

**(1980) 02 GUJ CK 0014**

**In the Gujarat High Court**

**Case No :** Civil Revision Application No. 1393 of 1979

Mer Nagajam Aala and Others

APPELLANT

Vs

Punja Kana and Others

RESPONDENT

**Date of Decision :** 22-02-1980

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 5  
Easements Act, 1882 — Section 15  
Evidence Act, 1872 — Section 101

**Citation :** AIR 1981 Guj 141 : (1981) GLR 74

**Hon'ble Judges :** N.H. Bhatt, J

**Bench :** Single Bench

**Advocate :** D. Shukla, for the Appellant; P.V. Hathi, for the Respondent

## **Judgement**

1. This is a revision application by the plaintiffs of the Regular Civil Suit No. 183 of 1976 pending in the Court of the learned Civil Judge, Junior Division, Porbandar. The plaintiffs have filed the said suit for restraining the defendants from burdening their property with the passage to the defendants fields. The suit is one purely for an injunction. The defendants who are the opponents herein have filed their reply to the suit asserting their easement right over the plaintiffs' fields. The learned Trial Judge has, therefore, raised the following issue: -

Whether the plaintiffs prove that the defendants have no right of way through the said land and are trying to create a new right of easement as alleged. The plaintiffs, therefore, gave an application to the learned Judge Exh. 51 requesting the learned Judge that the issue as framed above should be replaced by the issue to the effect whether the defendants proves a right of way as alleged by them.

2. The learned Judge, however, did not agree and by his order dated 9-8-79, rejected that application.

3. It is no doubt true that the party who goes for the court's assistance must

establish its case in order to get the relief prayed for. But in this case, the title of the plaintiffs to their lands is not in dispute. Ordinarily it is the incident of a proprietary right, to enjoy his property without any interference with his right by any of his neighbours. But in all civilized Nations, some such interference is recognised in the form of easement right and the easement right from its very definition is a right to burden another person's property for the more beneficial enjoyment of one's own, Property. From the very nature of things it is evident that the existence of such a burden is the matter of exception and unfettered enjoyment of one's property is the matter of general rule. Whoever wants the court to have the positive fact to be proved in his favour has to make that fact good in a court of law. To put it in a different way, it is the negative proposition from the very nature of things which is difficult to be proved. In a case like the one on hand, the plaintiffs cannot be asked to furnish negative proof about the absence of any right with the defendants. It is therefore, obvious that the defendants have to make good their assertion of the positive fact, namely, the existence of easement right as alleged by them. It is therefore, obvious that the issue framed by the Trial Judge is erroneous and it shows that the illegality is committed by him in exercise of his jurisdiction which, if allowed to stand, would cause miscarriage of justice because, the learned Trial Judge with this issue on record would proceed with the trial with misconception. I, therefore, allow the application Ex. 51 and delete the issue as framed by the learned Judge in accordance with the prayer put forward by the plaintiffs and direct the learned Trial Judge that he shall raise the issue to the effect whether the defendants prove that they have acquired the alleged easement right alleged by them by immemorial user. Rule is accordingly, made absolute with no order as to costs.

4. Rule made absolute.