

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 558 OF 2013

Mrs. Vaishali Rajendra Naphad and Ors. ... Appellants

Versus

Mr.Digambar Purushottam Naphad and Ors. ... Respondents

ALONG WITH
CIVIL APPLICATION NO. 1309 OF 2013
IN
SECOND APPEAL NO. 558 OF 2013

Mr. S.B.Deshmukh, for Appellants.

Mr. J.S.Kapre, for Respondent Nos.1 and 2.

CORAM : S.J. KATHAWALLA, J.
DATED : 19th JUNE, 2017

P.C.:

1. The above Second Appeal is filed by the Appellants being aggrieved by the two concurrent Judgments passed by the Trial Court as well as the Appellate Court, as more particularly set out hereinafter.

2. Regular Civil Suit No. 958 of 2001 was filed by Respondent Nos. 1 and 2 (Original Plaintiff Nos. 1 and 2) against Appellant Nos. 1 to 3 namely Mrs. Vaishali Rajendra Naphad, Mr. Laxman Purushottam Naphad and Mr. Rajendra Laxman Naphad (Original Defendants) before the Court of Civil Judge, Junior Division, Medha on deputation at Satara (the "Trial Court") seeking mandatory injunction against the Defendants to restore the original status of the Suit Property; for perpetual injunction restraining the Defendants from carrying out the construction over the Suit

Property, which is in common use, and for declaration that the Plaintiffs have right of easement to enjoy the light and air through the Suit Window. The Suit was partly allowed and the Defendants were directed by mandatory injunction to remove certain structures and restore the original status qua the Suit Property, described in paragraphs 1B, 1C and 1E of the Plaint, and the Defendants were also restrained by perpetual injunction from carrying out any construction on the common portion of the Suit property bearing CTS No. 339D and from obstructing the enjoyment of the Plaintiffs over the common portions of the Suit Property i.e. CTS Nos. 339D and 341.

3. Being aggrieved, Appellant Nos. 1 and 3 (Original Defendants) and Mr. Pramod Shankar Gujar, impugned the Judgment and Decree of the Trial Court dated 30th June, 2007 by filing Regular Civil Appeal No. 244 of 2007 before the Court of District Judge-3, Satara (the Appellate Court). The Appellate Court dismissed the Appeal by its Judgment and Order dated 9th April, 2013.

4. Again being aggrieved by the Judgment and Order of the Appellate Court dated 9th April, 2013, the Appellant Nos. 1 and 3 (Original Defendants) and Mr. Pramod Shankar Gujar have filed the above Second Appeal under Section 100 of the Code of Civil Procedure, 1908 ("CPC").

5. For the sake of convenience, the Appellants and the Respondents are referred to herein as per their original status i.e. the Defendants and the Plaintiffs, respectively.

6. The Plaintiffs are husband and wife. Defendant No.2 is the brother of

Plaintiff No. 1. Defendant No. 3 is the son of Defendant No. 2 and the husband of Defendant No. 1. The property CTS No. 339D as described in paragraph 1 of the Complaint, was originally owned by Purushottam (father of Plaintiff No. 1 and Defendant No.2). As per Final Decree Application No. 4 of 1971, the partition of the said property was effected between the sons of Purushottam i.e. Laxman (Original Defendant No. 2), Balkrishna, Pandurang and Digambar (Original Plaintiff No.1). The partition and separation of property took place as shown in the map attached to the Complaint. Part No. 1 came to the share of present Defendant No. 2 - Laxman, Part No. 2 came to the share of Balkrishna, Part No. 3 came to the share of Pandurang and Part Nos. 4 and 6 came to the share of present Plaintiff No. 1. After the said partition, some parts were transferred by sale etc. i.e. Part No. 1 was transferred by Defendant No. 2 to present Defendant No. 1, Part No. 2 was transferred by Balkrishna to the present Defendant No. 1, Part No. 3 was transferred by Pandurang to Plaintiff No. 2. Therefore, on the date of filing of the Suit, Part Nos. 3, 4, 5 and 6 belonged to the Plaintiffs, whereas Part Nos. 1 and 2 belonged to Defendant No.1. The parts shown in green and blue colour on the map attached to the Complaint, are common areas / property of the Plaintiffs and the Defendants.

7. According to the Plaintiffs, since a long time, they are using in common the lane and the open space of the property, described in paragraph 1C of the Complaint; Defendant No. 1 while obtaining Part Nos. 1 and 2 from its original owners - Laxman and Balkrishna, have not obtained their rights in the common property; in the month

of October-2001 Defendant No. 1 had decided to construct over Part No. 2 of the Suit property; the Plan for the construction was prepared and Defendants assured the Plaintiffs that they will not construct over the parts of the Suit Property which are in common use; therefore, keeping in view the family relations, Plaintiff No. 1 had signed the plan; since the Plaintiffs are residing at village - Wai, they were not able to come and visit the Suit Property; however, on 14th December, 2011 when Plaintiff No. 1 visited the Suit Property, he came to know that Defendant Nos. 1 and 2 had illegally started the work of erection of iron staircase over the Suit Property, described in paragraph 1C of the Plaint; they had also removed some part of the gallery in the Suit Property described in paragraph 1B of the Plaint; they also started construction in the Suit Property, described in paragraphs 1C and 1D of the Plaint; the Plaintiffs therefore immediately approached the Defendants and requested them to remove the encroachment and to restore the gallery and tin-sheet roofs, but the Defendants refused; the Defendants also threatened to close the window of the Plaintiffs' property and to carry out the construction of WC in the Suit Property, described in paragraph 2 of the Plaint; during the pendency of the Suit, the Defendants closed the window by constructing a bath room and water tank; they also erected construction over the land by putting slab over it; they also disconnected the electric supply to the Plaintiffs Property; the window was located in that part of the Suit Property which was originally owned by Puroshottam; the part from which the Plaintiffs were receiving air and light from a window, was allotted in partition to Balkrishna; thereafter, that part

was purchased by Defendant No. 1; therefore, the Plaintiffs have right of easement of necessity to enjoy the light and air through the said window; the Defendants have no right to obstruct the Plaintiffs' said right by closing that particular window. The Plaintiffs therefore filed the present Suit for the aforementioned reliefs.

8. Defendant Nos.1 to 3 contested the Suit by filing their Written Statement (Exhibit 37) and denied all the allegations made by the Plaintiffs against them. They resisted the Suit on the ground that they have not encroached the Suit Property. However, they have not disputed the description of the Suit Property. It is also not disputed by the Defendants that the Suit Property was partitioned amongst the sons of Puroshottam as per the Final Decree Application No.4 of 1971. It is also not in dispute that the Suit Property was divided into five parts. They have also not disputed that Part No.1 came to the share of the Defendant No.2, Part No.2 came to the share of Balkrishna, Part No.3 came to the share of Pandurang and Part No.4 to 6 came to the share of the Plaintiff No.1. It is also not in dispute that Part No.3 is purchased by Plaintiff No.1. They have not disputed that part Nos.3 to 6 belongs to the Plaintiffs. They have denied that the Defendant No.1 has not received any right in part of the Suit Property, which is in common use. They have also denied that some part of the Suit Property as contended by the Plaintiffs is kept for common use of the Plaintiffs and Defendants. They have denied that the Defendants illegally erected the stair case in common space and caused obstruction to the use and enjoyment of the common space to the Plaintiffs.

9. The Defendants have in their Written Statement also contended/stated that the Plaintiffs have made encroachment in the common property, by making construction of gallery and flooring stage; the construction raised by the Defendants in the common property adjacent to the respective shares of the holders is in accordance with the rules and customs; the Plaintiffs are not entitled for mandatory injunction since the Plaintiffs also have made construction over the common property; the Plaintiffs' property has adequate source of light and air through another window; the Defendant No.1 purchased the Suit Property No.339/D, so she has every right to construct on the said property as per her wish, though the property CTS No.341 is common property; the Defendants have carried out construction according to the mutual understanding and customs; the Plaintiffs and other share holders have also constructed the latrine in CTS No.341 and nobody had objected to the said construction; the Defendant No.1 has intimated to the Plaintiffs about the construction in CTS No.339/D; the Plaintiffs have consented to the said construction by putting his signature over the construction plan; the Plaintiffs were present at the time of the construction made by the Defendants but they have not raised any objection; the Defendant No.2 has obtained permission from the Municipal Corporation for the construction of the latrine in CTS No.341 as the Defendant No.1 purchased part of CTS No.339/D from the heirs of Balkrishna; the Plaintiffs due to ill-will have filed a false suit on false ground; the Report of the Court Commissioner is admitted by the Defendants; in the common lane adjacent to the Plaintiff's share,

there is a tin shed, which is not mentioned in the Commissioner's Report; the Plaintiffs and Defendants have a right to carry out the construction in the common property; that the Defendant No.1 has not demolished any part of the gallery; that the Defendant No.1 has not erected the stair case after encroaching any area.

10. The Defendants also filed additional Written Statement at Exhibit 43, wherein the Defendants denied that they have made construction adjacent to the window of the property of the Plaintiffs. The Defendants contended that no construction of WC and water tank is raised, and the construction of both rooms is raised in the property of the Defendants. The Defendants denied having disconnected the electric supply to the property of the Plaintiffs.

11. The Trial Court framed the issues at Exhibit 46, and after recording the evidence adduced by the parties and considering the oral as well as documentary evidence on record, and the submissions of the Learned Counsel for the parties, passed Judgment and Decree dated 30th June, 2007, holding that the Plaintiffs have proved that the portion in colour green, red and blue shown in the map attached to the Plaint, are in common use and common property of the Plaintiffs and Defendants; the Plaintiffs have proved that the Defendants unauthorizedly erected the stair case in the open space of the common property described in the Plaint para No.1C; the Plaintiffs have proved that the Defendants unauthorizedly caused damage and changed the nature of gallery as described in the Plaint para No.1B; the Plaintiffs have proved that the Defendants unauthorizedly constructed the slab over the common property

described in para No.1D of the Plaint; the Defendants unauthorizedly constructed the gallery as described in Plaint Para 1E; the Plaintiffs have proved that the Defendants caused obstruction to them from enjoying the common lane. However, the Learned Trial Court came to the conclusion that the Plaintiffs have failed to prove that they have right of easement by necessity of the Suit Window; the Plaintiffs failed to prove that the Defendants unauthorizedly obstructed easementary rights of taking light and air through the disputed window; the Plaintiffs failed to prove that the Defendants cut down the electric supply of their property; the Plaintiffs failed to prove that the Defendants unauthorizedly constructed the WC and safety tank as described in the Plaint Para No.1(F); the Plaintiffs failed to prove that the Defendants unauthorizedly caused damage to the tin-shed roof as described in Para 1A and accordingly the Suit came to be partly decreed, which is why the Defendants have preferred this Appeal.

12. The Trial Court therefore, partly allowed the Suit by its Judgment and Decree dated 30th June, 2007. The operative portion of the Order/Decree of the Trial Court is reproduced hereunder :

“(1) The Suit is partly allowed with costs.

(2)The Defendants are directed by mandatory injunction to restore the original status of balcony adjacent to the Plaintiff's room i.e. Suit property para 1B.

(3)The Defendants are directed by mandatory injunction to remove the structure of iron staircase erected in common property para 1C.

(4)The Defendants are directed by mandatory injunction to remove the construction of balcony (Suit property para 1E), the construction

over the suit property para 1DD i.e. upon common lane adjacent to their property.

(5) The Defendants are directed by mandatory injunction to remove the construction of bathroom and the water tank on it.

(6) The Defendants are restrained by perpetual injunction from constructing any construction on common part of the suit property (CTS No.339D).

(7) The Defendants are restrained by perpetual injunction from obstructing the enjoyment of the Plaintiffs over the common part of the Suit property i.e. CTS No.339D and 341.

(8) If the Defendants are failed to remove the construction, which are directed above to remove by issuing mandatory injunction, the Plaintiffs are entitled to remove that parts of the construction by appointing the Court Commissioner. In such circumstances, cost of commission be recovered from the Defendants.”

13. As set out hereinabove, being aggrieved and dissatisfied by the Judgment and Decree passed by the Trial Court, the Defendants have filed the Appeal being Regular Civil Appeal No.334 of 2007 before the District Judge – 3 at Satara. The issues framed by the Appellate Court are set out in Paragraph 12 of his Order. The Appellate Court has in support of the 14 issues raised by it, set out detailed reasons in Paragraphs 13 to 22 of its Judgment dated 9th April, 2013, and dismissed the Appeal.

14. Being aggrieved by the two concurrent Judgments passed by the Trial Court as well as the Appellate Court, the Defendants have filed the present Second Appeal on the ground that the Courts below have not considered that there is construction

made by the Plaintiff in the alleged common area; that if the Plaintiffs have made construction in the alleged common area, then it cannot be said that the Defendants have made encroachment in respect of the said common area; that the construction plan was signed by the Plaintiffs and once they have knowledge of the said construction, then the Plaintiffs are estopped from making the allegation that there is construction in the common area, and it also shows acquiescence on the part of the Plaintiffs; even if it is assumed that the said area is common, since the Defendants are the co-owners in respect of the same, no injunction can be granted; that the finding that the construction of the gallery is unauthorized is based on surmises and conjunctures and without any basis as well as evidence, only because the staircase leads to the gallery; that the Appellate Court has wrongly relied upon the Report of the Commissioner, which cannot be used for collecting the evidence and the finding ought not to have been given on the basis of the Report of the Commissioner; that the conclusion that there is construction on the roof of the common lane is perverse and the finding in respect of the construction of the bath room and toilet is also perverse.

15. As regards the ground raised by the Defendants in the Second Appeal, that the Court below has not considered that the Plaintiffs too have carried out construction in the alleged common area and therefore the construction carried out by Defendant No. 1 in the common area cannot be treated as an encroachment; the Trial Judge after considering the documents produced as well as the evidence led before it, held that so far as the property in CTS No. 339D is concerned, admittedly the same

was portioned/ divided, and the portion in colours blue, green and red, are kept in common use ; the allegation that the Plaintiffs have carried out construction in the common area is incorrect, since the alleged construction was in existence before the Decree of Partition was passed/obtained, and this fact is noted even in the Certified Copy of the Say (Exhibit-26 in Regular Civil Suit No. 181 of 1995) ; therefore at the time of actual separation of the shares and allotment of shares to the respective parties, the said construction including the stairs and flooring stage was allotted to the share of the Plaintiffs ; since the Decree of Partition is executed, and no objection is raised in regard thereto by the Defendants, they are not entitled to raise any objection qua the said construction over the common property. The Learned Trial Judge has therefore rejected the defence of the Defendants that, as there is construction of the Plaintiffs in the common area in CTS No. 339D, the Defendants were also entitled to raise construction in the common area and passed a mandatory injunction directing the Defendants to remove the construction. However, as regards the issue qua the construction of the latrine by the Defendants in CTS No. 341 is concerned, the Learned Trial Judge has rejected the objection raised by the Plaintiffs on the ground that subsequent to partition, the Plaintiffs as well as the other co-owners of the common area have constructed the latrines, and therefore they cannot object to the Defendants having constructed the same. The reasoning given by the Trial Court is also adopted / accepted by the Appellate Court.

16. As regards the ground raised in the Second Appeal by the Defendants that

the construction plan was signed by the Plaintiffs, the Learned Trial Judge has recorded that Rajendra (DW-1) has deposed that on the construction plan (Exhibit-17), the signature of Plaintiff No. 2 / Snehlata is not found. The Learned Trial Judge has also recorded that, in defense the Advocate for the Defendants submitted that at the time of submission of the construction plan (Exhibit-17), the Plaintiff No. 2 - Snehalata was not the owner of Part No. 3 and that the sale deed was executed in her favour after the said plan (Exhibit-17) was sanctioned. The Learned Trial Judge has explained that it is not shown by the Defendants that the said construction plan (Exhibit-17) was signed by the Predecessor-in-Title of Snehalata and therefore the Defendants cannot say that the said construction plan was signed by Snehalata. Again the learned Trial Judge has held that though Plaintiff No. 1 (Digambar) has signed the construction plan, it cannot be treated as consent 'for illegal construction'. The Trial Judge also went on to hold that an ordinary layman is not expected to understand the technical measurements set out in the map/plan and since there is no specific express consent, it cannot be said that there was consent for the construction. The Appellate Court also deemed it fit to not interfere with the said finding of the Trial Judge.

17. As regards the next ground raised by the Defendants in the Second Appeal that the Defendants as co-owners in respect of the common area are entitled to carry out construction in the said area therefore no injunction can be granted against the Defendants, the Learned Trial Judge has by giving detailed reasons held that the Defendants have carried out unauthorized construction over the common property in

CTS No. 339D, which at the time of partition, was kept open for common enjoyment ; the construction carried out by the Defendants over the common property, which is in common use of the Plaintiffs, causes obstruction to the Plaintiffs and their right to enjoy the property ; therefore, apart from the obstruction being proved on CTS No. 339D, the Plaintiffs are entitled to perpetual order and / or injunction restraining the Defendants from carrying out construction over the Suit Property which is in common use. The Appellate Court has also deemed fit not to interfere with the said findings of the Trial Judge.

18. As regards the ground raised by the Defendants in the Second Appeal that the finding that the construction of gallery is unauthorized, is based on surmises and conjunctures, and is without any basis as well as evidence, a reading of the Orders passed by the Trial Judge as well as Appellate Court in this regard, is necessary. The Learned Trial Judge has in paragraph 15 to 18 of his Judgment, discussed the evidence of the parties including the Defendants' admission made therein, and has pointed out how by carrying out alterations the Defendants have changed the nature of the gallery, and has directed the Defendants to restore the original status of the gallery. The Appellate Court too has accepted the findings of the Trial Court and has confirmed the direction given to the Defendants by the Trial Judge in this regard.

19. As regards the ground raised by the Defendants in the Second Appeal that the Appellate Court has wrongly relied upon the Report of the Commissioner, which cannot be used for collecting evidence and the findings ought not to be given on

the basis of the Report of the Commissioner, it is set out in the Judgment of the Trial Judge that DW-1 has in his deposition stated, that he has no objection to the Commissioner's Report (Exhibit-26), except for the objection that the shade made of tin-sheets over the common lane adjacent to the Plaintiff's property is not shown. However, the same finds mention in Map No.2 of the Report. In fact, in Regular Civil Appeal No. 244 of 2007 filed by Defendant No. 1 before the District Judge, Satara on 29th August, 2007, no ground is taken by the Defendants qua the Commissioner's Report, nor on the reliance placed thereon by the Trial Court.

20. As regards the ground raised by the Defendants in the Second Appeal that the findings qua the roof of the common lane, construction of the bathroom and toilet are perverse, the Trial Judge has after considering the evidence as well as the submissions of the parties and the Commissioner's Report given cogent reasons in paragraph 19 to 24, 44 of his Judgment in support of his findings.

21. As regards the ground raised by the Defendants in the Second Appeal that the Courts have granted mandatory injunction against them, the Trial Judge has in support of every order of mandatory injunction explained why the said injunction is granted. The Appellate Court has also deemed fit not to interfere with the said Judgment.

22. Therefore, in my view, both Trial Court and the Appellate Court have after appreciating the oral as well as documentary evidence, as well as submissions made on behalf of the parties, given concurrent findings and rejected the contentions/grounds

raised by the Defendants. I have perused and heard the Advocates for the Defendants on the questions of law raised in the Second Appeal, which are based on the grounds dealt with hereinabove. In my view, no question of law, much less substantial question of law, is therefore raised by the Defendants in the above Second Appeal. The Second Appeal is therefore dismissed. Civil Application No.1309 of 2013 also stands dismissed.

(S.J.KATHAWALLA, J.)