

(2018) 12 SHI CK 0031

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 262 Of 2006

Brahma Nand

APPELLANT

Vs

Teju Ram (Deceased) Through His Legal Representatives
Surat Ram And Others

RESPONDENT

Date of Decision : 18-12-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 107, 133, 150
Indian Easements Act, 1882 — Section 15, 18

Citation : (2018) 12 SHI CK 0031

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Romesh Verma, N.K. Sood, Aman Sood

Final Decision : Disposed Off

Judgement

Tarlok Singh Chauhan, J.

1. The suit filed by the plaintiff for permanent prohibitory injunction has been declined by both the learned Courts below and aggrieved thereby, he has filed the instant regular second appeal. The parties hereinafter shall be referred as 'plaintiff' and 'defendants'.

2. The plaintiff filed a suit for permanent injunction against the defendants on the allegations that he is owner in possession of land comprised in Khata-Khatauni No.20/27, Khasra Nos. 16, 17, 18, 19, 21, 22, 23, 60, 61, 62, 63, 64, 77, 78, 79, 80, 82, 84, 117, 118, 120, 228, 292/1, 294, 295 and 305. It was averred that the entire suit land bears apple orchard out of which about 800 plants are on bearing stage and rest of the plants are at the age of 2 to 5 years. The plaintiff had also constructed a huge building in the orchard. The defendants hail from village Gumna which is about one and half kilometres away from the suit land and Devidhar Road is situated below the suit land. The suit land has been fenced with barbed wire and wall etc. It was further averred that the village of the defendants is situated above the suit land and there are two common

paths from the time of ancestors for passing far away from the suit land. One of the paths passes through the Torsa Khad and another towards Devidhar side. The defendants are using the said path since the time of their ancestors, but recently, just to approach the main road through short-cut, the defendants started creating new path through the suit land which belongs to the plaintiff and the defendants have no right, title or interest to create new path through the suit land. It was also averred that the defendants falsely reported the matter to the police and the police did not find any path at the spot. The defendants threatened to create path through the suit land, so the plaintiff filed petition under Section 107/150 Cr. P.C. in the Court of SDM, Rohru. The defendants illegally uprooted 250 plants and potato crop from the suit land and after dismantling fencing and wall around the suit land caused damage of Rs.10,000/- to the plaintiff. The defendants did not resist from their illegal acts, hence, the suit.

3. The defendants contested the suit and raised preliminary objections about competency, plaintiff not coming to the Court with clean hands, estoppel and cause of action. On merits, it was averred that the old general public path starts from 'Shiv Mandir and passes through points a, b and c which have been shown in tatima by red dots and thereafter it passes through point 'd' and reaches at point 'e' and merges in Khasra No. 158 which is public thoroughfare. The aforesaid path was being used by the defendants and other general public continuously, openly, peacefully and without any interruption to the knowledge of the plaintiff since the time of their ancestors i.e. more than 60-70 years and this right of use of the path has matured in customary right of easement and the plaintiff has got no right to obstruct and block the said path. It was further averred that there was no other path for use by the defendants for reaching their houses and agricultural fields. The ancestral path of the defendants had been blocked by the plaintiff by digging and fencing with barbed wire which is a link between the hill top situated village Gumna and 'Shiv Mandir'. The defendants averred that the matter about obstruction of the path was brought to the notice of SDM, Rohru and Tehsildar, Chirgaon, who visited the spot and found that the plaintiff has caused blockade to the old ancestral path of the defendants by digging and fencing it with barbed wire at place Bhamani and also found that this blockade is a source of chronic nuisance to the residents of village Gumna and school children and also recommended stringent action to clear the path. The local police also visited the spot and found that the plaintiff had caused blockade to the ancestral path and petition under Section 133 Cr.P.C. had been presented against the plaintiff in the Court of SDM, Rohru. The dispute was between points 'B' and 'C' i.e. Khasra Nos. 305 and 294 which were previously 'Banjar Kadim' and the plaintiff planted apple plants in February, 2004. The defendants further averred that the path via 'Todsas Khad Nullah' passes through a dense forest and is full of monkeys and other wild animals and it is not possible for school children to pass through that path and in rainy season this 'Khad' is always in spate and during winter season this path is loaded with snow for 4 months and distance of

this path to village Gumna is about 5 kilometres whereas the disputed path shown in tatima is only about 1.5 kilometres from 'Shiv Temple' to Gumna village. Devidhar is about 3 kilometres ahead of 'Todsa' and for that the defendants will have to go Devidhar and thereafter to come 'Todsa' which is about 9 kilometres. The Panchayat head quarter of residents of village Gumna, School, Health Sub-Centre and Food Distribution Society are at village 'Todsa' and the disputed path is the only shortest convenient path to the defendants and other residents of village Gumna.

4. On the pleadings of the parties, the following issues were framed by the learned trial Court on 07.05.2004:-

"1. Whether the plaintiff is entitled to the relief of injunction as prayed? OPP.

2. Whether the suit of the plaintiff is not legally competent? OPD.

3. Whether the right of the defendants has measured as easementary right over the disputed path which has been shown in the Tatima? OPD.

4. Whether the plaintiff has obstructed the ancestral path of the defendants by digging and fencing with barbed wire, as alleged? OPD.

5. Whether the plaintiff has no cause of action? OPD.

6. Relief."

5. After recording evidence and evaluating the same, the suit filed by the plaintiff came to be dismissed and the appeal filed against the same was also dismissed by the learned first appellate Court constraining the plaintiff to file the instant appeal which was admitted on 03.01.2007 on the following substantial question of law:-

"Whether the defendants had not specifically claimed the passage through the land of the appellant/plaintiff by way of easement of prescription and, therefore, the finding returned by the two Courts below that they have acquired easementary right by prescription to pass through the land of the plaintiff, is bad?

6. Looking to the nature of question as framed, it would first be necessary to refer to the pleadings of the defendants regarding "easement". This plea is contained in para-2 of the written statement which reads thus:-

"2. That the plaintiff has not come to the Court with clean hands because he has concealed the material and vital facts from this Ld. Court. That as a matter of fact the old general public path starts from Shiv Mandir and passes through point a, b and c which has been shown in spot tatima by red dots and thereafter it passes through point d and reaches at point e and merges in Khasra No.158 which is public thoroughfare. The aforesaid path being used by the replying defendants and others and other general public continuously, openly, peacefully without any interruption to the knowledge of the plaintiff since the time of their ancestors i.e. for more than 60-70 years till now and this right of use of the path

has matured in the customary right of easement and the plaintiff has got no right to obstruct and block the said path under the guise of this civil suit. There is no other path, which can be used by the defendants and other general public for reaching their houses and agricultural fields. The path in dispute has been shown in the tatima of spot prepared by the Halka Patwari, which is enclosed herewith."

7. It would be evidently clear from the above that what the defendants have claimed is a customary easement of pathway. Whereas, the learned trial Court gave no specific findings regarding nature of the easement. However, it was held that the defendants were using the path since the time of their ancestors openly, peacefully and uninterruptedly and this ancestral path of the defendants had been blocked by the plaintiff by digging and fencing it with barbed wire, therefore, he was not entitled to the injunction. Whereas, the learned first appellate Court specifically held that since the defendants had been using the path as a right for the last 20 years, therefore, they had acquired easmentary right to the user of the path. Therefore, in the given circumstances, the further question that arises for consideration is whether customary easement of pathway is the same as easement by prescription.

8. This question is no longer *res integra* in view of the judgment rendered by this Court in *Lachhi and others versus Ghansara Singh*, AIR 1972 HP 89, wherein it was held that the persons claiming customary easement have not only to prove the elements required under Section 15 of the Act, but also something more, namely, that the custom set up was ancient, continuous, reasonable, certain and compulsory. For easement by prescription, it is not necessary that the user should be exclusive, but the claimant should exercise it under some claim existing in his own favour independently of all others. A customary easement embraces the needs of variable persons belonging to a class or locality while a right by prescription is always personal. It shall be apposite to refer to the relevant observations as contained in para-6 of the judgment which read thus:-

"6. Before parting with this case, however, I would like to stress the distinction which exists under law between an easement based on prescription and an easement founded on custom. The basis of every right of easement by whatsoever method it may have been acquired, is theoretically a grant from the servient-owner. It may be expressed, as is mentioned in Sections 8 to 12 of the Act, or it may be implied from the circumstances as in Section 13 of the Act. or it may be presumed from long and continued user for a certain period as in Section 15 of the Act, or it may be inferred from a long and continued practice of user by a certain class of the public in certain locality. It is then to be seen on the basis of proper evidence as to what type of easement, if any, can be claimed by the plaintiff. Persons claiming a customary easement have not only to prove the elements required under Section 15 of the Act but also something more, namely, that the custom set up was ancient, continuous, reasonable, certain and compulsory. For easement by prescription, it is not necessary that the user should be exclusive, but the claimant should exercise it under some claim

existing in his own favour independently of all others. Different persons may have a right of pasture over a land, but the plaintiff can nonetheless claim a right independent of others, provided the necessary conditions are satisfied. A customary easement, as is obvious, embraces the needs of variable persons belonging to a class or locality, while a right by prescription is always personal. These observations I have made, so that the evidence is properly appreciated, while the case goes back to lower Courts."

9. Thus, it is evidently clear that the learned first appellate Court failed to understand and draw distinction between the customary and prescriptive easement and, therefore, the judgment rendered by it is palpably wrong as it proceeds on the premise as if the case set up by the defendants was one based on prescriptive easement and not customary easement. In fact, the learned first appellate Court has not understood or rather misconstrued the concept of "easement" as set up by the defendants as it proceeded to record in para 19 of the judgment that the user of the path by the defendants was open, continuous and without interruption, but has not given any specific finding with regard to custom set up being ancient, continuous, reasonable, certain and compulsory. The learned first appellate Court has failed to draw a distinction between customary right from customary easement and proceeded on the premise that easement by prescription and customary easement are one and the same things, whereas, it is not so.

10. An easement can become absolute by prescription if the following conditions are satisfied:-

- (i) there must be a pre- existing easement which must have been enjoyed by the dominant owner;
- (ii) the enjoyment must have been peaceful;
- (iii) the enjoyment must have been as an easement;
- (iv) the enjoyment must have been as of right;
- (v) the right must have been enjoyed peacefully;
- (vi) the enjoyment must have been for a period of 20 years and;
- (vii) the enjoyment for 20 years must have been without interruption.

11. Section 15 of the Easements Act reads thus:-

"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 I. -Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II. -Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III. -Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

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 1[Government], this section shall be read as if, for the words "twenty years" the words 2["thirty years"] were substituted."

12. Customary easement, on the other hand, is dealt with in Section 18 of the Easement Act which reads thus:-

"18. Customary easements.- An easement may be acquired in virtue of a local custom. Such easements are called customary easements."

13. These are rights arising out of custom but unappurtenant to a dominant tenement, but the custom must be reasonable and certain. An easement belongs to a determinate person or persons in respect of his or their land. A fluctuating body like the inhabitants of the locality cannot claim an easement. Easements are private rights belonging to particular persons while customary rights are public rights annexed to the place in general and it was for this reason that the defendants instead of setting up a simple case of easement had set up the plea of customary easement.

14. However, merely because the learned first appellate Court has failed to draw a distinction between customary rights and easement, the suit of the plaintiff

cannot be decreed as the learned first appellate Court will still have to consider whether the defendants have been able to prove their customary rights or not. Undoubtedly, this question can even be determined by this Court, but in case such course is adopted, then one valuable channel/right of appeal would be lost.

15. The substantial question of law is answered in the aforesaid terms.

16. In view of the aforesaid findings, the appeal filed by the plaintiff is accepted and the matter is remanded back to the learned first appellate Court to decide specifically the question regarding the customary easement on the basis of the material already placed on record. Since the suit was filed way back in the year 2004, it is expected that the learned first appellate Court shall decide the appeal as expeditiously as possible and in no event later than 15th May, 2019.

17. The parties through their respective counsel(s) are directed to appear before the learned first appellate Court on 02.01.2019. Pending application, if any, also stands disposed of.