IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No. 353 of 2006.

Reserved on : 19th July, 2016.

Decided on :29th July, 2016.

Krishan Chad **…..Appellant/Plaintiff.**

Versus

Shri Ram Lal and Others **….Respondents/defendants.**

Coram:

***The Hon'ble Mr. Justice Sureshwar Thakur, Judge*.**

Whether approved for reporting?[1] *. Yes.*

For the Appellant: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashishta, Advocate.

For Respondent No.1: Mr. Neeraj Gupta, Advocate.

For Respondents No.2 to 4: Nemo.

Per Sureshwar Thakur, Judge.

The plaintiff's suit for permanent prohibitory injunction for restraining the contesting defendant from interfering with his possession qua the suit land stood decreed by the learned trial Court. However, in an appeal

[1] Whether reporters of the local papers may be allowed to see the judgment?

preferred therefrom by the contesting defendant before the learned first Appellate Court, the latter Court reversed the judgment and decree rendered vis-a-vis the plaintiff by the learned trial Court. In sequel, the plaintiff stands aggrieved by the judgment and decree rendered by the learned first Appellate Court whereupon he is constrained to assail it by instituting the instant appeal therefrom before this Court.

2. Briefly stated the facts of the case are that the suit land comprised in Khasra No. 410min sabik and Khasra No.61 hall, measuring 0-25-85 hectares, situated in Chak Hanstari, Sub Tehsil, Tikkar, District Shimla, H.P. is recorded in joint ownership of the plaintiff and proforma defendants. The suit land is in exclusive possession of the plaintiff for the last more than 30 years on the basis of private partition. The plaintiff has been cultivating the land exclusively, sowing crop regularly and also raised an apple orchard over the land, which is more than 12 years of age. Defendant No.1 is trying to interfere in the peaceful possession of the plaintiff by damaging the crop and tying to dispossess the plaintiff from

the suit land. The defendant made an attempt to tres-pass over the suit land without any legal right, title or interest. Hence the suit.

3. Defendant No.1 contested the suit and filed the written statement, wherein preliminary objections have been raised qua resjudicata and estoppel. On merits, defendant No.1 admitting the fact of the plaintiff cultivating and growing the crop over the suit land averred that the defendant has a path to his field situated over khasra No.67 through his land comprised in khasra No.s 42 and 41, over which residential house of the defendant was situated and the said passes through the suit land. The apple orchard of the defendant over khasra No.67 was more than 30 years old. The defendant has been using the path for the last more than 35 years though the suit land was growing crops, maintaining his apple orchard thereon and after harvesting the crop to bring the same and has acquired the right of easement of necessity and custom. There was no alternative path for the defendant to reach his land khasra No.67. The paths which are used by

the villagers to enter their fields are not the recorded paths. The plaintiff has take the similar plea in earlier suit No.156/1 of 96, 140/1 of 98 and the Sub Judge had vacated ex-parte injunction. The appeal filed by the plaintiff was also dismissed on 16.02.2000. The plaintiff has filed the suit after withdrawing the earlier suit without pleading liberty to file a fresh and to cause irreparable loss and injuries to the defendant.

4. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the defendant is causing interference over the suit land, as alleged?OPP
2. In case issue No.1 is proved, whether the plaintiff is entitled for injunction as prayed for?OPP
3. Whether there exists a path, which is being enjoyed by the defendant over the suit land as alleged?OPD
4. If issue NO.3 is proved, whether the defendant has got right to enjoy the path as claimed?OPD

5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court rendered a decree for permanent prohibitory mandatory injunction in favour of the plaintiff/appellant. In an appeal, preferred therefrom by the defendant/respondent No.1 herein, the learned first Appellate Court allowed the appeal.

7. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 21.12.2006, this Court, admitted the appeal as instituted hereinbefore by the plaintiff/appellant against the judgment and decree, rendered by the learned First Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether the reasoning recorded by the first Appellate Court to reverse the decree of the trial Court is not legally sustainable?

Substantial question of Law No.1:

8. Quintessentially, the purported overt act of invasion upon the suit land ascribed by the plaintiff to the contesting defendant is averred to stand spurred by the contesting defendant removing the barricade erected on his land by the plaintiff for preempting the contesting defendant to for accessing his estate use a portion of the suit land comprised in khasra No.61 as a path. The rival assertions qua the contesting defendant holding no right to use as a path a portion of khasra No.61 for accessing his land comprised in khasra No.67 besides khasra No.41 and 42 vis-a-vis the rights of user of tract thereof as a path by the contesting defendant stands enjoined to adjudicated upon by this Court. The assertion of the contesting defendant qua his holding a vested right to use as a path a tract/portion of the suit land comprised in khasra No.61 for enabling his accessing his estate stands anvilled upon his holding an easementary right qua its apposite user by him, right whereof spurs from a dire necessity, dire necessity qua its user by him sprouts from its comprising the only passage or path for facilitating his

accessing his estate. With the aforesaid assertions staked by the contesting defendant qua his entitlement to use a tract of khasra No.61 as a path, user whereof stands hinged upon an indefeasible easementary right of necessity qua its user inhering in him, it was incumbent upon him for lending sustenance qua it, to adduce clinching evidence qua the path comprised in a portion of khasra No.61, alone constituting the accessible route for him to reach his estate. However, DW-2 Sunder Lal in his deposition comprised in his cross-examination acquiesced to the factum of a path leading to his land existing by the side of the temple. Also he acquiesces in his cross-examination to the suggestion put to him by the learned counsel for the plaintiff of a path passing through the land of Diwan Chand and its leading to the house of the contesting defendant. Consequently, with DW-2 making unfoldments in his cross-examination qua existence of an alternative path to the one passing through a portion of the suit land, being available for user by the contesting defendant to access his estate, renders the path other than

the path qua which assertion qua its user by the contesting defendant on the anvil of his holding an easementary right of necessity qua its user, to be an alternative route/passage vis-a-vis the path purportedly existing on a portion of khasra No.61 being yet available for user by the contesting defendant to access his estate whereupon a formidable conclusion stands clinched of the espousal of the contesting defendant standing muted qua his holding an indefeasible easementary right of necessity to use a portion of khasra No.61 as a path. Since the principle of easementary right of necessity qua user as a path the land of the servient owner ousts for it to hold legal might, the availability of alternative routes or passages vis-a-vis the servient heritage to the dominant owner, as a corollary when the deposition of DW-2 ousts the attraction of the principle of easement of necessity of user as a path of the servient heritage comprised in a part of khasra No.61 by the purported dominant owner, hence warrants the espousal of the contesting defendant to suffer the ill-fate of its standing discounted.

9. The learned first Appellate Court side stepped the aforesaid tenet ingraining the principle of easement of necessity qua user as a path of a tract of khasra No.61 by the contesting defendant also it read in a rough shod manner the testimony of DW-2, who given his aforestated acquiescence qua availability of alternative routes/passages vis-a-vis the suit land the contesting defendant to access his estate obviously ousted its workability vis-a-vis the contesting defendant. The learned First Appellate Court merely on the anvil of Ex.DW1/A, an order recorded by the Gram Panchayat, Hanstrari wherein a proclamation occurs of a path existing over a portion of khasra No.61 stood constrained to encumber the plaintiff to permit its user as a path by the contesting defendant. However, the learned first Appellate Court in anvilling its decision upon EX.DW/1 has committed a legal fallacy arousable from the fact of its remaining oblivious to the fact of the decision of the Gram Panchayat standing reversed in appeal by the Civil Court concerned, verdict whereof stands embedded in Mark-A.

10. Moreover, the learned first Appellate Court had also relied upon a copy of Wazib-Ul-Arz besides upon the testimony of PW-3 anvilled upon a photo copy of Wazib-Ul-Arz holding manifestations of customary rights inhering in the estate right holders, one of the customary right being the one of a right of passage through the fields of a co-villager inhering in the other co-villagers for latter's accessing their fields whereupon it held of the contesting defendant standing vested with a right to use as a path a portion of khasra No.61 for enabling him to access his estate. Even the aforesaid reasoning meted by the learned first Appellate Court is harboured upon a gross misappraisal of the recitals of the relevant copy of the Wazib-Ul-Arz, photo copy whereof unveils of a right of passage through the lands of co-villagers inhering in the estate right holders. Even if, reverence is enjoined to be meted to the recitals aforesaid constituted in a copy of Wazib-ul-Arz of the relevant area yet any ascription of any vindication to its recitals would not except arousal of the tenet of availability of alternative routes/passages to the

villagers/estate right holders also enjoining validation besides reverence. Even otherwise, customary rights of user by the estate holder of the lands of co-villagers as a passage, for theirs accessing their fields cannot be read bereft of the indispensable tenets qua customary rights of easement of necessity qua user thereof standing clinched by invincible evidence. Since, the indispensable tenet ingraining the easementary right of necessity of a servient owner using the dominant heritage as a passage to access his estate warrants adduction of clinching evidence of no alternative route vis-a-vis it being available to the servient owner to access his estate. Consequently, when this Court for reasons aforestated has on the anvill of the relevant acquiescences of DW-2 qua routes/passages alternative to the one whereupon the contesting defendant as a servient owner stakes a vested right qua its user ensuing from his holding an apposite easementary right of necessity, being available for their apposite user by the contesting defendant/servient owner, imperatively hence with the salient underlying tenet

ingraining the customary user by way of easement of necessity of the suit land as a path by the defendant/servient owner standing not satiated. In aftermath, even if the Wazib-ul-Arz holds recitals of customary rights of passages being available to the estate right holders upon lands of co-villagers yet the said right is trammeled by the existence of paths alternative to it. In sequel, with this Court concluding of alternative paths vis-a-vis the one qua which a right stands staked by the contesting defendant being available for user by him for accessing his estate whereupon this Court has with invincibility concluded of the principle qua its user as a servient heritage by the contesting defendant by way of easement of necessity, stands denuded, naturally then the contesting defendant cannot either by any of his overts act of threatenings, invade the peaceful possession of the plaintiff/appellant qua his land comprised in khasra No.61.

12. With delineations occurring in ExPW4/A and also in Ex.PW3/A qua existence of paths upon the suit land, also are of no aid nor any leverage can be drawn therefrom by

contesting defendant as the path(s) depicted in the aforesaid exhibits hold no depictions therein qua the routes thereof upon khasra numbers referred therein nor they graphically display its point of termination or conclusion nor its width. Since, both the exhibits aforesaid to hold succor besides give leverage to the propagation of the contesting defendant were enjoined to hold delineations therein with specificity qua the facets aforesaid, contrarily with the facets aforesaid standing withheld therein, preclude this Court to render a decree with specificity qua the route of the passage existing thereon or qua its dimensions. In aftermath, with obstacles hindering this Court to render a decree with exactness qua the location and dimensions of the path existing in the exhibits aforesaid, renders both the exhibits aforesaid to hold no legal clout.

14. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are not based upon a proper and mature appreciation of the evidence on record. While rendering the apposite findings, the learned first Appellate Court has excluded germane and

apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/appellant and against the defendant/respondent.

15. In view of above discussion, the present Regular Second Appeal is allowed and the judgement and decree rendered by the learned Additional District Judge, Shimla is set aside. In sequel, the judgment and decree rendered by the learned Sub Judge 1st Class, Court No.1, Rohru, District Shimla, H.P. is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

(Sureshwar Thakur)
Judge.

29th July, 2016.
(jai)