

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.86 OF 2013**
WITH
CIVIL APPLICATION NO. 152/2013

SAGAR CO-OPERATIVE HOUSING
SOCIETY LIMITED.

..... APPELLANT.

V/S

DR. ADRIANO AFONSO (SINCE DEC.)
THROUGH ATTORNEY
DR. SKODA AFONSO, THROUGH LR'S
AND ANR.

..... RESPONDENTS.

Mr. Sudin M.S. Usgaonkar, Senior Advocate with Ms. T. Ghanekar,
Advocate for the appellant.

Mr. Valmiki Menezes, Advocate for the respondent No.1(a).

CORAM :- F.M. REIS, J.

Date : - 29TH JULY, 2016.

P.C. :

Heard Mr. Sudin Usgaonkar, learned Senior Counsel
appearing for the appellant and Mr. Valmiki Menezes, learned
Counsel appearing for the respondents.

2. The above appeal challenges the Judgments passed by the
Courts below, whereby the learned Trial Judge by a Judgment and

Decree dated 30/8/2002 accepted the case of the respondents that they had a right of way reserved by the erstwhile owners over the property belonged to the appellant which was purchased by a Sale Deed dated 30th April, 1980. It is the case of the respondents that they have purchased the property pursuant to a Sale Deed dated 9th November, 1979 which belonged to the same owners who had also sold a portion of the property to the appellants pursuant to the Sale Deed dated 30th April, 1980. It is further their case that whilst purchasing the said property pursuant to the sale deed dated 9th November, 1979, there was a 15 metres wide access reserved for the respondents in the adjoining property which then belonged to the same owners of the property. It is further pointed out that as the appellants had placed some impediments on such reserved access, the respondents were forced to file the suit for mandatory injunction to remove the impediment, as well as for a permanent injunction. It is the case of the respondents that such reserved road has a width of 15 metres. The appellants have disputed the claim of the respondents, *inter alia*, on the ground that there is no privity of contract between the appellants and the respondents and, consequently, the question of granting any access through the property belonging to the appellants

would not arise. It is further their case that the subject road was, in fact, constructed by the appellants at their own costs for the purpose of sub-division of their plots as approved by the Statutory Authorities. It is further their case that the respondents have their own access towards the southern side of the property having a width of about 1.5 metres and consequently, the question of claiming any access through the property of the appellants would not arise. The learned Trial Judge, by the impugned Judgment and Order dated 30/8/2002, decreed to the suit filed by the respondents, and, *inter alia*, granted a mandatory injunction to keep an access having a width of 1.5 metres for the benefit of the respondents herein. The appellants preferred an appeal before the learned Lower Appellate Court challenging the Judgment passed by the learned Trial Judge. By the impugned Judgment and Decree dated 31st July, 2012, the appeal was partly allowed. The relief granted by the learned Trial Judge came to be confirmed, however, the width of the access was reduced to 1.0 metres. Being aggrieved by the Judgments passed by the Courts below, the appellants have preferred the present second appeal.

3. Mr. Sudin Usgaonkar, learned Senior Counsel appearing

for the appellants has assailed the impugned Judgments essentially on the ground that both the Courts below have granted the mandatory injunction without examining whether there is an obligation in terms of Section 39 of the Specific Relief Act to grant such a relief. The learned Senior Counsel further submits that unless an obligation is culled out, the question of granting a mandatory injunction in favour of the respondents is not at all justified. It is further pointed out that a bare perusal of the sale deed executed in favour of the appellants, clearly discloses that there is no such right reserved in favour of the respondents in the sale deed by the vendors of the appellants. It is further submitted that the relief of mandatory injunction granted by the Courts below would mean that the respondents would be entitled to use the access constructed by the appellants in their own property, without having any right therein. It is further submitted that perusal of the sale deed in favour of the respondents, especially in the operative part thereof, there is no mention with regard to any reservation of 15 metres wide access through the portion sold to the appellants. It is further pointed out that prior to the execution of the sale deed, there was an agreement for sale in respect of such property in favour of the appellants, which also does not show that any right of access was

reserved for the respondents herein. The learned Counsel has, thereafter, taken me through the Judgments of the Courts below to point out that as no obligation has been established by the respondents, the question of granting any relief in favour of the respondents is not at all justified.

Mr. Usgaonkar, learned Senior Counsel appearing for the appellants, in support of his submissions, has relied upon a Judgment of the Apex Court in the case of ***K.S. Nanji and Co., v. Jatashankar Dossa and ors.***, reported in **AIR 1961 SC 1474** and a Judgment of the Privy Council in the case of ***Bomanji Ardeshir Wadia and ors. vs. Secretary of State***, reported in **AIR 1929 Privy Council 34**.

4. On the other hand, Mr. Menezes, learned Counsel appearing for the respondents has pointed out that both the Courts below, upon appreciating the evidence on record and examining the sale deeds of the appellants and the respondents, have concurrently come to the conclusion that the right of user of the access, through the property purchased by the appellants, has been clearly established. The learned Counsel further points out that a bare perusal of the Schedule attached to the Sale Deed, clearly discloses that on North-

Eastern side of the property purchased by the respondents, there is 15 metres proposed road which leads through the property purchased by the appellants. The learned Counsel has, thereafter, taken me through the impugned Judgments passed by the Courts below which clearly disclose that 15 metres wide access reserved in the sale deed of the respondents corresponds to the disputed claim in the suit. The learned Counsel has further pointed out that though the respondents are otherwise entitled for 15 metres wide access, they are satisfied with the Judgment of the learned Lower Appellate Court reserving the access with a width of 10 metres and, as such, submits that on perusal of the sale deed in favour of the respondents, there is a clear obligation reserved in favour of the respondents of a 15 metres wide access through the property purchased by the appellants. The learned Counsel, as such, points out that there are no substantial questions of law which arise in the present appeal for consideration.

5. I have duly considered the rival submissions and with the assistance of the learned Counsel, I have also gone through the records. On perusal of the sale deed and the Schedule thereto, executed in favour of the respondents, it is seen that it clearly stipulates that the property purchased by the respondents is bounded

towards east partly by the proposed road, 15 metres wide and partly by remaining portion of the property of the Vendors therein. It further reveals that the northern boundary is also partly by the aforesaid road of 15 metres width and partly by the property belonging to the Vendors therein. On perusal of the operative part of the sale deed, it is seen that what has been sold is the property as shown and identified in the Schedule annexed to the said sale deed. Hence, the Schedule has to be read in the said sale deed executed in favour of the respondents. The contention of Mr. Usgaonkar, learned Senior Counsel appearing for the appellants that the Schedule cannot form part of the Sale Deed and that the plan cannot be read therein cannot be accepted in the facts and circumstances of the present case. Apart from that, both the Courts below, upon appreciating the evidence on record, have concurrently come to the conclusion that the proposed road, as reflected in the said sale deed, as identified in the Schedule, corresponds to the subject road which is claimed by the respondents in the present proceedings. Besides that, the Courts below have concurrently found that on perusal of the sale deed in favour of the appellants in the year 1980, clause 13 of such sale deed clearly stipulates that a specific area of more than 1500 sq. metres has been reserved as an open space. The recitals also

provide for reservation of a road in the portion purchased by the appellant. The Courts below, upon appreciating the evidence on record, have correlated these recitals in the sale deed to come to the conclusion that it clearly shows that there is an encumbrance/right reserved in favour of the respondents when the appellants purchased the property way back in the year 1980. These concurrent finding of facts, arrived at by the Courts below upon appreciating the documentary evidence produced by the appellants and the respondents, cannot be reappreciated by this Court in the present Second Appeal, as there is no perversity in such findings rendered therein. The contention of Mr. Usgaonkar, learned Senior Counsel appearing for the appellants that there is no obligation culled out in favour of the respondents as such, cannot be accepted taking note of the recitals in the sale deed as referred to by the Courts below, as well as the recitals of the Sale Deed of the respondents.

6. In such circumstances, I find that the contention of Mr. Usgaonkar, learned Senior Counsel appearing for the appellants that the Courts below were not justified to grant the relief as prayed for by the respondent, cannot be accepted. Apart from that, Mr. Menezes, learned Counsel appearing for the respondents has pointed out that the

respondents restrict their claim in terms of the relief granted by the learned Lower Appellate Court, reserving right of access having a width of 10 metres.

7. With regard to the contention of Shri Usgaonkar, learned Senior Counsel appearing for the appellants that such access was developed and constructed at the costs of the appellants, I find that whether the respondents are liable to meet part of such expenses for maintenance of the reserved road, is a matter which does not arise in the present proceedings. These aspects, if at all, are to be examined on its own merits, in accordance with law.

8. Mr. Usgaonkar, learned Senior Counsel appearing for appellants presses for the proposed substantial questions of law at para 14(a), 14(e) and 14(g). With regard to the substantial question of law at para 14(a), this aspect has already been dealt with herein above, considering that the Courts below have come to the conclusion that a right of access is culled out in favour of the respondents to claim a right of access through the property of the appellants herein. As far as substantial questions of law at para 14(e) and 14(g) are concerned, the claim of the appellants is essentially on the ground that easement has

not been granted in favour of the respondents by the erstwhile vendors of the appellants as reflected in the sale deed executed in favour of the appellants.

9. But, however, both the Courts below upon appreciating the evidence on record have accepted the claim of the respondents and I find no perversity in such findings. As far as contention that no right can be claimed on the basis of the proposed road is concerned, the Courts below have concurrently found that the road reserved in terms of the said sale deed as shown in the Schedule corresponds to the road which has been constructed by the appellants which is the subject matter of the present suit. In such circumstances, merely because the road was proposed in the year 1979 which has thereafter been constructed at the site based on the permissions granted by the statutory authorities, I find that on that count no substantial question of law would arise in the present appeal

10 On perusal of the Judgment dated 31st July, 2012, passed by the Lower Appellate Court, I find that the learned Judge has rightly examined the plan annexed to the title deed, and relying upon the

Judgment of the Apex Court, held that the map referred to in the document should be treated as incorporated in such document and forming part of such document. The learned Judge also found that the road shown on the south western boundary of the property of the appellant No.2 is neither an internal road between the sub-divided plots of the appellant No.2, nor it is the road essentially meant for the benefit of the plot holders of the appellant No.2. The learned Judge, upon appreciating the oral, as well as the documentary evidence on record, has modified the Judgment of the learned Trial Judge to the effect that the relief of mandatory injunction is granted to the respondent by directing the appellant No.2 to make the road of 10 metres width available for the use of the respondent through the said open space of 5 metres' width on the north-eastern boundary of the suit property belonging to the respondent and as described in the Schedule of the Sale Deed dated 9th November, 1979 and delineated on the plan at Exhibit PW.1/B to go to the public road and not to cause any obstruction to the respondent while using the said road of 10 metres width in the property of the appellant No.2, along its south-western boundary. As pointed out herein above, there is no error committed by the Courts below whilst disposing of the suit filed by the

respondent.

10. In view of the above, I find, for the reasons stated herein above, that there is no reason for interference in the Judgment passed by the Lower Appellate Court. The findings therein are based on the material on record as pointed out herein above. There are no substantial questions of law which arise in the present appeal for consideration. Consequently, the appeal stands, accordingly, rejected. The Civil Application also stands rejected.

F.M. REIS, J.

ssm.