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**Puri Municipality Vs. Sradhamani Devi**

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**Court** : Orissa

**Decided On :** May-12-1995

**Reported in** : AIR1996Ori91

**Judge** : A. Pasayat, J.

**Acts** : Orissa Municipal Act, 1950 - Sections 349(1); Easements Act, 1882 - Sections 15

**Appeal No.** : Second Appeal No. 16 of 1995

**Appellant** : Puri Municipality

**Respondent** : Sradhamani Devi

**Advocate for Def.** : A.B. Misra, Adv.

**Advocate for Pet/Ap.** : P.K. Misra, Adv.

**Disposition** : Appeal dismissed

**Judgement** :

**Pasayat, J.**

1. The pivotal question involved in this appeal is whether learned subordinate Judge, Puri was justified in holding that in the circumstances of the case there was no necessity for notice under Section 349 of the Orissa Municipal Act, 1950 (in

short, the 'Act'), by reversing the contrary conclusion of learned Addl. Munsif, Puri.

2. A brief reference to the factual aspect is necessary because other conclusions essentially relate to facts with no perversity attached to it, and cannot be gone into this appeal. Plaintiff (respondent herein) filed the suit in respect of 15 square liaks of land relating to plot No. 1190, under Khata no. 111 in mouza Kundheibentasahi of Puri town. Plot Nos. 1191, 1184 and 1183 are adjoining plots of plot No. 1190, and plot No. 1193 is to its adjoining North. Nor ancestors-in-interest were the owners in possession of these plots, and plot No. 1193 measuring Ac. 0.020 decimals was sold to one Nagendra Nath Mukhopadhyaya by her grand-father Jagannath Praharaj by a registered sale-deed during his lifetime. They had a service latrine in plot No. 1190 and an agreement was entered into between her grand-father Jagannath Praharaj and Nagendranath Mukhopadhyaya at the time of sale of plot No. 1190 for allowing the Municipality sweepers to come over that plot for cleaning the latrine. She sold plot No. 1183 to one Chandramani Maharana and was in possession of plot Nos. 1184, 1190 and 1191 which are in a compact area consisting of her house and backyard. With the permission of Municipal authorities, she converted her service latrine into a septic latrine and as she did not find it necessary to keep the suit land vacant, she enclosed it with a fence. Puri Municipality through its authorities/functionaries/agents threatened to enter into the suit land by breaking open the fence raised by her, though it had no right, title and interest over the land. She filed the suit for declaration of title, confirmation of possession over the suit land and for permanent injunction.

3. The Municipality took the plea that the suit land locally called 'Nadigohiri' is existing since time immemorial, and is being used for the sweepers' passage for cleaning public latrines of local people. It has been exercising its rights over the same to the knowledge of plaintiff and public at large for the above purpose. It had acquired prescriptive title over it and plaintiffs title, if any, over it was lost by efflux of time. In No. 1 settlement 'Nadigahiri'. is recorded as a separate plot and as such, plaintiff has no right, title and interest over it. Learned Addl. Munsif (now designated as Civil Judge (Junior Division)) held that plaintiff had right, title and interest over the land. But was of the view that before institution of the suit notice under Section 349 of the Act was mandatory and in the absence of such notice,

the suit was not maintainable. Accordingly, he dismissed the suit. Learned subordinate Judge (now designated as Civil Judge (Senior Division)) confirmed the conclusions of learned Civil Judge (Junior Division) regarding right, title and interest. Additionally, he held that notice was not necessary.

4. In this appeal, two points have been urged by lerned counsel for appellant-Municipality. Firstly, it is submitted that learned Civil Judge (Senior Division) was not justified in holding that notice under Section 349 was not necessary. Secondly, it is submitted that courts below have erred is holding that there WHS no easementary right over the land in dispute.

5. So far as first question is concerned, it is necessary to refer to Section 349 of the Act. The same reads as follows :

'349. Notice of action against municipal council -

(1) No suit, or other legal proceeding shall be brought against any municipal councillor, the Chairman, Executive Officer, any Councillor, Officer or Servant in respect of any act done or purporting to be done in execution or intended execution of the Act or any rule, regulation, bye-law, or order made under it, or in respect of any alleged neglect or default in the execution of this Act or any such rule, regulation, bye-law or order, until the expiration of two months next after notice inwriting, stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and name and place of residence of the intended plaintiff has been left at the' office of the municipal council, and if the proceeding is intended to be brought against any such Chairman, Executive Officer, Councillor, Officer, Servant or person, also delivered to him, or left at his place of residences. And unless such notice be proved, the court shall find for the defendant.

(2) Every such proceeding shall unless it is a proceeding for the recovery of immovable property or for declaration of title thereto, be commenced within six months after the date on which the cause of action arises or in case a continuing injury or damage, during such continuance or within six months after the ceasing thereof.

(3) If any municipal council or person to whom notice is given under Sub-section (1) shall, before the proceeding is commenced, render amends to the plaintiff and if the plaintiff does not in any such proceeding recover more than the amount so tendered, he shall not recover any costs incurred by him after such tender. The plaintiff shall also pay all costs incurred by the defendant after such tender.

(4) No suit or other legal proceeding shall be brought against the Chairman, the Executive Officer, any Councillor, Officer or Servant of a municipal council or any person acting under the direction of a municipal council, or such Chairman, the Executive Officer, Councillor, Officer or Servant in respect of any act done, is execution or intended execution of this Act, or any rule, regulation, bye-law or order made under it, or in respect of any alleged neglect or default on his part in the execution of this Act or any such rule, regulation, bye-law or order, if such act was done, or if such neglect or default was done, in good faith; but any such proceeding shall, so far as it is maintainable in a court, be brought against the municipal council except in the case of suits brought under Section 375.'

6. A bare reading of Section 349(1) of the Act makes it clear that requirement of a notice of a contemplated suit was applicable only inthose cases where plaintiff claimed damages or compensation or in respect of acts done in execution or intended execution of the provisions of the Act, Rules, Regulations, Bye-laws or Order made under it. The question whether notice is necessary would depend not on whether the the cause of action arose in tort (sic) or contract or any other branch of law but on whether the act complained of was done or purported to have been done directly under the Act or Rules or Regulations or Bye-laws or Order. Section 349 is not applicable in a suit for possession of land as it is not an action for anything done or purporting to have been done in pursuance of the Act. Where the claim of the Municipality is based on a private right, the plaintiff who may be injured by the exercise of that right can sue without previous notice just as he might sue any other individual. It was held in S. Baliarsing and Anr. v. Bamdev Misra and Ors., 1971 (1) CWR 415 : (AIR 1971 Ori 291) that relief of declaration of title and recovery of possession being based on the cause of action of alleged trespass by the Municipality on his private rights, service of a notice under Section 349(1) of the Act is not a pre-condition for maintainability of the suit. Requirement

of notice of a contemplated suit was applicable only in those cases where plaintiff claim related to wrongful acts committed by any Municipal Councillor, the Chairman, Executive Officer, any Councillor, Officer or Servant in respect of any act done or purporting to he done in execution or intended execution of the Act or any rule, regulation, bye-law or order made under it. The acts must be in the exercise or honestly supposed exercise of their statutory powers, that is, to acts done by the Commissioners, 'colori offici'. Section 349(1) of the Act makes it imperative on the part of the plaintiff to serve a notice before institution of the suit in respect of acts done in execution or intended execution of the provisions of the Act, Rules, Regulations, Bye-laws etc. The impugned acts involved in the case at hand are not of such nature as to attract application of Section 349(1), as they cannot be brought under the umbrella of acts or purported acts contemplated under the provision. In Manohar Ganesh v. Dakor Municipality, ILR 16 Mad 296 it was held that notice was required in case of actions for possession of land brought against a municipality. It was observed by Faroli, C. J. that a suit for possession of land is not an 'action for anything done or purporting to be done in pursuance of the Act.' Ranade, J. made this point clear when he observed that 'where the claim of the Municipality is based on a private right, the plaintiff who may be injured by the exercise of that right can sue without giving previous notice just as he might sue any other individual.'

7. Since in the case at hand the Municipality has advanced plea of prescriptive title and easement, it is to be adjudicated whether such plea can be raised by it. Adverse possession and easement are conceptually different. In order that the possession may generate ownership, it is necessary that the possessor should hold the thing exclusively, and for himself as owner. If, on the other hand, a particular act is done upon a thing with the belief that another is owner and not with the intention to hold as owner, and if the particular act has been done continuously for the prescribed period as fixed by the law of prescription, the person doing the act acquired a legal right to do that act, though the thing upon which it is done is in other respects under another's dominion. This is the distinction between acts of ownership and acts which are done in the execise of easements.

8. The earliest definition of the word 'easement' is to be found in an ancient but well-known book called 'Termes de la Ley' in which it is laid down that an 'easement is a privilege that one neighbour both of another by writing or prescription, without profit as a way or sink through his land, or such like.' This definition has been held to be not sufficient to convey the true sense. Lord Cuber M. K. in Metropolitan Railway v. Fewier (1892) 1 QB 165 at page 171 defined it to be 'same right which a person has over land which is not his own'. A 'servitude' is the term used in the civil law to express the idea conveyed by the word 'easement', and may be defined as a right of the owner of one parcel of land, by reason of his ownership to use theland of another for a special purpose of his own, not inconsistent with the general property of the owner. The definition of the word 'easement' given in the Indian Limitation Act, 1963 (in short 'Limitation Act') is an inclusive one and the connotation of the word under the said Act is wide than given in Section 4 of the Indian Easements Act, 1882 (in short 'Easements Act'). The main characteristics of the essential are -- (a) there must be dominant and servient tenement, and (b) the easement must accommodate the dominant tenement, (c) dominant and servient owners must be different persons and (d) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant. An easement requires that some diminution of the natural rights incident to the ownership of an estate in one piece of land be reflected in a corresponding artificial right superimposed on the natural rights incident to another piece of land. A positive or affirmative easement confers a right to commit some act upon the servient tenement. A negative easement involves merely a right to prohibit the commission of certain acts upon the servient tenement which the servient owner would have been otherwise entitled to commit. There is a distinction between easements, such as, a right of way or easements used from time to time, and casements of necessity or continuous casements. Upon a severance of tenements, easements used as of necessity, or in their nature continuous will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only; they do not pass, unless the owner, by appropriate language, shows an intention that they should pass, (See Polden v. Bastard, Law Reports (1865-66) 1 QB 156). The definition of continuous and diseontinous easements in Section 5 of the Easements Act has

been taken from Gale's Law of Easements who had introduced it far the first time as a part of English law, having imported it from Code Napolean, Article 628.

9. Natural rights, as their name imports, are those incidents and advantages, which are provided by nature for the use and enjoyment of a man's property. These rights are treatedby law as the ordinary incidents of property and annexed to land whatever land exists. Generally speaking, it may be said that the function of natural rights is to secure to the owner of land the full enjoyment thereof undiminished by any tortious acts on the part of his neighbour. In considering the acquisition of easements a material effect of the distinction easements and natural rights is to be noticed. Easements can only be created and conferred by the act of man, whereas natural rights arc incident to land, and to them the owner of land has as much right as he has to the land itself, without the direct intervention of human agency -- that is, without any act of creation and gift by the servient owner, and without any act of acquisition on his own part. (Goddard on Law of Easements, 7th Edition at page 126). Natural rights though resembling easements in some respects, are clearly distinguishable from them. The essential distinction between easements and natural rights appears to lie in this that easements arc acquired restrictions of the complete rights of property, or, to put it in another way, acquired rights abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are ipso facto enforceable in law. Natural rights are themselves subject to restriction at the instance of easements. It is also necessary to notice the distinction between easement and licence. The chief distinction is that whereas an easement cannot be extinguished merely at the will of the grantor, a licence is, generally revocable at the will of the person who has given it.

10. It is essential that the plaintiff who alleges easement of passage must have been conscious when he was using the passage in question that he was exercising a right of easement over the land of another, The known methods of acquiring an easement by prescription are (a) prescription under the Easements Act where it is applicable; (b) prescription under Sections 26 and 27, Limitation Act; (c) claim founded on lost grant. Prescriptive easement as opposed to

easement by grant, isalways hostile. It is in assertion of a hostile claim of certain rights over another man's property and as such it resumbles in some respects, the claim to ownership by adverse possession of property; both arc 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 his own ownership in the case of easement he must assert limited rights of user on a property while acknowledging its ownership in someone else. The words 'as an easement' as appearing in Section 15 of the Easements Act is indicative of the fact that the right must be enjoyed by a person in his capacity as owner of certain land (called dominant heritage) for the beneficial enjoyment of that land over certain other land not his own (called the servient heritage). From its very definition, easementary right is a right to burden another person's property for the more beneficial enjoyment of one's own property. The existance of such a burden is the matter of exception and unfettered enjoyment of one's property in the matter of general rule. Whoever wants the Court to have the positive fact to be proved in his favour has to establish it. When the sweepers of the Municipality use the passage at the behest of the owner of the privy, the right is clearly exercised by the owner of the privy, though it is through the normal agancy of the municipal sweepers who alone cleanse the privy. The legal position is in no way altered if factually the sweepers cleanse the latrine without express behest from the owner of the privy. Owner's assertion of the right of way is to be implied from the factum of user by the sweepers without obstruction for the benefit of the owner. But that position does not help the Municipality in any way. The Municipality in the facts of the case cannot claim to have tenement of any description. Its stand has been rightly turned down by the courts below. No costs.

11. The appeal fails and is dismissed.

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