

Heeralal Vs. Ramjeevan

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Court : Rajasthan

Decided On : Sep-09-1987

Reported in : AIR1989Raj1; 1988(1)WLN791

Judge : N.C. Sharma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 and 101; [Easements Act, 1882](#) - Sections 15

Appeal No. : Second Appeal No. 413 of 1975

Appellant : Heeralal

Respondent : Ramjeevan

Advocate for Def. : L.R. Mehta and; R. Mehta, Adv.

Advocate for Pet/Ap. : H.C. Jain, Adv.

Judgement :

N.C. Sharma, J.

1. This second appeal is directed by defendants 1 and 2 against the decree of District Judge, Merta dt. Sept, 23, 1975 whereby the District Judge partly allowed the first appeal of Ramjeevan plaintiff filed against the decree of the Civil judge, Nagore dt. May 1, 1973 and decreed this suit of the plaintiff as against the

appellant in the manner that the way to the extent of 3' wide shall be left by the appellant immediately adjoining the plaintiff's house towards its west and that the appellant shall remove the constructions which they had put on 3' wide strip of land for access of the plaintiff to the underground cellar of his house.

2. Facts leading to the filing of the second appeal are that on Jan. 10, 1964 Ramjeevan respondent 1 instituted Civil Suit No. 7 of 1964 in the Court of Civil Judge, Nagaur, against the appellants with the averments that the plaintiff owned and possessed a house situated in village Rol. Tehsil Jayal. District Nagaur. It was alleged that on western side of the house of the plaintiff, there was an open chowk land towards which there was one gate of plaintiff's underground cellar. The other gate was closed. Along with the plaint, the plaintiff filed a rough sketch of the site. It was stated that this house had fallen to the share of the plaintiff as a result of partition. Heirs of one Gopilal had been impleaded as defendants 3 to 5. According to the plaintiff, his predecessor-in-interest had obtained permission on Jeth Budi 7, Samvat 1934, for opening two gates of his underground cellar on the western side of his house at places marked X and Y in the rough sketch. However, only one gate was opened which is marked as 'X' in the rough sketch. The plaintiff and his predecessor-in-interest were using 10' wide land immediately adjacent to his house towards its west as way as of right and without any interruption since last about 86 years, and they had acquired a right of easement of way through this 10' wide land on the west of points A to B of the rough sketch. It was also alleged that this land was also used for feeding pigeon by the plaintiff and his predecessor and other members of the public for the same period. Plaintiff used to reside at Mangal Beda in District Sholapur (Maharashtra) in connection with his vocation and in his absence on Dec. 20, 1963, the appellants constructed a 'kamtha' (shop) on the open land lying on the west of the plaintiff's house. The constructions alleged to have been made by the defendants have been marked as HCDEFG in the rough sketch. The defendants left only 1'9" wide open land in between the plaintiff's house and the constructions made by the defendant-appellants with the result that the right of way which the plaintiff was exercising not only by coming on foot but also by bringing bullock-carts to the gate marked 'X' was obstructed. The plaintiff, therefore, prayed that 10' wide way on the west of his house may be secured to him as a thorough way and construction made by the defendants-appellants may

be ordered to be dismantled by a mandatory injunction and further it may be directed that the land marked ABEF may be kept open by the appellant for the charitable purpose of feeding pigeon on this land. The plaintiff further prayed for a decree of permanent injunction also against the appellants.

3. The suit was contested by the appellants. The case of the appellants was that land immediately adjoining to the plaintiff's house towards its west was their 'patta' land on which at present a shop of the defendants was standing. The defendants had left two feet wide land in between the plaintiff's house and their shop so that the defendants may, when they choose to do so, open windows and ventilators and also pass through this two feet wide land. With regard to the underground cellar in the plaintiff's house, it was stated that previously the entrance gate to this underground cellar opened from the side of the plaintiff's house, but recently the plaintiff opened a new gate about 4 or 5 years back opening towards the land of the defendant towards west. It was denied that the defendants (or plaintiffs?) have acquired right of way through the land of the defendants as easement by prescription. The right claimed by the plaintiff to feed pigeon on the land of the defendants was also disputed. It was admitted that the defendants started constructing 'kamtha' (shop) on Dec. 20, 1963. It was stated that the construction has been completed.

4. The trial Court framed 11 issues in the case and after recording evidence decreed the suit of the plaintiff limited only to this extent that the appellants were restrained from making any constructions on 1'9" wide open land immediately adjacent to the plaintiff's house on its west which had been marked as ABCH in the rough sketch. Rest of the suit of the plaintiff was dismissed. The Civil Judge, Nagaur held that the entrance gate marked 'X' of the underground cellar of the plaintiff's house was in existence since a very long time and it was not constructed by the plaintiff recently as alleged by the appellants. It was stated that the plaintiff was residing at Mangal Bedi in District Sholapur, and he only occasionally visited his village Rol. The Civil Judge held that it was not established that the alleged way used by the plaintiff or his ancestors by bringing bullock carts up to the point 'X'. He, therefore, held that the plaintiff had acquired an easementary right of way only to come by foot in order to have access to the underground cellar. The trial

Court considered that 1'9" wide lane left by the appellants while constructing their shops was sufficient for the plaintiff for the exercise of his prescriptive easementary right of way and, therefore, it only restrained the appellants from obstructing 1'9" wide land left by them. The trial Court did not accept the plaintiff's version that it had right of way through 10' wide lane immediately adjoining his house towards its west. The trial Court held that if 10' wide way is provided to the plaintiff, it would mean depriving the appellants from a major portion of their land and would be nothing short of destruction of the defendants' property.

5. Aggrieved by this decree, plaintiff Ramjeevan filed Civil First Appeal No. 74 of 1978 before the District Judge, Merta. It may be mentioned that the defendants also preferred cross-objections. The District Judge concurred with the findings of the trial Court that the door marked 'X' was an old one. It was contended on behalf of the defendants before the District Judge that the plaintiff was admittedly residing in District Sholapur and he seldom came to village Rol and, therefore, his easementary right, if any had extinguished. This contention put forward on behalf of the defendants was rejected by the District Judge and he was of the opinion that the plaintiff had never abandoned his right of way and the mere fact that the plaintiff had no occasion to exercise the right for some years did not extinguish his right. He held it to be proved that the plaintiff had a right of way which was used by himself and his tenants. It was also proved that the way sufficiently wide and it had been considerably narrowed down by the shops constructed by the defendants by leaving only 1'9" land in between. The plaintiff was not held to be guilty of laches. He was residing at Sholapur and he immediately came to village Rol on coming to know that the defendants were raising constructions. The plaintiff was informed of the construction by Narsinghlal P. W. 10 by his letter dt. Dec. 24, 1963. It may also be mentioned here that temporary injunction had been issued against the defendant-appellants restraining them from making construction, which was subsequently vacated on Jan. 20, 1964, because the defendants gave an undertaking that if the plaintiffs' suit was decreed, they shall remove the constructions without claiming any compensation for the same. On this undertaking being given, the trial Court allowed the defendants to make the constructions. The District Judge was of the view that 1'9" wide lane was not at all sufficient for man of ordinary physique to pass through it easily and some more

space was required so that the plaintiff or any other person under the authority of the plaintiff may be able to enter the underground cellar. Taking into consideration all the facts and circumstances, the District Judge was of the view that the width of the way should be at least 3'. He accordingly partly allowed the appeal filed by the plaintiff and ordered that a 3' wide way shall be kept and the defendants shall remove the constructions raised by them on 3' wide land within 3 months of the date of the judgment. The cross-objection preferred by the defendants were dismissed.

6. Defendants Heeralal and Mishrilal have come in second appeal before this Court. The plaintiff has also filed cross-objections. Before proceeding further, I would like to make some observations regarding some unwarranted and undesirable comments which have been made by Civil Judge, Nagaur in his judgment dt. May 1, 1973 against Munsif, Nagaur. I shall quote the comments made by the Civil Judge, Nagaur which are as follows : --

'At the outset the regretful feature noticed in this case is that this case commenced its innings as early as in the inception of the year 1964 and had a chequered career up to 18-1-1972. Thereafter it was set down for hearing final arguments by the learned Munsif Shri K. L. Vyas R.J.S. and he could find leisure, could not form inclination and impetus for disposing of this case upto 4-11-1972 for a period of 9 months. Such unprecedented behaviour is strange indeed and needs to be reported to higher authority. Thereafter the present Munsif from 21-11-1972 till 9-4-1973 meted out the same rough weather treatment to this case, and it lingered on and on before it was transferred to this Court.

This case is exceedingly simpleton in nature and has no complexity involved in it at all.'

It may be mentioned that Civil Judge, Nagaur was not sitting either on judicial or on administrative side higher over Munsif, Nagaur. Neither such comments were necessary nor desirable to be made by a Judicial Officer trying a suit against a predecessor-officer of the trial Court, nor such practice can be commended. This Court had occasion to deprecate such tendency on the part of the Presiding Officers even in the past by Hon'ble D. P. Gupta, J. I again deprecate such

practice. The Civil Judge should have concerned himself more with deciding the suit rather naming the previous Presiding Officer and even making threatening remarks. Worst it was that he underlined his above observations.

7. Coming to the merits of the second appeal it may be mentioned that both the trial Court and the appellate Court have come to the conclusion that the gate of the underground cellar marked 'X' at least existed since Samvat year 1934. The version of the defendants-appellants in their written statement that the gate of entrance to the underground cellar was opened by the plaintiff. only 4 or 5 years before the year 1964 was rejected by the Courts below. Thus it is a concurrent finding of fact that the entrance gate to the underground cellar of the plaintiffs' house at place marked 'X' existed since the year 1934 and was not a recent opening as alleged by the appellants in their written statement. In order to confirm the position, I have also gone through the various documentary evidence on record. The oldest document on the record is Ex. 2 which is a 'patta' granted by Maharaj Kumar Sumer Singh of former Jodhpur State on Feb. 24, 1915 in favour of Ramkaran and his son Murlidhar. This 'patta' Ex. 2 mentions the position of the western site of the house which was subsequently purchased by the plaintiff and also about the western boundary of the house. It is clearly recited in it that in the western wall there are 2 windows of the underground cellar and beyond that there was Khalsa Chowk. It further mentions about a mere ancient document Ex. 4 of Miti Jeth Budi 7, Samvat 1934 (which will correspond to the year 1877 A.D.). From Ex. 4 it appears that Ramdhan and Murlidhar had made an application to Maji Shri Bhatiyaniiji seeking permission to open two gates in the underground cellar. Maji Bhatiyaniiji granted this permission by Ex. 4 of Miti Jeth Budi 7, Samvat 1934. It was after 37 years of the granting of permission Ex. 4 that Maharaj Kumar Sumer Singh had granted 'Patta' Ex. 2 in favour of Ramkaran and Murlidhar of this house. In the rough site sketch given in this 'Patta', it is shown that one entrance gate to the ground cellar was closed while the other entrance which corresponds to the entrance marked 'X' existed on February 24, 1915 when the 'patta' was granted. Then there is another 'patta' Ex. 1 of Miti Chait Sudi 4, Samvat 1987 corresponding to 3rd April, 1930 which was executed by Mst. Kishani widow of Ramkaran in favour of the plaintiff Ramjeevan and his two brothers Ramchandra and Gopilal and his nephew Bhagirath. By this document Mst. Kishani sold the

house in question to the aforesaid persons for consideration of Rs. 2501/-. In this 'patta' Ex. 1 also it is mentioned that there are two windows of the underground cellar on the western side of the house and thereafter there was open Khalsa Chowk. In order to have a confirmation of 'patta' Ex. 1, the plaintiff and his brother Gopilal and nephew Bhagirath also obtained a 'Jadid Patta' from Maharaj Kumar Shri Umed Singh of former Jodhpur State which is Ex. 3 on the record. After charging 'patta' fees of Rs. 254A, the Hawala Department of former Jodhpur State issued 'Jadid Patta' Ex. 3 on 6th Sept. 1934. There is a rough sketch site plan of the house sold to the plaintiff in patta Ex. 3. In this 'patta' also the entrance gate of the underground cellar has been shown. Apart from that, there are documents Ex. 8 and Ex. 9. These documents are of the years 1914 and 1915. It appears that Murlidhar Ramkaran had made an application to the Hawala Department of former Jodhpur State for grant of 'patta'. At that time the officials of the Hawala Department had inspected the site and in Ex. 8 it was mentioned that although permission had been obtained in Samvat 1934 for opening two gates for the underground cellar, but there was only one 'mokha' on the site. It was noted that Murlidhar and Ramkumar under the permission granted to them had the authority to open another 'mokha' as and when they required. Ex.P. 9 is the site plan prepared on Feb. 19, 1914. In site plan Ex. 9 it is noted that : --

^vkt ekSdk ns[kk] edku iq[rk g SA vkHkw.k dksBkrq[kkuk dk g SA nqdku jaxjst ekWMy g SA lqdjku eksMs dk ijokuk 1934 dk tsBon 7 dkgS tks Bhd g SA 19&2&14 ,l-Mh- i`Fohjkt njksxk gokykA**

Thus Ex. 9 clearly goes to show that Moda or the gate to the underground cellar existed even on Feb. 19, 1914 (i.e. Samvat 1971) and it is further clear that one Rangrez (a person who carries on the vocation of colouring cloth) was using the underground cellar. Thus the finding of both the Courts below regarding the existence of the gate at place marked 'X' since at least Samvat 1934 is established beyond any shadow of doubt by the various documents referred to above and this finding of fact cannot be interfered in second appeal, which is based on reliable evidence.

8. The District Judge, Merta, has further believed the two rent notes Ex. 5 and Ex. 6. Plaintiff has adduced evidence that during his absence at Mangal Beda, District Sholapur, the Tahkhana' (underground cellar) had been let out by him to the tenants. One of the tenants was Yakub who had executed rent note Ex. 5 in favour of the plaintiff in Samvat 1987 corresponding to the year 1930 A.D. Yakub and scribe of Ex. 5 have died. The plaintiff examined Jeet Mal P.W. 2 who is son of the scribe and Jeet Mal has deposed that Ex. 5 was in the handwriting of his father. Ex. 5 clearly goes to show that this underground cellar had been let out by the plaintiff to Yakub on an yearly rent of Rs. 6/- Miti Mah Sudi 1, Samvat 1987. Then there is another document Ex. 6 which is a rent note executed by Heeralal defendant in favour of the plaintiff. Under this rent note, Heeralal defendant had taken on rent an underground cellar from plaintiff on an yearly rent of Rs. 6/ -. For rent note F.x. 6, it was contended by the learned counsel for the appellants that it refers to some underground cellar which was in 'bapoti' house of the plaintiff and it was not with respect to the underground cellar involved in this case. The District Judge has held that Ex. 6 also relates to the plaintiffs' house and since the house had been purchased in the name of the plaintiff and his brothers, the words 'Bapoti ka Makan' were mentioned. This explanation has been accepted by the District Judge and in myview rightly. In former Marwar State, there was usage as well as rules for grant of Bapi Patta. Even in Ex. 4 which relates to the present house of the plaintiff, the words 'Bapoti ka chhe' have been used Thus it is very well established that when Prithvi Raj Daroga, Hawala Department had inspected the site on Feb. 19, 1914, one 'Rangrez' was using this underground cellar. After the plaintiff and his brothers had purchased this house from Mt. Kishani widow of Ramkaran, the underground cellar was let out to Yakub in the year 1930 and to Heeralal defendant in the year 1947. This further goes to show that this underground cellar had continuously been used for several years by tenants and the only entrance to the underground cellar was through the gate at place marked 'X' in the rough sketch filed by the plaintiff along with the plaint.

9. It may also be mentioned that during the trial of the suit, site was inspected twice by the Presiding Officer of the trial Court. The first site inspection was made on Jan. 15, 1964. The Presiding Officer found that after the appellants had constructed the shop they had left only 1 3/4 feet vacant gali in between the shops

constructed by the appellants and the house of the plaintiff. He also mentioned that some 'todas' of the house of the plaintiff projected towards west. It was noted that there was entrance gate of the underground cellar. In the underground cellar, five 'patties', some fire wood and other miscellaneous goods were lying. At the time of the site inspection, the counsel for the defendants invited attention of the trial Court to a part of the roof of the underground cellar in order to show that there was a way leading to the underground from over the roof. It is further clear that that portion of the roof was found closed at the time of the site inspection. Again the trial Court inspected the site on Mar. 15, 1972. In this site inspection note, it is mentioned that this gate of the underground cellar measured 2' 11' in breadth and 3' 7' in height. The learned couns'el for the defendants-appellants contended that in his statement Ramkaran plaintiff has deposed that the width of the gate was 1 1/2' and this goes to show that the width had been increased subsequently. There is no force in this contention. In the first instance, the plaintiff stated in cross-examination that he is not in a position to state about the length and breadth of this gate. Thereafter suggestions were put to him and then he stated that this gate was 1 1/2' wide and not 2 1/2'. The fact is that Ramkaran did not know the exact measurement of the gate. The site inspection note dated Mar. 15, 1972 mentions the exact measurement of the gate as 2' 11' wide and 3' 7" in height and I do not find any ground to doubt the correctness of this measurement.

11. The defendants have put forward false version in their statement that the entrance gate marked 'X' was opened by the plaintiff only 4 or 5 years before the filing of the written statement. The gate- has been found to be in existence even on Feb. 19, 1914 and this finds support from the permission which had been obtained by the predecessors of Ramkaran. The defendants had obtained 'patta' in their favour from Tehsildar, Nagaur on Mar. 29, 1954. It seems highly improbable that the defendants would have permitted plaintiff Ramkaran to widen the entrance gate opening towards the land which had been purchased by the defendants.

12. In my opinion, both the Courts below have correctly found that the entrance gate to the underground cellar is not only an old gate but it was also being used by various tenants who had been let out this underground cellar.

13. The learned counsel for the appellants vehemently put forward two arguments. The first argument was that the prescriptive right of easement is an inchoate right and the 'plaintiff has to establish that he had been peaceably and openly enjoying the right of way as an easement, and as of right without interruption and for 20 years and this enjoyment must end within 2 years of the suit. It was urged that it is an admitted fact that plaintiff Ramjeevan was carrying on his profession or business in Maharashtra and he only occasionally used to visit village RoL Plaintiff has himself stated that he came to village Rol in Samvat 2008 (1951 A.D.) to perform the marriage of his daughter and before that he had come in Samvat 2003 (1946 A.D.). Thus according to the counsel for the appellants, the plaintiff was not using the alleged way as admittedly he was doing business in Maharashtra since a very long time. It may be mentioned that Section 15 of the Easements Act uses the word 'enjoyment' in preference to the word 'user'. Explanation II to Section 15 provides that 'nothing is an interruption with the meaning of Section 15 unless there is an actual cessation of the enjoyment by raising of an obstruction by the act of some person other than the claimant and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorising the same to be made. The word 'enjoy' is used advisedly in order to make it clear that the enjoyment of a right is not necessarily identical with the user thereof, though the latter word is sometimes also used to denote enjoyment. Rights like right of way are by nature limited to occasional exercise. In the case of light and air, the position is slightly different as they are generally and every time used.

14. In *Koylash Chunder Ghose v. Sonatun Chung*, (1881) ILR 7 Cal 132, Garth, C. J. observed : --

'The section says not a word as to any actual user or exercise of the right within two years. It is obvious to us that the enjoyment intended by the section means something very different from an actual user. In order to establish the right, the enjoyment of it must continue for 20 years; but in the case of discontinuous easements this does not mean that actual user is to continue for the whole period of 20 years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and

weeks and months, the person claiming the right may have been in full enjoyment of it.'

This decision was again followed by the Calcutta High Court in *Gopal Chandra Sen v. Bankim Behari Ray*, 51 Ind Cas 372 : (AIR 1919 Cal 357). In *Gopal Chandra Sen's* case also the question was whether the period of enjoyment for 20 years ended within 2 years next before the institution of the suit. The right claimed was a right of way. Their Lordships referred to the case of *Sham Churn v. Taring Churn Banerjee*, (1909) 4 Ind Cas 422 wherein it was held that mere non-user for a time of an easement which the owner might, if he pleased to enjoy during every hour of that time but which for some good reason, he does not care to enjoy, is not necessarily discontinuance of enjoyment of the right; for instance, where the owner of a house does not use a way to it because the house is for a time unoccupied or where a farmer desisted for a time for using a pasture because he happens to have no pasturable cattle or because the herbage is unclean or unwholesome by reason of drought or like cause, each may well be considered as an enjoyment of the right of easement. The Calcutta High Court again in *Jogesh Chandra Roy v. Smt. Sachchhananda*, AIR 1935 Cal 282, observed that in order that a prescriptive right may be successfully claimed, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. The term 'interruption' refers to an adverse obstruction, not a mere discontinuance of user. A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment. Cessation of user is not an invariable indication of the abeyance of right i.e. not inconsistent with the continuance of the enjoyment of the right. To the same effect are the decisions in *Ramgopal Sen v. Abhoya Charan Ghosh*, AIR 1915 Cal 594 and *Partab Singh v. Hem Raj*, AIR 1929 All 497. In *Gajraj Singh v. Ramsahai*, AIR 1940 Oudh 197, it was laid down that the period of enjoyment up to within 2 years of the suit need not be a period of actual user upto the last moment, provided one can hold that the absence of user does not amount to absence of enjoyment, whether it does or does not depend on the facts of the particular case which must be considered. The burden lies on the person claiming easement to show that he has been in enjoyment within two years of the date of the suit. Even if there has been no actual user, that is to say, if the opposite party alleges that there has not

been user within 2 years of the date of the suit, then the person claiming the easement must show that there never-the-less had been an enjoyment. If, on the facts of the case, there appears to have been not merely non-user but actual abandonment, then the person claiming the easement cannot succeed.

15. I may next refer to the various decisions relied upon by the learned counsel for the appellants. The decision in *Shiw Pyari v. Mt. Sadari*, 1966 Raj LW 288 : (AIR 1966 Raj 265), wherein his Lordship Bhandari, J. stated that the definition of 'easement' in Section 4 of the Easements Act contemplates the perfected easement and not an easement, if it can be so called, in the process of acquisition. There is no quarrel with this proposition of law. In *Sohan Lal v. Smt. Manohar Bai*, 1973 Raj LW 106 : (AIR 1973 Raj 160), it was emphasized that the period of 20 years should end within 2 years next before the institution of the suit. However, long the enjoyment may have been, if the same had not ended within 2 years of the institution of the suit, easement by prescription will not be perfected. In *Sohanlal's* case also, it was not doubted that there is a distinction between enjoyment of an easement and non-user. It was stated that this may very well apply markedly in case of easement which are seasonable or periodically exercised. In my view, what is correct is that the above rule will not apply to non-continuous easements. It was recognised that the Court has to arrive at a conclusion bearing in mind the facts and circumstances of the case. One of the subject-matter of easements in *Sohanlal's* case was stair-case which had not been used for 15 years. The case of the defendant was that for the last 30 years the plaintiff had no ingress through the 'medi' of the defendant's house. Then what existed was a window and not a door which was also indicative to show that there could be no passage through the window. In *Bai Bhicaji v. Phiroz Shah Jeevanji*, AIR 1915 Bom 284, the grievance of the plaintiff was that the defendant had obtained a lease on the adjoining open land and had constructed stables there and as many as 225 hawk carriages parked there and were washed and cleaned on the spot which caused nuisance. It was held that the owner or the servient tenement was tethering bullocks up to 1908 i.e. considerably more than 2 years before the nuisance complained of came into existence and before the date of the suit. In such circumstances, it was held that prior easement unused for more than 2 years could not be said in defence in suit for nuisance. The present case is not

based on nuisance.

16. As already stated, it has been held since long that a discontinuous easement of a right of way is never expected to be exercised every moment. It is enough if it is exercised on proper occasions. The mere fact that a time interval of non-user elapsed between successive acts of user would cause no break in the period of enjoyment. If the use of the way, be continuous and uninterrupted generally, it is sufficient if it is used at such times as the users' convenience and business needs require. It is not necessary to prove an actual continuous user of the way by day and night for the full prescriptive period without any cessation provided the elements essential to an easement by prescription are present, and under such circumstances as exclude the presumption of a voluntary abandonment on the part of the party claiming the easement. Indeed, the circumstances may be such as to show a continuous use although direct evidence of actual use as to one or more years during the prescriptive period is wanting. In the instant case, the existence of the underground cellar is not in dispute. The learned counsel for the appellant also relied upon the decision in *Mt. Chanda Devi v. Mt. Kripa*, AIR 1947 All 374, and others in order to contend that if the plaintiff ceased to exercise as right within 2 years next before the institution of the suit wherein the claim to which such period relates is contested, that right fails. This decision has no application whatsoever to the present case for the simple reason that *Mt. Chanda Devi's* case related to a continuous easement and not to a discontinuous easement.

17. The correct law is that if a non-user for certain period is proved, it is further to be seen, whether the non-user was due to an obstruction laid down by the servient owner or to the abandonment of the intention to enjoy it on the part of the dominant owner or, because no occasion arose for the exercise of the right, or because though the occasion arose for the dominant owner had, during this period, other and more convenient means to enjoy his property, which being available to him for the time being, he did not stand in the need of exercising the right claimed. In first of two contingencies mentioned above, the continuity shall be deemed to be broken, but in the last two contingencies, it will remain unaffected as mere non-user is not abandonment. That sufficiently answers the contention of the learned counsel for the appellants.

18. It has already been held above that this underground cellar was occupied by a Rangraz even in the year 1914. Thereafter as found and held it had been let out to Yakum under the rent note Ex. 5 and to Heeralal defendant under rent note Ex. 6. There is evidence that Yakub remained tenant for 13 years and Heeralal for 11 years. Presently the underground cellar was found as being used for placing 'patties' and 'fire wood'. It cannot, therefore, be contended that the underground cellar was not used by entering through the gate marked 'X' in the rough sketch. Thus there was also user for sufficient long time and. it was used whenever necessity and occasion arose. The easementary right of way claimed by the plaintiff has perfected.

19. It has been found that it was not established that bullock carts were used for the purpose of bringing goods to the cellar. Enjoyment of the way by bringing bullock carts is found not to be established. All that is found is that the plaintiff or his tenants used the underground cellar for doing their vocation or for placing certain miscellaneous and sundry goods in the underground cellar, that is the normal use for which such a cellar is used. According to the trial Court, which has recognised the right of the plaintiff to way, the existing gap of 21' only left by the defendants in between the shops constructed by them and the plaintiff's house is sufficient. The District Judge, on the other hand, has come to the conclusion, and rightly so, that 21' wide lane was not at all sufficient for the plaintiff to the exercise of his above right of way which has perfected by prescription as an easementary right and the width of the passage should not be less than 3'. I agree with the findings of the District Judge that the plaintiff should have passage at least 3' wide in order to have ingress and egress to the underground cellar of his house. The learned counsel for the appellants contended that even if that is so, the plaintiff can only claim right of passage up to the point that he can conveniently have entrance and exit from and through the entrance gate marked 'X' in the rough sketch plan filed along with the plaint. The contention appears to be quite reasonable. The decree passed by the District Judge, Merta, deserves to be slightly modified in this manner that the defendants appellants shall keep passage vacant from point A, 3' wide towards west of the said point and up to 1' ahead of the northern end of the gate at X of the underground cellar.

20. This appeal is, therefore, partly allowed and it is ordered and decreed that the defendants shall dismantle the back side portion of the shop constructed by them and provide to the plaintiff a passage 3' wide from point A marked in the rough sketch plan filed along with the plaint towards its west and this 3' wide passage will be kept open and vacant towards north up to 1' ahead of the northern edge of the entrance door marked 'X' of the plaintiffs' underground cellar. The constructions made by the defendants limited to the above extent will be demolished by them within a period of 3 months from the date of this judgment and in case they fail to do so, the plaintiff shall be entitled to get constructions to the extent as aforesaid to be dismantled through the process of execution at the cost of the defendants. The defendants are further restrained by permanent injunction from obstructing the above 3' wide passage as decreed so as to interfere in the right of way perfected by the plaintiff as an easement. No construction whatsoever shall be made by the defendants on and over the 3' wide passage over which the plaintiff has been held to have perfected easementary right of way to the underground cellar of his house by this judgment. Beyond 1 foot from point 'X' on its north, the width of the existing open lane will remain as open as it is now. In the circumstances of the case, I shall leave the parties to bear their own costs throughout.