

**(2014) 12 CHH CK 0021**  
**In the Chhattisgarh High Court**  
**Case No : First Appeal No. 19 of 2002**

|                             |    |            |
|-----------------------------|----|------------|
| Goverdhan Prasad and Others | Vs | APPELLANT  |
| State of M.P. and Others    |    | RESPONDENT |

**Date of Decision :** 02-12-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, 80, 96 — Limitation Act, 1963 - Section 25(1), 25(3)

**Citation :** (2015) 2 CGLJ 89

**Hon'ble Judges :** Chandra Bhushan Bajpai, J.

**Bench :** Single Bench

**Advocate :** H.B. Agrawal, Sr. Advocate and Sushri Preeti Yadav, Advocate, for the Appellant; Shobha Kashyap, Dy. Govt. Advocate and SRJ Jaiswal, P.L., for the Respondent

**Final Decision :** Dismissed

## Judgement

Chandra Bhushan Bajpai, J. By this first appeal under Section 96 of the Civil Procedure Code, 1908 (in brevity "CPC"), appellants have challenged the legality and propriety of the judgment and decree dated 30-7-2001 passed by the Additional District Judge, Bemetara Distt. Durg, CG in Civil Suit No. 4-A/84 whereby and whereunder learned Court below has dismissed the suit filed by the plaintiffs/appellants herein for bringing the Tar in its original condition and for permanent injunction against any obstruction for irrigation from Tar and also for damages of crop. Learned court below dismissed the suit with costs as the plaintiffs failed to prove their case. As per brief facts of the civil suit filed before the Court below, the plaintiffs/appellants are holding agricultural land at village Kathiya, tehsil Bemetara which is named as Loharsahi. For its irrigation, rain water used to reach in these lands through a Tar. Said Tar was constructed by forefathers of the plaintiffs. Defendant No. 2 Kapil Narayan on account of enmity in the year 1979 damaged the Tar in question during deepening of Gatwa tank thereby the water which used to flow in the lands of plaintiffs at Loharsahi was obstructed. For this the then State Government was responsible. Hence the

plaintiffs by filing this suit prayed that original position of the Tar be restored and the defendants be permanently restrained for its closure again and also plaintiffs demanded for damage caused on account of being deprived from irrigation through concerned Tar and damages for its fulfillment.

2. Before the Court below defendant No. 1 by filing the written statement denied the entire pleadings adduced by the plaintiffs and pleaded that the plaintiffs had not acquired any easementary right; the suit is time barred. Hence the suit may be dismissed with costs.

3. Before the court below, defendant No. 2 filed his written statement separately and admitted that there is no canal in the village Kathiya and in the year 1979, he conducted relief work at village Kathiya in the capacity of sarpanch and he also deepen Gatwa tank. There is no easementary right. No land of plaintiffs was irrigated through Tar and no silt used to be deposited through Tar. Village panchayat is a necessary party, no notice is sent to village panchayat and he never damaged the Tar or filled the Tar by soil. The suit is not maintainable. Hence he also prays that the suit be dismissed with costs.

4. During trial defendant No. 2 filed an application under Order 23 Rule 4 of the CPC on 16-2-1993 for making compromise with plaintiffs which was ultimately disposed of by the trial Court on 2-12-1998 with the order that the suit will continue between the plaintiff and the defendant No. 1 as the defendant No. 2 entered into a compromise with plaintiffs. The said order was never challenged and has attained finality. Thereafter this suit was tried and contested between the plaintiffs and the defendant No. 1.

5. After affording opportunity of hearing to the parties including framing of issues and opportunity of adducing evidence, learned court below dismissed the suit filed by the plaintiffs/appellants on the ground that the plaintiffs are having alternate source for irrigation. Since the work of deepening of Gatwa tank was conducted by the Panchayat and no suit is instituted for the act done bona fide against the authorities of panchayat and as no notice under Section 80 of the CPC was given to the panchayat, the suit is time barred as per provisions of the Indian Easements Act, 1882; also the suit is time barred on the basis M.P. Panchayat Raj Adhinyam, 1981. Hence dismissed the suit with costs.

6. Against which the appellant has preferred instant first appeal on the ground that in view of para 1 of the impugned judgment, the trial court has not understood the case of the appellants, the judgment is vitiated, it is not according to the pleadings and issues. Defendant No. 2 has the best piece of evidence for giving judgment on admission under order 12 rule 6 of the CPC. The mud deposited in way of Tar was due to deepening of tank which was a work of government/respondent No. 1 therefore, the suit should have been decreed against it. The trial Court was wrong for not giving findings on relief claimed in the plaint. Cause of action continuous, as damage of crop was also continue since the decree for future damage under order 20 rule 12, CPC was also sought.

The appellants have proved their case and putting burden of proof on them was illegal. The trial Court refused the appellant for proving the photographs and produce witnesses, therefore the case is liable to be remitted back for trial afresh. The appellants are entitled to relief claimed by them. Finding on issue No. 3 is wrong because the appellants have no source for irrigation except the Tar from which they were taking water. Allowing cost despite compromise with respondent No. 2 is illegal and liable to be set aside. By filing this memo of appeal, the appellants prayed that this Court may allow the appeal either by remanding the case and refunding the court fee or decree the suit with costs throughout for the reliefs claimed in para 15 of the plaint.

7. I have heard learned counsel for the parties and perused the record of the court below including the impugned judgment.

8. Learned counsel for the appellants vehemently argued that easementary right is accrued in favour of the appellants and it should be restored. Para 12 of the judgment is not correct because the situation of the fields are not changed. Right to way and right to irrigation are different things. Pond and fields are different and there is no reason why Tar not to be restored. Right to way is not applicable in the present case. The person may approach to some place by an alternate way but how the appellants can get water for irrigating their field from any other place. The notice under Section 80, CPC was given to the State. The court below held that right of easement exists and State does not file any appeal against the appellants. Hence the claim against the State is maintainable. The State has to restore the right to irrigation as the cause of action is continue. Hence the appeal may be allowed.

9. Learned counsel for the respondent No. 1 State opposed the memo of appeal filed by the appellants, supported the judgment of the court below and prayed that it is proved that alternate source for irrigation is available. The relief work was conducted by panchayat bona fidely and no suit may be instituted for the work done bona fidely. The plaintiffs have not given any notice under Section 80, CPC to Panchayat, the suit is time barred as per provisions of Easements Acts and also as per provisions of Panchayat Raj Adhiniyam, 1981. It is further argued that this may not be held as judgment on admission under Order 12 Rule 6, CPC as the defendant No. 2 entered into a compromise along with the plaintiffs because the defendant No. 2 never performed any work in the personal capacity. He performed the work as a sarpanch of village for which he is not authorized to make a compromise in any official capacity. The plaintiffs made him party not as a sarpanch of village panchayat but in his personal capacity. Defendant No. 2 on his personal capacity may not be authorized to compromise on behalf of the panchayat and as the court held that the suit be continued against the defendant No. 1. Against the said order no revision was made by the plaintiffs and also plaintiffs never demanded before the trial court that his suit be decreed on the basis of admission done by the defendant No. 2. Virtually the said compromise does not at all affect the core issue of the suit. As the plaintiffs failed to prove its

case the appeal may be dismissed.

10. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the parties before the trial court, also law and other connected facts.

11. For assessment of issue No. 3, the trial Court held that alternate remedy is available which is assessed on the basis of evidence. Upon consideration of entire evidence, I am of the view that said Tar was not the only source of irrigation and the alternative source of irrigation is available. Also the trial Court held there is no evidence that the defendant No. 2 made a collusion with the State Government and damaged the Tar and closed it. The trial Court also held for Issue No. 6 that as per the evidence, deepening of Gatwa tank was conducted by village panchayat and as per provisions of Section 102 of MP Panchayat Raj Adhiniyam, 1981, for any act done bona fide no suit may be instituted. Further it is held that the plaintiffs have not opposed the deepening of Gatwa tank and as is held the defendant No. 2 had not deliberately damaged or closed the Tar in question with collusion with State government. The deepening of tank was for storage of more water and for benefit of villagers. Hence the trial Court held that no suit may be instituted for the act done bona fide by the authorities of the panchayat. In the present suit the village panchayat is not a party. It was a necessary party and no notice under Section 80, CPC was given to sarpanch or any other authority of Panchayat which is required under Section 103 of the Panchayat Raj Adhiniyam, 1981. The suit is held to be barred under Section 103 of the Act of 1981. If there is a dispute regarding any way or watercourse or use of any water or any other easement within 2 next years before the institution of the suit wherein the claim to which such period relate is contested and if a right claimed belongs to government, period prescribed in Section 25(3) of the Limitation Act shall be 30 years. The plaintiffs assessed the cause of action on 24-7-79 whereas the suit is filed on 23-12-1982 after about 3 years of the closure of the Tar in question by which the trial Court held that there is no suit filed within time. The trial Court while answering the issue No. 10, held that even the suit is not maintainable under the provisions of Section 103(2) of the Act of 1981 as per which suit is to be instituted within six months against the panchayat through authorities but as the suit is filed about after 3 years the suit is not maintainable. In the said provision of Section 25(1) and (2) of the Limitation Act, it is nowhere mentioned regarding the continuance of denial of easementary right. A specific date is given so that it has to be assessed from the date of cause of action. This cause of action is not the continuous cause of action.

12. The said deepening of Gatwa tank is not conducted by the defendant No. 1 and it was performed as a relief work for the benefit of villagers under the authorities of village panchayat. The plaintiffs have not made village panchayat as a party of the suit which was a necessary party because since he performed the entire deepening work he is required to answer for the cause. After appreciating the entire facts and circumstances of the case and the evidence,

this court is of the view that due to availability of alternative source to the plaintiffs, the Tar was not the sole source of irrigation for the plaintiffs, the act of deepening of the Gatwa tank wherein the damage of Tar or closure of the Tar are pleaded was done by the village panchayat authorities and they are not the parties in the suit. Defendant No. 2 was impleaded in personal capacity. He had no right or authority to compromise on behalf of the panchayat and also the panchayat authority performed the work for deepening bona fide. The suit is barred by two above mentioned reasons. The trial Court has not committed any illegality or infirmity while dismissing the suit filed by the plaintiff's.

13. Consequently the appeal filed by the appellants is dismissed as not maintainable. No order as to costs.