

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 312 of 2007**

Bedram S/o Naharlal, Aged about 60 years, R/o Tulsipur,
Rajnandgaon, Distt. Rajnandgaon, Chhattisgarh.

---- Appellant**Versus**

1. Mohanlal S/o Sufal Kalar, Aged about 66 years, R/o Tulsipur/Motipur, Tahsil & Distt. Rajnandgaon, Chhattisgarh.
2. Ashok Kumar S/o Jhumuklal Barai, Aged about 55 years, R/o Baldev Bag, Near Purani Kachahri, Rajnandgaon, Chhattisgarh.
3. Ku. Rajnibai W/o Brijlal Soni, R/o Tulsipur, Rajnandgaon, Chhattisgarh.

----Respondents

For Appellant : Mr. Ajit Singh, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****08.08.2019**

1. Heard on the question of admission and formulation of substantial question of law in this second appeal preferred by the plaintiff under Section 100 of the Code of Civil Procedure, 1908.
2. Mr. Ajit Singh, learned counsel appearing for the plaintiff submits that both the Courts below are absolutely unjustified in dismissing the suit of the plaintiff by holding that plaintiff has no right of easement over the suit pathway by ignoring Exhibit P/5 which is a demarcation report made by P.W.-2 Yusuf Khan, and placed reliance upon the decision rendered by the Supreme

Court, in the matter of ***Hero Vinoth (Minor) Vs. Seshammal***¹ to demonstrate that the legal effect of the terms or a term of a document would give rise to substantial question of law for determination in this second appeal.

3. I have heard learned counsel for the plaintiff, considered his submissions and went through the records with utmost circumspection.
4. Plaintiff herein filed a civil suit for declaration of title and permanent injunction stating *inter alia* that the pathway shown as A,B,C,D in the suit map annexed with the plaint, on which construction has been raised by defendant No. 2, be removed by decree and nistar rights be maintained in favour of the plaintiff.
5. Learned trial Court vide judgment and decree dated 06/08/2003, negated the plea of the plaintiff by holding that plaintiff has no easementary right over the suit pathway. The counterclaim made by defendant No. 1 was also dismissed by the trial Court.
6. Against the judgment and decree passed by the trial Court, plaintiff then preferred civil appeal which was also dismissed by learned first appellate Court by its judgment and decree dated 30/04/2007. Learned first appellate Court, while dismissing the appeal, has affirmed the finding recorded by the trial Court and held that plaintiff has failed to prove his easementary right over the suit pathway, as such, he is not entitled for decree.
7. It is a well-settled law that a right of easement is a precarious

¹ 2007 (1) MPLJ 17

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.

8. In ***Justiniano Antao & Ors. Vs. Bernadette B. Pereira (Smt.)***², 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

2 (2005) 1 SCC 471

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.”

9. Learned counsel for the plaintiff has placed great reliance Exhibit P/5, which is a demarcation report made by Yusuf Khan (P.W.-2). A careful perusal of that document would show that it is not of much use to the plaintiff as by the said document, the right of easement over the suit pathway is not established.
10. Both the Courts below have concurrently held that plaintiff has no right of easement over the suit pathway as also, in the sale deed filed by the plaintiff, right of easement is not clear and not proved. As such, the concurrent findings recorded by both the Courts below is a finding of fact based on evidence available on record which is neither perverse nor contrary to record and does not give rise to any substantial question of law for determination in this second appeal.
11. The second appeal deserves to be and is accordingly dismissed *in limine* without notice to the other side. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge