

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO.352 OF 2019
WITH
CIVIL APPLICATION NO.754 OF 2019**

Shri. Krishna Jambu Mali
Through His Power of Attorney Holder
Shri Ranjit Krishan

...Appellant

vs.

Shri. Subhadra Narayan Mali & Anr.

...Respondents

....

Mr. Ramdas A. Shelke, for the Appellant/Applicant.

Mr. Amrut Joshi, a/w. Mr. Akhil A. Kuparde, for the Respondents.

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CORAM : S.C. GUPTE, J.

DATE: 27 NOVEMBER 2019

P.C.:

. Heard learned Counsel for the parties.

2. The two concurrent judgments passed by the courts below, which are challenged herein, dismissed the suit filed by the Appellant (original plaintiff). The plaintiff's suit was on the basis of easement acquired by prescription. His case, in particular, was that there were two windows and a ventilation hole (zharokha) in the suit property, through which he enjoyed air and light. It was his grievance that the defendants had constructed a house obstructing the air and light enjoyed by the plaintiff from these two windows and opening. The trial court dismissed the suit *inter alia* holding that he had failed to prove that he

was having any easementary right to air and light from the two southern side windows or the round hole (zarokha) claimed to be part of the suit property. The trial court *inter alia* noted that the disputed questions before the court were whether two windows and zarokha were in existence since 20 years prior to the filing of the suit (their existence being claimed since 1955) and whether the plaintiff had easementary right to air and light from these windows and zarokha. After assessing the plaintiff's evidence, the trial court observed that in his cross-examination, the plaintiff himself had admitted that there was no mention of these two windows or zarokha in the gift deed, through which the suit property came to be owned by him; there was no mention of any easementary right; the gift deed described the suit property as a dilapidated property. The court noted the defendants' case that the windows and zarokha were recently opened by the plaintiff sometime in 2014. The court observed that though the witness did not step into the witness box to prove this fact, at the same time, the plaintiff had failed to prove, the onus to prove being squarely on him, that the disputed windows and zarokha were in existence for 20 years or more before the filing of the present suit. The only documentary evidence produced by the plaintiff before the court in this behalf was photographs, which, according to the court, were incapable of showing that the disputed windows or zarokha were in existence for 20 years or more or that the plaintiff was using the windows or zarokha without intervention at least for 20 years. Apart from his bare words, there was nothing produced by the plaintiff to prove his case. The issue concerning the existence of easementary right in respect of the two windows and zarokha was, accordingly, held by the trial court in the negative, that is to say, against

the plaintiff. The appeal court also went through the evidence in this behalf. It affirmed the findings of the trial court on the issue. The appeal court noted that so far as easementary right of the plaintiff was concerned, the plaintiff had only examined himself to prove such right. The court observed that, in the cross-examination, the plaintiff had admitted that he was residing elsewhere. The court also observed that even in the gift deed executed in favour of the plaintiff, there was no reference to any such easementary right; the gift deed clearly mentioned that the house gifted to the plaintiff was in a dilapidated condition. In his pleadings, the plaintiff has nowhere claimed that he was residing in the house and was using windows prior to 20 years from the date of filing of the suit. The court noted that except his oral evidence, nothing was brought on record either by way of testimony of an independent witness or otherwise to show that the two windows and ventilation hole existed either since the date of construction of the house or for more than 20 years before filing of the suit. The court observed that considering Section 15 of the Easements Act, the plaintiff ought to have proved that the windows and ventilation hole existed without any interruption allowing use of air or light to the occupant for 20 years. The court, accordingly, agreed with the trial court and found the issue of easementary rights against the plaintiff.

3. These are essentially issues of fact on which two courts below have come to concurrent findings. Nothing is pointed out to this Court to indicate that the conclusions suffer from any perversity. The conclusions are supported by some evidence on record. Both courts have considered all relevant and germane materials and circumstances

whilst arriving at these conclusions and no irrelevant or non-germane material or circumstance was considered. The impugned orders passed by the courts below are clearly within their jurisdiction and exhibit no perversity. No substantial question of law arises, in the premises, for consideration of this Court.

4. Learned Counsel for the Appellant alternatively submits that the second issue concerns illegality of the construction carried out by the defendants. As the courts below have observed, this really was not the issue before the courts. In fact, as observed by the lower appellate court, the plaintiff had not pleaded about any unauthorised construction and there was no prayer in the suit concerning such construction.

5. The second appeal is accordingly dismissed.

6. In view of the dismissal of the second appeal, the civil application does not survive and is disposed of. The interim relief, originally granted by lower appellate court and continued by this Court, stands vacated forthwith.

(S.C.GUPTE, J.)