

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.119 of 2011****Judgment Reserved on :18.02.2021****Judgment Delivered on:01.03.2021**

Prem Lal Yadav, Age-52 years, S/o Shri Dev Charan Yadav, R/o-Mangla, In front of J.P. Vihar, Tah.-Dist.Bilaspur (CG)

----- Appellant/Plaintiff**Versus**

1. Rajendra Prasad Chandravansi, Age-52 years, S/o Siddha Ram Chandravansi, R/o Mangla, Ganga Nagar Sector-2, Ner Mahadev Mandir, Tah.-Dist.-Bilaspur (CG)
2. State of Chhattisgarh Through-Collector Bilaspur, Tah.-Dist.-Bilaspur (CG)

----- Respondents/Defendants

For Appellant/Plaintiff:-

Mr.H.V.Sharma, Advocate

For Respondent No.1/Defendant No.1:-

Mr.Badruddin Khan, Advocate

For Respondent No.2/State:-

Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the appellant/plaintiff are as under:-

"1. Whether in the facts and circumstances of the case the Courts below have committed an error and not considering as to whether or not the plaintiff is entitled for grant of decree of injunction as prayed in paragraph 14 B, C of the plaint ?

2. Whether failure to frame proper issue for trial regarding plaintiff right to obtain permanent injunction has vitiated the trial ?"

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court].

2. The plaintiff herein filed a suit claiming the right of easement over the passage on Khasra Nos. 1095/13 and 1095/31 situated at village Mangla, Tahsil and District Bilaspur and also sought decree for injunction by removing obstruction i.e. boundary wall constructed by defendant No.1 and iron gate to obstruct the passage of the plaintiff. The plaintiff also sought relief for recovery of possession of 2x49 feet encroached by defendant No.1 by constructing boundary wall on the said khasra numbers.

3. Resisting the suit, defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that the plaintiff is not entitled for right of easement as claimed and he has not encroached upon the plaintiff's land and as such, the suit as framed and filed deserves to be dismissed.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 29.4.2010, partly decreed the suit holding that the plaintiff has easementary

right over passage/suit way, but further held that the plaintiff is not entitled for decree for possession of the aforesaid land i.e. 2x49 feet on the ground that the plaintiff has failed to prove that defendant No.1 has encroached upon his land. On appeal being preferred by the plaintiff, the first appellate Court has affirmed the judgment and decree of the trial Court and dismissed the appeal, against which, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which two substantial questions of law have been formulated by this Court, which have been set-out in opening paragraph of this judgment for sake of completeness.

5. Mr.H.V.Sharma, learned counsel for the appellant/plaintiff, would submit that the first appellate Court has committed an error in not considering as to whether or not the plaintiff is entitled for grant of decree of injunction as prayed in paragraph 14 B & C of the plaint. He would further submit that failure to frame proper issue for trial regrading plaintiff right to obtain permanent injunction has vitiated the finding of two Courts below to that extent and is liable to be set aside. He would rely upon the judgment of the Patna High Court in the matter of Sarab Lall Jha and Anr. v. Ucheshwar

Jha & Ors.¹ to buttress his submission.

6. On the other hand, Mr. Badruddin Khan, learned counsel for respondent No.1/defendant No.1, would submit that the trial Court has already granted decree *qua* easementary right to the plaintiff which the defendant has not questioned either by filing appeal before the first appellate Court or before this Court and that decree has become final and decree for possession has not been granted with regard to 2x49 sq.ft. of land as the plaintiff has failed to prove that defendant No.1 has encroached over the plaintiff's land.
7. I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove thoughtfully and also went through the records with utmost circumspection.
8. In a suit filed by the plaintiff claiming easementary right under Section 13 of the Indian Easements Act, 1882 and recovery of possession *qua* 2x49 sq.ft. of land, the trial Court clearly recorded a finding that out of Khasra Nos.1395/31 and 1095/13, 306 sq.ft. land is held by the plaintiff and defendant No.1 for their joint nistar rights, but further held that the plaintiff has failed to prove that defendant No.1 has encroached over 2x49 sq.ft. of land by making construction. The trial Court has also held while

¹ AIR 1972 Patna 490

answering issue No.2 that the plaintiff has failed to establish that defendant No.1 has encroached over 2x49 sq.ft. of land as no demarcation report has been filed and it has not been established as to whether on 2x49 sq.ft. of land defendant No.1 has encroached and the plaintiff's witnesses have not stated about the encroachment by defendant No.1 over the plaintiff's land, which was necessary in order to grant decree, if any, in favour of the plaintiff.

9. The plaintiff in para-14{२} of the plaint has clearly claimed that he also be granted injunction restraining defendant No.1 or his agent from using nistar way and claimed easementary right over the suit land in the shape of declaratory decree.

10. The trial Court upon appreciation of oral and documentary evidence available on record granted decree that the plaintiff and defendant No.1 have easementary right over the suit land i.e. 306 sq.ft., but neither framed an issue *qua* permanent injunction nor granted permanent injection. The plaintiff before the first appellate Court raised a specific plea in memo of appeal and even the first appellate Court in para-5 has clearly recorded the ground of the plaintiff that the trial Court has not considered the question of granting permanent injunction and in one

paragraph very cryptic order dismissed the appeal without undertaking the responsibility of the first appellate Court to consider the issue raised before it.

11. The Supreme Court in the matter of Santosh Hazari v. Purushottam Tiwari (deceased) by LRS.² has clearly held that first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The first appellate Court in the instant case, failed to perform its duties as delineated by their Lordships in the matter of Santosh Hazari (supra). The first appellate Court cannot shirk its responsibilities and duties.

12. The plaintiff has clearly pleaded in the plaint that along with decree of declaration based on easementary right, permanent injunction also be granted in his favour and obstruction made by defendant No.1 be directed to be removed. No doubt, the framing of issues is very important stage in civil

2 (2001) 3 SCC 179

litigation and it is bounden duty of the Court that due care, caution, diligence and attention must be bestowed by the Presiding Judge while framing issues. (See **Ramrameshwari Devi and others v. Nirmala Devi and others**³). However, non-framing an issue is not significant when parties are aware of rival cases and that issue is present in connected matter and evidence recorded on it without demur. (See **Sri Gangai Vinayagar Temple and another v. Meenakshi Ammal and others**⁴).

13. In the instant case, relief of permanent injunction was consequential relief claimed by the plaintiff and as such, even if the issue is not framed, the question of granting consequential relief of injunction can be considered, particularly when the parties go to trial, with facts and disputed points known to them.

14. The Supreme Court in the matter of **Nagubai Ammal and others v. B. Shama Rao and others**⁵ has held that non-framing of proper issues and want of pleadings will not be a ground for vitiating the trial.

15. Reverting to the facts of the present case in the light of above-stated legal position, it is quite vivid that the finding of the trial Court that 306

3 (2011) 8 SCC 249

4 (2015) 3 SCC 624

5 AIR 1956 SC 593

sq.ft. of land situated at village Mangla, District Bilaspur, which is part of Khasra Nos.1395/31 and 1095/13, is the land held by the plaintiff and defendant No.1 jointly for their joint nistar rights. The said finding has not been questioned by defendant No.1 before this Court by filing first appeal/cross-objection, as such, that finding has attained finality. Neither the trial Court nor the first appellate Court considered the issue of granting permanent injunction though claimed by the plaintiff and even in appeal, it has been raised, but it is established fact that the plaintiff has been found entitled for decree of declaration that he has easementary right over the said land, but decree for permanent injunction after removing obstruction made by defendant No.1 has not been granted in favour of the appellant/plaintiff.

16. Once the plaintiff has been held entitled for decree that he is entitled to have easementary right over the suit site, then order to enjoy that declaratory decree consequential relief of permanent injunction ought to have been granted in his favour, otherwise, the plaintiff would be forced to bring new suit for permanent injunction. Section 38 (3) (d) of the Specific Relief Act, 1963 (hereinafter called as

'the Act of 1963" provides as under:-

"38. Perpetual injunction when granted.—

(1) and (2) xxx xxx xxx

(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) to (c) xxx xxx xxx

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings."

As such, clause (d) of sub-section (3) of Section 38 of the Act of 1963 has reference to cases where unless an injunction is granted, the plaintiff would have to bring repeated suits/proceedings for the purpose of establishing or safeguarding his rights, or preventing acquisition of rights by the defendants.

17. The Madhya Pradesh High Court in the matter of Mohammad Husain Ramjan Husain v. Chairman, Mandi Committee⁶ has clearly held that one of objects for which injunction is issued is to prevent future mischief and multiplicity of judicial proceedings.

18. The Patna High Court in the matter of Sarab Lall Jha (supra) has clearly held that the plaintiff establishing his legal right of easement and the fact of its disturbance is entitled to a permanent injunction without proof of substantial damage, to

6 AIR 1957 MP 8

avoid multiplicity of proceedings and held as under:-

"9. According to principles of English Common Law relating to easements which have been made applicable to this part of the country by judicial decisions, in my opinion, the courts below have not erred in granting the relief for injunction. In *Imperial Gas Light and Coke Co. v. Broadbent*, (1859) 7 HLC 600 (612), which is a leading case on the subject, it has been held that if a plaintiff applies for an injunction in respect of a violation of a common law right and the existence of that right and of its fact is denied he must establish his right at law, but having done that, he is, except under special circumstances, entitled to injunction to prevent a recurrence of that violation. In the instant case, the plaintiffs, according to the findings of the court below, have established their legal right of easements and the fact of its disturbance. They have also alleged that the defendant, i.e., the appellants before us, are threatening to disturb the easement over again. The defendants-appellants do not say that they would not disturb the rights of the plaintiffs-respondents in future; rather they claim for themselves a right to disturb the easement enjoyed by the plaintiffs. According to the findings of the court below the defendants do not have such a right. In the circumstances, in my opinion, the plaintiffs-respondents having established their legal right of easement, are entitled of course to an injunction to prevent the recurrence of the disturbance. Even though there is threat of the disturbance in future of the plaintiffs' legal right of easement by the defendants-appellants, if prayer for injunction is refused on the ground that the damage by actual disturbance in the past was not substantial, the result will be that the plaintiffs-respondents will be forced to institute another suit when the defendants-appellants transform their illegal threat of disturbance in actual disturbance. There cannot be two opinions about the proposition that there should be endeavour by every court of law and justice to avoid multiplicity of judicial proceedings and really it is this principle which is embodied so far relief for perpetual

injunction is concerned in Section 38 (3) (d) of the Specific Relief Act, 1963. For the aforesaid reasons, I think that the courts below have not committed any error of law in granting the relief of injunction to the plaintiffs-respondents and there is no substance in the second contention of Mr. Sarkar either. "

19. Reverting to the facts of the present case following the principle of law laid down in the above-stated judgments (supra) and in view of provisions contained in Section 38(3)(d) of the Act of 1963, it is quite clear that the appellant/plaintiff having established easementary right over the suit land as held by two Courts below is entitled for consequential relief of permanent injunction restraining defendant No.1 from interfering with the use of said land, otherwise, it would give rise to multiplicity of proceedings and contrary to the provisions contained in Section 38 (3) (d) of the Act of 1963 and even decree already granted for declaration of easementary right in favour of the plaintiff by two Courts below would of no use to him.

20. Accordingly, the second appeal is allowed in part and it is decreed and directed that the plaintiff would also be entitled to use the land in question i.e. 6x49 sq.ft. shown in Schedule "A" appended with plaint for his nistar rights and obstruction/construction in the said area/on said

land, if any, shall be removed by defendant No.1 himself within 30 days and defendant No.1 or his agent will not create hindrance/obstruction in exercise of nistar right by the plaintiff over the said passage. Schedule 'A' be made part of decree. The substantial questions of law are answered accordingly. Parties shall bear their own cost(s).

21. A appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-