

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 161 OF 2016
WITH
CIVIL APPLICATION NO. 198 OF 2016

Ramesh Dattatraya Patil & Anr. ..Appellants
vs.
Mahadeo Yashwant Waghmare .. Respondent

Mr. Rajesh More for Appellants.
Mr. Girish Agrawal for Respondent.

CORAM : M. S. SONAK, J.
DATE: 23 FEBRUARY 2018

P.C :

- 1] Heard the learned counsel for the parties.
- 2] Mr. More, the learned counsel for the appellants submits that the following two substantial questions of law arise in the present appeal:

(A) Whether the trial court and the first appeal court are justified in holding that the C.T.S. No. 629 is the road property and by raising the wall the appellant closed the respondent approach way to the north?

(B) Whether the trial court and the first appeal court are justified in not appreciating that unless C.T.S Nos. 629, 639 and 640 are jointly measured the evidence of PW 2 Shewale and Map at Exh. 43 prepared by her have no value in the eye of law?

3] Mr. More also submitted that the two courts, have misconstrued the statement made by the appellants in the course of his cross-examination as to the existence of the road in CTS No. 629 is meaning the existence of a municipal or a gram panchayat road. Mr. More submits that the statement only means that CTS No. 629 as a private road, privately owned by the appellants. Mr. More relying upon the decision of this Court in the case of ***Kashinath Chindhuji Shastri vs. Haribhau Nathuji Bawanthade***¹ submits that in a matter where encroachment is alleged, the Commissioner is bound to take joint measurements and cannot rely upon measurements taken only in respect of one of the properties. He submits that since in this case, no such joint measurements were taken, the matter may be remanded to the appeal court or to the trial court for undertaking such an exercise. Mr. More in the course of his submissions submits that the findings of facts recorded by the two courts are vitiated by perversity for misconstruing the statement of the appellant and for failure to insist upon joint measurements.

4] Mr. Agrawal, the learned counsel for the respondent has referred to paragraph 31 of the appeal court judgment to point out that the appeal court has not at all treated the property at CTS No. 629 as municipal road or gram panchayat road but, has rightly proceeded on the basis that this was a road from which, access was provided. Further, Mr. Agrawal points out that the construction of the compound wall locking the access through CTS No. 629 is virtually on the foundation of the construction put up by the respondent plaintiff. Mr. Agrawal points out that there is overwhelming evidence in support of the findings of fact return by the two courts. Mr. Agrawal points out that there was no question of any joint measurement since, the map prepared at Exhibit 43 taken

1 2004 (2) Mh.L.J. 722

into consideration all the physical attributes at the site. Besides, there is evidence produced in form of photographs which has also been taken into consideration by the two courts return the findings of facts. For all these reasons, Mr. Agrawal submits that there is no substantial question of law involved in this appeal, which may be dismissed.

5] The two questions of law proposed by Mr. More can, hardly be described as any question of law, much less, substantial questions of law. In the first place, there is nothing in the two judgments and decrees to indicate that the two courts have misconstrued the statement of the appellant. The two courts have only stated that the appellant no.1, in the course of his cross-examination, has categorically admitted that the property at CTS No. 629 to the north of his house in CTS No. 639 is a road property. The appeal court, has further taken cognizance of the admission emanating from the deposition of the appellant no. 1 that there are two doors from the south and the north to the RCC two storied building of the plaintiffs and the staircase for the upper floors for the plaintiffs building is to the north side. The appeal court has also noted that during the course of cross-examination the appellant no. 1 was shown four photographs at Exhibits 51 to 54, which the appellant accepted as reflecting the true picture at the site. All this is sufficient to hold that there was neither any infirmity in the map produced on record at Exhibit 43 nor was it necessary to have any further measurements at the site. Since, the appellant no. 1, in the course of his cross-examination has admitted several factual aspects including that the four photographs at Exhibits 51 to 54 reflected the correct picture at the site, all that remains was the appreciation of such material evidence. The two courts, have evaluated and appreciated the

evidence and it cannot be said that there is any perversity. None of the findings of facts can be said to be based on '*no evidence*'. This is also not a case where relevant evidence has been ignored or some irrelevant evidence taken into consideration. This is also not a case of any misconstruction of the admission or the statement of the appellant as was sought to be contended by Mr. More, learned counsel for the appellants.

6] In *Kashinath Shastri* (supra) there was a serious dispute as regards the dimensions and its in this context that this court has held that a Commissioner must be appointed to prepare a map because in the absence of such a map there may be problems in the execution of the decree. In the present case there is a clear material on record as to the dimensions and the extent of a wall and therefore, observations in *Kashinath Shastri* (supra) are inapplicable. In any case, substantial question of law as proposed in (B) above clearly does not arise. In fact, the question proposed can hardly be regarded as any substantial question of law.

7] Recently, the Hon'ble Supreme Court in the case of ***Dagadabai (dead) by Legal Representatives vs. Abbas alias Gulab Rustum Pinjari***² has held that High Court cannot interfere in second appeal when such findings were neither opposed to pleadings, evidence or any provisions of law nor perverse on facts to the extent that no average juridical person could ever record the same.

8] Since, the two courts, have basically decided the matter on basis of facts and since, the findings of facts recorded by the two

2 (2017) 13 SCC 705

courts suffer from no perversity, there is no case made out to entertain the present second appeal.

9] Since the appeal is dismissed, interim order, if any, is vacated. In view of dismissal of appeal, civil application does not arise and is disposed of.

(M. S. SONAK, J.)

Chandka