

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.122 OF 2014

Shriram Digambar Patil

...Versus...

Rauf Ajijab Sayyed

...

Mr. C.R. Deshpande, Advocate for the appellant

Mr. Sabnis, Advocate h/f Mr. V.D. Gunale, Advocate for the respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 11th FEBRUARY, 2019

PRONOUNCED ON : 11th APRIL, 2019

ORDER :

1 Present appeal has been filed by the original defendant challenging the concurrent findings in Judgment and Decree passed in Regular Civil Appeal No.70/2011 by District Judge-2, Latur dated 13.08.2013 and Regular Civil Suit No.108/2006 by Civil Judge Junior Division, Chakur dated 28.02.2011, whereby the suit for perpetual injunction filed by the present respondent against him came to be decreed and appeal dismissed. (Parties are referred as per their nomenclature in the

suit.)

2 Plaintiff claimed that he is the owner and possessor of the Grampanchayat House No.114 (New Grampanchayat House No.130), CTS No.313 of village Janwal, Tq. Chakur, more particularly, described in para No.1 of the plaint. He contended that there is 10 feet wide and 50 feet length road in the front side of his house i.e. towards East, which he used for ingress and egress. That road was also used by defendant. The said road has also been described with boundaries. According to the plaintiff, defendant started digging the suit road in 2006 in front of plaintiff's gate in order to construct tank of latrine and bathroom. Plaintiff raised obstruction by filing application with Grampanchyat and thereafter the Grampanchayat Authority directed the defendant not to dig ditches, however, defendant did not stop. Hence the suit.

3 Defendant resisted the claim by filing written statement. He admitted the ownership of the plaintiff over the adjacent plot. It is denied that there is road on the western side and it was used by plaintiff as main entrance for the ingress and egress. According to him, plaintiff is using some other road. It is stated that there is an open space to the Eastern side, which is the part and parcel of the South side of his house and he has every right to use his space. The Grampanchayat has given permission to him to make construction and accordingly he is making the construction.

4 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. The learned Trial Court has held that the plaintiff has proved the existence of the suit road. It was also held that the defendant is obstructing the plaintiff from using the said road and therefore, the suit was decreed and defendant was injuncted. As aforesaid, the appeal filed by the defendant has been dismissed. Hence, the Second Appeal.

5 By order passed on 21.01.2019, by this Court, both the parties were put to notice that the matter would be heard finally at the stage of admission, taking into consideration the narrow controversy. Even the appellant produced the paper book containing the evidence i.e. before the Trial Court.

6 The learned Advocate for the appellant submitted that both the Courts below have not considered the evidence on record properly and have not appreciated the law points. Plaintiff was not the owner of the disputed property. No documentary evidence was produced stating that the disputed portion was part and parcel of the plaintiff's property. It was also not proved that the disputed portion is part of public road. If it is part of public road, then also the plaintiff may not get any right to claim relief. The Grampanchayat was not made a necessary party to the suit and therefore, the suit was bad for non joinder of necessary parties. The situation in the

Court commission map would show that plaintiff's suit was in dilapidated condition. When he himself is not residing at the said place, it is hard to believe that he would have used the disputed road or has any right over the said road for ingress and egress. The plaintiff in his deposition admitted that the road has not been shown in the CTS map Exh.69. If it was the public road, then it ought to have been reflected in CTS map. It was also not seen that the suit was not within limitation. Therefore, substantial questions of law are arising.

7 Per contra, the learned Advocate appearing for the respondent supported the reasons given by both the Courts below and submitted that plaintiff has proved the existence of the road, which is a public road. Admissions were given by the defendant to that effect. Under such circumstance, both the Courts below have correctly held that the plaintiff can seek the relief of injunction. He placed reliance on Jivanlal s/o Pokardas Motwani vs. State of Maharashtra and others, 2004 (1) Mh.L.J. 265, wherein it was held that -

“Where an encroachment is made on public road, which is meant for free passage within the local area, inconvenience and wrong to the public including the plaintiff must be presumed. The moment, it was accepted, that it is a public road, it must follow that no one has a right to make any encroachment or construction thereon. The plaintiff even though not suing in representative capacity, need

not show any special damages to him in order to obtain relief. This requirement has no application whatsoever where a citizen approaches the Court complaining of an encroachment on public road.”

In this case, the decree passed by the Lower Appellate Court was set aside and plaintiff's suit was decreed by this Court.

8 At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original plaintiff, for exercising jurisdiction of this Court under Section 100 of the Code of Civil Procedure. As per the law laid down by Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of CPC, after the 1976 amendment, is confined only when the Second Appeal involves as a substantial question of law. The existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the CPC.

9 Reliance can be placed on decision in **Ishwar Dass Jain vs. Sohan Lal** reported in **(2000) 1 SCC 434**, wherein it has been observed that -

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with

findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.”

Further reliance can also be placed on the decision in **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar** reported in **(1999) 3 SCC 722**, wherein it has been held that

“In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

- (i) Contrary to the mandatory provisions of the applicable law;
OR
- (ii) Contrary to the law as pronounced by the Apex Court;
OR
- (iii) Based on in-admissible evidence or no evidence.

Further, it is observed in the said case that, “if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal”. Thus, on the basis of said legal position, it

would be considered as to whether appellant herein has made out any case.

10 Here, there is concurrent findings of fact, that plaintiff has proved the existence of the suit road. Therefore, that findings of fact cannot take shape of a substantial question of law, merely because the suit road was not shown in CTS map. In his cross-examination DW 1 has admitted that there is a road on the Eastern side of the house of the plaintiff to enter into the house of the plaintiff. He further admitted that the road which is on the Eastern side of the house of the plaintiff is used by himself and the plaintiff. Therefore, this admission was sufficient to prove the existence of the said road. When the road was used by not only plaintiff as well as defendant but by others also, then definitely the observations in Jivanlal (supra) would come into operation. The said observations were based on the decision by the Division Bench of this Court in **Fatima w/o Caetano Joao vs. Village Panchayat of Merces and another, 2000(3) Mh.L.J., 624**, wherein it has been held that -

“The making of a scheme, or by-laws or building regulations by Municipal Council or Corporation is for the planned development of the area. It is for the benefit of the citizens residing in the area. A neighbour who is affected by an illegal construction has an obligation in his favour, based on which, he can maintain a suit for perpetual injunction. The suit at the instance of the neighbour for violation of the Municipal plans or rules or by-laws resulting in an invasion of right to light, air, privacy or causing

pollution, causing material injury would furnish the plaintiff a cause of action and it would be open for him to file a civil suit to challenge the invasion of his right causing material injury.”

11 No doubt, in the above cited case, the plaintiff had come with the case that there is a violation of by laws of the corporation. Here, it is a Grampanchayat property. However, admittedly in this case the construction activity i.e. ditches were taken on a public road. When that public road was for the use of public, the plaintiff in this case was justified in filing the suit. The learned Trial Court has also referred many decisions including Jivanlal's case (supra) and then arrived at the said conclusion. Therefore, both the Courts below have correctly appreciated the evidence as well as law involved in the case. No substantial question of law arises. Therefore, Second Appeal stands disposed of as “**Not admitted**”.

(Smt. Vibha Kankanwadi, J.)

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