

(2015) 10 OHC CK 0005
In the Orissa High Court
Case No : FAO No. 217 of 2014

Mideast Integrated Steels Ltd.

APPELLANT

Vs

Khatau Narbheram & Co.

RESPONDENT

Date of Decision : 15-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 6 Rule 17
Easements Act, 1882 — Section 13, 15, 22, 4
Mines and Minerals (Development and Regulation) Act, 1957 — Section 18, 8, 8(3)

Citation : (2015) 10 OHC CK 0005

Hon'ble Judges : Krushna Ram Mohapatra, J.

Bench : Single Bench

Advocate : Sanjeet Mohanty, Sr. Advocate, D. Mohanty, S.C. Samantray, R.R. Swain and S.P. Panda, for the Appellant; Dipak Kumar Dey and C.K. Dey, for the Respondent

Final Decision : Dismissed

Judgement

Krushna Ram Mohapatra, J.—Order dated 31.01.2014 passed by the learned Civil Judge (Senior Division), Champua in CMA No. 45 of 2013 arising out of CS No. 61 of 2013 rejecting an application under Order 39 Rules 1 and 2 of C.P.C. filed by the plaintiff is under challenged in this appeal.

2. Civil Suit No. 61 of 2013 has been filed for declaration and permanent injunction. The dispute is in respect of a 30 feet wide road connecting Roida-I iron ore mines with NH 215 running through the leasehold area of in Roida-II iron ore mines of the sole defendant (for short, "the suit road").

Case of the plaintiff in brief is that defendant was the lessee in respect of Roida-I and Roida-II iron ore mines since 23.01.1953. The said lease was for thirty years, i.e., up to 22.01.1983. First renewal of mining lease was granted in favour of the defendant in respect of both Roida-I and Roida-II iron ore mines for a period of 20 years, i.e., from 23.01.1983 to 22.01.2003. On 16.09.1994, the defendant made an application under Rule 37 of the Mineral Concession Rules,

1960 ("Rules 1960" for short) for transfer of the mining lease of Roida-I iron ore mines in favour of the plaintiff for the remaining period of the lease. On 20.05.1996, the Central Government conveyed its approval for transfer of Roida-I in favour of the plaintiff. Accordingly, the transfer deed in Form "O" was executed between the plaintiff, the defendant and Government of Odisha on 31.10.1996 for the remaining period, i.e., up to 22.01.2003. Clause-6 of the deed of transfer stipulates that all the rights and interests in the original mining lease in respect of Roida-I iron ore mines was transferred to the plaintiff on the same terms and conditions as was prevailing. Before expiry of the period of lease, the plaintiff submitted an application for second renewal on 25.11.2002 under Section 8(3) of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, "MMDR Act") and as per the provisions of Rule 24A(6) of the Rules, 1960, the mining lease was deemed to have been extended. As such, the plaintiff continued to carry out mining operation. It is contended by the plaintiff that in the year 1997, the defendant blocked the suit road which was reported to the Deputy Director of Mines, Joda. Deputy Director of Mines, Joda vide order dated 20.05.1997, directed the defendant to allow access for movement of carriers of the plaintiff on the suit road. Again on 27.11.2013, the defendant attempted to block the suit road disrupting the mining activities and lodged an FIR against the officials of the plaintiff. Hence, the suit was filed for the aforesaid relief. Reiterating the assertions made in the plaint, the plaintiff filed CMA No. 45 of 2013 for an order of temporary injunction restraining the defendant and any other person claiming under it from creating any type of blockage over the suit road and interference with the peaceful use of the suit road by the plaintiff till disposal of the suit.

3. The defendant on appearance filed its show cause though admitting the lease of Roida-I mines in favour of the plaintiff with effect from 31.10.1996, but refuted the existence of the suit road and its use by the plaintiff. It is contended by the defendant that the suit road existed prior to the transfer of the mining lease of Roida-I iron ore mines in favour of the plaintiff, but the same is no more in existence. As the said area upon which the suit road existed is under the operational area to carry out the mining activities as per the mining plan approved by the competent authority, i.e., Indian Bureau of Mines (IBM), access through the operational area of Roida-II mines, as claimed by the plaintiff, is not permissible under law. The defendant further contended that the plaintiff had no access to the suit road through Roida-II iron ore mines at any point of time since the date of transfer made in October, 1996. Though the plaintiff had made a complaint before the DDM, Joda regarding alleged refusal of the defendant for an access of the plaintiff through Roida-II mines in the year 1997, the DDM, Joda only made a request to allow access for movement of carriers through the suit road, since such an arrangement was not viable in terms of the provisions under the MMDR Act as well as the Rules made there under, the request was never heeded to by the defendant. From the date of transfer of the mining lease in favour of the plaintiff in respect of Roida-I iron ore mines, it has been using the

road running from pillar No. 29 to have an access to NH 215, which is apparent from the contentions of the plaintiff in W.P.(C) Nos. 1402 of 2011 and 23722 of 2011 in relation to the user of their existing road and on the basis of such contention and pleadings, interim orders were passed in favour of the plaintiff. It was the further case of the defendant that when the plaintiff faced difficulty in using the road from pillar No. 29 to NH 215 they attempted to construct a road from pillar No. 21-A in Roida-II iron ore mines of the defendant for an approach to NH 215 on or about 06.07.2011, which was objected to by the defendant. The defendant lodged a complaint before the Forest Range Officer and in response thereto a notice to show cause was issued to the plaintiff vide Memo No. 831 dated 21.07.2011. Thereafter, the plaintiff keeping silence over the matter for some time, again on or about 28.11.2013 as well as 16.12.2013 attempted to trespass into the defendant's leasehold area and cause obstruction in the mining activities for which an FIR was lodged against the plaintiff in Barbil Police Station and a criminal proceeding was initiated against the plaintiff. Thus, the defendant claimed that the plaintiff had neither any locus standi nor any cause of action to file the petition for temporary injunction. The same is also not maintainable in the eye of law and facts. As such, the defendant prayed for dismissal of the same.

4. Learned Trial Court while holding that the plaintiff/appellant has prima facie case, came to a conclusion that the question of plaintiff's suffering irreparable loss does arise and the balance of convenience leans in favour of the defendant. Accordingly, he dismissed the petition vide order dated 31.01.2014, which is under challenge in this appeal.

5. Learned counsel for the plaintiff/appellant reiterating the pleadings in the plaint submitted that the Hon'ble Supreme Court in W.P.(C) No. 114 of 2014 held that the provision of deemed renewal in Rule 24A(6) of the Rules, 1960 is not available for the second and subsequent renewals of mining lease considering the language of Section 8(3) of the MMDR Act. Accordingly, vide Gazette Notification dated 18.07.2014, the Central Government amended Rule 24A(6) of Rules 1960 stating that the provision of sub-rule (6) was not applicable to renewal under sub-Section (3) of Section 8 of the MMDR Act. Thus, the deemed extension of Roida-I iron ore mines in favour of the plaintiff came to an end on 18.07.2014. However, the Government of India promulgated the Mines and Minerals (Development and Regulation) Amendment Ordinance, 2015 published in Gazette of India on 12.01.2015 and subsequently, Section 8 of the MMDR Act was amended and it was published in the Gazette of India on 27.03.2015. Section 8A(6) of the MMDR Amendment Act, 2015 provided as under:-

8A(6) Notwithstanding anything contained in sub-sections (2), (3) and sub-section (4), the period of lease granted before the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, where mineral is used for other than captive purpose, shall be extended and be deemed to have been extended up to a period ending on the 31st March, 2020 with effect from the date of expiry of the period of renewal last made or till the completion

of renewal period, if any, or a period of fifty years from the date of grant of such lease, whichever is later, subject to the condition that all the terms and conditions of the lease have been complied with.

Pursuant to the amended provision of Section 8A(6) of the MMDR Amendment Act, 2015, the mining lease in respect of Roida-I iron ore mines stood extended in favour of the plaintiff till 31.03.2020. Accordingly, the State Government granted extension of the period of mining lease in respect of Roida-I mines from 22.01.2003 to 31.03.2020. He further contented that the lease was extended up to 2020 on the same terms and conditions as was in existence on the date of transfer, i.e., 31.10.1996. Thus, the plaintiff has the right to use the suit road for movement of his carrier and for other purposes. The alleged existence of another road from pillar No. 29 was unauthorized and not approved one. The said road proceeds through the reserve forest and this Court vide order dated 29.09.2011 directed the plaintiff/appellant to approach the competent authority for necessary permission to use the said road from pillar No. 29 for access to NH 215. Pursuant to the direction of this Court, Divisional Forest Officer, Keonjhar used to grant temporary permissions for use of that road from time to time. The map attached to the plaint indicates that the suit road is in existence since 1953 as per the land use plan approved by the Ministry of Environment and Forest, Government of India, New Delhi. The said approved road (suit road) existed prior to 30.10.1996, i.e., from 11.11.1994, when the Forest (Conservation) Act, 1980 came into force. Thus, denial of the defendant with regard to existence of suit road is not correct and is contradictory to the approved plan of the year 1994 filed along with the plaint. Learned counsel for the appellant further contented that the learned Trial Court rejected the interim application only on the ground that the plaintiff had admitted of road from pillar No. 29 as the only road to approach NH-215. It is his submission that "a road" means a road lawfully permitted to be used as such. An unlawfully constructed road cannot be treated to be an alternative road in existence. Moreover, prosecution is pending against the plaintiff for such illegal construction of road snatched down near pillar No. 29. As such, the plaintiff has a right of user of the suit road which is existing since 1953 and was being used by the defendant till 1996 and thereafter by the plaintiff. The plaintiff has been using the said road since 1996 as the dominant hereditament over the servient heritage for the beneficial use of enjoyment of the dominant owner. Moreover, in view of the transfer of lease of Roida-I mines in favour of the defendant in the year 1996, which was valid up to 2003, the plaintiff had the right to use the suit road as such for the rest of the extended period of lease, i.e., up to 2003 and thereafter. Clause-6 of Chapter-III in Form-K under the Rules 1960 gives a right of use of road to the plaintiff as that of the original owner. The plaintiff also claims the right of easement over the suit road. Learned counsel for the appellant further contended that Clause-6 of Chapter-III of mining lease deed has its source from Rules 1960. The mining lease deed is a statutory deed and as such the defendant has no right of denying or obstructing the right of way/easement. The right of easement created in favour of the

plaintiff cannot be terminated by the defendant because he is only a lessee and not the owner of the suit road. The plaintiff has no other approved road except the suit road approved by the Ministry of Environment and Forest as per the sketch map attached to the plaint and it only claims to pass through the approved road and not beyond that. Further, defendant had acquired the prescriptive right by long use of the road. The plaintiff has a right to access to NH 215 through the suit road even if there exists an alternate road carved out by it. Learned Court below failed to appreciate that except the suit road, the plaintiff has no other road for access to NH 215 and by not granting right of easement or access to NH 215 through the suit road the entire mining activities of the plaintiff is closed. Three hundred fifty employees of Roida-I mines would be retrenched and the integrated steel plant would be shutdown. Thus, he prayed for setting aside the impugned order as not sustainable in the eye of law and facts.

6. Mr. Dey, learned counsel for the respondent, on the other hand, refuted the contentions of learned counsel for the appellant and submitted that the learned Trial Court has rightly dealt with the matter in detail and passed the impugned order which needs no interference by this Court. It is his case that a mining leaseholder like the present defendant has to carry out the mining operation in accordance with the Approved Mining Plan (AMP) and in the present case, the area of Roida-II iron ore mines of the defendant/respondent upon which the plaintiff claims right of use as a road does not exist and the same is within the operational area of the mining by the defendant as per the AMP and the plaintiff cannot be allowed to use the same as road in view of the provisions of law, more particularly in view of Rule 22A, Rule 27(1)(u) of the Rules, 1960 and Rule 13 of the Mineral Conservation and Development Rules, 1988 (for short, "Rules 1988"), which read as follows:-

"22A. Mining operations to be in accordance with Mining Plans. - (1) Mining operations shall be undertaken in accordance with the duly approved mining plan.

(2) Modification of the approved mining plan during the operation of a mining lease also requires prior approval."

Rule 27(1)(u) of the MC Rules, 1960:-

"Conditions.- (1) Every mining lease shall be subject to the following conditions:

xx xx xx

(u) the lessee shall comply with the Mineral Conservation and Development Rules framed under section 18 ."

Rule 13 of the Mineral Conservation and Development Rules, 1988:-

"13. Mining operations to be in accordance with mining plans:- (1) Every holder of a mining lease shall carry out mining operations in accordance with the approved mining plan with such conditions as may have been prescribed under sub-rule (2) of rule 9 or with such modifications, if any, as permitted under rule

10 or the mining plan or scheme approved under rule 11 or 12 as the case may be. (2) If the mining operations are not carried out in accordance with the mining plan as referred to under sub-rule (1), the Regional Controller or the authorised officer may order suspension of all or any of the mining operations and permit continuance of only such operations as may be necessary to restore the conditions in the mine as envisaged under the said mining plan."

Thus, allowing such an access, as claimed by the plaintiff, is neither permissible under law nor on facts, inasmuch as allowing such an access would result in causing substantial hindrance to the mining operation of the defendant and it would attract penal provision of suspension of mining operation as envisaged under Rule 13(2) of Rules, 1988. Moreover, there cannot be a scheduled road in a mining area. Although declaratory relief of injunction is made in the suit it is not clear as to whether the plaintiff raises his claim for getting the relief prayed for in exercise of right of easement or for enforcement of the terms and conditions of lease agreement. However, the plaintiff is neither entitled to the relief under easement or for that purpose enforcing his right over the suit road under the terms and conditions of the lease agreement. Hence, he claimed that the learned Trial Court has rightly considered the matter from its proper perspective and passed the impugned order, which needs no interference and prayed for dismissal of the appeal.

7. It is not disputed that the defendant was a lessee in respect of Roida-I iron ore mines for a period of thirty years from 23.01.1953 to 22.01.1983. The first renewal of the mining lease in favour of the defendant was granted for a period of twenty years, i.e., from 23.01.1983 to 22.01.2003. The defendant/respondent was also granted lease of Roida-II iron ore mines, which adjoins the northern and eastern part of Roida-I iron ore mines. While continuing as such, the defendant transferred the mining lease in respect of Roida-I iron ore mines in favour of the plaintiff for which the State Government granted approval in terms of Rule 37 of the Rules, 1960. A tripartite deed of transfer dated 31.10.1996 was executed between the defendant as the transferor, plaintiff as the transferee and the Government of Odisha represented through the Collector, Keonjhar. Upon execution of the deed of transfer, the plaintiff stood on the footing of the transferor/lessee, i.e., the defendant, with all rights and liability appended to the said lease in respect of Roida-I mines on and from 31.10.1996 for the rest of the period of lease. Prior to such transfer, the defendant, being the lessee of both Roida-I and Roida-II iron ore mines, for its own convenience had constructed a road for transporting minerals and for other ancillary mining activities from Roida-I mines through Roida-II iron ore mines to get an access to NH 215, which is apparent from the sketch map of 1994 appended to the plaint and relied upon by the appellant in course of hearing of this appeal. Prior to expiry of the lease in respect of Roida-I mines, which was valid up to 22.01.2003, the plaintiff submitted his second renewal application on 25.11.2002 under Section 8(3) of the MMDR Act and in view of the deeming provisions of Rule 24A(6) of the Rules, 1960 (as was existing then) and pursuant to the operation of amended

provisions of 8A(6) of the MMDR Amended Act, 2015, the lease in respect of Roida-I mines in favour of the plaintiff is valid up to 31.03.2020. There is also no dispute to the fact that the plaintiff had filed W.P.(C) No. 1402 of 2011, which was disposed of on 25.01.2011 and W.P.(C) No. 23722 of 2011 (sub judice before this Court), wherein, he has asserted that the only road for access from Roida-I iron ore mines to NH 215 is from pillar No. 29 of Roida-I mines though Sidha Math reserve forest, which is being used by the plaintiff from the date of their mining operation and the suit road was constructed in the year 1964. On the basis of such assertion on oath by the plaintiff, interim order was granted on 29.09.2011 in Misc. Case Nos. 13641 and 13642 of 2011 arising out of W.P.(C) No. 23722 of 2011, which read as follows:-

"As an interim measure, it would be just and proper for this Court to direct the petitioner-company to seek permission from the O.P. No. 4 to transport the raw materials in the road touching the point No. 29 which leads to N.H.-215 as has been shown in the map without affecting the diversion of forest area till the end of October, 2011."

8. During course of argument, learned counsel for the appellant submits that the said road is being used by the plaintiff till date on temporary permissions. It is also not disputed that the plaintiff has come up with a definite case in the suit that the suit road which runs through Roida-II mines is the only road available for access of the plaintiff to NH-215 from Roida-I mines. However, learned counsel for the appellant admitting the same contended that the assertions made in the aforesaid two writ petitions were on a different context and the road which is existing from pillar No. 29 of Roida-I mines to have an access to NH-215 is an un-approved road which runs through the reserve forest for which the plaintiff is facing prosecution. However, Mr. Dey, learned counsel for the respondent strongly refuting such submission alleges that existence of a relevant fact will not lose its relevancy, if made, in different context.

9. The plaintiff specifically pleaded in the plaint as well as in the petition for interim injunction that the plaintiff is using the suit road from the date of execution of the deed of transfer of lease dated 31.10.1996 and the same is the only access of the plaintiff to NH-215. The defendant obstructed the plaintiff from using the suit road for which the plaintiff represented to the DDM, Joda, who in his letter dated 20.05.1997, communicated the defendant stating that the plaintiff has the right and privilege to use the suit road and the defendant should allow free access for movement of carriers through the said road over Roida-II iron ore mines under the provisions of mining lease deed (annexure-3 to the appeal). On perusal of the said letter, it appears that only a request was made to the defendant to allow access for free movement of carriers through the existing road over Roida-II mines under the provisions of the mining lease deed. It is further contended that the defendant again created obstruction on 27.11.2013 and also filed FIR against the officers of the plaintiff for disrupting mining activities of the defendant, for which the suit was filed. The defendant/

respondent on the other hand, strongly refuting such contentions of the plaintiff/appellant submitted that the plaintiff had never used the suit road for movement of its carriers. On the other hand, it only used the road starting from pillar No. 29 to NH-215 for its mining activities. This being the factual dispute can only be adjudicated at the time of trial. However, the fact remains that the plaintiff with prior permission of the Forest Department is using the road starting from pillar No. 29 to have an access to N.H.-215.

10. The appellant strongly relied upon Clause-6 of Chapter-III in Form-K of Rules, 1960, which is the prescribed form of the mining lease deed and claimed that it has a right to use the suit road in view of the terms and conditions embodied in the said mining lease deed. Clause-6 of Chapter-III in Form-K reads as follows:-

"6. The lessee/lessees shall allow existing and future holders of Government licences or leases over any land which is compromised in or adjoins or is reached by the land held by the lessee/lessees reasonable facilities of access thereto:

PROVIDED THAT no substantial hindrance or interference shall be caused by such holders of licences or leases to the operations of the lessee/lessees under these presents and fair compensation (as may be mutually agreed upon or in the event of disagreement as may be decided by the State Government) shall be made to the lessee/lessees for loss or damage sustained by the lessee/lessees by reason of the exercise of this liberty."

11. Mr. Dey, learned counsel for the respondents drawing attention of this Court to the opening words of the said clause submitted that, the words "the lessee/lessees shall allow?" clearly indicate that the claim of the appellant is based on the terms of lease deed and not the deed of transfer (annexure-2 to the appeal). He further submitted that the benefit granted under Clause-6 for access over the leasehold area of the respondent is not an absolute privilege as may be evident from Clause-6 itself since the same is qualified by the proviso thereto. The said proviso has two limbs, i.e., (i) no substantial hindrance or interference shall be caused to the respondent and (ii) a fair compensation (as may be agreed upon by the parties or in the event of disagreement as may be decided by the State Government), shall be made to the lessee for the loss or damage, sustained by the respondent, if any. When no such compensation is agreed upon between the appellant and the respondent and/or decided by the Government for alleged use of the suit road, it is apparent that the said condition was never given effect to. However, it is a matter of adjudication as to whether there was any agreement with regard to compensation, as aforesaid and in that event as decided by the Government as a condition precedent use of the suit road. Thus, Clause-6 of the lease agreement cannot be invoked at this stage for adjudication of this Appeal. Moreover, it is a matter of adjudication as to whether the appellant is entitled to enforce such a condition of the lease deed against the respondent, which is between the State Government and the defendant/respondent in which the respondent is not a party. It is a separate matter that no injunction can be

granted to prevent breach of contract.

In a decision in the case of M.C. Chacko Vs. The State Bank of Travancore, Trivandrum, , the Hon"ble Supreme Court held as under:

"It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract."

Thus, in view of the ratio decided by the Hon"ble Supreme Court (supra), the plaintiff/appellant may not enforce any right whatsoever conferred by Clause-6 of the lease deed against the defendant/respondent as he was not a party to the said lease agreement.

12. Learned counsel for the appellant, also led his claim claiming easement over the suit road. Section 4 of the Indian Easement Act, 1982 read as follows:-

"4. "Easement" defined.- An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners.-The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.- In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon. Illustrations

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household, out of a spring therein. This is an easement.

(c) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(d) A, as the owner of a certain house and farm, has the right to graze a certain

number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees in E's land. These are easements.

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f) A is bound to cleanse a water course running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement."

13. The definition of easement envisages that a right of easement can only be claimed over a piece of land if the servient ownership of which belongs to a person other than the dominant owner. On the basis of the aforesaid provision of law, learned counsel for the plaintiff/appellant resorting to Section 13 of the Indian Easement Act as well as the deed of transfer under Annexure-2 to the appeal memo submitted that since Roida-I iron ore mines is inaccessible except by passing over the suit road over Roida-II mines which adjoins the Roida-I, the plaintiff is entitled to use the suit road for movement of its carriers. Resorting to Section 15 of the Indian Easement Act, 1982, he submitted that the plaintiff/appellant has acquired a right of way over the suit road by prescription. Further, the use of the suit road would not be prejudicial or affect any interest of the defendant/respondent. It is the admitted case of the parties that the appellant started its mining activities over Roida-I iron ore mines on or after 31.10.1996. Thus, by no stretch of imagination, it can be said that the plaintiff has acquired a right of easement by prescription over the suit road as the plaintiff/appellant has not completed twenty years from the date of commencement of his mining work. So far as the right of easement of necessity is concerned, as provided under Section 13 of the Easement Act, it does not fulfill the requirements provided under Clause-(a) and (b) of Section 13. For better appreciation, Clause-(a) and (b) of Section 13 of the Easement Act, 1982 is reproduced hereunder:-

"13. Easements of necessity and quasi easements-

Where one person transfers or bequeaths immovable property to another,-

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or?."

Illustration to Clause-(a) and (b), makes it clear that right of necessity would only arise when the Roida-I iron ore mines becomes inaccessible except passing

over the suit road. It is not disputed by the appellant that in W.P.(C) No. 23722 of 2011, he has taken a specific stand therein that he (appellant) has access to NH-215 from Roida-I mines through pillar No. 29 and the same was the only access and is being used as such from the date of commencement of mining work at Roida-I mines. Learned counsel for the appellant, however, submitted that such a statement on oath was made before this Court on a different context. Mr. Dey, learned counsel for the respondent refuting the same submitted that a statement on oath does not lose its relevancy irrespective of the context for which it is made. Moreover, after rejection of the injunction petition, the plaintiff/appellant filed a petition under Order 6 Rule 17, CPC to incorporate the pleadings to the effect that existence of the road from pillar No. 29 stated in the writ petitions was on a different context. The said application was rejected on 24.09.2014 and remained unchallenged till date. Learned counsel for the appellant does not dispute this factual aspect in course of his argument.

From the discussion made above, it is crystal clear that there is a road existing from pillar No. 29 to NH-215 from Roida-I mines and it is being used as such under temporary permission of the Forest Department as admitted in course of argument. Thus, the case of the plaintiff does not fall under Clause-(a) and (b) of Section-13 of the Easement Act. Section 22 of the Easement Act has no application to the case at hand, inasmuch as use of suit road would be detrimental to the interest of the defendant/respondent as contended by him. However, determination of right by easement needs factual adjudication, which can only be done at the time of trial.

14. The decision in the case of Dalpat Kumar and Another Vs. Prahlad Singh and Others, is a leading case where the principles of grant of temporary injunction has been elaborately discussed. Existence of a prima facie case in favour of the plaintiff-appellant needs no discussion as learned trial court has held that the plaintiff has a prima facie case in its favour while discussing the ingredients of irreparable injury, the Hon'ble Supreme Court held in the case of Dalpat Kumar (supra) that the Court has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages.

15. On a scrutiny of the case of the appellant in the light of the aforesaid principles settled, it is seen that the plaintiff/appellant has an alternative road from pillar No. 29 of Roida-I mines leading to NH-215 available for movement of his carriers and other purposes. Learned counsel for the appellant submitted that at present the appellant is using the road from pillar No. 29 to have access to NH-215 from Roida-I mines on temporary permission of the Forest Department.

When an alternative road is available for the appellant for transport of iron ore materials and movement of carriers from Roida-I mines to NH-215, it cannot be said that the appellant would suffer irreparable injury if the order of injunction is refused.

Next comes the question of "balance of convenience". In the case of Dalpat Kumar (*supra*), the Hon'ble Supreme Court held that the Court, while granting or refusing to grant injunction, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued.

16. It is the admitted case of the parties that the suit road falls within the leasehold area of Roida-II mines leased out in favour of the respondent. The respondent claims that the suit road is no more in existence at present as it falls within the operational area of the mining lease of the respondent as per the mining plan approved by the IBM and deviation from such mining plan would entail prosecution under Section 13(2) of the Rules, 1988 as well as cancellation of the lease. On the other hand, exigency to use the suit road by the appellant does not arise at this stage because he has an alternate road for movement of his carriers and transportation etc. In view of the above, comparative mischief or prejudice is more likely to be caused to the respondent if an order of injunction is granted. Thus, balance of convenience leans in favour of the respondent and not in favour of the appellant.

17. Injunction is a relief of equity and discretion. Thus, he who seeks an order of injunction must come to the Court with clean hand. Though in one hand the plaintiff/appellant has taken a specific stand before this Court in W.P.(C) No. 23722 of 2011 to the effect that Roida-I iron ore mines has approach to NH-215 from pillar No. 29 and it is the only road available to him for movement of his carriers. On the other hand, he comes up with a different case in the suit that the suit road is the only way of approach to NH-215. The pleading in the suit is conspicuously silent about the existence of alternate road from pillar No. 29 of Roida-I mines to NH-215. After disposal of the interim application for injunction, the plaintiff/appellant made an attempt to amend its pleading by incorporating the pleadings to the effect that the statement on oath in the writ proceeding before this Court to the effect that the plaintiff has only approach to NH-215 from pillar No. 29 was on a different context and the said petition was rejected. It is also admitted during course of argument by learned counsel for the appellant that till date the appellant is transporting the materials from pillar No. 29 to the NH-215 by obtaining temporary permission from the Forest Department. Clause-196 of General Rules and Circular Orders, (Civil) Vol.-I (for short "GRCO") provides as follows:

"196. Particulars in the application for injunction to be supported by affidavit- Every application for an injunction must be supported by affidavit. All material facts must be fully and fairly stated to the Court and there must be no concealment or misrepresentation of any material fact."

Thus, all material facts must be fully and fairly stated to the Court by the applicant who seeks a temporary injunction. There must be no concealment or misrepresentation of any material fact. In the case of M/s. Seemax Construction (P) Ltd. Vs. State Bank of India and another, , it has been held as under:

"10. The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking discretionary relief has to approach the court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from court is not entitled to any discretionary relief. The court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the court. Reference may be made to decision in *The King v. The General Commissioners for the purposes of the Income-tax Acts for the District of Kensington, 1917* (1) King's Bench Division 486 where the court refused a writ of prohibition without going into the merits because of suppression of material facts by the applicant. The legal position in our country is also no different. (See: *Charanji Lal and Others Vs. Financial Commissioner Haryana, Chandigarh and Others,*). Reference may also be made to a decision of the Supreme Court in *Udai Chand v. Shankar Lal*. In the said decision the Supreme Court revoked the order granting special leave and held that there was a misstatement of material fact and that amounted to serious misrepresentation. The principles applicable are same whether it is a case of misstatement of a material fact or suppression of material fact."

Thus, there remains no element of doubt that the plaintiff/appellant has not come to the Court with clean hand to seek for a relief of equity and discretion inasmuch as he has suppressed material fact, which was brought to light by the defendant-respondent.

18. In that view of the matter, the appellant fails in all respect to establish a case for grant of temporary injunction in its favour. Thus, I find no reason to interfere with the impugned order. Hence, the appeal fails and the same is accordingly dismissed, but in the circumstances, there shall be no order as to costs.