

(1991) 02 BOM CK 0083

In the Bombay High Court

Case No : Civil Revision Applications No's. 28 and 29 of 1990

Macario Antonio Francisco De Cunha and Another

APPELLANT

Vs

Alex Fred D'Souza and Others

RESPONDENT

Date of Decision : 25-02-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 2
Easements Act, 1882 — Section 13, 15

Citation : (1993) 1 BomCR 465

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : S.K. Kakodkar, S. A., R.V. Kamat and A.F. Diniz, for the Appellant;
J.E. Coelho Pereira, for the Respondent

Judgement

G.D. Kamat, J.—Petitioners are the owners in possession of a property bearing Survey No. 173/2 situate in the village of Parra. It is common ground that it is an open plot of land except for a small structure thereon in which the business of grocery and bar is being run. A well is also situated in this property. It appears that on 20th January, 1986, the petitioners brought about the construction of compound walls and when the said work was in progress the original plaintiffs, now respondents No. 1 to 5, apprehended that their way would be blocked from the public road Parra-Anjuna. Respondents No. 1 to 5, for short plaintiffs, instituted Regular Civil Suit No. 26 of 1986 praying for a declaration that they are entitled to use a strip of land of three metres in breadth as indicated in the plan annexed thereto or, in the alternative, for a declaration that they have acquired right to use the said way by prescription. A mandatory injunction was also sought restraining the petitioners from obstructing in any manner the use of the said way or making any construction or erecting any obstruction. At the same time a further declaration was sought that the first respondent has a right and is entitled to draw water from the well existing in that property or in the alternative, that the first respondent has acquired right to draw water from the said well by prescription. An injunction is also sought in respect of this property

for right to draw water. On instituting this suit, a motion was made pending the hearing and final disposal of the suit in terms similar to the reliefs sought in the suit.

2. An ex-parte order was made in terms and on hearing the petitioners after a due show cause notice, by order dated 16th September, 1987, the trial Court while dismissing the original plaintiffs application for temporary injunction however directed the petitioner to keep an opening of one metre as an excess to the plaintiffs to go to the main road and the well, on the line shown in green in the plan annexed to the plaint till the suit was decided on merits.

3. Against the dismissal of their application for temporary injunction, the original plaintiffs instituted Miscellaneous Civil Appeal No. 130 of 1987 in the District Court. At the same time, the petitioners also instituted an appeal to the District Court against the same order complaining about the direction for reservation of one metre wide access, vide Miscellaneous Civil Appeal No. 131 of 1987. The petitioners however felt that despite dismissal of the plaintiffs' application for temporary injunction, the direction to them to keep an opening of one metre as and by way of an access to go to the main road and to the well within the lines shown in green ink in the plan would cause hardship to them for they will be unable to make their proposed construction and therefore, instituted an application under Order XXXIX, Rule 4 of the CPC on 23rd September, 1987 for the variation or modification of the order dated 16th September, 1987. It is however mentioned in that application for variation that the petitioners are ready and willing to earmark 0.50 cms. wide access on the extreme southern side of their property and they will have therefore no objection if the original plaintiffs use the same for passing and repassing and fetching water from the well. This application found favour with the trial Court and by order dated 26th November, 1987, petitioners were directed to keep access of one metre towards the southern side of the suit property for the plaintiffs to go to the main road and also to allow the first plaintiff to draw water from the well. The plaintiffs felt aggrieved by the variation or modification as contained in the order dated 26th November, 1987, and therefore, instituted an appeal before the District Court vide Miscellaneous Civil Appeal No. 157 of 1987. Petitioners' Miscellaneous Civil Appeal No. 131 of 1987 and the original plaintiffs' Miscellaneous Civil Appeal No. 157 of 1987 are being disposed of by the common judgment delivered by the learned Additional District Judge on 18th January, 1990, which has now given rise to the present two revision applications and both by the petitioners. To make the story complete, in the first place it may be noted that the plaintiffs' Miscellaneous Civil Appeal No. 130 of 1987 was dismissed long ago on 28th June, 1988. The petitioners' Miscellaneous Civil Appeal No. 131 of 1987 now stands dismissed by the impugned Order, whereas plaintiffs' Miscellaneous Civil Appeal No. 157 of 1987 is allowed. The sum total of all these miscellaneous proceedings including the appeals today in effect comes to the restoration of the first order of the trial Court dated 16th September, 1987, with the result the plaintiffs get an access of one metre in width from the petitioners' property shown in green ink in

the plan 1 sketch annexed to the plaint until the suit is decided on merits. In addition, the first plaintiff gets excess to the well.

4. The Indian Easements Act was brought into force in the territory of Goa with effect from 1st November, 1978. The law relating to easements prior to this date was contained in the Civil Code (Portuguese) in Title IV Chapter V setting out definition of easements (servidoes) and other aspects. Article 2309 in a different Chapter (Title V Chapter III) envisages landlocked property. Briefly stated, it provides that an owner of landlocked property which does not have an access to the public road gives such owner a right to demand a passage from the owners of the neighbouring land, however, on payment of the price to be judicially fixed in a proceedings before the Court. I have made reference to this Article 2309 because a contention has been raised by the Counsel for the petitioners that this Article cannot be now invoked being no more available as from 1st November, 1978, the date on which the Easements Act is brought into force in Goa. In that the contention is that regard being had to the Extension Act read with the provisions of the General Clauses Act all corresponding provisions existing prior to that date stand repealed and that the corresponding provisions need not be identical. It is then pointed out as the preamble itself suggests the Indian Easements Act is an act which defines the law relating to easements and licences and does not make any provision for acquisition of a right over the properties of neighbouring owners in favour of the owners of landlocked property. In this situation, it is urged that barring acquisition of land by the Government on payment of compensation to the owners of any law requiring a neighbouring owner to involuntarily sell right of passage or access to owners of landlocked property is opposed to the constitution and/or to constitutional conscience. I will return to this question if I find it necessary to deal with the same later in the judgment, but suffice for the moment to say that with effect from 1st November, 1978, a claim to easement must necessarily fall within the provisions of the Indian Easements Act and if a party wants to establish any right having acquired by him based on the repealed provisions of the law, then in force or from the saving clauses of any law in force needless to say that such party is bound to plead and show how the relief prayed for is founded thereon.

5. Coming to the Indian Easements Act section 13 speaks of easements of necessity and quasi easements. It takes care of a situation when one person transfers or bequeaths Immovable property to another and secondly where there has been partition of a joint property between several persons. Acquisition of easement by prescription is spoken to in section 15 thereof. What is relevant for our purpose is what is sought i.e. right of way claimed by plaintiffs acquired by way of prescription. Part of section 15 reads : "..... and where a right of way or easement has been peaceably and openly enjoyed by any persons claiming title therein as an easement as and of right without interruption for 20 years."

Section 22 speaks of the confinement of exercise of easement by a dominant owner in the mode which is least onerous to a servient owner and when the

exercise of easement can without detriment to the dominant owner be confined to a determinate part of servient heritage such exercise shall, at the request of the servient owner be so confined. The extent of easement is spoken to in section 28. It suggests that in the absence of evidence as to a clear intention and purpose a right of way of one kind does not include a right of any other kind.

6. Having surveyed these provisions of the Indian Easements Act what therefore stands out is that when a party claims acquisition of an easement by prescription, qua a right of way, he must have not only enjoyed it peaceably and openly but as an easement as and of right without interruption for 20 years. What therefore further stands out is that if a party goes about the property of another even for a period longer than 20 years as long as he has not done it as an easement and as of right, there is no acquisition of easement by prescription. Insofar as the easement of necessity is concerned it is restricted only to cases of transfer and secondly when there is a partition of a joint property. It is therefore common ground that on the facts of this case the original plaintiffs have not invoked the easement of necessity as spelt out in section 13.

7. The acquisition of easement under the Civil Code (Portuguese) is on the same principles, but however to invoke the acquisition by prescription the period stipulated is 30 years, unlike 20 years under the Easement Act.

8. Let me now come to the challenges made in these two revision applications. Mr. Kakodkar, learned Counsel appearing for the petitioners, has however, mentioned that in case he succeeds in Civil Revision Application No. 28 of 1990 then the Civil Revision Application No. 29 of 1990 would be rendered infructuous as nothing will survive in that matter. Civil Revision Application No. 28 of 1990 as mentioned earlier challenges the order made by the Additional District Judge dated 18th January, 1990, whereby petitioners Miscellaneous Civil Appeal No. 131/87 is dismissed and that too despite the dismissal of Miscellaneous Civil Appeal instituted by the original plaintiffs vide Miscellaneous Civil Appeal No. 130/87 and allowing Miscellaneous Civil Appeal No. 157/87 filed by the original plaintiffs which challenged the order modifying the earlier order by the trial Court. These two matters are argued at length before me and several questions have been raised which, if decided, may have a telling effect on the merits of the suit and that is the fear expressed by Mr. Coelho Pereira for the original plaintiffs. Mr. Kakodkar indeed stated that there can be no apprehension whatsoever on this count because the Court would decide the matters on prima facie findings. I am painfully aware that I am hearing revisions in interlocutory matters. I would therefore restrict myself to what is required to be gone into for prima facie considerations and needless to say that the trial Court will decide on the merits advantageously after recording full-fledged evidence led by the parties. The contention of the petitioners now is that once the trial Court rejected the application for temporary injunction and/or mandatory relief by the order dated 16th September, 1987, and the Appellate Court having dismissed Miscellaneous Civil Appeal No. 130/87 on 28th June, 1988, it was not open to the learned

Additional District Judge to re-open the case of the original plaintiffs and bestow relief in their favour by dismissing the Miscellaneous Civil Appeal No 131/89 filed by the petitioners and/or allow the Miscellaneous Civil Appeal No. 157/87 instituted by the original plaintiffs. According to him this is a clear jurisdictional error of giving something to the original plaintiffs through the back door, what was not made available to them from the front door.

9. The fact of the matter is while disposing of the interim relief sought by the original plaintiffs on 16th September, 1987, operative part of the order reads thus :-- "Plaintiffs" application for temporary injunction is dismissed. However, the defendants are directed to keep an opening of 1 metre as an access to the plaintiffs to go to the main road and the well in the line shown in green ink in the sketch annexed with the plaint, till the suit is decided on merits. " Undoubtedly, the original plaintiffs felt aggrieved by the dismissal of this application for temporary injunction and that is how they preferred Miscellaneous Civil Application No. 130/87. The further fact remains that appeal was dismissed by the Appellate Court on 28th June, 1988. Indeed an attempt is made by Mr. Coelho Pereira, learned Counsel appearing for the original plaintiffs to point out that it is only sometime before the hearing of this petition that he became aware that the Miscellaneous Civil Appeal No. 130/87 had been dismissed for default on 28th June, 1988. He further stated that in fact all these three appeals were being taken up together for disposal and he was at all times under an impression that no orders have been passed by the Additional District Judge in that appeal . The fact remains that by the impugned order Miscellaneous Civil Appeal No. 131/87 filed by the petitioners and Miscellaneous Civil Appeal No. 157/87 filed by the original plaintiffs are disposed of together. There is no whisper about the Miscellaneous Civil Appeal No. 130/87, Mr. Kakodkar is right in pointing out that whatever reasons apart, the fact remains that the original plaintiffs' appeal has been dismissed and he is further right when he points out that there is nothing before the Court even today that an attempt has been made to revive that appeal. In any case, it is difficult at this stage to contend that an attempt can be made to revive that appeal dismissed as early as 28th June, 1988. Coming back to Mr. Kakodkar's submissions, I find lot of merit that once the application for temporary injunction was dismissed by the trial Court, the original plaintiff chose to go in appeal and that appeal is dismissed. Can the Appeal Court then grant relief in an appeal preferred by the present petitioners and more so when the only grievance made in that appeal was the legality of the direction for keeping an opening of one metre as an access to the original plaintiffs? The sole controversy therefore was whether that direction for providing one metre of access was at all justified. Mr. Kakodkar next pointed out that from paragraph 8 of the impugned judgment, the trial Court clearly held that the original plaintiff had not challenged the order dismissing the application for temporary injunction filed by the original plaintiffs. This is beyond any pale of controversy.

10. Before I come to the other points canvassed, it is advantageous to refer to certain admitted facts and pleadings. According to the original plaintiffs they are

the occupants of various houses, one beyond the other west of each other and at the back of Survey No. 174/6 and which property is to the north of the petitioners' property bearing survey No. 173/2. It is common ground that the petitioners' property bearing survey No. 173/2 and property bearing survey No. 174/6 are abutting Parra-Anjuna road and divided by a drain. The story of this drain is not complete with this. It is found on the west of the petitioners' property also. In other words, the drain originates somewhere, passes through the western side then from the southern side, then runs eastwards parallel to the Parra-Anjuna road. From the sketch produced by the plaintiffs themselves, it is clear that the first plaintiffs' property is separated from the petitioners' property by that drain and their house lies exactly to the west of the property bearing survey No. 174/6. As mentioned earlier houses of other plaintiffs lie to the west of each other. It has been averred in the plaint itself that the right of way which the plaintiffs have passes from the property of the petitioners for short servient property, thereafter through the drain passing westwards providing access to all the plaintiffs. It is averred that the drain is a public drain. Though all the plaintiffs have claimed right of way from the servient property going westwards through the drain the first petitioner (respondent No. 1 in this petition) has claimed an additional right of easement to draw water from the well existing in the servient property. In other words, the first plaintiff has claimed two easementary rights, one a right of way and the other to draw water from the well, whereas others have restricted themselves merely to a right of way.

11. A question did arise as to why more parties were impleaded on the side of the defendants in addition to the petitioners in the suit. Mr. Coelho Pereira candidly conceded that regard being had to the prayers, namely declarations, they were necessary parties in the suit. If this be so, one fails to understand as rightly contended by Mr. Kakodkar as to why the owners of the public drain are not made parties to this suit. It is urged by Mr. Kakodkar that if passage claimed by the plaintiffs runs through a public drain it is owned either by the Government or by the local Panchayat and therefore non-joinder of the owner of the public drain is fatal to the suit. Neither the existence of the drain nor its public character has been disputed. Mr. Coelho Pereira says that this drain belongs to the Comunidade, but according to Mr. Kakodkar whether it belongs to the Comunidade or the Government by virtue of the provisions of the Village Panchayat Regulations public drains, water passages, etc. vest in the Panchayat. I can only mention at this stage that when the claim to passage is through a public drain the owners of the drain would be a necessary party. The non-joinder by itself may not at this stage be viewed to say that the plaintiffs are not entitled to the reliefs claimed in the present motions.

12. Before however I deal with the right of way across the servient property, let me consider whether there can be any easement for drawing water from the neighbour's property. In the first place, let me make it clear that it is no where the case of the original plaintiff No. 1 that the water drawn from the well lying in the servient property is for the beneficial enjoyment of his dominant property.

Regard being had to the pleadings, it is clear that the water is for the domestic consumption by the plaintiff No. 1 and his members of the family. From the very definition of "easement" it is a right which the owner or occupier of certain land possesses for the beneficial enjoyment of the land. It is therefore clear that consumption of water for domestic use by the person residing in property can by no stretch of imagination be said to be a requirement for the beneficial enjoyment of dominant property. If any authority is needed at this stage, then in my view the decision of *Har Dayal and Others Vs. Chotai and Others*, is sufficient in the matter and regard being had to the definition, in my view, I must record with due respect, my full approval for this authority.

13. What therefore remains in the field insofar as the plaintiff No. 1 is concerned is that at the most he has been drawing water from the well situated in the servient property by tolerance or under licence but it can never be any easementary right.

14. I will now come to the right of way sought. In this connection, in the first place, I would like to remind myself that section 15 of the Easement Act makes it amply clear that to acquire an easement by prescription in respect of right of way it must not only be peaceably and openly enjoyed but as an easement and as of right without interruption for 20 years. Before embarking on further discussion on this matter, the original plaintiffs themselves say in para 1 of the plaint that the servient property is open on all sides. It is therefore clear that it is an open plot. A large number of authorities have been relied upon by Mr. Kakodkar to suggest as to how the courts have viewed no acquisition of easement over an open piece of land in this country in distinction with English view point.

15. Open pieces of land are being freely traversed by members of the public in this country. In the light of the provisions of the Easements Act several matters came for consideration before various High Courts and let us succinctly have a look at them. In the authority of *Ramchandra Trimbak Joshi v. Hari Mortand Joshi*, a Division Bench decision reported in AIR 1929 Bom. 144, on a claim u/s 15 for right of way it is laid down that the user of the right of way to be open must raise presumption that it is to the knowledge of the owner of the servient property and that the owners acquiesced. It also lays down that the Court should consider the right of way, the character of the ground, the steps for which the right is claimed and the relation between the parties and what is more the circumstances under which the user takes place and whether such a user was as of right. What is however interesting is that the observation made in relation to the open lands in this country cannot be overlooked which are to this effect :

"In a country like India where the lands are usually unenclosed, before a right of easement is declared to be established over them, the courts, in my opinion, must require strict proof that the plaintiff has satisfied the requirement of the section. "Referring to the decision in another case *Khoda Buksh v. Rajuddin*, what is extracted cannot be less overemphasized....." having regard to the habits of the people of this country, I do not think that it would be right to draw the same

inference from mere user that would be proper and legitimate in a case arising in England. The question is always a question of fact and the propriety of the rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case but also of each particular country, regard being had to the habits of the people of that country."

In the case of *Siti Kanta Pal and Another Vs. Radha Gobinda Sen and Others*, it has been laid down with reference to section 15 that long user does not prove enjoyment as of right though an enjoyment as of right cannot be inferred as a matter of course from a finding only or for that matter long user. To same effect is the decision of *Harisadhan De and Others Vs. Radhika Prosad Pandit and Others*, .

In the decision of *Salina Jitendra Lal v. Ram Charan*, reported in AIR 1959 Pat. 47 , it is observed that the question that merely because a land was fallow and not cultivated for some time and that there was a user of a pathway over the land by the villagers was held to be not giving the right to a presumption either in law or in fact that such a user by the villagers was as a matter of right. The reasoning which prevailed upon the Division Bench was that in India people view exclusiveness of landed property unlike other countries in the West and it is common for the owners as long as the land is lying waste not to raise objection to passage of strangers or other people. As early as 1959 a learned Single Judge of this Court in the decision of *Tukaram Rajaram Suple and Others Vs. Sonba Chindhu Mali*, , held that having regard to the habits of the people of this country it would not be right to draw the same inference from mere user to give rise to acquisition of easement or raise such a presumption. The Court further observed that it is not in every case of right of way that the Court as soon as the plaintiff leads evidence to prove uninterrupted user of right of way for more than 20 years can straightaway draw the presumption that the user was as of right. A learned Single Judge of the Orissa High Court in the decision of *Lambodar Panda and Others Vs. Ramesh Chandra Panda and Others*, , went a little further and observed that a mere period of long user will not give rise to a presumption as it is common in this country and for that matter even customary that the owner of a piece of waste land would not raise any objection for the passage. When I said that the learned Single Judge went a little further he made an observation that the plaintiff has to establish the user as of right and despite objection from the owner of the servient property. Some more authorities have been relied upon by the learned Counsel which need not be referred to to unnecessarily burden the judgment and suffice at the moment to succinctly record that in this country the owners look upon traversing their property as something not an act of aggression or encroachment as long as they are open pieces of land or waste pieces of land and secondly, a long user for the purposes of crossing over does not raise a presumption that the user has been as of right and this is so despite people making use of the land for a number of years even in excess of 20 years.

16. Mr. Kakodkar now says that in fact there is no cause of action in the suit for

there is no foundation laid for any acquisition of the easement by prescription by the plaintiffs for it is nowhere pleaded that the plaintiffs were making use of the servient property as easement and as of right, so as to crystallize an easement in favour of the original plaintiffs.

17. Mr. Kakodkar says that there is no question of easement of necessity in the present case because the pleadings themselves suggest that the properties are not landlocked and what is more, the trial Judge on inspection, found that the properties of the plaintiffs are not landlocked.

18. It is indeed true that in the judgment of the trial Court the learned Judge on referring to the inspection conducted by him says that the properties of the plaintiffs are not landlocked. This finding in the judgment of the trial Court is said to be not supported by a memo of inspection. A considerable debate has been made over the subject. The fact is and it is common ground that the trial Court inspected the properties but memo of inspection is not found on the record. Placing reliance on various authorities, Mr. Kakodkar urges that despite the absence of memo of inspection, there is no error in relying upon the inspection carried out by the trial Court and secondly if the evidence on record suggests that in fact the properties of the plaintiffs are not landlocked and access from other places available however inconvenient, nothing can be faulted for the absence of the memo of inspection. Mr. Coelho Pereira, learned Counsel has also relied upon a number of authorities to suggest that the trial Court cannot import its own knowledge even when the trial Court has done the inspection for finally it is the memo of inspection which must form part of the records.

19. In my view I need not go into this controversy at all and ignore what is mentioned by the trial Court from its knowledge that the dominant properties are not landlocked.

20. The original plaintiffs insofar as their pleadings are concerned, have stated thus :

"The suit property was open on all sides(para 1). In view of the fact that the suit property abuts on the public road the only access which the plaintiffs have to their respective properties and the shortest access the plaintiffs have to the main road is through the suit property. (The suit property is the servient property).....In fact, the plaintiff is owning a scooter for the last 10 years and since then is using the said access as a motorable. The plaintiff No. 1 in fact has been using the said access for the last more than 50 years through himself and his predecessor in title peaceably, equitably and openly without any interruption and obstruction from anybody. The plaintiff No. 1 has a right over the said access by way of necessity and if not and or has also acquired right over it by prescriptionplaintiff No. 2 is also using the said access through the suit property as indicated in the plan in red shading for the last more than 50 years peacefully, quietly without any objection and without any interruptionThe said plaintiff No. 2 is using the said access through the suit

property as indicated in the plan hereto annexed in green lines by way of necessity and or has acquired right to the suit access by way of prescription(para 2). As far as plaintiffs No. 3 and 4 are concerned it is stated and submitted that the plaintiff No. 3 has a motor cycle. Whenever he uses the motor cycle the said plaintiff goes by another way which exists to the north of their property and connects Almeida Vaddo to Gama Vaddo. The said way also leads to the said main road. The said public road connects Parra-Anjuna. Hereinafter called the suit road. The plaintiff No. 3 however takes his motor cycle through the said way as due to the obstruction which exists in between the suit property and other properties it is not possible for the plaintiff No. 3 to take his motor cycle through the said property The said plaintiffs' property and the suit property separated by a drain which is shown in the plan hereto annexed in yellow but there were steps connecting the said plaintiffs' property to the said drain and the said drain through the suit way. However, the steps are not in existence since a week or so. (para 3)."

21. Plaintiffs annexed a sketch to the plaint and have shown the said way not only from the servient property, but from several other properties to the west and needless to say as averred in the plaint itself that it is almost in a straightline. A peep into that sketch itself suggests that the suit way claimed by the plaintiffs from Parra-Anjuna road at the beginning is not on the extreme southern side of the servient property, though it is undoubtedly on the southern side. However, at the opening of Parra-Anjuna road it leave a greater space in the servient property from the southeast corner but thereafter it is as if it runs westwards nearly in a straightline. It may however, be noted that it is not a sketch to a scale.

22. Both the courts below in the matter of passing impugned orders have relied upon as the orders themselves suggest on a sketch produced by Prazeres A. Gonsalves, a Surveyor, appointed by the present petitioners. A copy of this sketch is produced in these proceedings at page 105 of the paperbook. The survey done by this Gonsalves suggests that the width of the water passage (nullah) or the public drain as called by the original plaintiffs is having a width of 1.28 mts. It candidly shows that three different ways were found 35 cms. in width in the servient property. Obviously, this reference is to what are known as pathways. On a perusal of this sketch and compared with the sketch produced by the original plaintiffs themselves it does not reveal the way as claimed by the original plaintiffs. The pleadings themselves are clear that the plaintiffs' properties are situate beyond the drain which separates the servient property of the petitioners. On all these factors therefore, the trial Court correctly came to a conclusion that there was no prima facie case established and therefore rightly rejected the application for temporary injunction of the original plaintiffs. The original plaintiffs themselves preferred an appeal against that order but for whatever reason that appeal has been dismissed. The learned Additional District Judge in the impugned Order has, in fact, upheld the order of the trial Court mentioning that the original plaintiffs had not challenged the dismissal of their

application for interim injunction though erroneously. Once we have found this, the learned Additional District Judge recorded : "Under such circumstances, I feel that I cannot interfere with that part of the order. However, since I find that the plaintiffs had shown the existence of the suit pathway through the suit property and its use for more than 30 years, as such, the direction by the trial Court to keep one metre opening as an access to the plaintiffs to go to the main road and the well in the line shown in green ink in the sketch cannot be said to be bad."

It is on this basis that the Appellate Court found reason to dismiss the Miscellaneous Civil Appeal No. 131 of 1987. What is however necessary to find out is that the plaintiffs claimed right of way of three metres in width and that was the way which was in fact sought for at the interim stage. No prima facie case in respect of that claim had been made before the Court. Mr. Kakodkar made a considerable quarrel now that the learned Additional District Judge has fallen into the same error which was committed by the trial Court.

23. Mr. Kakodkar now points out that the finding of the learned Additional District Judge about the existence of the pathway is by itself not sufficient to indicate that the plaintiffs have acquired the right of way as an easement as of right even when assumed that the servient property was used by the plaintiffs being an open plot of land. There is great merit and force in this contention.

24. Mr. Coelho Pereira, learned Counsel appearing for the original plaintiffs, says that no case has been made out for any interference presently in these revision applications and even if something can yet be said in favour of the petitioners according to him looking from every angle and regard being had to the findings and fact disclosed, there is no scope for interference in revision. In this connection he presses the decision of *Shah Jagmohandas Purshottamdas and Another Vs. Jamnadas Vrajlal Gandhi and Others*, . Relying upon para 37 of the report, he suggests that the High Court is not bound to interfere in revision in all cases even when it is found that the inferior courts have acted without jurisdiction or failed to exercise jurisdiction or acted illegally or with material irregularity in exercise of their jurisdiction. The report further says if the interference of the High Court will bring about injustice or encourage abuse of the process of the Court or promote mere technicalities without advancing the cause of justice or be futile the High Court will not interfere in revision even though the conditions specified in any of the three clauses of the section are satisfied.

25. Mr. Coelho Pereira now urged that the original plaintiffs have come with a case of easement. As against the same he says the petitioners' case is that there is no easement, but however, they have themselves suggested a way of 0.50 cms. in their sketch placed on record. This position is reflected in the written statement also. He therefore says that if this be the position and as long as the matter in reality required investigation which will be undoubtedly made at the trial, there is nothing to interfere in these cases at this stage. In order to come

out of the predicament that the original plaintiffs' Miscellaneous Civil Appeal No. 130 of 1987 had been dismissed on 28th June, 1988, it is submitted by Mr. Coelho Pereira that as long as the trial Court order has merged with the Appellate Court order, the dismissal of the appeal cannot come in the way. Normally, it is possible for a respondent even to assail in an appeal taken by the opposite party certain findings recorded. Sometimes, it is possible even to give some relief to the respondent in an appeal filed by the opposite party, but I am afraid that in this case the original plaintiffs having taken an appeal against the specific case decided by the trial Court that they have no prima facie case and once their application for temporary injunction had been dismissed, I need not overemphasize that the original plaintiffs could be now permitted to say on the basis of the doctrine of merger that it was open to the original plaintiffs to have got reopened their case in an appeal filed by the petitioners before the District Judge. He also says that so far as the findings are concerned, again the order of the lower Court has merged with the order of the Appellate Court. I will presently point out that even those findings are based on a total misdirection.

26. There was nothing before the learned Additional District Judge to hold that the original plaintiffs had shown existence of the suit pathways and their use for more than 30 years as and by way of easement and as of right. Apart from this, such a thing had also not been pleaded at all. The only question that was required in reality for the Additional District Judge to consider in the appeal filed by the present petitioners that is to say, in Miscellaneous Civil Appeal No. 131 of 1987 was whether the direction for keeping one metre made by the trial Court after the dismissal of the original plaintiffs' application for temporary injunction was legally sustainable and there could not have been any other inquiry about either the establishment of the prima facie case by the original plaintiffs or anything in that direction.

27. Before I go further, I may mention that Mr. Coelho Pereira, learned Counsel for the original plaintiffs, has relied upon a number of decisions to suggest certain propositions, viz. (1) that allegations with regard to cases of easements are required to be investigated at the trial; (2) that apart from the principle of requirement of pleadings to be construed liberally it is permissible to plead easements in alternative; and (3) once the user is established at least for some long time there is presumption that it is by way of and as a matter of right.

28. He also says that there is no need to plead law of easement in the pleadings. Mr. Coelho Pereira has naturally stated so in view of the point raised by Mr. Kakodkar on behalf of the petitioners that the original plaintiffs cannot be permitted to invoke the provisions of the Civil Code (Portuguese) in the present suit. In fact, Mr. Kakodkar had urged that the suit having been filed much after the enforcement of the Indian Easements Act, the case of the parties must be governed by the provisions of the Easements Act. He had secondly contended that if the original plaintiffs were claiming any right under the articles of the Civil Code then they had to specifically state so in the pleadings and lastly he had

contended that when one reads the entire pleadings in this case, it is as if the original plaintiffs have laid their claim by invoking the provisions of the Indian Easements Act. Prima facie I accept this position. A debate was made before me to which I have already made reference earlier qua repeal of the provision relating to easements contained in the Civil Code (Portuguese) as also Mr. Kakodkar's submission that Article 2309 stands repealed although there is no corresponding provision available under Indian Easements Act because it is against the constitutional conscience. I again maintain that it is not necessary to decide this question in this case as also what is saved with the extension of the Indian Easements Act as from 1st November, 1978.

29. The decisions otherwise relied upon by Mr. Coelho Pereira are Sampuran Singh v. Arjun Singh and others, reported AIR 1961 Pun. & Har. 415, Mahadeyamma and another v. M. Nanjappa Setty and others, reported in AIR 1973 Mys. 254 , M. Ratanchand Chordia and Others Vs. Kasim Khaleeli, and Naba Kishore Das and Another Vs. Umakanta Mohapatra and Others, . For the purpose that the servient owner cannot at his choice substitute another way in the servient property he has relied upon the decision of Khandeswar Champati and Others Vs. Gokulananda Jena and Others, .

30. The order made by the trial Court dated 16th September, 1987, was in fact challenged by the original plaintiffs and the present petitioners, the contesting defendants, before the District Court. But soon thereafter the trial Court modified that order at the behest of the petitioners when they moved an application styling it to be under Order XXXIX, Rule 4 of the Code of Civil Procedure. This application was in fact instituted on 23rd September, 1987, and the impugned Order was made on 26th November, 1987, which was challenged by plaintiffs in Miscellaneous Civil Appeal No. 157 of 1988. What did the trial Court do by this Order on 26th November, 1987 is really worth noticing. Whereas by the earlier order the petitioners were directed to keep an opening of one metre as an access to the original plaintiffs to go the main road and the well, within lines shown in green ink in the sketch produced by the plaintiffs, on modifying this order it is shifted to the extreme southern side of the servient property. Miscellaneous Civil Appeal No. 157 of 1987 which was allowed with the result the plaintiffs succeeded, is the subject matter of the second revision filed by the petitioners.

31. Though several contentions have been raised before me I will first look into the genesis of the first order of 16th September, 1987. In my view on a correct interpretation the trial Court on dismissing the plaintiffs' temporary injunction directed the petitioners to keep an opening of one metre as an access to go to the main road and the well. This was obviously so on a concession made in the written statement by the very petitioners and shown in the sketch of Gonsalves to which I have made reference earlier. There is no need to read in the order of the trial Court that this direction was pursuant to any prima facie case made out by the original plaintiffs and this is where the learned Additional District Judge has misdirected himself. I will advantageously transcribe what was stated by the

petitioners in their written statement in paragraph 3 : "These defendants have shown these ways and also the proposed way of about 0.50 cms. which these defendants wish to keep for their own use from the backside of the house in the sketch attached hereto."

The trial Court having made such a direction purportedly based on the concession of the petitioners modified it at their behest a little later and it was shifted to the southern side. It was pleaded in the application for modification that the petitioners would be put to hardship and greatly affected when they were to make their proposed construction. The trial Judge felt that he should modify the order and accordingly he did so. The learned Additional District Judge felt in the appeal taken by the original plaintiffs against this order of modification that the petitioners had not established that the unmodified order, if maintained, would cause undue hardship to them. For that matter, he invoked second proviso to Rule 4 of Order XXXIX of the Code of Civil Procedure. Some authorities have been relied upon by Mr. Coelho Pereira and he contended that nothing new was put before the trial Court by way of changed circumstances by the petitioners so as to enable the trial Court to have modified that order.

32. It is indeed true that the application was styled as an application under Order XXXIX, Rule 4 of the Code and except for the statement that the petitioners would be put to hardship because their proposed construction would be in jeopardy nothing was placed on behalf of the petitioner. Mr. Coelho Pereira also insisted before this Court that it is not the case of the petitioners that they have acquired any licence for construction or that they have got any immediate plan of making any construction. I have considered this matter. In fact, the petitioners had even in their affidavit in reply earlier in opposing the original plaintiffs' application for temporary injunction made it clear that they have proposed a construction of their house for which they have purchased this land. I have already mentioned that the trial Court after having dismissed the application for temporary injunction by the original plaintiffs on the basis of the concession of the petitioners had earmarked a way of width of one metre. This being so, if the petitioners sought modification of that way a little further down on the southern side, in my view there was nothing for the Appellate Court to have interfered with such an order. I fail to understand as to why one should produce licence or say that one has immediate plans of making construction. It is common ground that this suit will take several years before it is finally disposed of and even when the petitioners do not desire to take up the construction just now and even when they have got a future plan it does not mean that they are not entitled to move such an application. I however make it clear that if the original plaintiffs had made out a prima facie case as pleaded by them, then an order could not have been modified so easily but since the trial Court has given the plaintiffs the way based on petitioners' concession, there is nothing to fault with, when the trial Judge felt that he ought to modify the same, as one day or the other the same would come in the way of the proposed construction by the petitioners.

33. I cannot resist but mention what the original plaintiff No. 1 mentioned in the affidavit in rejoinder at page 130 :

"I say that all the other accesses to the house of mine are not motorable and there is no other way to my house as all the land around my house is consisting of uneven levels making the passage of my scooter of vehicle even by way of walk impossible."

Now, it is the case of the first plaintiff that he has bought a scooter about 10 years ago. What right has he established and that too what sort of easementary right? What is still worse the first plaintiff says that he has to get the scooter down the drain and take it up again to approach his property. Though it is mentioned by the plaintiffs that to come to the servient property and on to the public road they have to get through the drain there were some sort of steps to get down and then to get up. He himself says that no such steps were in existence when the suit was filed. Prima facie therefore, there are indications to suggest that there are more ways to approach the public road though they may be perhaps inconvenient and may be furthest.

34. One I have come to the conclusion that the trial Court had directed keeping of one metre as an access to the plaintiffs, based on concession and even when it was modified by the second order dated 26th November, 1987, by bringing it to the southern side of the servient property, there was nothing to fault with such orders. It is for the plaintiffs to establish their case before the trial Court at the trial and needless to say that the trial Court will decide the suit based on the evidence before. I am therefore, inclined to maintain the order of 26th November, 1987, which order modified direction earlier made on 16th September, 1987.

35. The impugned order dated 18th January, 1990, insofar as it dismisses Miscellaneous Civil Appeal No. 131 of 1987 is maintained but for different reasons. The Order in Miscellaneous Civil Appeal No. 157 of 1987 is quashed and set aside. The trial Court Order dated 26th November, 1987, is affirmed. The petitioners have equally suggested they have no objection for the original first plaintiff to draw water from the well. The first plaintiff may do so at his choice. If the petitioners desire to either make a construction of their house or for that purpose want to fill up the well, they are at liberty to seek appropriate directions from the trial Court. Rule is accordingly discharged in Civil Revision Application No. 28 of 1990 and made absolute in Civil Revision Application No. 29 of 1990. Respondents No. 1 to 5 are directed to pay costs.