

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.96 of 2009

1. Onkar Prasad, aged 42 yrs

2. Vijay Kumar, aged 30 yrs

3. Brijlal, aged 52 yrs

All S/o Jaddu Sapaha

4. Smt. Phool Bai, Wd/o Jaddu Sapaha

5. Smt. Muthan Bai, W/o Shri Punu Ram, aged 46 yrs

6. Smt. Kamala Bai, W/o Baishakhu, aged 46 yrs

7. Smt. Supeta Bai, W/o Shri Shravan Dhimar, aged 33 yrs

No.1 to 7 all R/o Mahamai Para, Raipur (C.G.)

8. Smt. Dasari Bai, W/o Shri Dau Lal, aged 50 yrs, R/o Kankalipara,
Raipur, Distt. Raipur (C.G.)

(Plaintiffs)

---- Appellants

Versus

The Municipal Corporation, Through the Commissioner, Municipal
Corporation, Raipur (C.G.)

(Defendant)

---- Respondent

For Appellants / Plaintiffs: Mr. Rakesh Thakur, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

15/07/2020

1. Proceedings of this matter have been taken-up for hearing on the
question of admission through video conferencing.

2. Heard on admission and formulation of substantial question of law in the

second appeal preferred by the plaintiffs.

3. By the impugned judgment, the first appellate Court has reversed the judgment & decree of the trial Court by which the plaintiffs' suit was decreed by the trial Court and consequently dismissed the suit.
4. Mr. Rakesh Thakur, learned counsel appearing for the appellants herein / plaintiffs, would submit that the first appellate Court has erred in holding that the plaintiffs are not entitled for decree of permanent injunction based on easement in their favour by recording a finding which is perverse to the record and the appeal involves substantial question of law for determination and thereby the appeal be admitted for final hearing.
5. The plaintiffs filed suit that they have purchased the part of land of Khasra No.931/2, area 3937 sq.ft. at Kankalipara, Raipur and are in possession of the suit land and on western side of the said land, the defendant Municipal Corporation is constructing a stadium whereas, they have the right of way i.e. access to main road over the said land up to their home and as such the defendant be restrained from interfering with the easementary right of way which the defendant opposed by filing written statement. Ultimately, the trial Court decreed the suit by directing the defendant to give 10 ft. of road to the plaintiffs for access to the main road. On appeal being preferred by the defendant, the first appellate Court allowed the appeal and dismissed the suit.
6. 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.”

7. 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."

8. 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.

9. 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."

10. 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.

11. 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.

12. 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.

13. 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.”

14. 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 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.”

15. 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.

16. In the matter of 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'."

17. Reverting to the facts of the present case in the light of the aforesaid legal proposition noticed herein-above, it is quite vivid that the first appellate Court has clearly held that the plaintiffs are not staying in the suit land and not using the suit way for their access to the main road for last 20 years and they have alternative way for access to the road and it has not been established that they are using the suit way for last 20 years, as such, the easementary right has not been established. The aforesaid finding recorded by the first appellate Court is a finding of fact based on the evidence available on record, it is neither perverse nor contrary to the record and as such, the plaintiffs have failed to establish easementary right over the suit land owned by the defendant. Even otherwise, the trial Court has granted decree granting land of 10 ft. in favour of the plaintiffs which is without authority of law, even no decree based on easementary right was granted by the trial Court.
18. 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