IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.628 OF 2016
along with
CIVIL APPLICATION NO.1272 OF 2016

Sunil Vitthal Hawal & Ors. .. Appellants
Vs.
Farid Ilahibaksha Maner & Ors. .. Respondents

Mr.Sudhir Sadavarte for the Appellants.
Mr.Amit Borkar for the Respondent no.1.

CORAM : R.D. DHANUKA, J.
DATE : 6th December 2016

P.C.

. By this appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellants (original defendants) have impugned the judgment and decree dated 29th January, 2015 passed by the learned Ad-hoc District Judge – 2, Kolhapur dismissing the Regular Civil Appeal No. 207 of 2000 filed by the appellants and allowing the cross-objection filed by the respondent no.1 (original plaintiff).

2. It was the case of the plaintiff that he was owner and possessor of house properties CTS No. 50/1, 560/2 and 560/4 lying in north to south direction towards south situated in 'D' of Kolhapur Municipal Corporation whilst the defendant nos. 1 and 2 are the owners and possessors of house properties CTS No. 69/1 and 569/2 lying in north to south direction situated in 'D' Kolhapur Municipal Corporation towards western side of his properties. It was the case of the plaintiff that in the said CTS No. 560/1, his predecessor had made construction about

40 years ago and on the western wall of CTS No. 560/1 there were windows and he was receiving light and air through them to his property.

3. It was also the case of the plaintiff that there was constructed a latrine in western portion of his property CTS No. 560/2 having one window on its western wall. There was compound wall lying in north south direction length of 17 foot height of 12 foot and width of 1 ½ foot. It was the case of the plaintiff that the defendant nos.1 and 2 pulled down the suit wall to some extent and above the pulled portion reconstructed it with bricks and cement by encroaching over the ownership right of the plaintiff. The plaintiff accordingly filed a suit inter alia praying for declaration of perpetual and mandatory injunction in relation to his property. The suit was resisted by the defendant No.1.

4. The learned trial Judge framed nine issues. The plaintiff and the defendant No.1 examined the witness and also led documentary evidence. In the written statement filed by the defendants, it was admitted about the existence of door to CTS No. 560/1 opening in the said lane. It was admitted that the existence lane was towards western side of the plaintiff's house CTS No.560/1.

5. The learned trial Judge after considering the oral and documentary evidence held that the plaintiff had proved that the resolution passed by the Municipal Corporation on 29th September 1990 was passed by defendant No.3 by joining hands with the defendant nos.1 and 2. It was held that by the said resolution, the Municipal Corporation had illegally allowed the defendants nos. 1 and 2 to carry out

construction without issuing any notice upon the plaintiff. It was held that the resolution thus passed by the Corporation was void ab initio, illegal and was not binding on the plaintiff. It was held by the learned trial judge that the defendant nos. 1 and 2 had carried out illegal construction in the passage situated between CTS Nos. 560/2 and 569/2. The learned trial Judge however accepted the plea of defendant nos. 1 and 2 and held that the plaintiff had failed to prove that the defendant nos.1 and 2 had made illegal construction by putting pillars in CTS No. 560/2.

6. By the said judgment and decree dated 24th April 2000, the learned trial Judge ordered and decreed that the resolution dated 29thMarch 1992 passed by the defendant no.3 granting permission to the plaintiff letting the property in between CTS Nos. 560/2 and 569/2 admeasuring 15” x 3.6” sq. foot situated within limits of 'D' ward Kolhapur to the defendant nos. 1 and 2 on premium basis was not binding on the plaintiff and ordered to remove the same within a period of two months from the date of the said decree at their own costs. The defendant nos. 1 and 2 were permanently restrained causing obstruction in the enjoyment of the plaintiff over lane of the suit property.

7. Being aggrieved by the said judgment and decree dated 24th April, 2000, the defendant nos. 1 and 2 preferred Regular Civil Appeal No. 207 of 2000 before the learned Ad-hoc District Judge-2, Kolhapur. The original plaintiff preferred a cross-objection in the said appeal.

8. The learned Ad-hoc District Judge-2, Kolhapur framed nine points for determination and after considering the oral and documentary

evidence, by a judgment and decree dated 29th January 2015 held that the plaintiff had proved that the resolution passed by the defendant no.3 was passed in collusion with the defendant nos. 1 and 2 and the said resolution was void ab initio, illegal and was not binding on the plaintiff. It was held that the plaintiff had proved that the defendant nos. 1 and 2 had carried out illegal construction in the passage situated between CTS Nos. 560/2 and 569/2.

9. The first appellate Court reversed the part of the finding which was rendered by the learned trial Judge against the plaintiff and granted relief prayed by the plaintiff which was rejected by the learned trial Judge by allowing the cross-objection filed by the plaintiff.

10. With the assistance of the learned Counsel appearing for the parties, I have perused the judgment and decree passed by the two Courts below. A perusal of the impugned judgment and decree passed by the first appellate Court clearly indicates that the witness examined by the defendant nos.1 and 2 had clearly admitted in the cross-examination that the suit wall belonged to the plaintiff and not the defendants. The defendants had done construction on the said wall by demolishing some portion of the wall of the plaintiff and thereon constructed it with bricks, cement and with pillars.

11. Learned District Judge also considered the Court Commissioner Report which showed that the defendants had constructed wall on the old wall of the plaintiff's' property CTS No. 560/2.

12. The first appellate Court has rendered a finding that the predecessor of the plaintiff had right over sweeper's passage was not continued ingress and ingress of sweeper but it also extended right to take air and light from the window situated therein. It is held that the learned trial Judge had lost sight of the Court Commissioner Report and map and panchnama.

13. In so far as the conclusion drawn by the learned trial Judge that the permission granted by the Municipal Corporation to carry out construction was illegal, void ab initio and was not binding on the plaintiff is concerned, the said conclusion is rightly upheld by the first appellate Court.

14. In so far as the submission of the learned counsel for the defendant nos. 1 and 2 that while reversing the part of the findings rendered by the learned trial Judge in paragraph 53 in the impugned judgment and decree, the evidence led by the defendant Nos. 1 and 2 is not considered is concerned, in my view, the first appellate Court has considered and appreciated the evidence including the Court Commissioner Report in right perspective in the said paragraph which was not considered by the learned trial Judge. I do not find any infirmity with findings rendered by the first appellate Court in the said paragraph. In my view, no substantial question of law arises in this appeal. The first appellate Court has rightly allowed the cross-objection filed by the plaintiff and has rightly rendered various findings which are not perverse and thus cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

15. I therefore pass the following order.

(i) Second Appeal is dismissed.

(ii) In view dismissal of the second appeal, civil application does not survive and is accordingly dismissed;

(iii) There shall be no order as costs.

16. At the request of the learned counsel for the appellants, the respondent no.1 is directed not to execute the decree passed by the first appellate Court for four weeks from today. If any Special Leave Petition is filed by the appellants, the papers and proceedings in the said petition along with notice shall be served upon the respondent no.1 in advance.

R.D. DHANUKA, J.