

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

SECOND APPEAL NO.559 OF 1989

Uttamrao s/o Ramrao Agnihotri
died, through his L.R.
Smt. Suvarna (Usha)
w/o Ratnakar Joshi,
Age 46 years, Occu. Service,
R/o Ajabnagar, Aurangabad

.. Appellant

Versus

1. Bhanudas s/o Bajirao Mane,
Age 49 years, Occu. Service
R/o Sabji Mandi, Aurangabad

2. Mahesh Pralhadrao Dogwat Patil,
Age 37 years, Occu. Business,
R/o Ajabnagar, Aurangabad

.. Respondents

Mr P.M. Bakshi, Advocate for appellant
Mr M.M. Bhokarikar, Advocate h/f Mr Yogesh Deshmukh, Advocate for
added respondent – Mahesh Patil

CORAM : N.W. SAMBRE, J.

DATE : 9th July 2015

PER COURT

1. This appeal is by the original plaintiff questioning the judgment and decree delivered in Regular Civil Suit No.489 of 1981 below Exh.68, a suit for mandatory and perpetual injunction which came to be dismissed on 16th September 1985 which was subsequently affirmed in appeal at the behest of present appellant-plaintiff bearing Regular Civil Appeal No.248/1985 dismissed on 10th March 1988.

2. Heard learned Counsel for respective parties.

3. The few facts as are necessary for deciding the present appeal are as under :

4. The plaintiff-appellant filed suit against the present respondent claiming to be owner and possessor of House No.5-20-20, CTS No.14314, Sheet No.87, Chalta No.24 located at Sabji Mandi, Aurangabad which was purchased by the plaintiff-appellant on 13th December 1975 from Sk. Rahim. It is claimed that from the southern side of the said house there is a window and door and there was an open plot through which a lane ad measuring about 10 feet was passing, over which the plaintiff claimed easementary right. It is further claimed by the plaintiff-appellant that his vendor Sk.Rahim was enjoying easementary right i.e. right to air, sunlight ingress and egress and as such, sought injunction claiming that his smooth use of the lane was interfered by the defendant.

5. The claim was resisted by the defendant by filing written statement at Exh.39. The defendant denied existence of door and window on the southern side of wall of the plaintiff's house so also any easementary right both air and way from the southern side and specifically denied the existence of 10 feet wide open space adjoining the southern side of wall of the plaintiff's house. The defendant claimed that he has purchased the plot from Sk.Rahim on 3rd April 1978 and constructed the house thereon.

6. In view of denial of the claim put forth by the defendant, the trial Court framed issues at Exh.40, particularly having regard to the provisions of Easements Act. The trial Court observed that the plaintiff has proved that there exists 5 feet lane towards southern side

of the house and granted injunction by judgment and decree dated 16th September 1985 against the defendant - respondent to the extent of 5 feet width street on the Southern side of the house of the plaintiff restraining the defendant from interfering with the use of the said lane by the plaintiff, as was described in the map drawn by the Commissioner at Exh.27.

7. The present respondent feeling aggrieved thereby preferred an appeal before the Joint District Judge, Aurangabad vide Regular Civil Appeal No.248 of 1985. The Joint District Judge, Aurangabad by his judgment and order dated 10th March 1988 has allowed the appeal and set aside the judgment and decree dated 16th September 1985 passed by Civil Judge, Junior Division, Aurangabad, as such present second appeal.

8. Mr Bakshi, learned Counsel for the appellant while questioning the legality and validity of the judgment delivered by the lower appellate Court would urge that the learned lower appellate Court has committed error by giving perverse finding and sought to raise a question of law to that effect. According to him, the easementary right as was said to be established in the light of provisions of Section 15 of the Easements Act was inappropriately appreciated by the lower appellate Court, as according to him, the lower appellate Court has not considered the continuity of easement in favour of the predecessor in title Sk.Rahim. In addition to above, he would urge that the fact about use of the lane was not in dispute, however, taking

disadvantage of physical deformity of the appellant and his absence for some period, the defendant has carried out construction contrary to development regulation. According to him, the judgment delivered by the learned lower appellate Court is contrary to the provisions of Sections 13 and 15 of the Easements Act which provides easement by necessity and easement by prescription, respectively. In support of his contention, learned Counsel has relied upon the recitals of Exh.64, the sale deed executed in favour of the present appellant.

9. Mr Bhokarikar, learned Counsel for the respondent has supported the judgment passed by the lower appellate Court on the ground that the learned lower appellate Court has rightly analysed the evidence brought on record, particularly in the light of requirement of Sections 13 and 15 of the Easements Act. He would urge that the issue as regards the illegal construction by the respondent is not an issue which was looked into by the Court below. He sought dismissal of the appeal as there is no substantial question of law involved.

10. Upon considering the rival submissions of the respective parties, it is noted that in support of the claim put forth by the appellant-plaintiff, the plaintiff has examined himself and relied upon the sale deed in his favour dated 13th December 1977 at Exh.64. Though it was noted by the Court that on Southern side of the house of the plaintiff there is a door, however, while dealing with the aspect as regards easement by necessity or prescription, as provided under Sections 13 and 15 of the Act, noted the Commissioner's report

Exh.27 which speaks of 5 feet lane on the Southern side wall of the plaintiff's house was taken note of. However, for establishing easement, the burden on the appellant-plaintiff was not discharged by him. Though the plaintiff has tried to establish the same through his testimony at Exh.53 and the testimony of Commissioner at Exh.60, it is required to be noted that it has come in the evidence of the plaintiff that there was bath room on South-East side of the wall of the plaintiff's house. It is further noted that it was the duty of the plaintiff to establish on record that since last continuous period of twenty years, the said way was enjoyed by the plaintiff, particularly having light, air and passage which fact was not established by the plaintiff by leading any cogent evidence. It is further required to be noted that though it is an admitted fact that the door of the wall of the plaintiff's house opens on the Southern side, however, that by itself cannot be a ground for the concluding that the appellant-plaintiff was discharged enjoying easement as per Sections 13 and 15 of the Easements Act for last twenty years.

11. Though the learned trial Court, in the background of the boundary shown under the sale deed Exh.64, executed by Sk. Rahim Sk. Madar on 13th December 1975 and the continuous use of the 5 feet lane on the Southern side by both, the plaintiff and defendant had granted permission to the parties to the suit to use the said lane, however, the appellate Court has proceeded to examine the same in the light of requirement of Section 13 and Section 15 of the Easements Act.

12. The requirement of Section 13 of the Act reflects that the plaintiff was required to establish easement by necessity by demonstrating that except the lane passing through East-West in between the plots of the plaintiff and defendant which are located on the North and South side of the said lane. It has come on record that there exists another door towards the Western side of the property of the appellants-original plaintiff.

13. The lower appellate Court then noted that in view of the requirement of Section 13 of the Easements Act, the plaintiff has failed to establish through proper evidence, the case for grant of easement by necessity. Apart from above, even the requirement of Section 15 of the said Act i.e. easement by prescription was also not at all established, as the property in question was purchased by the defendant immediately after one year in 1978. Even otherwise, the evidence of the plaintiff and his witnesses has not supported the case of continuous use of the right of way, as was required under Section 15 of the Easements Act.

14. In my opinion, in view of the same, no case for interference is made out at the behest of the appellant.

15. The above observations are made based on the evidence and the pleadings of the parties, however, shall not be construed that this Court or the Court below has legalised the construction of the defendant. As submitted by learned Counsel for the appellant the

right of the appellant to take up proceedings against the respondent for any illegal construction are kept intact and he shall be at liberty to initiate appropriate proceedings against the appellant, if he so desires.

16. With above observations, Second Appeal stands dismissed.

(N.W. SAMBRE, J.)

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