

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.319 of 2004

Kameshwar Prasad son of Janakram Jaiswal, aged 75 years,
 resident of Sero, Tahsil Malkharauda, Distt. Janjgir-
 Champa (CG)

(Defendant)
 ---- Appellant

Versus

1. Shivajee son of Gulab Khan Kalar, aged 65 years.
2. Kunjal Prasad (Dead) through his LR's
 - 2(a) Smt.Rama Bai, aged about 65 years, widow of late Kunjal Prasad the 1st wife
 - 2(b) Smt.Saraswati Bai aged about 60 years, widow of late Kunjal Prasad the 2nd wife
 - 2(c) Jagannath aged about 29 years, son of late Kunjal Prasad
 - 2(d) Balbhadra aged about 26 years, son of late Kunjal Prasad
 - 2(e) Smt.Harsh Lata (Janki Bai), aged about 33 years, daughter of late Kunjal Prasad
 - 2(f) Smt.Urmila Bai aged about 31 years, daughter of late Kunjal Prasad
 - 2(g) Ku. Kiran Bai aged about 21 years, daughter of late Kunjal Prasad
 Above all by caste Kalar, resident of village Singhitari, Tahsil Dabhra, District Janjgir-Champa (CG)
3. Nar Singh son of Shivajee Kalar, Aged 35 years,
 Respondents No.1 and 3 are resident of Sero, Tahsil Malkharauda, District Janjgir-Champa (Chhattisgarh)
 (Plaintiffs No.1 to 3)
4. State of Chhattisgarh Through – Collector, District Janjgir-Champa (CG)

---- Respondents

For Appellant/Defendant: Mr.H.B.Agrawal, Senior Advocate
 with Mr.Pankaj Agrawal, Advocate
 For Res.No.1 to 3/plaintiffs:
 None present
 For Respondent No.4: Mr.Sanjeev Kr.Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

20/12/2019

1. This defendant's second appeal under Section 100 of the Code of Civil Procedure, 1908 was admitted for hearing

by formulating the following substantial question of law: -

“Whether both the Courts below were justified in granting the relief of permanent injunction to the respondents NO.1 to 3 when they had no right or title over the suit property nor any easementary right ?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. Respondents No.1 to 3/plaintiffs filed a suit for declaration of title stating inter-alia that the defendant has no title over the suit tank bearing Khasra No.245 area 1.10 acres known as “dharambandh talab” and they are title-holders being ancestral tank, they have right/title as they are in possession of adjoining lands bearing Khasra Nos.247/1, 247/2, 247/3, 249/1, 249/2, 249/3 and 252 and cultivating the same being “dhanha land” having right of irrigation and the defendant has no right/title over the suit tank.
3. The defendant filed his written statement and denied the averments made in the plaint stating inter-alia that he has purchased the suit land bearing Khasra No.249/1 area 0.34 decimal and Khasra No.249/2 area 0.21 decimal from Ramsubhran by registered sale deed dated 24.1.73 on cash consideration of ₹ 4000/- and denied the title as well as right of irrigation by the plaintiffs and prayed that the suit be dismissed with cost(s).

4. The trial Court upon evaluation and appreciation of oral and documentary evidence available on record, by its judgment and decree dated 25.11.2000, held that the plaintiffs are not owners and title-holders of the suit tank bearing Khasra No.245, but further held that since they are owners of adjoining lands, therefore, they have a right of irrigation and granted permanent injunction in their favour by restraining the defendant to interfere with their right of irrigation, against which, the defendant preferred first appeal under Section 96 of the CPC before the first appellate Court, but remained unsuccessful, thereafter, he preferred this second appeal under Section 100 of the CPC before this Court, in which substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment.
5. Mr.H.B.Agrawal, learned Senior Advocate with Mr.Pankaj Agrawal, learned counsel for the appellant/defendant, would submit that both the Courts below are absolutely unjustified after having held that the plaintiffs are not title-holders of the suit tank in granting permanent injunction in their favour as easementary right was never pleaded. It ought to have specifically pleaded and proved in order to get the decree on the basis of easementary right. In view of that, the judgment and decree of both the Courts below granting permanent injunction against the appellant/defendant deserve to be

set aside.

6. None present for respondents No.1 to 3 though served.
7. I have heard learned counsel for the appellant/plaintiff and considered the submissions made hereinabove and went through the record with utmost circumspection.
8. It is quite vivid that the trial court has clearly held that the plaintiffs are not title-holders of the suit tank bearing Khasra No.245 area 1.10 acres, but further held that since the plaintiffs are owners of adjoining lands, therefore, they have a right of irrigation from the suit tank.
9. Submission made on behalf of the appellant/defendant is that both the Courts below were unjustified in granting decree for permanent injunction in favour of the plaintiffs based on easementary right after having held that the plaintiffs have no title over the suit tank.
10. It is correct to say that decree for permanent injunction based on easementary right of the plaintiffs holding that they have right of irrigation has been granted in favour of the plaintiffs by the trial Court and duly upheld by the first appellate Court.
11. The term "Easement" has been defined in Section 4 of the Indian Easements Act, 1882 (hereinafter called as '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."

12. 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."

13. 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 a right,
- (v) without interruption, and
- (vi) for last 20 years.

14. In the matter of Justiniano Antao and others v. 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 was 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

¹ (2005) 1 SCC 471

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."

15. In the above referred to decision, Their Lordships 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.

16. In the matter of Surendra Singh Inder Singh and another v. Phirozshah Bairamji and another², a Division Bench of the 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'."

17. Reverting to the facts of the present case in the light of principle of law laid down in the above-stated judgments (supra), it is quite vivid that the plaintiffs

² AIR 1953 Nagpur 205

have asserted their title over the suit tank with an averment that they are irrigating adjoining suit lands, but they did not claim any specific right of easement and simply pleaded that they are using the suit tank from long time for irrigating their lands and as such, the defendant be restrained from interfering with their right of easement. There is no precise pleading that since what date to which date for last 20 years the plaintiffs had been in use of the suit tank nor any document has been filed by them to establish the plea of exercising the right of easement and even no any material has been brought on record, yet the trial Court granted decree on the basis of easementary right, which has been upheld by the first appellate Court. Neither there is any precise pleading in terms of decision rendered by the Supreme Court in Justiniano Antao (supra) nor there is evidence brought on record that they are using the suit tank since what date to which date for last 20 years. Specific pleading and categorical evidence is wanting and missing.

18. In view of above, the judgment and decree passed by both the Courts below that the plaintiffs are entitled for decree of permanent injunction restraining the defendant from exercising of their right of easement over the suit tank is perverse and contrary to record.

19. Accordingly, the judgment and decree of both the Courts below to the extent of decree of permanent

injunction is set-aside and the suit is dismissed in toto.

20. The second appeal is allowed to the extent indicated hereinabove. No order as to cost(s) since the plaintiffs are not appearing.

21. A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-