The Easements Act, 1882

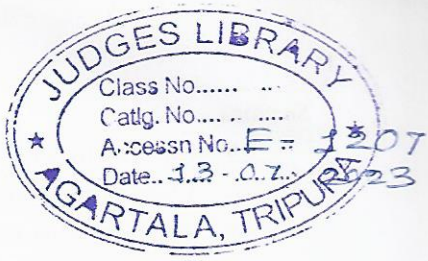
[Act 5 of 1882]

with

Case Law

EBC

Lucknow | Delhi | Prayagraj | Guwahati
Bengaluru | Ahmedabad | Nagpur



CONTENTS

Sections *Pages*

CHAPTER VI
LICENSES

The Easements Act, 1882[1]

[Act 5 of 1882]

[*17th February, 1882*]

An Act to define and amend the Law relating to Easements and Licenses

Preamble.—Whereas it is expedient to define and amend the law relating to Easements and Licenses, it is hereby enacted as follows:

Prefatory Note.—For SOR see Gazette of India 1880, Pt. V., p. 494; for R.S. Com., see ibid., Pt. V., p. 1021; and for Proceedings in Council, see ibid., 1881, Supplement, pp. 687 and 766; and ibid., Supplement, p. 172.

Statement of Objects and Reasons.—This Bill is intended to form part of the Indian Civil Code, and attempts to state, clearly and compactly, the rules relating to easements, that is to say, the rights which a man sometimes has over one piece of immovable property by reason of his ownership of another. As to these rights our present statutory law is silent, except so far as regards the acquisition of easements by long and continued possession, the limitation of suits for disturbing them, and the granting of injunctions to prevent such disturbance; and three of our most experienced Judges — Sir Michael Westropp, Mr. Justice (now Sir Louis) Jackson and Mr. Justice Innes have expressed their opinion that it is desirable to codify the law on the subject, which is now (to quote the Chief Justice of Bombay) "for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal profession in the mufassal and to the subordinate Judges." There is much litigation in the case of urban easements and a late Judge of the Punjab Chief Court asserts that this is largely due to the fact that neither the people themselves, nor the majority of the Courts, understand the principles upon which such disputes should be determined. The Bill is mainly based on the law of England, which, being just, equitable and almost free from local peculiarities, has, in many cases, been held to regulate the subject in this country; but a few deviations (hereinafter specified) have been made from that law, and rules as to some matters which have not hitherto come under the cognisance of the English and Indian Courts have been adopted from the writing of modern jurists.

Of Easements generally.—The Bill is divided into six chapters. The first chapter treats of easements generally, and opens with definition of the term, so framed as to exclude all rights in gross, i.e., those which are not annexed to the ownership of immovable property. The definition also indicates that the easement must be in a corporeal heritage, and that the servient owner can only be required not to do something or to suffer something to be done. The definition also requires that the easement must be of some advantage to the dominant heritage. Such advantage, it is explained, may be contingent or remote, and even a mere amenity.

An explanation declares in effect that there may be an easement entitling the dominant owner to remove and appropriate for his own use, as such, any part of the soil of the servient heritage or anything growing or subsisting thereon. This, though in conformity with continental system of jurisprudence, is in comprehension of the English law, which reckons, for instance, as an easement, the right to take water from a spring on your neighbour's land, but denies that name to a right to take grass or gravel. "It has been said" to quote Mr. Justice Markby, "that the distinction is that the first is for convenience only while the latter is for profit. But this, besides being a very slender distinction, is not always observed. The right to take water is just as much an easement if the water be made into beer, and sold by the person who takes it, as if it be used by himself for domestic purposes."

---

1. Received the assent of the Governor-General on 17th February, 1882.

Sections 5 and 6 define, in accordance with English law, easements affirmative and negative, continuous and discontinuous, apparent and non-apparent. An illustration to Section 5 shows that an easement to restrain interference with privacy is recognised by the Bill and is a negative easement. Such a right, founded as it is on the oriental custom of secluding females, is of much importance in India. It is recognised generally in the countries whose system is founded on the Civil Law; and the decisions of the High Courts adverse to such rights should not, in the opinion of the Indian Law Commission, be followed by the legislature.

Section 7 [now Section 6] declares that an easement may be for a limited period, or subject to periodical interruption, or exercisable only at a certain time or on condition.

Easements being restrictions on the free use of property in others are regarded with disfavour by the law, and Section 8 (now Section 7) accordingly declares that all easements are in derogation of one or other of certain rights incidental to the ownership of immovable property. These are (*a*) the exclusive right (subject to existing law) to enjoy and dispose of immovable property and its products, and (*b*) the right of the owner of such property to the enjoyment of the natural advantages arising from its situation, such as unpolluted air, quiet, the vertical passage of right and air, the natural support of land by the soil of another, unpolluted water, draining the uninterrupted flow of water naturally flowing in defined channels, the discharge of surface water of lower adjoining land, and, lastly, the use of the water of a stream for drinking household purposes, watering cattle and, sub modo, for irrigation and manufactures.

Imposition, Acquisition and Transfer of Easements.—Chapter II treats of the imposition, acquisition and transfer of easements. Sections 9, 10 and 11 (now Sections 8, 9, 10 and 11) treat of the person capable of constituting easements, whether permanent or temporary, Provision is made for the cases of lessees, co-owners, trustees, servient owners, lessors and mortgagors. The Bill (here following a decision of Madras High Court but deviating from English law) does not require the expressed imposition of an easement to be evidenced by writing. The Bill then shews who may acquire easements, allowing one of several co-owners to acquire, without the consent of the others, an easement for the benefit of the property held in co-ownership, allowing also (in accordance with *Lord Kenyon's dictim in Large* v. *Pitt*) a lessee whose interest is permanent and transferable to acquire an easement over land held by another like lessee of the same landlord, but forbidding a lessee to acquire for the beneficial enjoyment of other land of his own an easement in respect of the land comprised in his lease. Nothing is said of the acquisition of an easement by estoppel of the servient owner, as for instance, when a person having no right to certain land purports to impose an easement upon it and afterwards acquires the land. This matter seems sufficiently provided for by the Evidence Act.

Sections 13 and 14 deal with easements of necessity, that is to say, the rights which are absolutely necessary for enjoying property and quasi-easements that is to say conveniences to which an owner subjects one part of his property for the benefit of another. These conveniences, when apparent and continuous and necessary for enjoying property as it was enjoyed when it was separated by grant or bequest, will in the absence of a stipulation to the contrary, be taken as easements by the grantee or legatee of the quasi-dominant heritage. In like manner, they will be reserved as easements by the person retaining the portion for the benefit of which the conveniences existed. This Bill here follows the decision in *Pyer* v. *Carter*, 1 H and N 916, rather than that in *Suffield* v. *Brown*, 33 LJ Ch 249. When the person entitled to set out a way of necessity refuses or neglects to do so the Bill declares that the dominant owner shall be entitled to set it out. But there is no rule, such as exists in England, that a way of necessity shall not be varied save with the consent of both dominant and servient owners, or unless the servient owner, renders it impassable. The imposition is intentional, as such a rule would, it is said by an eminent authority, be opposed to Indian rural economy and convenience.

The Bill then deals with the important subject of the acquisition of easements by long and continued possession. Sections 15 and 16 correspond to Sections 26 and 27 of the Indian Limitation Act, 1877, but with the addition, in Section 15, of a provision that a prescriptive right to support may, by user for twenty years, be acquired for land with things affixed thereto, and of explanations that nothing

is an "enjoyment" when it has been had in pursuance of an agreement with the owner of the property over which the right is claimed and such right has not been granted as an easement, and that suspension of the enjoyment of an easement in pursuance of a contract between the dominant and servient owners is not such an interruption as will defeat a claim by prescription. Section 17 sets forth the limits to the acquisition of prescriptive rights. It agrees with the present law and its English prototype (where the user has continued for 40 years) in making no provision for cases in which servient owner is ignorant of the user or has been incapable of resisting it. The Bill also provides, in accordance with a decision of the House of Lords, that a right tending to the destruction of the servient heritage cannot be acquired by prescription.

Section 18 deals with customary easements, i.e., easements acquired in virtue of a local custom, such for example as the custom that every cultivator of village-land is entitled, as such, to graze his cattle on the common pasture, and the custom that no owner of a house can open a new window therein so as substantially to invade his neighbour's privacy.

As an easement exists only for the beneficial enjoyment of a certain thing, it cannot be separated from that thing. Section 19, taken from the Transfer of Property Bill, accordingly declares that the transfer of a dominant heritage passes the easement, unless a contrary intention appears.

Incidents of easements.—Chapter III deals with the user, the extent and other incidents of easements. The rules which it contains are expressly made subject to the incidents of customary easements, to contract and to the provisions of any instrument or of a decree by which an easement is imposed. As an easement exists only for the benefit of a certain heritage, it can be exercised only in the interests of that heritage and to supply its wants. Section 21 accordingly declares that an easement cannot be used for any purpose unconnected with the enjoyment of the dominant heritage. As the law does not favour restrictions on rights of property, Section 22 declares that an easement must be exercised in the mode least onerous to the servient owner, and allows him to confine such exercise to a determinate part of a servient heritage when this can be done without detriment to the dominant owner. Section 23 allows on the other hand, a corresponding privilege to the dominant owner by permitting him to alter the mode and place of enjoying his easement so long as such alteration imposes no additional burden on the servient heritage. By Sections 24, 25 and 26, the dominant owner may, in proper time and manner, do what is necessary to secure the full enjoyment of his easement bearing the expenses of constructing or repairing necessary works, and being liable for damage arising from their disrepair. As an easement is imposed on a thing, and not on its owner, Section 27 declares that the servient owner is not, as such, bound to do anything for the benefit of the dominant heritage. This rule, however, like the others in the chapter, is subject to local usage saved by law, such for example, as the Punjab usage that the servient owner of upper land shall in Chait break his dam so as to ensure a certain modicum of water to the dominant owner of the lower land. Section 28 defines, in accordance with English decisions, the mode in which the extent of easements is to be determined; Section 29 declares the law as to the increase of easements, including the case, noticed by Potheir, of increase of the dominant heritage by alluvion. As easements are indivisible, as they cannot be acquired, exercised or lost in, or for the benefit of, an ideal part of a heritage, Section 30 declares that when the dominant heritage is divided, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage.

The chapter concludes with a declaration that the servient owner may ordinarily obstruct an excessive user of an easement (but only on the servient heritage). This, of course, is without prejudice to any other remedy, such as a suit for compensation or an injunction, to which he may be entitled.

Disturbance of Easements.—Chapter IV, on the disturbance of easements after describing the general right to undisturbed enjoyment, proceeds (Section 33) to provide that the owner of any interest in the dominant heritage, or the occupier of the heritage, may sue for a disturbance if it has caused him substantial damage. Such damage includes the doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage. As the law stands both in England and in India, as suit will.lie for the disturbance of a right to light where the

obstruction interferes materially with the comfort of the plaintiff. But in the case of a right to air, the obstruction, to be actionable, must amount to a nuisance (3 Beng O.C. 18 at page 45). It would seem that, in a country like India, the right to air is entitled to at least as much favour as the right to light and that we should not in this respect follow a law fashioned upon the wants of the inhabitants of a northern country (15 Beng. 361 at pages 367, 368). The Bill accordingly allows a suit for the obstruction of the free passage of air where it interferes materially with the plaintiff's physical comfort, although it is not injurious to his health.

The period at which the cause of action arises when a right of support is disturbed is declared, by Section 34, in accordance with the decision in *Bonomi* v. *Backhouse*, (1861) 9 HLC 503, and the Indian Limitation Act, 1877, Section 24, to be when the damage is sustained.... (In Section 35) rules as to injunctions to restrain disturbances are added.... to those already contained in the Specific Relief Act. In Section 38 (now Section 36), the right to abate a wrongful obstruction of light, air or water, is disallowed. This, though a deviation from English law, will avoid the risk of riot and trespass, and is a step taken in the direction in which all modern systems of law have tended, of forbidding private persons to redress their grievances by their own act. There is, it seems a contrary usage in the Sialkot District; but this will be saved by Section 2, Clause (*b*).

Extinction, suspension and Revival of Easements.—Chapter V deals with the extinction, suspension and revival of easements. It first states eleven cases in which an easement may be extinguished as follows:—

(*a*) by dissolution of the right of the person who imposed the easement (Section 39 (now Section 37));
(*b*) by release [Section 40 (now Section 38)];
(*c*) by revocation (Section 41 (now section 39));
(*d*) by expiration of the time for which the easement was imposed or the happening of the dissolving condition annexed thereto [Section 42 (now Section 40)];
(*e*) in the case of an easement of necessity, when the necessity ends [Section 43 (now Section 41)];
(*f*) when the easement becomes incapable of being under any circumstances beneficial [Section 44 (now Section 42)];
(*g*) by alteration of the dominant heritage [Section 45 (now Section 43)];
(*h*) by alterations of the servient heritage [Section 48 (now Section 44)];
(*i*) by destruction of either heritage [Section 47 (now Section 45)];
(*j*) by unity of ownership (Section 48 (now Section 46));
(*k*) by non-user (Section 49 (now Section 47)).

In most of these cases the reason for extinction is obvious. There, however, may need explanation. Useless restrictions of the rights of property are to be avoided, and Section 44 (now Section 42) consequently declares that an easement which under no circumstances, can be advantageous to the dominant heritage shall cease to exist. Every easement is a right which the dominant owner would not require if he were also owner of the servient heritage. Section 48 (now Section 46), therefore, declares that an easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

The Section 47 treating of extinctive prescription, i.e., the extinction by non-user of prescriptive rights and other easements, requires fuller notice. As in the case of acquisition by prescription, the Bill does not assume that a fictitious grant has been made by the servient owner, so here the Bill rejects the doctrine that non-user is to be regarded merely as evidence from which a release may be implied (Rules on this difficult subject are given in Section 47.) It will be seen that the same period is fixed for the loss of an easement by non-user as for its original acquisition by enjoyment; that this method of extinction is not confined (as seems to be the case in America) to prescriptive rights, and that no exception is made where the exercise of the easement has been prevented by force or by the theft of its subject. There is, in such cases, a de facto interruption of the dominant owner's quasi-possession, even

though he is unaware of the obstruction or ignorant of his right. Where the dominant owner exercises, during the prescriptive period, a right less extensive than that to which he is entitled, some systems lay down that his easement shall be reduced to the right actually exercised. The Bill omits all provisions on this head, partly because they are inconsistent with the indivisible nature of an easement, and partly because they would obviously encourage litigation.

Nothing is said of the extinction of an easement by estoppel of the dominant owner as this matter seems sufficiently provided for by the Evidence Act.

The extinction of rights accessory to easements is provided for by Section 56 (now Section 48).

The suspension of easements by unity of possession is then dealt with by Section 51 (now Section 49). Suspension by encroachment is not recognised by the Bill.

Section 52 (now Section 50) negatives any right of the servient owner to require that an easement should continue. It also negatives his right to demand compensation for damage caused by its extinguishment or suspension if the dominant owner has given him such notice as will enable him, without unreasonable expense to protect the servient heritage from such damage. Where such notice has not been given the servient owner will be entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension. The Bill here deviates somewhat from the English law, as declared in *Mason* v. *The Shrewsbury and Hereford Railway Co.*, LR 6 QB 578.

Lastly, Section 53 (now Section 51) deals with the revival of extinguished and suspended easements, and provides not only for the common case of a house pulled down for the purpose of re-building, but also for that of a diluviated heritage restored by alluvion.

The Bill saves (Section 2) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed by the public expense for irrigation. The power of the Executive to carry out schemes of irrigation will thus remain unhampered. The Bill also saves all enactments not expressly repealed, such for example, as a Forest Act and, in the Punjab, Act IV of 1872, Section 7, and in Oudh, Act XVII of 1876, Section 4. It will thus avoid interference with forest-conservancy and with local usage in those parts of India in which customary law prevails. It also, ex abundanti cautela saves any customary or other right (not conferred by licence) over land which the Government, the public or any person may possess irrespective of any other land. Such rights, when conferred by licence, are dealt with by Chapter VI.

It may, in conclusion, be remarked that a rough draft of this Bill was circulated in February, 1878, to the Local Governments for opinion. The result was a mass of criticism some of which was searching and therefore welcome. The bill was then revised and submitted to the Indian Law Commissioners, who in their report made the following observations:—

"The chief objections taken to the Bill are that, by informing people of their rights, it will provoke litigation, and that it will abolish or otherwise interfere with easements recognised only by local usage. The former objection, if valid, is an objection to all positive law declaring rights and in a less degree, to every decision of a court of justice which enunciates a general rule respecting rights. But it is matter of ordinary experience that people are more prone to bring or resist claims to doubtful than to certain rights; that, in other words, litigation is promoted by doubt as to what is, and what is not a right recognised by the courts of justice. By its explicit declarations of the law on points now held doubtful by the people, the Bar and the Judges of the Subordinate Courts, the Bill appears likely to check, rather than increase, litigation. As to the latter objection that the Bill will interfere with local usages, we have been unable to find in the papers submitted to us a single instance of a right in the nature of an easement that would have been affected in malam partem by the Bill; and we strongly suspect that many of its critics have confounded rights in gross with easements properly so called."

The Bill as revised by the Law Commission extends to the whole of British India; but as there are some parts of the country (e.g., Assam and British Burma) where the rights with which it deals

are said to be practically unknown; as in others (e.g., the Punjab), it may, perhaps, be expedient to extend it to towns, leaving the rural districts entirely to their local usage. The Local Governments are invited to state whether the extension of the proposed law should be made permissive. The bill is now published in accordance with the permission of the present Secretary of State for India, and save that the definition of an apparent easement has been amended, that Section 13 (as to easements of necessity) has been slightly altered so as express the recent decision of the Master of the Rolls in *Mayor of London* v. *Riggs*, (49 LJ Chan Div. 297), and that the commencement of the Act and the dates in the illustrations to Section 15 have been changed, it reproduces the draft as settled by the Law Commission.

PRELIMINARY

1. Short title.—This Act may be called the Indian Easements Act, 1882.

Local extent.—It extends[2] to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg.

Commencement.—It shall come into force on the first day of July, 1882.

STATE AMENDMENTS

ANDHRA PRADESH.—(*i*) For the words "territories respectively administered by the Governor of Madras in Council and" *substitute* the words "whole of the State of Andhra and the territories administered by" [*Vide* Andhra A.L.O., 1953; A.P. A.L.O., 1957].

(*ii*) For the words "respectively administered by the Governor of Madras in Council and", *substitute* the words "specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (C.A. 56 of 1959) and the territories administered by" [*Vide* A.P. A.L.O., 1961].

HIMACHAL PRADESH.—*Omit* 2nd and 3rd paras of S. 1 [*Vide* H.P. A.L.O., 1948 (25-12-1948)].

KARNATAKA.—For the entry under the heading "Local Extent" *substitute* the following :—

"It extends to the whole of the State of Karnataka". [*Vide* Karnataka Act 33 of 1978, S. 7 (1-12-1978)].

---

2. The Act was extended to Bombay and the U.P. by Act 8 of 1891 and continues in force, with modifications, in the territory transferred to Delhi State, *see* the Delhi Laws Act, 1915 (7 of 1915), S. 3 and Sch. III.

This Act has been extended to Rampur State with effect from December 30, 1949 by Section 3 of Rampur (Application of Laws) Act (Act 12 of 1950) published in the Extra. Gazette, dated March 16, 1950, and to Banaras and Tehri Garhwal States with effect from November 30, 1949, by Section 3 of Banaras (Application of Laws) Order and Tehri Garhwal (Application of Laws) Order, 1949 vide Noti. No. 3262 (1) and 3262 (2)/XVII-Merge, dated November 30, 1949, published in Extra. Gazette, dated November 30, 1949.

It has been extended to the transferred territories in Madras State, see Mad. Act 22 of 1957, Section 3 and Sch. (18-12-1957).

It has been extended to the Union Territory of Himachal Pradesh by the H.P.A.L.O., 1948 made under Section 4 of Act 47 of 1947.

The Act now extends to the States of—

(1) Madhya Pradesh — *See* M.P. Act 23 of 1958, Section 3(1) and Sch., Para A.
(2) Karnataka — *See* Karnataka Act 33 of 1978, S. 7 (29-12-78).
(3) Kerala — *See* Kerala Act 5 of 1962 (1-4-1962).
(4) Punjab — *See* Punjab Act 29 of 1961 (12-10-1961).
(5) Orissa — *See* Orissa Act 24 of 1967 (31-08-1967).
(6) Haryana — *See* Punjab Act 29 of 1961 and Haryana A.L.O., 1968.
(7) Goa, Daman and Diu — See Goa Act 16 of 1978 (Goa is now a State).
(8) Extended to the Union Territory of Jammu and Kashmir and Union Territory of Ladakh by Act 34 of 2019, S. 95 and the Fifth Schedule (w.e.f. 31-10-2019).

It now extends to the Union Territory of Pondicherry — *See* Act 26 of 1968 (24-5-1968).

KERALA.—For the second paragraph *substitute*—

"It extends to the whole of the Malabar District". [*Vide* Kerala A.L.O., 1956].

Madhya Pradesh.—For the words beginning with "it extends" and ending with "Coorg" *substitute*—

"It extends to the territories of Madras, Madhya Pradesh and Coorg." [*Vide* M.P. A.L.O., 1956 and M.P. Act 23 of 1958, Section 3(1) and Sch. Part A].

MAHARASHTRA.—For the words beginning with "It extends" and ending with "Coorg", *substitute*—

"It extends to the territories of Madras, Vidharbha region and Coorg" [*Vide* Bom. A.L.O., 1956].

TAMIL NADU.—(*i*) For the words "Governor of Madras" *substitute* the words "Governor of Tamil Nadu". [*Vide* T.N. A.L.O., 1970 (w.e.f. 14-1-1969)].

(*ii*) In the territories added by Act 56 of 1959, for the words "whole of the State of Andhra and the territories administered by", *substitute* the words "territories respectively administered by the Governor of Madras in Council and" [*Vide* Madras (Addl. Terr.) A.L.O., 1961].

CASE LAW ▸ Applicability.—The Act does not apply to Tehri Garhwal district of U.P. but the principles incorporated in the Act are applicable. *Bhandoo* v. *Udatoo*, AIR 1970 All 307 : 1970 AWR 156. See also (1971) 75 Cal WN 590.

In those parts of the country where the Act is not in operation the principles underlying the Act should be followed. *Nunia Mal* v. *Duni Chand*, AIR 1962 Punj 299.

▸ **Customary rights.**—Right to take channel over adjoining lands is purely personal. It cannot be claimed as custom. The plaintiff has to prove and establish essential requisites for valid customary rights. *P.K. Ambalam* v. *Karuppan Ambalam*, AIR 1965 Mad 379.

2. Savings.—Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(*a*) any right of the [3][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 an channel or other work constructed at the public expense for irrigation;

(*b*) any customary or other right (not being a license) in or over immovable property which the [4][Government], the public or any person may possess irrespective of other immovable property; or

(*c*) any right acquired, or arising out of a relation created, before this Act comes into force.

[5][**3. Construction of certain references to Act 15 of 1877 and Act 9 of 1871.**—All references in any Act or Regulation to Sections 26 and 27 of the Indian Limitation Act, 1877 (15 of 1877)* or to Sections 27 and 28 of Act 9 of 1871[6],

3. *Subs.* for "Crown" by A.O. 1950 (w.e.f. 26-1-1950).
4. *Subs.* for "Crown" by A.O. 1950 (w.e.f. 26-1-1950).
5. *Subs.* by Act 10 of 1914, S. 2 and Sch. I (w.e.f. 17-3-1914).
* *See* Limitation Act, 1963.
6. *Rep.* by Act 15 of 1877 (w.e.f. 1-10-1877).

shall, in the territories to which this Act extends, be read as made to Sections 15 and 16 of this Act.]

CASE LAW ▸ Factors governing easements law.—This section and the words "define and amend the law relating to easements and licenses" of the preamble have made the Act inexhaustive. The law relating to easements is, therefore, governed by many factors as rules of English Common law, which are not inconsistent with the Act, the rights acquired before the Act came into force and the doctrine of lost grant etc., *Rajroop Kaur* v. *Abdul Husain*, 6 Cal 394 (PC); *Sita Ram* v. *Petia*, 43 IC 962, *Bhabdeb Chatterji* v. *Bhuan Chandra Mukerji*, 53 Cal 1016.

CHAPTER I
OF EASEMENTS GENERALLY

4. "Easement" defined.—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.

CASE LAW ▸ Easementary right.—Term easement may include profit-a-prendre but not profit-a-prendre in gross where there is no dominant heritage i.e. land for the beneficial enjoyment of which easementary right is claimed or exists in the corresponding subservient heritage. Right to profit-a-prendre must be based on a legal and valid custom to be legal and valid, a custom must be reasonable, *Tulsi Ram* v. *Mathurasagar Pan Tatha Krishi*, (2003) 1 SCC 478.

Dominant and servient heritages 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 on *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.

CASE LAW ▸ Nature and scope.—Section 4 places no restrictions on the nature of user of the servient heritage by the owner or occupier of the dominant heritage. *Mumtaz Ali* v. *Mohd. Sharif Khan*, 1972 All LJ 656.

Right to use highway is not an easement right. *Saghir Ahmad* v. *State of U.P.*, AIR 1954 SC 728 : (1955) 1 SCR 707.

▸ **Basis of right of easement.**—The basis of right of easement is a grant from servient owners. It may be express or implied or may be presumed from a long and continued use for a certain period or may be inferred from a long and continued use by certain class of the public in certain locality. *Lachhi* v. *Ghansara Singh*, AIR 1972 HP 89.

▸ **Easement by prescription.**—Easement by prescription cannot be acquired when both the tenements are owned or held by the same person. *Dewan Durag Singh* v. *State of M.P.*, AIR 1972 MP 12.

▸ **Right of easement.**—Where user of land for sitting and sleeping purposes is intended to be for more beneficial living and enjoyment of adjoining house, it is not a personal right but an easement. *Mumtaz Ali* v. *Mohd. Sharif Khan*, 1972 All LJ 656.

Use of adjoining land for purposes of sitting and sleeping will amount to a right of easement. *Mumtaz Ali* v. *Mohd. Sharif Khan*, 1972 All LJ 656.

A profit-a-prendre in gross that is a right exercisable by an indeterminate body of persons to take something from the land of others, but not for the more beneficial enjoyment of a dominant tenement — is not an easement. *State of Bihar* v. *Subhodh Gopal Bose*, AIR 1968 SC 281.

An easement cannot be extinguished (except in the modes mentioned in the Act) merely at the will of the grantor. It is always appurtenant to the dominant tenement and is inheritable and assignable. *P.N. Kapoor* v. *Natha Ahir*, 1975 ALJ 513.

5. Continuous and discontinuous, apparent and non-apparent easements.—Easements are either 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 windows 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 matters. 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.

CASE LAW ▸ Right of passage.—Right of passage need not be continuous and apparent. *Ram Narain* v. *Gangadhar*, AIR 1975 All 248.

6. Easement for limited time or on condition.—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.

7. Easements restrictive of certain rights.—Easements are restrictions of one or 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.

(*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.

Illustrations of the Rights above referred to

(*a*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e*) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(*h*) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(*i*) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(*j*) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

CASE LAW ▸ Flow of the rain water.—A complete reversal of the direction of a flow of the rain water due to the construction of a dam cannot be said to be a natural user and any one who seeks to do something of this kind cannot claim that he is merely taking protective steps against flood water. *Hari Ram* v. *Siya Ram*, AIR 1977 All 244.

▸ **Impedes the natural flow of water.**—Where the owner of the lower ground by creating an embankment impedes the natural flow of water he would be obstructing the natural outlet for that water. *Patneedy Rudrayya* v. *Velugubantla Venkayya*, AIR 1961 SC 1821.

A riparian owner has a right to protect himself against extraordinary floods but he would not be entitled to impede the flow of the stream along its natural course. *Patneedy Rudrayya* v. *Velugubantla Venkayya*, AIR 1961 SC 1821.

CHAPTER II

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS

8. Who may impose easements.—An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations

(*a*) *A* is tenant of *B*'s land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. *A* may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(*b*) *A* is tenant for his life of certain land with remainder to *B* absolutely. *A* cannot, unless with *B*'s consent, impose an easement thereon which will continue after the determination of his life interest.

(*c*) *A*, *B* and *C* are co-owners of certain land. *A* cannot, without the consent of *B* and *C*, impose an easement on the land or on any part thereof.

(*d*) *A* and *B* are lessees of the same lessor, *A* of a field *X* for a term of five years, and *B* of a field *Y* for a term of ten years. *A*'s interest under his lease is transferable; *B*'s is not. *A* may impose on *X*, in favour of *B*, a right of way terminable with *A*'s lease.

CASE LAW ▸ Imposition of easement.—The owner of a servient tenement can by his unilateral act impose an easement on his property even though the owners of the dominant tenement are not parties to that transaction. *Nafisun Nisa* v. *Mohd. Ishaque*, AIR 1975 All 431.

▸ **Applicability.**—Where the party claimed easementary right only as an alternative ground but the main ground on which they based their claim was on the right of co-ownership, illustration (*c*) to Section 8 would not be applicable as it applies only where a co-owner seeks to impose an easementary right on the land or any part thereof. *Ayyaswami Gounder* v. *Munnuswamy Gounder*, (1984) 4 SCC 376.

▸ **Validity of easement.**—Where a sale deed stipulating an easement by way of passage is not rectified by minors on becoming major the easement would not be valid in view of illustration (*c*). *Nafisun Nisa* v. *Mohd. Ishaque*, AIR 1975 All 431.

▸ **Effect of co-ownership.**—When there is common well and channel held in co-ownership, apart from common user thereof, on co-owner is entitled to use the common channel for irrigating his own lands from his exclusive well, provided no prejudice or detriment is caused to the other co-owner, *Ayyaswami Goundar* v. *Munnuswamy Gounder*, (1984) 4 SCC 376.

▸ **Easement by implication.**—Grant of easement can be by implication as well, *Sree Swayam Prakash Ashramam* v. *G. Anandavally Amma*, (2010) 2 SCC 689 : (2010) 1 SCC (Civ) 543.

9. Servient owners.—Subject to the provisions of Section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations

(*a*) *A* has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B*'s stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset: Provided that *A*'s supply is not thereby diminished.

(*b*) *A* has, in respect of his house, a right of way over *B*'s land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: Provided that *A*'s right of way is not thereby obstructed.

10. Lessor and mortgagor.—Subject to the provisions of Section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

11. Lessee.—No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

12. Who may acquire easements.—An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

CASE LAW ▸ Nature and scope.—This section lays down the broad principle that every easementary right appurtenant to a tenement, in whatever way it may have originated, may be acquired only by or on behalf of the full owner of the dominant tenement, it is in him that the acquired right should be deemed to have invariably vested. *B. Nihal Chand* v. *Bhagwan Dei*, AIR 1934 All 527.

This section simply gives a codified form to the fundamental rule of property which vests in full owner an undisputed right to enjoy a tenement with all its advantages and appurtenances.

These clauses merely elaborate the main principle contained in clause (1). A co-owner or lessee may represent the other co-owner or the lessor and acquire an easement for the beneficial enjoyment of an immovable property with or without the consent of the other co-owners or the lessor but cannot impose an easement prejudicial to the interest of the other co-owner or the lessor, as the case may be.

▸ **Easement by prescription.**—In *Mani Chandra Chakravarty* v. *Baikunth Nath*, 29 Cal 363 : 9 CWN 856, it was held that a tenant, through having a permanent right of tenancy cannot acquire an easement by prescription in other lands of his lessor. There is, however, a difference of opinion between the High Courts of Patna and Allahabad on the point whether a tenant can acquire easement rights against property held by another tenant of the same landlord, Allahabad High Court holding the affirmative view, *Chotey* v. *Dalchand*, AIR 1929 All 862. This High Court is of the view that English law does not apply in India and hence a tenant can acquire easement against his landlord. ILR 1955 All 5.

▸ **Acquisition of easement.**—According to this section it is the owner of the immovable property who alone can acquire an easement. Whereas the right of way or other easements as are given in Section 15 must have been enjoyed in the manner laid down there, by the owner or occupier of the dominant heritage, and the fact that persons visiting the alleged dominant heritage have been following a certain route cannot confer a right of way on the owners of the alleged dominant heritage. *Lallu Mal* v. *Aziz Fatima*, 1938 ALJ 1142.

To establish prescriptive acquisition of a right one must prove that he was exercising that right on a property treating it as someone else's property. Where a lessee fails to prove that he acquired certain land by accession or was using it as an incident of his ownership of that property and it is proved on the other hand that this use was permissive, he cannot claim acquisition of a right as an easement by prescription. *Chapsibhai Dhanjibhai Danand* v. *Purushottam*, (1971) 2 SCC 205.

Lessee or mortgagee of an immovable property, held, cannot acquire any easement right for his own benefit. He can start prescribing for an easement only from the date of purchase of right of reversion when he became an absolute owner, not before. *Madan Gopal Bhatnagar* v. *Jogya Devi*, 1980 Supp SCC 777.

▸ **Right of access to the pathway.**—The right of access to the pathway at all points where the house adjoins the pathway belongs to the owner of the house as also its occupiers and they can sue for removal of the obstruction interrupting that right. *Ranjit Singh* v. *Ram Nath Singh*, AIR 1976 All 417.

▸ **Locus standi.**—Statutory corporation has locus standi to maintain suit for easementary rights, *Mandal Panchayat Hunsagi* v. *North-Eastern Karnataka RTC*, (2009) 7 SCC 450.

13. Easements of necessity and quasi-easements.—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, been entitled to such easement;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator,

shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations

(*a*) *A* sells *B* a field then used for agricultural purposes only. It is inaccessible except by passing over *A*'s adjoining land or by trespassing on the land of a stranger. *B* is entitled to a right of way, for agricultural purposes only, over *A*'s adjoining land to the field sold.

(*b*) *A*, the owner of two fields, sells one to *B*, and retains the other. The field retained was, at the date of the sale, used for agricultural purposes only, and is inaccessible except by passing over the field sold to *B*. *A* is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(*c*) *A* sells *B* a house with windows overlooking *A*'s land, which *A* retains. The light which passes over *A*'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on his land.

(*d*) *A* sells *B* a house with windows overlooking *A*'s land. The light passing over *A*'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards *A* sells the land to *C*. Here *C* cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in *A*'s hands.

(*e*) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A* simultaneously sells the house to *B* and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f*) *A* is the owner of a house and adjoining land. The house has windows overlooking the land. *A*, retaining the house, sells the land to *B*, without expressly reserving any easement. The light passing over the land is

necessary for enjoying the house as it was enjoyed when the sale took effect. *A* is entitled to the light, and *B* cannot build on the land so as to obstruct such light.

(*g*) *A*, the owner of a house, sells *B* a factory built on adjoining land. *B* is entitled, as against *A*, to pollute the air, when necessary, with smoke and vapours from the factory.

(*h*) *A*, the owner of two adjoining houses, *Y* and *Z*, sells *Y* to *B*, and retains *Z*. *B* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Y* as it was enjoyed when the sale took effect, and *A* is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying *Z* as it was enjoyed when the sale took effect.

(*i*) *A*, the owner of two adjoining buildings, sells one to *B*, retaining the other. *B* is entitled to a right to lateral support from *A*'s building, and *A* is entitled to a right to lateral support from *B*'s building.

(*j*) *A*, the owner of two adjoining buildings, sells one to *B* and the other to *C*. *C* is entitled to lateral support from *B*'s building, and *B* is entitled to lateral support from *C*'s building.

(*k*) *A* grants lands to *B* for the purpose of building a house thereon. *B* is entitled to such amount of lateral and subjacent support from *A*'s land as is necessary for the safety of the house.

(*l*) Under the Land Acquisition Act, 1870[7], a Railway Company compulsorily acquires a portion of *B*'s land for the purpose of making a siding. The Company is entitled to such amount of lateral support from *B*'s adjoining land as is essential for the safety of the siding.

(*m*) Owing to the partition of joint property, *A* becomes the owner of an upper room in a building, and *B* becomes the owner of the portion of the building immediately beneath it. *A* is entitled to such amount of vertical support from *B*'s portion as is essential for the safety of the upper room.

(*n*) *A* lets a house and grounds to *B* for a particular business. *B* has no access to them other than by crossing *A*'s land. *B* is entitled to a right to way over that land suitable to the business to be carried on by *B* in the house and grounds.

CASE LAW ▸ Implied grant.—There is no implied grant of a right of way recognised in U.P., outside the provisions of Section 13, *Ragho Pd.* v. *Godawari Sugar Mills Ltd.*, 1970 All LJ 929.

Absence of an express grant of an easement does not negative an implied grant of such easement, *K.G. Chettiar* v. *N.S. Naidu*, AIR 1972 Mad 307.

▸ **Easementary right by implication.**—Where a certain extent of land towards the south of the house gifted to the defendant was gifted to the plaintiff after leaving a gali between the house gifted to the defendant and the land gifted to the plaintiff and there was express mention in gift deed of plaintiff that the same was left out for enjoyment by defendant of windows, etc. of his house and subsequently the said

7. *See* now the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013).

gali was transferred by the donor to the defendant, it was held in such circumstances that plaintiff was not entitled for easementary right in the gali by implication, *Kamla* v. *Bhanwarlal Vaid*, (1985) 1 SCC 563.

▸ **Acquisition of share.**—A person who acquires a share in a portion of the land and a share in the well can irrigate the portion of land so acquired or any other land owned by him to the extent of the land acquired, *Tanhabai* v. *Dhondiram*, AIR 1974 Bom 107.

▸ **Easement of necessity.**—Easement of necessity involves an absolute necessity. If there exists any other way, there can be no easement of necessity, *Sree Swayam Prakash Ashramam* v. *G. Anandavally Amma*, (2010) 2 SCC 689 : (2010) 1 SCC (Civ) 543.

▸ **Easement of grant.**—Easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not by anything else. The grant may be express or even by necessary under Section 13 of the Easements Act, 1882 even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Anyhow the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only until such time as the necessity was absolute; in fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognized and the servient tenement will be recognized and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Easements Act, 1882 which is applicable only to easement of necessity arising under Section 13, *Hero Vinoth* v. *Seshammal*, (2006) 5 SCC 545.

14. Direction of way of necessity.—When [8][a right] to a way of necessity is created under Section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

15. Acquisition by prescription.—Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and 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 twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

---

8. *Subs.* for "right" by Act 12 of 1891 (w.e.f. 21-3-1891).

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorising the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to [9][Government], this section shall be read as if, for the words "twenty years" the words "[10][thirty] years" were *substituted.*

Illustrations

(*a*) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto, as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgement.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(*c*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be

9. *Subs.* for "Crown" by A.O. 1950 (w.e.f. 26-1-1950).
10. *Subs.* for "sixty" by Act 36 of 1963, S. 28 (w.e.f. 1-1-1964).

dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

CASE LAW ▸ Applicability.—Section 15 does not apply to a case of customary right against Government. *Khandeswar* v. *Gukulananda Jena*, AIR 1965 Ori 91.

▸ **Easement by prescription.**—Easement by prescription cannot be acquired when both the treatments are owned or held by the same person. *Dewan Durag Singh* v. *State of M.P.*, AIR 1972 MP 12.

An exclusive right to ferry cannot be acquired by prescription. *Manindra Nath Bose* v. *Balaram*, AIR 1973 Cal 145.

The evidence from which a lost grant may be inferred is not very different from the evidence on which a claim for prescriptive easement may be established. *Krishna Narain* v. *Carlton Hotel*, 1969 SCD 1105.

For acquisition of right of way by prescription it has to be shown that incumbent has been using said land as of right peacefully and openly and without any interruption for the past twenty years. Specific pleadings have to be averred and categorical evidence led in general, and specifically in respect of dates between which right of way concerned has been used for (at least) twenty years, *Justiniano Antao* v. *Bernadette B. Pereira*, (2005) 1 SCC 471.

▸ **Prescriptive easement.**—Where the exercise of the right claimed by the appellant was not open but was exercised secretly no right of prescriptive easement could be exercised. *Krishna Narain* v. *Carlton Hotel*, 1969 SCD 1105.

▸ **Claim to easementary right.**—Easementary right can be claimed only after 20 years enjoyment; and that period of 20 years can be broken not only by an interruption as defined in Explanation II but also by discontinuance of enjoyment. *Madan Lal* v. *Giri Lal*, 1969 All LJ 777.

No lost grant can be presumed in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a village and that such a right can only be acquired by custom. *Raja Biaja Sundar Deb* v. *Moni Behara*, 1951 SCR 431 : AIR 1951 SC 247.

Where the plaintiff was using the defendant's courtyard for the purpose of repairing the wall of is house for over 20 years it was held that that fact was a prima facie evidence of enjoyment as of right within the meaning of Section 15. *Abdul Shakoor* v. *Ghisso Bibi*, 1972 A.W.R. 424.

Right to discharge drain water over the land in question claimed by the plaintiff on the basis of such discharge for long time, held claim acceptable. *Umar Khatoon* v. *Mohd. Zafir Khan*, (1997) 1 SCC 550.

Owner of land using the ridges between adjoining fields of his neighbour for reaching the road cannot be presumed to have used it 'as of right'. The user can be presumed only to be permissive. No right of easement can be claimed on the basis of such user, *Balley* v. *Rama Shankar*, AIR 1975 All 461.

No easementary right can be acquired by use of a 'Mend' as a passage unless there is clear evidence of such user as a matter of right. *Vidya Sagar* v. *Ram Das*, AIR 1976 All 415.

When right to discharge drain water order the land in question has been claimed by plaintiff on the basis of such discharge for long time claim acceptable, *Umrah Khatoon* v. *Mohd. Zafir Khan*, (1997) 1 SCC 550.

▸ **Customary right of privacy.**—Where customary right of privacy was neither pleaded nor proved if one party opens windows it is equally open to another party to block them by raising walls. *Anguri* v. *Jiwan Dass*, (1988) 4 SCC 189.

▸ **Right of passage.**—Right of passage need not be continuous and apparent. *Ram Narain* v. *Gangadhar*, AIR 1975 All 248.

16. Exclusion in favour of reversioner of servient heritage.—Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such, interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration

A sues for a declaration that he is entitled to a right of way over *B*'s land, *A* proves that he has enjoyed the right for twenty-five years; but *B* shows that during ten of these years *C* had a life-interest in the land; that on *C*'s death *B* became entitled to the land; and that within two years after *C*'s death he contested *A*'s claim to the right. The suit must be dismissed, as *A*, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

17. Rights which cannot be acquired by prescription.—Easements acquired under Section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

(*b*) a right to the free passage of light or air to an open space of ground;

(*c*) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(*d*) a right to underground water not passing in a defined channel.

CASE LAW ▸ Applicability.—Section 17 does not apply where what the plaintiff is claiming is a right to flow water which passes from his Nabdan over the defendant's land onward. It is not a claim to surface water. *Ram Narain* v. *Gangadhar*, AIR 1975 All 248.

▸ **Acquisition of right.**—The fact that a number of fishermen from time to time have been exercising the night of fishing with the leave and license of some of the owners is not sufficient for acquisition of the right either by adverse possession or by prescription. *Raja Braja Sundar Deb* v. *Moni Behara*, AIR 1951 SC 247 : 1951 SCR 431.

18. Customary easements.—An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations

(*a*) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. *A*, having become the tenant of a plot of uncultivated land in the village, breaks

up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. *A* builds a house in the town near *B*'s house. *A* thereupon acquires an easement that *B* shall not open new windows in his house so as to command a view of the portions of *A*'s house which are ordinarily excluded from observation, and *B* acquires a like easement with respect to *A*'s house.

CASE LAW ▸ Customary easement.—Customary easement based upon local custom must be ancient, continuous, reasonable, certain and compulsory. *Mangala Pd.* v. *Parbati*, 1974 ALJ 921.

Sanction for enforceability of a customary easement being in custom, the right must satisfy all the tests which a local custom for recognition by courts must satisfy. *State* v. *Subodh Gopal Bose*, AIR 1968 SC 281.

A customary easement within the meaning of Section 18 of the Easement Act is not a customary right. A customary easement is without doubt an easement: it is, however, not founded on immemorial user, or prescription or grant, but on the custom of the locality. The right to customary easement must still belong to a determinate person, or persons exercisable for the more beneficial enjoyment of land belonging to or occupied by such person or persons. A customary easement is, therefore, claimable only in respect of a dominant tenement, and not in gross.

▸ **Customary rights.**—A right which is claimed not in respect of each of the residents of the locality but is confined only to the descendants of one single person would not be a custom as recognised by the law. *Prabhu Dayal* v. *Leela Dhar*, 1972 All LJ 138.

Customary right exchanged with an express grant must be shown to exist in the form of customary right before that right can be exchanged with or converted into or confined to the kind of grant set-up by the plaintiff. *Ragho Pd.* v. *Godawari Sugar Mills Ltd.*, 1970 All LJ 929.

A customary right is a public right and arises out of the custom of the locality: it may be claimable by a fluctuating body of persons, and is a part of the law of the locality and is not a private right dependant upon grant, dedication or prescription. A customary right is available for the benefit of all persons who reside in the locality, or form a distinct class or have a common attribute and for whose benefit the custom in the locality prevails. Customary rights are saved from the operation of the Easement Act. The Easements Act by Section 2(*b*) provides that the Act does not derogate from any customary or other right (not being a licensee) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property. *Rameshwar Pd. Agarwala* v. *Jagat Narain Pandey*, CA No. 112 of 1962, dated 22-4-1965.

▸ **Public highway.**—Inference of dedication of a highway to public may be drawn from a long user of the highway by the public. The width of the highway depends upon the extent of the user. The sidelands are ordinarily included in the road. In case of pathway its permanent landmarks and the manner and mode of its maintenance usually indicate the extent of the user. *Municipal Board Manglaur* v. *Mahadeoji Maharaj*, AIR 1965 SC 1147.

▸ **Privacy.**—Privacy inside the house is a right of every woman and much more so for a woman who has inhibitions by customs or religious notions to appear in public and keeps herself in seclusion by observing purdah. *Ganeshi Lal* v. *Rasool Fatima*, AIR 1977 All 118.

▸ **Right of privacy.**—Where right of privacy of the women-folk was infringed by the openings made by the defendant in the wall of the upper storey of his house, suit for mandatory injunction for closing such openings was maintainable. *Bhagwan Dass* v. *Parmeshwar*, 1971 AWR 474.

▸ **Unreasonable custom.**—Where the tenants of two villages claimed the right to excavate stone from land in same village for purposes of trade and there were chances of breach of peace it was held that such a custom would be unreasonable. *State of Bihar* v. *Subodh Gopal Bose*, AIR 1968 SC 281.

▸ **Acquisition of right.**—Once there is a permissive right under a lease or licence, it would be difficult to arrive at the conclusion that a customary right to obtain a lease or licence had been acquired. The fact that a number of fishermen exercising right of fishing with leave and licence of owners over a long period of time is not sufficient for acquisition of right either by adverse possession or prescription, *Ramchandra Wahiwatdar* v. *Narayan*, (2003) 10 SCC 685.

19. Transfer of dominant heritage passes easement.—Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration

A has certain land to which a right of way is annexed. *A* lets the land to *B* for twenty years. The right of way vests in *B* and his legal representative so long as the lease continues.

CHAPTER III

THE INCIDENTS OF EASEMENTS

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 in inconsistent with such rules, nothing in this Chapter shall affect such incident.

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 that the house is kept in repair.

CASE LAW ▸ Nature and scope.—This section protects the rights of the servient owners and prohibits any such rights, which are unconnected with the enjoyment of the dominant heritage. As every easement is an appurtenance or an appendage of some ascertained dominant heritage for the beneficial enjoyment of which it solely exists, and it is not a personal right of the owner of the dominant tenement, it is necessarily incapable of being enjoyed for purposes which might be unconnected with the needs of dominant tenement, *Rangly* v. *Midland Rly Co.*, (1868) 3 Ch App 306; *Lallu* v. *Municipal Board of Kanpur*, 20 All 200. Such an enjoyment would place on the servient heritage, a burden to provide for the enjoyment of a "right in gross" which being uncertain in its extent would hedge the subjected tenement with unknown and unheard of restrictions, which may be increased or decreased to suit the whim of the enjoyer of the easement. A conversion of an easement into "a right in gross" cannot be permitted — *Peacock's Easement*, Third Edition 472. But a grant of way in general terms includes right of passage for scavenger, who cleans the privy, 34 Bom LR 1150: ILR 57 Bom 186.

▸ **Legal user.**—Legal user cannot be restrained because it is prompted by improper motive, 11 CWN 1296 or 20 CLJ 97.

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.

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 saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill; provided that it can be worked by the same amount of water.

(*b*) *A* has a right to discharge on *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 in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, 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 the stream by discharging into it poisonous liquor.

CASE LAW ▸ Alteration of the mode.—By the alteration of the mode or place of enjoyment of easement, it was held that no additonal burden should be imposed on servient heritage under Section 23. *Anguri* v. *Jiwan Dass*, (1988) 4 SCC 189.

▸ **Change in mode.**—Plea of change in mode and place of enjoyment of easement could not be allowed to be raised for the first time before Supreme Court, in appeal by special leave. *Anguri* v. *Jiwan Dass*, (1988) 4 SCC 189.

24. Right to do acts to secure enjoyment.—The dominant owner is entitled,[11] 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 as 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 rights.

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.

---

11. But *see* S. 36, *infra*, as to abatement of obstruction of easement.

(*e*) *A*, as owner of a certain house, has a right of way over *B*'s field. *A* may remove rocks to make the way.

(*f*) *A* has an easement of support from *B*'s wall. 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.

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.

CASE LAW ▸ Servient owner.—This section exempts servient owner from any responsibility and obligation to keep his tenements in good repairs unless he has bound himself by express stipulation. The principle underlying the section is "he who has the use of a thing ought to repair it" as indicated by Lord Mansfield in *Taylor* v. *Whitehead*, (1781) 2 Dong 745 and in *Braj Sunder* v. *Rajendra*, AIR 1941 Pat 260 by Their Lordships of Patna High Court.

26. Liability for damage from want of repair.—Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.[12]

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. *B* must not drive stakes so as to obstruct the watercourse.

---

12. But *see* S. 50, *infra*, as to extinguishment or suspension of easement.

(*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.

CASE LAW ▸ Servient heritage.—Opening of new windows towards servient heritage cannot be restrained in absence of any customary right of privacy but servient owner is entitled to block the windows by raising the height of his wall. In that event dominant owner cannot break or damage the wall or any portion thereof so as to remove the obstruction to their windows, *Anguri* v. *Jiwan Dass*, (1988) 4 SCC 189.

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 to 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 irrespectively 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.

CASE LAW ▸ Dominant tenement.—The owner of a dominant tenement does not obtain by his easement a right to all the light he has enjoyed during the period of prescription. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy. *Shiv Pratap Singh* v. *Prem Narain*, 1978 ALJ 304.

▸ **Easementary right of passage.**—Once it is held that the plaintiff had an easementary right of passage over the entire disputed land, the said right cannot be cut down by reducing the width of the passage. *Allah Din* v. *Rukmani Devi*, (1976) 2 ALR 122 (Summary).

► **Easementary right.**—When an easementary right has been established the court is not competent to cut down such right on consent of parties to the suit. *Allah Din* v. *Rukmani Devi*, (1976) 2 ALR 122 (Summary).

29. Increase of easement.—The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and, if the dominant heritage is diminished by diluvion, the easement is proportionately disminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations

(*a*) *A*, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. *A* alters the machinery of his mill. He cannot thereby increase his right to divert water.

(*b*) *A* has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. *A* extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*) *A*, as the owner of a farm, has a right to take, for the purpose of manufacturing his farm, leaves which have fallen from the trees on *B*'s land. *A* buys a field and unites it to his farm. *A* is not thereby entitled to take leaves to manure this field.

30. Partition of dominant heritage.—Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations

(*a*) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to *A*, the other to *B*. Each is entitled, in respect of his part, to a right of way by the same path.

(*b*) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to *A*, the other to *B*. *A* and *B* are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c*) *A*, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

CASE LAW ▸ Nature and scope.—Easement right is indivisible and, therefore, when a partition of dominant heritage takes place all easement rights which are attached to the partitioned tenement attach to the severed portions, *Ram Prasad* v. *Court of Wards*, 21 WR 152; *Nathubhai Dhirajbhai* v. *Bai Hansagarvi*, 36 Bom 379. The section makes it very clear that the process of partition cannot vest in the new owners of the severed tenement a right to place any additional burden on the servient heritage. If the breaking up of the dominant heritage is difficult or is likely to impose an additional burden on the servient tenement, the division cannot take place.

If two houses were common and a certain right of way belonged to the parties the passage being common it must be presumed, in the absence of any express agreement between the parties, that at partition, the passage was reserved for common enjoyment. *Nathubhai Dhirajbhai* v. *Bai Hansagarvi*, 36 Bom 379 or 151 C 818 or 14 Bom LR 418. When a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares provided that such annexation is consistent with the terms of the instrument under which the division was made, 18 LW 404 or 1923 M 674; 38 M 141 or 24 MLJ indicates that the consequence where the same grantor conveys in the course of one transaction portions of his property to several grantees.

31. Obstruction in case of excessive user.—In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: Provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration

A, having a right to the free passage over *B*'s land of light to four windows, six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. *B* cannot obstruct the excessive user.

CHAPTER IV
THE DISTURBANCE OF EASEMENTS

32. Right to enjoyment without disturbance.—The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration

A, as owner of a house, has a right of way over *B*'s land. *C* unlawfully enters on *B*'s land, and obstructs *A* in his right of way. *A* may sue *C* for compensation, not for the entry, but for the obstruction.

33. Suit for disturbance of easement.—The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory

thereto: Provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and Section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first *Explanation*, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations

(*a*) *A* places a permanent obstruction in a path over which *B*, as tenant of *C*'s house, has a right of way. This is substantial damage to *C*, for it may affect the evidence of his reversionary right to the easement.

(*b*) *A*, as owner of a house, has a right to walk along one side of *B*'s house. *B* builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to *A*.

CASE LAW ▸ Dominant heritage.—Under Section 33, the owner of any interest in the dominant heritage or the occupier of such heritage may institute a suit for the disturbance of the easement provided that the disturbance has actually caused substantial damage to the plaintiff. No damage is substantial unless the interference materially diminishes the value of the dominant heritage. *Chapsibhi Dhanjibhai Danand* v. *Purushottam*, (1971) 2 SCC 205.

▸ **Right of the free passage of air.**—Where the disturbance is to the right of the free passage of air, damage is substantial if it interferes materially with the physical comfort of the plaintiff. *Chapsibhi Dhanjibhai Danand* v. *Purushottam*, (1971) 2 SCC 205.

34. When cause of action arises for removal of support.—The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

35. Injunction to restrain disturbance.—Subject to the provisions of the Specific Relief Act, 1877 (1 of 1877)[13], Sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement,—

13. *See* now the Specific Relief Act, 1963 (47 of 1963) (w.e.f. 1-3-1964).

(*a*) If the easement is actually disturbed — when compensation for such disturbance might be recovered under this Chapter;

(*b*) If the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

CASE LAW ▸ Right of easement.—A court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence because there are various kinds of easements. Again a right of easement can be declared only when the servient owner is a party to the suit, *Bachhaj Nahar* v. *Nilima Mandal*, (2008) 17 SCC 491.

36. Abatement of obstruction of easement.—Notwithstanding the provisions of Section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CASE LAW ▸ Obstruction to the right of easement.—In England a party who has been refused a mandatory injunction by the court can if so chooses abate the obstruction to the right of easement; but in India it is totally forbidden, *Lane* v. *Capsey*, 3 Ch 411; *Emperor* v. *Zipru Tanaji*, 29 Bom LR 484. The person abating may be prosecuted and punished for trespass or other criminal act. It is the duty of the court to help the decree-holder. Section 147 of the Criminal Procedure Code is for the dominant tenement owner, he is not to abate the obstruction himself; it cannot be applied against the defendant. In place where the Act is not enforced the decree-holder is allowed the right to go and abate the obstruction, as in England, *Emperor* v. *Raj Kumar*, 3 Cal 411. In the case of infringement to natural right by any obstruction, the decree-holder can go and abate the obstruction, *Secretary of State* v. *Zamindar of Sophur*, 1938 Mad 180.

CHAPTER V

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS

37. Extinction by dissolution of right of servient owner.—When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with Section 10.

Illustrations

(*a*) *A* transfers Sultanpur to *B* on condition that he does not marry *C*. *B* imposes an easement on Sultanpur. Then *B* marries *C*. *B*'s interest in Sultanpur ends, and with it the easement is extinguished.

(*b*) *A*, in 1860, let Sultanpur to *B* for thirty years from the date of the lease. *B*, in 1861, imposes an easement on the land in favour of *C*, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years, *B*'s interest in Sultanpur then ends, and with it *C*'s easement.

(*c*) *A* and *B*, tenants of *C*, have permanent transferable interests in their respective holdings. *A* imposes on his holding an easement to draw water from a tank for the purpose of irrigating *B*'s land. *B* enjoys the easement

for twenty years. Then *A*'s rent falls into arrear and his interest is sold. *B*'s easement is extinguished.

(*d*) *A* mortgages Sultanpur to *B*, and lawfully imposes an easement on the land in favour of *C* in accordance with the provisions of Section 10. The land is sold to *D* in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

38. Extinction by release.—An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations

(*a*) *A*, *B* and *C* are co-owners of a house to which an easement is annexed. *A*, without the consent of *B* and *C*, releases the easement. This release is effectual only as against *A* and his legal representative.

(*b*) *A* grants *B* an easement over *A*'s land for the beneficial enjoyment of his house. *B* assigns the house to *C*. *B* then purports to release the easement. The release is ineffectual.

(*c*) *A*, having the right to discharge his eavesdroppings into *B*'s yard, expressly authorises *B* to build over this yard to a height which will interfere with the discharge. *B* builds accordingly. *A*'s easement is extinguished to the extent of the interference.

(*d*) *A*, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*) *A*, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on *B*'s land, permanently alters the roof so as to direct the rain-water into a different channel and discharge it on *C*'s land. The easement is impliedly released.

CASE LAW ▸ Gratuitous possession/permissive possession.—Suit for injunction by watchman/caretaker/agent/servant, all of them being persons in gratuitous possession/permissive possession, against dispossession by owner of the premises is not maintainable. Such person holds property on behalf of principal

(owner) and acquires no right or interest therein irrespective of long possession. Protection of court can be granted or extended only to a person who has valid subsisting rent agreement, lease agreement or licence agreement in his favour, *A. Shanmugam* v. *Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam*, (2012) 6 SCC 430 : (2012) 3 SCC (Civ) 735

▸ **Mantainability.**—Action for injunction sought by plaintiff gratuitous licensee for restraining co-owners of suit property from dispossessing plaintiff, held not maintainable, *Behram Tejani* v. *Azeem Jagani*, (2017) 2 SCC 759 : (2017) 2 SCC (Civ) 161.

39. Extinction by revocation.—An easement is extinguished when the servient owner, in exercise of power reserved in this behalf, revokes the easement.

40. Extinction on expiration of limited period or happening of dissolving condition.—An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

41. Extinction on termination of necessity.—An easement of necessity is extinguished when the necessity comes to an end.

Illustration

A grants *B* a field inaccessible except by passing over *A*'s adjoining land. *B* afterwards purchases a part of that land over which he can pass to his field. The right of way over *A*'s land which *B* had acquired is extinguished.

42. Extinction of useless easement.—An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

43. Extinction by permanent change in dominant heritage.—Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished unless—

(*a*) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(*b*) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(*c*) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

44. Extinction on permanent alteration of servient heritage by superior force.—An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of Section 14 apply to such way.

Illustrations

(*a*) *A* grants to *B*, as the owner of a certain house, a right to fish in a river running through *A*'s land. The river changes its course permanently and runs through *C*'s land. *B*'s easement is extinguished.

(*b*) Access to a path over which *A* has a right of way is permanently cut off by an earthquake. *A*'s right is extinguished.

45. Extinction by destruction of either heritage.—An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration

A 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. *A*'s easement is extinguished.

CASE LAW ▸ Nature and scope.—This section is more wide than previous one. Under this section the easement extinguishes when either of the two heritages dominant or servient is destroyed. The destruction required under this section is total destruction, partial destruction of either tenement does not take away this right, unless the enjoyment of easement becomes impossible, *Framji* v. *Framji*, 7 Bom LR 352.

46. Extinction by unity of ownership.—An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations

(*a*) *A*, as the owner of a house, has a right of way over *B*'s field. *A* mortgages his house, and *B* mortgages his field to *C*. Then *C* forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in Section 41.

(*c*) The servient owner acquires the dominant heritage in connection with a third person; the easement is not extinguished.

(*d*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages; the easements are not extinguished.

(*e*) The joint owners of the dominant heritage jointly acquire the servient heritage; the easement is extinguished.

(*f*) *A* single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(*g*) *A* has a right of way over *B*'s road. *B* dedicates the road to the public. *A*'s right of way is not extinguished.

47. Extinction by non-enjoyment.—A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877 (3 of 1877)[14], a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration

A has, as annexed to his house, rights of way from the high road thither over the heritages *X* and *Z* and the intervening heritage *Y*. Before the twenty years expire, *A* exercises his right of way over *X*. His rights of way over *Y* and *Z* are not extinguished.

48. Extinction of accessory rights.—When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration

A has an easement to draw water from *B*'s well. As accessory thereto, he has a right of way over *B*'s land to and from the well. The easement to draw water is extinguished under Section 47. The right of way is also extinguished.

---

14. *See* now the Indian Registration Act, 1908 (16 of 1908) (w.e.f. 1-1-1909).

49. Suspension of easement.—An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

50. Servient owner not entitled to require continuance.—The servient owner has no right to require that an easement be continued; and notwithstanding the provisions of Section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment or suspension.—Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration

A, in exercise of an easement, diverts to his canal the water of *B*'s stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. *A* then abandons his easement, and restores the stream to its ancient course. *B*'s land is consequently flooded. *B* sues *A* for compensation for the damage caused by the flooding. It is proved that *A* gave *B* a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable *B*, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

51. Revival of easements.—An easement extinguished under Section 45 revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under Section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under Section 47.

Illustration

A, as the absolute owner of field *Y*, has a right of way thither over *B*'s field *Z*. *A* obtains from *B* a lease of *Z* for twenty years. The easement is suspended so long as *A* remains lessee of *Z*. But when *A* assigns the lease to *C*, or surrenders it to *B*, the right of way revives.

CHAPTER VI
LICENSES

52. "License" defined.—Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

CASE LAW ▸ License, What is.—License is a privilege to do something on the premises which otherwise would be unlawful. License is a personal privilege. *Chandavarkar Sita Ratna Rao* v. *Ashalata S. Guram*, (1986) 4 SCC 447. Payment of license fee is not essential for subsistence of license. *State of Punjab* v. *Brig. Sukhjit Singh*, (1993) 3 SCC 459.

The arrangement of catching fish from the tank and in consideration paying rent and cleansing the tank, would not mean a lease but only constitute a license. *State of W.B.* v. *Sardia Thakurani*, (1972) 4 SCC 158.

When the license permits any person to do something on immovable property and also includes permission to take away movable property the license may operate not only as a license but also as a grant for movable property. *Rameshwar Pd.* v. *Commissioner Land Reforms*, AIR 1959 SC 498.

Right to catch and carry away fish in specific sections of the lake over a specified future period, amounts to a license to enter on the land coupled with a grant to catch and carry away the fish i.e. it is a profit-a-prendre. *Ananda Behera* v. *State of Orissa*, AIR 1956 SC 17 : (1955) 2 SCR 919.

Licence is a privilege to do something on the premises which otherwise would be unlawful. Licence is a personal privilege, *Chandavarkar Sita Ratna Rao* v. *Ashalata S. Guram*, (1986) 4 SCC 447.

Person having permission or authority to occupy the property under certain terms without having any right or interest in the property which remains with the owner, is a licensee. Though occupation of the licensee is permissive but he acquires right to continue his occupation unless his authority or licence has expired or the same has been determined or the licence revoked or licensee evicted, *Corpn. of Calicut* v. *K. Sreenivasan*, (2002) 5 SCC 361.

▸ **Lease, What is.**—A right to carry on mining operations in land to extract a specified mineral and to remove and appropriate that mineral, is a "right to enjoy immovable property" within the meaning of Section 105 of T.P. Act, more so when it is coupled with a right to be in its exclusive khas possession for a specified period. The transaction, though labelled as license, has all the essential elements of a "lease". *Sri Tarkeshwar Sio Thakur Jiu* v. *Dav Dass Dey & Co.*, (1979) 3 SCC 106.

If an interest in immovable property entitling the transferers to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a license is the legal result. *Qudratullah* v. *Municipal Board*, (1974) 1 SCC 202.

A license confers a right to do or continue to do something in or upon immovable property of grantor which but for the grant of the right may be unlawful, but it creates no estate or interest in the property. A lease on the other hand creates an interest in the property. *Sohan Lal* v. *Laxmi Das*, (1971) 1 SCC 276.

The transaction is a lease if it grants an interest in the land; it is a license if it gives a personal privilege with no interest in land. *B.N. Lall* v. *Dunlop Rubber Co.*, AIR 1968 SC 175.

Where the document only confers a right to enter on the lands in order to cut down certain kinds of trees and carry away the wood, the transaction would amount to a license. *Shantabai* v. *State of Bombay*, AIR 1958 SC 532.

► **Lease and license.**—A lease cannot be converted into a license by merely calling it a license. *Ram Niwas* v. *Municipal Board*, AIR 1976 All 241.

► **License or lease.**—To ascertain whether a document creates a license or lease the substance of the document must be preferred to the form. The real test is the intention of the parties. *Associated Hotels of India Ltd.* v. *R.N. Kapoor*, AIR 1959 SC 1262 : (1960) 1 SCR 368.

A lease is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a license. A license does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a license is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a license, it is essential therefore, to look to the substance and essence of the agreement and not to its form. *Board of Revenue* v. *A.M. Ansari*, (1976) 3 SCC 512. Following *Associated Hotels of India Ltd.* v. *R.N. Kapoor*, AIR 1959 SC 1262 : (1960) 1 SCR 368.

It is not necessary that lease should always be reduced to writing. What is necessary is for transfer of a right of enjoyment of the property made for a certain time, expressed or implied and for consideration of the price, paid or promised, the transferee must have been put in possession of the demised property. It is also necessary that an agreement can be entered into for rendering periodical service and for consideration thereof and on transfer of the land to the transferee and acceptance thereof, either orally or in writing, the lease comes into existence. A licensee has no right in the property, not to speak of any right to the exclusive possession of the property and animus of possession always remains with the licensor; the licensee gets the possession only with the consent of the licensee and is liable to vacate when so asked. *Tulsi* v. *Paro*, (1997) 2 SCC 706.

Exclusive possession itself is not decisive in favour of a lease and against a mere license, for, even the grant of exclusive possession might turn out to be only a license and not a lease where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a license "turns on the operative intention of the parties" and that there is no single, simple litmus test to distinguish one from the other. The "solution that would seen to have been found is, as one would expect, that it must depend on the intention of the parties". *Rajbir Kaur* v. *S. Chokesiri and Co.*, (1989) 1 SCC 19.

Where the nomenclature of the document was license and the document clearly postulated that possession and control should remain with the owner, the incorporation of the grantee's undertaking in the document that he would not sublet the property, held could not alter the relationship of the parties as lessor and lessee. Thus the document in question is a license and not a lease. *Swarn Singh* v. *Madan Singh*, 1995 Supp (1) SCC 306.

Where the deed postulated absence of any right or interest of the licensee in the shop except as licensee in accordance with the terms and conditions of the agreement, the deed further postulated the vesting of possession of the shop in the licensor with right to enter at any time to inspect the same, on facts the appellant licensee found to be not in exclusive possession of the shop and found to be executing periodical deeds, in such circumstances the High Court rightly held that the appellant had been granted only a license and not a

lease. *Om Prakash* v. *Ravinder Kumar Sharma (Dr)*, 1995 Supp (4) SCC 115, affirming *Ravindra Kumar Sharma* v. *Om Prakash*, (1993-1) 103 Punj LR 52.

Where a vacant land demised by the Government to appellants for 50 years with a right to renewal for a further period of 50 years, the said land was demised with exclusive possession but subject to construction of building within a specified period, peaceful and exclusive possession and enjoyment thereof and any payment of lease amounts to the Government, the transaction was held to be lease and not license. *Ratan Kumar Tandon* v. *State of U.P.*, Civil Appeal No. 10786 of 1996.

The provision in license that the licensee would be entitled to a notice before being required to vacate is not inconsistent with a license. Mere necessity of giving a notice would not indicate that the transaction was a lease. *M.N. Clubwala* v. *Fida Husain Saheb*, AIR 1965 SC 610.

▸ **Right to possession.**—The legal incidence of license in normal parlance is that licensee has no right to possession of the demised property as the legal possession always remains with the licensor. It creates neither interest nor estate therein. After the expiry of the period of license or termination thereof, the continuance in possession of the premises by the licensee would be as a respasser unless the covenant in a contract under which he/they came into possession creates such a right or is acquiesced by the licensor. His possession, thereof, would not be juridical. *East India Hotels Ltd.* v. *Syndicate Bank*, 1992 Supp (2) SCC 29.

▸ **Service occupation.**—A service occupation is a particular kind of license whereby a servant is required to live in the premises for the better performance of his duties. *B.N. Lall* v. *Dunlop Rubber Co.*, AIR 1968 SC 175.

▸ **Exclusive possession.**—Exclusive possession is not the sole indicia to establish the relationship of landlord and tenant between the parties. It is true that the word "demise" indicates either lease or conveyance depending upon the terms of the document. But, at the same time the said word is to be construed by finding out what is sought to be conveyed or transferred in the context of all the terms of the document. If the privilege of occupying the premises exclusively is granted on certain terms and conditions specifically as a licensee or what is agreed to be granted is exclusive possession of the premises on certain terms and conditions as a licensee, then there is no question of holding to the contrary. This would be clear from various meanings which could be assigned to the word "demise". Hence for determining whether the phrase "demised premises" shall be construed as a lease or a licence as expressly stated in the agreement, the phrase or the word is to be construed in the context in which it is used, *Delta International Ltd.* v. *Shyam Sundar Ganeriwalla*, (1999) 4 SCC 545.

▸ **Contractual licence.**—Mere licence does not create any estate or interest in property to claim irrevocability. Contractual licence is normally revocable but depends on express terms of contract, *Mumbai International Airport (P) Ltd.* v. *Golden Chariot Airport*, (2010) 10 SCC 422.

▸ **Better rights.**—Transferor cannot transfer better rights than what he himself possessed, *Chandy Varghese* v. *K. Abdul Khader*, (2003) 11 SCC 328.

▸ **Local standi.**—Locus standi to challenge setting aside of cancellation, held, extends only to licensor and not to a third party (who had subsequently been allotted the licence on its cancellation). Position contrasted with when property rights are acquired, *Poonam* v. *State of U.P.*, (2016) 2 SCC 779 : (2016) 2 SCC (Civ) 297.

▸ **Transfer by way of an agreement.**—Valuation of Compulsory purchase of immovable property in case of transfer by way of an agreement or arrangement which has the effect of transferring or

enabling enjoyment of immovable property, in case of undervaluation to evade tax to arrive at inference of undervaluation, has to be proportionate to value of rights transferred. Expression "transfer" is wide enough to include within its scope, agreements or arrangements which have the effect of transferring all important rights in land for future considerations such as part acquisition of shares in buildings to be constructed, even though the transfer does not amount to sale, lease or exchange, *Unitech Ltd.* v. *Union of India*, (2016) 2 SCC 569 : (2016) 2 SCC (Civ) 129.

53. Who may grant license.—A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

54. Grant may be express or implied.—The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

55. Accessory licenses annexed by law.—All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration

A sells the trees growing on his land to *B*. *B* is entitled to go on the land and take away the trees.

56. License when transferable.—Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

Illustrations

(*a*) *A* grants *B* a right to walk over *A*'s field whenever he pleases. The right is not annexed to any immovable property of *B*. The right cannot be transferred.

(*b*) The Government grant *B* a license to erect and use temporary grain-sheds on government land. In the absence of express provision to the contrary, *B*'s servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

57. Grantor's duty to disclose defects.—The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

58. Grantor's duty not to render property unsafe.—The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

CASE LAW ▸ Gross negligence.—Licensee will be liable for the consequences of any wrong act, as deliberately lying a pitfall for the licensee or misrepresenting the condition of his property, but not for mere omissions unless they amount to gross negligence, *Fredrick Thomas* v. *Secretary of State*, 72 IC 27 : 1923 Cal 49.

59. Grantor's transferee not bound by license.—When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

CASE LAW ▸ Tenants-at-will.—"tenant members" (licensees/tenants-at-will) though members of the Society but having not proprietary interest in the property in question ordinarily interim injunction restraining cooperative housing Society from taking steps in furtherance of its resolution for sale and redevelopment of society property to developer for demolition of existing cottages and construction of apartment/blocks/buildings cannot be sought by such persons, *Margaret Almeida* v. *Bombay Catholic Coop. Housing Society Ltd.*, (2013) 6 SCC 538 : (2013) 3 SCC (Civ) 313.

60. License when revocable.—A license may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property and such transfer is in force;

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

CASE LAW ▸ Section 60(*b*)—Applicability—Conditions for.—Where a license was granted in 1963 for two years with permission to make temporary construction thereon but with the understanding to remove the construction and deliver *khas* possession of the land after two years, suit filed in 1966 for *khas* possession, the suit was decreed by the trial court and first appellate court but in second appeal High Court, on the basis of report submitted by Advocate Commissioner in 1975, taking the view that the licensee had raised structure of permanent nature on the land and that even though Easements Act was not applicable in State of Assam, Section 60(*b*) thereof was applicable on the principle of equity, justice and good conscience and as such the license had become irrevocable, it was held that High Court erred in relying upon report of the Commissioner submitted in 1975, when question of raising the construction was to be considered in relation to the period of license i.e. from 1963 to 1965. High Court's view of applicability of Section 60(*b*) was also erroneous once it was found that the Act itself was inapplicable to the State of Assam. Hence, grant of relief on the principle of justice, equity and good conscience was also not permissible when, on facts the licensee himself had not come to the court with clean hands. *Panchugopal Barua* v. *Umesh Chandra Goswami*, (1997) 4 SCC 713.

Improvements made as a tenant or prospective purchaser were, held to be not covered within the meaning of Section 60(*b*). *Shankar Gopinath Apte* v. *Gangabai Hariharrao Patwardhan*, (1976) 4 SCC 112.

Parties by agreement can make licence irrevocable even if it is not covered by clause (*a*) or (*b*). where licence is oral, purpose of its grant and circumstances leading to the grant as also conduct of the parties have to be considered to determine whether it is irrevocable, *Ram Sarup Gupta* v. *Bishun Narain Inter College*, (1987) 2 SCC 555.

▸ **Revocational license.**—In order to be irrevocable the license has to be coupled with a transfer of property whereas under the English law it was enough if it was coupled with a grant or interest in the nature of profit and in every case the irrevocability whether under the English law or under the Indian statute will give way to special agreement of any of the parties. *Chevalier I. I. Vyyappan* v. *Dharmodayan Co.*, (1963) 1 SCR 85 : AIR 1966 SC 1017.

Where on the basis of the license a building of permanent nature is constructed, the license becomes irrevocable. *Iftikharul Haq* v. *Lala Data Ram*, 1975 All LJ 670.

Where the licensee acting upon a license has executed a work of permanent character and incurred expenses, in the execution, the license cannot be revoked by the grantor. *Iftikharul Haq* v. *Lala Data Ram*, 1975 All LJ 670.

Where license in respect of certain premises were granted to the licensee for running a school and acting upon such license the licensee made construction on the licensed premises without there being any objection by the licensor, it would be reasonable to infer an implied condition that license was irrevocable and licensor or transferee could not revoke it so long as the purpose for which license was granted is carried on by the licensee. *Ram Sarup Gupta* v. *Bishun Narain Inter College*, (1987) 2 SCC 555.

▸ **Mandatory injunction.**—Grant of mandatory injunction for eviction of gratuitous licensees or persons in permissive possession, upon revocation of permission by owner by trial court, held, proper, *Gowri* v. *Shanthi*, (2014) 11 SCC 664 : (2014) 4 SCC (Civ) 250.

▸ **Permissive or gratuitous possession.**—Possession without any right to possess, but with permission of owner is "permissive possession". Permissive possessee is liable to be evicted forthwith on revocation of permission by owner, *Gowri* v. *Shanthi*, (2014) 11 SCC 664 : (2014) 4 SCC (Civ) 250.

61. Revocation express or implied.—The revocation of a license may be express or implied.

Illustrations

(*a*) *A*, the owner of a field, grants a license to *B* to use a path across it. *A*, with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b*) *A*, the owner of a field, grants a license to *B* to stack hay on the field. *A* lets or sells the field to *C*. The license is revoked.

62. License when deemed revoked.—A license is deemed to be revoked—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license;

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative;

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled;

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license;

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable;

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee;

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

CASE LAW ▸ Contractual tenancy.—On determination of contractual tenancy, statutory tenant ceases to have any assignable interest in the property and as such license granted by him prior to the determination of tenancy would be deemed to be revoked under Section 62(*a*). *S.J. Pande* v. *P.K. Balkrishnan*, (1993) 3 SCC 297.

▸ **Revocation of license.**—Revocation of license cannot be undone by acceptance of compensation by the owner. *D.H. Maniar* v. *Waman Laxman Kudav*, (1976) 4 SCC 118.

▸ **Suit for eviction.**—Where a suit for eviction of State of Punjab from a building which formed part of an integrated complex known as Jallowkhana in Kapurthala (Punjab) was filed on the ground that the State was in occupation of the building as a licensee, the plaintiff-respondent, being heir of the erstwhile ruler of Kapurthala State, already held by courts below to be owner of the Jallowkhana complex, the State contended that it was not a mere licensee of the building as no license fee was agreed to be paid, that it became owner of the building by adverse possession and that the building having not been included in the list of personal properties of the ruler at the time of merger, it was not the property of the plaintiff-respondent, the Farman of the former ruler treated the entire complex to be neither personal property of the ruler nor state property but property of each heir apparent succeeding by rule of primogeniture so as to keep the name of the dynasty perpetuated in the Jallowkhana as such, it was held that respondent was owner of the building also and the State had no title to it and hence state must obey the mandatory injunction issued by the lower appellate court and confirmed by the High Court requiring the state to vacate the building. *State of Punjab* v. *Brig. Sukhjit Singh*, (1993) 3 SCC 459.

▸ **Contractual tenancy.**—On determination of contractual tenancy, statutory tenant ceases to have any assignable interest in the property and as such licence granted by him prior to the determination of tenancy would be 'deemed to be revoked' under Section 62(*a*), *S.J. Pande* v. *P.K. Balakrishnan*, (1993) 3 SCC 297.

63. Licensee's rights on revocation.—Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

CASE LAW ▸ Revocation of license.—A person continuing in possession of the premises after termination, withdrawal or revocation of the license continues to occupy it as a trespasser or as a person who has no semblance of any right to continue in occupation of the premises. Such a person by no stretch of imagination can be called a licensee. *D.H. Maniar* v. *Waman Laxman Kudav*, (1976) 4 SCC 118.

64. Licensee's rights on eviction.—Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

CASE LAW ▸ Forceful eviction.—Though an forceful eviction, licensee has only right to compensation and not resumption of occupation, it does not imply that licensee can be forcefully evicted by the grantor without recourse to law, *Corpn. of Calicut* v. *K. Sreenivasan*, (2002) 5 SCC 361.