

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.143 of 2011

1. Ajay Kumar Agrawal, S/o Purushottamdas Agrawal, aged about 51 years, Occupation-Business,
 2. Manoj Kumar Agrawal, S/o Purushottamdas Agrawal, aged about 42 years,
- Both are residents of village and Tahsil Kunkuri, Distt.Jashpur (CG)

(Plaintiffs)
 ---- Appellants

Versus

1. Janak Singh, S/o Late Shri Maku Singh, aged about 50 years, Caste Rajput R/o Village and Tahsil Kunkuri, Distt.Jashpur (CG)
2. Tahsildar, Kunkuri, Tahsil Kunkuri, Distt. Jashpur (CG)
3. Naib Tahsildar, Kunkuri, Tahsil Kunkuri, Distt.Jashpur (CG)
4. Halka Patwari, Patwari Halka No.7, Tahsil Kunkuri, Distt.Jashpur (CG)
5. Collector, Jashpur, Distt.Jashpur (CG)
6. State of Chhattisgarh Through Collector, Jashpur, Distt.Jashpur (CG)

(Defendants)
 ---- Respondents

For Appellants/Plaintiffs:- Mr.Ratan Pusty, Advocate
 For Respondent No.1/Defendant No.1:-
 Mr.J.K.Saxena, Advocate
 For Respondents No.2 to 6/State:-
 Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

27/01/2021

1. This plaintiffs second appeal under Section 100 of the Code of Civil Procedure, 1908 was admitted for hearing by formulating the following substantial question of law: -

“Whether the lower appellate Court has erred in reversing the judgment and decree of the trial Court even without meeting the reasons ?”

(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.)

2. The plaintiffs filed a suit for declaration of title and permanent injunction over the suit land stating inter-alia that the suit land was earlier held by late Shri Vijay Bhushan Singh Judeo and he has given the suit land to the plaintiffs father in the year 1959 and they have acquired their title by way of adverse possession. Patta was also granted to the plaintiffs.
3. Resisting the suit, defendant No.1 filed his written statement and only claimed that he has right of easement over the suit land i.e. 137 ft. x 10 ft.
4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 28.4.2006, decreed the suit holding that the suit land was earlier held by late Shri Vijay Bhushan Singh Judeo, which he has given to the plaintiffs father and the plaintiffs have acquired their title by way of adverse possession, but rejected the plea of defendant No.1 that he has right of easement over the suit land i.e.137 ft. x 10 ft. Feeling aggrieved against the judgment and decree of the trial Court, defendant No.1 preferred first appeal under Section 96 of the CPC before the first appellate Court. The first appellate Court by the impugned judgment and

decree allowed the appeal holding that the plaintiffs are not title-holders of the suit land and defendant No.1 has right of way over the suit land i.e. 137 ft. x 10 ft. land, which has been questioned by the appellants/plaintiffs under Section 100 of the CPC before this Court, in which substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment of sake of completeness.

5. Mr.Ratan Pusty, learned counsel for the appellants/plaintiffs, would make two folds submission:-

(i) That, the first appellate Court could not have gone into title of the plaintiffs as only claim of defendant No.1 is that he has right of easement over the suit land i.e. 137 ft. x 10 ft., therefore, the finding with regard to title of the plaintiffs is erroneous.

(ii) That, the finding of right of easement is contrary to the well settled principle of law laid down by the Supreme Court in the matter of Justiniano Antao and others v. Bernadette B. Pereira (Smt.)¹ and without specific pleading and specific evidence, the finding of the first appellate Court deserves to be set aside, as such, first appeal has not been decided satisfactorily.

6. On the other hand, Mr.J.K.Saxena, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree and submit that the first

¹ (2005) 1 SCC 471

appellate Court has rightly set-aside the judgment and decree of the trial Court and allowed the appeal, in which no interference is called for in exercise of jurisdiction under Section 100 of the CPC.

7. I have heard learned counsel for the parties, considered their rival submissions made hereinabove & also went through the records with utmost circumspection.
8. The trial Court after elaborate discussion while answering issue Nos.1 to 3 has clearly recorded a finding that the plaintiffs are title-holders of the suit land and as the suit land was originally held by Late Shri Vijay Bhushan Singh Judeo and he has given the suit land to the plaintiffs father and they have perfected their title by way of adverse possession, in which defendant No.1 only claimed that he has right of easement over the suit land i.e. 137ft. X 10ft., but the trial Court rejected the plea. In first appeal preferred at the instance of defendant No.1, the first appellate Court could have gone to the extent of examining as to whether defendant No.1 has right of easement over the suit land or not in the light of Section 15 of the Indian Easements Act, 1882 (hereinafter called as 'Act of 1882'), but the first appellate Court unnecessarily gone into the question of title of the plaintiffs and set aside that finding, which was totally unnecessary.
9. Since defendant No.1 is claiming easementary right over

the suit land, the first appellate Court could have been examined that issue as to whether defendant No.1 has right of easementary over the suit land or not, as such, finding of the first appellate Court in regard to title of the plaintiffs is set aside.

10. The term "Easement" has been defined in Section 4 of 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 a right,
- (v) without interruption, and
- (vi) for last 20 years.

13. In the matter of Justiniano Antao (supra), 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 was 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."

14. In the above referred to decision, their Lordships held that 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 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 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

² AIR 1953 Nagpur 205

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 the light of legal position noticed herein, it would appear that in para-8 of written statement, defendant No.1 has pleaded *qua* easementary right as under:-

"8. यह कि वाद पत्र की कंडिका 9 में वर्णित कथन भ्रामक आधारों पर आधारित होने से अस्वीकार है। निवेदन है कि प्रतिवादी क्र. 1 आने-जाने के लिये अपने पूर्वजों के समय से उपयोग कर रहा है सुखाधिकार प्राप्त कर लिया है।"

17. A careful perusal of above-stated paragraph of written statement, it appears that there is no pleading as to which date he is using the access for last 20 years. The Supreme Court in Justiniano Antao (supra) has clearly held that in order to establish an easement by way of prescription to the detriment of the other party, there should be categorical pleadings that since what date to which date one is using the access for last 20 years.

18. Reverting to the facts of the present case in the light of aforesaid legal position, it is quite vivid that though defendant No.1 has claimed right of easement over the suit land i.e. 137 ft. x 10 ft., he is using the suit land since the time of his forefathers, but there is no any precise pleading that what date to which

date for last 20 years defendant No.1 is using the the suit land. No document has been filed by defendant No.1 to establish the plea of exercising right of easement over the suit land and no any material has been brought on record, yet the first appellate Court without meeting with the reasonings of the trial Court interfered with the judgment and decree of the trial Court. Neither there is any precise pleading in terms of decision rendered by the Supreme Court in Justiniano Antao (supra) nor there is evidence brought on record that he is using the suit land since what date to which date for last 20 years. Specific pleading and categorical evidence is wanting and missing, as such, the first appellate Court is absolutely unjustified in reversing the judgment and decree of the trial Court.

19. Accordingly, the judgment and decree of the first appellate Court is hereby set-aside and that of the trial Court is hereby restored by answering the substantial question of law in favour of the plaintiffs and against defendant No.1.

20. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

21. A appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge