

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.332 OF 2018
WITH
CIVIL APPLICATION NO.741 OF 2018**

Shri. Bhikaji Bhiva Chougale Appellant

Vs.

Shri. Shridhar Yashwant Kalikute Respondents
& Ors.

Mr. V.A. Shastry for Appellant/Applicant.
Mr. Nikhil Pawar for Respondent Nos. 1 to 3.

**Coram : NITIN W. SAMBRE, J.
Date : 18th February, 2020**

P.C.:

1. This appeal is against the concurrent findings. Respondents/ plaintiffs initiated a suit for mandatory and perpetual injunction.

2. The case of the respondents-plaintiffs before the trial Court was that property Gram Panchayat House No. 106 is owned by himself,

whereas Gram Panchayat House No. 105 is owned by the appellant/defendant. A lane ad-measuring 3 feet East-West runs in between these two properties, which is sought to be used as a way for entering in the property of the plaintiff alongwith his cattle.

3. It is claimed that the father of both the parties i.e. plaintiff and defendant entered into an agreement on 7th May, 1961, thereby agreeing to maintain the lane of aforesaid 3 feet to be used by the plaintiff, so as to have ingress and egress of his cattle.

4. Since the appellant/defendant started interfering with use of said way, suit came to be initiated, which was subsequently amended as the appellant/defendant created impediment by carrying out construction, thereby obstructing the right of the way.

5. Said suit came to be decreed, whereby appellant/defendant was restrained from making any construction or obstruction in the lane in question, described in paragraph 1 of the plaint and also a mandatory injunction was ordered, thereby, the appellant is directed to remove the construction on disputed lane within a period of two months.

6. The appellate Court at the behest of the present appellant reaffirmed the evidence and pleadings and substituted its findings as that of easement by necessity to that of prescription. As such, this appeal.

7. Amongst the grounds, which are raised by the learned counsel for the appellant so as to question both these judgments are, the appellate Court has failed to consider very explanation to Section 13 of the Indian Easement Act, 1882, which deals with the easement of necessity. According to him appellate Court without considering the evidence and pleadings in relation to disputed agreement dated 7th May, 1961, has decreed the suit. According to him based on report of the Court Commissioner, Court has proceeded to record erroneous findings. So as to substantiate his claim, Mr. Shastry would rely on the observations made by the Courts below, which is claimed to be contrary to documents / agreement entered into between the father of plaintiff and defendant on 7th May, 1961, so also the plaint map.

8. Mr. Shastry would then urged that the plaintiff has himself come out with a case that the defendant has disputed agreement dated 7th May, 1961. In view of above, plaintiffs/respondents ought to have sought declaration of existence of such an agreement. Hence it is claimed that in absence of prayer for such declaration, the relief of mandatory and perpetual injunction ought not to have been granted.

9. As such the question of law, which is sought to be canvassed is “Whether the Courts below have committed an error in delivering the judgment contrary to the provisions of Section 13 of the Easement Act ?

10. While countering the aforesaid submissions, the counsel for the plaintiffs/respondents would support the judgment and urged that in view of admissions given by the defendant in the cross-examination, the Courts below were justified in decreeing the suit.

11. He sought dismissal.

12. This Court need not be oblivious to the fact that the appeal is preferred against the concurrent findings.

13. The trial Court while decreeing the suit has taken recourse to the provisions of Section 15 of the Easement Act thereby recording findings of easement by prescription after considering the terms of the agreement dated 7th May, 1961. The appellate Court rightly reappreciated the entire pleadings and evidence of the matter and after considering the terms of the agreement dated 7th May, 1961 has observed that the requirement under Section 15 for easement by necessity could be inferred from the terms of the said agreement.

14. The appellant/defendant though have disputed the very agreement dated 7th May, 1961, both the Courts below have considered the evidence of the appellant/defendant particularly the admissions given by it about the existence of 3 feet lane, from the date of construction of house by the plaintiff i.e. 1961-1962 and construction of house by appellant/defendant in 1965. Based on the principal of evidence as to 30 years old documents and admissions given by the appellant /defendant in his cross-examination, the Courts below have rightly held that there exist lane of 3 feet prior to filing of suit and the

appellant/defendant has created interference in the smooth use of the said lane by carrying out construction.

15. As far as the contention of the appellant as regards the claim of the respondents-plaintiffs in the suit about the dispute as to existence of agreement dated 7th May, 1961 and report of the Court Commissioner is concerned, this Court noted that both the Courts below in appreciation of evidence of respective parties have considered the admission given by the appellant/defendant about the existence of lane before creation of impediment. The report of Court Commissioner in such eventuality would be only considered for the purpose of strengthening the case of either of the parties and cannot be considered to be a substantial piece of evidence so as to link it for establishing absolute right of either of the parties.

16. Since the documentary evidence in the form of agreement dated 7th May, 1961 and the admissions given in cross-examination by the appellant/defendant about the existence and use of 3 feet width way in between property bearing Gram Panchayat House No. 515 and

516 is held to be in use of the plaintiffs/respondents, in my opinion, the recourse taken to the provisions of Section 15 of the Easement Act cannot be faulted with.

17. No substantial question of law is involved in the Second Appeal, which warrants consideration. The appeal, as such fails, stands dismissed.

18. The interim relief ordered by this Court in the present Second Appeal shall continue to operate for a period of four weeks from today and shall automatically cease to operate thereafter.

19. In view of dismissal of Second Appeal, the Civil Application does not survive, the same is accordingly disposed of.

(NITIN W. SAMBRE, J.)