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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 862 OF 2017

Anusaya Laxman Marde & Ors ...Petitioners
Versus
Jamsine Parvez Gimi alias Jasmine Nozer Irani & ...Respondents
Anr

Mr Rajiv Patil, Senior Advocate, *with Tanmay Vispute, i/b Sachin Punde, for the Petitioners.*
Mr PM Arjunwadkar, *for Respondent No. 1.*
Mr Rajesh S Datar, *for Respondent No. 2.*

CORAM: G.S. PATEL, J
DATED: 27th March 2018

PC:-

1. The Writ Petition, though not presently in my current assignment, has been assigned to my Court by a specific administrative order. I issued Rule on 31st October 2017 and granted a stay on execution.
2. The Writ Petition is brought by some 74 persons, all claiming to be fisher folk in the Dahanu area.
3. The challenge is to an order dated 19th August 2016 passed by the District Court at Palghar in an appeal against an order dated

24th November 2014 of the Civil Judge, Junior Division, Dahanu, in execution in Regular Darkhast No. 1 of 2003. The Civil Judge, Junior Division rejected an application, Exhibit 24, in regular darkhast proceedings.

4. The 1st Respondent to the Writ Petition, one Jasmine Parvez Gimi (“**Jasmine**”), filed Regular Civil Suit No. 28 of 1997 in which she sought a decree of possession of a gala of approximately 60 ft x 40 ft. This was numbered as Municipal Property No. 255. It stands on Survey No. 114/1 admeasuring 6.1 Are and Survey No. 31/B admeasuring 4.30 Are at Dahanu. It was known as a fish market. The Defendant to Jasmine’s Suit was the present 2nd Respondent, the Dahanu Nagar Parishad or Dahanu Municipal Council. The Suit sought a decree of eviction and possession under the Bombay Rent Act. It was decreed on 31st August 2009. This decree was confirmed all the way to the Supreme Court.

5. Jasmine then filed Execution Proceeding No. 1 of 2003 to recover actual possession of the suit property. It was at this stage that the present Petitioners, or some of them, all fish vendors, obstructed delivery of possession. Jasmine filed an application seeking police assistance for forcible possession. After this, some of the fish vendors, the present Petitioners, preferred an application numbered Exhibit 24 styled as an obstructionist proceeding in execution. This was filed on 26th April 2014. Jasmine objected to the obstructionist proceedings saying that the obstructionists had no locus. This application was rejected, then restored and heard afresh after giving an opportunity of leading evidence. The Executing Court, viz., the Civil Judge, Junior Division, Dahanu rejected the

application below Exhibit 24. Hence the Appeal to the District Judge.

6. In deciding the application, the Civil Judge, Junior Division, Dahanu framed issues and heard evidence on these. In appeal, the District Court framed five points for determination. The first was whether the Decree Holder proved that there was an obstruction, and this was, of necessity, answered in the affirmative. The second point for determination was whether the obstructionists proved that the Dahanu Municipal Council, the present 2nd Respondent, had no concern with the suit property or the obstructionists, and this was answered in the negative. The third point for decision in appeal was whether the obstructionists were able to prove that they had a 'customary easementary right' to use the suit property. This was also answered in the negative. Finally the fourth issue was whether the matter called for judicial interference, and this was also answered in the negative. Evidently, it is finding on the second and third issues that are principally under challenge.

7. What is it that the Petitioners did to establish their claim of this so-called 'customary easementary right'? They led the evidence of a solitary witness, one Sulochana Ramkrishna Dhanmeher. They relied on a single receipt issued by Jasmine to one of the obstructionists regarding cleanliness charges, and on an undated letter issued by Jasmine to all the fish vendors. Jasmine and the Dahanu Municipal Council led no separate oral or documentary evidence.

8. Before the Appeal Court, the Petitioners argued that there was a failure of the mandatory procedure and that Jasmine, when confronted with an obstruction, was required to place that fact on record under Order XXI Rule 97 of the Code of Civil Procedure 1908 and that the Executing Court should have separately considered the application for police assistance, numbered it and decided it. Before the Executing Court, the obstructionists also sought an order that Jasmine as the Decree Holder should lead evidence first. This was rejected. All these grounds were used to assail the order of the Executing Court. I do not believe there is much substance in these submissions, and in fairness, Mr Patil, learned Senior Advocate for the Petitioners has not pressed this aspect of the matter. The finding of the Appellate Court that ultimately procedure must yield to substantive justice is correct. It was the obstructionists who raised the plea of a customary easementary right and, therefore, the burden was on them to establish this.

9. Indeed it is this claim of a customary easementary right that lies at the heart of the matter. The easement pleaded as a custom is this: that the Petitioners have a right by virtue of that 'customary easement' to sell fish in the very suit property. This is important because it is not the case of the Petitioners that any form of an easement is required *over* Jasmine's property in relation to some *other* property owned by the Petitioners/Obstructionists and of which they are dominant owners. They claim this 'easement' to use and occupy the landlord's property as their own and to vend their fish from that property. It is their case that they have been doing this

from time immemorial and should, therefore, be allowed to do this for all time to come.

10. As the Appeal Court correctly pointed out in paragraph 9 of the impugned judgment, the burden of proving this was squarely on the obstructionists. If they were right and could prove their case, execution against them would immediately halt. On the other hand, if they failed to establish their right, they would be non-suited in the execution proceedings and forcible possession would have to be directed against them.

11. It is well settled that 'custom' has to be both properly pleaded and proved. Both are essential. The pleading here as to a custom is virtually non-existent. The Appeal Court says it is a very cryptic pleading and indeed even before the Appeal Court the Petitioners were not able to demonstrate a sufficient pleading which led, inevitably, to the submission 'a pleading must be constructed as a whole'. There is a settled position in law that a custom requires to be specifically pleaded and this means setting out specifically what that custom is, how old it is, and how it can be said to be derived or known from what material. It is not possible to try and elicit some implicit custom buried in elliptical or vague pleadings, even given that it is generally true that one does not pluck out individual sentences from here or there. Indeed, this entire submission is really one that stands on its head. For, in this case, it is not so much a case of plucking out a sentence as a case of the Petitioners demanding the insertion of a necessary averment which is altogether missing. If the case is founded on a custom, that custom must be pleaded, not left to be gleaned.

12. But what of the proof that was led by the Obstructionists? As I have noted there was only a solitary witness and a single receipt regarding collection of cleanliness charges. Sulochana, the witness, said that she had many receipts but those were lost in some unknown flood. She said there were other receipts as well but these were never produced. There was no ambiguity about this. Thus, the situation that arose before both the Executing Court and the Appeal Court was that there was a near-fatal absence of a necessary pleading and virtually no proof of this right claimed.

13. Let me now consider what it was that was alleged. This was not a claim of a easement *simpliciter*. It might be possible for an individual in his own right to claim such an easement over another individual's property. That must be an 'easement' within the meaning of the Indian Easements Act 1882. An easement is defined in Section 4, thus:

"4." Easement" defined.— An easement is a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, **certain other land not his own.**

Dominant and servient heritages and owners.— The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner."

(Emphasis added)

14. Evidently, the first portion of Section 4 and the later definition of “dominant and servient heritages and owners” makes it clear that there must be two properties involved. The claim has to be by the dominant owner of the property, and the claim must arise as an easement to use or pass over another’s property so as to better enjoy or more fully benefit from the property of which he is the dominant owner. The land on which the liability of the easement is imposed is called, thus, *the servient heritage* and the land for the beneficial enjoyment in which the right exist is called the *dominant heritage*.

15. This is the first difficulty in the Petitioners’ way. *There is simply no dominant heritage*. Or, to put it differently, the dominant heritage is the servient heritage itself. This, to my mind, at the threshold, completely puts outside the frame of any legal consideration any concept of an easementary right, whether customary or otherwise. It wholly non-suits the Petitioners.

16. Mr Patil relies on Section 18 of the Act:

“18. **Customary easement.**— An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

The illustrations to this Section are most illuminating. They are set out below:

Illustrations

(a) **By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a**

plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation and B acquires a like easement with respect to A's house.

(Emphasis added)

17. It is to be noted that a 'customary easement' does not stand part or adrift from the definition of an 'easement'. It is an easement with an additional qualification, quality or attribute, viz., a custom. In other words, a customary easement has all the incidents of an easement, but in addition must be established and proved to be one that has been acquired by custom.

18. When it comes to a question of custom, it seems to me simply logical that this must apply not to an individual but to a community or a group which is identifiable. I will take it, for the purposes of this Petition, that the Petitioners themselves do constitute such a community or a group. But that only presents before them another obstacle. They must show that there existed such a custom vested in or accrued to every member of that community and it did so from some time in the past. One of the best gauges of a custom is its longevity, the duration for which it has been in existence.

Sulochana's evidence does not even begin to approach this standard of proof. Showing a solitary receipt for cleanliness charges establishes nothing other than some form of possession and there is no dispute that this was used as a market by the lessee or tenant, the Dahanu Municipal Council.

19. What in essence the Obstructionists want to do is to establish a right superior to that of a tenant and perhaps superior even to that of the owner of the plot in question. It was not for them to argue that the lease between Jasmine and the Dahanu Municipal Council was not proved or established. That would become relevant only if the Petitioners' agree that they were sub-tenants or licensees or allottees of the Municipal Council and claimed no other right. That was not their case at all. They claim a dominant or overarching title to the land based on both custom and easement, neither of which they were able to cogently establish.

20. I am inclined to believe that accepting such a proposition is possibly fraught with all manner of legal and jurisprudential dangers. In sum and substance what the Petitioners seem to suggest is that outside of any known method of acquiring property, a person who is simply squatting on some land can, can, by leading evidence of one person showing one solitary document, claim to have a 'customary easement' and remain on another man's land for all time to come. This is not acquisition. This is not requisition. This is not sale, rent, lease, license or purchase. This is something else altogether and it is put up to suggest that there vests in these Petitioners a permanent right of occupation amounting to ownership by virtue of some

unknown and ineffable sort of possessory title that lies wholly outside the conception of law.

21. In any case, as I have noted, unless an easementary right is first established under Section 4, there is no question of proceeding to establish a custom attached to that easement. In this particular case, neither are established.

22. There is no substance to the Writ Petition. Rule is discharged. There will be no order as to costs.

23. Mr Patil points out that the execution was stayed by my order dated 31st October 2017. At his request the stay will continue for a period of six weeks from today.

(G. S. PATEL, J)