

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

***SECOND APPEAL NO. 502 OF 1993
ALONG WITH
CIVIL APPLICATION NO. 4909 OF 1993
(Not on board)***

Balgonda Satgonda Malgi,
Residing at Gijawane,
Taluka – Gadhinglaj, Dist. Kolhapur.

... Appellant
(Ori. Plaintiff)

v/s

1. Sou. Gourabai Gorling Satwar,
Residing at Gijawane,
Taluka – Gadhinglaj, Dist. Kolhapur.

2. Shri Dhanpal Satgonda Patil,
Residing at Gijawane,
Taluka – Gadhinglaj, Dist. Kolhapur.
(deceased)

... Respondents
(Ori. Defendants)

Mr.S.V.Kurade for the appellant.
Mr.Nagesh Chavan i/by Tejpal Ingale for Resp. Nos.2A to 2F.

Coram: N.M. Jamdar, J.

Dated: 9 June 2016

ORAL JUDGMENT:

Heard learned counsel for the parties.

2 The appeal was admitted on the substantial questions of law, as to whether in the absence of contract can the transferee possess all rights and liabilities of the transferor, and whether the learned Appellate Court ought

to have considered that at the time of city survey scheme the concern authorities have not mentioned about the suit way in city survey record pertaining to the said house and the city survey authority have not followed proper procedure and they have prepared incorrect record pertaining to the above said houses.

3 The Appellant challenges the judgment and order passed by the Joint District Judge, Kolhapur, dated 8 July 1993 allowing the appeal filed by the Respondents and setting aside the judgment and decree passed by the learned Civil Judge, Senior Division, Gadhinglaj, dated 27 September 1988. The learned Civil Judge had decreed the suit of the Appellant and had restrained the Respondents from interfering with the possession of the Appellant in respect of right of way to the property in question and also declared that the decision of the City Survey authorities was not binding on the Appellant.

4 The Appellant filed the suit bearing No.121 of 1984 in the Court of Civil Judge, Junior Division, Gadhinglaj, in respect of the suit property admeasuring 4½ East-West and 38 feet in length from South-North passing through City Survey No.571 and 572 at Mouje Gijavane, Tal. Gadhinglaj, Dist. Kolhapur. According to the Appellant, the way in question was being used by the Appellant for the last hundred years and the Appellant had acquired a right by way of easement of necessity and also by way of prescription. According to the Appellant, since the Respondents obstructed his enjoyment of the right of way, relying on an entry in the city survey record, the suit had to be filed for a declaration and injunction. The Respondents filed their written statement and contested

the suit. According to the Respondents, there was no such right of way in existence and there existed a public road on the northern side which was being used by the Appellant.

5 The learned Civil Judge came to the conclusion that the way in question was being used by the Appellant for more than 100 years and the decision of city survey authorities was incorrect. As regard the other way available to the Appellant, the learned Civil Judge did not consider the issue as material one to be answered. The learned Civil Judge by judgment and decree dated 27 September 1988 decreed the suit. In the appeal filed by the Respondents in the District Court, Kolhapur, the learned District Judge found that one Neelkanth Malgi sold the property to one Bhimgonda Patil and thereafter Bhimgonda sold the property to one Dattu Gajbar. Bhimgonda was the ancestor of the Appellant and Dattu Gajbar, father of Defendant No.1. The learned District Judge found that, when Bhimgonda sold the property he did not use the right to use the right of way. As regard the finding of easement by way of prescription, the learned District Judge found that there was no such evidence. Accordingly, by judgment and order dated 8 July 1993, the learned District Judge allowed the appeal.

6 I have heard the learned counsel for the parties who reiterated the contentions raised in the Courts below. As regard the case of the Appellant that the way in question was being used for the last 100 years, there was hardly any evidence produced by the Appellant to that effect. The learned Civil Judge concluded in a single sentence that, looking at the location of the house of the Plaintiff and Defendants and facts and circumstances of

the case, it appears that there must have been suit way, left by the predecessor in title. The learned District Judge has rightly held that there was no evidence at all to arrive at this conclusion by the learned Civil Judge. The fact that the Appellant was using this way for the last hundred years was something for the Appellant to prove, which the Appellant failed to do. When the Court Commissioner was appointed, he found that there was no way in existence and there were stones on the site. Instead of relying on the Commissioner's report regarding non-existence of the way, the learned Civil Judge concluded that the stones must have been kept by the Respondents. On the basis of such scanty evidence, the learned Civil Judge proceeded to set aside the City Survey record as not binding on the Appellant. The learned District Judge was therefore right in holding that the Plaintiff had not established his right.

7 Even in the sale deed executed by the Predecessor of the Appellant, there is no right of way incorporated. The decision of the learned Civil Judge holding that there was a right of way in existence for the last 100 years was based on no evidence and suffered from unsatisfactory reasoning, which the First Appellant Court has rightly corrected and set aside. The approach adopted by the District Court cannot be stated to be perverse. The learned District Judge has also recorded that the Appellant has another right of way which he is using. Besides relying on the conclusions reached by the learned Civil Judge, which are based on no evidence, the learned counsel for the Appellant is not able to show how the impugned judgment and order suffer from any error.

8 The question of law regarding error in city survey record will arise if

the Appellant, on facts, is able to show existence of way. Also the contract of the predecessor of the Appellant did not mention a right of way. Nothing is shown by the learned counsel as to how a right of way existed relying on this contract. The questions so framed therefore cannot be considered as the substantial questions of law and cannot be answered in favour of the Appellant and the appeal of the Appellant cannot be allowed on the questions so framed.

9 The appeal is accordingly dismissed. The civil application is disposed of.

(N. M. JAMDAR, J.)