

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Second Appeal No.714 of 2017
(Khemlal Govindlal Nagpure .vs. Smt. Sheelabai w/o Kripachary Kokude and ors.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders.
and Registrar's orders

Mr. R.K. Borkar, Advocate for Appellant.
Mr. S.S. Dhengale, Advocate for Respondent No.1.
Mrs. Geeta Tiwari, AGP for Respondent Nos. 2 to 5.

CORAM : Manish Pitale, J.
DATED : April 05, 2018.

The appellant is the unsuccessful plaintiff before the Courts below. He had approached the Court of Civil Judge, Senior Division, Gondia (trial Court) by filing Regular Civil Suit No.104/2008, claiming that he had a right of way to his own agricultural land being Gat No. 314/2 from Gat no.312 in village Saheshpur, T.S. No.2, tahsil and district Gondia. It was claimed by him that the respondent-defendant No.1 being an encroacher on Government land, had started obstructing his way some time around 14.07.2008 giving him cause of action to file the aforesaid suit, wherein he prayed for a permanent injunction to restrain all the respondents from interfering in enjoyment of suit way and for declaration that he had a right of way in Gat No.312 as shown in the plaint map.

2. In the plaint, in paragraph no.2 the appellant categorically stated that for better enjoyment of the property, his predecessor-in-title had been using the suit

way since time immemorial. Thus, it was his case that his predecessors and thereafter he himself had been using the alleged right of way from Gat No.312 for a long period of time and that therefore, he had acquired a right which could not be obstructed by the respondents.

3. Before the trial Court, only the respondent no.1 filed written statement and denied the claims made by the appellant, although conceding that the land at Gat No.312 belonged to the Government, in which she was cultivating for her own livelihood, being a poor and landless lady. She also claimed she had paid a sum of money in an encroachment case that was initiated and that she was in settled possession of Gat No.312.

4. In order to prove his case, the appellant examined himself and two more witnesses. On perusal of the oral and documentary evidence on record, the trial Court came to the conclusion that the appellant had miserably failed to place on record any documentary proof in support of his claim of right of way from Gat No.312, on the basis that the same had been used by his predecessors and by him for access to his agricultural land at Gat No.314/2. Oral testimony of witnesses produced on behalf of the appellant was also analysed by the trial Court and it was found that the appellant had failed to place any evidence in support of his contention. On this basis, the trial Court dismissed the suit on 21.04.2012

5. Aggrieved by the same, the appellant filed Regular Civil Appeal No. 115 of 2012 before the Court of District Judge, Gondia (appellate Court). By the impugned judgment and order, the appellate Court has dismissed the appeal and confirmed the findings of the trial Court.

6. Mr. R.K. Borkar, learned counsel appearing on behalf of the appellant has submitted that the Courts below have erred in rejecting the contentions of the appellant and dismissing his suit because a perusal of the plaint map and Exh.76, being a communication addressed by the Circle Officer to the Sub Divisional Officer, Gondia dated 27.07.2007, would show that there was indeed a right of way from Gat No. 312 and that the Courts below have committed a grave error in dismissing the suit.

7. On the other hand, Mr. S.S. Dhengale, learned counsel appearing on behalf of the first respondent has submitted that the appellant had come with a positive case before the trial Court claiming that the right of way existed since time immemorial and it was being used by the appellant and his predecessor but the appellant had failed to produce any evidence in support of the aforesaid claim and that, therefore, the Courts below were justified in dismissing the suit. It is also pointed out that when the appeal was pending before the appellate Court, an amendment application was moved by the appellant seeking to bring out a new case in the

form of easement of lost grant. The said amendment was rejected by the appellate Court. According to the learned counsel appearing on behalf of the respondent No.1, this demonstrated that the appellant was seeking to shift stands only because he had no evidence in support of his contention.

8. Mrs. Geeta Tiwari, learned AGP has appeared on behalf of the respondent Nos. 2 to 5.

9. Having heard the learned counsel for the parties and upon perusal of the record, it becomes evident that the appellant approached the Court on the basis that there existed a right of way from Gat No.312 since time immemorial, which was being used by the appellant and his predecessors. In support of the said contention, there is no documentary evidence that the appellant could produce on record. The oral evidence is in the form of three witnesses appearing in support of the claim made by the appellant. One being the appellant himself and two other witnesses, who claimed to know the appellant, were agriculturists having land in the vicinity. A perusal of the said evidence of the three witnesses shows that other than making mere statements, they have not been able to bring any positive evidence on record to support the contentions of the appellant. In fact, the two witnesses produced on behalf of the appellant, in cross-examination have made statements against the claim made by the appellant in the suit. One of the witnesses has stated that agriculturists having lands adjacent to the agricultural

land of the appellant at Gat No.314/2 are using alternate way available. In any case, their evidence has fallen short of bringing any positive evidence on record to show that a right of way, as claimed by the appellant, was available and was being used by the appellant and his predecessors since time immemorial.

10. In this situation, the learned counsel appearing on behalf of the appellant has sought to rely upon a document stated to be Wajib-ul-Urj prepared by the revenue authorities. Apart from the fact that this document was not produced by the appellant before the Court below, a perusal of the same shows that neither Gat No. 314/2 nor Gat No.312 is mentioned in the same, for it to be considered as a basis for right of way as claimed by the appellant. Therefore, there is no evidence to support the contentions of the appellant.

11. The trial Court has held that since the appellant has failed to produce evidence in support of his contentions, the right of way as claimed by him, cannot be accepted. On this basis, the suit has been dismissed. The appellate Court has also elaborately discussed the evidence and material on record and it has found that adjacent land owners are approaching their fields by two alternate ways and that in any case the appellant has not been able to prove that the right of way claimed by him from Gat No.312 existed since time immemorial. On this basis, the appellate Court has dismissed the appeal and confirmed the findings of facts arrived at by the trial Court.

12. In this backdrop, it is evident that this appeal does not give rise to any substantial question of law, on the basis of which, jurisdiction under Section 100 of the Code of Civil Procedure can be exercised by this Court. There is no perversity in the findings recorded by the Courts below and the appellant has failed to demonstrate any error in the appreciation of the evidence and material on record by the Courts below while arriving at concurrent findings against the appellant.

13. Hence this appeal is dismissed with no order as to costs.

JUDGE

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