

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.8 of 2001**

Bhuloo alias Darasram aged about 50 years Son of Sukhan caste Hindu Sahu, cultivator resident of village Salouni-Kala, Tahsil Balouda Bazar Distt. Raipur

---- Appellant/Plaintiff

Versus

1(a) Noni Bai W/o Dhanaram, D/o Late Alguram, aged about 42 years, R/o village-Pendri, Police Station - Hasaud, Tahsil-Jaijaipur, Civil & Revenue District Janjgir-Champa (CG)

1(b) Nandau S/o Late Alguram, aged about 37 years,

1(c) Jodo Sahu S/o Late Alguram, aged about 32 years,
Both are R/o Village-Salounikala, Tahsil-Bilaigarh, Civil & Revenue District-Balodabazar - Bhatapara (CG)

2. Ramsingh aged 55 years son of Bhokli.

Sahu by caste residents of village Salouni-Kala Tahsil Balouda Bazar Distt.Raipur

3. State of Chhattisgarh Through : Collector Raipur

---- Respondents

For Plaintiff/Appellant	: Mr.P.M.Shriwas, Advocate
For Respondent No.1(a)	: Mr.Rajendra Patel, Advocate
For Respondent No.3	: Mr.A.N.Bhakta, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

08/01/2019

1. The substantial question of law involved, formulated and to be answered in second appeal preferred by the plaintiff is as under:-

“Whether on the facts and in the circumstance of the case, the Court below committed an error in dismissing the suit as there was no reference to the right of easement in the sale-deed executed by the original owner Ramsingh in favour of the plaintiff?”

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

2. The plaintiff and defendant No.1 both were brothers.

Plaintiff-Bhulu filed a suit claiming easementary right stating inter-alia that he is owner and title-holder of land bearing khasra No.768/3 area 0.061 hectare, whereas defendant No.1 is owner and title-holder of khasra No.768/2 area 0.081 hectare situated at Salounikala. It has further been pleaded that in between Aamgali and his land, a land bearing khasra No.768/2 area 0.081 hectare owned by defendant No.1 is situated. There is passage of about 5 ft. in khasra No.768/2 and through this passage, the plaintiff used to go to his field from aamgali. Defendant No.1 has purchased the said land from defendant No.2 on 15.3.1993 (Ex.D/1) and said passage was being used by the plaintiff for more than 24 years and he has perfected his right of peaceful enjoyment on the said path. It has also pleaded that defendant No.1 Alguram digging the said path for constructing a wall of stones and obstructing the plaintiff from using the path, therefore, a decree be passed declaring his easementary right.

3. Defendant No.1 filed his written statement denying the plaintiff's right of user as a passage to the part of khasra

No.768/2.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 15.12.98, dismissed the suit holding that the plaintiff does not possess right of enjoyment and easement, which was upheld by the First Appellate Court by the impugned judgment and decree.
5. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.
6. Mr.P.M.Shriwas, learned counsel for the appellants/plaintiff, would submit that both the Courts below are absolutely unjustified in dismissing the suit by holding that the plaintiff does not possess right of enjoyment and easement.
7. On the other hand, Mr.Rajendra Patel, learned counsel for respondent No.1(a), would support the impugned judgment and decree impugned.
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 a 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. The 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. The 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

¹ (2005) 1 SCC 471

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 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 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 at Page 608:--

'As an easement is not one of the ordinary rights of ownership, it is necessary that either

² AIR 1953 Nagpur 205

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 the case of the plaintiff that there is passage of about 5 ft. in khasra No.768/2, which is owned by defendant No.1 purchased from defendant No.2 by way of registered sale deed 15.2.93 (Ex.D/1) in which the plaintiff has easementary right, if any. However, in sale deed dated 15.2.93 (Ex.D/1), there is no such mention of passage/right of enjoyment by the plaintiff over the said suit land. The plaintiff has simply stated that he was using the part of land bearing khasra No.768/2 owned by defendant No.1 for last 24 years, but there is no specific pleading and there is no evidence on record that since what date to which the plaintiff was using the passage for last 24 years. The trial Court upon appreciation of oral and documentary evidence has clearly reached to the finding that the plaintiff has not established that he has been using the said path peacefully and openly and without any interruption for last 24 years as no date from which the plaintiff was using the said path has been indicated. The said finding has been affirmed by the First Appellate Court holding that the plaintiff has failed to establish his

easementary right over the said land for last 24 years.

21. In the considered opinion of this Court, neither there is a precise pleading that since what date to which date for last 24 years defendant No.1's land is being used by the plaintiff to have an access nor any document has been filed by the plaintiff to establish the plea of exercising the easement of right to way for last 24 years. The aforesaid finding is finding of fact based on evidence available on record. It is neither perverse nor contrary to record.

22. 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.

23. A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-