JUDICIAL DISTRICT BEED

SECOND WORKSHOP Dt. 09.01.2016

A SUMMARY OF PAPER

Civil Law : Group – A

Subject : (A) The contempt of Courts Act, 1971 – Practice and procedure to be followed by the Subordinate Courts.

01] INTRODUCTION :-

01. The law relating to Contempt of Courts is dealt with by the Act known as "the Contempt of Courts Act,1971". Generally speaking contempt of Court is understood as, "any conduct which tends to bring the authority or administration of law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the legal proceeding". The purpose of this law is to give power and jurisdiction to the Court to punish for its contempt to ensure free and unhampered administration of justice. The independence of judiciary cannot be effective unless it possess necessary power and measure for punishing those who impede in its working and obstruct the execution of its orders and decree.

2. The object of Contempt proceeding is not to afford protection to the Judges personally from imputations to which they may be exposed as usual. It is intended to be a protection to the public whose interest would be affected by the act or conduct of any party, or the authority of the Court is lowered down and the sense of confidence which people have in the administration of justice is weakened.

Historical perspective :

03. The law of contempt in India has its root in the English law. It is

well known that the superior Courts of record in English have from early times exercised the powers to punish for the contempt. The law of Contempt of Court is founded entirely on the public policy. It is not there to protect the private rights of the parties to the litigation. The first legislation on the subject was enacted in British India which is known as Contempt of Courts Act,1926, it was subsequently repealed by the Contempt of Courts Act,1952, which had included within its purview the Court of Judicial Commissioner and it was conferred with the jurisdiction to enquire into and try contempt of itself or any Courts subordinate to it.

04. After the Indian independence and coming into force of the Constitution of India in 1950, the process for enactment of new law relating to contempt was started and on 1.4.1960 a Bill was introduced in the parliament in this regard for enactment of law on the subject. The existing law of contempt is a self contained Code. Some important features of this law are that as per Sec. 3 innocent publication and distribution of matter are not treated as contempt of court. Sec. 4 declares that a person shall not be guilty of contempt of court for publishing a fair and accurate report of judicial proceeding or any stage thereof. The only exception to this general rule is in respect of proceeding held in camera or in chamber. Sec. 5 protects a person from guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.

Contempt of Court : Defined :

05. Generally the legal acceptation of the term 'contempt' primarily signifies "disrespect to that which is entitled to legal regard". To speak generally, Contempt of Court may be said to have taken place by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation.

06. The Contempt Act defines what is a “civil contempt” and what is a “criminal contempt”. The two kinds of contempt are defined as follows :-

Sec.2(a) “contempt of court” means civil contempt and criminal contempt.

Sec.2(b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court.

" Sec.2(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which:- (i)Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any Court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

Initiation of Contempt Proceedings :

07. The penal Sec.12 of the Contempt Act does not make any difference between the punishment for a civil contempt and punishment for a criminal contempt. In regard to both kinds of contempt, the person charged is described as an accused. The difference being that a person convicted of a civil contempt is liable to be sent to civil prison and not what is known as a criminal prison. None the less in both the cases, the punishment is by way of incarceration. Following are some of the situations or stages which may arise before the Court dealing with contempt proceedings.

(1) a private party may file or present an application or petition for initiating any proceedings for civil contempt; or

(2) the Court may receive a motion or reference from the

Advocate General or

(3) with his consent in writing from any other person or a specified Law Officer or a Court subordinate to High Court;

(4) the Court may in routine issue notice to the person sought to be proceeded against; or the Court may issue notice to the respondent calling upon him to show cause why the proceedings for contempt be not initiated;

(5) the Court may issue notice to the person sought to be proceeded against calling upon him to show cause why he be not punished for contempt.

08. Contempt generally (and criminal contempt in particular) is a matter between the Court and the alleged Contemnor. The jurisdiction in contempt shall be exercised only on a clear case having been made out. A private party or a litigant may also invite the attention of the Court to such facts as may persuade the Court in initiating proceedings for contempt. However, such person filing an application or petition before the Court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. It is thereafter for the Court to act on such information or not to act though the private party or litigant moving the Court may at the discretion of the Court continue to render its assistance during the course of proceedings. The subordinate Court cannot take any action for contempt for its contempt and what the subordinate Court is expected to do is to make a reference to the High Court for initiating proceedings.

<u>What Constitutes a Civil Contempt</u>:-

09. Civil contempt means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of undertaking given to a Court.

10. In civil contempt the act of disobedience consists in refusing to do what has been ordered and in doing what has been prohibited. It is well settled that in case of civil contempt unless it is willful, the contemnor cannot be held guilty of contempt of Court. The object to punish the willful disobedience to any order of Court is to secure the enforcement of the said order.

When there is no contempt :-

1. Acting negligently or inadvertently, would not amount to disobedience;
2. Acting bonafide under some misconception does not amount to willful disobedience;
3. Person having no knowledge of order, not guilty of contempt;
4. Absence of mens rea;
5. Understanding of the order;
6. Ambiguous orders, not comprehensible order;
7. Constitutionally invalid order;
8. Illegal order or order irregularly obtained;
9. Order lacking territorial or pecuniary jurisdiction;
10. Order impossible to be obeyed;
11. Bonafide difficulties in implementing the order;
12. Order passed in ignorance of Court order;
13. Incorrect interpretation.

Criminal contempt and exceptions:-

11. Criminal contempt means the publication, whether by words, spoken or written or by signs or by visible representation or otherwise of any matter or the doing of any act whatsoever which scandalizes or tends to scandalize or lowers or tends to lower the authority of any Court or prejudices or interferes or tends to interfere with due course of any judicial proceedings, or interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any other manner. However,

1. Innocent publication and distribution of matter is not contempt;
2. Fair and accurate report of judicial proceeding is not contempt;
3. Fair criticism of judicial act not contempt.

2] Contempt in the face of the Subordinate Courts :- Statuary, Provisions :-

12. In case of the contempt committed in the face of the subordinate court, the subordinate Court can take immediate action under Section 228 of the Indian Penal Code read with Sections 345 and 346 of the Code of Criminal Procedure, 1973. Section 345 of the Criminal Procedure Code lays down the procedure for investigation and punishment for the offences specified in Section 175, 178, 179, 180 or 228 of the Indian penal Code committed in the view or presence of any civil, criminal or revenue Court.

SUMMURY PROCEDURE

13. The special feature of the procedure to be followed in a contempt proceeding that if is the summary procedure which is recognized not only in India but also abroad, for taking a quick action in the matter. The Limitation period for actions of contempt is a period of one year from the date on which the contempt is alleged to have been committed [u/S. 20 of the Act].

03] PROCDURE TO BE FOLLOWED BY SUBORDINATES COURT IN CONTEMPT PROCEEDINGS.

14. As section 15(2) provides that the High Court can take cognizance of criminal contempt of a subordinate Court on the reference made by it. The word 'reference' has not been defined in the Act. It appears that the word 'reference' has been used in the sense of conveying information of the contempt to the High Court. Until a rule is made to the contrary under Section 23 of the Contempt of Courts Act, 1971, a statement submitted to the High Court by the subordinate Courts through the District and

Sessions Judge is taken as a reference within the meaning of Section 15(2). The subordinate Court is not bound to make reference. It is solely within the discretion of the subordinate court to decide whether reference has to be made or not, thought the discretion has to be exercised judicially and not arbitrarily.

15. Accordingly Rules to Regulate Proceedings for contempt under Article 215 of the Constitution of India and the Contempt of Courts Act 1971 framed by the Hon'ble Bomaby High Court as laid down in Chapter 34 in para 667 of the Civil Manual under title Bombay High Court Rules 1994. However, these rules provide for the procedure to be followed while taking cognizance of contempt by the Hon'ble High Court. The topic of todays workshop is restricted to the procedure followed by the subordinate Courts when contempt of subordinate Court is committed. Therefore, the relevant rules in that regard quoted for ready reference as under :-

> ***Cognizance and Procedure :- Rule 6 says about the parties to the petition.***
>
> *(a) Every petition for initiating proceedings for contempt of Court shall be registered as contempt petition.*
>
> *(b) In a proceeding initiated by petition the initiator shall be described as petitioner and the opposite party as respondent.*
>
> *(c) In every petition for criminal contempt, the State of Maharashtra shall be made a respondent.*
>
> *7(a) Every petition or reference under Rule 5(b), (c), (d) or (e) shall contain.*
>
> *(i) the name, description and complete address of the petitioner or the date or dates of commission of the alleged:*
>
> *(ii) nature of the contempt alleged, and such material facts, including the date or dates of commission of the alleged contempt, as may be necessary for the proper determination of the case:*

(iii) if a petition has previously been made by him on the same facts, the petitioner shall give the details of the petition previously made and shall also indicate the result thereof:

(b) Every petition under Rule 5(c) shall be supported by an Affidavit.

(c) Where the petitioner relies upon a document or documents in his possession or power, he shall file such document or documents or true copies thereof with the petition.

8(1) Every petition or reference under Rules 5(b), (c), (d) or (e) shall on being filed on received be forthwith posted before the Court for preliminary hearing and for orders as to issue of notice. Upon such hearing, the notice, may issue such notice to the Contemnor and, if not so satisfied may dismiss the petition.

(2) the Court may, if it thinks it absolute necessary to do so, and where the Court is of the opinion that mere service of notice, will to secure the presence of the Contemnor alongwith issue of notice also issue a bailable or non-bailable warrant for arrest of the Contemnor.

9(1) Notice to the person charged shall be form I. The person charged shall, unless otherwise ordered, appear in person before the Court as directed on the date fixed for hearing of the proceeding, and shall continue to remain present during hearing till the proceedings in finally disposed off by Order of the Court.

(2) When action is initiated on a petition or a reference, a copy of the petition or the reference alongwith the annexures and Affidavit shall be served upon the person charged.

10. The person charged may file his reply by way of an Affidavit or Affidavits within 14 days from the service of the Notice or within such time as the Court may fix.

11. No further affidavit or document shall be filed except with the leave of the Court.

12(a) Reference under section 15(2) of the Act may be made by subordinate Courts either suo motu or on an application received by it.

16. The subordinate Court is required to examine the facts and see whether reference should be made to the High Court. In taking decision as to whether reference should be made or not, the subordinate Court has to observe some procedure based on the principles of natural justice. While deciding to make a reference, the subordinate Court is required to state reasons. If the subordinate Court refuses to make the reference, the information of contempt may be brought to the notice of High Court or Supreme Court and the High Court or Supreme Court and it may take action suo motu on getting such information.

17. Before making a reference, the subordinate Court shall hold a preliminary enquiry by issuing show cause notice stating therein the alleged acts committed by the Contemner and how it amounts to contempt of subordinate Court and calling the explanation of the Contemner if any in that regard. The notice should be accompanied by copies of relevant documents, if any, to the contemner and after hearing him the subordinate Court shall write a consigned reasoned order of reference indicating why contempts appears to have been committed. A subordinate Court must justify that there is any contempt.

04] <u>IMPORTANT RULINGS ON THE LAW OF CONTEMTP</u> :-

- ***Can the Hon'ble High Court take action suo motu of the contempt of a subordinate Court?***

This question was answered in the affirmative by the Hon'ble Supreme Court in the case of ***S.K. Sarkar Vs. V. C. Misra (1881) 1 SCC***

436 in these words;

"We have, therefore, no hesitation in holding in agreement with the High Court, that sub-section (2) of Section 15, properly construed, does not restrict the power of the High Court to take cognizance of and punish contempt of a subordinate court, on its own motion."

- **Reference** :-

Reference means a statement of a subordinate court submitted to the High Court through proper channel, i.e. through the District and Session Judge, has to be taken to be a reference within the meaning of sub-section (2) of Section 15 of the 1971 Act. The Hon'ble Bombay High Court in ***Prabhakar Vs. Sadanand 1975 Cri.LJ. 531*** has taken this view: A reference in the criminal proceedings is a well known expression. Under the Criminal Procedure Code whenever Sessions Judges make reference to the High Court, they write a speaking order.

- ***Reference by District Judge to High Court for violating injunction order passed by subordinate Court, action under section 15 not justified High Court can refuse to take action*** as held in case of ***State of UP Vs. Behari Lal 2003 Cri. L.J. 163 (ALL).***

In the case of ***Court of Small Causes, Mumbai Vs. Vaziralli Pvt. Ltd., 2006 (4) Mh.L.J. 139***, it is observed by Hon'ble Bombay High Court that, "*Reference to initiate contempt proceedings, not to be resorted to too frequently and too lightly. Power must be invoked only when interference in judicial proceedings is writ large from the conduct of the contemner."*

Hon'ble Apex Court in case of ***D. N. Taneja Vs. Bhajanlal*** reported in ***(1988(3) SCC 26)*** held that, a contempt is a matter between the court and the alleged contemnor. Similar view is taken in the case of ***Om Prakas Jaiswal Vs. D.K. Mittal and another*** reported in ***(2000(3) SCC 171)*** Hon'ble Apex Court held that, contempt generally and criminal contempt certainly is a matter between the court and the alleged contemnor. No one can compel or demand as of right the initiation of

proceedings for contempt.

18. As per Section-5 of the Contempt of Courts Act, a fair criticism of judicial act is not a contempt. A person shall not be guilty of contempt of court for publishing any fair comments on the merits of the case which has been heard and finally decided but any criticism of a court when transgresses the limits of fair and bonafide criticism it amounts to contempt of court. If an act is punishable under the Indian Penal Code or any other offence it would not be a contempt of court. Hon'ble Bombay High Court in case of ***Shri. R. S. Paranjape Vs. Shri. Sunil S. Doshi*** reported in ***2010(112) Bom.L.R. 2537*** held that, in the application for transfer if an expression of apprehension by litigant that, justice will not be done in his case is made then it would not amount to contempt of court. Hon'ble Apex Court in case of ***Leila David Vs. State of Maharashtra and others, Writ Petition (Criminal) No.D-22040 of 2008*** held that, the procedure for initiating contempt of court is to be followed in summary way.

05] Conclusion :-

19. After thorough discussion of law of contempt and practice and procedure to be followed in contempt proceeding, it becomes clear that, the very object of enacting law is not only to protect the judicial officers but also to preserve the dignity of the court for proper administration of justice. The object of contempt law is that, the fountain of justice can not be allowed to be colluded by disgruntled litigants. Said protection is necessary for the courts to enable them to discharge their judicial functions without fear. However, the contempt jurisdiction is required to be used in deserving cases only and not in routine manner.

The contempt jurisdiction is to uphold majesty and dignity of the law courts and the image of such majesty in the mind of public can not be allowed to be distorted. Nowadays dangerous trend of making false

allegations against judicial officers and humiliating them is increasing day by day. Such tendency has to be curbed with heavy hands otherwise the whole judicial system itself would collapse. A deliberate attempt to scandalize the court which would shake the confidence of the litigants in the system would cause serious damage to the institution of judiciary.

It can be seen from the above discussion that the jurisdiction and power conferred on the subordinate Courts in respect of its contempt is only to the extent of making an enquiry for the purpose of deciding whether contempt has been committed or not.

If subordinate court is prima facie of the opinion that contempt has been committed by the contemner, then the subordinate court has to pass a reasoned order and make a reference to the High Court.

It is an important aspect of law of contempt that even if contempt proceedings are initiated on an application or petition filed by any litigant, his role is very limited and only to the extent of bringing the facts to the notice of the court regarding the contempt. Once this stage is over, then the matter of contempt is between the court and the contemner and even if the applicant or petitioner in such case who initiated the proceeding died the proceeding do not abate. Therefore, the contempt proceedings once initiated can either end in punishing the contemner or if the Court is satisfied with the explanation and defence of the contemner then the proceeding can be dropped by the Court.

Subject :- (B) TYPES OF EASEMENT UNDER THE EASEMENT ACT, 1882.

01] INTRODUCTION :-

20. Wherever immovable property is involved, there are certain rights connected to the enjoyment of such immovable property, without which

right may not be conveniently and fully held and enjoyed . Such rights are called easement.

The right of easement is as old as the day when the human race, first emerging from barbarism, adopted the custom of living together in towns, or living as other's neighbor, or respecting each other's rights. The right of easement is the necessary consequence of the right of ownership of immovable property.

An easement is a right of way or a similar right over others land. Several authorities have defined easement in different ways. Easement is an interest in property which, though direct from an ownership in the land itself, nevertheless confers on the holder an enforceable right to use the property of another for a specific purpose.

EASEMENT DEFINED-

Section 4 of the Indian Easement Act provides definition of easement as under,-

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

DOMINANT AND SERVIENT HERITAGES AND OWNERS.-

The land for the beneficial enjoyment of which the right exist 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.-

21. 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 advantages 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 any thing growing or subsisting thereon.

22. Easement is a right to use the real property of another for a specific purpose. It is itself a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. Typical easements are for access to the another property for utility or sewer lines both under and above ground, use of spring water, entry to make repairs on a fence or slide area, drive cattle across and other uses. Easement may be specifically described by boundaries.

02] <u>TYPES OF EASEMENT :</u>

23. Section-5 of the Easement Act, 1882 provides four types of easements. I) Continuous easement is one whose enjoyment is or may be continuously without the act of man. II) Dis-continuous easement is one that needs the act of man for its enjoyment. III) Apparent easement is one the existence of which shown by some permanent sign which upon careful inspection by a competent person would be visible to him. IV) Non-apparent easement is one that has no such sign. An illustration of continuous easement is a right annexed to A's house to receive light by the windows without obstruction by his neighbour. A right of way annexed to A's house over B's land is a dis-continuous easement.

24. There are two main kinds of easement. One is public easement and another is private easement. A public easement can be entertained by public at large. For example a right to public thoroughfare, road, streetlights, drainage etc. Private easements are those in which the persons of inherence is some private individual or class of individuals and not the public at large. For example a right to a private street.

25. Section-6 of the Easement Act divides easement into two kinds on the basis of duration of its enjoyment. 1) Permanent easement, and 2)

Easement for limited time on condition. Permanent easement means the dominant owner enjoys the easement uninterruptedly and permanently. Whereas easement for limited time of one condition is an easement 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. For example right of way may be limited to a particular season and the year, right to repair etc.

26. Easement may be acquired by different modes. Easements are super added rights to the ordinary natural incidents of the ownership of a dominant tenement. There are various ways to acquire easement. Following are some ways to acquire right of easement 1) easement by conduct, 2) easement by prescription, 3) easement by operation of law, 4) easement credited or recognized by a judgment or decree, 5) easement by necessity, 6) easement by quasi easement, 7) easement by custom or by transfer.

Section 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, be entitled to such easement;

(c) If an easement in the subject of the transfer or bequest is necessary for enjoying the 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 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 a different intention is expressed or necessarily implied, be entitled to such easement.

Recent Ruling on the point :

In a recent case of ***Karbhari S/o Abaji Lodhe & Others Vs. Devidas S/o Ukandrao Lodhe & Others reported in 2015 (1) Mh. L. J. 700***, it is observed by Hon'ble Bombay High Court that, "*When due to sub-division of a particular survey number or Gat number, bandhs are created on the boundaries of the sub-divisions, these bandhs can be used by the owners of such sub-divisions of lands. Such easementary right created in favour of owners of sub-divisions falls under section 13 of Easements Act, 1882. Over the years, such right to use bandhs as way became customary right but it has it's origin in concept of 'easement of necessity.*'

Sec.15 Acquisition by prescription- This Section 15 deals with the method of acquiring easements. An easement by prescription under Section 15 of the Act is in fact an assertion of a hostile claim of certain rights over another man's property and in order to acquire the easement

the person who asserts the hostile claim must prove that he had the consciousness to exercise that hostile claim on a property which is not his own and where no such consciousness is proved he cannot establish a prescriptive acquisition of the right.

> Enjoyment must be as of right without interruption for the statutory period of 20 years and it must be as an easement. A mere Discontinuance of the exercise of the alleged right at the will of the dominant tenement is not necessarily an interruption which will defeat a prescriptive claim. There must be an adverse act indicating that the right is disputed and an actual discontinuance of the enjoyment by reason of an obstruction which is submitted to or acquiesced in for a year. A discontinuous of the enjoyment due to natural causes and not to any act of the parties does not amount to an interruption. Discontinuance means such a voluntary discontinuance of the user.

Cardinal Rule of Prescription : One must bear in mind the carinal rules of prescription, first, that no length of enjoyment can establish a title wich could have no legal origin, as, for instance, an estate or interest which the law does not recognise; and next, that “antiquity of time justifies all titles, and supposes the best beginning the law can give them”. So that, if evidence be given after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property, in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern is deemed to have taken place beyond legal memory.

Plaintiff is required to plead and prove that he had been enjoying the easement as of right for a period more than 60 years continuously and uninterruptedly the period of 20 years shall be taken to be a period within two years next before the institution of the suit wherein the claim to which such period relates is contested.

In Justiniano Anato v/s Smt.Bernandette B.Pereira AIR 2005 S.C 236 Hon'ble Supreme Court held that in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 yrs. There should be categorical pleadings that since what date to which date one is using the access for the last 20 years .In order to establish the right of prescription to the detriment of the other one has to aver specific pleadings and categorical evidence.

Known method of acquiring prescriptive easements are;

1) presumption under Easement Act,

2) prescription under Sec. 25 of the Limitation Act and

3) claim founded on lost grant.

The prescriptive easement are of two kinds 1) positive or acquisitive prescription and 2) negative or extinctive prescription. In positive prescription it is title of right but in negative prescriptive it is divestive fact namely prescription of title by adverse possession.

Customary easements : When the easement is acquired by virtue of local custom such easement called as customary easement. The examples or illustrations are found below Sec. 18 of the Law of Easement. The essential characteristics of custom are that it must be of immemorial existence, it must be reasonable, it must be certain and it must be continuous. Want of continuity or interruption or disturbance raises a strong presumption as to its non existence. The party must plead in specific terms as to what is the custom that he is relying on and he must prove the custom pleaded. Hearsay evidence is allowed to prove immemorial custom. Therefore as to the date from which the custom is said to have been prevailed after the existence of custom for some years has been proved by direct evidence then it can be shown to be immemorial by hearsay evidence.

Conclusion :-

Thus concluding, an easement is a right which the owner of a property has to compel the owner of another property to permit something to be done, or to refrain from doing something on the survient element for the benefit of the dominant tenement. E.g. Right to light, right of way. The property in respect of which as easement is enjoyed is the dominant element, and its owner, dominant owner, and that over which the right is exercised is called the survient tenement, and its owner, a survient owner.

However unlike a lease, an easement does not give the holder a right of “possession” of the property. Thus, according to the researcher an easementary right is provided for specific relief from specific violations of common basic rights. In the case of the right to way, any wrongful interference with the right of way constitutes a nuisance.

In the case of right to access of air, it is co-existence with the right to light. The owner of the house cannot by prescription claim an entitlement of the flow and uninterrupted passage of current of wind, neither is he entitled to right of uninterrupted flow of breeze as such, and he can claim only such amount of air which is sufficient for sanitary purposes. Hence, it is only in rare and special cases involving danger to health cases that the Court would justify as interfering with the right to diminution of light and air as per the provisions of Indian Easements Act, 1882.