

**IN THE COURT OF THE CIVIL JUDGE (J. D.)
BHUBANESWAR, DISTRICT- KHURDA.**

Present : Ms. Sujata Priyambada Swain,
Civil Judge(Jr.Divn.),
Bhubaneswar, Dist-Khurda.

C.S. No. 89/2010

Tunendra Pattanaik, aged about 55 yrs,
S/o-Late Jayakrushna Pattanaik,
At/Po-Dumduma, PS-Khandarigi,
Bhubaneswar, Dist-Khurda,
At present S.V.Govt. School of Air and Crafts,
At/PO-Jaypore, Dist-Koraput.

..... Plaintiff

- Versus -

Gyanendra Kumar Pattanaik, aged about 45 yrs,
S/o-Late Jayakrushna Pattanaik,
At/PO-Dumduma, PS-Khandagiri,
Bhubaneswar, Dist-Khurda,
At present-Plot no.547/3173,
Somanath Garden, At/PO-Dumduma.
PS-Khandagiri, Bhubaneswar, District-Khurda.

..... Defendant

Counsel for the plaintiff	: M/s. Ajaya Ku. Mohanty , Advocate, BBSR & Associates
Counsel for the defendant	: M/s. S. N. Das, Advocate, BBSR & Associates
Date of hearing of argument	:08.05.14
Date of delivery of judgment	:13.05.14

J U D G E M E N T

1. The plaintiff has filed the present suit for declaration of his right of easement over the suit land, permanent injunction against the defendant restraining him from interfering with the free passage of the plaintiff over the suit land and other reliefs.

2. The plaint averments in brief are as follows:

The schedule "A" of the suit schedule property constitutes an area of 10 feet in breadth from east to west and 20 feet in length from north to south. The suit schedule property constitutes an area of Ac 0.004.6 decimals out of Ac 0.015 decimals towards western side of plot no.988 under khata no.426 of Mouza-Dumduma. The suit land originally belonged to and was recorded in the name of one Haramani Pattanaik as per record of rights prepared and published in the year 1982. Haramani died leaving behind her only daughter Bidulata Pattanaik. The present parties, their brother Chitaranjan, sister Puspanjali are children of said Bidulata. The mother of the parties succeeded to the suit plot from Haramani Pattanaik and - the suit land has been in use and enjoyment of the parties. The plaintiff serves as a craft teacher under the State Government and he resides at his service place at Jeypore under Koraput district. Taking undue advantage of the absence of the plaintiff at the house and the old and ailing condition of the mother the defendant prevailed upon their mother and managed to obtain a sale deed bearing no.3992 dtd.16.4.08 in respect of the suit plot in his name. The defendant had suppressed the said fact of alienation before others till their mother breathed her last on dated. 19.03.2009. After the death of their mother the defendant demanded money from the plaintiff for enjoyment of the suit land as passage from plot no.987 which was acquired by the plaintiff on the basis of a registered sale deed and subsequently under a consent decree in a partition suit. The defendant threatened the plaintiff to make boundary around the suit land and block the passage of the plaintiff to plot no.987. The suit plot touches the plot of the plaintiff to the

north and the land of the defendant to the south. The suit strip of land is a passage and a part of revenue plot no.988. It is the only passage between plot no.987 of the plaintiff to the public road bearing plot no.891. The plaintiff has been exercising his right of passage from his plot no.987 to the public road through the suit land not only from his childhood but also through his mother and grandmother. The plaintiff has no other passage to plot no.987 from the public road. The right of easement by the plaintiff has been acquired not only by prescription but also by necessity. When the present plaintiff was about 9 years old his maternal grandmother Haramani executed and registered a sale deed in his favour bearing no.1266 dtd.19.2.64 in respect of an area of Ac 3.230 decimals under Mouza-Dumduma. During consolidation the father of the plaintiff taking undue advantage of his minority and having his desire that his sons should equally benefit managed to get the ROR prepared in the name of his three sons- although the sale deed was exclusively executed in the name of the plaintiff alone. Accordingly, the consolidation ROR covering an area of Ac 2.865 decimals under khata no.143 was recorded in the name of the plaintiff, the defendant and their brother Chitaranjan. The plaintiff did not challenge the preparation of such consolidation ROR. The brothers of the plaintiff tried to mismanage the property under khata no.143 and in order to get rid of the unpleasant situation the plaintiff filed a suit bearing no.TS No.350/98 for partition in respect of the properties covered under khata no.142. During pendency of the suit the sister of the parties intervened and claimed a share. The suit ended in a compromise wherein the plaintiff was allotted an area of Ac 0.588 decimals constituting 8 numbers of plot including plot no.987. The defendant

knowing very well that the suit land is the only passage from plot no.987 for the plaintiff to the public road clandestinely obtained the suit plot from their mother by way of a registered sale deed. The cause of action for the suit arose on different dates and it continues after the death of their mother on 19.3.09 and lastly on 18.2.2010 when the defendant accompanied by masons and labourers threatened the plaintiff and attempted to make construction of wall over the suit plot by force and illegal means and thereby infringed upon the right of passage of the plaintiff. Therefore, the suit may be decreed.

3. On the other hand, the defendant has made his appearance and has filed his written statement in which it is submitted that the suit is not maintainable, there is no cause of action, the suit is bad for mis-joinder and non-joinder of necessary parties, the description of the suit property is not in accordance with Order 7 Rule 3 of CPC. It is submitted that earlier the parties to the case had participated in a decree of compromise vide TS No.350/90/4-04 wherein plot no.987 was a subject matter of that suit. By that time the plaintiff could have raised the claim of right to easement of way to that plot. At that time the plaintiff completely remained silent and did not whisper a single word about the right to easement of way over the land of the defendant. So, the case of the plaintiff is hit under the provisions of law of acquiesce. The plaintiff is neither entitled to right of way by prescription nor entitled to easement of necessity. The present plaintiff at no point of time enjoyed the suit land as road leading to his plot from the main road. The status of the defendant's land is not a road; it is a stitiban homestead land of defendant, which he purchased from the rightful owner under RSD vide No.3992 dtd.16.4.08 for consideration.

Although, plot no.987 was a subject matter of a previous partition suit the plaintiff had not raised any voice about right of easement over the suit land; and for the first time he is raising his voice that since 1964 he has been enjoying the suit land as road. The earlier sale deed bearing no.1266 dtd.19.12.64 alleged to have been executed by the grandmother of the plaintiff in favour of the plaintiff has been set aside by the competent Civil Court and necessary distribution was made by the Civil Court Commissioner on the strength of decree passed by Civil Court in CS No.350/98/4-04. So, the plaintiff is estopped from getting the benefit of sale deed bearing no.1266 dated.19.12.64. The present suit land is neither the subject matter of earlier partition suit nor the recorded owner of the suit land was a party to earlier suit. So the findings of the earlier partition suit is not binding on the vendor of the present defendant. The defendant is the rightful owner in possession of the suit land and has raised substantial construction over it. The cause of action as stated in the plaint is denied. Therefore, it is submitted that the suit may be dismissed.

4. In view of the above pleadings of both the parties, the following issues have been framed for adjudication.

Issues

- i) Whether the suit is maintainable?
- ii) Whether there is any cause of action to file the suit?
- iii) Whether the plaintiff is entitled to a decree of declaration of the right of easement of the plaintiff over the suit land?
- iv) Whether the plaintiff is entitled to a relief of permanent injunction restraining the defendant from interfering with the

free passage of the plaintiff over the suit land?

- v) Whether the suit is bad for non-joinder and mis-joinder of necessary parties?
- vi) Whether the suit is hit under the provisions of Order 7 Rule 3 of the CPC?
- vii) To what other relief (relief's) is the plaintiff entitled?

5. In order to substantiate his case the plaintiff has examined himself as the sole witness and has proved 6 number of documents. On the other hand the defendant has examined himself as the sole witness on his behalf and has proved 3 number of documents, in order to contradict the plaintiff.

6. **Findings:**

For the sake of convenience issue no.(iii) & (iv) shall be taken up for consideration together as the issues are inter related and issue no.(iv) is based on the findings in the issue no.(iii).

Issue no.(iii) and (iv):

The plaintiff has claimed right of easement in respect of the suit land and has prayed for relief of injunction against the defendant from interfering with his right of free passage while the defendant has denied existence of any such right.

- l) A critical evaluation of the oral evidences adduced reveals as follows:

PW 1 who is the plaintiff states that the defendant is his brother. The suit land has a dimension of 10 feet breadth from east to west and 20 feet length from north to south

measuring an area of Ac 0.004.6 decimals out of Ac 0.015 decimals. PW 1 reiterates that the suit land originally belonged to and was recorded in the name of Haramani Pattnaik; Bidulata being the successor of Haramani; the parties, their siblings being children of Bidulata. The residential house since the time of their maternal grandmother is situated over plot no.987 where she and after her their mother along with the parties and their siblings were residing . After the death of his mother he has been residing in the house which was allotted in his favour in partition. Throughout the said period the suit land has been used and enjoyed as passage from public road at north to their house at the south. PW 1 states that presently he is enjoying the passage having right to easement. The suit land is the only passage from the residential house over plot no.987 and has been used as such prior to his birth; as the house existed prior to his birth. The drainage water of the house also passes through the suit land towards the road. Taking undue advantage of his absence the defendant prevailed upon their mother who was old and ailing and resided with the defendant and with malafide intention managed to obtain a sale deed dated. 16.4.08 in respect of the suit plot in his name. The defendant suppressed the fact of such sale deed till his mother died on 19.3.09. After death of their mother the defendant created problem for pw1's passage over the suit land. The suit strip of land is the only passage in between plot no.987 to the public road bearing plot no.891. He has been exercising his right of passage from his childhood and also through his mother and grandmother as his grandmother was owner in respect of both the plots. PW 1 states that he has no other passage from his house over plot no.987 to the public road. His maternal grandmother on

19.2.64 had executed a sale deed in respect of an area of Ac 3.230 decimals in his favour. PW 1 reiterates the plaint averments that during consolidation his father got the property covered under the sale deed recorded in the name of all his brothers including him. And his brothers compelled him for partition and T.S. No.350/98 ended in compromise. PW 1 proves the certified copy of ROR of khata no.426 of Mouza-Dumduma as Ext.1; the certified copy of RSD No.3992 dtd.16.4.08 as Ext.2; the village map of the suit plot as Ext.3; the certified copy of judgment and decree in TS No.350/04 of 1998/04 in the Court of Ad hoc Additional District Judge- Cum-Track Court as Ext.4; the certified copy of compromise between the parties as Ext.5; the certified copy of RSD No.1266 dated.19.2.64 as Ext.6.

During cross-examination PW 1 states that in the sketch map attached to his plaint a road exists to the north east corner of his land; the same is joint land. PW 1 further states that in field no road exists to the north-east and the house of Birakishore Pattanaik and others exists on the said road on map. Concerning plot no.985 in the sketch map of the plaint, PW 1 has remained silent to the suggestion that the map of plot no.985 is wrong and states that the land is used by others. It is pertinent to mention that with reference to the said evidence of PW 1 that as per schedule "B" of the plaint in which a sketch map is given plot no.985 is shown with dotted lines indicating it's status as road and the said plot no.985 touches north-eastern portion of plot no.987. In Para 14 PW 1 has remained silent to suggestion that the dotted marked area is not shown as road. On being shown Ext.3 i.e., the village map, PW 1 states that as per Ext.3 his plot 1202 does not touch any road and as per Ext.3 dotted area is road. In Para 16 PW 1 states that his grandmother

Haramani had executed the sale deed in his favour in respect of plot no.987. Plot no.987 was included in their compromise decree. PW 1 states that at the time of compromise decree he had raised the issue of no road existing to access plot no.987 and at that time he was told that the problem would be solved later with the help of his mother. During the lifetime of his mother he did not solve the problem concerning road. His mother has not given anything in writing to the effect that she would arrange for road from the disputed land. In Para 20 PW 1 states that he has no objection to the sale by his mother in favour of the defendant, he wants passage. He has taken electric connection to his house, he had not taken water connection as he has a well. PW 1 denies that road exists to the north-east of his plot which he uses as road.

DW 1 who is the defendant states that the nature of the suit land is a road and was recorded in the name of Haramani Pattanaik, after Haramani the property devolved upon Bidulata. During her lifetime to meet her legal necessity, Bidulata executed RSD no.3992 dtd.6.4.08 in his favour. The suit land has never been used as a road by the plaintiff. In the partition suit which ended in a compromise vide TS No.350/98 the plaintiff did not raise any contention that the suit land is being used as road. The plaintiff has separate access to the suit land. DW 1 proves the ROR of khata no.426 of Mouza-Dumduma as Ext.A; the RSD no.3992 dtd.16.4.08 as Ext.B; the rent receipt in respect of the suit land as Ext.C.

During cross-examination the DW 1 admits that plot no.987 had a dwelling house at the time of his maternal grandmother and the plaintiff had received plot no.987 from his maternal grandmother on the basis of a sale deed. DW

1 states that plot no.986 is to the east of plot no.987 and is recorded in the names of the three brothers. In Para 13 of his evidence DW 1 states that plot no.985 is to east of plot no.986 and is in the name of Birokishore Pattanaik and others.

A very relevant question in the present case is whether there is any alternative passage to plot number 987 of the plaintiff. In this connection in Para 13 of his evidence DW 1 states that plot no.985 is to east of plot no.986 and is in the name of Birokishore Pattanaik and others. In this respect it is pertinent to mention that the learned counsel for the defendant has submitted during argument that plot no.985 is an alternative road for the plaintiff as is revealed in the sketch map of schedule "B" of the plaint. In schedule "B" of the plaint plot no.985 touches a small portion of the north-eastern portion of the plaintiff's plot no.987 and dotted lines exist over plot no.985, indicating that plot no.985 is a road. Nevertheless, the plaintiff in his evidence has stated that the said land is used by others. As per evidence of the defendant, DW 1 plot no.985 is recorded in the names of Birokishore Pattanaik and others. Therefore, even if it is accepted for the sake of argument that plot no.985 is a path, the same would not indicate that plot 985 is a public path as- the evidences of the plaintiff and the defendant indicates that the said land is utilized by and belongs to Birakishore Pattanaik and others. As per the evidence of PW 1 and DW 1 it seems that plot no.985 may be a private road – therefore it does not seem from the evidence of Dw1 that plot no.985 is an alternative passage for the plaintiff from plot no.987 .

In Para 14 DW 1 states that the plot to the west of plot no.1202 is in his name. It is pertinent to mention in this regard that plot no.1202 is the plot of the plaintiff to the north

of plot no.987 and is a longitudinal strip of land. This evidence of DW 1 if construed in the light of the sketch maps as given in schedule "B" of plaint and Ext. "B" - would indicate that plot no.1202 cannot be used as a passage from plot no.987 by the plaintiff because another plot blocks plot no.1202 from the west. The defendant has admitted that the said plot belongs to him.

Concerning alternative passage it is pertinent to mention that in Para 18 DW1 admits that the relative location of the plots in the sketch map in the schedule of the plaint are in conformity with the revenue village map. DW 1 admits that plot no.988 is to the front of plot no.986, in which he has his share. DW 1 denies that he acted fraudulently for purchasing of plot no.988 to obstruct the path of the plaintiff from public road to his house. In Para 20 of his evidence DW 1 states that an alternative path exists over plot no.989 which is recorded in the name of the plaintiff and plot no.988 is not the only path from public road to the plot no.987. In the light of the said evidence of DW 1 it is pertinent to mention that DW 1 has admitted the sketch map given in the plaint according to which the south-western corner of plot no.987 touches north-eastern corner of plot no.988. Thus as per schedule B of the plaint which is admitted by the defendant only the corners of plot no.987 and 989 meet. It is also pertinent to mention that as per Ext. B i.e, the RSD in favour of the defendant the corner of plot no.989 touches the corner of 987. Thus, it is not possible to use plot no.989 as passage from plot no.987 if the sketch map as given in Ext.B (RSD in favour of defendant) and the sketch map in schedule "B" of the plaint which is admitted by the both the parties are taken into consideration.

The plaintiff has claimed both easement of necessity and easement of prescription. The evidence of DW1 concerning easement of prescription may be scanned. In Para 14, DW 1 states that the suit land is presently vacant land and about 20 years ago a house which existed over it from the time of his maternal grandmother has been destroyed. DW 1 admits that a village road exists to the south of the suit plot running in east-west direction and the house which previously existed in the suit land faced southern direction. DW 1 admits that the house which existed over plot no.988 was used by his maternal grandmother, her daughter and children of her daughter.

A vital admission concerning easement of prescription is that in Para 21 of his evidence DW 1 admits that during the time of his maternal grandmother plot no.988 was used as a path for passage from plot no.987.

About the present condition of the suit land. DW 1 states that a "Chatana" (flooring) exist within plot no.988. It is the cement floor of the previously existing house ;this evidence of DW 1 indicates that presently no construction exists over the suit plot as claimed by the defendant .

In Para 16 DW 1 states that plot no.988 was recorded in the name of his grandmother, Haramani during settlement. His mother was not a party to the partition compromise suit and the present suit plot was not a subject of partition in the said suit. DW 1 states that plot no.988 was purchased by him subsequent to compromise partition.

Concerning cause of action in Para 22 DW 1 states that as he wanted to raise construction over the suit land the plaintiff has filed the case.

II) An evaluation of the documents submitted reveals the following:

Ext.1 is the ROR of consolidation khata no.426 of Mouza-Dumuduma. The recorded owner is Haramani Pattnaik. The said khata consists of plot no.988 and 1009 of areas of Ac 0.015 decimal and Ac 0.036 decimals respectively; the status of both the plots is gharabari.

Ext.2 is the certified copy of RSD NO.3992, dated.16.4.08 which corresponds to Ext.B; Ext.B being the original RSD .

Ext.3 is the revenue map of sheet no.5 of Mouza-Dumuduma. Keeping in view the question of whether any alternative path exists to plot 987,an evaluation of Ext 3 reveals as follows. A perusal of Ext.3 reveals that plot no.987 exists to the north of plot no.988 which touches the public road. The north-eastern corner of plot no.989 touches the south-western corner of plot no.987. Plot no.985 which seems to touch a small portion of plot no.987 at the north-eastern portion – is shown as a path running between plots touching another path plot no.1002 which also runs between plots touching another path plot 1003 and plot 1003 ends at plot no.996. Thus if for the sake of argument plot no.985 is accepted as an alternative path of the plaintiff, the same would not end in any public road. Similarly plot no.1202 which admittedly belongs to the plaintiff exists to the north of plot no.987 and the defendant has admitted that to the west of plot no.1202 exits his plot. Thus, plot no.1202 does not seem to be a path and is blocked on all sides by other plots with no access to any public road. Plot no.996 which exists to the north of plot no.1202 is also surrounded from all sides by other plots.

Ext.4 is the certified copy of final decree in CS No.350/98/4-04 in the Court of Additional Ad hoc District Judge-Cum- First Track Court no IV. Chitaranjan Pattnaik;

the admitted brother of the parties, the present defendant, Puspanjali, the sister of the parties and the present plaintiff are the parties to the suit. Khata no.143 Chaka 120 consisting of plot nos.560, 996, 994,989, 987, 1011, 546, 997/1202, 549, 547- a total number of 10 plots which constitute an area of Ac 2.68 decimals form the subject matter of partition. Vide schedule "A" several plots including plot no.987 have been allotted to Tunendra Pattanaik, who is the plaintiff. Plot no.989 and 997/1202 have also been allotted to the plaintiff.

Ext.5 is the judgment in TS NO.350/98 in which the partition of land among the present plaintiff and the present defendant, Chitaranjan Pattnaik and Puspanjali Pattanaik, who are all children of late Jaykrushna Pattanaik has been made. The concerned land has been divided into five schedules; schedule "A" is allotted to Tunendra Kumar Pattanaik; schedule "B" is allotted to Gyanendra Kumar Pattnaik, the present defendant; schedule "C" is allotted to Chitaranjan Pattnaik; schedule "D" is allotted to Puspanjali Pattanaik and schedule "E" which consists of plot no.547 and 549 are kept as joint land.

Ext.6 is the certified copy of RSD no.1266 dated.19.2.64; the name of the *data* is stated to be Haramani Bewa and the name of the *grahita* is stated to be Tunendra Kumar Pattanaik who is a minor and son of Jayakrushna Pattnaik. Although, the nature of the document is stated to be a sale deed the use of the terms *data and grahita* indicates that the possibility of the transfer being a gift cannot be ruled out in the light of the admitted fact that the plaintiff is the grandson of Haramani Bewa; as admitted by the parties, the plaintiff's mother was the only child of Haramani Bewa. The schedule of land transferred vide Ext 6 is in respect of Mouza-Dumduma, Khata no.311 plot nos .754, 755, 614, 615, 619,

632, 752, 753, 779/1119, 775, 634, 630. Thus, vide Ext.6, 12 numbers of plots were transferred in favour of the plaintiff and the total area of the said plots is Ac 3.230.

Thus a comparison of Ext.4 and Ext.6 reveals that the total area partitioned vide Ext.4 is smaller than the land transferred in favour of the plaintiff vide Ext.6.

Ext.A is the certified copy of ROR of khata no.426 of Mouza-Dumduma; the recorded owner is Haramani Bewa; the said khata consists of the plot nos.988 and 1009 of area Ac 0.015 decimals and Ac 0.035 decimals respectively.

Ext.B is the RSD no.3992 dated.16.4.08; the vendor is Bidulata Pattanaik, the mother of the parties; the vendee is the present defendant. The lands sold constitute plot nos.1009 of area Ac 0.035 decimals and plot no.988 of area Ac 0.015 decimals under khata no.426 of Mouza-Dumduma.

Ext.C is a rent receipt in respect of khata no.426 paid in the name of Haramani Pattanaik by Gyanendra Kumar Pattanaik.

III) After a careful evaluation of the available evidences and documents on records and the submissions of the counsels the following is revealed:

Admittedly, the maternal grandmother of the plaintiff Haramani had executed a registered sale deed in favour of the plaintiff in respect of certain lands; the claim of the plaintiff that during consolidation his father had got the lands given to him by his grandmother recorded in the name of the plaintiff, has not been denied by the defendant. To establish his claim that he had received lands from his maternal grandmother, the plaintiff has proved the registered sale deed in his favour, vide Ext.6. It is pertinent to mention that although Ext.6 appears to be a sale deed the vendor has been stated as "data" and the vendee has been stated as "grahita"; use of such terms also indicate that the possibility

of gift to the plaintiff ; the said document is of the year 1964 and admittedly by them, the consolidation operation had not taken place. None of the parties have proved any ROR in connection with the lands transferred in favour of the plaintiff vide Ext.6; although, admittedly the lands given to the plaintiff vide Ext.6 were subsequently recorded in the names of the plaintiff and his two brothers – during consolidation ; no ROR has been submitted to establish the same. It seems from the pleadings and statements of both the parties that the lands transferred to the plaintiff vide Ext.6 subsequently became subject matter of a partition suit in which the lands were partitioned between the plaintiff, his two brothers and his sister. No documents have been submitted to establish that the lands transferred vide Ext.6 are the same lands which are subject matter of the partition suit and compromise decree vide Ext.4 and 5 ; no concerned documents of Hal-Sabik correspondence has been given. Nevertheless, a compromise decree of partition has been passed in accordance with the compromise agreement between the parties vide Ext.4 and 5. But certain things remain unexplained and have not been brought to light because vide Ext.4, a total area of Ac 2.68 decimals constituting 10 plots have been partitioned; in contrast vide Ext.6, 12 plots constituting Ac 3.230 decimals were transferred - although the claim is that the land transferred vide Ext.6 were partitioned vide Ext.4 and 5. Thus a comparison of Ext.4 and Ext.6 reveals that the total area partitioned vide Ext.4 is smaller than the land transferred in favour of the plaintiff vide Ext.6.

- IV) The plaintiff has claimed that he has both the easement of necessity and easement of prescription in respect of the suit land. Methods for acquiring easementary have been

described in AIR 1996 ORI 92 Para 20 “ Methods of acquiring easement by (1) prescription under Easement Act where applicable (2) prescription U/s.26 and 27, of Limitation Act; and (3) lost grant”

- V) Concerning alternate passage and easement of necessity the claim of the plaintiff is that he has no alternate passage to his plot no.987 except the plot no.988. The admissions of DW1 and documentary evidences concerning alternate passage to plot 987 have already been discussed. A holistic appreciation of the oral evidences of the parties, the documentary evidences vide the sketch map of Ext B and the sketch map of the plaint together with Ext 3 indicates that if plot no.988 is not taken as a path there will be no alternate path for plot no.987 from any public road. Admittedly, plot no.988 intervenes between the public road 891 and the plaintiff's plot 987. The claim of the defendant is that the plaintiff's plot has an alternate passage as plot no.985 which touches the north-eastern portion of plot no.987, is a road as per the sketch map of the plaint. As already discussed the said plot no.985 is a private land and may be a private road; further, the said plot no.985 does not end with any other road. The plot no.1202 belonging to the plaintiff and adjacent to plot no.987 also does not touch any public road; as already discussed as per the sketch map of Ext.B and admission of the defendant the plot of the defendant exists to west of plot no.1202 and plot no.998 exists to east of 1202. These discussions indicate that the plaintiff has no passage to plot no.987 from north. As discussed the corner of plot no.989 belonging to the plaintiff, touches the corner of plot 987 belonging to the plaintiff. Therefore, it is not practically possible to have any passage from the plot no.987 to plot no.989 – although the defendant has claimed in his evidence

that plot no.989 is an alternate passage for the plaintiff. Thus, these discussions based on a holistic appreciation of the oral evidence of the defendant, the sketch map attached to the plaint which is admitted by the defendant, the sketch map given in the RSD in favour of the defendant vide Ext.B, the revenue map vide Ext.3 - all indicate that there is no alternate passage for the plaintiff to approach any public road from plot 987 except the plot no.988.

Concerning easement of necessity reference may be made to Section 13 (a) and 13 (b) of the Indian Easement Act 1882 which reads as *"Where one person transfers or bequeaths immovable property to another, - (a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or*

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled, to such easement;"

Section 25 (1) of the limitation Act 1963 reads as *"Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) 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, way, watercourse, use of water, or other easement shall be absolute and indefeasible"*

Concerning easement of necessity reference may be made to the decision in *Kusasan Samal v. Chandamani Pradhan* AIR 2003 Ori 157 in which Villagers claim right of passage through plaintiff's land on the plea that it was the only passage to go to the river ghat for fetching water for domestic use and drinking purposes as the village has no well or pond. Plaintiff pleads that they have alternative passage. Evidence reveals that such alternative passage is situated at a considerable distance. Villagers' plea of easement of necessity succeeds.

Concerning test for easement of necessity it has been held in *Ponnaiyan alias Gounder v. Karuppakkal @ Ponnayal* AIR 2002 Mad. 443: "*Test of easement of necessity is for absolute necessity, not for convenience*". Further, it has been held in *Hero Vinoth v. Seshammal* (2006) 5 SCC 545 "*An easement of necessity is one which is not merely necessary for the reasonable enjoyment of dominant tenement, but one where dominant tenement cannot be used at all without the easement*".

VI) Another question is whether the plaintiff is entitled to easementary right by way of prescription. The oral evidences and admissions which indicate that the plaintiff might have easementary right by way of prescription are as follows:

The defendant, as DW 1 in Para 14 of his evidence states that the suit plot is presently vacant land and about 20 years ago a house which existed on the suit land from the time of his maternal grandmother has been destroyed. DW 1 also admits that the village road exists to the south of the said plot – and the said contention is also made in the plaint, reflected in the sketch map of the plaint and sketch map of Ext.B. In Para 21 DW 1 has admitted that during the time of

his maternal grandmother plot no.988 was used as path for passage from plot no.987. In Para 14 DW 1 admits that the house which existed on plot no.988 was used by his maternal grandmother, her daughter and children of her daughter. In this regard it is pertinent to mention that admittedly, both the parties are children of the only daughter of the maternal grandmother of DW 1. These admissions of DW 1 together with the preceding discussions indicate that previously the house of the maternal grandmother of parties existed over plot no.988, which was adjacent to the public road to south; the said house was used by the maternal grandmother of the parties, the mother of the parties and the parties about 20 years ago; and plot no.988 was also used as passage from plot No.989 to the public road. Thus, the admissions of the defendant indicates that more than 20 years ago plot no.988 was used as passage from plot no.989 to the public road. (Plot no.988 and 989 belonging to the same person i.e., Haramani, maternal grandmother of the parties) ; the claim of the defendant is that he has already made construction over the suit plot, has been proved to be false as the defendant has himself admitted that the suit land is vacant land and only Chatana (flooring) of the old house of their maternal grandmother exists over the suit land. Now the question arises as to whether the circumstances as described will entitled plaintiff to easementary right over the suit land by way of prescription.

Concerning easement by prescription according to Section 15 of the Indian Easement Act 1882 *"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 20 years, the right to such access and the use light or air,*

support or other easement shall be absolute”.

Concerning easement of prescription an essential condition is exercise of the right adverse to the right of the persons over whose lands easement is claimed. Can permissive possession come under the purview of easement of prescription? In this respect reference may be made to the decision in Heera Bai v. Thakuri AIR 1998 MP 273. *“ In case of claim of acquisition of right of way over other’s land by prescription, claimant has to show that right claimed by peaceable and open means without interruption over period of 20 years, adverse to rights of person over whose land easement is claimed”*

Further reference may be made to the decision in Punit Das (Smt.) V. Kanailal Das AIR 2001 Cal.110 where the plaintiff claims that as permitted by the grandfather of the defendants, his predecessor and then he has been using their water pond for over last 20 years. Held, even then there would be no easementary right by prescription. For, permissive use never matures into right. In the present case the claimed dominant heritage (plot no.987) originally belonged to Haramani – then was sold to minor plaintiff – and in a redistribution (partition) was again allotted to the plaintiff. The claimed servient heritage (plot no.988) originally belonged to Haramani, then devolved upon her daughter Bidulata, mother of the parties; and was then sold to the defendant. Thus Haramani, grandmother of parties was originally owner of both the claimed dominant and servient heritages. Then the plaintiff became owner of the dominant heritage and used as passage the land of his grandmother which admittedly devolved upon his mother. Thus, in the present case although use of plot no.988 as passage bears the colour of permissive possession such permissive

possession has its roots in necessity.

- VII) Can the easement claimed by the plaintiff be said to be based on contract. Admittedly, the parties and their siblings had entered into an agreement for partition and allotment of shares were made in accordance with the terms of partition vide Ext.4 and 5. A decree was passed in terms of the partition agreement between the parties. Thus, the agreement for partition between the parties is a contract between the parties. Family harmony and peaceful enjoyment of land allotted by partition is the consideration for such agreement for partition. In this respect reference may be made to the decision in *Laxmi Narain vs Bansilal* (AIR 1965 All 522) *“An arrangement arrived at for composing differences for maintaining amity and good relations or for preserving the property, would be upheld as a family arrangement. Indeed even a dispute in praesenti is not necessary and a family arrangement may have for its basis the preservation of peace and property only”*.

With reference to easement based on grant reference may be made to the decision in *Hero Vinoth v. Seshammal* (2006) 5 SCC 545 that *“In a case of easement by grant, parties are governed by the terms of grant and not by anything else. Of course, such grant may not always be explicit. The grant maybe implicit as well”*. In the said case it has also been held that *“Easement of grant is a matter of contract between the parties. It may be that but for such grant, the dominant tenement could not be enjoyed at all and therefore there was a strong case in favour of easement of necessity”*.

- VIII) Will the partition agreement between the parties act as estoppel against the defendant in denying the right of easement of the plaintiff over plot no.988? In the present case

as admitted by the parties the plaintiff instead of pursuing the rights conferred on him by virtue of the deed executed by his maternal grandmother upon him had entered into an agreement for partition with the defendants and his siblings. As the deed in favour of the plaintiff is admitted by the defendant the said partition bears the color of relinquishment by the plaintiff; this is because as per the claim of the plaintiff and admission of the defendant all the partitioned properties had been transferred in favour of the plaintiff prior to the partition. Enjoyment of the land allotted to the plaintiff in the partition is an implied condition of the agreement for partition between the parties; and land allotted to the plaintiff cannot be enjoyed without any passage to such land. A prudent man would believe that the plaintiff would not have agreed to the deed of partition had he known that in future he will not be able to have access to the land allotted to him. Had the plaintiff known that he would face difficulties in having access to the land allotted to him the plaintiff might have pursued the registered agreement which has been admittedly executed in his favour by his maternal grandmother and sought for relief before consolidation authorities. All the discussions of the present para are based on the contention that the land transferred in favour of the plaintiff vide Ext.6 was partitioned in between the parties vide Ext.4 and 5. Such contention is based on the claim of the plaintiff which is admitted by the defendant; however, such contention is not based on documentary evidence which create incomplete picture because documents concerning - Hal sabik corresponds, ROR in favour of Haramani in respect of land transfer to the plaintiff, ROR in favour of the plaintiff and his brothers published during consolidation (as claimed and admitted by the parties) have not been submitted. Only the

document of transfer in favour of the plaintiff and documents concerning partition have been filed. However admissions of both the parties indicate that the lands transferred vide ext 6 and the lands partitioned correspond.

IX) As already discussed, had the plaintiff known that he would not have access to his plot no.987, he would not have agreed for partition. By agreeing to the partition the plaintiff seems to have relinquished what was allotted to him by transfer. Under the circumstance, will the principles of estoppel apply in favour of the plaintiff and the defendant be estopped from denying right of passage to the plaintiff over plot no.988. In this regard Section 43 of the Transfer of Property Act and Section 115 of the Evidence Act come to the background.

X) Section 43 of Transfer of Property Act reads as follows:
“Where a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsist”
 Therefore, the conditions required for invocation of the provisions of Section 43 of the Transfer of Property Act are:

- (a) Transfer for consideration;
- (b) Subsequent acquisition of interest;
- (c) Fraudulent/erroneous representation;

Concerning consideration it has already been discussed that in case of family arrangement and partition preservation of peace, amity and good relationship is consideration

The land over which easementary right is claimed originally belonged to Haramani the grandmother of the

parties. The title of Haramani is proved vide Ext.B. The properties vide Ext.A which include the suit plot are transferred in favour of the defendant by the mother of the parties. Thus, although, the grandmother of the parties is the recorded owner vide Ext.A, the mother of the parties executed the deed of transfer for consideration in favour of the defendant. In his evidence the plaintiff has not objected to the sale in favour of the defendant vide Ext.B stating that he only wants path. A woman is the absolute owner of the property inherited by her by virtue of section 14 of the Hindu Succession Act . As admitted by the parties the mother of the parties was the only daughter of Haramani ; so it seems that the mother of the parties Bidulata had sold the suit land to the defendant by virtue of being heir of Haramani. It is pertinent to mention that vide Ext.B there are several endorsements on different pages to the effect that although the vendor is educated and on account of extreme old age she is unable to sign ; the endorsements are available on each page bearing the thumb impression of Bidulata; the mother of the parties. It is also pertinent to mention that vide Ext.B, Chitaranjan Pattanaik and Puspanjali Pattanaik the siblings of the parties have signed on the deed. As it seems from Ext.B that the mother of the parties was suffering from extreme old age when she executed the deed in favour of the defendant, the possibility of undue influence cannot be ruled out. Nevertheless, as admitted by the parties and as is obvious from the documents the defendant has acquired interest in respect of the suit land subsequent to the partition agreement between the parties. Thus two conditions, that is payment of consideration and subsequent acquisition of interest as envisaged in the provisions of Section 43 of the Transfer of Property Act have been fulfilled in the present

case. Another condition is misrepresentation or fraudulent representation. Admittedly, at the time of the execution of the partition deed the plaintiff had knowledge concerning ownership of the suit land. The same belonged to his grandmother. If Haramani was alive then or the said land belonged to the mother of the parties as heir of Haramani, presuming that Haramani died intestate- is not known. Thus, there was no misrepresentation concerning the ownership of plot no.988 at the time of the partition deed; and it was known that the plot no.988 was not the property of the defendant at the time of the partition deed. Thus, there was no misrepresentation concerning ownership at the time of execution of the partition deed ; the vital question is whether there was any misrepresentation at all and in case of such misrepresentation can the provisions of Section 43 of the Transfer of Property Act or 115 of the evidence Act can be invoked. To answer the said questions one has to delve into the factual aspects to the case. There was an implied understanding between the parties to the partition (the plaintiff, defendant and others) that one will be able to enjoy the portion allotted to him; as a corollary there is an implied understanding that the parties will have a right to passage. However, as is revealed from the sketch map of the plaint which is admitted and corresponds to the revenue map of the village and Ext.B – plot no 988 is the only access from the public road to plot no.987 and plot 986 which according to the defendant, is the joint land of all the brothers. Plot 988 belonged to Haramani and admittedly, the mother of the parties was the only child of Haramani. Therefore, it seems that the implied understanding concerning passage was arrived at between the parties on the basis of their fair chance of succeeding to the interest of Haramani in respect

of plot no.988 together. In this respect reference may be made to Section 6(a) of the Transfer of Property Act according to which the chances of an heir apparent or other mere possibility of a like nature cannot be transferred. So the question arises as to whether Section 43 of the Transfer of property Act apply to the present case.

It has been held in *Alamanaya Kunigari Nabi Sab. V. Murukuti Papiah* (1915) 29 MLJ 733 “*When a person transfers property representing that he has a present interest therein, whereas he has in fact only a spes successions, the transferee is entitled to the benefit of Section 43, if he has taken the transfer on the faith of that representation and for consideration*”. In the present case as the plaintiff, the defendant and their siblings – all had chances as heirs apparents in respect of plot no.988 , it cannot be said that there was misrepresentation. Under the circumstances the doctrine involved in Section 43 of the Transfer of Property Act cannot be invoked as the implied understanding concerning passage was admittedly, a spes successions.

XI) Nevertheless, it cannot be denied that based on an implied understanding the plaintiff had proceeded with the compromise decree for partition and had altered his position. So the question arises as to whether the doctrine of promissory estoppel would be applicable to the plaintiff. Reference may be made to the decision in *Motilal Padampat Sugar Mills v. State Govt. of U.P.*, (1979)2 SCC 409:AIR 1979 SC.61 in which the doctrine of promissory of estoppel was discussed “ *It is however, necessary to make it clear that though the doctrine has been called in various judgments and text-books as promissory estoppels, and it has been variously described as “equitable estoppels”, ‘quasi estoppel’ and ‘new estoppel’; it is not really based upon the principle of*

estoppels but it is a doctrine evolved by equity in order to prevent injustice where a promise made by a person knowing that it would be acted on by the person to whom it is made and in fact it is so acted on and it is inequitable to allow the party making the promise to go back upon it”.

In the said case it has also been held that what is necessary is that the promisee should have altered his position in reliance on the promises. However, there can be no estoppel against law or statute. In view of Section 6 (a) of the Transfer of Property Act the principle of promissory estoppel cannot be applied. Thus on the basis of agreement of partition between the parties, the plaintiff cannot invoke the principles of estoppel.

XII) Taking these discussions into consideration it seems that the plaintiff does not have an easement of prescription in his favour in respect of the suit land; nor can the plaintiff avail of the provisions of Section 43 of the Transfer of Property Act or Section 115 of Evidence Act or the principle of promissory estoppel and invoke the principles of estoppels – as such invocation would go against the provisions of Section 6 (a) of the Transfer of Property Act. Nevertheless, as already discussed the plaintiff has no alternative passage to his plot no.987 ; he has absolute necessity of right of path over the suit land for access to the public road. Therefore, the plaintiff is entitled to an easement of necessity in respect of the suit land.

The easement of necessity of the plaintiff started when he purchased the suit land from his grandmother. As per the claim of the plaintiff and admission of the defendant the plot 987 had been sold to the plaintiff by his grandmother Haramani vide Ext 6 (though hal-sabik correspondence documents are not available). The suit plot is recorded in the

name of Haramani vide Ext 1; and from the oral evidences of both the parties it seems that the house of Haramani was located over the suit plot. So when Haramani sold plot 987 to the plaintiff, the easement of necessity in favour of the plaintiff was created- in view of section 13(a) and 13(b) of the Indian Easement Act. Haramani was the owner of both the dominant heritage and the servient heritage- when she executed sale deed in respect of dominant heritage in favour of the plaintiff. The defendant has admitted as DW1 in para 21 that from the time of his maternal grandmother plot 988 was used as path for passage from plot 987. Thus from the time of execution of the sale deed in favour of the plaintiff in respect of plot 987- an easement of necessity was created; such right of easement got attached to plot 987. Subsequent transfer of plot 988 by the heir of Haramani in favour of the defendant does not extinguish such right of easement. Can the defendant claim that on account of the partition deed between the parties, such right was extinguished? The partition deed was subsequent to the sale deed in favour of the plaintiff which created the easement of necessity; and such easement of necessity got attached to plot 987, not to the plaintiff. So the partition deed which seems to alter the rights created in favour of the plaintiff by virtue of the sale deed in his favour- will not have the effect of cancelling the right of easement which had already got attached to plot 987.

Therefore, the plaintiff is entitled to a relief of declaration of his right of easement over the suit land. Accordingly issue No.(iii) is answered. As issue no.(iv) is based on issue no.(iii) the same is also answered in positive. A question arises as to the area over which the plaintiff can have his right to easement. Reference may be made to the provisions of Section 14 of Indian Easement Act 1882 "When the person so

entitled to set out the way refuses or neglects to do so, the dominant owner may set it out". In the present case the defendant has denied the right of easement of the plaintiff. Therefore, the plaintiff is entitled to right of easement over a passage, 10 feet in width along the western side boundary plot 988, joining plot no.987, with plot no.891.

Issue numbers (I) (ii) (v) (vi) (vii)

In view of the preceding discussions, the suit is maintainable and the plaintiff has a cause of action to file to the suit. Concerning non-joinder of necessary parties, all the siblings of the plaintiff have not been made parties; nevertheless the claim of the plaintiff is against the defendant and no suit shall be defeated by reason of mis-joinder or non-joinder of parties. The plaintiff has claimed relief for ten feet width of passage. Under the circumstances the plaintiff is not entitled to any other relief. Accordingly these issues are answered.

Order

The suit be and the same is decreed on contest against the defendant, but under the circumstances, without any cost. Accordingly it is declared that the plaintiff has an easementary right of passage, 10 feet in width over suit plot no.988 running along the western boundary of plot no.988 from plot no.987 to plot no.891. The defendant is permanently restrained from creating any obstruction to the plaintiff in respect of the said passage.

Advocate's fee be assessed at the contested scale.

**Civil Judge(Jr.Divn.)
Bhubaneswar.**

The judgment is dictated, corrected and pronounced by me in the open Court today i.e. on the day of 13th day of May, 2014 under my seal and signature.

**Civil Judge(Jr.Divn)
Bhubaneswar.**

List of witnesses examined on behalf the plaintiff:

P.W.1 Tunendra Kumar Pattanaik

List of witnesses examined on behalf of the defendant:

D.W.1 Gyanendra Kumar Pattanaik

List of documents marked as exhibits on behalf of the plaintiff:

- Ext.1 Certified copy of ROR of khata no.426 of Mouza-Dumduma.
- Ext.2 Certified copy of RSD no.3992 dtd.16.4.08.
- Ext.3 Village Map of suit plot
- Ext.4 Certified copy of Judgment and Decree in TS No.350/04 of 1998/2004, in the Court of Ad hoc Additional District Judge-Cum-First Track Court.4.
- Ext.5 Certified copy of the compromise petition.
- Ext.6 Certified copy of RSD no.1266 dated.19.02.1964.

List of documents marked as exhibits on behalf of the defendant:

- Ext.A ROR of Khata no.426 of Mouza-Dumduma.
- Ext.B RSD No.3992 dtd.16.04.08.
- Ext.C Rent receipt in respect of suit land.

**Civil Judge(Jr.Divn.)
Bhubaneswar.**