

(2015) 09 DEL CK 0048

In the Delhi High Court

Case No : FAO (OS) 367/2013, C.M. Appl. 12397/2013 and FAO (OS) 420/2013,
C.M. Appl. 14516 of 2013

Surabhi Gehlot and Others

APPELLANT

Vs

Swarn Kanta Punj

RESPONDENT

Date of Decision : 18-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(d)
Easements Act, 1882 — Section 12, 15, 4
Transfer of Property Act, 1882 — Section 108, 108(d)

Citation : (2015) 152 DRJ 587

Hon'ble Judges : S. Ravindra Bhat, J;Deepa Sharma, J

Bench : Division Bench

Advocate : Sudhir Nandrajog, Senior Advocate, Amitabh Chaturvedi, Sumit Gahlawat, T.S. Thakraar and Nikhil Bhalla, for the Appellant; Sanjeev Sindhwani, R.V. Saini, Uday and Ayush Arora, Advocates for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J—This common judgment will dispose of two connected appeals, i.e. FAO No. 367/2013, (where the defendant complains that the application for rejection of the respondent's plaint in the suit - I.A. No. 5932/2013 in CS (OS) 3559/2012- was wrongly dismissed) and FAO(OS) 420/2013, (where the ad-interim injunction claimed in I.A. No. 1035/2013 in the said suit was granted). The application for rejection of plaint was dismissed by order dated 08.07.2013 and the temporary injunction was granted by an order dated 06.08.2013.

2. The factual matrix within which the present dispute arises is as follows. Since 1948, one Shri Chaman Lal, and his brother, Shri Swaran Lal's family had been living at 12, Kasturba Gandhi Marg, New Delhi (hereafter the demised premises) as tenants. After the latter's death, his family members continued in possession of the premises and his widow, the respondent in the present matter has been

paying rent to the landlord. Subsequently even after Shri Chaman Lal moved away, and his children were married, the plaintiff continued to reside in the demised premises. In December 2012, the premises were sold by the erstwhile owners to the appellants. The plaintiff alleged that on 14.12.2012, the appellants put up an iron gate at the opening of the passage leading to the demised premises, thereby obstructing her passage to the premises by car and parking the same in the open space adjacent to the demised premises. The defendant/appellants argued that the plaintiff had in no way been denied access or impeded in her approach to the demised premises; only that she cannot access the premises by car and/or park her car in the open space.

3. These developments impelled the plaintiff to file CS (OS) 3559/2012 for a permanent injunction against the appellants restraining them from interfering, in any manner, with the ingress and egress to - and those of her family members, relatives and friends -the premises under her occupation and parking her vehicle in front of/or near the entrance of the premises in the open space as detailed in the plaint. The primary contention of the respondent plaintiff in this regard is that her right to park is a right of easement by prescription by virtue of Section 15 of the Indian Easements Act, 1882 [hereafter "the Act"]. To this effect she filed an I.A. No. 1035/13, seeking an interim injunction that would have the same effect, i.e. restrain the respondents from interfering with her right to park in front of the demised premises.

4. Refuting the plaintiff's alleged right of easement over the open space, the appellant/ defendants filed I.A. No. 5932/13 seeking rejection of the plaint on two grounds (1) that the plaint did not disclose a cause of action and (2) that the reliefs prayed for in the suit are barred by law. The learned Single Judge by order dated 08.07.2013 dismissed the application for rejection of the plaint. He held that from the averments in the plaint, it cannot be said that the plaint discloses no cause of action or that the suit is barred on the aforesaid averments under any law. He agreed with the contention of the learned senior counsel for the plaintiff that the question whether the plaintiff has been parking outside the premises in her occupation as a matter of right and under the terms of the lease between her predecessors-in-interest and the erstwhile owners/landlords or not, shall be decided after the trial during which both sides shall be given the opportunity to lead evidence in support of their respective stands. The learned Single Judge further observed that a bare reading of the plaint does not show that the plaintiff is claiming a decree of injunction simply on the ground that she has acquired an easementary right of parking her car outside the premises under her occupation as a tenant. That is an alternative plea and whether or not she would succeed on that plea is also a matter to be decided after trial. By virtue of order dated 06.08.2013, the learned Single Judge granted the interim injunction claimed by the respondents thereby enjoining the appellants from obstructing in any manner, the respondent's right to park in the open space.

Contentions of parties

5. Mr. Sudhir Nandrajog, learned Counsel for the appellant, contends that the plaint is liable to be rejected on two grounds; namely, Order VII Rule 11(a) -i.e. that it does not disclose a cause of action; and secondly Order VII Rule 11(d), i.e. that it is barred by law, specifically, the Indian Easements Act. He argues that it is not the plaintiff's case that a right to park in the open space was a part of the tenancy, but merely that this right had accrued to her absolutely by virtue of the Indian Easements Act. As a result of this singular ground of claim, he argues that the plaint must be rejected as it is a settled position of law that the right of parking cannot be termed an easementary right. Further, learned counsel argues that the learned Single Judge erroneously allowed the respondent to lead evidence to project that the right to park was a part of the terms of the lease. For this purpose, he draws our attention to the plaint, averring that the plaintiff had never actually argued the terms of the lease as a ground to claim her right. There being no debate as to the principle of law that constrains the leading of evidence to the limits of the pleadings, any relief granted on the basis of such evidence, unsupported by an averment in the pleadings must be set aside. Counsel also argued that the plaint is to be rejected by virtue of Order VII Rule 11(d), namely that the relief claimed by the respondents is barred by Section 12 of the Act and is also against the provisions of Section 4, 12 and 15 of the Act. It was argued, importantly that the judgments in Chapsibhai Dhanjibhai Danad Vs. Purushottam, AIR 1971 SC 1878 : (1971) 2 SCC 205 : (1971) SCR 335 Supp , particularly the following observations:

"If the appellant, and previously his father, were permitted to draw water from that well the use of the well for drawing water and of the strip of land as a passage for going to the well was clearly permissive and not as an open hostile use over the lessor's property. The appellant himself admitted that his father had taken a portion of plot No. 93 on lease paying separate rent therefore at Rs. 45/- a year, and had put up thereon a tin-shed which stood there from 1935 to 1941. It is clear that the strip of land was allowed to be used as a passage both to the well and the said tin-shed. He admitted two letters, dated September 30, 1958 and December 4, 1959, having been written by him to the respondent both relating to rent due, by him in respect of the said land on which the said tin-shed stood. On these facts it is impossible to sustain the right of passage over the said strip of land as an easementary right by prescription for a continuous period of 20 years."

6. Counsel also relied on the subsequent judgment Madan Gopal Bhatnagar Vs. Smt. Jogya Devi and Others, (1978) 10 UJ 373 to say that an easement over land cannot be set up by a lessee against the landlord and that only permissive possession, wherever given can be insisted upon. It is also argued that the plaintiff's claim for accession rights in terms of Section 108, Transfer of Property Act (TPA) independently of easement cannot exist; that situation would arise if the adjacent strip of land is owned or acquired subsequently by the tenant and there is accession over that land. Counsel submitted that Chapsibai Dhanjibai itself is authority for this proposition.

7. It was further argued that the suit averments nowhere set up a claim of exclusive use of the right to park; rather the plaintiff's complaint is that the use permitted by the defendant's predecessor-in-interest has resulted in an obligation to continue granting such permission. It was also argued that there is no term in the lease document which entitles the lessee to claim use of the kind sought in the suit. Impugning the order dated 06.08.2013 granting the interim injunction, the appellants argue that (1) no right of easement can be asserted by a tenant against his own landlord, (2) that a right of access to the said premises can in no way be construed as a right to an easement of parking over the same (3) that the plea of accretion can also not be pressed against the landlord for the simple reason that the plea is with regard to land that already belongs to the appellants.

8. Counsel for the plaintiff argues that even if it is the case of the defendants that claim under Section 15 of the Easements Act must fail, the fact of the matter is that the issue of entitlement of a relief under a statute is entirely different from the issue that the said statute expressly bars the plaintiff from claiming the relief at all; here the appellants rely on Section 12 of the Easements Act, to say that such easement claims are barred by law.

9. Mr. Sanjeev Sindhvani, the plaintiff's learned senior counsel submits that the impugned order of the learned Single Judge should not be interfered with. The merits of the claim in the plaintiff should not be gone into by the court, said the plaintiff's senior counsel, because then the plaintiff would be under a handicap of being denied a chance to rely upon evidence. It was submitted that taken in sum, the totality of the averments in the plaint and the documents filed in support are to be considered. In so doing, in the present case, the plaintiff's case for the relief claimed has been made out.

10. It was next urged that a simple suit for permanent injunction at the instance of someone who is facing a threat of dispossession from the premises in dispute from the landlord in any manner, like in the present suit the defendants have started doing things which shall lead to a situation when the plaintiff shall have no alternative but to vacate the premises under tenancy, is not barred under any law and, therefore, the plaint is not liable to be rejected. The claim for any term entitling the plaintiff to use any land for parking may not be part of a written lease between a landlord and tenant and the absence of a written document of lease placed on record by the plaintiff she can still prove it during evidence when the trial begins that the terms of lease included the right to park the car also at the open space outside her tenanted premises which also formed part of the tenanted premises. Counsel relied upon Section 108(d) of the TPA and the judgment of the Supreme Court to reiterate the applicability of Section 108. It was argued that once the plaintiff's right to sue was recognized, given the long established user of the premises, inevitably the learned Single Judge was bound to exercise judicial discretion in her favour and grant ad-interim temporary injunction to secure the ends of justice, which he did.

Analysis and Conclusions

11. As is evident from the factual discussion, the appellant urged the Court to reject the plaint on two grounds, first, that the suit failed to disclose a cause of action, and second that it was barred by law, specifically by a reading of Sections 4, 12 and 15 of the Indian Easements Act. The Single Judge rejected these grounds stating that the cause of action was based on a claim of a right under Section 15 of the Easements Act as well as averred from the terms of the lease and that these questions must be decided on the merits of the case. Under Order VII Rule 11, the court is under an imperative duty, as evidenced by the words "shall be rejected" to reject the plaint if it falls within any of the categories mentioned under the rule. The court would first address the ground of a lack of cause of action. There are well settled essentials governing the law of rejection of a plaint on the ground that it does not disclose a cause of action. First, a cause of action is a constituent set of facts, a collective reading of which gives rise to a discernible case, irrespective of merit or the chances of the plaintiff's success. All that is necessary is that the averments give rise to a situation which the court must resolve by way of an order or judgment. By definition therefore, an absence of a cause of action is incapable of giving rise to any question of law for the simple reason that there exist no facts that could compound into such a question. Second, it is a matter of settled law (*M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property*, (1998) 7 AD 37 : AIR 1998 SC 3085 : (1999) 1 CTC 175 : (1998) 6 JT 289 : (1998) 5 SCALE 195 : (1998) 7 SCC 184 : (1998) 1 SCR 485 Supp : (1998) AIRSCW 2994 : (1998) 7 Supreme 276 , *Popat and Kotecha Property Vs. State Bank of India Staff Association*, (2005) 4 CTC 489 : (2005) 12 JT 302 : (2005) 7 SCC 510 : (2005) 2 SCR 1030 Supp that the averments of the defendants in relation to the case of the plaintiff should play no part in the determination of the existence of a cause of action. The court must singularly focus on the averments in the plaint and the documents relied upon by them. In those circumstances, if the facts divulged or enlisted do not give rise to a cause of action, the plaint must be rejected. Thirdly, the absence of a cause of action cannot and must not be equated with a bad or weak case. An absence of a cause of action must be akin to an absolute failure to disclose any grievance or claim at all through the facts presented. Probable or even certain rejection or even the perceived weakness of the outcome of the ultimate prayer emanating from the cause of action is not a ground for rejection of the plaint.

12. What the appellant essentially argues is that since it is a matter of well settled law that a right to parking is a valuable right, and not an easementary right, the plaintiff's insistence on claiming it as an easement, makes the plaint liable to be rejected on the ground that there exists no cause of action. Along with the principles stated above, in light of this contention of the appellants, we find it apposite to distinguish between a situation where a question of law has been settled by the courts, where any further case that contains that relevant question will be answered by implementing the doctrine of precedent and a case where no cause of action is disclosed in the plaint. A precedent being developed

or put in place by the courts can never been equated with either a bar to institute a suit which would be covered by the same question of law, or to hold that there is no cause of action. For a plaint to be maintainable is that it must disclose facts which would construct a legitimate question and an actionable lis that the court must decide, irrespective of whether the court will be laying down new a new principle of law while adjudging the case, or simply apply precedent if the facts of the case squarely fall within such precedent's ambit. It is imperative, therefore, to distinguish cases where precedent exists and must be followed and cases where a cause of action is lacking. This Court of the opinion that the plaint in the present case does not suffer from any such infirmity with regard to a cause of action. Therefore, the appellant's submission that the plaint does not disclose a cause of action, is meritless.

13. The second ground urged by the appellants for rejection of the plaint is that the easement claim is barred by Section 12 of the Easements Act. Section 12 of the Easements Act states follows:

"Who may acquire easements: An easement may be acquired by the owner of the immovable property for the beneficial employment of which the right is created, or on his behalf, by any person in possession of the same. One of two or more co-owners of immovable property may as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property. No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, as easement in or the property comprised in his lease."

14. Section 12 is facially not worded in a manner barring a suit by a lessee against his landlord. It merely lists out instances where a legitimate and sustainable case of an easementary right can be brought forth. The respondent plaintiff urges her right to easement of parking by virtue of Section 15 of the Easements Act. Section 15 of the Act states as follows:

"15. Acquisition by prescription

Where the access and use of light or air 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.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

15. The right to easement of parking, if such a right were to exist, asserted as acquired by prescription in the present case, is a particular form of easement. In other words, it is a specific extent of a right of easement. Before the Court can answer whether there is such a specific right of easement of parking over the demised premises, the Court must first answer the more fundamental question, i.e. whether in the present circumstances, any right of easement can arise in the first instance. In other words, the right of an easement of parking presupposes that the core essentials for a valid easement have already been met and satisfied. Even at the risk of stating the obvious, it should be noted at the very outset that Section 15 is only a mode of acquiring an easement. The actual essentials of an easement are mandated by the defining section, specifically Section 4 of the Act. We shall, therefore, first reiterate the essential principles of an easement and then go on to analyse whether in the present conspectus of facts such a right of easement can be successfully claimed.

16. Section 4 of the Easements Act defines an easement 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 servant 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; and land on which the liability is imposed is called the servant heritage, and the owner or occupier thereof the servant 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, or any part of the soil of the servant heritage, or anything growing or subsisting thereon."

17. A right of easement is essentially a right which a person has over land that is not his own, for the enjoyment of land that does belong to him. In *Re Ellenborough Park* [1956] Ch. 131 it was held that the four characteristics of an easement are that (i) There must be a dominant and servient tenement, (ii) an easement must accommodate the dominant tenement, (iii) dominant and servient tenement owners must be different persons and lastly (iv) a right over

the land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

18. Crucially, therefore, there must be a dominant and servient heritage; two separate and distinct areas of land owned by two distinct and separate owners. The essence of an easement is that an encumbrance of sorts is imposed by the owner of the dominant heritage on the land of another, for the enjoyment of his own land. In other words, an easement requires some form of diminution of the natural rights incident to the ownership of an estate of the servient heritage, and that diminution of right must be reflected as a corresponding positive right of the owner of the dominant heritage to effect enjoyment of his land. Logically, therefore, an easement can never be exerted over one's own land. The basic nature of an easement presupposes a derivation of an enjoyment from land that is not the prior entitlement of the person deriving such benefit. Ownership or entitlement, can never co-exist with a claim of easement. There must be an element of acquisition or specifically, an animus of acquisition, for one cannot seek to acquire what is already his. In the present case, the respondent plaintiff has asserted a right of easement over the open space adjacent to the apartment, both being a part of one piece of land owned by the appellant. What the plaintiff asserts as her right was a permissive user, which never entailed questioning the right of the lessor over the entire property. The essential ingredient of hostility (of title to use) and exclusivity was, therefore, absent.

19. In essence, this is a case of a lessee exerting a right of easement over the land of his lessor. In such a case, as has been held in a long line of judgments, no right of easement can be claimed. Since the tenant holds the property through the title of the landlord, he cannot use that same title, to claim an easement by prescription over land the title of which already belongs to the landlord. *Large v. Pitt* (1797) Peake, Add. Cas. 152, *Gayford v. Moffat* (1868) 4 Ch. App. The rationale for this stems from the basic nature of the relationship between the lessor and the lessee. A lessee admittedly holds the land of the lessor for him. The physical possession of the land by the lessee does not in any way effect the rightful ownership of the lessor. In other words, the lessee holds the land by reason of the title of the lessor. In such circumstances, a lessee cannot claim a right of easement over the lessor with respect to land that already belongs to him. Essentially it is a claim exerted over the same owner over his own land, a claim that is wholly at odds with the concept of an easement for the simple reason that in such an event there exists no dominant or servient heritage or tenement. As held in *Gayford v. Moffat*(supra) and *Kilgour v. Gaddes* (1904) 1 K.B. 457 the tenant's occupation is in the sight of the law that of his landlord, and when the tenant goes on to the adjoining land of that landlord he cannot be said to do so as claiming a right in respect of the supposed dominant tenement on behalf of the freeholder, the supposed servient tenement being the freeholder's own land.

20. In *Jeenab Ali Vs. Allabuddin* (followed and reiterated in *Madan Gopal*

Bhatnagar Vs. Smt. Jogya Devi and Others, (1978) 10 UJ 373 and Omprakash Tulsiram and Others Vs. H.J. Leach and Co., (1988) 4 BomCR 97 : (1988) 90 BOMLR 554 : (1989) MhLj 51 it was held that

"A tenant cannot, as against his landlord acquire by prescription an easement of way, in favour of the land occupied by him as tenant over other land belonging to his landlord. But a tenant is settled to a way of necessity over the adjoining land of his landlord".

21. Earlier, in Abdul Rashid v. Brahman Saran (ILR 1938 All 538) a Full Bench of the Allahabad High Court held, while considering Section 12, that the possession of a tenant being in law the possession of his landlord, the tenant cannot acquire by prescription an easement in favour of his holding except on behalf of his landlord. The Full Bench, however, made a distinction between an easementary right of way and an easementary right of light and air mentioned in the first two paragraphs of Section 15 and held that though a lessee of land, who is the owner of the building on such land, cannot acquire by prescription an easement of a right of way or one to flow water over another land of the lessor, so far as the use of light and air or support for his building is concerned he is the owner of the building and may under the first two paragraphs of Section 15 acquire such easements as he would not acquire them for any one except himself under Section 12. This decision was followed in Haji Abdulla Harron v. Municipal Corporation, Karachi (AIR 1939 Sind 39) . In a judgment by a Full Bench of the Allahabad High Court; Udit Singh and Others v. Kashi Ram, I.L.R. 14 All 185 a tenant had alleged that he had acquired by use an easement of right of way over the adjoining land of his landlords. When the landlords sought to build a wall the tenant contended that that would interfere with the right of way claimed by him. He alleged that he was the tenant in occupation of the holding and had by user obtained a right of way against his landlords over the adjoining land. The Court held that:

""it is contrary to common sense that any such right as is here alleged could possibly have been acquired. Such right could only have been acquired, if at all, in respect of the holding occupied by the plaintiff. That holding is the landlord's holding, and they, the landlords, are in possession of it through their tenant, the plaintiff. The plaintiff is not an owner claiming a right in respect of a dominant tenement over another, servient tenement; he is not claiming this right for on behalf of his landlords; but he is claiming it adversely to them, although for and on behalf of their property.""

22. Even the limited exception indicated by the Allahabad High Court, i.e. easement over air or support for building, was held not to exist, by the Bombay High Court, in Ambaram Popat Vankar Vs. Budhalal Mahasukram Shah, AIR 1943 Bom 443 : (1943) 45 BOMLR 795 :

"Then Section 12 directs that an easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created,

or, on his behalf, by any person in possession of the same. That section seems to incorporate the English rule applicable to easements other than easements of light. It provides that an easement can be acquired by the owner, or on his behalf by a person in possession, and no distinction is drawn in that section between easements of light and other easements. The section which draws such a distinction is Section 15, which provides in the first paragraph that "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 in the third paragraph that "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, by or other easement shall be absolute. The first paragraph, no doubt, refers to buildings, because a right to light can only be acquired in respect of a building; there is no such easement known to the law as a right to light or air to an open space. But Section 15 deals with the method of acquiring easements, and not with the persons by whom they can be acquired, which is covered by Section 12, and it seems to me that there is no justification for drawing the distinction which has been created under English law, owing to the difference in phraseology between Section 2 and Section 3 of the Prescription Act. An easement of light, like any other easement, must be acquired, under Section 12, by the owner, or on his behalf, by the person in possession. Therefore, if the lessee acquires a right to light, he acquires it on behalf of the owner, which I think means the absolute owner, and he cannot acquire it on behalf of the owner as against such owner. A man cannot acquire an easement as against himself."

23. Many of these decisions were considered in *Madan Gopal Bhatnagar* (supra) when the Supreme Court held that such easements cannot be claimed by tenants, even if they acquire adjoining property:

"5. Section 15 of the Act deals with the method of acquiring easements.

6. The words "owner...or on his behalf by any person in occupation of the same" occurring in the aforementioned Section 12 of the Act are very significant. They no doubt indicate that it is the owner of an immoveable property or a person in occupation of such property who can acquire an easement but it is to be noted that the person in possession of immoveable property like a lessee or a mortgagee who is not an owner thereof cannot acquire easement for his own benefit as in that event he would be violating the provisions of Section 12 which clearly interdicts the acquisition of an easement by a lessee or a mortgagee for his own benefit. As in the instant case, the appellant was not an owner but only a lessee of the immoveable property at that time he is alleged to have commenced using the adjacent land belonging to his landlord as a passage or as a means for discharging waste water, he can not tack the period during which he was using the by or discharging the water on the other land of his land of his landlord during the period of the lease to the period smarting from the point when he

commenced doing so as an owner. He could, of course, have started prescribing for such easement from February 18, 1970 when he purchased the right of reversion from his lessor but cannot tack on the period of his prior enjoyment as lessee to the period of enjoyment since 1970 when he purchased the right of reversion and became the absolute owner. This conclusion receives support from a number of decisions of the Indian High Court. In *Udit Singh and Ors. v. Kashi Ram* (I.L.R. 14 (1892) All. 185), a Full Bench of five Judges of Allahabad High Court held that a tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as a tenant over the land belonging to his landlord. The following observations made by Edge. G.J. in that decision are worth quoting :

I should point out that the tenant does not allege that his holding had at the time it was let to him the right of way in question as appurtenant to it, nor does he allege that the landlords granted any such right of way as appurtenant to the holding, nor again does he allege that the way claimed was what is known in law as a way of necessity he merely alleges that he as the tenant in the occupation of his holding had by user obtained a right of way against his landlords, over their adjoining land. In my opinion it is contrary to common sense that any such right as is here alleged could possibly have been acquired. Such right could only have been acquired, if at all, in respect of the holding occupied by the plaintiff. That holding is the landlords' holding, and they, the landlords, are in possession of it through their tenant the plaintiff. The plaintiff is not an owner claiming a right in respect of dominant tenement over another, servient, tenement; he is not claiming this right for or on behalf of his landlords; but he is claiming it adversely to them, although for and on behalf of their own property. The law, as conceived it to be, was very concisely put and illustrated by Lord Cairns in his judgment in *Gayford v. Moffatt* (L.R. 47 Cn A 133) *Tim* was a case in which a tenant was claiming a right of easement over his landlord's property as a right acquired by the tenants not granted by the landlord Lord Cairns said But it is not necessary to examine the user, for this reason, that if there is a person to whom the owner of two closes has demised one of them, and if in order to get at that one there is a necessity to cross the other close which was not demised, and if, in the course of years, from the circumstance that the landlord had no particular occasion to the close for any other purposes, of that he was not strict in obliging his tenant to adhere strictly to the way, he had allowed the tenant for his convenience occasionally to make deposits of this kind on other parts of the close, still it is utterly impossible that by such a course of proceeding the tenant as against his landlord could acquire any enactment whatever.

9. In *Doma v. Ragho* (I.L.R 1917 Nag. 254). it was held that no easement by prescription can be acquired by a tenant against his landlord

10. Again in *Girdhar Singh v. Gokul* (1975 Raj. L.W. 299), it was held that a tenant cannot acquire a prescriptive right of easement in land or well belonging to the landlord.

11. In view of the foregoing, we have no hesitation in holding that the High Court was right in disallowing the claims of the appellant and restoring the decision of the trial court in reversal of the decision of the lower appellate court"

24. In the present case, the land over which the respondent plaintiff has claimed her right to easement is land which belongs to the appellants, her lessor. In such circumstances, the case falls squarely within the law as expounded by the cases above. It is, therefore, irrelevant for how long the respondent has parked her car in the demised premises. Having held that the essential requirement for a right of easement, i.e. there must be a dominant and servient heritage, owned by two different persons is a requirement that is not met in the present case, we hold that the respondent has no easement of way, much less an easementary right of parking.

25. As far as the right to accession, under Section 108 TPA is concerned, the Court is of opinion that like in Chapsibai Dhanjibai, the question of accession does not arise. Firstly, there is nothing in the wording of Section 108 indicating that accession to land can be independently enjoyed by the tenant. Accession means something "acquired or added". Following the thread of reasoning in respect of easement, as long as there is an accretion or accession to the lease, i.e. use of adjoining land or use of something adjoining the demised premises, the tenant's use in praesenti inures only in favour of the lessor/landlord.

26. There is however, still a pressing need to at this point, to differentiate between the right of the plaintiff to access to her apartment, or her right of way to her apartment or the demised premises and a right of easement, whether by parking or any other manner with respect to the demised premises. A tenant is entitled to only such rights that would be reasonably necessary for the enjoyment of the tenancy. Having held that the right to park is not an easementary right in the circumstances, we also make it clear that such a right, in the absence of any inclusion as part of the terms of the lease cannot be read into the lease as an implied term of the tenancy. The appellants are not wrong when they state that the right to park is indeed a valuable right which cannot be assumed to be a part of the lease unless expressly stipulated under it. A previous judgment of this Court in Shri Akesh Kumar Jain and Another Vs. Shri Harmeet Singh Bakshi and Another, (2001) 59 DRJ 734 has no doubt held to this effect. The court in that case held:

"The analysis of the aforesaid legal position would show that the tenant would be entitled to only such rights that would be reasonably necessary for the enjoyment of the tenancy. The question is whether the requirement of parking a car in the drive way be considered as an implied term or a right of enjoyment of the tenancy? In our view the answer to the same is in the negative."

That being said, this judgment, however, may not be read in a manner as to preclude the right of the plaintiff/respondent to access the demised premises by foot. This right, however, though integral to the enjoyment of the property

rightfully leased to is not be equated to a right to easement of way. This right must be read into her lease agreement as a necessary concomitant of her right of enjoyment of the property. To hold that her right of way to access the demised premises is subject to the whim of the owners of the property may give rise to rather incredulous results, while rendering the lease agreement and her right to reside in the property obsolete. It was not disputed during the hearing that such right of access to the demised premises, ie entry into the premises exists. As a result we hold that while the plaintiff has a right to access the premises, there is no easementary right to park her car in the demised premises.

27. The above reasons would also apply squarely to the defendant's appeal against the ad-interim injunction order issued against her. Consequently, both appeals, i.e. FAO (OS) 367/2013 and FAO (OS) 420/2013 succeed; the plaint in the suit, CS (OS) 3559/2012 stands rejected. The order dated 06.08.2013 granting interim injunction is thus set aside. Both appeals are allowed. No costs.