

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 140 OF 2013

Rohidas Pandurang Kandolkar,
aged 56 years, married,
painter,
R/O Santa Cruz, Waddo Bastora,
Bardez, Goa. Appellant

V e r s u s

1. Mr. Cezario F. D'Souza
aged 70 years,
married, service.
2. Mrs Ulbaldina D'Souza,
aged 65 years,
married, house wife,
(both are r/o Santa Cruz waddo,
Bastora, Bardez-Goa and others. Respondents

Mr. Guru Shirodkar, Advocate for the Appellant.
Mr. A. D. Bhobe, Advocate for the Respondents.

CORAM: N. M. JAMDAR, J.

DATE: 5TH FEBRUARY, 2015.

ORAL ORDER:

By this second appeal, the appellant challenges the judgment and order passed by the District Court, North Goa and the judgment and order passed by the Civil Judge, Junior Division, Mapusa, dismissing the appeal and the suit filed by the appellant. The suit was filed claiming easementary rights.

2. According to the appellant, he is residing in survey no.80/13. The suit came to be filed by father of the appellant against respondents no.1 and 2, which was compromised and it was agreed that a way will be provided through the property of the respondents no.1 and 2 on the southern side. The appellant thereafter filed the present suit stating that the compromise decree was obtained by the father of the appellant in collusion with respondents no.1 and 2 and in the compromise decree a way was shown on the southern side which never existed. It is submitted that the appellant was using a different way for the last more than 21 years and since the respondents no.1 and 2 started obstructing the appellant, the present suit had to be filed for declaration that the appellant has a right of way/access through the property of respondents no.1 and 2, as shown in the sketch.

3. The suit was resisted by the respondents no.1 and 2. The respondents no.1 and 2 stated that as per the terms of compromise way was provided to the appellant and no easement of necessity will arise from the other side as claimed by the appellant. The trial court accepted the case of

respondents no.1 and 2 and dismissed the suit by judgment and order dated 26/7/2010, holding that compromise decree was valid and a right of way exists on the southern side The trial court also took note of the admissions of the appellant to that effect. The appeal filed by the appellant to the District Court was dismissed confirming the judgment and order of the Civil Judge.

4. Mr. Guru Shirodkar, the learned counsel for the appellant submitted that there was no right of way existing when the compromise decree was passed and decree was obtained by collusion. Both the Courts have taken note of the fact that the appellant was staying with his father and in the evidence he admitted that his relations with his father were cordial. Both the Courts have rightly disbelieved the theory of collusion by the father of the appellant with respondents no.1 and 2. In fact both the Courts correctly imposed costs on the appellant for making needless allegations against his father just to secure the right of way. Thus, once the compromise decree is held to be valid then there is a right of way provided under the compromise decree which the appellant can always enforce. If the right of way existed under the compromise decree, no error can be found with the decisions of the Courts below that the right of necessity or easement or by prescription cannot be claimed on the other side of the property.

5. Though Mr. Shirodkar, has sought to explain that the admissions relied upon by the Courts below regarding

providing access are not in respect of the claim of the appellant, the argument does not appear to be probable. The compromise decree was about the access from the southern side and in the evidence the appellant did mention that 3 meters access has been left on the southern side.

6. Mr. Shirodkar, then submitted that the respondents no.4 and 5 have blocked the access on the southern side and therefore right of way specified in the compromise decree cannot be used by the appellant. The learned counsel for the appellant is not able to show that this point specifically is taken in the appeal memo before the District Court. This argument entails inquiry into factual and unless this point is taken in the appeal memo, before the appellate court, it cannot be made a foundation for framing a substantial question of law.

7. Mr. A. D. Bhobe, the learned counsel for the respondents no.1 and 2 contended that the suit is filed by the plaintiff is in collusion with respondents no.4 and 5. He submitted that the order which is passed in the suit instituted by respondents no. 4 and 5, which is set up as a ground in the present proceeding, has not been challenged by the appellant. If the appellant has a right of way under the compromise decree, then he should have pursued his claim against respondents no.4 and 5. The submission made by Mr. Bhobe, the learned counsel for the respondent that the present suit is collusive one this appears to be plausible.

8. In the circumstances, no question of law arises in the appeal. The appeal is dismissed.

N. M. JAMDAR, J.

AP/-