

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 124 of 2010**

1. Smt. Geeta Devi Namdeo, W/o Shri Balbahadur Namdeo, Aged about 67 years.

2. Rajesh Kumar Namdeo, S/o Late Ballu Prasad Namdeo, Aged about 53 years.

Both are R/o Jawahar Nagar, Raipur, Tahsil and District Raipur, Chhattisgarh.

---Appellants/Plaintiffs

Versus

Sanjay Jadwani S/o Late Manohar Jadwani, Proprietor M/s Sanjay Auto Mobiles, M.G. Road, Raipur, Tahsil and District Raipur, Chhattisgarh.

--- Respondent/Defendant

For Appellants	:-	Mr. Nitesh Jha on behalf of Mr. R.N. Jha, Advocate
For Respondent	:-	None

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

13/01/2021

1. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellants/plaintiffs under Section 100 of the CPC against the impugned judgment and decree passed by the first appellate Court affirming the judgment and

decree passed by the trial Court dismissing the suit of the plaintiffs.

2. Mr. Nitesh Jha on behalf of Mr. R.N. Jha, learned counsel for the appellants/plaintiffs, would submit orally as well as in written submission that both the Courts below are absolutely unjustified in dismissing the suit by holding that plaintiffs have failed to prove the easementary right over the suit land in terms of Section 15 of the Indian Easement Act, 1882, as such, the appeal deserves to be admitted by formulating substantial question of law in this regard.
3. Plaintiffs filed a suit for declaration of title and permanent injunction stating inter alia that the defendant be restrained from raising construction and in alternative demolition of his construction as in the western side of plaintiffs' house, they have opened 20 windows through which they enjoy beneficial easementary rights of light and air and due to the construction raised by the defendant in his land which is attached to the western side of the plaintiffs' land, the plaintiffs are unable to enjoy the easementary rights of light and air

which they have been using for the last 20 years. The suit was opposed by the defendant by filing written statement stating that no such easementary right was ever available to the plaintiffs.

4. Learned trial Court, upon appreciation of oral and documentary evidence on record, dismissed the suit of the plaintiffs finding no merit which was affirmed by the first appellate Court in the appeal preferred by them.

5. 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."

6. 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."

7. 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.

8. 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."

9. 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.

10. 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.

11. 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.

12. **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."

13. 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 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

1(2005) 1 SCC 471

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."

14. 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.

15. 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

² AIR 1953 Nagpur 205

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'."

16. Reverting to the facts of the present case in light of the aforesaid legal position, it is quite vivid that learned trial Court has clearly recorded a finding that plaintiffs have failed to prove that they are using the said easement for the last 20 years peaceably, uninterruptedly and without interference of the defendant. Learned first appellate Court has also recorded that plaintiffs' witness namely Sanjay Jadwani (PW -1) has clearly admitted that plaintiffs have opened the said windows for the last 7-8 years, as such, the said finding recorded by the trial Court affirmed by the first appellate Court that plaintiffs have failed to prove the requirement of Section 15 of the Indian Easement Act that they have been using the same easementary right for the last 20 years peaceably, uninterruptedly and without any interference from the defendant is a finding of fact based on evidence available on record which

is neither perverse nor contrary to the record.

I do not find any substantial question of law.

17. The second appeal, being devoid of merit, deserves to be and is accordingly dismissed *in limine* without notice to the other side.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet