

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 57 of 2010**

Laxminath Yadav S/o Late Budhram, Aged about 49 years, Occupation Service, R/o Pathraguda, Tahsil Jagdalpur, Distt. Bastar, Chhattisgarh.

--Appellant/Plaintiff

Versus

1. Nazul Officer, Distt. Office Jagdalpur, Distt. Bastar, Chhattisgarh.
2. Asst. Superintendent, Land Records, Nazul Navkaran Sakha, Jagdalpur, Distt. Office Jagdalpur.
3. Nazul Maintenance Supdt. (N.M.S.), Nazul Navkaran Sakha, Jagdalpur, Distt. Office Jagdalpur.
4. State of Chhattisgarh, Through Collector, Jagdalpur, Distt. Bastar.
5. Smt. Leelawati W/o Fagnuram, Aged about 46 years, R/o Pathraguda, Jagdalpur, Distt. Bastar, Chhattisgarh.
6. Kumari Namita, W/o Fagnuram, Aged about 26 years, R/o Pathraguda, Jagdalpur, Distt. Bastar, Chhattisgarh.

---Respondents/Defendants

For Appellant :-

Mr. Pallav Mishra, Advocate

For Respondents No. 5 and 6 :-

Mr. Nimesh Jain, Advocate

For Respondents No. 1 to 4/State :-

Mr. Akash Pandey, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

27/02/2020

1. This second appeal was admitted for hearing on the following substantial questions of law :-

“(i). Whether the two Courts below were justified in holding that defendants 5 and 6 having not encroached the land was otherwise used as a road.

(ii). Whether the trial Court was justified in deciding the suit without conducting a demarcation as to whether there has been any encroachment or not on the land belonging to the plaintiff.”

(For the sake of convenience, the parties will hereinafter be referred as per their status before the trial Court.)

2. Plaintiff filed a suit claiming for removal of obstruction in exercise of his easementary right of way and also for mandatory injunction stating *inter alia* that he is the owner and title-holder of suit land bearing Plot No. 111/4 area 1330 sq. ft. on sheet No. 121 situated at village Pathraguda, Jagdalpur which has been duly recorded in the revenue records whereas defendant No. 5, his sister and defendant No. 6, his sister's daughter were granted patta on nazul land bearing Plot No. 113/1 area 510 sq. ft. and 221 sq. ft. on 25/09/1998. It is the case of the

plaintiff that defendant No. 5 has encroached upon plaintiff's land bearing Plot No. 111/4 on Sheet No. 121 and has obstructed the access of plaintiff to his house due to which, plaintiff filed a complaint against defendant No. 5 before the Nazul Tahsildar, Jagdalpur but his complaint was dismissed on 23/10/1999, as such, the house constructed by defendants No. 5 and 6 be demolished as he has easementary right over the suit land and he has no other alternative way to access his house.

3. Defendants No. 5 and 6 filed their written statement refuting the plaint allegations stating inter alia that plaintiff's and defendant No. 5's father Budhram sold the suit land to defendant No. 5, as such, she has been in possession of the suit land and in her part of the suit land, suit house has been constructed by defendants No. 5 and 6, therefore, plaintiff is not the title-holder of the entire land bearing Plot No. 111/4 on sheet No. 121 and his suit deserves to be dismissed.

4. Learned trial Court, upon appreciation of oral and documentary evidence on record, dismissed plaintiff's suit vide its judgment and decree

dated 04/08/2008 holding that plaintiff is not the only owner of suit land bearing Plot No. 111/4 area 1330 sq. ft. on sheet No. 121 and defendants No. 5 and 6 have not obstructed plaintiff's access to his house by constructing their house in front of plaintiff's.

5. On appeal being preferred, learned first appellate Court affirmed the judgment and decree of the trial Court vide its judgment and decree dated 30/09/2009 dismissing the appeal of the plaintiff against which this second appeal has been preferred by him under Section 100 of the CPC wherein substantial questions of law has been framed and set out in the opening paragraph of this judgment.

6. Mr. Pallav Mishra, learned counsel for the appellant/plaintiff would submit that both the Courts below have erred in dismissing plaintiff's suit by holding that defendants No. 5 and 6 have not encroached upon the land of the plaintiff and it does not obstruct plaintiff's entry and exit into his house ignoring the right of easement which was duly established by the plaintiff in his suit and demarcation ought to have been conducted over the private land of the plaintiff

before deciding the suit, as such, the judgment and decree passed by the trial Court affirmed by the first appellate Court deserves to be set aside.

7. Mr. Nimesh Jain, learned counsel for respondents No. 5 and 6 would support the impugned judgment and decree and submit that second appeal deserves to be dismissed.

8. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

9. A careful perusal of the plaint would show that plaintiff has claimed the right of easement over the land held by defendants No. 5 and 6 and has also prayed for the relief of demolition of the house constructed by defendants No. 5 and 6 therein.

10. The term "Easement" has been defined in Section 4 of the Indian Easements Act, 1882 (henceforth '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."

11. 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.

* * * *

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."

12. 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.

13. 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."

14. 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.
15. There cannot be any doubt that easement is a right and the same is not a mercy. If a plaintiff is having an easementary right, certainly he can establish it and continue to exercise it by filing a suit if the defendant obstructs him to execute 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.
16. 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.

17. 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 as 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."

18. In Justiniano Antao & Ors. 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

¹(2005) 1 SCC 471

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."

19. In the above referred case, their Lordships held that there should be categorical pleadings that since what date to which date one is using the access for the last twenty 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.

20. In 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'."

21. Reverting to the facts of the present case in light of the aforesaid legal position, it is quite vivid that though plaintiff has claimed easementary right over the land held by defendants No. 5 and 6, but Admittedly, part of the suit land bearing Plot No. 111/4 in sheet No. 121 has been held to be owned by defendant No. 5 which she purchased from hers and plaintiff's father Budhram vide registered sale deed dated 02/11/1993 (Ex. D/2). Similarly, defendants No. 5 and 6 have been granted patta on plot No. 113/1 area 510 sq. ft. and 221 sq. ft., as such, plaintiff is not the absolute owner of suit land bearing Plot No. 111/4 area 1330 sq. ft. which has also been held by both the Courts concurrently. As the plaintiff has claimed the

right of easement over the suit land, he ought to have pleaded the date since he has been using the said land. He also failed to prove that he is using the suit land for the last 30 years. He has simply claimed easementary right over the suit land.

22. The Supreme Court as noticed herein above in the matter of Justiniano (supra) has clearly held that in order to establish a right by way of prescription, there should be specific pleading and categorical evidence to prove the right of easement which the plaintiff has failed to prove by not pleading that since what date he was using the suit land for entry and exit into his house, rather it has been established that defendants are the owners and title-holders of the suit land. It has also been held that an alternative way is available to the plaintiff to use for the purpose of making entry and exit into his house and the said fact has been duly admitted by the plaintiff and his witnesses. In fact, plaintiff has already filed demarcation report (Ex. P/7) which has not been accepted by both the Courts below, as such, the two Courts below have rightly held that plaintiff is not the only owner of Plot

No. 111/4 area 1330 sq. ft. on sheet No. 121 as part of that land is also owned by defendant No. 5 and he has failed to establish his easementary right over the suit land. I do not find any perversity or illegality in the said finding recorded by both the Courts below.

23. The second appeal deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s). Decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

Harneet