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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.310 OF 2017
WITH
CIVIL APPLICATION NO.480 OF 2017
IN
SECOND APPEAL NO.310 OF 2017
WITH
CIVIL APPLICATION NO.365 OF 2018
IN
SECOND APPEAL NO.310 OF 2017.

Umar Abdulla Jalgaonkar ... Applicant
V/s.
Kasim Umar Lokhande and
ors ... Respondents

ALONGWITH

SECOND APPEAL NO.309 OF 2017
WITH
CIVIL APPLICATION NO.488 OF 2017
IN
SECOND APPEAL NO.309 OF 2017

Umar Abdulla Jalgaonkar ... Applicant
V/s.
Chandbibi Kasim Lokhande and
ors ... Respondents

Mr. M. D. Naik i/by Subhash V. Gutte, for the appellant in both the appeals.
Mr. Nitin Mulye, for respondent Nos. 1 to 3 in S.A. No.310 of 2017 and for respondent No.1 in Second Appeal No.309 of 2017.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 4th JULY, 2018.

P.C. :

1] Heard learned counsel for the appellant and learned counsel for the respondents.

2] These appeals are directed against the common judgment and decree dated 26.10.2015, passed by Ad-Hoc District Judge, Mangaon, District Raigad, in Civil Appeal Nos.58 of 2014 and 59 of 2014. Both these appeals were directed against the common judgment and decree dated 14.7.2014, passed by the Civil Judge Junior Division, in R.C.S. No.82 of 2011 and R.C.S. No.182 of 2012.

3] The suit bearing R.C.S.No.182 of 2012, was filed by the present appellant against the respondents seeking decree of permanent injunction restraining respondents from obstructing his peaceful enjoyment of the suit way, admeasuirng 10 x 12 feet and directing the respondents not to place iron gate, so as to block the said road.

4] As per appellant, he has initiated earlier proceedings in respect of his right of access from the said road before the Tahsildar against respondents. At that time the Tahsildar personally visited the spot and after hearing the parties, by its order dated 31.7.2011, directed the respondents not to block the suit way, which according appellant is the only way of access to his house. An appeal was

preferred by the respondents against the order of Tahsildar, before the Sub Divisional Officer, Mangaon, which also came to be rejected by order dated 4.11.2011.

5] Respondents had challenged the said order by filing Writ Petition No.11104 of 2011, before this Court. This Court has allowed the said Writ Petition, without expressing any opinion about the merits of the respective contentions with regard to the availability of road or otherwise, and directed the parties to file appropriate proceeding before the appropriate forum.

6] In view thereof, appellant had filed Suit bearing R.C.S.No.182 of 2012 for injunction before the trial Court. Meanwhile the respondent No.2 Chandbibi, has also filed R.C.S.No.82 of 2011, seeking permanent injunction against the appellant and others from using the said road.

7] The suit filed by the present appellant came to be dismissed; whereas the suit filed by respondent No.2 came to be decreed by the trial Court vide its common judgment. The said common judgment is confirmed by the first Appellate Court and hence these appeals are preferred by the appellant.

8] The submission of learned counsel for appellant is that the appellant has claimed right of easement by way of necessity and it was established on the basis of admission given by respondent No.2

Chandbibi. However, the Appellate Court has considered easementary right of prescription and without taking into consideration the admissions given by respondent No.2-Chanbibi, dismissed the appellant's suit. It is further submitted by the appellant that the map drawn by T.I.L.R., shows that the appellant and other land holders are having right to use the disputed way. On the basis of this map, in these Second Appeals, the appellant has also filed an Application bearing Stamp No.365 of 2018, for remanding the matter to the trial Court with permission to lead additional evidence. In support of his submissions, learned counsel for the appellant has relied upon the judgment of this Court, in the case of **Haryana Waqf Board -vs- Shanti Sarup and others [(2008) 8 SCC 671].**

9] However, before adverting to this application, it would be necessary to revert back to the findings, as recorded by the trial Court and also by the Appellate Court. It is pertinent to note that the appellant's suit is simpliciter for injunction, without claiming any declaratory relief of easementary right. Neither he has specifically pleaded the easement by prescription or even by way of necessity.

10] Both the trial Court and the Appellate Court had therefore, considered that there is not a single avernment in the entire pleading or the evidence that appellant is using the disputed way since last more than 20 years. No further details are also given

to prove this easementary right whether by way of prescription or by way of necessity. Conversely, the appellant has admitted in his cross examination that now he wants to have access for the vehicles from this disputed road as he has purchased the vehicle in the year 2011 and therefore, he is raising obstruction to the respondents' act of putting an iron gate. This admission given by the appellant himself in his cross examination is more than sufficient to disclose that he is claiming some new right of way for the purpose of access to his vehicle. Hence in the absence of any evidence on record to show that he was having such easementary right either by way of prescription or by way of necessity; both the trial Court and the Appellate Court had rightly dismissed his suit. This finding of fact cannot be disturbed in the Second Appeal as it would amount to re-appreciation of evidence by this Court and this Court cannot convert itself to third fact finding Court.

11] The perusal of the judgment of the appellate court shows that admissions given by respondent No.2 Chanbibi are also considered by the Appellate Court in paragraph No.22 of its judgment. In such situation, the Second Appeals do not raise any question of law, far remain, substantial question of law.

12] With regard to the submission that the matter be remanded to the trial Court and for that purpose, reliance placed on

the judgment of Apex Court in the case of **Haryana Waqf Board -vs- Shanti Sarup and ors (supra),** it must be stated that the said case pertains to the removal of encroachment and in that context it was held that Commissioner for making legal investigation should have been appointed. As he was not appointed, it was held that the Second Appeal should not have been dismissed summarily.

13] As against it, in the present case, the suit is not for removal of encroachment, but it is for the purpose of injunction without establishing right of way whether by way of easement or otherwise. Hence, the prayer for remand cannot be entertained.

14] Both the appeals therefore, stand dismissed.

15] As appeals are dismissed, pending Civil Applications also stand dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]