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HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.462 of 1999**

1. Ullash Vimal Mahishwar S/o Late Shri Chhaganlal Mahishwar, aged about 52 years,
2. Dr.Aishwarya Vimal Mahishwar, S/o Late Shri Chhaganlal Mahishwar, aged about 51 years,
3. Ashok Kumar Mahishwar, S/o late Shri Chhaganlal Mahishwar, aged about 49 years,
All resident of Muskan Clinic, Balod, Tah. & Distt. Balod,
Distt. Balod (CG)

---- Appellant**Versus**

1. State of M.P. through the Collector, Durg (MP) (Now CG)
2. Naib Tahsildar, Tehsil Balod, Distt. Durg (MP) (Now CG)

---- Respondents

For Appellants	:	Mr.M.K.Sinha and Mr.Utsav Mahishwar, Advocates
For Respondents	:	Mr.Ashish Surana, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****24/08/2018**

1. The substantial question of law involved, formulated and to be answered in this appellants/plaintiffs second appeal is as under:-

“Whether the Court below is right in holding that the appellant had not acquired the requirement of easement of necessity over the suit-property?”

2. In view of pleading of the parties and with the consent of the parties, substantial question of law is modified as under:-

“Whether the Court below is right in holding

that the appellant had acquired the requirement of easement over the suit property under Section 15 of the Indian Easements Act, 1882 ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court]

3. The imperative facts required for determination of above-stated substantial question of law are as under:-

3.1 The plaintiff filed a suit that he has easementary right over the subject land 95x10 ft. i.e. path way to approach well (kuwa) constructed by the plaintiff as he was using path way right from 1953 uninterruptedly and full knowledge of the defendants and described the same in schedule 'A' attached with the plaint.

3.2 The defendants filed their written statement before the trial Court opposing the plaint averments stating inter-alia that the plaintiff is not entitled for such relief as the land in which the plaintiff has constructed house situated in Kh.No.601 area 0.11 decimal was allotted to him on patta by the State Government on 3.10.1953 and thereafter he made construction over and above the allotted land. Encroachment proceedings under Section 248 of the Chhattisgarh Land Revenue Code, 1959 were initiated against the plaintiff by the Tahsildar in Revenue Case No.58A/68 in the year 83-84, as such, the plaintiff is

not entitled for any relief.

4. The trial Court after appreciating oral and documentary evidence available on record came to the conclusion that the plaintiff has not acquired any easementary right under Section 15 of the Indian Easements Act, 1882 (hereinafter called as 'the Act of 1882') over the subject path and is not entitled for permanent injunction by the judgment and decree dated 17.7.95.
5. Feeling aggrieved against the judgment and decree of the trial Court, the plaintiff preferred first appeal under Section 96 of the Code of Civil Procedure before the First Appellate Court. The First Appellate Court also affirmed the judgment and decree of the trial Court resulting into filing of second appeal under Section 100 of the Code of Civil Procedure, in which substantial question of law has been framed by order dated 22.3.2000 and same has been incorporated in the opening paragraph of this judgment.
6. Mr.M.K.Sinha and Mr.Utsav Mahishwar, learned counsel for the appellants, would submit that the finding recorded by two Courts below is perverse and contrary to record as in Ex.P/7 it has been clearly mentioned that the plaintiff has constructed subject path in the year 1953-54 and suit was filed on 28.8.84, as such, he has acquired easementary right over the subject land and the

judgment and decree passed by the trial Court as well as by the First Appellate Court deserve to be set aside and suit be decreed with cost(s).

7. Mr.Ashish Surana, learned Panel Lawyer for the respondents/State, would support the impugned judgment and decree passed by the First Appellate Court affirming the judgment and decree of the trial Court.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
9. The term "Easement" has been defined in Section 4 of the Act of 1882. The definition runs thus:--

4. "Easement" defined.--An easement is 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.

Dominant and servient heritages and owners.--The land for the beneficial enjoyment of which the right exists is called the dominant heritage, 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.

Explanation:--In the first and second clauses of this section, the expression 'land' includes also things permanently attached to the earth; the expression 'beneficial enjoyment' includes also possible convenience, remote advantage, and

even a mere amenity; and the expression 'to do something' includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon."

10. Section 15 of the Act of 1882 provides for acquisition by prescription as under:--

*"15. Acquisition by prescription.--*Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

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*Explanation IV:--*In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to the Government, this section shall be read as if, for the words 'twenty years' the words 'thirty years' were substituted.

11. A close reading of Section 15 of the Act of 1882 would show that a right to way or any other easement can be acquired by prescription under Section 15 of the Act of 1882 provided the right to access/way has been enjoyed:-

- (i) peaceably,
- (ii) openly,
- (iii) as an easement,
- (iv) as of right,
- (v) without interruption, and
- (vi) for last 20 years.

12. Section 19 of the Act of 1882 speaks about passing of easement on account of transfer of dominant heritage.

Section 19 reads as under:--

“19. Transfer of dominant heritage passes easement.--Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.”

13. The purpose of elucidating the law contemplated in Sections 4, 15 and 19 of the Act of 1882 is that whether in the given case the plaintiffs are having easementary right and whether they have acquired such right by prescription.
14. There cannot be any doubt that easement is a right and the same is not a mercy. If a plaintiff is having an easementary right, certainly he can establish it and continue to exercise it by filing a suit if the defendant obstructs him to exercise it. If an easementary right is in

respect of a way on the servient heritage to approach the dominant heritage, the plaintiff is bound to prove his case on the foregoing tests in order to bring his case within the purview of Section 15 of the Act of 1882.

15. It is a well-settled law that a right of easement is a precarious and special right claimed over the land of another. A party claiming or relying on easement should plead the nature of title thereto as to clearly show the origin of right, whether it arises by statutory prescription etc. and whenever a right of easement is claimed, pleading should be precise and clear and it should not be vague, as right of easement is one which a person claims over a land which is not his own.
16. Gale on Easements (15th Edition; Pages 3 and 4) states the precise nature of an easement as under:--

“It is of the essence of an easement that, as between two pieces of land, there is a shift in the equilibrium of natural rights incident to their ownership, a diminution in the natural rights of one being accompanied by a corresponding artificial addition to the natural rights of the other; the result being that a conveyance of either operate automatically, and can only operate, as a transfer of natural rights diminished, or of natural rights plus an additionally acquired right.”

At Page 415 of the book, the learned author states thus:--

“Under the present system of pleading, it is conceived that, whether the section be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or

lost), prescription at common law, or under the Prescription Act, and in many cases it is advisable to plead, alternatively, a title by all three methods.”

17. In **Justiniano Antao and others Vs. Bernadette B. Pereira (Smt.)**¹, the Supreme Court held that in order to establish a right by way of prescription, there should be specific pleading and categorical evidence in general and specifically that since what date to which date one is using the access for last 20 years. It held thus:--

“9. We have gone through the three judgments, i.e., Trial Court, First Appellate Court and that of the High Court. We have gone through the evidence adduced. From this, it is more than clear that there is no specific averment in the plaint or in the statement of the witnesses showing that this access from the land of the defendants was used as of right for the last 20 years. The evidence very categorically shows that the plaintiff has an access on the south-east side and this was being used by her for a long time. It was pointed out that only in the year 1984, the plaintiff has started using the access through the property of the defendants. It is also admitted that the defendants were during that time on board of ship and as soon as they came and saw the use of their land by the plaintiff, they put obstructions to it. Therefore, it is clear that it is not the case that the plaintiff has been using the access as of right through the property of the defendants for more than 20 years. Since the plaintiff has an access through the southern side of her property we see no reason why the property of other persons be used as an access to her house. If the plaintiff had no access to her house except through that of the property of the defendants, then perhaps, we would have considered appreciating as easement of necessity. But in order to establish a right by way of prescription, one has to show that the

¹ (2005) 1 SCC 471

incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence. In the present case, after going through the pleadings as well as the statement of the witnesses it is more than clear that the plaintiff has failed to establish that she has been using the access peacefully, openly as of right for the last 20 years. More so, we find that material placed on record and especially the photographs, which have been exhibited and marked as Exh. D.W. 3-A in the Court that there are two pillars showing the existence of a gate in southern side, but it has been closed down by rubble stones. The defendants have put up a strong case that the plaintiff has an opening in the southern side and it is amply established that there exist two pillars showing the existence of a gate, which has been covered by rubble stones in the southern side. It was also pleaded that the plaintiff was using the same and it is only after 1984 she got the gate constructed through the land of the defendants. Therefore, on the basis of the evidence and statement of the witnesses, we are satisfied that the First Appellate Court has correctly approached the matter and the view taken by the High Court as well as the Trial Court does not appear to be based on correct appreciation of facts."

18. In the above referred judgments, Their Lordships have held that there should be categorical pleadings that since what date to which date one is using the access for the last 20 years. In order to establish an easement by way of prescription to the detriment of the other party, one has to aver specific pleadings and lead categorical evidence.

19. In **Surendra Singh Inder Singh and another Vs.**

Phirozshah Bairamji and another², a Division Bench of

Nagpur High Court held thus:--

“(9) It is necessary to point out that pleadings in a case dealing with easement have to be very precise. As has been stated by Peacock in his 'Law Relating to Easements in British India', third Edition at Page 608:--

'As an easement is not one of the ordinary rights of ownership, it is necessary that either party claiming or relying on an easement should plead the nature of this title thereto so as clearly to show the origin of the right, whether it arises by statutory prescription, or express or implied grant, or the old common law method of a lost grant'."

20. Thus, having ascertained the legal position, I shall revert to the facts of the present case. It is clear from Ex.P/7 that the land on which the plaintiff has constructed his house was allotted to him i.e. Kh.No.601 area 0.11 decimal by order of the Collector dated 3.10.53 and thereafter he has constructed well on his own land and also said to have constructed path way to approach on well constructed by him, which is apparent from Ex.P/7 filed by the plaintiff. The aforesaid document clearly shows that patta was allotted to the plaintiff on 3.10.53 and suit was filed on 28.8.84 as it is requirement that the plaintiff must have pleaded and proved that he is in possession of the subject property (land of the State Government) uninterruptedly for last 30 years and there must be specific pleading and

² AIR 1953 Nagpur 205

categorical evidence that since what date to which date the plaintiff was using the access for last 30 years.

21. The trial Court upon appreciation of evidence available on record has clearly reached a finding that the plaintiff has not established statutory period of 30 years that he was using path way for last 30 years. The plaintiff has filed the document Ex.P/7 in which it has been mentioned that in Kh.No.601 area 0.11 decimal he has made construction in the year 1955-56, but in Ex.P/7, no date from which the plaintiff was using the said path way has been indicated and simply it has been stated that construction of well had already been done prior to 1955-56. It cannot be held that he was using since 30 years particularly when the area in which the plaintiff has constructed his house was allotted to him on 3.10.53 and suit was filed on 28.8.84 whereas particular date from which he was using path way he must plead and prove usage for 30 years by leading evidence as held by the Supreme Court in **Justiniano Antao** (supra). The said finding has been affirmed by the First Appellate Court by holding that the plaintiff has failed to establish his easementary right over the said land for last 30 years.
22. In the considered opinion of this Court, neither there is a precise pleading that since what date to which date for last 30 years the defendant's land is being used by the

plaintiff to have an access in his well nor any document has been filed by the plaintiff to establish the plea of exercising the easement of right to way for last 30 years. The aforesaid finding is finding of fact based on evidence available on record.

23. In view of the aforesaid analysis, I do not find any merit in this second appeal and substantial question of law is answered accordingly. The second appeal deserves to be and is accordingly dismissed re-affirming the judgment and decree of the trial Court.

24. A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-