

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.472 of 2009Judgment reserved on: 4-8-2020Judgment delivered on: 24-8-2020

1. Himmatlal Patel, S/o Late Kanji Bhai Patel, aged about 48 years,
2. Suresh Kumar Patel, S/o Late Kanji Bhai Patel, aged about 42 years,

Both are residents of Ramkrishna Timbers, Sardar Patel Timber Market,
Ghat Road, Nagpur (Maharashtra)

3. Ramji Bhai, S/o Shivdas Bhai Patel, aged about 65 years, R/o Near Sagar Bhawan, Saw Mill Area, Ward No.27, G.E. Road, Rajnandgaon, District Rajnandgaon (C.G.)

(Defendants)
---- Appellants

Versus

1. Smt. Neeta Ben, W/o Shri Amritlal Patel, aged about 44 years,
2. Smt. Savita Ben, W/o Shri Prabhudas Patel, aged about 40 years,

Both residents of Ward No.27, G.E. Road, Rajnandgaon, both through
General Power of Attorney Holder Shri Amritlal Patel, S/o Shivdas
Patel, aged about 47 years, R/o Ward No.27, G.E. Road, Rajnandgaon,
District Rajnandgaon (C.G.)

(Plaintiffs)
---- Respondents

For Appellants / Defendants: Mr. Sumesh Bajaj, Advocate.
For Respondents / Plaintiffs: Mr. Manoj Paranjpe, Advocate.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Judgment

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.
2. This second appeal preferred by the defendants was admitted for hearing by order dated 10-7-2020 and substantial question of law has been

formulated for determination which has been slightly modified by order dated 4-8-2020 as under: -

“Whether the first appellate Court was justified in granting permanent injunction in favour of the plaintiffs by recording a finding which is perverse to the record even when the suit is not for declaring easementary rights of the plaintiffs over the suit land?”

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

3. Dispute between the parties relates to 15 ft. land crossing the defendants' suit land and opening into G.E. Road, Rajnandgaon from the plaintiffs' land. Land bearing Khasra Nos.294/6, 294/16 & 294/17 was sold by Kanji Bhai Patel vide sale deeds dated 21-3-1985 (Ex.D-1), 2-11-1987 (Ex.P-6) and 31-1-1989 (Ex.D-2) in favour of Karamsi Bhai Patel and after death of Karamsi Bhai Patel, his son Narendra Kumar Patel transferred the aforesaid three pieces of land vide Ex.P-7 to the plaintiffs on 23-8-2002. The plaintiffs, thereafter, on 25-10-2004 filed civil suit for permanent injunction simpliciter stating that they have purchased the suit land vide Ex.P-7 from Narendra Kumar Patel and in the said sale deed, it has been mentioned that there is a way / road of 15 ft. from their purchased land crossing the defendants' land and opening into G.E. Road, Rajnandgaon and it was also mentioned that in the sale deeds Exs.D-1, P-6 & D-2 by which the said lands were transferred by Kanji Bhai Patel in favour of Karamsi Bhai Patel, 15 ft. road has been mentioned, thus, the plaintiffs have acquired right to use the said 15 ft. road after having purchased the land vide Ex.P-7 and they are entitled to use the said land of 15 ft. road for reaching to G.E. Road, Rajnandgaon which the defendants are not allowing and

obstructing them from using the said suit way, and they have acquired easementary right and therefore decree for declaration of permanent injunction be granted in their favour and as such, the suit was based on claiming easementary right of way of land over the suit land.

4. Resisting the suit, the defendants filed written statement stating inter alia that on the southern side of suit land belonging to the plaintiffs, there is a main road named as Sardar Patel Marg and the plaintiffs can use only that land for access to their land. It was further pleaded that there is no way towards the southern side of the suit land and in fact, the southern side of the suit land belongs to the defendants and they are in exclusive possession and occupation of the same. It was also pleaded that three sale deeds Exs.D-1, P-6 and D-2 executed by Kanji Bhai Patel in favour of Karamsi Bhai Patel from whose son the plaintiffs have purchased, do not show 15 ft. road in the map attached to the said sale deeds and the plaintiffs have not acquired any easementary right, therefore, the plaintiffs are not entitled for any decree of permanent injunction in their favour.
5. The trial Court after appreciating oral and documentary evidence available on record dismissed the suit answering all the six issues against the plaintiffs and in favour of the defendants which was appealed by the plaintiffs before the first appellate Court and the first appellate Court by its impugned judgment & decree found favour with the submissions of the plaintiffs and granted decree for permanent injunction in favour of the plaintiffs restraining the defendants from interfering with the use of the said 15 ft. road from their land to reach to G.E. Road, Rajnandgaon. Feeling aggrieved and dissatisfied with the judgment &

decree of the first appellate Court, the defendants have preferred this second appeal before this Court in which substantial question of law has already been formulated and set-out in the opening paragraph of this judgment for the sake of completeness.

6. Mr. Sumesh Bajaj, learned counsel appearing for the defendants / appellants herein, would submit that bare suit for permanent injunction without seeking the relief of declaration of title was not at all maintainable in view of the fact that the plaintiffs have not sought the relief of declaration of title in the light of absence of any easementary right in their favour under Section 15 of the Easements Act, 1882 and further, in view of the fact that they have not claimed any title, they do not have any title over the suit way. Even otherwise, they have not completed 20 years using the suit land as mandated under Section 15 of the Easements Act, 1882, therefore, even they are not entitled for any decree of permanent injunction. As such, the judgment & decree passed by the first appellate Court deserve to be set aside and the judgment & decree of the trial Court be restored.

7. Mr. Manoj Paranjpe, learned counsel appearing for the plaintiffs / respondents herein, would submit that the three sale deeds executed by Kanji Bhai Patel – predecessor-in-title of the defendants in favour of Karamsi Bhai Patel – father of Narendra Kumar Patel from whom the plaintiffs have purchased vide Ex.P-7, clearly indicate that 15 ft. road was left over by the defendants for the purchasers and there was specific recital in the sale deeds that the seller – Kanji Bhai Patel would give 15 ft. road to the purchaser – Karamsi Bhai Patel and thereby right of way has been created in favour of the plaintiffs, as such, the second appeal

deserves to be dismissed. He would rely upon the decision of the Supreme Court in the matter of Hero Vinoth (Minor) v. Seshammal¹ and further decision of the Supreme Court in the matter of S. Kumar and others v. S. Ramalingam² to buttress his submission.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
9. Landed property was sold by the defendants' father – Kanji Bhai Patel vide Exs.D-1, P-6 & D-2 in favour of Karamsi Bhai Patel and thereafter, Karamsi Bhai Patel's son Narendra Kumar Patel sold the property in favour of the plaintiffs vide Ex.P-7 on 23-8-2002. Taking the first sale deed dated 21-3-1985 if easementary right is considered, the suit as filed on 25-10-2004, the period of 20 years as mandated under Section 15 of the Easements Act, 1882, has not completed on the date of institution of suit by the plaintiffs before the trial Court. So, on the date of suit, the plaintiffs did not have any easementary right over the defendant's land. Therefore, the plaintiffs did not have any easementary right and rightly it was not granted by the trial Court in the light of the mandate contained in Section 15 of the Easements Act, 1882. The plaintiffs claimed that predecessor-in-title of Narendra Kumar Patel and his father Karamsi Bhai Patel were using the path way from the date of purchase vide Exs.D-1, P-6 & D-2 and that right the plaintiffs have acquired after having purchased vide Ex.P-7, as there is a mention in one of the sale deeds that there is 15 ft. road, but no such right to use has been transferred by the erstwhile owner in favour of Karamsi Bhai Patel,

1 (2006) 5 SCC 545

2 AIR 2019 SC 3654

as in none of the sale deeds, the said path way is said to have been transferred by Kanji Bhai Patel – defendant’s father in favour of Karamsi Bhai Patel vide Exs.D-1, P-6 & D-2. In order to transfer title, it must be by a registered instrument and merely mentioning, if any, “15 ft. road”, it would not confer any right to the purchaser or any other person to hold that there is 15 ft. road, unless it is duly established. The plaintiffs neither examined Narendra Kumar Patel from whom they have purchased the suit property nor any other person has been examined to demonstrate that in fact, they were using the land from the date of purchase i.e. vide Exs.D-1, P-6 & D-2. There is not an iota of evidence brought on record to establish the fact of use of land firstly by Karamsi Bhai Patel from the date of purchase vide Ex.D-1, P-6 & D-2 and thereafter, by the plaintiffs from 23-8-2002 till the institution of suit on 25-10-2004. As such, in view of total lack of evidence on record to establish the said right, it cannot be held that the plaintiffs have established that their predecessor-in-title was using the land and thereafter, they are using the land.

10. At this stage, it would be appropriate to notice Section 38 of the Specific Relief Act, 1963, which states as under: -

“38. Perpetual injunction when granted.—(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff’s right to, or enjoyment of, property, the court

may grant a perpetual injunction in the following cases, namely:—

- (a) where the defendant is trustee of the property for the plaintiff;
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (c) where the invasion is such that compensation in money would not afford adequate relief;
- (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.”

11. A careful perusal of sub-section (1) of Section 38 of the Specific Relief

Act would show that perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication. The word “obligation” has been defined in Section 2(a) of the Specific Relief Act which states that “obligation” includes every duty enforceable by law. The obligation may arise from contract or may be in the nature of price or obligation from breach of which amounts to tort or civil wrong or any other legal obligation. But in order to be enforceable, it must be an obligation recognised by law. Legal obligation includes every duty enforceable by law so that when a legal duty is imposed on the person in respect to another, the other is invested with a corresponding legal right. This definition is used in its wider juristic sense as covering duties arising *ex contractu* or *ex delicto*, and may cover any other enforceable duty under any statute. As such, obligation contemplated under Section 38 of the Specific Relief Act is legal obligation capable of being enforced by law.

12. Where there is invasion of the plaintiff's rights to property or its enjoyment, injunction may be granted in the circumstances mentioned in

clauses (a) to (d) of sub-section (3) of Section 38 of the Specific Relief Act. There must be, however, right to or enjoyment of property.

13. The question is, whether only the suit for injunction simpliciter is maintainable without a prayer for declaration?

14. Section 34 of the Specific Relief Act provides as under: -

“34. Discretion of court as to declaration of status or right.— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

*Explanation.—*A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee.”

15. The Supreme Court in the matter of Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and others³ considered the question as to when a bare suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief and held as under: -

“13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person

who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised

only the issue of possession and not any issue of title.

15. In a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally."

16. Their Lordships summarized the legal position qua the prohibitory injunction as under: -

"21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a

suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annamuthu Thevar*⁴). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

17. The proposition laid down in Anathula Sudhakar (supra) (paragraph 14)

has been followed with approval in the matter of Kurella Naga Druva Vudaya Bhaskara Rao (supra).

18. In a recently pronounced judgment of Their Lordships of the Supreme

Court in the matter of Balkrishna Dattatraya Galande v. Balkrishna Rambharose Gupta and another⁵, it has been held that possession of the plaintiff on the date of suit is a must for grant of permanent injunction, and observed as under: -

4 *Annamuthu Thevar v. Alagammal*, (2005) 6 SCC 202

5 2019 SCC OnLine SC 135

“17. As discussed earlier, in a suit filed under Section 38 of the Specific Relief Act, possession on the date of suit is a must for grant of permanent injunction. When the first respondent-plaintiff has failed to prove that he was in actual possession of the property on the date of the suit, he is not entitled for the decree for permanent injunction.”

19. Reverting to the facts of the case finally, it is quite vivid that the plaintiffs' own witness Amritlal Patel – Power of Attorney of the plaintiffs, in paragraph 10 has clearly admitted that the suit path is owned by the defendants and they are title holders of the suit land. As such, the plaintiffs even have failed to establish the use of land / path way for 20 years in view of the fact that first transaction was made by the predecessor-in-title of Narendra Kumar Patel on 21-3-1985 and suit was filed on 25-10-2004 and therefore 20 years' period as mandated in Section 15 of the Easements Act, 1882 has not been completed on the date of filing suit. Further, the plaintiffs have failed to establish that they are using the land and therefore they are in possession of the suit land. As such, the plaintiffs ought to have filed comprehensive suit for declaration of title on the basis of suit land and bare suit for permanent injunction in absence of either title or possession over the suit land is not maintainable and as such, easementary right is not found to be established by the trial Court. In the considered opinion of this Court, bare suit for permanent injunction without seeking the relief of declaration of title was not at all maintainable. Right to property is a constitutional right under Article 300A of the Constitution of India, it cannot be taken away without authority of law. The plaintiffs not being title holders and not having either claimed or established easementary right over the suit way cannot be allowed to use the land owned by the defendants merely because it has been mentioned in the sale deed that

15 ft. road has been left. Any accuracy in reducing the sale deed or any other mistake in the sale deed cannot confer any title or right to use the land of the defendants as path way, as right to property is not only constitutional right, it is human right also. (See **Hari Krishna Mandir Trust v. State of Maharashtra and others**⁶.) The judgments cited by learned counsel for the respondents is not at all applicable to the facts of the present case.

20. Therefore, in my considered opinion, bare suit for permanent injunction particularly when the plaintiffs have no title and are not in possession over the suit land is not maintainable. Moreover, the plaintiffs did not seek any declaration of easementary right over the suit land and even on admitted facts, easementary right is not established in view of Section 15 of the Easements Act, 1882. As such, the first appellate Court absolutely went wrong in reversing the judgment & decree of the trial Court by recording a finding which is not only perverse, but is absolutely based on no evidence and is contrary to the record. Resultantly, judgment & decree of the first appellate Court are set aside that of the trial Court are restored. The substantial question of law is answered accordingly.

21. The second appeal is allowed to the extent indicated herein-above. No order as to cost(s).

22. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma