IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

SECOND APPEAL No. 430 of 1997

Between:-

GULAB CHAND TAMRAKAR (DEAD) BY Lrs.:

1(A) SMT. RAMKUAR BAI, AGED ABOUT 65 YEARS WIDOW OF GULAB CHAND TAMRAKAR

1(B) MAHESH KUMAR TAMRAKAR (DEAD) BY LRs.:(a) SMT. NAVITA TAMRAKAR AGED ABOUR 42 YEARS WIDOW OF MAHESH KUMAR TAMRAKAR(b) KU. SHIVANGI TAMRAKAR AGED ABOUT 13 YEARS(c) KU. SHIVANI AGED ABOUT 11 YEARS

NO.(b) AND (c) BOTH DAUGHTERS OF MAHESH KUMAR TAMRAKAR, BOTH MINOR THROUGH GUARDIAN MOTHER SMT. NAVITA TAMRAKAR, ALL RESIDENT OF FUTERA WARD NO.3, DAMOH (M.P.)

1(C) CHIMANLAL TAMRAKAR, AGED ABOUT 40 YEARS S/O GULAB CHAND TAMRAKAR

1(D) BALDEO PRASAD TAMRAKAR, AGED ABOUT 30 YEARS S/O GULAB CGAND TAMRAKAR

1(E) KUMARI SARLA TAMRAKAR, AGED ABOUT 32 YEARS DAUGHTER OF GULAB CHAND TAMRAKAR

1(F) SMT. MUNNI BAI (DEAD) BY LRs.(a) CHHOTELAL TAMRAKAR, AGED ABOUT 50 YEARS S/O JHUMAL LAL(b) KU. MANJUSHA, AGED ABOUT 14 YEARS(c) KU. MEENA, AGED ABOUT 12 YEARS

NO. (b) AND (c) BOTH MINOR DAUGHTERS OF CHHOTELAL TAMRAKAR, THROUGH GUARDIAN FATHER CHHOTELAL TAMRAKAR.

NO.(a) TO (c) ALL RESIDENTS OF KHURAI, TAHSIL KHURAI, DISTRICT SAGAR

1(G) SMT. GAUTRI BAI, AGED ABOUT 35 YEARS, DAUGHTER OF GULABCHAND TAMRAKAR AND WIFE OF KAILASH CHAND TAMRAKAR, RESIDENT OF CURJI, TAHSIL SIHORA, DISTRICT JABALPUR (M.P.)

.....APPELLANTS

(BY SHRI PRATEEK RUSIA, ADVOCATE)

AND

BHUSHAN (DEAD) BY Lrs.

1A. SMT. GEETA RAWAT, WIDOW OF LATE BHUSHAN PRASAD RAWAT AGED ABOUT 60 YEARS

1B. PRASANT RAWAT, AGED ABOUT 33 YEARS, SON OF LATE BHUSHAN PRASAD RAWAT

1C. NISHAN @ SHYAM RAWAT, AGED ABOUT 30 YEARS, SON OF LATE BHUSHAN PRASAD RAWAT

ALL ARE RESIDENT OF FUTERA WARD NO.3, DAMOH TEHSIL & DISTRICT DAMOH

1D. SMT. NEETU RAWAT, AGED ABOUT 35 YEARS, D/O LATE BHUSHAN PRASAD RAWAT, R/O PATARIYA, DISTRICT DAMOH

1E. SMT. RASHMI RAWAT, AGED ABOUT 34 YEARS, D/O LATE BHUSHAN PRASAD RAWAT R/O SAGAR

1F. SMT. JYOTI RAWAT, AGED ABOUT 32 YEARS, D/O LATE BHUSHAN PRASAD RAWAT R/O PATARIYA DISTRICT DAMOH

1G. ITI @ SAWATI RAWAT, AGED ABOUT 28 YEARS, D/O LATE BHUSHAN PRASAD RAWAT, DAMOH

.....RESPONDENTS

(BY SHRI SUSHANT RANJAN, ADVOCATE ON BEHALF OF SHRI RAVI RANJAN, ADVOCATE)

Reserved on : 04/08/2022
Passed on : 16/08/2022

This appeal coming on for final hearing this day, the court passed the following:

JUDGMENT

This second appeal had been filed by appellant/defendant- Gulab Chand (now represented by the legal representatives) challenging the judgment and decree dated 29/01/1997 passed by Third Additional District Judge, Damoh in Civil Appeal No.17-A/1996, whereby confirming the judgment and decree dated 20/02/1996 passed by First Civil Judge Class-II, Damoh in Civil Suit No.46-A/1992, whereby suit for permanent injunction filed by the respondent/plaintiff -Bhushan (now

represented by the legal representatives) was decreed holding the passage in question to be a public passage.

2. In short the facts of the case are that the original plaintiff-Bhushan Prasad instituted a suit for permanent injunction regarding the passage in question alleging that the plaintiff and other residents are using the passage in question for a period more than 100 years and the plaintiff has acquired right of easement by prescription. It is alleged in para 4 of the plaint that the pavement (Pharshikaran) of the disputed passage (Kuliya) was done 25 years ago by erstwhile Nagar Parishad, Damoh. On inter alia allegations, the suit was filed for restraining the defendant from making any interference in the plaintiff's use of the passage in question by raising construction or otherwise.

3. The defendant/appellant appeared and filed written statement denying the plaint allegations and contended that he is owner of the dispute passage (Kuliya), which he purchased from predecessor-in-title namely Banbihari Choubey and the plaintiff is not in use of the said Kuliya. Accordingly, the suit was prayed to be dismissed with exemplary cost of Rs.1,000/-.

4. On the basis of pleadings, learned trial Court framed as many as four issues and recorded evidence of the parties. After considering and appreciating oral as well as documentary evidence of both the parties, learned trial Court vide judgment and decree dated 20/02/1996, held that the passage (Kuliya) in question is a public passage and is being used by plaintiff and other persons. However, it was also held that the plaintiff has not acquired right of easement by prescription. Upon appeal filed by the

appellant/defendant, learned first appellate Court vide its judgment and decree dated 29/01/1997 affirmed the judgment and decree of trial Court.

5. This second appeal was admitted by this Court on 29/06/1998 on the following substantial questions of law:-

> *(a) Whether the Courts below wrongly travelled beyond pleadings and held that the suit land is a public passage while it was never pleaded by the plaintiff that it is a public passage?*
>
> *(b) Whether in the facts and circumstances of the case, the plaintiff has failed to establish his claim for right of way over the suit land and grant of permanent injunction?*

6. Learned counsel for the appellant submits that the Court cannot travel beyond the case pleaded by parties and there is no specific pleading in the plaint to the effect that the suit land is a public passage and he further submits that in view of the finding to the effect that the plaintiff has not acquired right of easement by prescription, the learned Court below has erred in granting decree of permanent injunction in his favour. He contends that the second appeal be allowed.

7. Learned counsel for the respondent submits that there are sufficient pleadings in the plaint that the passage (Kuliya) in question is a public passage and is being used by plaintiff and other persons for a long period. The pavement of it was got done 25 years ago by erstwhile Nagar Parishad, Damoh. He submits that after considering the evidence led by parties, the learned Courts below have rightly decreed the suit and granted decree of permanent injunction and in the second appeal re-appreciation of evidence is not permissible. With these submissions, he prays for dismissal of the appeal.

8. Heard learned counsel for the parties and perused the record.

9. From bare perusal of the plaint allegations, it is clear that although there is no specific pleading regarding the nature of disputed land to be a public land/passage but in para 2 of the plaint, the plaintiff has specifically alleged that the plaintiff and Durga Prasad Rawat are in use of the Kuliya for a long period and in the khasra of year 11-12 (i.e. the year 1911-12) (Ex.P/1) there is entry of Kuliya, from which Girdhari Mithya repairs his wall and pakhana of other persons is being cleaned, as such the disputed Kuliya is in use of the plaintiff and his ancestors for a period more than 100 years. In para 4 of the plaint, the plaintiff has pleaded that the pavement of the disputed passage (Kuliya) was got done 25 years ago by erstwhile Nagar Parishad, Damoh.

10. In the Municipal Corporation Act, 1956, public street has been defined under Section 5(49), as under:-

> *49. "**public street**" means any street-*
>
> *(a) over which the public have a right of way; or*
> *(b) which have been heretofore levelled, paved, metalled, asphalted, channelled, sewered or repaired out of municipal or other public funds; or*
> *(c) which under the provisions of this Act becomes a public street;*
>
> *and includes-*
>
> *(i) the roadway over any public bridge or causeway;*
> *(ii) the footway attached to any such street;*
> *(iii) public bridge or causeway, and the drains attached to any such street, public bridge or causeway.*

11. Learned trial Court and first appellate Court have after appreciating the documentary evidence as well as oral testimony of plaintiff and defendant's witnesses including the statement of Court Commissioner found that the passage (Kuliya) in question is being used by plaintiff as well as other persons for a long period and held that it is a public passage having pavement, which was not got done by the defendant's ancestors because there is no door or way of the defendant towards disputed Kuliya.

12. The Supreme Court has in the case of ***Ram Sarup Gupta (Dead) By LRs vs. Bishun Narain Inter College & Ors AIR 1987 SC 1242*** considered a Constitutional Bench's decision in the case of ***Bhagwati Prasad Vs. Shri Chandramaul AIR 1966 SC 735*** and held as under:

> ***6.*** *The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by S. 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should*

not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad v. Shri Chandramaul, (1966) 2 SCR 286: (AIR 1966 SC 735) a Constitution Bench of this Court considering this question observed (at p. 738 of AIR):

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

13. Similarly in the present case in spite of deficiency in the pleadings, both the parties knew the case of each other, proceeded to trial and led evidence, then the evidence which has come on record cannot be ignored for want of specific pleadings. As such even if there is no specific

pleading regarding nature of land to be a public passage, it cannot be said that the land in question is not a public passage and at the stage of second appeal it is not open to the appellant to raise the question of absence of pleadings. As such in my considered opinion, the learned Courts below have not committed any error in holding the disputed land (Kuliya) to be a public passage. As such the **substantial question of law no.1** is decided against the appellant and in favour of the respondent.

14. As the learned Courts below have held that the passage (Kuliya) in question is a public passage, therefore, the plaintiff has vested right to use the same and he is not required to seek any declaration of easementary right. Further, the plaintiff having vested right over the public passage, has right to seek permanent injunction restraining the defendant from making any interference in free use of it and having found the same established, the learned Courts below have rightly granted decree of permanent injunction in favour of the plaintiff/respondent. As such the **substantial question of law no.2** is also decided against the appellant and in favour of the respondent.

15. Resultantly, the second appeal deserves to be and is hereby **dismissed.** However no order as to costs.

(DWARKA DHISH BANSAL)
JUDGE

RS

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