

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 101 of 2009**

Kanhaiya Lal Sahu, Aged about 47 years, S/o Navman Sahu, R/o Vill. Chipaiapara,
Ward No.8, Akaltara, Tah. & Dist. Janjgir, Champa (C.G.)

----Appellant/Plaintiff

Versus

1. Pusaibai, W/o Puniram, Aged about 50 years,

2. Munni Bai, D/o Puniram Sahu, Aged about 45 years,

Both R/o Vil. Chipaiapara, Ward No. 8, Akaltara, Tah. & Dist. Janjgir, Champa (C.G.)

----Respondents/Defendants

For Appellant/Plaintiff : Mr. Parag Kotecha, Advocate.

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

17/07/2020

(1) Heard on the question of admission and formulation of substantial question of law in this second appeal under Section 100 of the Code of Civil Procedure, 1908 preferred by appellant/plaintiff against the impugned judgment and decree passed by the first appellate Court affirming the judgment and decree of the trial court dismissing the suit.

(2) Learned counsel appearing for the appellant/plaintiff would submit that both the courts were absolutely unjustified in dismissing the suit of the plaintiff by recording a finding, which is perverse and contrary to the record, it ought to have held that the suit courtyard is jointly used by the plaintiff and defendants for the last 25 years, as such, plaintiff has acquired easementary right over the suit courtyard and, therefore, the appeal deserves to be admitted for hearing by formulating substantial question of law for determination.

(3) The plaintiff filed a suit for declaration of title and injunction stating *inter alia* that he has

purchased the suit courtyard from Rajlal Sahu and Bisahuram Sahu and adjoining his house, the house of Pusaibai, defendant No. 1 herein is situated having court yard of 15" x 14", in which doors of the house of the plaintiff opens and this is the way for coming out of the house and, as such, he is using the suit courtyard for the last 25 years but on 19.02.2002, the defendants started constructing septic tank and toilet in the said courtyard leading to filing of the civil suit, which the defendants opposed by submitting that the suit courtyard is owned by the defendants as they have purchased the same by registered sale deed dated 8.1.1968, as such, the plaintiff has never used the said suit courtyard and he is not entitled for any kind of decree of declaration of title and injunction.

(4) The trial court dismissed the suit holding that plaintiff failed to prove that the suit courtyard is the way of coming out of his house and he acquired any easementary right over it.

(5) The plaintiff preferred first appeal there-against. The first appellate court, re-appreciating the entire evidence adduced in the case, affirmed the judgment and decree passed by the trial court.

(6) The plaintiff preferred this second appeal under Section 100 of the Code of Civil Procedure.

(7) The term "Easement" has been defined in Section 4 of the Indian Easements Act, 1882 (for short, '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.”

(8) 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:—*n 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.”

(9) 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.

(10) 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.”

(11) 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.

(12) 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 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.

(13) 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.

(14) **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.”

(15) 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 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

¹ (2005) 1 SCC 471

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.”

(16) In the above referred decision, their Lordships held that there should be categorical pleadings that since what date of 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.

(17) In the matter of **Surendra Singh Inder Singh and another v. Phirozshah Bairamji and another**², 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'."

(18) Reverting to the facts of the present case in the light of the aforesaid legal proposition noticed herein-above, it is quite vivid that though the plaintiff has pleaded that he is using the suit courtyard for the last 25 years but both the courts below have rightly and concurrently held that the plaintiff has failed to prove his easementary right over the suit courtyard in terms of Section 15 of the Act of 1882. The said finding recorded by both the courts below holding that plaintiff has failed to prove his easementary right over the suit courtyard is a finding of fact based on material available on record, which is neither perverse nor contrary to the record. I do not find any substantial question of law involved in the second appeal.

(19) For the reasons mentioned herein-above, the second appeal being devoid of merit is liable to be and is hereby dismissed *in limine* without notice to the other side. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

