

SMT. RAMKANYA BAI & ANR.

v.

JAGDISH & ORS.

(Civil Appeal No. 4922 of 2011)

JULY 04, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

Madhya Pradesh Land Revenue Code, 1959:

ss. 131, 242, and 257 – Easementary rights determined u/s. 131 by revenue court (Tahsildar) – Subsequent civil suit by the owner of a land for declaration that servient owner does not have an easementary right, customary or otherwise, over his property and the order of Tahsildar u/s. 131 recognizing such right, is illegal and erroneous – Trial court dismissed the suit holding that the revenue court alone had jurisdiction to grant relief and not the civil court – Jurisdiction of civil court – Held: The Code does not bar the jurisdiction of civil courts nor creates any new category of private easementary rights not covered by the provisions of the Easements Act – Decision of Tahsildar will not bar a subsequent civil suit by either party to a proceeding u/s 131 in respect of easement claimed in the proceedings u/s. 131 – It cannot be said that Tahsildar alone has the jurisdiction, and not the civil court, to decide upon the existence or otherwise of a customary easement – Decision of Tahsildar after a summary enquiry with reference to the 'previous custom' and with due regard to the conveniences of all parties, u/s. 131(1), is open to challenge in a civil suit and subject to the decision of the civil courts – s. 257 providing for exclusion of jurisdiction of civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights.

s. 242 – Customary easements – Wajib-ul-arz – Held: It is the record of customs in a village in regard to easements

A (including the right to irrigation and right of way); and the right to fishing in privately owned/held lands and water bodies.

B The first respondent filed an application to the Naib Tahsildar under Section 131 of the Madhya Pradesh Land Revenue Code, 1959 claiming a right of way over the land of appellants to reach his lands and the same was allowed. The appellants filed an appeal as also revision and the same were dismissed. The appellants then filed a civil suit seeking a declaration that the first respondent does not have an easementary right, customary or otherwise, over his property and the order of Tahsildar under Section 131 of the Code recognizing such right, is illegal and erroneous. The trial court dismissed the suit on the ground that having regard to Section 131 read with Section 257 of the Code, the revenue court (Tahsildar) alone had jurisdiction to grant relief on the basis of custom and convenience of parties, and not the civil court. Aggrieved, the appellants filed an appeal as also second appeal and the same were dismissed. Therefore, the appellant filed an instant appeal.

E Allowing the appeal, the Court

F HELD: 1.1 Under Section 131 of the Madhya Pradesh Land Revenue Code, 1959 a dispute relating to a claim for a customary easement over a private land, relating to a right of way or right to take water, which is not recognized and recorded as a customary easement in the village *Wajib-ul-arz* could be decided. [Para 6] [826-C-D]

G *Kamala Mills Ltd. v. State of Bombay* AIR 1965 SC 1942:1966 SCR 64; *Dhulabhai v. State of Madhya Pradesh* 1968 (3) SCR 662 – referred to.

H 1.2. The Code nowhere bars the jurisdiction of civil courts to decide upon easementary rights relating to agricultural or other lands. It neither creates nor

recognizes any new category of private easementary rights either by way of right of way or right to take water, which is not covered by the provisions of the Easements Act or which is not required to fulfill the requirements prescribed by the Easements Act. An easement cannot be acquired otherwise than in the manner provided in the Easement Act. Section 131 of the Code merely deals with customary easements covered by Section 18 of the Easements Act. It cannot be said that the elements of an easement required to be fulfilled under the Easement Act are not required in respect of a private easement under Section 131. Apart from the fact that Section 131 of the Code does not deal with acquisition of any special easement by some method which is not referred in the Easements Act, sub-Section (2) of Section 131 expressly provides that irrespective of any order passed by the Tahsildar under Section 131, any person can establish any right relating to an easement by a civil suit. There is nothing in Section 131 or any other provision of the Code, which makes the decision of the Tahsildar final and not open to question in a civil court. Therefore, the decision of the Tahsildar will not bar a subsequent civil suit by either party to a proceeding under Section 131, in respect of the easement claimed in the proceedings under Section 131 of the Code. [Para 9] [828-H; 829-A-F]

1.3. When a person (dominant owner) has an easementary right, and the servient owner disturbs, obstructs or interferes with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil court for the relief of declaration and/or injunction. Similarly, when a person who does not have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such land can resist such assertion or obstruct the exercise of the easementary right and also approach the civil court to declare that the defendant has

A no easementary right of the nature claimed, over his land and/or that the defendant should be prevented from asserting such right or interfering with his possession and enjoyment. [Para 10] [829-G-H; 830-A]

B 1.4. Section 257 of the Madhya Pradesh Land
 Revenue Code, 1959 relates to the exclusive jurisdiction
 of the revenue authorities. Any statutory provision
 ousting the jurisdiction of civil courts should be strictly
 construed. A suit for enforcement of an easementary
 C right or for a declaration that the defendant does not have
 any easementary right over plaintiff's property or a suit
 for injunction to restrain a defendant from interfering with
 the possession of plaintiff or exercising any easementary
 right over plaintiff's property, is not barred by the Code.
 D Such suits do not fall under any of the excluded matters
 enumerated in clauses (a) to (z-2) of Section 257 of the
 Code. Section 257, no doubt, also provides that no civil
 court shall entertain any suit instituted to obtain a
 decision or order *on any matter which the States
 Government, the Board or any Revenue Officer is
 E empowered to determine by the provisions of the Code.*
 But this is subject to the opening words of the Section
 "except as otherwise provided in this Code or in any
 other enactment for the time being in force". Sub-section
 (2) of Section 131 of the Code reserves and retains
 F specifically the jurisdiction of the civil court to entertain
 suits relating to any easements, irrespective of the
 decision of the Tahsildar on a similar issue. Therefore, the
 right to decide upon the nature of easements and
 enforcement of easements is expressly preserved for
 G decision by a civil court in a civil suit. The two fold object
 of sub-Section (2) of Section 131 is to declare that Section
 131(1) of the Code does not deal with a matter which is
 in the exclusive province of revenue authorities and also
 to enable either party to approach the civil court in regard
 H to any easementary right, irrespective of the decision

under Section 131(1) by the Tahsildar. The effect of Section 257 and Section 131(2) is that the enquiry and decision by the Tahsildar based on "previous custom" and "conveniences of parties" in regard to any private easementary rights relating to right of way or right to water will always be subject to the decision of the civil court in any civil suit by any party relating to that matter. Therefore, Section 257 providing for exclusion of jurisdiction of civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights. [Para 11] [830-B-H; 831-A-B]

Nathuram v. Siyasharan 1969 J LJ 115; *Rambai v. Harchand* 1979 RN 532 – disapproved.

Gopidas (Mahant) v. Ram Krishna Pandey 1971 J LJ 825; *Fakka v. Hafiram* 1984 RN 422 – approved.

1.5. *Wajib-ul-arz* is the record of customs in a village in regard to easements (including the right to irrigation and right of way); and the right to fishing in privately owned/held lands and water bodies. These entries could be modified in the manner provided in sub-section (5) of Section 242 of the Code. Though the Code provides for maintaining a record of all customary easements imposed upon privately held lands and water bodies, significantly the Code does not provide the remedies available in the event of disturbance or interference with such easements recorded in *Wajib-ul-arz*, as the remedy is only way of a suit before the civil court. Customary easements are the most difficult to prove among easements. To establish a custom, the plaintiff will have to show that (a) the usage is ancient or from time immemorial; (b) the usage is regular and continuous; (c) the usage is certain and not varied; and (d) the usage is reasonable. If the *Wajib-ul-arz* (where such a record is maintained) records or shows the customary easement,

A it would make the task of civil courts comparatively easy, as there will be no need for detailed evidence to establish the custom. If the remedy for violation of a customary easement recognized and recorded in the *Wajib-ul-arz* is by way of a civil suit, it is inconceivable that in regard to
 B violation of a customary easement *not recognized or recorded in the Wajib-ul-arz*, the remedy would be only by way of a summary enquiry by the Tahsildar under Section 131 of the Code, and not by a suit, before the civil court. [Para 15] [834-G-H; 835-A-D]

C 1.6. It cannot be said that Tahsildar alone has the jurisdiction, and not the civil court, to decide upon the existence or otherwise of a customary easement (relating to right of way or right to take water, to a person's land).
 D The decision of the Tahsildar after a summary enquiry with reference to the 'previous custom' and with due regard to the conveniences of all parties, under Section 131(1), is open to challenge in a civil suit and subject to the decision of the civil court. The jurisdiction of the civil court to try any suit relating to easements is not affected
 E by Sections 131, 242 or 257 of the Code. The judgments and decrees of the courts below are set aside and it is declared that the civil court has the jurisdiction to try the suit filed by the appellants. [Para 16] [835-E-G]

Case Law Reference:			
F	1966 SCR 64	Referred to.	Para 8
	1968 (3) SCR 662	Referred to.	Para 8
	1969 JLJ 115	Disapproved.	Para 12
G	1979 RN 532	Disapproved.	Para 12
	1971 JLJ 825	Approved.	Para 13
	1984 RN 422	Approved.	Para 13

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4922 of 2011. A

From the Judgment & Order dated 19.1.2007 of the High Court of Madhya Pradesh Bench at Indore in First Appeal No. 1151 of 2005. B

Ujjal Singh, J.P. Singh, R.C. Kaushik for the Appellants.

Sushil Kumar Jain, Puneet Jain, B.L. Joshi, Pratibha Jain, Vikas Upadhyay, B.S. Banthia for the Respondents.

The Judgment of the Court was delivered by C

R.V.RAVEENDRAN, J. 1. Leave granted.

2. The appellants claim to be the owners of lands bearing Khasra Nos.29/2/2 and 29/1. The first respondent Jagdish claims to be the owner of Khasra Nos.36/3 and 36/4. The first respondent made an application to the Naib Tahsildar, Tappa Betma, Depalpur, Indore District, under section 131 of the Madhya Pradesh Land Revenue Code, 1959 ('Code' for short) claiming a right of way over Khasra Nos.29/2/2 and 29/1 of the appellants, to reach his lands bearing Khasra Nos.36/3 and 36/4. The Naib Tahsildar made an order dated 25.10.2001, under section 131 of the Code, holding that first respondent, with his agricultural equipments, bullock-cart etc., was entitled to pass through the Government Road, Khasra No.21 (East to West) of the village Salampur and thereafter pass through Khasra Nos. 29/1 and 29/2/2 belonging to the appellants, for reaching his land bearing Khasra Nos.36/3 and 36/4 and the appellants shall not obstruct such passage. The appeal by the appellants filed against the said order under section 44 of the Code was dismissed and the subsequent revision filed by the appellants under section 50 of the Act was also dismissed. D E F G

3. Thereafter appellants filed Civil Suit No.66A/2002 on the file of the Civil Judge (Class II), Depalpur, Indore district for the following reliefs : (a) a declaration that the first respondent did H

- A not have any right of way over their lands bearing Nos.29/2/2 and 29/1 to reach his lands bearing Khasra Nos.36/3 and 36/4 and that they are entitled to enjoy their lands without any interference from first respondent; (b) for a declaration that the order dated 25.10.2001 passed by the Tahsildar creating a new passage, over khasra Nos.29/1 and 29/2/2, was illegal; and (c) for a consequential injunction restraining first respondent from creating/ constructing any new passage, over their lands. The said suit was dismissed by the trial court, by judgment dated 4.12.2004 on the ground that having regard to section 131 read with section 257 of the Code, the revenue court (Tahsildar) alone had jurisdiction to grant relief on the basis of custom and convenience of parties, and it did not have any jurisdiction. The appeal (Appeal No.3-A/2005) filed by the appellants was dismissed by the first appellate court on 19.4.2005. The subsequent second appeal filed by the appellants was also dismissed by the High Court on 19.1.2007. The said judgment is under challenge in this appeal by special leave.

4. On the contentions urged by the parties, the following questions arise for our consideration:

(a) Whether the jurisdiction of the civil court to entertain a suit for declaration or injunction, claiming a customary easement of right of way or right to take water, through the land of a servient owner, is barred by section 257 of the Code, on the ground that it is a matter which the Revenue Officer (Tahsildar) is empowered to decide under section 131 of the Code?

(b) Whether the civil court has no jurisdiction to entertain a suit by the owner of a land for a declaration that the defendant does not have an easementary right, customary or otherwise, over his property and the order of Tahsildar under section 131 of the Code recognizing such right, is illegal and erroneous?

5. Section 131 of the Code deals with rights of way and other private easements. It is extracted below : A

"131. Rights of way and other private easements.—(1) In the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of the village, otherwise than by the recognized roads, paths or common land, including those road and paths recorded in the village Wajib-ul-arz prepared under section 242 or as to the source from or course by which he may avail himself of water, a Tahsildar may, after local enquiry, decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned. B C

(2) No order passed under this section shall debar any person from establishing such rights of easement as he may claim by a civil suit." D

Section 257 deals with the exclusive jurisdiction of revenue authorities in regard to revenue matters under the Code, and bar of jurisdiction of civil courts in regard to such matters. The relevant portion thereof is extracted below : E

"257. Exclusive jurisdiction of revenue authorities.— Except as otherwise provided in this Code, or in any other enactment for the time being in force, no Civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board, or any Revenue Officer is by this Code, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters— F G

(a) to (z-2) xxxxx [not extracted as not relevant]"

6. An analysis of section 131 of the Code shows that it provides for the adjudication by the Tahsildar, in respect of disputes raised by a cultivator, relating to any of the following H

A three private easementary rights:-

(a) the route by which a cultivator shall have access to his fields;

B (b) the route by which a cultivator shall have access to waste or pasture lands of the village; and

(c) the route by which a cultivator shall have access to the source from which, or the course by which, he may avail himself of water.

C Section 131 provides that such disputes shall be decided in each case, by the Tahsildar, after a local enquiry, with reference to the previous custom and with due regard to the convenience of all parties concerned. The disputes relating to recognized roads, paths or common land including those roads

D and paths recorded in the village *Wajib-ul-arz* prepared under section 242 of the Code are expressly excluded from the scope of section 131 of the Code. It is thus clear that what could be decided under section 131 of the Code is a dispute relating to a claim for a customary easement over a private land, relating

E to a right of way or right to take water, which is not recognized and recorded as a customary easement in the village *Wajib-ul-arz*.

F 7. The definition of different easements, the manner of imposition and acquisition of easementary rights, the incidents of easements and the remedies in case of interference or disturbance with easements are governed by the provisions of the Indian Easements Act, 1882. Easement Act refers to the different methods by which easements are acquired or imposed, that is, namely easements by grant, easements of

G necessity, easements by prescription and customary easements. Acquisition of an easementary right, by any of the aforesaid methods, requires fulfillment of the conditions prescribed under the Easements Act. A private easement, including a right of way to a person's land or right to take water

H from a source to his land, cannot be acquired in a manner not

contemplated or prescribed by the Easement Act. Easements by grant require a grant by the owner of the servient heritage. Easements of necessity are based on implied grants or reservations made by the owner of a servient heritage, at the time of disposition such as transfers and partitions. Easements by prescription can be acquired only by peaceable and open enjoyment, without interruption for twenty years. Customary easement can be are acquired by virtue of a local custom.

8. Having regard to section 9 of the Code of Civil Procedure, a civil court can entertain any suit of civil nature except those, cognizance of which is expressly or impliedly barred. In *Kamala Mills Ltd. v. State of Bombay* [AIR 1965 SC 1942] this court held :

"The normal rule prescribed by section 9 of the Code of Civil Procedure is that the courts shall (subject to the provisions contained in the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred..... Whenever it is urged before a civil court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider *whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate*. In cases where the exclusion of the civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. *But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive*. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the

- A tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not.”
- (emphasis supplied)
- B In *Dhulabhai v. State of Madhya Pradesh* - 1968 (3) SCR 662, a Constitution Bench of this Court held that exclusion of the jurisdiction of the civil court is not readily to be inferred with, unless the following, among other conditions apply :
- C “(1) Where the statute gives a finality to the orders of the special tribunals the civil court’s jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.....
- D
- E (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
- F Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.”
- G
- H 9. The Code nowhere bars the jurisdiction of civil courts

to decide upon easementary rights relating to agricultural or other lands. The Madhya Pradesh Land Revenue Code neither creates nor recognizes any new category of private easementary rights either by way of right of way or right to take water, which is not covered by the provisions of the Easements Act or which is not required to fulfill the requirements prescribed by the Easements Act. An easement cannot be acquired otherwise than in the manner provided in the Easement Act. Section 131 of the Code does not provide for or recognize a new type of easement which is not contemplated or recognized in Easement Act, but merely deals with customary easements covered by section 18 of the Easements Act. Nor can it be said that the elements of an easement required to be fulfilled under the Easement Act are not required in respect of a private easement under section 131 of the Code. Apart from the fact that section 131 of the Code does not deal with acquisition of any special easement by some method which is not referred in the Easements Act, sub-section (2) of section 131 expressly provides that irrespective of any order passed by the Tahsildar under section 131, any person can establish any right relating to an easement by a civil suit. There is nothing in section 131 or any other provision of the Code, which makes the decision of the Tahsildar final and not open to question in a civil court. Therefore, the decision of the Tahsildar will not bar a subsequent civil suit by either party to a proceeding under section 131 of the Code, in respect of the easement claimed in the proceedings under section 131 of the Code.

10. When a person (dominant owner) has an easementary right, and the servient owner disturbs, obstructs or interferes with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil court for the relief of declaration and/or injunction. Similarly, when a person who does not have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such land can resist such assertion or obstruct the exercise of the easementary right and also approach the civil

- A court to declare that the defendant has no easementary right of the nature claimed, over his land and/or that the defendant should be prevented from asserting such right or interfering with his possession and enjoyment.
- B 11. Section 257 relates to the exclusive jurisdiction of the revenue authorities. Any statutory provision ousting the jurisdiction of civil courts should be strictly construed. A suit for enforcement of an easementary right or for a declaration that the defendant does not have any easementary right over plaintiff's property or a suit for injunction to restrain a defendant from interfering with the possession of plaintiff or exercising any easementary right over plaintiff's property, is not barred by the Code. Such suits do not fall under any of the excluded matters enumerated in clauses (a) to (z-2) of section 257 of the Code. Section 257, no doubt, also provides that no civil court shall entertain any suit instituted to obtain a decision or order *on any matter which the State Government, the Board or any Revenue Officer is empowered to determine by the provisions of the code*. But this is subject to the opening words of the section "except as otherwise provided in this Code or in any other enactment for the time being in force". We have already noticed that sub-section (2) of section 131 of the Code reserves and retains specifically the jurisdiction of the civil court to entertain suits relating to any easements, irrespective of the decision of the Tahsildar on a similar issue. Sub-section (2) of section 131 provides that no order passed under section 131 shall debar any person from establishing such rights of easements as he may claim by a civil suit. Therefore the right to decide upon the nature of easements and enforcement of easements is expressly preserved for decision by a civil court in a civil suit. The two fold object of sub-section (2) of section 131 is to declare that section 131(1) of the Code does not deal with a matter which is in the exclusive province of revenue authorities and also to enable either party to approach the civil court in regard to any easementary right, irrespective of the decision under section 131(1) by the Tahsildar. The effect of

section 257 and section 131(2) is that the enquiry and decision by the Tahsildar based on "previous custom" and "conveniences of parties" in regard to any private easementary rights relating to right of way or right to water will always be subject to the decision of the civil court in any civil suit by any party relating to that matter. Therefore it has to be held that section 257 providing for exclusion of jurisdiction of civil court in regard to certain matters, does not apply to any suit involving or relating to easementary rights.

12. But some decisions of the Madhya Pradesh High Court have proceeded on the assumption, rather erroneously and without any basis, that the private easements including right of way referred under section 131 of the Code, are not the easements which are dealt with in the Indian Easement Act, but are a new type of easement unknown to general law of easements, which require to be decided by the Tahsildar only with reference to the previous customs and conveniences of parties. A distinction is sought to be drawn by those decisions, between easements under the Easement Act and easements under section 131 of the Code, by holding that the Easement Act deals with easements perfected by prescription, whereas section 131 of the Code refers to private easements, which are not perfected by prescription. They also proceed on the basis that in view of section 131 of the Code providing for a Revenue Authority, that is a Tahsildar, to deal with the special type of private easements provided for in section 131 of the Code, civil courts will have no jurisdiction to entertain or decide any matter relating to such type of private easements, having regard to the bar contained in section 257 of the Code, and consequently any decision of the Tahsildar under section 131 of the Code is amenable only to an appeal and thereafter a revision provided under the Code itself, and is not open to challenge in a civil suit [See : *Nathuram v. Siyasharan* - 1969 J.L.J. 115, and *Rambai v. Harchand* - 1979 RN 532].

13. On the other hand, other decisions of the Madhya Pradesh High Court have taken the view that a civil court is not

A barred from entertaining suits for declaration and/or injunction, against a person who has secured an order under section 131 of the Code, to declare such order of Tahsildar as illegal and not binding or to restrain the defendant from exercising the right recognized by the Tahsildar [*Gopidas (Mahant) v. Ram Krishna Pandey* – 1971 J LJ 825 and *Fakka v. Hariram* – 1984 RN 422]. In *Gopidas* (supra), a learned Single Judge of the Madhya Pradesh High Court (A.P. Sen, J., as he then was) explained the position succinctly, thus:

C “The scheme underlying the section, envisages a suit under section 131(2) by the claimant for the establishment of his right, if such right is not recognized by the Tahsildar. This necessarily implies that the correctness of the finding reached by the Tahsildar may be questioned in subsequent legal proceedings in the ordinary Courts of law. No doubt, D the language of section 131(2) is susceptible of the construction suggested by the learned counsel that the right of a suit is confined to the claimant. This, however, does not result in the consequence that a person, on whose property a right of way is declared by Tahsildar to exist, should have no remedy for the protection of his rights in property, against an arbitrary or erroneous assumption of jurisdiction by the Tahsildar.”

F We respectfully agree with the said observations. The decisions in *Nathuram* and *Rambai* are not good law.

14. At this juncture we may refer to the relevance of *Wajib-ul-arz* while dealing with cases of customary easements. Section 242 of the Code deals with *Wajib-ul-arz* and is extracted below :

G “242. *Wajib-ul-arz*.—(1) As soon as may be after this Code comes into force, the Sub-Divisional Officer shall, in the prescribed manner, ascertain and record the customs in each village in regard to –

H (a) the right to irrigation or right of way or other

... easement;

A

(b) the right to fishing;

in any land or water not belonging to or controlled or managed by the State Government or a local authority and such record shall be known as the Wajib-ul-arz of the village.

B

(2) The record made in pursuance of sub-section (1), shall be published by the Sub-Divisional Officer in such manner as may be prescribed.

C

(3) Any person aggrieved by any entry made in such record may, within one year from the date of the publication of such record under sub-section (2), institute a suit in a civil court to have such entry cancelled or modified.

D

(4) The record made under sub-section (1) shall, subject to the decision of the civil court in the suit instituted under sub-section (3), be final and conclusive.

(5) The (Sub-Divisional Officer) may, on the application of any person interested or on his own motion, modify an entry or insert any new entry in the Wajib-ul-arz on any of the following grounds :

E

(a) That all persons interested in such entry wish to have it modified; or

F

(b) That by a decree in a civil suit it has been declared to be erroneous; or

(c) That being founded on a decree or order of a civil court or on the order of a Revenue Officer it is not in accordance with such decree or order; or

G

(d) That being so founded, such decree or order has subsequently been varied on appeal, revision or review; or

H

A (e) That the civil court has by a decree determined any custom existing in the village."

Rules have been made under section 242 relating to *Wajib-ul-arz* vide notification dated 2.2.1966, Rule 2 thereof is extracted below :

B "2. Customs under sub-section (1) of section 242 shall be ascertained and recorded in the *Wajib-ul-arz* under the following heads, namely : -

- C (i) Right to irrigation;
- (ii) Other water-rights;
- (ii) Right to fishing;
- D (iv) Rights of way, village roads, paths, drains and the like;
- (v) Rights of persons of other villages over the lands of the village;
- E (vi) Rights of the villagers over the lands of other villages;
- (vii) Other easement – (a) Burial and cremation ground, (b) Gaothan, (c) Encamping-ground, (d) Threshing-floor, (e) Bazars; (f) Skinning-grounds; (g) Rights to graze and take fuel, (h) Manure and rubbish;
- F (viii) Other miscellaneous rights."

G 15. *Wajib-ul-arz* is thus the record of customs in a village in regard to (i) easements (including the right to irrigation and right of way); and (ii) the right to fishing in privately owned/held lands and water bodies. The entries therein could be modified in the manner provided in sub-section (5) of section 242 of the Code. Though the Code provides for maintaining a record of all customary easements imposed upon privately held lands and H water bodies, significantly the Code does not provide the

remedies available in the event of disturbance or interference with such easements recorded in *Wajib-ul-arz*, as the remedy is only way of a suit before the civil court. Customary easements are the most difficult to prove among easements. To establish a custom, the plaintiff will have to show that (a) the usage is ancient or from time immemorial; (b) the usage is regular and continuous; (c) the usage is certain and not varied; and (d) the usage is reasonable. If the *Wajib-ul-arz* (where such a record is maintained) records or shows the customary easement, it would make the task of civil courts comparatively easy, as there will be no need for detailed evidence to establish the custom. Be that as it may. If the remedy for violation of a customary easement recognized and recorded in the *Wajib-ul-arz* is by way of a civil suit, it is inconceivable that in regard to violation of a customary easement *not recognized or recorded in the Wajib-ul-arz*, the remedy would be only by way of a summary enquiry by the Tahsildar under section 131 of the Code, and not by a suit, before the civil court.

Conclusion

16. In the circumstances, we reject the contention that Tahsildar alone has the jurisdiction, and not the civil court, to decide upon the existence or otherwise of a customary easement (relating to right of way or right to take water, to a person's land). The decision of the Tahsildar after a summary enquiry with reference to the 'previous custom' and with due regard to the conveniences of all parties, under section 131(1) of the Code, is open to challenge in a civil suit and subject to the decision of the civil court. The jurisdiction of the civil court to try any suit relating to easements is not affected by section 131, 242 or section 257 of the Code. In view of the above, this appeal is allowed and the judgments and decrees of the courts below are set aside and it is declared that the civil court has the jurisdiction to try the suit filed by the appellants. The trial court is requested to dispose of the suit expeditiously.