

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 69 OF 2015
WITH
CIVIL APPLICATION NO. 2604 OF 2015

ANIL TEJRAO WARGANE AND ANOTHER
VERSUS
GANESH SAMPATRAO WARGANE AND ANOTHER

Advocate for Appellants : Shri A.J. Patil
h/f. Shri B.S. Deshmukh.
Advocate for Respondent No. 1 : Shri S.S. Pawar.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 25th January, 2018

PER COURT :

1. I have heard the learned counsel for the appellants/original defendants and the respondents/original plaintiffs. With their assistance, I have gone through the Second Appeal paper book and the documents annexed to the Civil Application.

2. After considering the extensive submissions of the learned advocates for the respective sides, it is undisputed that the original defendants have moved the revenue authorities under Section 143 of the M.L.R, Code. That limb of litigation is said to be pending.

3. The original plaintiffs had approached the Trial Court by filing R.C.S. No. 125/2008, in which, the plaintiffs had prayed for

injunction to restrain the defendants from creating a new cart way passing through the suit land and obstructing the plaintiffs possession. The suit property of 01 Hectore and 10 Acre was described as under:

“To East – Land belonging to defendant No. 1 and Raju S/o. Sakharam Wargane.

To West – Land belonging to Shrirang S/o. Shankar Wargane.

To North- Land belonging to defendant No. 1.

To South- Government Land.”

4. By the judgment dated 03/02/2010, the Trial Court has concluded that a common Bandh may be used by the parties and no injunction needs to be granted and the suit was dismissed.

5. The plaintiffs preferred R.C.A. No. 26/2010. The Appellate Court has considered the entire oral and documentary evidence and the pleadings of the parties afresh. By the impugned judgment, the appeal has been allowed. The judgment of the Trial Court has been quashed and set aside and R.C.S. No. 125/2008 is decreed by directing the defendants, vide a perpetual injunction, that they would not cause any obstruction and interference in the peaceful possession of the plaintiff's land block No. 261, as is described in the plaint.

5. The submissions of the litigating sides need to be assessed by considering the observations of the Appellate Court in paragraph No. 8 of the impugned judgment, which reads as under:-

“It is curiously enough that the learned trial Court has observed that though the defendants have not placed on record any documentary evidence showing the existence of any cart way as is claimed by them yet from the evidence brought on record in the cross-examination of DW-2 Raju and it can be said that the road passing from the common bund of the suit land and the land of Shrirang Wargane and thus on that basis defendant can not be said that they are creating any new way and accordingly the learned trial Court has observed that the plaintiff/appellant failed to prove that the defendants are creating new way and thereby obstructing his possession over the suit land.”

6. In the backdrop of the fact, besides the word of mouth, there is no documentary evidence, indicating the existence of any cart way, as was claimed by the defendants. My attention is drawn to the rough sketch map, which the plaintiffs had placed on record along with suit. Same is at page No. 20 in the Civil application No. 2604/2015, paper book.

7. The defendants claim that defendant No. 1 Anil has his land on the North side of the plaintiffs land and one small portion on the East side of the plaintiffs land, thereby touching the land of the

plaintiffs on the North-Eastern side. The defendants claim that they do not have any cart way from the Eastern side which half way through, is adjacent to the land of plaintiff Ganesh and another landlord Raju. The remaining half path can be from the small portion of the land on the North Eastern side.

8. What is prayed is that on the Western side of the land of Ganesh adjacent to land of Shrirang, the cart way be created which will go South North and at the border of the land of Ganesh for entering the lands of the defendant No. 1/Anil and defendant No. 2/Ravindra. It is stated that for the present, the original defendants are using the Vahivaat, which is from East to West direction besides the lands of Raju, Ganesh and Shrirang on the Southern side. These three landlords have no objection for the path which is stated to be presently used by the defendants till the edge of Gut No. 260, land belonging to Shrirang. From the Western side of Shrirang, the path is being used from South to North direction, so as to reach the land of defendant No. 2/Ravindra and from whose land defendant No. 1/Anil travels to his land on the North side and one portion on the North Eastern side.

9. Since, the defendants, without bringing on record any documentary evidence, as like the spot inspection map and spot

panchnama, are praying for creation of the path, without establishing that the said path on the Western side of the land of Ganesh, was existing for decades.

10. Learned counsel for the defendants/appellants herein submits that the defendants are relying upon Section 13 (e) of the Easement Act 1882, by which, after partition of the joint property amongst several persons, if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement. Section 13 (f) indicates that if such an easement is apparent and continues and necessary for enjoying the share of the latter, as it was enjoyed when the partition took effect, he shall, be entitled to such easement.

11. Section 13 (e) and (f) would have been pressed into service if the defendants established that the easement was apparent and continues from the Western side of the land of Ganesh. As against that, without there being any evidence on record that such an easement existed, no relief can be claimed by the defendants. It also cannot be ignored that when the plaintiffs sought injunction by preferring a suit, besides opposing the suit, the defendants had neither filed a counter claim, nor have they filed an independent suit to have such a right adjudicated upon.

12. The Appellate Court has allowed the appeal by the impugned order in view of there being no documentary evidence on record to support the contention of the defendants. In this backdrop, I do not find that the appellants have succeeded in raising any substantial question of law in the Second Appeal. Second Appeal, being devoid of merits, is therefore, dismissed. Pending Civil Application does not survive and stand disposed of.

(RAVINDRA V. GHUGE, J.)

S.P.C.