

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 373 OF 2017
WITH
CIVIL APPLICATION No. 1860 OF 2016

Appalal Rasul Magdum
(since deceased, represented through LRs) & Anr. ... Appellants
Vs.
Bapu Hanif Magdum ... Respondent

Mr. Umesh Mankapure, for the Appellants.

Mr. Tejpal Ingale, for the Respondent.

CORAM : C. V. BHADANG, J.

DATE : MARCH 11, 2020

PC :

1. The challenge in this appeal is to the judgment and decree dated 29th December, 2015 passed by the learned District Judge, Sangli in Regular Civil Appeal No. 97 of 2009. By the impugned judgment, the first appellate court has allowed the aforesaid appeal filed by the respondent / plaintiff and has restrained the appellants (original defendants) or anybody acting on their behalf from interfering or disturbing possession of the respondents over the suit property (which is to the eastern side of Gat No. 300 of village Dhulgaon, taluka Tasgaon, district Sangli) and / or from creating any new way through the suit property.

2. The respondent (plaintiff) had filed Regular Civil Suit No. 335 of 2003 claiming that the appellants are trying to interfere with the

suit property by claiming that they have a right of way through the said land to approach the northern side road, which in turn leads towards the stream (Oadha).

3. The appellants claimed that there is a Gavthan road running north-south from the western side of the suit property leading to the road on north

4. The learned trial court framed issues. The parties went to trial and produced oral and documentary evidence. The learned trial court by a judgment and decree dated 12th March, 2009 dismissed the suit, which was challenged by the respondent, before the first appellate court. The first appellate court framed following points for determination:

- (i) Whether the plaintiff / appellant is in lawful possession of the suit way portion, used by him for dunk pit situated towards western side of his house and abutting to field Gat No. 300 owned by Haibati Gaikwad?
- (ii) Whether the defendants prove any kind of their right over suit way through disputed portion of the land of the plaintiff?
- (iii) Whether the interfere of this Court is warranted?

5. The first appellate court by the impugned judgment and decree has decreed the suit. Hence this appeal.

6. I have heard the learned counsel for the parties. With the assistance of the learned counsel for the parties, I have gone through the judgment of the courts below as well as the oral and documentary evidence, produced on record.

7. Although there are several grounds / substantial questions of law, framed in the appeal, the learned counsel for the appellants states that the appeal involves, the following substantial questions of law:

- (i) Whether the first appellate court is justified in discarding evidence of sale-deed dated 28th December, 1994, which clearly shows boundaries and the Gavthan road ?
- (ii) Whether the first appellate court, is justified in refusing to consider the claim of the right of way of the appellants through the suit property, on the basis of the oral partition?

8. The learned counsel for the appellants strenuously urged that various sale-deeds executed, and particularly the sale-deed dated 28th December, 1994 records existence of the Gavthan road on the western side of the suit property. It is submitted that the first appellate court failed to properly consider this aspect and was not justified in refusing to consider the said sale-deed on the ground that the respondent is not a party to the said sale-deed. It is submitted that the

oral evidence on record clearly shows that there is a Gavthan road, as claimed by the appellants, which passes through the suit property leading to the road on the northern side. For this purpose, the learned counsel has taken me to the sketch, which is at page 5 of the compilation, filed by the appellants.

9. It is also submitted that there was a cloud raised, on the title of the respondent, over the suit property, and therefore, the suit simplicitor for injunction, was not maintainable. The learned counsel pointed out that the plaintiff in his evidence has failed to show as to how much area is owned by him. He therefore, submits that the first appellate court is in error in interfering with the judgment and decree passed by the trial court, by which suit was rightly dismissed.

10. The learned counsel for the respondent has supported the impugned judgment. It is submitted that advocate Mr. Tamboli, who was appointed as a commissioner, in his report (Exhibit 39) dated 12th November, 2003 has found that there is no Gavthan road in existence, as claimed by the appellants. It is submitted that the sale-deed of the year 1994 has rightly been discarded as the respondents are not party to the said sale-deed and the recitals in the said sale-deed are not binding on them.

11. I have carefully considered the submissions made and I do

not find that the appeal involves any substantial questions of law.

12. A bare perusal of the plaint would show that between the property of the respondent (original plaintiff) and that of the appellants (original defendant Nos. 1 and 2), there is a portion belonging to one Yusuf Akbar Magdum. It is significant to note that if at all there is a road, as claimed by the appellants, in existence, the said road ought to pass through the portion belonging to Yusuf Magdum also. The first appellate court in para 11 of the impugned judgment has held that Yusuf Magdum has not claimed any such right about existence of any road from the western side of the suit property belonging to the respondent.

13. It is necessary to note that the first appellate court has held, and to mind rightly so, that no reliance can be placed on the sale-deed of the year 1994 to accept claim of the appellants against the respondent, inasmuch as the respondent is not a party to the said sale-deed, and therefore, the recitals therein cannot bind the respondent. Thus, on the basis of the oral and documentary evidence, to my mind, it is not established that there is any such road in existence, as claimed by the appellants. The first appellate court has also rightly noticed the report of the commissioner (Exhibit 39), wherein the commissioner has not seen the existence of any road, as claimed by the appellants.

The first appellate court has also noticed that there is a Gram Panchayat road, abutting towards the eastern side and it is nobody's case that the land of the appellants is landlocked.

14. Insofar as the ground about the non-maintainability of the suit simplicitor for injunction is concerned, I do not find that the appeal involves any such issue. The only dispute in the appeal is about claim of the appellants about existence of a Gavthan road, running north-south from the western side of the suit property of the respondent. Admittedly, the land now in possession of the respondent, was allotted to the respondent in partition between father of the appellants and the father of the respondent.

15. Looked from any angle, the finding of fact, as recorded by the first appellate court, does not suffer from any infirmity or perversity so as to amount to a substantial question of law. The appeal is without any merit, and is accordingly dismissed, with no order as to costs.

16. In view of dismissal of the appeal, civil application filed in the appeal does not survive and is accordingly disposed of.

Sd/-
C. V. BHADANG, J.