

AN ANALYSIS ON THE DOCTRINE OF EASEMENT

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ABSTRACT

The evolution of civilization had begun when people started living in groups, in realization of the each individuals' private rights with mutual benefits within the society. Hence, the right of easement dates back to the period of recognition of private property in a well-established society. Such a right, arises out of certain aspects of morality, which allows a third person to enjoy certain benefits in relation to the property, on which he has, neither ownership nor possession. With progress in the society, the legislation has given deference to the easement rights, which makes it necessary for us to have a line of thinking on it. This paper revolves around the doctrine of easement and the essential conditions, process of acquisition and process of termination, suspension and revival of easement and attempts to answer the question as to whether the Indian easements act is complete in itself or not and whether Section 2 of the said act conflicts with doctrine of easement with reference to rights of a riparian.

INTRODUCTION

An easement is a right permitted by law to occupy or use another person's land for a particular purpose. The use of the land here is limited, and the original owner retains lawful title of the land. A legally binding easement ought to be in writing, the exact location is stipulated in the property's deed. Easements commonly provides utility companies access for the purpose of installing and maintaining power, phone, and cable lines, as well as for water drainage purposes.¹ The term easement is derived from the Latin word '*aisementum*' which means comfort, convenience or privilege, and later on developed into a legal right or privilege of using something not one's own. The concept of easement can be traced to antiquity and it is said that is meant is as old as the concept of property itself. the earliest reference of easement could be found in Halhed Gentoo code which is a compilation of ancient Hindu law which was and force during the period 1773-1775 under the directions of Warren Hastings. The term easement is nowhere defined Hindi English law. Lord Esher in *Metropolitan Railway v.*

*Fowler*ⁱⁱ define easement as “some right which a person has over land which is not his own”.ⁱⁱⁱ

In the words of a well renowned jurist Salmond, easement is a legal servient which can be exercised on some other piece of land specifically for the beneficial enjoyment of one’s own land. Right of easement is a form of privilege, the integral part of this privilege is to do an act or prevent certain acts on some other land for enjoyment of one’s own land.^{iv}

CONCEPT OF EASEMENT

Easement is a right, which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land to perform and continue to perform something, or to avert and continue to avert something being done, in or upon, or in respect of, certain other land which is not his own. The land for the beneficial enjoyment of which the right exists is known as the dominant heritage and the owner or occupier of such land is called the dominant owner. The piece of land on which the liability is trusted upon is called the servient heritage and the owner or occupier of such land is called the servient owner.

The concept of easement has been defined under Section 4 of The Indian Easements Act, 1882. According to the provisions of section, an easement right is a right possessed by the owner or occupier of the land on some other land, not his own, the purpose of which is to provide the beneficial enjoyment of the land. This right is granted because without the existence of this right an occupier or owner cannot fully enjoy his own property. It includes the right to do or continue to do something or to prevent or to continue to prevent something in connection with or in respect of some other land, which is not his own, for the enjoyment of his own land.

The word ‘land’ refers to everything permanently attached to the earth and the words ‘beneficial enjoyment’ denotes convenience, advantage or any amenity or any necessity. The occupier or the owner referred to in the provision is known as the Dominant Owner and the land for the benefit of which the easementary right exists is called Dominant Heritage. Whereas the owner upon whose land the liability is imposed is known as the Servient Owner and the land on which such a liability is imposed to do or prevent something, is known as the Servient Heritage.^v

Illustrations-

1. 'A' being the owner of certain land or house has a right of way over B's house, adjacent to his house, to move out of the street. This is known as right of easement.
2. Q's right to go on his neighbor R's household for fetching water from the well for the purpose of his own household is a right of easement. Here, the way to the well is through R's land only. Hence, Q has an easementary right to pass through R's household

REQUIREMENTS OF A VALID EASEMENT

The essential features of an easement, in the strict sense of the doctrine, are as follows:

- (a) It is an incorporeal right; a right to the utilize and enjoyment of land not to the land itself;
- (b) it is trusted upon corporeal property;
- (c) it demands for its constitution two distinct tenements the "dominant tenement" which enjoys the right, and the "servient tenement" which submits to it.

The characteristics that are required for the validity of an easement has been laid down by the court in *Re Ellenborough Park*^{vi}. The Court of Appeal had to decide the status with respect to a right for residents to use a garden in the middle of a square around which their houses were built.^{vii}

TYPES OF EASEMENT

There are four different types of easement Section 5 of Indian Easement Act explain the various types of easement. It provides that the easements are either discontinuous or continuous, apparent or non-apparent.

A) Continuous Easement -A continuous easement is one whose enjoyment is, or may be, continual without the act of a human being.

Illustration -A right annexed to Y's house to receive light by the windows without obstruction by his neighbor X. This is a continuous easement.

X continuous easement is extinguished when it is totally cease to be enjoyed as such for an unbroken period of 20 years.

B) Discontinuous easement - A discontinuous easement is one that needs the act of human being for its enjoyment.

Illustration - A right of way annexed to Q's house over R's land. This is a discontinuous easement.

C) Apparent easement - An apparent easement is that type of easement which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

Illustration- Rights annexed to L's land to lead water thither across M's land by an aqueduct and to draw off water thence by a drain. The drain would be found upon careful inspection by a person conversant with such matters. This is called as apparent easements.

D) Non-apparent easement - A non-apparent easement is the one that has no such sign.

Illustration -A right annexed to Y's house to prevent Z from building on his own land. This is a non-apparent easement.^{viii}

CREATION OF EASEMENT

Easements are usually created by conveyance in a deed, or some other written document such as a will or contract. Creation an easement demands for the same formalities as the transferring or creating of other interests in land do, which typically are: a signature, a written instrument, and proper delivery of the document. In limited circumstances, the court would create an easement by implying its existence based on the circumstances.^{ix}

Two familiar easements created by implication are easements of necessity and easements implied from quasi-easements. Easements of necessity is typically implied to provide access to a landlocked fragment of property. Easements implied from quasi-easements are based on a landowner's prior utilization of part of his property for the benefit of another portion of his land. Other methods of establishing easements are prescriptive use (the routine, adverse use of another's land), estoppel, custom, public trust, and condemnation.^x

For example, A sells his land to B and by the same deed he may grant a right of way to B for such land for another land of his. Grant is provided by an agreement executed by the grantor in favour of the grantee for specific consideration. The grant comes into effect when the grantee has the right to enter upon the grantor's land. Easement by virtue of custom is nothing but a legal right which is acquired by the operation of law through continuous use of a land

over a long period of time. Henceforth the right of way continues to exist by prescription, grant or by virtue of custom. Easements, which are the subject matters of agreement between the two parties, are for right of way, right to air and light. Surrendering an easement right does not refer to transfer of property. Easement can be made, altered and even released. Easement right cannot be created or altered orally. It must be in a written format.

However, easements by prescription and custom not necessarily be in writing. A deed of grant must clearly mention the purpose of which easement is granted. By the deed of grant the subservient owner hands over free and full right to the dominant owner and also his successors a passage wide enough for movement of people or vehicles between the dominant owner's premises and the public road against a price consideration. In the case of *Moody v. Steggles*^{xi} the grant of a right to put up a signboard to the adjoining property advertising the public house which constituted the dominant tenement was held to comprise an easement.^{xii}

MODES OF AQUISITION OF EASEMENT

- Express Grant: One of the most direct method of creating an easement is by Express grant. Express easements are created by means of a written agreement between the landowners grant in for receiving an easement. An Express easement is created by either a deed or by will. Therefore, it must be in writing. Express easement ought to be signed by both the parties and are recorded with the deeds to each other. An Express easement can also be created by the owner of a certain piece of property when he conveys the land to another but reserves or saves and easement in it. This arrangement is known as easement by reservation.
- Implied Circumstances^{xiii}: Easementary right can be acquired under implied circumstances in the following ways-

➤ Easement of Necessity:

Section 13^{xiv} of the act deals with easement of necessity. This specifically deals with the circumstances where the owner or occupier is not privileged to use his property without exercising the right of easement over the servient heritage. Thus, absolute necessity is considered to be the test and the convenience.

For example– A sells his land to B for agricultural purpose. Here, B cannot access his land without passing through C’s land (his neighbor). Thus, this is an easement of necessity.

➤ Quasi Easements:

In the case of a person transferring his property to another person then-

If an easement is continuous, apparent and necessary to enjoy, then in such a case the transferee shall be entitled to it,

- If such an easement is continuous, apparent and necessary to enjoy the said property, the transferor has a right to such easement over property transferred by him
- In case of partition of the property of the joint family, if an easement is continuous, apparent and necessary to enjoy the share of one coparcener over the other coparcener, then he is entitled to such a right of easement.^{xv}

Easements are quasi as those arise out of circumstances, that is, when common properties are converted into tenements by means of sale, mortgage, partition or through any other form of transfer. In such of a case, there is an implied grant of right of easement.

For example– A’s right attached to B’s house to receive air and light through a window without any obstruction by his neighbor.

➤ Prescriptive Easements:

Section 15^{xvi} provides for this type. Following are the requisites-

- Right must be definite and certain,
- Right must have been independently enjoyed without any agreement with the servient owner,
- Must be enjoyed openly, peacefully and as of a right without any interruption for a continuous period of 20 years and in respect of any government land the period of non-interruption shall be 30 years.^{xvii}

➤ Customary Easements

An easement right can be acquired by virtue of a local custom. This is known as customary

easements. Section 18^{xviii} of the Act provides for it. For example- people living in a particular town or city having a right to bury the dead in a particular area or riparian right to use water.^{xix}

NATURE AND DURATION OF EASEMENT

According to Section 6^{xx} of the Easements Act, 1882, “An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified Act.” The nature of easements is described under Section 7 of the Act, 1882 which states that easements are restrictions of one or the other of the following rights, namely:

- (a) Exclusive right to enjoy - The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.^{xxi}
- (b) Rights to advantages arising from situation the right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.^{xxii}

TERMINATION, SUSPENSION AND REVIVAL OF EASEMENTS

Usually, mere non- use of property does not end an easement. One or more of the following factors might also have to be present.

Extinction by dissolution of right of servient owner: When, due to a cause which preceded the imposition of an easement, the person by whom it was imposed discontinues to have rights on the servient heritage, the easement considered to be extinguished. For example, X transfers Sultanpur to Y on condition that he does not marry Z, Y impress an easement on Sultanpur. Then Y marries Z, Y’s interest in Sultanpur ends, and with it the easement is extinguished.

Agreement to terminate by grantor and the grantee of the easement: An easement is considered to be extinguished when the dominant owner releases it, either expressly or impliedly, to the servient owner. Such release can only be made in the circumstances and to the extent in, and

to which the dominant owner can alienate the dominant heritage. An easement may be released only of the servient heritage. Likewise, as per section 39^{xxiii} of the Indian Easements Act, 1870 an easement is terminated when the servient owner, in exercise of power reserved in this behalf, revokes the easement.

Expiration of the time allowed for the easement: An easement is terminated where it has been imposed for a limited period of time, or acquired on condition that it shall become void on the performance or non-performance of a specific act, and the period either expires or the condition is fulfilled.

Abandonment or expressed intent to discontinue use of the easement: A continuous easement or a discontinuous easement is extinguished when it completely ceases to be enjoyed as such for an unbroken period of about twenty years. With respect to a continuous easement, from the very day of its enjoyment, was obstructed by the servient owner or rendered not possible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by the person as a dominant owner.

Merger where one person buys both dominant and servient tenement: An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant as well as servient heritages. For example, X, as the owner of a house, has a right of way over Y's field. X mortgages his house, and Y mortgages his field to Z. Then Z forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

Extinction by end of necessity in case of easement by necessity: An easement of necessity is extinguished when the necessity ceases. For example, X grant Y a field inaccessible except by passing over X's adjoining land, Y afterwards purchases a part of that land over which he can pass to his field. The right of way over X's land which Y has acquired is extinguished.

Extinction by Destruction of Subject Matter: An easement is extinguished when either the dominant or the servient heritage is totally destroyed. For example, P has a right of way over a road running along the foot of a sea cliff. The road is washed away by a permanent encroachment of the sea. P's easement is extinguished.

Suspension of Easement: An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest. For example:

X has a right of way of Y's land obtains for lease his land, the easementary right of way is suspended during this period.

Revival of Easements: An easement extinguished under Section 45 revives when the destroyed heritage is, before the completion of twenty years has expired, restored by the deposit of alluvion or, when the destroyed heritage is a servant building and before twenty years have expired such building is rebuilt on the same site, and when the destroyed heritage is a dominate building and before the twenty years have expired such building is rebuilt on the same site and in such a manner as not to impose burden on the servant heritage. An easement extinguished under Section 46 is revived when the grant or bequest by which the unity of ownership was produced, is set aside by the decree of a competent Court of law. A necessary easement extinguished under the same section is revived when the unity of ownership ceases due to any other cause. A suspended easement is revived if the cause of Suspension is removed before the right is extinguished under Section 47^{xxiv}.

SECTION 2 OF INDIAN EASEMENTS ACT v. RIGHTS OF

RIPARIAN

Indian Easement Act 1882 is a Complete Code in itself in the territories to which this Act applies. Act define and regulate the easement rights in all aspects so that everyone enjoys common easementary rights and there should be least controversy in this regard. Though the Act is complete in itself yet it is not exhaustive. It is supplemented by following:

- (A) Transfer of Property Act 1872 - regarding transfer of easements
- (B) Criminal procedure Code regarding procedure in disputes concerning easements.
- (C) Limitation Act 1908, regarding right of easement by prescription under Section 25 of the Act.

The Act is a Complete and self-contained code on the subject of easement. It was also observed that where the Act is not in force, principles of English law as embodying the principles of equity, justice and good conscience are to be applied^{xxv}. In India, water law or the following doctrines fall within the purview of the Indian Easements Act of 1882. In the

Indian Constitution, water is in the state list as Entry 17 subject to the provisions of Entry 56 of List I i.e., Union list.

Under the Easements Act, the rights of a riparian i.e. a person who owns the land adjoining a river or a water stream is recognized by this right. A riparian owner is vested with the right to use water stream which flows through his land equally with other riparian owners. A riparian shall also incur the right to utilize the water which would come to him undiminished in flow, quantity, quality and to go beyond his land without any obstruction. Section 7 of the Act renders that every riparian owner has the right to continued flow of waters of a natural stream without any destruction or unreasonable pollution.^{xxvi} It would be pertinent to note that The Easement's Act of 1882 recognizes the customary rights of riparian that are acquired under two basic rules. They are:

1. Long usage or prescription
2. Local custom

However, these rights are also not absolute. It does not provide a completely independent and absolute right that is enjoyable without any external interference. To be more precise it could be noted that these rights are subject to the Government's right to regulate the collection, the distribution and the retention of the waters of rivers and streams flowing in natural channels.^{xxvii}

RIGHT OF THE GOVERNMENT TO REGULATE THE FLOW OF WATER:

Section 2(a)^{xxviii} provides that the Indian Easements Act will not affect any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing, in natural channels, and of natural lakes and ponds, or of the water flowing collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation. Put differently, this section saves from the operation of the Act rights of the Government to regulates, collect and distribute water in natural and artificial water courses, ponds, rivers and lakes. The Government may distribute water and also maintain and conserve it for public good wherever necessary. It may construct works of irrigation and also maintenances of old ones according to the needs and circumstances of the country.

In a leading case, “it was observed that the overriding powers of States to regulate streams and rivers are not taken away by this Act, however the State while regulating the water source cannot defeat customary supply of water based on either prescription or natural right. So, regulation and distribution of water is sovereign power of State. Any question under Easement Act, if arises has to be examined on collection of evidence and investigation of facts and conclusion drawn thereon with reference to the factual matrix and which can only be decided in a suit and not by writ petition.”^{xxix}

Therefore, we can conclude that Section 2^{xxx} of Indian Easements Act, which empowers the government with the power to regulate the flow of water in natural or artificial stream acts as an exception to the general rule of easementary rights, or specifically, riparian rights under easementary rights and therefore cannot be challenged for invalidity or unconstitutionality.

CONCLUSION

Unlike lease, an easement does not provide the holder a right of "possession" of the property. Therefore, an easementary right is a provision made for specific relief from specific violations of common basic rights. In the case of the right to way, any unlawful interference with the right of way constitutes a nuisance. However, a right of way doesn't entitles the grantee, or those lawfully using the way under the grant, to the exclusive use of the land over which the way exists neither does every obstruction of the way amounts to an unlawful interference, and no action would comply unless there is a substantial interference with the easement granted. In the case of right to access of light, it does not constitute the right to have a continuance of the same amount of light throughout. In case of a diminution, the dominant owner ought to show that the diminution has interfered with his ordinary course of life and it results in a nuisance if it is enough to render the occupation of the house uncomfortable, and obstructs the owner from carrying his business as beneficially as he formerly did.

In the landmark case of *Hero Vinoth v. Seshamma*^{xxxi}, it was held that – an easement would last only as long as the absolute necessity existed and such a legal extinction could not apply to an acquisition by grant- if a right of way was provided to a particular sharer, it could not be terminated merely because such sharer had other alternative way.

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