

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 357 of 2006**

Akhileshwar, Aged about 34 years, S/o Uddhavlal Kolta, R/o. Bamhani, P.H. No. 33 years, R.N.M. Sankara, Tahsil and District Mahasasmund (C.G.)

----Appellant/Plaintiff

Versus

1. Dhanurjay, Aged about 41 years, S/o. Narayan,
2. Pitambar, Aged about 38 years, S/o. Shivcharan,
3. Mitrabhanu, Aged about 42 years, S/o. Budha Gautiya
4. Parmeshwar, Aged about 56 years, S/o. Mangalu,
5. Sahasram, Aged about 44 years, S/o. Santosh,
6. Butu, Aged about 25 years, S/o. Jagdish
7. Karmu, Aged about 39 years, S/o. Padum
8. Bheem, Aged about 42 years, S/o Jogeshwar.
9. Fulsingh, Aged about 42 years, S/o. Narayan.
10. Tilmoti, Aged about 41 years, Wd/o. Late Rajau Kanwar,
11. Dhaniram, Aged about 36 years, S/o. Duklalu

All above R/o. Village Bamhani, P.H. No. 33, R.N.M. Sankra, Tahsil and District Mahasamund (C.G.)

12. State of Chhattisgarh, Through: Mahasamund, District Mahasamund (C.G.)

----Respondents/defendants.

For Appellant : Mr. Prasoon Agrawal, Advocate.
 For Respondent No.12/State : Mr. Ashish Surana, PL for the State.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

28/09/2018

- (1) This is plaintiff's Second Appeal filed under Section 100 of CPC against the

judgment and decree dated 28.11.2005, passed by the 1st Additional District Judge, Mahasamund Raigarh, in Civil Appeal No. 38-A/2004 affirming the judgment and decree dated 17.08.2004 passed by Third Civil Judge, Class-I, Mahasamund, in Civil Suit No. 176-A/2002 dismissing the suit.

(2) The plaintiff's suit for permanent injunction restraining the defendants from interfering in any manner with the right of the plaintiff to take natural water come from Khasra No. 592 based on easementary right under Section 15 of the Indian Easement Act, 1882 (henceforth 'the Act of 1882') was dismissed by the trial Court. Plaintiff preferred first appeal there-against. The first appellate court, on re-appreciation of evidence dismissed the appeal. Hence this Second Appeal.

(3) Learned counsel appearing for the appellant/plaintiff would submit the both the courts below have concurrently erred in dismissing the suit of the plaintiff and that give rise a substantial question of law for determination in this appeal.

(4) I have heard learned counsel appearing for the appellant and perused the records of both the courts below with utmost circumspection.

(5) In a suit filed by plaintiff, appellant herein claiming easementary right stating that the plaintiff has a right to take natural water come Khasra No. 592 uninterruptedly, which has been dismissed by the trial Court and also upheld by the first appellate Court.

(6) 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:

1 (2005) 1 SCC 471

“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 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 Ext.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.”

(7) In the above referred to decision, their Lordships held that there should be categorical pleading that since what date to which date one is using the access for the last 20 years openly and peacefully. 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.

(8) In **Surendra Singh Inder Singh and another Vs. Phirozshah Bairamji and another**², 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 as 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.

² AIR 1953 Nagpur 205

(9) In the instant case, both the courts below have concurrently recorded a finding that the plaintiff has failed to prove that the plaintiff has failed to prove beyond the easementary right based on under Section 15 of the Act, 1982 for the last 20 years openly and peacefully is a finding of fact based on material available on record and I do not find it either perverse or contrary to record and no question of law much less substantial question of law is involved in this appeal.

(10) Accordingly, the second appeal, being devoid of merit, is liable to be and is hereby dismissed in *limine*.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

