

(1975) 01 GUJ CK 0007
In the Gujarat High Court
Case No : Second Appeal No. 829 of 1969

Purani Dhirajlal Amritlal

APPELLANT

Vs

Mehta Sankleshwar Aditram and Another

RESPONDENT

Date of Decision : 10-01-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Easements Act, 1882 — Section 15, 4

Citation : AIR 1976 Guj 180 : (1976) GLR 67

Hon'ble Judges : J.M. Sheth, J;A.N. Surti, J

Bench : Division Bench

Advocate : C.M. Trivedi, for the Appellant; J.B. Patel, for the Respondent

Judgement

J.M. Sheth, J.—This appeal is directed against the judgment and decree passed by the learned Assistant Judge, Nadiad, in Civil Appeal No. 108 of 1959, allowing the appeal and dismissing Regular Civil Suit No. 169 of 1957 with costs throughout.

2-5. omitted as per order of Court.

6. The learned Single Judge of this Court, before whom the appeal was placed for hearing, has referred it to the Division Bench and that is why the matter has come before us.

7. Mr. C. M. Trivedi, appearing for the plaintiff -appellant, has urged that even though the plaintiff- appellant, in his plaint, claimed ownership over the suit Chhindi, in law he is entitled to take an alternative inconsistent plea, viz. that he has got an easement right to take air and light through the door and the openings in his back wall abutting on the suit Chhindi and he is exercising such right and making such use from times immemorial. Mr. Trivedi has vehemently contended before us that even in the decision relied upon by the learned appellate Judge, it has been in terms observed that such inconsistent plea can be taken and from the mere fact that ownership was claimed, the Court could not

jump to the conclusion that easement right was not established. He has further contended that this was not a case where right of way was claimed through the suit Chhindi. It was a case of right to take air and light through the door and the openings (Jalis) abutting on the Chhindi. In such a case, mere long user would be sufficient to reach the conclusion that there was a requisite animus. Mr Trivedi has further submitted that the plaintiff-appellant, in his deposition, had stated that he had not stayed in the house for the last several years and the house in question was in occupation of his tenants. Tenants stated about such enjoyment. It could not, therefore, be in the circumstances of the case said that the enjoyment was in the exercise of the rights of ownership and not in the exercise of the right of easement. He has therefore, contended that in the circumstances of the case, the learned appellate Judge was not justified in reaching the conclusion that there was no requisite animus to enable the appellant to get the right of easement.

8. We first propose to refer to the question of law arising in this appeal as the matter has been referred by the learned single Judge to the larger Bench. Probably, it must have been referred to a larger Bench in view of the contrary view having been taken by a single Judge of the Rajasthan High Court in *Shiwpyari v. Mst. Sardari* AIR 1966 Raj 265. Bhandari, J., has observed.

"If a person under a mistaken belief that he has a higher right of ownership over the land of the other which he has in fact not got has been doing for the requisite period of 20 years something which is otherwise sufficient for the acquisition of the right of easement he must be deemed to have acquired such right notwithstanding the fact that in his mind whatever he is doing, he is doing in the belief that he is the owner of the other land though it turns out that he is not the owner of that other land. If the physical acts committed by him are such as to entitle him to acquire the right of easement, the mere fact that he has performed such acts with the consciousness that the other land belonged to him and not to the other person would not operate against him in the matter of acquisition of easement, The case may be different when the physical acts are not being done as of right. for example, what was being done, was being done by virtue of a licence. In such case, he cannot acquire the right of easement because his acts are performed not as of right but because of permission granted to him by the owner of the other land. It is essential that continued user by a person must be in his own right, otherwise he cannot acquire easement in spite of the fact that all along he is doing physical acts entitling him to acquire easement.

In case where the servient owner has property adjoining the one which is subject-matter of suit for easement the mere fact that the dominant owner had asserted ownership to such other property would not defeat his claim for easementary right merely because he had asserted earlier that he was the owner of the other land. In such a case his physical acts if they are of such a nature as to entitle him to acquire the right of easement should be sufficient to grant him the right of easement irrespective of the fact that he was committing these acts considering

himself as the owner of the other land. Animus is of no importance in such a case. But if the user is referable to exclusive possession which a plaintiff had claimed in the earlier suit, he cannot be deemed to acquire any right of easement except under exceptional circumstances."

He has relied upon the decision of the Madras High Court in AIR 1916 Mad 718, (19,07) ILR 34 Cal 51 (FB) and earlier decisions of the Bombay High Court. He has laid considerable emphasis in support of his conclusion, that the definition of easement given in Section 4 of the Easements Act, 1882 (which will be hereinafter referred to as "the Act") cannot be imported to construe that expression *usei* in Section 15 of the Act. At pages 266 and 267, he has observed:

"The view which maintains that animus of the person acquiring easement is to be considered lays emphasis on the words "as an easement" used in the definition of easement given in Section 15 read with Section 4. Support is also drawn for this view from certain observations of their Lordships of the Privy Council in *Attorney General of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd* AIR 1915 PC 131."

Bhandari, J., has thereafter observed:

"In the first place, I may humbly point out, it would not be proper to import the definition of Section 4 while considering section 15. section 15 deals with the acquisition of the right of easement by prescription. section 15 says that if certain conditions are fulfilled, the right of way becomes absolute. Section 4, defines easement as a perfected right i.e. when a particular right has become absolute. The definition of easement in Section 4 speaks of a right which the owner or occupier of a certain land possesses for the beneficial enjoyment of that land (in praesenti) and for continuing to do something (in future) in or upon or in respect of certain other land not his own This section speaks of the existence of the right of easement for the beneficial enjoyment of the dominant heritage on the other land on which the liability is imposed which is called the servient heritage. The definition of easement in Section 4, therefore, clearly contemplates the perfected easement and not an easement if it can be so-called, in the process of acquisition. section 15 deals with the acquisition of the right of easement by prescription. Till the easement becomes absolute u/s 15, it cannot be an easement as defined u/s 4, though the word "easement" finds place in section 15, It, therefore, follows that the definition of easement in Section 4 does not fit exactly in the expression "as an easement, used in section 15.

Nonetheless, it may be conceded that the expression "as an easement" used in section 15 means a limited use by an occupier or owner of one land, in or upon certain other land, not his own, in the manner provided in that section. A person acquiring right of easement u/s 15 must be doing something in the manner provided in section 15 in or upon, or in respect of certain other land not his own for the requisite period of 20 years. Thus, in order that a person may acquire any right of easement, there must be user of another person's land. It must be

open, notorious, uninterrupted and adverse use of land of the other person under a claim of right. In a nutshell, it should be limited adverse use by the owner or occupier of one land, in or upon certain other land, not his own, and of another person for the beneficial enjoyment of his own land,"

At page 270, after referring to the following observations made by the Full Bench of the Bombay High Court in Raychand Vanmalidas Vs. Maneklal Mansukhbhai, :

"To prove that the right was exercised as an easement, it is necessary to establish that it was exercised on somebody else's property and not as an incident of his own ownership of that property, For that purpose his consciousness, that he was exercising that right on the property treating it as somebody else's property, is a necessary ingredient in proof of the establishment of that right as an easement. If a person has actually claimed ownership of the servient tenement in a previous litigation within the statutory period of twenty years it may be regarded as an important piece of evidence to show that he did not exercise that right as an easement.

It is true that the outward indication of the exercise of the right by virtue of ownership and easement may in most cases be the same, but where there is evidence of his previous conduct of the right of ownership, it is for him to show that notwithstanding that conduct he did all the acts of enjoyment of the right as an easement. His conduct is not quite conclusive against him, At the same time it lays a heavy burden on him to prove that his assertion of ownership was not merely untenable but known to be false and inconsistent, with his conduct."

It is observed in para 23 by Bhandari, J. :

"With utmost respect I may observe that while it is necessary that the right of easement must have been exercised on somebody else's land and not as an incident of the ownership of the land by the person claiming the right of easement, such ownership must be reality and not a pretension for ownership. A person may be, under a mistaken belief that he is an owner of an adjoining plot of land or he may be making an unfounded claim of ownership over it, but thereby he does not cease to acquire right of way if the physical acts which he does are sufficient in the eye of law to grant him right of way as an easement acquired by prescription. I have already pointed out that unity of possession stands on a different footing and except under exceptional circumstances, a claim for acquisition of right of easement cannot be claimed, in case of unity of possession."

In para 25, he has observed:

"In my humble opinion, if in the previous suit filed by the plaintiff he did not assert that he was in possession of the land over which he is now claiming easement, his claim for acquisition of right would not be defeated merely because he had asserted earlier that he was the owner of the other land. In such a case his physical acts if they are of such a nature as entitle him to acquire the right of easement should be sufficient to grant, him the right of easement

irrespective of the fact that he was committing these acts considering himself as the owner of the other land. Animus is of no importance in such a case. But if the user is referable to exclusive possession which a plaintiff had claimed in the earlier suit, he cannot be deemed to acquire any right of easement except under exceptional circumstances. If in a previous suit the plaintiff alleged to be in exclusive possession of other land which allegation was found to be untrue in the previous suit. he may show that in spite of his previous allegation of possession he was in fact never in such exclusive possession and he had in fact acquired right of easement over the land." With respect, we may say that the reasoning adopted by Bhandari, J., does not appear to us to be quite sound.

9. Section 4 of the Act falls in Chapter 1 which deals with "Easements Generally", and section 4 defines "easement" as under:

"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. "

It defines "easement" generally Chapter II deals with "The imposition, acquisition and transfer of easements." section 15 falls in that chapter which deals with acquisition of right of easement by prescription. It reads:

"Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, and where support from one person's land or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto, as an easement, without interruption, and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such access and use of light or air, support or other easement shall be absolute."

It is significant to note that this section 15 deals with acquisition of easement by prescription. So far as right of way is concerned, it can be acquired by peaceable and open enjoyment by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years. So far as right of easement to air and light is concerned, access and use of light or air to and for any building has been peaceably enjoyed therewith as an easement, without interruption, and for twenty years, one acquires that right and such right becomes absolute if it is enjoyed as such without interruption and for twenty years. It is thus evident that the expression "as an easement" plays an important role in case of acquisition of right of easement to light and air as well as easementary right of way. The word "easement" is defined in section 4 of the Act, It is difficult to understand how different meaning can be given to that expression "easement" used in section 15 than the meaning that is given by the

legislature by giving a definition clause. It is the right of easement which becomes absolute by acquiring it by prescription as contemplated by section 15.

10. In *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool), Ltd* AIR 1915 P.C. 131, at page 137 it is observed:

"..... With regard to the first point it is maintained that such an easement is unknown to law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors-in-title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the Procession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade. and there is nothing in the purpose for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application. and was so treated in the House of Lords in *Dyce v. Hay* ((1852)) 1 Macq. 305) by Lord St, Leonards L, C.. who observed: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind," But in their Lordships' opinion the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands, There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly, beneficial to the general interest, in no way to be of the nature of wilful appropriation or of trespass but merely by making good and proper use of their right as owners of property abutting upon the sea. An easement. however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. "

11. In *(Pannala) Subba Rao Vs. (Parupudi) Lakshmana Rao and Another*, , a Full Bench of the Madras High Court has in terms held after referring to certain English decisions at page 732:

".....The learned Judges in *Konda v. Ramasawmi*, (ILR 38 Mad 1 : AIR 1916 Mad 718) seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit* to what purported character are the acts of user to be ascribed is one which the Court must answer, and if *Konda v. Ramasawmi* implies the contrary, we think it is wrongly decided. We agree with the conclusion of *Shearman, J., in Lyell v. Lord Hothfield* ((1914) 3 K. B. 911) that acts done

during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact which must be determined in the light of these observations by the Division Bench."

It is also observed by the Full Bench:

"..... It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner however strong evidence such a claim might be against him."

It is thus evident that the Madras decision relied upon by Bhandari, J., of the Rajasthan High Court has been over-ruled by the Division Bench of that Court in the aforesaid decision.

12. In *Raychand Vanmalidas v. Manaklal Mansukhbhai*, 48 Bom LR25 : (AIR 1946 Born 266), a Full Bench of the Bombay High Court has referred to earlier conflicting decisions of that Court and several English decisions and the decisions of other High Courts and Divatia, J. has at page 32, after referring to the English decision in *Lyell v. Lord Hothr field* (1914) 3 K. B. 911, observed:

".....In my judgment the authority of *Chunilal Fulchand v. Mangaldas Goverdhandas* (1892) ILR 16 Bom 592 is not shaken by any subsequent authority of this Court.

It is not necessary to enter into an elaborate enquiry as to whether the law which is laid down in Sections 4 and 15 of the Indian Easements Act was based upon English Common law or upon the English Prescription Act. For the purpose of this case we have to construe Sections 4 and 15 of the Indian Easements Act. section 4 says, among other things, that 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 something, or to prevent something being done upon certain other land not of his own. So that it is necessary that the right must be exercised upon a land which does not belong to the person who is exercising that right, and section 15, which deals with the acquisition of that right, clearly says that the right must be exercised among other things as an easement. In considering this question it is necessary to keep in mind the distinction between a rule of pleading and a rule of proof. That inconsistent pleadings can be pleaded in the alternative is a well established rule of pleading, but the proof of a plea depends on the provisions of substantive law. Therefore, although it is permissible to plead inconsistent, defences in the alternative, such as right of ownership and right of easement, it does not necessarily follow there from that when a person has unsuccessfully pleaded his right of ownership of property in a previous litigation he can in a subsequent suit succeed by merely proving enjoyment of a certain right over the property for the statutory period without also proving the enjoyment of that as an easement u/s 15 of the Indian Easements Act."

These observations underlined by us are a complete answer to the argument advanced by Mr. Trivedi before us, that from mere user for 50 years or so, even though right of ownership was claimed over the suit Chhindi, this right of easement should have been held established. It is further observed by Divatia, J.:

"To prove that the right was exercised as an easement, it is necessary to establish that it was exercised on somebody else's property and not as an incident of his own ownership of that property. For that

purpose his consciousness, that he. was exercising that right on the property treating it as somebody else's property, is a necessary ingredient in proof of the establishment of that right as an , easement. If a person has actually claimed ownership of the servient. tenement. in a previous litigation within the statutory period of twenty years, it may be regarded as an important piece of evidence to show that he did not exercise that right as an easement. It is true that outward indication of the exercise of the right by virtue of ownership and easement may inmost case be the, same; but where there is evidence of his previous conduct of the right of ownership, it is for him to show that notwithstanding that conduct he did all the acts of enjoyment of the right as an easement His conduct is not quite conclusive agamst him. At the same time it lays a heavy burden on him to prove that his assertion of ownership was not merely untenable but known to be false and inconsistent with his conduct. Where there is no such assertion in a previous litigation but alternative pleas of ownership and easement are taken in the same suit, (as in the present case) the election to prove one of the two alternative pleas may be made when evidence is to be led or even after the evidence is over."

It is significant to note that in the instant case, no such election was made when the evidence was led or even after the evidence was over, Question of ownership over the Chhindi, the servient tenement, was fought to the last. Even before the District Court, an attempt was made to raise that question, but it was not allowed to be raised as no appeal was filed against that finding recorded by the trial Court and nc cross objections were also filed. It is further obserVCU UY Divatia, J.:

"The party may contend that though the evidence is not satisfactory to establish ownership, it is sufficient to prove the right of easerrient. In any case it must be shown that the right was enjoyed as an easement, that is as an assertion of a hostile claim of certain limited rights over somebody else's property.

Such an assertion cannot be held proved without satisfactory proof of the requisite consciousness."

It is thus evident that it is in terms stated in this Full Bench decision of the Bombay High Court that the proof of the requisite consciousness is a must. It is further observed by Divatia, J.:

"Prescriptive easement, as opposed to easement by grant, is always hostile. It is in fact an assertion of a hostile. claim of certain rights over another man's

property and as such it resembles in some respects the claim to ownership by adverse possession of property; both are of hostile origin and are, therefore, prescriptive rights obtained by adverse enjoyment for a certain period, the difference being that while in the case of adverse possession the possessor must assert his own ownership, in the case of easement he must assert limited rights of user on a property and acknowledge its ownership in some one else. It must, therefore, follow, in my opinion, that a person who asserts such a hostile claim must prove that he had the consciousness of exercising that hostile claim on a property which is not his own, and where no such consciousness is proved, he cannot prove the prescriptive acquisition of the right."

In our opinion, this decision lays down the correct ratio, if one reads Sections 4 and 15 of the Act together. Furthermore, this decision which has been given by the Full Bench of the Bombay High Court prior to the bifurcation of the bigger Bilingual Bombay State, is binding on this Court. At page 35, Sen, J., has also observed, after referring to the aforesaid Privy Council decision in Attorney General of Southern Nigeria's case (AIR 1915 PC 131) (supra).

"There is in this conclusion a clear reference to the attitude or mental condition of the dominant owner, and that is in consonance with the meaning of the words "as an easement" in section 15 of the Indian Easements Act. That attitude of the dominant owner must involve the consciousness. that the right is over the property of another person, a consciousness obviously inconsistent with a genuine claim of ownership of such property. As Beaumont C J. observed in *Rau Rama Atkile Vs. Tukaram Nana Atkile*, each case must depend on the particular facts proved, but it will be necessary in every case in which acquisition of easement by prescription is claimed to establish that such an attitude or unconsciousness in the dominant owner can be inferred from the circumstances of that case. If such an inference is impossible, for instance, owing to the fact that he had been making definite and bona fide claims of ownership, it would not be open to him to claim an easement."

Weston, J., has very succinctly dealt with this question. He observes:

"The question which arises for our consideration may, I think, be put in these terms:- "Whether a person can be said to establish a right of easement, when it is shown that during part of the prescriptive period this person has exercised the right he now claims as easement, not as a right over the property of another, but as a right over property which at the time he considered to belong to himself?" On the authority of the decisions of this Court and other High Courts, this question would have to be answered in the negative. The observations of the late Chief Justice (Beaumont C. J.) in the two Bombay cases do, however, suggest that the consciousness during the period of prescription on the part of the person claiming the easement that the property over which he claims the easement is the property of another, and not of himself, is entirely irrelevant. The cases of the other High Courts, which have been set out by my brother Divatia, to one of which, *Khanchand Jethamal v. Narandas Pahlajrai* ILR (1939) Kar 307 (AIR 1939

Sind 110) 7 was a party, proceed, except Chunilal. Fulchand v. Mangaldas Goverdhandas (1892) ILR 16 Bom 592, which was a case under the Limitation Act, on the wording of Sections 4 and 15 of the Indian Easements Act, and upon observations in certain English cases, particularly the observations of the Privy Council in Attorney General of Southern Nigeria V. John Holt and Co. (Liverpool), Limited. AIR 1915 PC 131. The important words in the Sections 4 and 15 of the Indian Easements Act are the words in section 15 "as an easement," and that these words should be taken to mean that the person exercising those acts must do so with the consciousness that he is not the owner received substantial support from the observations of their Lordships of the Privy Council in the case referred to above, These are (p. 618):

"An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant. tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other."

I think therefore that there can be no doubt that in this country if the owner of the dominant tenement has during part of the period of prescription exercised the rights which he now claims as an ease ment, under the assertion or belief that he was the owner of the servient tene ment, then his exercise of those rights is not exercise "as easement," and he must fail in a claim to easement.

13. Several other High Courts have also taken a similar view. We need not refer to those decisions in view of the Supreme Court decision in Chapsibhat Dhanjibhai Dand v. Purushottam AIR 1971 SC 1879., it is observed:

".....In Raychand Vanmalidas Vs. Maneklal Mansukhbhai, , it was held that an easement by prescription under Sections 12, and 15 of the Act is in fact an assertion of a hostile claim of certain rights over another man's property and in order to acquire the easement the person who asserts the hostile claim must prove that he had the consciousness to exercise that hostile claim on a property which is not his own and where no such consciousness is proved he cannot establish a prescriptive acquisition of the right. Therefore, if the owner of a dominant tenement has, during the period of prescription exercised rights on the footing that he is the owner but which he later on claims as an easement over a servient tenement, then, his exercise of those rights is not exercised as an easement and he must fail in his claim for an easement " As already stated, a party to a suit can plead inconsistent pleas in the alternative such as the right of ownership and a right of easement. But, where he has pleaded ownership and has failed, he cannot subsequently turn around and claim that right as an easement by prescription. To prove the latter, it is necessary to establish that it was exercised on someone else's property and not as an incident of his own ownership of that property. For that purpose, his consciousness that he was exercising that right on the property treating it as someone else's property is a necessary ingredient in proof of the establishment of that right as an easement."

In para 20, it is observed.

"In his evidence, the appellant did not claim the right of passage or of light and air or of draining his waste and rain water over the said strip of land as rights over the respondent's property. On the contrary, he made it clear that the said strip of land fell under that document of lease. "I have a right on both the properties under the lease deed itself," he declared in his evidence, and added, whatever rights I have acquired are under the lease deed itself and not afterwards . His claim that the strip of land was included in the leased land could not succeed because he had to admit that although two different municipal numbers 94 and 93, were given as early as 1929 to the two portions of the land, 94 to the portion under his possession, and 93 to

that under the possession of the respondent, no complaint was ever made to the municipality or any other authority, that the strip of land which he claimed to be covered under the lease should be included in his plot, namely, No. 94. In 1940, and again in 1955, when transfer deeds in respect of plot No. 94 were executed by him, the area mentioned therein was described as measuring 5182 sq. ft. which would not include the strip of land forming part of plot No. 93. Having thus failed in his claim that the said strip of land was acquired either as accession or as one covered by the lease deed, he could not turn round and successfully claim that he had during the requisite period exercised rights over it on the footing of an owner of a dominant tenement exercising these rights over a servient tenement of another."

Similar is the position in the instant case.

14. In plaint para 5, he claims the suit Chhindi to be of his exclusive ownership and in terms states that to have access of that Chhindi of his exclusive ownership, there was a small door put up. It was from very olden times and it is there It is further stated therein that in his house bearing city survey No. 61,67, in the back-wall of his exclusive ownership, there were two Jalis abutting on that Chhindi of his. They were also from olden times and they are there and that fact is very well known to the defendant and the said Chhindi of his was _ open from the northern side. In para 6 of the plaint also, he reiterates that the said ChhiAdi is of his ownership and it is not purchased by the defendant, and has not been acquired by him in any manner, and though it is very clear that this Chhindi is of plaintiff's independent ownership and of exclusive possession and enjoyment, and the said defendant has no right in that Chhindi except to drop the water of the eaves of the roof of his house, bearing city survey No. ,6178, he has done the acts complained of. Even in para 8 of the plaint, he mentions that before the city survey authority, defendant had wrongly asserted that this Chhindi which belonged to the plaintiff, was of the defendant. Whatever the orders have been passed against him by the city survey officer in respect of the suit Chhindi are not binding on him. In para 9, he also refers to rent-notes wherein also Chhindi has been shown to be of his independent ownership and exclusive possession and enjoyment. He also further reiterates that in the document of purchase of

defendant, Chhindi has not been given to him and he has not purchased it and so, the defendant is estopped from pleading that the suit Chhindi belongs to him. Even in para 14, relief clause, he has asserted that this Chhindi is of his exclusive and independent ownership and he has claimed reliefs, referred to, by us earlier. He has in terms pleaded for the Khas possession of this Chhindi and also claimed that the defendant be restrained permanently from interfering with his possession and enjoyment of the suit Chhindi.

15. As stated even by the Bombay High Court in the aforesaid Full Bench decision, inconsistent pleadings can be taken. Our learned Brother A. D. Desai, J., has held that plaint in the moffusil should be construed liberally, and on perusing paras 5 and 6 of the plaint, he has reached the conclusion that there was such implicit pleading regarding the right of easement claimed on the basis of immemorial user. It is, therefore, not open to us in this second appeal to take any contrary view in that behalf. We, therefore, assume that such a right has been pleaded. Such alternative inconsistent pleas can be taken. But the question is, whether such a claim is proved. For the proof of it, requisite animus is a necessary ingredient. The learned appellate Judge has stated that even in the evidence, plaintiff has claimed ownership over the suit Chhindi. It is significant to note that he has nowhere stated any facts which would show that he acknowledged the ownership of deceased defendant over the suit Chhindi. On the contrary, he asserted his ownership over the suit Chhindi even in his evidence. It is, therefore, difficult, in the circumstances of the case and on the evidence led in the instant case, to reach the conclusion that there was requisite animus which is a necessary ingredient for the proof of the claim in question.

16. We have already stated earlier that in the instant case, election was made by the plaintiff-appellant at time the evidence was to be led. He not make any such election even subsequent to it. He all along up to the last, claimed ownership over the suit Chhindi. Even in the appeal he tried to take up that contention. He was not allowed to take up that contention as he had not filed any appeal or cross objections against the finding recorded against him by the trial Court in this behalf. This is his conduct in this litigation.

17. We are, therefore, of the opinion that the learned appellate Judge was fully justified in reaching the conclusion that this requisite animus having been not established in the instant case, plaintiff-appellant cannot be granted the reliefs on the basis of right of easement, which the trial Court has granted to him. In the course of the hearing of this second appeal, we had pointed out to Mr " Trivedi, appearing for the plaintiff-appellant, and to Mr. J. B. Patel, appearing for the respondent, whether the aforesaid position would hold good even in case, where such right is claimed on the basis of immemorial user and not on the basis of prescriptive right u/s 15 of the Act. Mr. Trivedi has fairly invited our attention to the decision of the Bombay High Court which has taken into consideration this aspect of the case also.

18. In *Chunilal Fulchand v. Mangaldas Govardhandas* (1892) ILR 16 Bom 592, a

Division Bench of the Bombay High Court has observed:

"In order to acquire an easement u/s 26 of the Limitation Act XV of 1877). the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years. Evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negated tend to establish an easement." In the instant case, position is quite similar to it At page 595, Sargent, Kt., Chief Justice, observes:

" ".....But it is plain, from the case the plaintiff made in his suit of 1882, that he never claimed the right to use the Nul, Gutter and Kothi as an easement, but by right of ownership of the land itself, and, therefore, the lower Court of appeal was right in holding that his claim to an easement fails so far not as it is based on Section 26 of the Limitation Act. It appears, from the judgment of the Subordinate Judge, that the plaintiff's pleader also cited *Punja Kuverji v. Bai Kuvar* ((1881) ILR 6 Bom 20) to show that the plaintiff might, according to the decision of the Privy Council in *Maharani Rajroop Koer v. Sayed Abul Hossein* ((1881) 7 IA 240(PC), establish his right to the easement by evidence as to immemorial user. But in that case it would be equally necessary for the plaintiff to prove a user of the Nul, gutter and Kothi as of right as an easement, as distinguished from a right of ownership."

19. Mr. Trivedi has invited our attention to the decision of the Privy Council in *Rajrup Koer v. Abul Hossein* (1881) ILR 6 Cal 394 (PC). The ratio of that decision is only, that it is only in case of prescriptive easement contemplated u/s 15 of the Act, person claiming such easement has to prove that each of the said periods of twenty years is a period ending within two years next before the institution of the suit, where the claim to which such period relates is contested. In case of such easement right based on immemorial user, it is not necessary to prove that the obstruction was caused only within the period of two years next before the date of the institution of the suit. That decision does not touch the question that is posed before us.

20. Mr. Trivedi has invited our attention to the statement of law made by Gale on Easements, 13th edition, at page 162 under the caption "Enjoyment under a mistake." The statement relied upon by him reads:

".....Thus, where A, owning a tenement, claimed as appurtenant thereto the right to cut, litter in a forest on the ground of more than sixty years' enjoyment, the Court of Appeal held that there had been enjoyment as of right, although A had claimed to do the acts of enjoyment under the mistaken supposition that they were justified by an old decree which in the Court's view did not confer the right. The nature of the claim made by the dominant owner when doing the acts of enjoyment was said to be immaterial."

In view of the decision of the Full Bench of the Bombay High Court and the Supreme Court decision, it is evident that for the proof of such easement right, proof of requisite animus is a must.

21. Learned author Katlyar, in his book "Treatise on the Law of Easements and Licences in India", 7th edition, at page 275, comments:

"The onus to prove ingredients are satisfied that the above (while referring to the case of immemorial user) is on the person who claims it. If the evidence does not go beyond the period of the survey record of rights, it cannot be said that the right had been enjoyed for such a long number of years as to raise a presumption that it had a legal origin. The applicability of the rule of English law, that the presumption from long user would be of a right being enjoyed as of right, would depend on the facts and circumstances under which the user takes place, Or the relationship or friendship between the parties and the character of the dominant and servient tenements. Thus, where the claimant first asserts a right of way as an owner and in the alternative claims it as an easement, it would not be right to say that the long user must be as of right as an easement, inasmuch as plaintiff had not succeeded in establishing that the user was as of right. So, the propriety of the rule that the presumption from long user should be that it is as of right must depend upon the circumstances not only for each particular" case but also of each particular country, The Court has to look to the circumstances of each case such as: the nature and character of the servient land, the relation between the parties and the circumstances and the manner in which the user has taken place and then see whether the presumption could be legally drawn."

The aforesaid statement of law is consistent with the statement of law made by the Bombay High Court in Chunilal's case (1892) ILR 16 Bom 592 (supra).

22. In the instant case, plaintiff appellant, in his plaint, has referred to the existence of the door as well as Jalis from olden times and that is, in our opinion, indicating the exercise of the rights as an owner. He has referred to those facts, in our opinion, as incidents of ownership. At the cost of repetition, we may say that even at the trial. he has referred to them as incidents of ownership. He has nowhere stated that the Chhindi in question belonged to the defendant and he exercised these rights over the land of somebody else, i.e., of defendant, and consequently, there could be no question of enjoyment of it as easement. Proof of the most important ingredient of requisite animus is lacking in the instant case. The learned appellate Judge, in our opinion, has, therefore, rightly reversed the decision of the learned trial Judge and has rightly dismissed the plaintiff's suit. In view of the Peculiar circumstances of the case, we are of the opinion that it will be just and proper to order each party to bear its own costs in the appeal.

23. Appeal is dismissed. Each party is ordered to bear its own costs in this second appeal.

24. Appeal dismissed.