nirmala Jha in favour of the plaintiff as Ext. 4/B; certified copy of the sale deed dated 05.05.1997, executed by M/s S.K.Trading Company through Shri Subodh Kr. Jhunjhunwala (defendant no.2) in favour of



defendant no.1 as Ext.4/C; certified copy of the sale deed dated 24.02.1971, executed by Shri Ganga Dayal Choudhary in favour of M/s S.K. Trading Company as Ext.4/D in addition to certain other documents.

12. The defendant also got examined 05 witnesses and proved certified copy of the order dated 08.12.1999 passed in Mutation Case No. 236(M)/1999-Ext.A; certified copy of Khatian of plot no.219 as Ext.B and certified copy of G.R. Case No.125 of 2000, Danapur P.S. Case No.30 of 2000 as Ext.C. He also proved certified copy of the sale deed dated 30.03.1971, executed by Shri Ganga Dayal Choudhary and others in faovur of Laxmin Niwas Poddar as Ext.D/1 and certified copy of the sale deed dated 20.11.1968, executed by Shri Ganga Dayal Choudhary in favour of M/s S.K. Trading Company. He further proved certified copy of the sale deed dated 05.05.1997, executed by M/s S.K.Trading Company through Subodh Kr. Jhunhunwala in favour of defendant no.1.

13. The trial court, at the very beginning and rightly so, dealt with the issue No.VII, i.e., as to whether the suit land detailed in Schedule-III of the plaint could be said to have been retained by Smt. Sumitra Devi, out of schedule-I land. The court below noticed that the suit land was situated in the



northern part of plot no.219, having a width of 10 ft., which was being described as part of C.S. Plot No. 219, having an area of 09 katha 17 dhur and 14 dhurki. Noticing that the plaintiff failed to adduce any documentary evidence to prove that Sumitra Devi had retained Schedule-I land which included Schedule-III land with Schedule-II land, the trial court decided issue No. VII in negative. The instrument or the mode through which the said Sumitra Devi could retain Schedule-I land, which included Schedule-III land. The trial court recorded that the plaintiff produced Ext.4 only to show that Sumitra Devi had executed the sale deed showing a *Rasta*, 10 ft. wide (north of Schedule-II land). On the reasoning that the said Sumitra Devi could not have retained the suit land, the trial court concluded that there was, thus, no question of retaining the suit land by her, showing it as *Rasta* in the sale deed (Ext.4). It decided issue no. 7 against the plaintiff accordingly.

14. Dealing with issue nos. 5 and 6 thereafter, the trial court, upon appreciation of evidence, recorded the specific finding on the basis of the certified copy of the registered sale deed, executed by Ganga Dayal Choudhary in favour of M/s S.K.Trading Company that plot no.219 having an area of 1.5 decimal along with 2.5 decimal of plot no.225 was transferred,



which was subsequently transferred by M/s S.K. Trading Company through a registered sale dated 05.05.1997 to defendant no.1. The sale deed dated 05.05.1997, executed by defendant no.2 in favour of defendant no.1 in respect of schedule-III land was valid. Issue nos. 5 and 6 were also, thus, decided in favour of defendant no.1.

15. Issue no.8, which in court's opinion, was the most crucial for determination of the claim of the plaintiff's easement right i.e. whether the plaintiff's land and house was situated running north to south and he had alternative way on the road towards west of his house, the learned trial court held that the plaintiff himself had constructed shops to block the outlet in west side of his plot adjoining Ram Jaipal Road running north to south and by doing so he had closed his own exit. For reaching the said conclusion, the trial court relied on the statement of P.Ws.1,2 and 3, who had admitted existence of road running north to south adjacent to west of the plot of the plaintiff and the plaintiff had constructed the shops on the western side of his plot, thus closing his exit. The Advocate Commissioner also admitted in his evidence that there were shops on the west side of the plaintiff's land in C.S. Plot No.219, adjacent to Ram Jaipal Road.



16. After having decided the aforesaid issue, the learned trial court considered the main issue i.e. as to whether the plaintiff had any right of easement over the Schedule-III land. The court considered the evidence to the effect that prior to construction of the defendant's house, the plaintiff had constructed shops over the land and he had intentionally blocked his exit and therefore could not claim the right of easement by necessity. After having decided the issue against the plaintiff, the trial court dismissed the suit.

Discussions and findings of the first appellate court

17. Feeling aggrieved, plaintiff filed little appeal against the judgment and decree of the trial court giving rise to Title Appeal No.47 of 2010, which came to be registered on the file of the learned Ad hoc Additional District and Sessions Judge V, Patna, who reversed the findings of the trial court by the judgment and decree dated 31.10.2013, which is impugned in the present second appeal.

18. It transpires from the impugned judgment of the first appellate court that the court below formulated the following two points for consideration:-

“1. Whether the appellant/plaintiff has easementary right by necessary over the suit land in schedule III with the plaintiff?



2. Whether the plaintiff has got valid cause of action for filing the suit of the plaintiff is sustainable (sic.)?”

19. The appellate court below, on re-appreciation of evidence, relying on Exts. 4, 4/A and 4/B, concluded that there was a road on the northern side of the plaintiff/appellant's plot, 10 ft. wide. The appellate court held that it was clear from the evidence that the disputed land did not belong to the plaintiff or the plaintiff's earlier vendors and no right had been given to him by them to use it as a way. The appellate court, therefore, held that no case of easement by grant was made out. The appellate court opined that since all the three sale deeds (Exts.4, 4/A and 4/B) showed that there was 10 ft. wide road on the northern side of the plaintiff's plot and since it was the road which “the plaintiff as well as other vendors must have been using it” for reaching on their plot, a case of easementary right was made out. The appellate court below accepted that the plaintiff had blocked the western side of his plot by constructing five shops which were proved by the report of the Advocate Commissioner also. The appellate court below, however, held that “the plaintiff was under the notion that there was already a road on the northern side, so he constructed shops on the western side of his plot and now there was no way left out for



him to reach on the main road which is mentioned as Ram Jaipal Road.” The first appellate court further held that even after constructing the shops, the plaintiff was using the disputed land for reaching his plot and problem arose only when the defendant purchased plot no.225 from S.K.Trading Company (defendant no.2) and purchased 1 ½ decimal of the disputed land and blocked it.

20. Accordingly, since according to the appellate court below, the plaintiff had no way left to run on the road, which he had been using from earlier, it was a fit case for grant of easement by necessity. The appellate court below after having held so, decided point no. 1 in favour of the plaintiff and against the defendant. In the background of decision on point no. 1, the appellate court held that the plaintiff had valid cause of action to file the suit since the way, through which the plaintiff used to reach the main road, was blocked by defendant no. 1.

Cross-objection on behalf of the plaintiff/respondent in Second Appeal

21. The respondent has filed a cross objection in the present second appeal on the ground that certain findings in the judgment of the appellate court below, which are against the plaintiff, are not in-consonance with the pleadings, evidence and position of law which ought to have been decided in favour of



the plaintiff. It is his case that the finding of the appellate court that the respondent could not make out the case of 'easement by grant' on account of non-mentioning the same in the sale deed, is erroneous finding, since 'easement by grant' may also be by implication, even without mentioning it in the sale deed. It is further case of the respondent that though the appellate court took note of the fact that the measurement of the disputed land was 100 ft. X 10 ft. which is more than the area claimed to have been purchased by the defendant/respondent, through sale deed dated 05.05.1997, the defendant was not entitled to enclose any land beyond his deed of sale.

22. This is to be noted that this matter was earlier taken up on 09.05.2014, when this Court had granted interim protection to the appellant to the effect that no writ shall be issued for execution of the decree, which was subject-matter of the Execution Case No. 02 of 2013. The said interim order was limited to a period of time. The appeal was heard under Order XLI Rule 11 of the CPC on 28.01.2015, when this Court found following substantial question of law to be arising in the appeal for consideration:-

“Whether the findings by the appellate court below that the plaintiff has acquired easementary right of necessity cannot be



sustained in law as well as on facts”.

23. While admitting the second appeal by the said order, dated 28.01.2015, the Court ordered that the interim order, dated 09.05.2014, shall continue, in the meanwhile.

Submissions on behalf of the appellant

24. Mr. Jintendra Kishore Verma, learned counsel, appearing on behalf of the appellant/defendant, has submitted that the finding and decretal of the suit by the appellate court on the ground of easement of necessity is manifestly a finding beyond the pleadings of the parties, since there was no pleading to make out a case of easement by necessity by the plaintiff in his plaint and other pleadings. He has submitted, accordingly, relying on a Supreme Court's decision in the case of **Union of India Vs. Ibrahim Uddin & Another (2013 (1) PLJR 48 SC)**, in the case of **Messrs. Trojan & Co. Vs. RM. N. N. Nagappa Chettiar (AIR (1953) SC 235)** and in the case of **Bachhaj Nahar Vs. Nilima Mandal & Ors. (AIR (2009) SC 1103)**. That judgment of the appellate court below requires interference by this Court. He has further submitted that the appellate court miserably failed to appreciate, meet and reverse the findings of the trial court, based on admission of the plaintiff himself that after purchase of the property, he had constructed shops in front



of his own plot, adjoining road in western boundary and thereby closing his way to the main road and, in such circumstance, he could not have claimed easementary right. He has also submitted that though the plaintiff had entire frontage of the purchased plot on the main road and, therefore, alternative way was very much available as on the date of purchase. The plaintiff, he contends, cannot be permitted to take advantage of his own action of blocking access for commercial use and at the cost of his neighbour and plead easement by necessity. He has relied on another Supreme Court's decision in case of **Justiniano Antao and others Vs. Smt. Bernadette B. Pereira (AIR 2005 SC 236)**. He would contend that the findings of the appellate court to make out a new case of easement of necessity is assumptive, inasmuch as the appellate court has recorded his finding on the reasoning that "plaintiff as well as other vendors must be using it for reaching on their plot", which is without any evidence and, therefore, perverse. He has gone on to contend that the appellate court below miserably failed to appreciate clear distinction between the concepts of easement by grant, easement by prescription, and easement by necessity, which operate in different sets of facts. He further contends that the question of easement of necessity would have arisen only



whereupon transfer, bequest or partition, a single tenement is divided into two or more separated and distinct tenements and any of these tenements,(whether transferred or reserved) is so situated that it cannot be used at all without the enjoyment of certain privileges on any other such tenements and, in such circumstance, only the law presumes existence of easement of necessity of way in favour of dominant tenement from the servient tenement. He contends that the plaintiff did not plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and there has been severance of such ownership and without easementary rights being claimed, dominant tenement could not be used at all. He has relied on Supreme Court's decision in case of **Bachhaj Nahar Vs. Nilima Mandal & Ors.** (supra) and in the case of **Thimma Alias Thimma Raju Vs. State Of Mysore (AIR 1971 SC 1871)**. He has also relied on a judgment of this Court in case of **Santosh Kumar Banerjee Vs. Krishna Kant Gupta (1984 (1) PLJR 890)**.

25. Opposing the cross objection filed on behalf of the plaintiff, he has contended that any cross objection in the second appeal stands on the similar footing as the second appeal itself



and for admission of the cross objection, the plaintiff is required to establish that the cross objection involves a substantial question of law, before the cross objection is admitted. He submits that no case of easement of necessity was pleaded by the plaintiff and a case of acquisition of easement by prescription for 20 years could not have been pleaded since the plaintiff had pleaded the case of easement by grant. He submits that, on the basis of vague pleadings of mere continuous user without clear pleadings, the specific ingredients of hostile user for 20 years, the plaintiff could not get an easementary declaration of right by prescription. He has relied on the decisions in case of **Bachhaj Nahar Vs. Nilima Mandal & Ors.** (supra), in the case of **Thimma Alias Thimma Raju Vs. State of Mysore** (supra) and in case of **Santosh Kumar Banerjee Vs. Krishna Kant Gupta** (supra).

26. Contesting the plea of the plaintiff that since the area of schedule-II land was 100 ft.x10 ft., whereas defendant no. 1 had purchased lands measuring 65 ft.x10 ft., and therefore, he could not defend the suit regarding area of 35 ft. x 10 ft., Mr. Verma has submitted that the submission is entirely misconceived, inasmuch the suit which was brought being not of title, rather it was confined to the easementary right of the



plaintiff, by implication, he admitted the title of the defendants to entire Schedule-III land. He submits that if it is the claim of the plaintiff that the defendant did not have any title to a part of the suit land, then the present suit, being for claim of easementary right, would not be maintainable in the absence of so-called real owner of the land as a party to the suit. He contends that, in any view of the matter, in a suit for declaration, the plaintiff has to succeed on the strength or weakness of his own case and cannot succeed by relying on the stand/document of the defendant. He has relied on Supreme Court's decision in case of **Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others (2014) 2 SCC 269**).

Submissions on behalf of respondent

27. Mr. J. S. Arora, learned counsel, appearing on behalf of the respondent, on the other hand, has strenuously submitted that the dimension of the disputed land to which the defendant claimed his title was 65ft.x10 ft., which is clear admission in the averments made in the written statement and, therefore, the defendant was contesting the plaintiff's claim only to the extent of 1.5 decimal of land i.e. 65 ft.x10' ft. and there was no claim or dispute by the defendant relating to rest 35 ft x 10 ft., which is adjacent west to the said 1.5 decimal of land. He contends



that the defendant made construction encroaching upon the said 35 ft. x 10 ft. area as well, for which the plaint was amended, but no additional written statement was filed by the appellant. He has, accordingly, submitted that the appellant cannot challenge the decree by his own claim beyond the scope of his defence on which he contested the suit, i.e., only to the extent of 65 ft. x 10 ft. land adjacent west to plot no. 225. He, with all vehemence, has submitted that the appellant cannot be rewarded beyond the scope of his claim to the extent of which he had contested the claim of respondent, that too, on the basis of his sale deed. He thereafter, submits that the lower appellate court rightly decreed the suit in respect of Schedule-III land being passage/*rasta* since it was being used since more than 20 years by the respondent, his vendor, vendor's vendor and so on. This Court, in second appellate jurisdiction, would not enter into such question of fact nor reappraise the evidence, he contends.

28. He lastly submits that if at all the appeal is found to be allowed, then also to the extent of the claim of entitlement of the appellant i.e. only to the extent the appellant had contested and disputed the claim of the respondent i.e. 1.5 decimal of land of plot no. 219 i.e. 65 ft. x 10 ft., adjacent west



to the land of plot no. 225 and he could not be permitted to get any relief in respect of rest 35 ft.x10 ft., which according to his own pleading, did not belong to him and nor did he challenge that aspect of the matter, which has been considered by the lower appellate court. He has relied on the following decisions of Supreme Court in support of his submissions:-

- 1. Hardevinder Singh Vs. Paramjit Singh and others 2013 (2) PLJR (SC) page 6,**
- 2. Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra & Ors. 2013 (1) PLJR SC page 84 &**
- 3. 2017 SCCR 675 (Vol. 13 Part 8).**

29. The submissions, so advanced on behalf of the parties, have to be appreciated to answer the substantial question of law i.e. whether the findings by the appellate court below that the plaintiff acquired his easementary right of necessity is sustainable in law as well as on facts. There is no gainsay, which is evident from the evidence available on record that eastern boundary of the land in possession of the plaintiff is on the road for reaching which the plaintiff is claiming his easementary rights through the disputed scheduled-III land. This is not in dispute that had there been no shop constructed by the



plaintiff himself on the road for reaching which he is claiming easementary right, he could not have raised any right of easement. There was clear access to road from his land, which he is said to have blocked by constructing shops. It is evident from the pleadings that the plaintiff attempted to make out a case of easementary right of prescription.

30. This is to be kept in mind, which facts have already been taken note of, that the plaintiff-respondent has claimed his right of easement by grant which has been expressly rejected by the first appellate Court on examining Exhibit-4, i.e. the sale deed dated 30.10.1975. His claim was on the basis that he had acquired his easementary right through successive sale/purchase transactions. The appellate Court, however, decreed the suit on the ground of easement by necessity. No easement by necessity was pleaded by the plaintiff before the trial court. The plaintiff filed a cross-objection in this case assailing the impugned judgment and decree of the appellate Court to the extent the appellate court held that the plaintiff could not make out a case of easement by grant on account of non-mentioning the same in the sale deed. It is the plea of the plaintiff that the said finding is erroneous and easement by grant may also exist by implication even without the same having not been mentioned



in the deed of sale.

31. Mr. Jitendra Kishore Verma, learned counsel appearing on behalf of the appellant-defendant is, in my view, correct in his submission that maintainability of a cross-objection in a second appeal has to be tested on the same parameters as required for entertaining a second appeal. The only plea which has been taken in the cross-objection to assail the said finding of the first appellate Court that the plaintiff failed to make out a case of easement by grant is erroneous. Following statement has been made in paragraph 4 of the cross-objection:-

“4. That the finding of the lower appellate Court that the plaintiff/appellant/respondent has not been able to make out a case of “easement by grant” on account of non mentioning the same in the sale deed is a erroneous finding since the “easement by grant” may also be by implication even without mentioning in the deed of sale.”

32. The said finding of the trial Court is not being assailed on the ground of perversity. The ground which has been taken in the cross-objection for assailing the finding is quite vague and in my view, the cross-objection deserves to be



dismissed on that ground. The cross-objection filed on behalf of the plaintiff/respondent is, accordingly, dismissed.

33. As has been noticed, the appellate Court below, after having rejected the claim of the plaintiff of his easement by grant, decreed the suit on the ground of right of easement by necessity, in favour of the plaintiff considering the fact that he has been using the disputed road, which earlier belonged the vendor Ganga Dayal Choudhary.

34. Mr. Jitendra Kishore Verma, learned counsel appearing on behalf of the appellant has rightly contended that in the absence of pleadings in respect of easement by necessity, the appellate Court has committed a gross error. As has been held by Supreme Court in case of ***Bachhaj Nahar Vs. Nilima Mandal (AIR 2009 SC 1103)***, the object and purpose of pleadings and issues is to ensure that the litigants come to a trial with all issues clearly defined and to prevent cases being expanded and grounds being shifted during trial. A case not specifically pleaded can be considered by the Court only where the pleadings in substance, contained necessary averments to make out a particular case and issues framed also generally covered the question involved. Here in the present case, entire pleading of the plaintiff was confined to easement by grant.



Section 4 of the Indian Easements Act, 1882 defines easement as a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land, not his own. It also defines dominant and servient heritages as the land for the beneficial enjoyment of which the land exists and the owner or occupier thereof, the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof, the servient owner. A dominant owner, seeking any declaratory or injunctive right shall have to plead and prove the nature of easement, the manner of acquisition of the easementary right and the manner of disturbance or obstructions to the easementary right. Observing thus, the Supreme Court in case of ***Bachhaj Nahar Vs. Nilima Mandal*** (supra) has held that pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. The Supreme Court has further held that in regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right



for a period of 20 years. In addition, he is required to prove that the said right was being enjoyed independent of any agreement. The Supreme Court has further held in ***Bachhaj Nahar*** (supra), as would be evident from paragraph 14 of the said judgment that for claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership.

35. Section 13 of the Indian Easements Act, 1882 defines easement of necessity and quasi-easements and lays down six different situations arising out of transfer of immovable property covered by sub-Sections (a) to (f), which are as follows:-

“13. Easement of necessity and quasi-easements.-Where one person transfers or bequeaths immovable property to another,-

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying



the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying the other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons.-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or



necessarily implied, be entitled to such easement.

The easements mentioned in this section, Cls. (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.”

36. I find force in the submission made by Mr. Verma learned counsel that no case of acquisition of easement by prescription for 20 years could have been pleaded by the plaintiff. He is right while saying that easement by grant begins with consent and voluntarily transfer of such rights by the original owner of servient tenement whereas the easement by prescription begins with forceful usurp of property without the consent of the co-owner.

37. The law on easement by necessity has been succinctly dealt and explained in this Court's decision in case of **Santosh Kumar Banerjee Vs. Krishna Kant Gupta** (supra), wherein the Supreme Court, tracing the history of easementry right of necessity has held that to constitute an easement of necessity, a single tenement must have been divided into two



or more separate and distinct units and the situation of one of them is such that it cannot be used or enjoyed without a certain privilege like a right of way. Paragraph 5 of the aforesaid decision can be usefully referred to in this regard.

38. It is evident thus, that the plaintiff's claim for grant of easementary right by grant had failed. The easement by necessity could not be established for the apparent reason that there was no apparent ground for seeking such easementary rights. The plaintiff cannot be said to be entitled to right of easement by necessity, in view of clear law laid down by this Court in case of ***Santosh Kumar Banerjee*** (supra) and ***Bachhj Nahar Vs. Nilima Mandal*** (supra).

39. The substantial question of law so framed is, accordingly, answered. The finding recorded by the first appellate Court below holding that the plaintiff established his right of easement by necessity is not at all sustainable.

40. The second appeal is, accordingly, allowed.

41. The impugned judgment and decree dated 31.10.2013 passed by the learned Ad hoc Additional District and Sessions Judge V, Patna in Title Appeal No. 47 of 2010 is, hereby, set aside and consequently the judgment and decree dated 21.05.2010, passed by learned Sub-Judge II, Danapur



being T. S. No. 78 of 1999 is, hereby, restored.

42. The second appeal stands allowed.

43. There shall, however, be no order as to costs.

(Chakradhari Sharan Singh, J)

HR/-

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CAV DATE	04.05.2018
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