

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 16 of 2005**

1. Bagas Ram Sahu, S/o Manrakhan Sahu,
 2. Vishal Sahu, S/o Manrakhan Sahu,
 3. Mulchand Sahu, S/o Manrakhan Sahu,
- All R/o village Parsada, Tahsil Patan, Distt. Durg (C.G.)

---- Appellants/plaintiffs**Versus**

1. Arjun Sahu, S/o Manrakhan Sahu,
 2. Palan Kumar, S/o Arjun Sahu,
- All R/o village Parsada, Tahsil Patan, Distt. Durg (C.G.)
3. State of Chhattisgarh, through the Collector, Durg, Distt. Durg (C.G.)

---- Respondents/defendants

For Appellants/plaintiffs	: Mr. Shobhit Kosta, Advocate.
For Respondent No.1/defendant	: Mr. Goutam Khetrapal, Advocate.
For Respondent No. 3	: Mr. Akash Pandey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment On Board****19/07/2019**

(1) The substantial questions of law involved, formulated and to be answered in this plaintiffs' second appeal state as under:

“Whether the learned first Appellate Court was justified in reversing the judgment and decree passed by the trial Court which has been passed on the basis of admission of the respondents/defendants that the disputed passage

was for the use of plaintiff and defendants as a common route ?

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

(2) Plaintiffs No. 1 to 3 and defendant No. 1 are the real brothers. The suit pathway was originally held by their father Manrakhan. After the death of Manrakhan, they partitioned the property including pathway and admittedly the pathway came in the share of defendant No. 1, in which, at the time of partition before the revenue officer, parties including defendant No. 1 agreed on 26.09.1998 (Ex.P-1) that the suit pathway will also be used by the plaintiffs also, which was duly recorded in the *namantaran panji* and on 25.5.1999 (Ex.D-1) agreement was executed between the plaintiffs and defendant No.1 that the pathway will be used by all the four brothers i.e. plaintiffs No. 1 to 3 and defendant No.1, in whose favour the suit pathway has fallen.

(3) On 5.4.1999, the plaintiffs brought a suit that the defendant No. 1 is obstructing the use of suit pathway by them and, therefore, he be enjoined not to interfere with his pathway as it is being used for last so many years and the plaintiffs also claimed that they are entitled to use the pathway as per agreement executed on 26.09.1998.

(4) The defendant No. 1 while filing the written statement clearly admitted the existence of the suit pathway; and also admitted the fact that in past he had no objection in using suit pathway by the plaintiffs and presently also he has no objection in using the suit pathway by the plaintiffs except the complaint that when the door for entering into the suit pathway is left open by the plaintiffs, by which the cattle entered into the land and caused damage to the crop sown by him and on this ground the defendant

No. 1 prayed for dismissal of the suit .

(5) The trial Court after appreciating the oral and documentary evidence available on record found the existence of suit pathway and the plaintiffs have also right to use such a pathway and also found that the suit pathway has been agreed to be used by the plaintiffs by Ex.P-1 on 26.09.1998.

(6) Defendants preferred first appeal under Section 96 of the Code of Civil Procedure thereagainst. The first appellate Court set aside the judgment and decree of the trial Court by allowing the appeal and dismissing the suit of the plaintiffs holding that suit pathway has fallen into share of defendant No. 1, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/plaintiffs , in which substantial question of law has been formulated and set-out in the opening paragraph of this judgment.

(7) Learned counsel appearing for the appellants/plaintiffs would submit that the first appellate Court is absolutely unjustified in setting aside the judgment & decree of the trial Court in granting easementary right in favour of plaintiffs on the basis of easement as well as on the basis of grant dated 26.09.1998 (Ex.P-1) and even the defendant No. 1 has admitted the case of the plaintiffs, as such, judgment and decree of the trial Court is liable to be dismissed.

(8) Per contra, learned counsel appearing for respondent No. 1/ defendant No.1 would vehemently oppose and submit that it is a precarious right to be granted on the defendant's land and, therefore, there must be clear pleading, which the plaintiff has failed to prove in light of the judgment rendered by this Court in Second Appeal No. 608 of 2004 {**Ramlal and others Vs. Tulsi Ram and others**}, decided on 3rd March, 2014.

(9) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(10) A careful perusal of the plaint would show that plaintiff's has based his case on easement under Section 15 of the Indian Easements Act, 1882 as well as on the basis of grant dated 26.9.1998 (Ex.P-1) entered into between the parties.

(11) It is an admitted position on record that plaintiffs No. 1 to 3 and defendant No. 4 are real brothers and while making mutation pursuant to their mutual partition vide Ex.P-2, the plaintiffs and defendant No.1 have unequivocally stated that they will all use the suit pathway for their agricultural operation, which was reduced in writing vide Ex.P-1 and even in the written statement, the defendant No.1 has fairly clearly admitted the fact that he has no objection in using suit pathway by the plaintiffs except the complaint, which he has made of getting the door of pathway remained open by the plaintiffs, by which, cattle are entering and causing damage to crop sown by him, as such, the suit pathway is admittedly in existence and available to be used by the plaintiffs and defendant No. 1 vide Exs. P-1, P-2 and consent letter (Ex.D-1) executed by defendant No. 1 and plaintiffs on 25.09.1998.

(12) The Supreme Court in the matter of **Sree Swayam Prakash Ashramam and another Vs. G. Anandavally Amma and others**¹ held as under :-

“29. In our view, therefore, the High Court was also fully justified in holding that there was implied grant of B schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to A schedule property of the plaint and there was no objection also

1 (2010) 2 SCC 689

to the use of B schedule property of the plaint as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose.”

(13) Reverting to the facts of the present case, it is quite vivid that in the present case at the time of mutation before the revenue officer, admittedly, existence of pathway and also admitted that the same to be used by the plaintiffs, which defendant No. 1 agreed vide Ex. D-1, as such, the trial Court has rightly concluded while recording issue No. 5 that on the basis of agreement (Ex.P-1) the plaintiffs have a right of easement, which has been reversed by the first appellate Court on untenable grounds holding that defendant No. 1 is title holder of the suit pathway.

(14) It is 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.

(15) Mr. Khetrapal, learned counsel appearing for respondent No. 1/defendant No. 1 has relied upon judgment of this Court in the matter of **Ramlal & others v. Tulsi Ram & others**², in which this Court has held that in order to establish right by easement, 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

(16) In ***Justiniano Antao and others v. Bernadette B. Pereira (Smt.)***³, their Lordships of the supreme Court held that in order to establish a right by way of

² Second appeal No. 608 of 2004, decided on 3 March, 2014

³ (2005) 1 SCC 471

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 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.”

(17) In the above referred decision, 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.

(18) In the instant case, plaintiffs have claimed easement on the basis of agreement dated 26.09.1998 vide Ex.P-1, which the trial Court has found favour considering the relationship between the parties as plaintiffs and defendant No. 1 are the real brothers and defendant No. 1 has agreed that it can be used by the plaintiffs before the Revenue Officer vide Ex.D-1 and in that view of the matter learned first appellate Court is absolutely unjustified in taking exception to the fact and reversing the judgment and

decree of the trial Court.

(19) Resultantly, judgment and decree passed by the first appellate Court are set aside and judgment and decree passed by the trial Court are restored. The second appeal is consequently, allowed and the plaintiff's suit stands decreed with no order as to cost(s).

(20) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

