

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL (ST) NO. 27224 OF 2016****ALONGWITH****CIVIL APPLICATION NO. 1703 OF 2016****Sanjay Vishnu Wagh & Anr.****..... Appellants****VERSUS****Arun Karbhari Palhal & Ors.****..... Respondents**

Mr.Girish Agrawal for the Appellants.

Ms.Shama Mulla, i/b. Ajay Misar & Co. for Respondent no.1.

CORAM : R.D. DHANUKA, J.**DATE : 24th OCTOBER, 2016****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original defendant nos. 1 and 2) had impugned the judgment and decree dated 8th July, 2016 passed by the learned District Judge -1, Niphad dismissing the Civil Appeal No. 2 of 2013 filed by the appellants inter alia impugning the judgment and decree dated 17th December, 2012 passed by the Civil Judge, Junior Division, Pimpalgaon (B) by which the learned trial judge had decreed the suit filed by the respondent nos. 1,2 and 4 inter alia praying for a declaration and for perpetual mandatory injunction against the appellants. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The parties in this judgment are described as per their original status before the learned trial judge in the Regular Civil Suit No.175 of 1999. It was the case of the plaintiffs that they are the owners of the property situated over City Survey No.1505 at Village Ozar, Taluka Niphad, District Nashik which property was their

ancestral property. It was the case of the plaintiffs that from the Western side of the said property bearing Survey No.1505, there was an approach road in their property which passes along in between Survey Nos. 1508 and 1507 which they were using since last more than 40 years. It was the case of the plaintiffs that since the defendants started erecting construction of their house over the disputed right of way, the plaintiffs filed a suit inter alia praying for a declaration and perpetual injunction against the defendants.

3. The defendant nos. 1 to 4 contested the suit by filing a written statement and additional written statement and denied the existence of the disputed right of way to the plaintiffs' property bearing City Survey No. 1505. It was the case of the defendant nos. 1 to 4 that the defendant no.2 had purchased part of the property situated over City Survey No. 1507 from Bapu and Balu Palhal and the property situated over City Survey No.1508 from the defendant nos. 3 and 4 and had constructed a house thereon.

4. The learned trial judge framed six issues including the issue as to whether the plaintiffs prove the existence of road as described in paragraph (2) of the plaint and their use of the said road and as to whether they prove that the defendants had carried out the construction over the land of disputed way.

5. The plaintiffs and defendants examined three witnesses each.

6. The learned trial judge after considering the oral and documentary evidence passed a judgment and decree on 17th December,2012 in the said Regular Civil Suit No.175 of 1999 and declared that the disputed road situated in between City Survey Nos. 1507 and 1508 was the road available for the plaintiffs to approach at

their property situated over City Survey No. 1505 and granted perpetual mandatory injunction against the defendants to remove the construction carried over the space of suit way by them within three months from the date of the said judgment and decree and further passed an injunction restraining the defendants from carrying out any kind of construction work over the disputed way.

7. Being aggrieved by the said judgment and decree dated 17th December, 2012, the defendants filed Civil Appeal No. 2 of 2013 before the learned District Judge-1, Niphad. The learned District Judge formulated six points for determination including the issue as to whether the plaintiffs had proved the existence of the disputed way as described in paragraph 2 of the plaint and whether the defendants had carried out construction over the disputed way.

8. The learned District Judge after considering the oral and documentary evidence led by both parties dismissed the appeal filed by the defendants. This judgment and decree dated 8th July, 2016 passed by the learned District Judge-1, Niphad is impugned by the defendants in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

9. Mr. Agrawal, learned counsel for the defendants invited my attention to some of the findings recorded by the learned trial judge and also by the first appellate court. He submits that though both the parties had placed reliance upon the map produced by the Survey Department by examining the witnesses, both the courts below have disbelieved the map and the evidence produced by the defendants and have rendered the findings merely on the basis of the map and the oral evidence led by the plaintiffs. He submits that in view of the fact that there was a dispute regarding the alleged encroachment on the right of way alleged to have been used

by the plaintiffs, the two courts below ought to have passed an order for carrying out measurement by cadastral surveyor on the basis of permanent boundary mark in presence of both the owners of their respective plots and to ascertain the possession of the encroached land. He placed reliance on the Order 7 Rule 3 of the Code of Civil Procedure, 1908 in support of this submission.

10. Learned counsel for the defendants also placed reliance on the judgment of this court in case of ***Smt.Niranjanabai Chandrakant Vira vs. Pramilabai Balkrishna Zade & another, 2004(3) ALL MR 619*** and in particular paragraph 14 and would submit that since the required procedure was not followed by the surveyor who had drawn the maps, such maps drawn by such surveyor was not admissible in law.

11. Learned counsel appearing for the defendants also placed reliance on the judgment of this court in case of ***Fatima Gomes Furtado & Ors. vs. Smt.Indirabai Vinayak Lotlikar & Ors., 2016(2) Civil Court Cases 390 (Bombay)*** and in particular paragraph 9 in support of submission that since there was an allegation of encroachment made by the plaintiffs against the defendants, the court below ought to have exercised powers under Order 27 Rule 9 of the Code of Civil Procedure, 1908 to appoint a commissioner to examine the alleged claim of the parties based on the documents of the title of both the parties.

12. Learned counsel appearing for the respondent no.1 on the other hand placed reliance on various findings of fact rendered by both the courts and would submit that the findings being concurrent and being more perverse, cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908. she submits that the defendants never applied for appointment of the cadastral

surveyor or for appointment of the court commissioner as canvassed by the learned counsel for the defendants in these proceedings for the first time. He submits that this court thus cannot allow the defendants to make such request for appointment of the cadastral surveyor or for appointment of a court commissioner at this stage with a view to prolong the matter further. She submits that both the parties had produced the map and their respective witnesses to prove the correctness of those maps. She relied upon various admissions of the witnesses examined by the defendants which were duly considered by both the courts below.

13. A perusal of the record indicates that both the parties had examined witnesses. In the year 1969, city survey scheme was implemented in the said Ozar village and accordingly the competent authority had carried out the inspection and inquiry and had prepared the city survey maps accordingly.

14. A perusal of the record indicates that the suit filed by the plaintiffs was initially decreed in the year 2005 which was impugned by the defendants by preferring an appeal (RCS No. 270 of 2005). Before the first appellate court in the said proceedings, the defendants had produced certified copy of the city survey record and had urged that the trial court had not appreciated the evidence on record in proper prospective. The first appellate court had accordingly remanded the matter to the trial court with a direction to consider the documents produced by the defendants before the first appellate court. The trial court after considering the evidence of the city survey official and the record produced by both the parties, once again decreed the suit.

15. A perusal of the judgment and decree passed by the learned trial judge indicates that the witness (DW1) in his cross examination admitted that he had

purchased the open land situated between City Survey Nos.1507 and 1508. There was no construction over City Survey Nos.1507 and 1508 when the defendant no.1 had purchased the said property. The learned trial judge held that the said disputed way was sold by the defendant nos. 2 and 3 in favour of the defendant no.1. The defendants did not produce any oral or documentary evidence to show that they were the owners of the disputed way.

16. The learned trial judge also considered the city survey map produced by the witness examined by the plaintiffs which showed that in between City Survey Nos.1507 and 1508, the said disputed way was situated and no survey number was marked to the portion of the disputed way which was the only approach road available to the land bearing City Survey No.1505 which was owned by the plaintiffs. The plaintiffs had also examined other two witnesses to prove and establish the record of city survey.

17. The learned trial judge considered the oral and documentary evidence of all the witnesses in great detail in the impugned judgment and decree and held that the plaintiffs had proved the existence of the approach road as described in the plaint which was being used by the plaintiffs as approach road for reaching their plot. It is also held that the defendants had not taken any permission for carrying out any construction over the approach road from the authority.

18. A perusal of the judgment and decree passed by the first appellate court indicates that the first appellate court also has considered the entire documentary and oral evidence in the impugned judgment and decree. It is held by the first appellate court that after remand of the suit by the first appellate court, the defendants had examined two city survey officials in support of their defence. The

witness (DW2) produced three Sanad which clearly proved that the disputed way was in existence in between City Survey Nos.1508 and 1507 to approach the plot bearing City Survey No.1505. He deposed that the said Sanads were prepared by the officials of the city survey office on the basis of the original record of city survey office. In his cross examination he however admitted that he had not brought the original map of the city survey record with him. He admitted that the alleged map produced by him was not the map as per the original record of the city survey. The first appellate court held that the certified copy of the map at Ex.139 was prepared on the basis of alleged map Ex.141 and therefore certified copy of the map produced by the defendants vide Ex.139 was not a correct map as per the testimony of the DW2 examined by the defendants.

19. The witness (DW3) deposed that the map at Ex.141 was not correct map as per the record of the city survey official of their office. However, he deposed that the certified copy of the map was produced at Ex.51 was a correct map as per Ex.158. After considering the evidence of the DW2 and DW3 who were the city survey officials and the documents produced by them, the first appellate court has rendered a finding that the disputed way was in existence to approach the land bearing City Survey No.1505. It is held that the certified copy of the map produced by the plaintiffs at Ex.51 was correct and was genuine map as per the city survey record whereas the map produced by the defendants at Exs.139 to 141 were not correct map as per city survey record.

20. The first appellate court also considered the oral evidence of the witnesses examined by the defendants and has rendered a finding that the defendant no.1 had categorically admitted that on 11th February, 2000, he had not carried out complete construction over the disputed way and he had not obtained any construction

permission prior to carrying out the construction.

21. A perusal of the record indicates that the learned trial judge had considered the documents produced by the defendants after remand of the suit by the first appellate court and after considering those documents and oral evidence led by the defendants once again rejected the plea of the defendants rightly. A perusal of the record indicates that the defendants did not make any application before the first appellate court when the earlier decree was challenged to apply for the appointment of the court commissioner or for appointment of the cadastral surveyor as urged in this proceedings by the learned counsel across the bar. The defendants also did not make any such request before first appellate court. In my view the defendants thus cannot be allowed to raise this issue for the first time in this appeal before this court for the first time with a view to delay the execution of the decree passed by the two courts below in favour of the plaintiffs. I am thus not inclined to permit the learned counsel for the defendants to make this request in this proceedings for the first time. In my view appointment of cadastral surveyor or commissioner is even otherwise not warranted at this stage.

22. Insofar as judgment of this court in case of ***Smt.Niranjanabai Chandrakant Vira*** (supra) relied upon by the learned counsel for the defendants is concerned, the defendants could not prove before the learned trial judge or before the first appellate court that the surveyor while drawing map had not followed the required procedure for drawing the map produced by him. The learned trial judge has rendered a finding of fact on the authenticity and the accuracy of the map produced by the surveyor examined by the plaintiffs and similar findings are rendered by the first appellate court. The judgment of this court in case of ***Smt.Niranjanabai Chandrakant Vira*** (supra) thus does not assist the case of the

defendants.

23. Insofar as judgment of this court in case of *Fatima Gomes Furtado & Ors.* (supra) relied upon by the learned counsel for the defendants is concerned, since both the parties placed reliance on the map produced by them and had examined various witnesses to prove the correctness of the map and more particularly the surveyor department, the trial court was not required to appoint a commissioner by exercising the power under Order 26 Rule 9 of the Code of Civil Procedure, 1908. Be that as it may, no such application was made by the defendants before the learned trial judge or before the first appellate court. The said judgment of this court in case of *Fatima Gomes Furtado & Ors.* (supra) thus does not assist the case of the defendants.

24. In my view the findings recorded by the two courts below are recorded after considering the oral and documentary evidence and after considering the provisions of law and the findings being concurrent and being not perverse, cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908. In my view no substantial questions of law arises in this appeal.

25. Appeal is totally devoid of merits. I, therefore, pass the following order :-

- (a) Second Appeal (St) No.27224 of 2016 is dismissed.
- (b) In view of the dismissal of the second appeal, Civil Application No.1703 of 2016 does not survive and is accordingly dismissed. No order as to costs.

(R.D.DHANUKA, J.)