

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 666 OF 2015
AND
CIVIL APPLICATION NO. 15136 OF 2015

Trimbak Dhaklu Patil (Died)
through his LRs.

- 1] Indubai Trimbak Patil,
Age : 80 years, Occu.: Household,
R/o : Nagalwadi, Tq. : Chopda,
Dist. : Jalgaon
- 2] Anna Trimbak Patil,
Age : 54 years, Occu.: Service,
R/o : Nagalwadi, Tq. Chopda,
Dist. : Jalgaon
- 3] Gopal Trimbak Patil,
Age : 52 years, Occu.: Agril.,
R/o. : Nagalwadi, Tq. Chopda,
Dist. : Jalgaon
- 4] Vatsalabai Arvind Rajput (Died)
Through her LRs.
 - 1] Bharat Arvind Rajput,
Age : 40 years, Occu.: Service,
R/o : Houser, Tamilnadu
 - 2] Pradeep Arvind Rajput,
Age : 38 years, Occu.: Service,
R/o. : Houser, Tamilnadu
 - 3] Ranjana Yogendra Patil,
Age : 42 years, Occu.: Household,
R/o : Nagalwadi, Tq. Chopda,
Dist. : Jalgaon
 - 4] Seema Vijay Patil (Rajput)
Age : 36 years, Occu.: Household,
R/o : Nandurbar, Dist. Nandurbar

.. Appellants
(Orig. Plaintiffs)

VS.

Dattabhojraj Pundlik Rajput,
Age : 68 years, Occu.: Trader,
R/o : Nagalwadi, Tq. Chopda,
Dist. : Jalgaon

.. Respondent

Mr. M.M. Joshi, Advocate for the appellants
Mr. P.R. Katneshwarkar, Advocate for the respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 04-04-2017

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. The substantial question that arises in the matter, to be answered, appears to be;

“ Whether the matter is liable to be remanded to appellate court for reconsideration, as original plaintiff is aggrieved by non-consideration of and reference to his case, in defence to the counter claim of the original defendant ? ”

3. Plaintiff – present appellant is owner of house bearing no.2 (C.T.S. no.644). Defendant - present respondent is owner of house no. 70 (C.T.S. no.640). Subject matter of *lis* between the parties, is a lane having 5 feet width running east-west from eastern side of plaintiff's house, whereon plaintiff claims right of exclusive user.

4. The defendant tried to have a door on the northern side wall, on which side the suit lane is situated and was also trying to construct steps in the lane. The plaintiff, as such, had apprehended obstruction to his user of suit lane, and suit ensued. The plaintiff had sought relief seeking restraint on defendant from opening door in the suit lane, and, constructing steps and causing obstruction and declaration that he has exclusive right.

5. The defendant had denied the claim of the plaintiff, *inter alia* claim of exclusive user of the lane by plaintiff. He further denied that he is opening a door in the suit lane and constructing a platform.

6. Defendant had filed counter claim disputing four boundaries mentioned by plaintiff of his own house. It was claimed that plaintiff had no easementary right on the east side of his house. It was alleged that plaintiff had opened a door and window and constructed a platform, and, had made encroachment, over suit lane. The plaintiff has no right to take air, light and use suit lane by opening door and window and constructing the platform. The defendant claims that he has right to have light and air from northern side. The defendant has also right to use open space on the northern side of his house. Suit lane is used for parking bicycle and other articles. In the counter claim, the defendant had prayed

for mandatory injunction for removal of door and window of plaintiff on northern wall of his house no.2 and platform admeasuring 10 X 10 feet, with declaration that plaintiff is not having right of way from C.T.S. no. 644 and that defendant is having right to use suit lane and right to take air and light from the window situated in the east-west wall of his house towards northern side and injunction against plaintiff restraining him from using suit lane and further injunction restraining the plaintiff from obstructing defendant from using suit lane and taking air and light.

7. Trial court had partly decreed the suit, granting injunction against defendant, restraining him from constructing steps in suit lane, and, doing any act causing obstruction to right of way and had dismissed counter claim. The defendant had been before appellate court in regular civil appeal no.2 of 2012. Appellate court had narrated case of plaintiff in plaint and as also case of defendant in written statement and counter claim. Narration of facts, however, by appellate court does not refer to written statement by plaintiff to the counter claim, wherein it is stated to have been claimed by plaintiff that platform and steps on eastern side of C.T.S. no.644, are in the property owned by plaintiff.

8. With the assistance of learned counsel for parties, I have gone through record.

9. Learned counsel for the appellant has submitted that while appeal is allowed by appellate court, granting counter claim of mandatory injunction as prayed for, removal of platform on the eastern side of C.T.S. no.644, and, further declaring that defendant has right of light and air from the suit lane, and, restraining plaintiff from causing obstruction to the defendant from use of suit lane. He submits case of plaintiff has neither been referred to in the decision nor the submissions on behalf of plaintiff find place anywhere in the judgment of appellate court.

10. He submits that despite there being written statement - exhibit - 38 to the counter claim, yet, the judgment does not even by whisper, refer to any resistance by the plaintiff to the counter claim of defendant. He submits that non-consideration of plaintiff's case and his defence to the counter claim, has seriously prejudiced claim of plaintiff and under the circumstances, impugned judgment and order being deficient in this material aspect, is liable to be set aside and the matter deserves to be remanded for reconsideration of the case of the plaintiff.

11. Countering aforesaid submissions of Mr. Joshi, Mr. Katneshwarkar, learned counsel appearing for respondent - defendant submits that ostensibly, there may not be a literal

reference made to the plaintiff's claim or for that matter to the submissions, however, perusal of judgment would generally reflect that whole case of plaintiff has undergone consideration by appellate court. He submits that it is a technical plea being taken about non-consideration of the case of the plaintiff. It is not sufficient to tilt the scale in favour of the appellant, who is seeking remand. However, on instructions, he submits that the respondent – defendant is amenable to the request of remand of the matter in the larger interest of justice since prejudice is stated to have been caused.

12. Perusal of the judgment of the appellate court, does not appear to take into account that there had been in-fact defence by plaintiff to the counter claim. The judgment appears to be deficient in respect of reference to the same. Even further in the reasoning part of judgment, there does not appear to be consideration of the defence by plaintiff to counter claim despite there has been specific defence taken to the counter claim that the alleged encroached portion is within the property owned by the plaintiff. Appellate court also appears to have missed out the contention of the plaintiff about the said construction being existing since times immemorial.

13. Having regard to aforesaid, it appears to be in the fitness of things, and, expedient, particularly having regard to the defendant – respondent has no objection, if the matter is remanded for reconsideration by appellate court.

14. As such, the substantial question, as framed hereinabove earlier, stands answered that the matter is liable to be remanded for reconsideration afresh by appellate court.

15. In the circumstances, the judgment and decree of first appellate court dated 18-09-2015 in regular civil appeal no. 2 of 2012 stands set aside. Regular civil appeal no. 2 of 2012 stands restored to its position as it had been subsisting prior to 18-09-2015.

16. Since learned counsel for the appellant/plaintiff has pointed out that paperbook of the appellate court is deficient of written statement of plaintiff to counter claim of defendant, the same shall be incorporated in the already existing paper book, and, taken into account while deciding the matter.

17. Regular civil appeal no. 2 of 2012 be taken up, and, decided by appellate court, as expeditiously as possible, preferably within a period of five (5) months from receipt of this order by appellate court.

18. It is being specifically made clear that none of the observations hereinabove made in this order, shall be deemed to be observations on merits of the case, and, regular civil appeal is to be

reconsidered on merits, without getting influenced by the order for remand and observations herein.

19. Second appeal stands disposed of.

20. Consequently, civil application no. 15136 of 2015 stands disposed of accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/