

The Indian Easements Act, 1882

BA.LL.B. 7th Semester

Introduction

The right of easement is a right as old as the day when human race first emerging from barbarism, adopted the custom of living as other's neighbors, or respecting each other's rights. It found it indispensable for common good to adopt the general principle that an individual should enjoy his property, though fully and exclusively, yet so as not to interfere with neighbor's legitimate enjoyment of his own property rights. This salutary principle appears to be the original foundation on which easements are based. In this I Introductory lesson we will discuss various aspects of easement such as definition and meaning of Easement, Easement and Public right contrasted, Easement distinguished from customary rights and Difference between easement under the English and Indian Laws. We will also discuss continuous and discontinuous, apparent and non-apparent easements. In order to check your level comprehension, the students are advised to answer questions as asked at the end of each sub-section and also at the end of the lesson.

1.1 Easement Defined

The term "easement" has been variously defined. An easement has been said to be a privilege which the owner of one tenement has over the tenement of another. It has also been defined as a right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden on the land. In some cases it has been stated that an easement is a right

which one proprietor has to some profit, benefit, or lawful use out of or over the estate of another proprietor.

Section 4 of the Indian Easements Act defines easement as:

An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritage and owners.-

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.- In the first and second clauses of this section the, expression “land” includes also things permanently attached to the earth; the expression “beneficial enjoyment” includes also possible convenience, remote advantage, and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

Illustrations

- (a) A, as the owner of a certain house, has a right of way thither over his neighbour B’s land for purposes connected with the beneficial enjoyment of the house. This is an easement.

- (b) A, as the owner of a certain house, has the right to go on his neighbour B's land and to take water for the purposes of his household, out of a spring therein. This is an easement.
- (c) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountain in the garden attached to the house. This is an easement.
- (d) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees in E's land. These are easements.
- (e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.
- (f) A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

Notes

Essential characteristics of easement: The following six characteristics are essential to an easement:

- (1) There must be a dominant and servient tenement;
- (2) An easement must accommodate the dominant tenement;
- (3) The right of easement must be possessed for the beneficial enjoyment of the dominant tenement;

- (4) Dominant and servient owners must be different persons;
- (5) The right should entitle the dominant owner to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of the servient tenement; and
- (6) That something must be of a certain or well defined character and may be capable of forming the subject-matter of a grant.

In *Nirmala Devi and Ors. v. Ram Sahai and Ors. AIR 2004 All 358*, the court laid down that in view of the definition of the Easement in Section 4 of the Easements Act the following materials are required to be present in order to claim an easement right:-

- (i) the right is in the owner or occupier of land as such;
- (ii) it is for the beneficial enjoyment of that land;
- (iii) it is to do or to continue to do something or to prevent or continue to prevent something being done;
- (iv) that something is in or upon or in respect of certain other land; and
- (v) the other land is not his own.

1.2 Easement and Public right contrasted

An easement is a private proprietary privilege appurtenant to a dominant tenement. Apart from statute, it must be founded against common right on a grant express or implied in a transaction

or presumed from long user by prescription. By contrast a public right is enjoyed by the public at large, irrespective of any interest they may have in the tenement. An indeterminate and fluctuating body of persons, such as the public, or the community, or a section of the public, or section of the community, cannot have any right of easement. For instance, public rights of way which every citizen is entitled to use at his pleasure are not dependant on the ownership of any estate; and even a public road or highway is taken to be a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing. So far as the ordinary easement is concerned, the occupation remains with the owner of the servient heritage, subject to the easement.

1.3 Easement distinguished from customary rights

Easements are distinguished from that class of rights which exist in particular localities under special local customs whereby a wholly undefined and fluctuating body of persons is entitled to utilize the land of another person in a particular manner and for a particular purpose. Such rights founded on custom appertain to many persons as a class, and not as grantees, nor do such rights require the existence of a dominant tenement. They are analogous to easements, but are not really easements, since some necessary elements of easements are wanting.

A customary right is a right in gross while an easement is always appurtenant to a tenement. Customary rights are claimed for a large or fluctuating body of persons in respect of a locality and it is unnecessary to look out for their origin from grant or otherwise. Private easements, on the other hand, are claimed by defined persons and arise from a grant, which is either express or implied or by prescription.

1.4 Difference between easement under the English and Indian Laws

1. In India easementary rights can be claimed only in respect of corporeal property such as land and not in respect of incorporeal rights. But under the English Law an easement can be claimed in respect of an incorporeal right also.

2. An easement right under the English Law is a privilege without profit. It permits enjoyment of certain rights in respect of the dominant tenement without allowing the owner of the dominant tenement to share in the profits which arise out of the soil of the servient heritage. Thus easement excludes what is called *profits a prendre*. Under Indian Law an easement also includes *profits a prendre*. It includes a right to enjoy the profits arising out of the soil of another owner. This is made clear by the Explanation to section 4 which lays down that the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

3. Under the Indian Law two tenements need not be adjacent to each other because used in the section are that the servient heritage must be “certain other land” not belonging to the dominant owner. But under the English Law the heritages must be adjacent ones.

1.5 Section 5. Continuous and discontinuous, apparent and non-apparent easements.-

Easements are continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign, which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations

- (a) A right annexed to B's house to receive light by the window without obstruction by his neighbour A. This is a continuous easement.
- (b) A right of way annexed to A's house over B's land. This is a discontinuous easement.
- (c) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matter. These are apparent easements.
- (d) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

Apparent and non-apparent easements.- An easement is apparent if its existence is evidenced by some apparent sign, whether that sign be patent to everyone or whether it can only be perceived on a careful inspection by a person ordinarily conversant with the subject. An easement is non-apparent if no external sign points to its existence. For apparenacy to be material the apparenacy must be on the servient tenement. A right of way on the servient tenement may be an apparent easement or a non-apparent easement according to the circumstances of each case. Where a right of way is shown by a permanent doorway and a formed path, it is an apparent

easement. But where there is neither permanent doorway nor a formed path, the right of way cannot be said to be an apparent easement.

Continuous and discontinuous easement.-Continuous easements are those whose enjoyment is, or may be, continued without the act of man. A right to receive light or air are examples of continuous easements, because for their enjoyment no act of man is needed. A discontinuous easement is one that needs the act of man for its enjoyment. A right of way is an example of discontinuous easement, because for its enjoyment an act of man is needed and the act is done on the soil of the servient owner.

INCIDENTS OF EASEMENTS (SECTIONS 20-31)

2.0 Introduction

In this lesson we will discuss the incidents of easement, bar to use unconnected with enjoyment, confinement of exercise of easement, right to alter mode of enjoyment, right to do acts to secure enjoyment. We will also discuss liability for expenses necessary for preservation of easement, liability for damage for want of repair, extent of easements and increase of easement.

2.2 Section 20. Rules controlled by contract or title. –

The rules contained in this Chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.- And when any incident of any customary easement is inconsistent with such rules, nothing in this Chapter shall affect such incident.

Section 20 lays down that the rules in Chapter III (Sections 20-31) are controlled by any contract between the dominant and servient owner relating to a servient heritage. As a matter of construction it only means that if there is any inconsistency between the terms of the terms of the contract between the parties and the rules laid down in Chapter III, it is the terms of the contract that will prevail and not the particular rule contained in that chapter. But where there is no such inconsistency, the terms of the contract can be given effect to without ignoring or in any way whittling down the effect of any rule contained in Chapter III.

2.3 Section 21. Bar to use unconnected with enjoyment.-

An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations

- (a) A, as owner of a farm Y, has right of way over B's land to Y. Lying beyond Y, A has another farm Z the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.
- (b) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers: for this is a purpose, connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing the house is kept in repair.

It is well established that an easement must be used by the dominant owner for some purpose connected with the enjoyment of the property in the dominant tenement. It cannot be enjoyed for the purposes unconnected with the enjoy of the dominant tenement.

The justice and good sense of this are obvious, otherwise the user of the restrictive right might be extended in all sorts of ways not contemplated by the servient owner, the burden imposed on the servient tenement might be indefinitely increased, and the easement in relation to such extended user might become a mere right in gross.

2.4 Section 22. Exercise of easement: confinement of exercise of easement.-

The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be, confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner be so confined.

Illustrations

- (a) A has a right of way over B's field, A must enter the way at either end and not at any intermediate point.
- (b) A has a right annexed to his house to cut thatching grass in B's swamp. A when exercising his easement must cut the grass so that the plants may not be destroyed.

Section 22 lays down that every easement right should be exercised in a way which is "least onerous to the servient owner. The least onerous mode of enjoyment of his right by the dominant owner is that which might be expected from the full owner of the servient tenement

himself had he any occasion to enjoy the same right. The test of the conduct of the dominant owner is what a reasonable man would do under similar circumstances on his own land. The reason for this rule is that an easement right imposes a burden on the servient heritage and it is but reasonable that the dominant owner must be enjoined not to increase the burden by indiscriminate use of the right.

2.5 Section 23. Right to alter mode of enjoyment.-

Subject to the provisions of Section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage.

Exception.- The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations

- (a) A, the owner of a sawmill, has a right to a flow of water sufficient to work the mill. He may convert the sawmill into a corn-mill; provided that it can be worked by the same amount of water.
- (b) A has a right to discharge in B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.
- (c) A as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse liquor produced by making in the mill paper from rags. He may pollute the stream by pouring

similar liquor produced by making in the mill paper by a new process from bamboss, provided that he does not substantially increase the amount, or injuriously change of the pollution.

- (d) A, a riparian owner, acquires as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute by discharging into it poisonous liquor.

2.6 Section 24. Right to do acts to secure enjoyment.-

The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.- Rights to do acts necessary to secure the full enjoyment of an easement are called accessory right.

Illustrations

- (a) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.
- (b) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land,

- (c) A, as owner of a certain house, has a right of way over B's land. The way is out of repair or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.
- (d) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B provided that the deviation is reasonable.
- (e) A, as owner of a certain house, has a right or way over B's field. A may remove rocks to make the way.
- (f) A has an easement of support from B's well. The wall gives way. A may enter upon B's land and repair the wall,
- (g) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept by an inundation. A may enter upon B's land and repair the dam.

Accessory rights.- Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights. These are sometimes called "Accessory easements" or "Secondary easements". It should be here noted that the maxim of law is that whosoever grants a thing is supposed also tacitly to grant that without which the grant shall be of no effect. A dominant owner is free to do all such acts on the servient tenement as are accessory to secure the fullest possible enjoyment of the easement, but he cannot act in a manner as to impose a greater burden on the servient tenement. He must take all possible precautions to see that he exercises his acts at the such time and in such manner that least inconvenience is caused to the servient owner. If by the exercise of an accessory right some damage is caused to the servient owner, the dominant

owner must repair as far as possible the damage so caused. Accessory easements must not be confused with subordinate easements which have been described as independent and inconsistent easements capable of imposition upon the same servient heritage when subject admits of it.

2.7 Section 25. Liability for expenses necessary for preservation of easement-

The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

Notes

As a general rule it is an obligation of the dominant owner to carry out all repairs and do all acts on the servient tenement necessary for the use and the preservation of his easement and to bear the expenses of so doing because “he who has the use of a thing ought to repair it.” The liability of the dominant owner is a necessary corollary to the rule that the servient owner is under no personal or active obligation to do anything for the benefit of the dominant tenement.

2.8 Section 26. Liability for damage for want of repair.–

Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation of any damage to the servient heritage arising from the want of repair of such work.

Where the enjoyment of the easement is to be had by means of any artificial work on the servient tenement, placed thereby, and belonging to the dominant owner, he is under a duty to

keep the work in proper repair so as not to cause damage to the servient tenement. The dominant owner is liable for any damage arising from the want of repair of such work.

2.9 Section 27. Servient owner not bound to do anything.—

The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient.

Illustrations

- (a) A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound, as servient owner, to clear the watercourse or scour the sewer.
- (b) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.
- (c) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound, as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.
- (d) A, in respect of his mill, is entitled to a watercourse through B's land. A must not drive stakes so as to obstruct the watercourse.

- (e) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

Notes

The servient owner is under no personal obligation to do anything for the benefit of the dominant owner. He is free to use his tenement in any way he likes provided it is not inconsistent with the enjoyment of his tenement by the dominant owner. The owner of the servient heritage is prohibited from doing any act tending to restrict the easement, or to render its exercise less convenient

2.10 Section 28. Extent of easements-

With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:

Easement of necessity- An easement of necessity is co-extensive with the necessity, as it existed when the easement was imposed.

Other easements- The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose-

- (a) **Right of way-** A right of way of any one kind does not include a right of way of any other kind;
- (b) **Right of light or air acquired by grant.-** The extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made;
- (c) **Prescriptive right to light or air-** The extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purposes for which it has been used;
- (d) **Prescriptive right to pollute air or water-** The extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose; and
- (e) **Other prescriptive rights-** The extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Notes

Section 28 lays down certain rules for determining the extent of easements and the mode of their enjoyment.

Easements of necessity.- In the case of an easement of necessity the rule broadly stated is that the user of the right must be limited by the actual necessity of the case. In relation to the use to which the dominant tenement may be put, the question arises as to the point of time to which the actual necessity is to be referred. The state of circumstances existing at the time of the grant must determine the necessity of the case. Otherwise the necessity which is the foundation of the right, might be converted into a mere question of convenience, changing its character according as the dominant owner choose to alter the mode of his enjoyment of the dominant tenement. It is well settled law both in India and England that an easement of necessity cannot be converted into an easement of convenience, which might change its character frequently according to the whims and needs of the dominant owner.

Right of Way.- When an easement of way is created by deed of grant or by will the extent and mode of its enjoyment must, in conformity with the general rule, be ascertained from the terms of the instrument itself, which are to be construed, if necessary, with reference to the circumstances existing at the date of the instrument. However, where there is a right of way proved by user, the extent of the right must be measured by the extent of the user.

Right to light and air.- In suit for damages for obstruction of easement of light and air the dominant owner (plaintiff) must prove that there has been diminution in the quantity of light and air which used to enter his house during the whole of the prescriptive period and that such diminution has made the occupation of the house uncomfortable or unsuitable for carrying on his business as beneficially as he was doing before. Mere diminution in the quantity of light and

air does not give rise to the cause of action. Section 28 which confers the right of easement has to be read with Section 33 of the Act which indicates the extent and the limitation under which the right of easement is enjoyed. Indeed if Section 28 is completely divorced from the scope of Sections 33 and 35 then the two sections would run contradictory to each other and this will be against the rule of harmonious interpretation of statutes. Section 28 merely indicates in what measure a right of easement of light or air can be acquired but how that right is to be actually enforced when disturbed is laid down in Sections 33 and 35 of the Act.

Extent of right to light or air acquired by grant: If the plaintiff has been receiving light and air through his two ventilators for over the statutory period and has thus acquired easementary right, he is entitled to get light and air through the said ventilators though he might be getting enough light and air by other means (*Santhannagiri Rammaya v. Narsinhapuram Narayana Chetty, AIR 1968 AP 151*).

If there is something in the instrument itself, as to the extent and mode of enjoyment, the terms of the deed, and not this rule, will be proper guide fixing such extent and mode of enjoyment, as the rule applies only when there is no evidence as to the intention of the parties and the purpose for which the right was created (*Ganga Charan Dhar v. Satkrit Lal Dey, 133 I.C. 214: AIR 1932 Cal. 118: 53 C.L.J. 604*).

Extent of prescriptive right to light and air.- The owner of the dominant tenement has a right to claim that he must receive his prescriptive share of light or air through the defined passage

(Shanker v Dattaraya, 131 I.C. 429: AIR 1931 Nag. 80). The use of the words “window, door or other opening” shows that the Indian law, unlike the English law expressly regards a door as an opening for the passage of light. Therefore, according to the Indian law, the prescriptive right to light and air can be acquired even through a door (*Veerappa Mallappa v. Nagappa Jakirappa, AIR 1965 Mys. 292*).